

Consultation notice

Introduction

Under the EU treaties, trade policy is decided at EU level. Representatives of the governments of the EU's Member States meet weekly with the European Commission to set the direction for the EU's trade policy with non-EU countries. The Commission then negotiates on behalf of the EU. Since 2009, under the Lisbon Treaty, foreign direct investment has also been part of the EU's trade policy. Therefore, the Commission also negotiates the EU's investment agreements with non-EU countries. It does so under the guidance of Member States and the European Parliament.

Objective of the consultation

In June 2013, the Council asked the Commission by unanimity to start negotiating a free trade agreement with the United States. It also adopted guidelines that set out what the negotiations should include. Before this, in May 2013, a large majority in the European Parliament had welcomed the imminent launch of the negotiations¹.

In these guidelines, the governments agreed that the EU should seek to include provisions on investment protection and investor-to-state dispute settlement (ISDS) in the proposed agreement. Negotiations for an agreement – the Transatlantic Trade and Investment Partnership (TTIP) – started in July 2013.

Given the strong public interest in this issue the European Commission is **consulting the public in the EU** on a possible approach to investment protection and ISDS that contains a series of innovative elements outlined below and that the EU intends to use as the basis for the TTIP negotiations. The key issue on which we are consulting is whether the **EU's proposed approach for TTIP achieves the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest.**

Content

Investment protection agreements create a framework that encourages investment by providing guarantees that governments will respect some fundamental principles of treatment that the investor can rely on when investing. These agreements establish some basic obligations of the Parties regarding foreign investment, such as:

- an obligation ***not to discriminate***;
- an obligation to ensure ***fair and equitable treatment***, or

¹ European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America.

- a prohibition of direct or indirect **expropriation** without compensation.

In the event of an alleged breach of these obligations by a state, foreign investors are allowed to bring a claim to international arbitration through a specific mechanism: **investor-to-state dispute settlement** (“ISDS”). In such cases, the investors would have to prove that the measures in question caused them significant damage and, if so, the host country would have to provide compensation for the damage caused.

Since the 1950s, **EU Member States have concluded over 1400 bilateral investment treaties (BITs)** with a large number of third countries, including countries in the OECD (a group of 34 of the world's most advanced economies). Overall, the BITs concluded by Member States represent about half of all the BITs world-wide. All **contain largely similar provisions on investment protection and ISDS**. EU investors are the largest users of ISDS globally.

In the negotiations with the US, the Commission wants to **ensure a high level of protection for EU investors** while **safeguarding the right to regulate** in order to respect the public welfare objectives of the EU and its Member States. The Commission set out these twin objectives in its 2010 Communication (a policy paper) “Towards a comprehensive European international investment policy”². The Council and the European Parliament supported the policy paper as the basis for EU negotiations.^{3 4}

The Commission is proposing an innovative approach on investment protection and ISDS for the TTIP. It draws on **lessons learnt and from experience** with existing investment treaties and with how the existing ISDS arbitration system works. It **addresses the concerns and shortcomings** that have featured prominently in public discussions about investment protection and ISDS. The Commission is developing a new and innovative approach to address those concerns through **two sets of actions**:

a) Clarifying and improving investment protection rules so as to guarantee that the right to regulate is not undermined, through the following:

- As a basic principle, to explicitly reaffirm the Parties’ **right to regulate** and to pursue legitimate public policy objectives.

² COM (2010) 343 final.

³ Conclusions of the 3041st Foreign Affairs Council meeting, Luxembourg, 25 October 2010

⁴ European Parliament resolution on the future EU investment policy, 22 March 2011

- When the state acts ***in a non-discriminatory way*** to ***protect the public interest***, guarantees are provided so that the measures it takes cannot be considered equivalent to an expropriation. Neither a loss of profits by the investor nor compulsory licenses issued in accordance with WTO provisions guaranteeing access to medicines can be considered an expropriation.

- The obligation to provide ***'fair and equitable treatment'*** is defined within precise limits by a list of acts that could constitute a breach: manifest arbitrariness, denial of justice, abusive treatment such as coercion, duress or harassment.

- As in other EU free trade agreements, in the TTIP the Parties would be able to adopt and enforce ***prudential measures*** – preventive measures taken by a state to ensure the stability of its financial system.

- ***Shell companies*** are not protected. Only substantive business operations in the territory of one of the Parties could qualify as an “investor”.

b) Building a modern, transparent and efficient ISDS system, through the following:

- ***Preventing the risk of abuse of the system*** by allowing for the early dismissal of unfounded claims and by preventing investors from bringing multiple claims in various jurisdictions. Also, the losing party will bear the cost. This is a powerful disincentive to weak, frivolous or tactical claims.

- ***Making the arbitration system more transparent***. The EU has played a leading role in improving the United Nations' rules on transparency in international investment proceedings. As a result, the United Nations Commission for International Trade Law (UNCITRAL) has approved new rules that will soon be adopted by the UN General Assembly. These new rules will be proposed and negotiated in the EU's trade agreement with the US. In the TTIP, all ISDS documents will be publicly available, hearings will be open to the public and interested third parties – such as NGOs – will be able to intervene during the proceedings. This ensures that broader societal concerns are heard.

- ***Preventing conflicts of interest or bias in arbitrators*** by a code of conduct with specific and binding obligations for arbitrators, including on conflicts of interests and ethics together with rules on how these should be enforced.

- ***Ensuring better consistency and control*** through an appellate body to review awards. That would help ensure consistency of interpretation.

- **Keeping control of the agreement** by allowing the Parties to the agreement to agree on how they interpret a certain provision. This interpretation will be binding on the arbitral tribunal and direct the interpretation by arbitrators. The Parties can also intervene in ISDS proceedings to present their views on how the agreement should be applied.

- **Ensuring that ISDS will only apply to breaches of the investment protection** provisions and not to other parts of the TTIP agreement. ISDS does not apply to market access or regulatory provisions.

These improvements to investment protection and ISDS will clarify and improve the balance between investors' rights to protection and states' right to regulate. With these public policy elements, the proposed TTIP investment and ISDS approach is very different from existing investment agreements and will correct the apparent weaknesses in those agreements.

Background on investment protection and ISDS in TTIP

Europe's prosperity depends in large part on foreign investment, inward and outward. So far, the EU's Member States have concluded about 1400 Bilateral Investment Treaties on the protection of investment. Virtually all such agreements include ISDS.

While nine EU Member States currently have bilateral investment treaties with the US, others do not. This situation means that some EU investors in the US are treated differently compared to other EU investors, and that US investors have more rights in some EU Member States than in others. Furthermore, the US has, or is negotiating a large number of agreements including investment protection and ISDS with many important players in the global economy. Investors from all these countries compete both on the US market and internationally with investors from the EU. It is important to ensure equal and fair treatment of European investors in the US.

The EU and the US are together, by far, the world's largest destinations of foreign investment, representing 40% of total world investment inflows. They are also the biggest sources of investment with 47% of total world outflows. They are, by far, each other's biggest investment partner: the US accounts for 39% of the total foreign investment stock in the EU and the EU for 41% of the total foreign investment stock in the US.

This two-way flow of investment underpins millions of jobs in the EU and the US, not just in the companies in which the investments are made but in firms supplying them with components and services, including many small and medium-sized companies.

Given the size of their investment relationship, the EU and the US are in a unique position to together develop modern investment rules. These rules should above all

create a framework that encourages further investment by providing guarantees that governments will treat foreign firms on a level playing field. At the same time, these rules cannot be allowed to restrict the right of the European Union or its Member States to make policy in the public interest on matters such as health, safety, consumer protection or the environment.

The TTIP will be an international treaty. The US, like the EU, does not allow its international trade treaties to be directly enforced in domestic courts. Hence, the rules on investment protection in the TTIP do not form part of the rules enforceable at national level, unless they would be specifically transposed into US law by federal legislation. This would mean, for example, that the obligation not to discriminate against foreign investors could not be enforced by domestic courts.

The consultation is organised as follows:

1. For every relevant issue, you will find an introductory explanation, a description of the approach found in most investment agreements, a description of the EU objectives for the TTIP and reference texts. These texts present, side by side, the way the relevant issue has been dealt with, respectively, in most investment agreements and in the investment chapter of the EU-Canada Free Trade Agreement (CETA) so far. The reference text developed in the CETA negotiations is presented in English only, for two main reasons: firstly, because English is the original negotiation language of these texts; secondly, to avoid any possible misinterpretation due to differences resulting from translation.
2. Following the introductory documentation, a specific question referring to the description of the approach and the explanations, to be completed by you.
3. At the end of the questionnaire, you will find a final question to allow you to add any additional views and remarks that may not have been addressed by the previous questions.

Following the public consultation, the Commission will discuss with the Council, the European Parliament and stakeholders the outcome and the EU position on investment in the TTIP. The Commission will publish on line a report on the results of the public consultation after the consultation has been concluded.

How to participate in this consultation?

[Link to the on line consultation](#)

Before activating the link, please note that given the length of the questionnaire, we strongly recommend that you print out this notice and the questionnaire so that you can prepare your answers off line and insert them into 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.

What will happen to your contribution?

The contributions received, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case the contribution will be published in anonymous form. Any objections concerning publication of personal data should be sent to the service responsible for the consultation (email: Trade-TTIP-Investment-protection-and-ISDS@ec.europa.eu) or the opt-out option being chosen by checking the appropriate box in the questionnaire (question 1.1.)

Your input to this consultation is important to help the Commission to produce a negotiating text that best reflects the EU's overall interests. We look forward to your views, including concrete suggestions as to how we could improve the approach towards the US.

We thank you in advance for your contribution.

The deadline for submissions will be three months from the date at which the consultation is available in all official EU languages. Accordingly, the final deadline for submissions will be indicated on the consultation webpage once the texts are available in all EU languages.

[For more information about the EU investment policy please click here](#)