Investment

Creating more investment opportunities in the EU and the US

In this chapter we want to:

- **provide new opportunities for EU companies to invest in the US**
- **encourage more US investment in Europe**
- **ensure a level playing field for EU businesses and professionals in the US**
- **set up a new Investment Court System (ICS) to replace the existing Investor-State Dispute Settlement (ISDS) system**

Reasons for negotiating on investment

TTIP aims to encourage investment access to the Atlantic in two main ways.

First, by making it easier for EU companies to invest in the US, and for US companies to invest in the EU.

And second, by giving each other's investors more certainty when they do invest.

Investment matters because by investing abroad, European companies expand globally and remain competitive internationally.

And as those companies grow, they recruit more staff back home. They also invest more in research and development, which helps Europe stay competitive.

Investment by US firms in the EU also creates new opportunities for business and partnerships with EU companies. This in turn boosts growth and jobs in Europe.

The EU is already the biggest investor in the US. EU companies' combined investments in the US are worth more than € 1.6 trillion.

But we could still make it easier for EU companies to set up and sell their goods and services in the US. EU companies are especially efficient in the services sector.

We could also use TTIP to reduce the element of uncertainty when investing abroad. This can go beyond the normal risks of doing business abroad, such as the degree of local competition or changes in exchange rates.

For example, the two sides' legal and economic traditions can differ, or there might be a general perception in the host country of the investor as 'foreign'.

To address this, the EU and US want to provide basic guarantees to each other that they:

- won't discriminate against each other's investors, but instead
- will treat them in line with some basic principles known as 'standards of investment protection'.

A new way of protecting investments

In fact, the EU wants to use TTIP as a starting point for creating a new way of protecting investments.

The EU wants to set up a new Investment Court System (ICS) to:

- make sure governments respect these basic guarantees and
- enable governments and investors to resolve any potential disputes that do arise between them in a fair and impartial way.

EU goals

Four basic guarantees for foreign investors

The EU proposal sets out four types of basic guarantee. An investor could only bring a claim to the Investment Court System that alleged a breach of one or more of these guarantees. **They could not bring a claim on the sole grounds of lost profits due to government regulation.**

In a nutshell, the EU and US would commit:

- not to discriminate against each other's investors on the grounds of nationality
- not to take control of (expropriate) their assets, such as through nationalisation without paying them compensation
- to allowing foreign investors to eventually transfer funds related to their investments to and from their home country – for example, by repatriating profits or using them to add to their capital base
- to protecting foreign investors against being unfairly treated in certain other ways, such as through:
  - denial of justice, where an investor is denied the possibility to bring a legitimate claim in the courts of the country they're investing in
  - targeted discrimination based on grounds such as an investor's gender, race or religious belief.

In addition, the new system would:

- address concerns about the lack of legitimacy and transparency in an existing system for resolving disputes between governments and foreign investors, known as investor-to-state dispute settlement system (ISDS)
- guarantee the right of governments to pass regulation in the public interest.

1. A new system to replace ISDS

The cornerstones of the new system are:

a. A new Investment Court System

The Commission proposes setting up an Investment Court System (ICS) with judges publicly appointed by the EU and US.

It would comprise:

- an Investment Tribunal with 15 judges:
  - five EU nationals
  - five US nationals
  - five nationals of other countries.
- an Appeals Tribunal with six judges:
  - two EU nationals
  - two US nationals
  - two nationals of other countries.

b. Clear rules for judges

All judges would:

- have to hold qualifications comparable to judges in other international courts, such as the International Court of Justice.
- be assigned to each case on a random basis to guarantee their independence; each case or appeal would be heard by three judges - one EU judge, one US judge and one judge from a third country
- have to follow a set of strict rules on ethics
- be banned from working as legal counsel on any other investment disputes while they act as judge.

c. Innovative procedures

The new system would also feature:

- a new mediation mechanism to help solve disputes amicably and avoid litigation
- tight deadlines - disputes would be decided within two years, including appeals
- specific provisions to make it easier for smaller companies (SMEs) to access the system, including:

- a cap on the procedural costs the SME would have to cover if it lost its case
- the possibility to submit a claim to a sole judge, allowing a case to proceed more quickly and efficiently

2. Safeguarding governments' right to regulate

The Commission's proposal:

- clearly states that governments' right to regulate for public policies [explain] is fully preserved.
- clarifies that investment protection provisions cannot be interpreted as a commitment by governments not to change their laws in the future, even if that may negatively affect the investor's expectations of profits.

3. Building on existing reforms

The Commission's proposal for TTIP builds on reforms it has already included in the EU's trade agreements with Canada and Singapore.

It:

- clearly defines standards of protection, in order to prevent abuse of the ICS
- provides full transparency in the dispute settlement proceedings:
    - all documents would be posted online
    - all hearings would be open to the public
- bans 'forum shopping' – where an investor goes to a court where they think they're most likely to win
- allows governments to interpret how the agreement should apply
- allows judges to dismiss claims early on if they consider them to be unfounded
- requires the loser in a case to pay for the costs of hearing the case (the loser pays principle), to deter investors from bringing cases in the first place which are unfounded .

Sensitive or controversial issues

In this area, some issues are sensitive or controversial.

Here's a summary of themes and what we're doing to address each of them.

Sensitivity/concern	EU response
1. Governments' right to regulate	
Some argue that Investment protection in TTIP will jeopardize the right of governments to regulate in the public interest.	The Commission's proposal includes a specific article upholding the governments' right to regulate
2. Lack of transparency and legitimacy of 'ISDS'	
There are concerns that ISDS proceedings are conducted in secret and tainted by bias and conflicts of interests.	The Commission's proposal for a new transparent Investment Court System with publicly appointed judges will guarantee impartiality, ethical conduct of judges, and make the system more legitimate.
3. Lack of consistency in ISDS decisions	
Some stakeholders are concerned that ISDS tribunals generate inconsistent and sometimes biased practice and their decisions should be subject to review.	The Commission's proposal to include an Appeal Tribunal will ensure that any legal or factual error can be corrected and thereby ensure consistency