

Public consultation on modalities for investment protection and ISDS in TTIP

A. 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?

The ETUC does not believe that ISDS should be included in TTIP. Investment protection is neither necessary nor helpful in an agreement between the EU and the US. The US and the EU legal systems provide sufficient legal protection to businesses. Two reasons for an investment protection chapter in the TTIP which are often claimed are:

- Including an investment chapter with the elements suggested in the consultation document would be a major step in the process of reforming the international investment law; and
- Without investment protection in TTIP, the EU cannot ask for investment protection in other negotiations e. g. with China

Neither argument is convincing: first, it should be noted that most reforms proposed by the EU in the consultation document have already been implemented in other investment agreements and model BITs (such as the Canadian model BIT) or are being discussed in various fora including UNCTAD's Investment Framework for Sustainable Development. It is unlikely that the exclusion of an investment protection chapter in the TTIP would significantly impede the reform of the system. In fact, excluding investment protection from the TTIP might even support those reforms because this would indicate that investment protection chapters are not always the best and only solution. Second, even if one assumes that an investment chapter in agreements with other trading partners are necessary, investment protection in the TTIP is not a prerequisite. In fact, trade and investment relations between European and North America traditionally did not involve investment protection agreements. In addition, countries such as Australia have shown that a country can credibly exclude investment protection in a trade agreement with one country (e.g. US-Australia FTA) and still include it in an agreement with another country (e.g. Korea-Australia FTA). It is not plausible that the EU could not follow a similar path.

Despite proposed improvements on current practice, the ETUC is opposed to including ISDS in TTIP for the following reasons. ISDS establishes a system of judicial protection which is only available for foreign investors. By definition, this additional system awards benefits to foreign companies which are not given to domestic companies. This discriminates against domestic companies. ISDS destabilises the domestic judicial system because public measures can be subject to two diverging legal assessments. This leads to legal uncertainty in particular if the questions before domestic courts and investment tribunals are essentially the same. ISDS can influence domestic legislative

and administrative decision-making even if the substantive standards are defined in a restrictive way and even if ISDS proceedings are transparent.

The EU approach towards investment protection and ISDS in TTIP contains a number of improvements if compared with traditional BITs, including BITs of some of the EU Member States. However, the EU approach fails to incorporate key reform proposals outlined elsewhere in the ETUC's response to this consultation.

In particular, the EU approach contains no provisions on obligations of investors or the promotion of human rights, labour rights and environmental standards. This is regrettable. Investors should be required to adhere fully to international standards and guidelines for multinational enterprises (such as the OECD Guidelines or the ILO Declaration) before turning to ISDS. Furthermore, an EU investment protection chapter should also require the investor to prove that he or she also adhered to the laws of the host state.

Improving the international investment protection system requires a new start instead of relying on reforms of the current system. A fundamental change is needed and the EU's approach, as laid down in the draft investment chapter of CETA, is not the appropriate path. Making policy on the back of negotiations with particular countries is not acceptable.

Question 1: Scope of the substantive investment protection provisions
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?

The scope of the EU's investment chapter is based on the definitions of the terms "investor" and "investment". Both definitions are too broad. One problem is that they would enable foreign shareholders of a company to raise claims in the same matter as the company itself.

Furthermore, the definition of investment is "asset-based" and includes portfolio investment. ETUC opposes this. A lasting or significant interest in a foreign enterprise should be a necessary element of the definition of investment

Investments which are not made in accordance with the applicable law at that time are not considered protected investments. This is positive in principle but it should include the requirement that the investment does not cause or contribute to serious adverse human and labour rights impacts.

The definition of an investor is limited to enterprises with substantial business activities. This is to be welcomed in principle. However, the term "substantial business activities" should be further defined to ensure that it is not interpreted in a narrow way.

More generally, international investment law should:

- protect domestic and foreign investors engaged in sustainable investment activities against arbitrary state actions
- promote the rule of law and the protection of property rights in order to foster sustainable development and growth in all countries
- be compatible with domestic regulations aimed at legitimate public interests even if they have negative impacts on private business activities
- be integrated into domestic legal systems and support the development and maintenance of an impartial and functioning judicial system which is compatible with international human rights standards.

Question 2: Non-discriminatory treatment for investors

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.

The non-discrimination treatment clauses (national treatment and most-favoured nation treatment) cover de jure and de facto discrimination. However, the draft text contains no further definition of the scope of de facto discrimination. Hence even general laws which have de facto a discriminatory effect could be a violation of the non-discrimination clauses. ETUC opposes such a broad reach of the non-discrimination treatment. The principle should be limited to regulatory measures enacted primarily for a formally discriminatory purpose.

National treatment and most-favoured nation treatment are subject to general exceptions modelled on the basis of the relevant WTO provisions (Art. XX GATT and Art. XIV GATS). This allows states to defend discriminatory measures taken for specific legitimate policy goals provided that the measures are necessary and that their application is not discriminatory and does not constitute a disguised restriction on trade. However, these general exception clauses only apply to the non-discrimination provisions, but not to the rest of the agreement. A measure amounting to an indirect expropriation could not be justified on the basis of the exception clauses. ETUC therefore proposes to apply the general exception clauses to the entire investment chapter.

Furthermore, the scope of the exception clauses is limited to those policy goals mentioned in Art. XX GATT and Art. XIV GATS such as public order and public security measures, health and safety measures and environmental measures. It is absolutely essential that labour law and collective agreements are also covered by exception clauses. It should not be possible for a foreign investor to claim discriminatory effect where working conditions are more protective in a given EU Member State than in the investor's country of origin, thereby allegedly placing the investor at a competitive disadvantage. Other general measures such as subsidies, procurement, tax, or the protection of essential public services should also be part of an exception clause.

The EU approach seeks to exclude the import of standards from other investment agreements through an MFN clause. However, the exclusion only applies to procedural matters and not to substantive clauses. This presents a major problem, because the restrictions of Fair and Equitable Treatment and indirect expropriation proposed in the EU document could be circumvented if the MFN clause does not exclude the importation of substantial standards from other investment agreements as well.

Question 3: Fair and equitable treatment

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?

The EU tries to limit the FET standard by reducing it to specific cases such as denial of justice, fundamental breach of due process, manifest arbitrariness, and targeted discrimination on manifestly wrongful grounds or abusive treatment of investors. This would reduce the scope of this clause which has been used to curtail a number of regulatory policies in past investment cases. However, FET is not limited to its core standard under customary international law. In addition, the parties may amend the list of specific cases which might amount to a breach of FET. This may open the door to a broader scope of FET. The text should therefore clarify that any future amendments may not broaden the scope of FET beyond the scope defined in the treaty.

The term “full protection and security” is limited to the protection of the physical security of investors and covered investments. This is a useful restriction.

Another problem of the FET standard is the reliance on the investor’s expectations. In the past, this has been interpreted broadly by some investment tribunals. The EU text should clarify that investor’s expectations are only relevant if they are based on formal representations issued by competent authorities which are based on existing law. In particular, if a state official makes a promise which is not in accordance with domestic law, such a promise cannot give rise to legitimate expectations of the investor. Furthermore, it should be made clear the expectations of the investor cannot prejudice the legislative process or the application of existing laws by the administration.

Question 4: Expropriation

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.

The EU approach covers direct and indirect expropriation. These terms are further defined in an Annex on Expropriation. Indirect expropriation is a measure or a series of measures with an effect “equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.” This is a standard and broad definition of indirect expropriation. It is further specified by a list of factors which should be taken into account when determining indirect expropriation. Furthermore, measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations except in rare circumstances.

These definitions clarify the scope of indirect expropriation and reject an understanding of indirect expropriation which is only based on the effects of the measure. However, the definition is still relatively broad.

In general, ETUC suggests that the term expropriation should be limited to cases “in which a host state appropriates an investment for its own use, or the use of a third party”. Hence, indirect expropriation should never apply to general regulatory or administrative measures.

In any event, any reference to the investor’s expectations should be defined as suggested in the answer to question 3. Furthermore, the notion of “manifestly excessive” should be clarified. For example, it should be made clear that a fundamental change of a particular policy (such as prohibiting certain energy forms such as nuclear energy, or introducing mandatory minimum wages etc) can under no circumstances be considered as manifestly excessive.

Question 5: Ensuring the right to regulate and investment protection

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?

The text accompanying question 5 indicates that the investment and services liberalisation chapter of the agreement are based on a negative-list approach with a so-called ratchet clause (at least concerning national treatment and most-favoured-nation-treatment). ETUC strongly opposes this approach which would essentially bind any autonomous liberalisation measures at the international level and make the reversal of such liberalisation policies in the future impossible.

In addition and as mentioned above, the general exclusion clauses only apply to non-discrimination clauses (national treatment and MFN), but not to other provisions or to chapter in general. In addition, they only cover a limited set of policy goals. There is no clause which would exempt public interest objectives including fundamental labour rights, protection of public, health, education, security, rights of employees, social legislation, human, rights, financial market regulation, industrial, policy and tax policy and environmental protection from the scope of the investment protection chapter. This should be changed as already suggested in our answer to question 2.

ETUC noted with satisfaction that EU approach does not contain a so-called umbrella clause. It is essential that the EU does not accept an umbrella or stabilization clause in any investment protection chapter.

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

Question 6: Transparency in ISDS

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.

The EU Commission proposes to include the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State-Arbitration as mandatory in any ISDS. This would require the publication of all relevant documents (briefs and statements of the parties including annexes and all decisions of the tribunal). Furthermore the Tribunal would have the right to receive amicus curiae briefs. Finally all hearings would be public. This is a welcome step in the right direction.

However, some questions remain: According to Article 6 (3) of the UNCITRAL Rules a tribunal may “decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible”. It is unclear how the tribunals should apply the requirement of “infeasibility”. It would therefore be beneficial if the EU text would provide guidance in this matter. In addition, Article 6 (3) of the UNCITRAL Rules allows video transmissions of the hearing. The EU draft does not mention this possibility. It should be clarified that the possibility of video links is not excluded in the EU draft.

Question 7: Multiple claims and relationship to domestic courts

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.

The draft text includes “Fork-in-the-Road”- and “No-U-Turn”- clauses which exclude parallel proceedings before an investment tribunal and a domestic court. This is a useful restriction. However, if an investor turns to the domestic legal system first and obtains a final judgement, the investor can still bring a claim to an investment tribunal. This means that the investment tribunal becomes the ultimate adjudicator over a final judgement of a domestic court. This is one of the reasons why ETUC opposes ISDS in general.

In any event, there are also problems with the EU approach even if ISDS is accepted in an EU trade and investment agreement: For example, it is not clear if the EU proposal would exclude parallel proceedings initiated by the parent company or its shareholders

on the one side and the local subsidiary on the other. In particular does the EU proposal allow a parent company to lodge an investor-state claim while domestic subsidiary raises the same claim in domestic courts? Such a situation could occur if e.g. Vattenfall Sweden would address its claims to an investment tribunal while Vattenfall Germany would file a complaint in German courts.

The EU draft text does not include the requirement of the exhaustion of local remedies. ETUC holds the position that the investor needs to exhaust domestic remedies within the host state before being able to file a claim under ISDS unless futility is demonstrated. In order to determine “futility”, the investor would need to demonstrate that local remedies are not available or effective by proving that the investor cannot expect effective remedies from the domestic legal system, because these remedies are not available to him or her and may not offer effective remedies.

In general, international investment law should be integrated into domestic legal systems and support the development and maintenance of an impartial and functioning judicial system which is compatible with international human rights standards.

An alternative investment protection system could be built on a number of ideas including reliance on specific state-investor investment contracts. Another option could be to include chapters on judicial reform and the rule of law international trade and investment agreements should and offer cooperation and support for countries which are struggling with these issues. For example, it might be worth exploring this avenue in negotiations with Thailand, Vietnam or other countries. However, a trade agreement with the US does not need such a chapter, because the US legal system offers sufficient protection for economic actors including foreign investors.

Question 8: Arbitrator ethics, conduct and qualifications

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?

The EU approach foresees a TTIP Committee on Services and Investment which shall establish a roster of panellists to be used only if the tribunal is not constituted within 30 days. In essence, this means that the roster of panellist only becomes relevant if the two arbitrators appointed by the parties cannot agree on the presiding arbitrator. The EU proposed roster would therefore serve the same function as the existing ICSID Panels of Conciliators and of Arbitrators. In order to secure consistency of the decisions of the tribunals it would be preferable if the roster would be mandatory, i.e. the disputing parties would have to select their arbitrator from the roster.

The EU approach requires arbitrator experience in public international law, in particular investment law. However, the arbitrators should also have competence in the relevant domestic legal system.

In order to avoid a conflict of interests, arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration which only relate to individual conflict of interests, but not to systemic interest in upholding investment arbitration for the benefit of investors and to a code of conduct for arbitrators adopted by Committee on Services and Investment. The draft text only contains a broad mandate and no specific guidance on the contents of the code. It would be preferable if the agreement would be specific on which situations such a code should avoid.

It is also unclear whether the code of conduct is considered to be binding. While the draft text states that arbitrators “shall” comply with the code, the term “Code of Conduct” usually refers to nonbinding provisions. If the code should be binding it might be preferable to call it “Rules”.

Question 9: Reducing the risk of frivolous and unfounded cases

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.

The EU included provision to quickly reject a claim which is manifestly without legal merit or which is unfounded as matter of law. This is useful, but already exists under the ICSID Arbitration rules (Rule 41 (6)). It is therefore unclear whether the EU approach contains any added-value.

At the same time, there is no general “Investor Screen” which would exclude claims which would cause serious public harm or which concern areas such as taxation or financial regulation. This is a significant lapse.

Question 10: Allowing claims to proceed (filter)

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?

In essence, the filtering mechanism enables the responding state to refer a matter which relates to financial services mechanism to the Financial Services Committee in order to determine if the state could rely on prudential carve-out. This is a useful procedural step in principle. However, its practical value may be limited as there is no agreement at the international level of what constitutes a “prudential measure” in financial services regulation. As the matter would be referred back to the investment tribunal if the Financial Services Committee or the Trade Committee would not come up with a decision, it is questionable if the filtering mechanism would ever work in practice.

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

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?

The EU approach foresees the potential for the parties to the agreement to issue binding definitions on specific legal points. Again, this is a useful mechanism in principle, but experience in the NAFTA context suggests that parties may be reluctant to issue such interpretations. Furthermore, investment tribunals may either find ways to ignore such a decision of the parties (see the tribunal in Methanex/USA) or may question whether the definition of the parties is really an interpretation or whether it is in fact an amendment (see the tribunal in Pope and Talbot/Canada). It is therefore not clear whether the tribunals would actually accept the definition as “binding” as the Vienna Convention on the Law of Treaties treats such definitions as a means of interpretation, but not as an amendment of the treaty.

Question 12: Appellate Mechanism and consistency of rulings

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.

The EU proposal includes an Appellate Mechanism, but it would apply only in the context of the respective agreement (CETA or TTIP). Unlike some investment agreements, the EU proposal does not foresee the possibility of a general appellate mechanism for all investment cases. This also means that investment tribunals in a CETA context could issue different interpretations of the same clause as an investment tribunal in the TTIP context. The Appellate Mechanism would therefore only ensure uniformity and predictability of the interpretation of the CETA or TTIP, but would not reduce the overall heterogeneity and fragmentation of the investor-state dispute settlement system. The EU should therefore consider the establishment of an Appellate Mechanism which would apply to all investment treaties and not only the CETA or TTIP. At least, there should be an appeals mechanism which ensures uniformity of the interpretation of all EU agreements.