EUROPEAN COMMISSION

MEMO

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Questions and Answers: Public online consultation on investor protection in TTIP

A major issue in the debate around the Transatlantic Trade and Investment Partnership (TTIP) relates to the rules protecting investment and providing for an Investor-to-State Dispute Settlement (ISDS) mechanism. Some have suggested that these rules would give too many rights to private companies and unduly limit the EU's and Member States' right to regulate.

As a matter of transparency, the Commission has decided to hold a wide public consultation beyond usual stakeholders on how to include investment protection and ISDS in TTIP.

About the consultation

What is the consultation about?

The key question on which the Commission wishes to gather views on are the investment provisions in TTIP and how they can achieve an adequate balance between the protection of investors and the protection of the EU and its Member States' right to regulate. Concrete suggestions as to how we might be able to improve the approach towards the US will be welcome.

How will this consultation work?

Anyone interested in the subject will be able to reply online to a set of questions and upload comments on the Commission's DG Trade website. To ensure the highest level of transparency, contributions will be made public unless requested otherwise by the author.

The consultation is structured as follows:

- A consultation notice which presents the objective of the consultation, its content and how to take part.
- A set of questions to be completed, on the basis of explanations and examples. Each question is accompanied by: an explanation of the issue; a description of the existing approach in most investment agreements; a presentation of the EU's objectives and approach; text provided as reference based on the approach developed in the EU-Canada negotiations and in comparison with provisions commonly found in bilateral investment agreements. A number of open questions should allow respondents a sufficient margin to present their views on the issues that have proved controversial in the past.

Practical considerations

The consultation material is available online in English for public consultation from 27 March. The consultation notice and the questionnaire will subsequently be available in all EU languages.

The 'on-line' public consultations will last 90 days from the moment the last official EU language translation of the 'consultation text' goes on-line.

This system will ensure that no European citizen will be disadvantaged because of the language he or she speaks. In short, this public consultation will be in every EU language for a minimum of 90 days so that all European citizens or organizations have an equal opportunity to participate.

How will the Commission use the results of this consultation?

The Commission will analyse the contributions with a view to taking them into account in the negotiation process. Following the consultation, the Commission will discuss with the Council, the European Parliament and stakeholders the EU's negotiating position on investment in the TTIP.

About investment protection and ISDS in TTIP

Why do we need Investment protection and Investor-to-State Dispute Settlement with the US?

Although the EU and the US are developed economies, investors can still encounter problems affecting their investments which their domestic courts systems are not always able to deal with effectively. To give an example, US law does not explicitly prohibit discrimination against foreigners, which is one of the key elements of investment protection. Also the rights given to investors under the TTIP will not be directly enforceable in US courts. ISDS provides investors with a neutral, apolitical venue to resolve such disputes. These are some of the reasons that justify including provisions in the TTIP to protect investors. And, as it brings together the world's two major economies, the TTIP will foster further reform of the investment protection and ISDS system which will set standards for the future.

Would an Investor to State Dispute Settlement unnecessarily limit the Member States' ability or right to regulate?

Investment protection and ISDS are not new. Most Member States' Bilateral Investment Treaties (BITs) already contain ISDS provisions. Since the late 1950s, the EU's Member States have signed more than 1400 investment protection agreements. These agreements have generally helped EU investors when they have encountered problems with host states. EU investors are the most frequent users of ISDS.

The existence of investment protection and ISDS provisions would not in itself prevent governments from passing laws, nor would it require laws to be repealed. At most, it can lead to compensation being paid. With over 1400 agreements, over the last decades the EU's Member States have been able to put in place sophisticated regulatory systems. In any event, the EU is working on providing even greater clarity to ensure that genuine regulatory action cannot be successfully challenged in investor-to-state disputes.

What are the Commission's objectives on investment protection?

First, the Commission must implement the negotiating directives decided by Member States.

Second, the EU aims at introducing modern investment rules that provide guarantees that governments will not discriminate against foreign firms. At the same time, it is important to ensure that investment rules do not unduly restrict the right of the European Union or its Member States to regulate in the public interest on matters such as health, safety, consumer protection or the environment.

Investment provisions in the TTIP would reaffirm the right to regulate through greater clarity to the drafting and meaning of the traditional investment protection standards typically found in investment agreements. They would also include the necessary guarantees and safeguards against the possibility of abusing the system. The latter would include the introduction of transparency commitments, rules to make sure that arbitrators are objective and unbiased, mechanisms for the parties (i.e. the EU and US) to control the interpretation of the agreement, and the creation of an appellate mechanism.

What sort of additional guarantees does the Commission have in mind?

The intended approach for the TTIP already reflects some important changes compared to traditional investment agreements that take into account the need to make improvements. In particular, it:

- Has a clear definition of 'Fair and Equitable Treatment' based on a closed list of elements;
- Includes a clarification that 'Fair and Equitable Treatment' does not imply that the Parties would not be able to modify or introduce new legislation;
- Clarifies that measures taken for public welfare objectives such as health, consumer protection or the protection of environment cannot be considered equivalent to indirect expropriation;
- Envisages an Appellate Mechanism for investor-to-state dispute settlement;
- Includes the principle of 'costs follow the law', whereby the losing party pays all costs relating to the dispute, as a disincentive against frivolous or tactical claims;
- Includes provisions against treaty-shopping, by clarifying that investors who tactically restructure their investments to be able to bring themselves within the scope of the TTIP (for example, by setting up a shell company in the US) will not be able to bring an ISDS claim;
- Includes a binding code of conduct for arbitrators setting out in detail the level of independence expected of them. The aim is to avoid as far as possible conflicts of interest.

For further information:

Access the public consultation

Press release (IP/14/292): European Commission launches public online consultation on investor rights in TTIP, 27 March 2014

In a nutshell: Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements

This Factsheet summarises the EU's changes to existing investment protection rules and the ISDS system.

TTIP negotiations website

Frequently Asked Questions about the Transatlantic Trade and Investment Agreement

The EU-US trade relationship

Transparency in EU trade negotiations