

MEMO

Strasbourg, January 2015

Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement

On 27 March 2014, the Commission launched an online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP). The Commission issued a first, [preliminary statistical report](#) in July 2014.

The Commission has now completed its analysis of the almost 150,000 replies. The report published today presents the detailed results.

TTIP aims at removing trade barriers in a wide range of economic sectors to make it easier to buy and sell goods and services between the EU and the US as well as to facilitate investments on both sides of the Atlantic. An [independent report](#) and our past trade agreements suggest that an ambitious deal could result in millions of euros of savings to companies and create many jobs in the EU.

Why this consultation?

The TTIP negotiations, which concern the world's two largest economies, have attracted a strong interest from the public and civil society organisations, with much of the attention focusing on the provisions on investment protection and ISDS.

The objective of the consultation was to seek views on a possible approach to investment protection and ISDS in the TTIP. This approach would be to use, as a basis, a number of innovative elements. The overarching question in the consultation was whether the EU's proposed approach for TTIP would achieve the right balance between safeguarding the EU's right and ability to regulate in the public interest, and protecting investors.

The negotiations on investment in TTIP have been suspended and will only resume once the Commission has come to the assessment that its new proposals guarantee among other things that the jurisdiction of courts in the EU Member States will not be limited by special regimes for investor-to-state-disputes. Other parts of the TTIP negotiations have continued as planned.

Some facts about investment in trade agreements

Investment is essential for growth and for job creation. As the world's largest source and destination of foreign direct investment (FDI), the EU has a strategic interest in seeking the ambitious opening of third country markets commensurate with the high level of openness of the EU for foreign investment. Jobs will be created by EU companies exploiting new investment opportunities that trade and investment agreements can provide, for example in the services markets of the United States. That strategic interest includes the protection of European investors abroad by ensuring certain basic rules (e.g. non-discrimination) are respected.

These strategic interests have existed for decades. Since the 1950s, EU Member States have signed around 1,400 Bilateral Investment Agreements with third countries to encourage and protect investment, including nine with the United States. Investment protection and ISDS is therefore nothing new. For TTIP, the [EU's Member States unanimously asked the Commission](#) to negotiate investment protection and ISDS. This mandate foresees the inclusion of investment protection and investor-to-state dispute settlement (ISDS) provided a number of conditions are met. A decision on whether or not to include ISDS is to be taken during the final phase of the negotiations.

Organisation of the consultation

The consultation was open online between 27 March and 13 July 2014.

In the [consultation document](#) the Commission sought views on twelve specific issues:

- Scope of the substantive investment protection provisions;
- Non-discriminatory treatment for investors;
- Fair and equitable treatment;
- Expropriation;
- Ensuring the right to regulate and investment protection;
- Transparency in ISDS, multiple claims and relationship to domestic court;
- Arbitrators' ethics;
- Conduct and qualifications;
- Reducing the risk of frivolous and unfounded cases;
- Allowing claims to proceed (filter);
- Guidance by the parties on the interpretation of the agreement;
- Appellate mechanism and consistency of rulings.

In addition, a final, open question allowed respondents to present general views about investment protection and ISDS in the TTIP.

For every issue, the consultation provided:

- an introductory explanation;
- a description of the approach found in most investment agreements;
- a description of the EU's objectives for TTIP;
- reference texts with legal language illustrating how each issue could be addressed.

All questions were open, allowing respondents maximum freedom to express their views.

Overview of the respondents to the consultation

The Commission received nearly 150,000 replies. The vast majority, around 145,000 (or 97%), were submitted collectively through various on-line platforms containing pre-defined answers which respondents could adhere to. In addition, the Commission received individual replies from more than 3,000 individual citizens and from some 450 organisations representing a wide spectrum of EU civil society (business organisations, trade unions, consumer organisations, law firms, academics, etc.). See annex to this memo for more details. About half of the respondents have agreed to the publication of their contribution. These contributions are already available online.

What are the main results of the consultation?

A majority of respondents used the consultation to voice their opposition to, or concerns about, TTIP in general. The collective submissions were used mainly to express concerns about TTIP in general or ISDS in TTIP in particular.

On the twelve questions of the consultation relating to the approach proposed by the Commission on specific investment protection issues, views are divided on almost all questions, with divisions between various categories of respondents and sometimes within the same category.

In general, many respondents recognise the EU's efforts to **improve the investment protection system**, but consider for various reasons that the approach is insufficient. A significant number of trade unions and a large group of NGOs stress the need to strengthen **the right to regulate** in the public interest.

Some call for stronger **investor obligations**, in particular in relation to human rights, social and environmental regulations or, more generally, to corporate social responsibility.

In the business community, despite overall support for a more inclusive and coherent ISDS system, characterised **by transparency and ethics**, there are concerns that the EU's approach could decrease **the level of protection** for investors as compared to existing investment agreements and that this could make the EU less attractive to foreign investment. Others express the view that there is no contradiction between international rules on investment and the right of States to regulate.

On ISDS, the **improvements to transparency** are generally viewed positively. Some nevertheless consider the approach to be insufficient due to the confidentiality exemptions.

There is much discussion of the relationship between ISDS and domestic courts, and of the EU's approach to the appointment and qualifications of arbitrators. The introduction of a code of conduct for arbitrators is also generally viewed in a positive light.

The possibility of **an appeals body** is also generally welcomed as a means to improve the coherence and legitimacy of ISDS but the lack of certainty as to its creation is seen as an issue. In many cases it is stated that domestic courts should be exclusively used to settle disputes between states and foreign investors.

Concerns are also expressed that the accessibility to the ISDS mechanism remains *de facto* a prerogative mainly of large-scale firms, as its costs and complexity make it difficult for small private investors to resort to it. A dispute resolution mechanism more suited to SMEs is seen as desirable.

What conclusions does the Commission draw from this consultation?

The publication of the report on the consultation is only a first step. Further discussions with the other EU institutions and stakeholders will be necessary. However, the consultation has already allowed the identification of four areas where further improvements should be explored:

- the protection of the right to regulate;
- the supervision and functioning of arbitral tribunals;
- the relationship between ISDS arbitration and domestic remedies;
- the review of ISDS decisions for legal correctness through an appellate mechanism.

Moreover, in the mandate given to the Commission unanimously, it was made clear that investment protection and ISDS should form part of the agreement concluded with the US, provided a number of conditions, as set out in the negotiating directives adopted by the Council, are met.

It follows therefore that a decision on whether or not to include ISDS is to be taken during the final phase of the negotiations.

In addition, as was stated by President Juncker in the European Parliament on 22 October 2014, a final decision on whether ISDS will or will not be included in TTIP will be taken in agreement with First Vice-President Timmermans, who shall ensure that ISDS fully complies with the rule of law, the principle of equality before the law, and the principle of transparency.

So what are the next steps?

In the first quarter of 2015, the Commission intends to further consult EU stakeholders, EU Member States and the European Parliament on the above-mentioned core issues, as part of a wider debate on the approach to investment protection and ISDS in TTIP, with a view to developing concrete proposals for the TTIP negotiations.

Until then it should be recalled that no negotiations are currently taking place on this issue.

From 150,000 replies to the report: The methodology

The report presents the views expressed by respondents. It also includes an overview of the number and typology of respondents, as well as some preliminary conclusions.

The report combines:

- A qualitative analysis, in line with the purpose of the consultation, which was to gather substantive views and suggestions on the approach in relation to the investment protection and ISDS provisions in TTIP, and the presentation of the consultation document as a list of open questions; and
- Elements of a quantitative analysis, warranted by a significant polarisation of views in the context of an unprecedented level of interest and participation, and allowing the identification of trends.

The contributions were grouped as follows:

- Collective submissions, whereby several batches, each with identical or very similar answers to questions, could be identified;
- Individual contributions from citizens, with arguments predominantly of a generic nature of the arguments presented in the replies, it was decided to present them altogether under a separate section rather than to divide them by question;
- For organisations, by categories (trade unions, business organisations, etc.) based on their self-identification.

The investment provisions of TTIP: Where we come from

In the TTIP, as in its broader international investment policy, the EU seeks to find a balance between the protection of international investors and the recognised need for clearer, more transparent and impartial rules. The [investment provisions of the Comprehensive Economic and Trade Agreement \(CETA\)](#) recently concluded with Canada are an example of this new approach. Key improvements include an explicit reference to States' right to regulate in the public interest, much clearer substantive provisions, full transparency for ISDS cases and a code of conduct to ensure arbitrators are chosen fairly and act impartially.

For further information:

Report: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

Press release: http://europa.eu/rapid/press-release_IP-15-3201_en.htm

DG Trade website:

- On the public consultation on ISDS in TTIP:

http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

- On investment:

<http://ec.europa.eu/trade/policy/accessing-markets/investment/>

- On TTIP:

<http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/>

Fact sheet about ISDS:

http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf

TTIP Negotiating directives:

<http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

ANNEX

Table 1: Distribution of replies - by Member State

Member State	Number of replies	% of total
UK	52,008	34.8%
Austria	33,753	22.6%
Germany	32,513	21.8%
France	9,791	6.5%
Belgium	9,397	6.3%
Netherlands	4,906	3.3%
Spain	2,537	1.7%
Total	144,905	97,0%
Other Member States	4,494	3,0%
Overall total	149,399	100,0%

Table 2: Distribution of respondents by category

Type of respondent	Total replies
Citizens	148,830
Organisations, of which:	569
<i>Academics</i>	8
<i>Companies</i>	60
<i>Consultancy firms</i>	15
<i>Government institutions & regulatory authorities</i>	11
<i>Law firms</i>	7
<i>Non-governmental organisations</i>	180
<i>Trade associations representing EU businesses</i>	66
<i>Trade unions & organisations representing EU trade unions</i>	42
<i>Umbrella non-governmental organisations</i>	22
<i>Think tanks</i>	21
<i>Other organisations</i>	137
Total exact duplicates (resubmissions)	6,346
Total mass submissions (without duplicates)	139,464
Total individual submissions	3,589
Total replies	149,399