

1. RESPONDENT DETAILS

1.1. Type of respondent -single choice reply- (compulsory) I am answering this consultation on behalf of a company/organisation

Your details - Companies/Organisations

1.1.1. My company's/organisation's name may be published alongside my contribution. -single choice reply- (compulsory) Yes

1.1.2. Company/Organisation name: -open reply- (compulsory) European Environmental Bureau

1.1.5 What is your profile? -single choice reply- (compulsory) Non-governmental organisation

1.1.5.1. If you are a company, what is the size of your company? -single choice reply- (compulsory)

1.1.5.2. If you are a non-governmental organisation, how many members does your organisation have? -single choice reply- (compulsory) 100 - 500

1.1.5.3. If you are a trade association, how many members does your association have? -single choice reply- (compulsory)

1.1.5.4. If you are a trade association representing businesses, please provide information on your members (number, names of organisations). -open reply- (compulsory) 1.1.5.5. If you are an organisation representing several non-governmental organisations, please provide information on your members (number, names of organisations). -open reply- (compulsory)

1.1.5.6. If you replied "other", please specify: -open reply- (compulsory)

1.1.6. In which country are the headquarters of your company/organisation located? -single choice reply- (compulsory) In one of the EU28 Member States

1.1.6.1. Please specify which Member State: -single choice reply- (compulsory) Belgium

1.1.6.2. If you replied "other", please specify: -open reply- (compulsory)

Your details - Individuals

1.1.1. My name may be published alongside my contribution -single choice reply- (compulsory)

1.1.1.1. Contact person -open reply- (compulsory)

1.1.2. If you are answering as a citizen/individual, please specify: -single choice reply- (compulsory)

1.1.2.1. If you replied "EU citizen", please specify from which Member State: -single choice reply- (compulsory)

1.1.2.1. If you replied "other", please specify: -open reply- (compulsory)

1.2. Your contribution

I agree for my contribution to be made public on the European Commission's website -single choice reply- (compulsory) Yes

1.4. Registration: Are you registered in the EU's transparency register? -single choice reply- (compulsory)

1.3. What is your main area/sector of activity/interest? -open reply- (compulsory) Environment and sustainability

1.5. Have you already invested in the USA? -single choice
reply- (compulsory) No

A. Substantive investment protection provisions

Question 1: Scope of the substantive investment protection provisions

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The EEB does not consider that these improvements proposed by the European Commission will effectively address the fundamental flaws of the ISDS system nor will they effectively mitigate the risk that the extension of the ISDS instrument from 9 to 28 EU member states will trigger an explosion in ISDS cases. Firstly, ISDS undermines countries' legal systems and provides privileged treatment for foreign investors over domestic ones, at the taxpayers' expense. Companies have used ISDS around 600 times to seek compensation from governments, in many cases for measures that protect public health, consumers or the environment, such as protection from harmful chemicals, high-risk energy explorations, and smoking. Although technically a government's right to regulate is not prevented, there are a number of concerns that governments are deferring or abandoning regulation in case of disputes. In 60% of the cases so far, the companies won or the case was settled - implying a significant cost to the taxpayer of the country in question. Finally, it socialises private risk – one of the key drivers behind the financial crisis – creating an indirect subsidy for shaky investment and a tax on citizens. When it comes to the scope of the substantive investment provisions in TTIP, the European Commission refers to the revised definitions used in the EU-Canada (CETA) agreement. These definitions provide some tightening but still leave it up to three unaccountable for-profit arbitrators to determine how these definitions apply, with no appeal possibility. According to the reference text, an investment covers "every kind of asset", which encompasses but is not limited to an indicative list provided in the definition. Clearly this is not restrictive enough. For instance the list includes "expectation of gain or profit", which is very broad and can be interpreted in a very loose way by arbitrators. The definition of a "covered investment" includes investments "directly or indirectly owned or controlled by an investor of the other party", but does not give details on the situations falling in this definition. The clarification of what defines an "investor" is useful to avoid the misuse of the treaty by mailbox investors, but doesn't change the fact that the system itself is inherently flawed.

Question 2: Non-discriminatory treatment for investors

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The EEB considers that the EU approach is insufficient to address the fundamental problem that ISDS provides foreign investors with preferential treatment under a set of rules to be interpreted by three private sector lawyers. Particularly problematic in this area, is the Most Favoured Nation (MFN) provision. By definition the MFN is bound to undermine any specific provision that parties may try to tighten up in the context of a specific agreement, since it allows investors to invoke any rights given to them under other treaties. The MFN allows companies using the ISDS mechanism to cherry-pick provisions from other investment treaties that are more favourable to their case – this flies in the face of bed rock legal principle that the same law applies equally to everybody. The restrictive language about the MFN in CETA does not solve the fundamental problems about this provision and will allow going back to earlier treaties that do not contain such restrictions. Therefore, including a MFN provision in CETA and TTIP will nullify any other reforms included in the texts.

Question 3: Fair and equitable treatment

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The fair and equitable treatment (FET) provision is one of the most dangerous features of the ISDS mechanism. FET has been the most relied on clause in ISDS cases, and its interpretation by arbitration tribunals has been very broad and also dangerously abused -

as recognized by the European Commission itself . The CETA text in fact combines a closed list with open ended and vague formulations that leave arbitrators far too much freedom to interpret investor rights in a way that limits governments' right to regulate in the public interest. According to the reference text proposed, "a state could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice, the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment such as coercion, duress or harassment". Arbitrators would still however need to interpret these basic rights in individual cases including questions as:

- What constitutes "manifest arbitrariness" (c.) without any proposed safeguard to prevent arbitrators from re-opening the supposedly closed definition list of the provision through expansive interpretation of "breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article".
- What constitutes a "specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated" (article 4). Representation could mean anything that arbitrators will decide. The definition also requires the representation to have been made to induce the investment, but not that the investment took place only because of this. The introduction of a broad basis for reviewing the legitimate expectations of an investor adds increased uncertainty and subjectivity to the interpretation and application of this clause. According to the article, it would still be up to arbitrators to decide whether an investment only took place because of this representation or not – which is a big loophole, making the article much broader than the Commission states. Finally, the text foresees that the definition might be expanded in the future (article 3), which creates uncertainty, while leaving it unclear what the process for such expansion would be.

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

Question 7: Multiple claims and relationship to domestic courts

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The EEB takes the view that the best way to prevent multiple claims to be filed in parallel is to not create the possibility of ISDS. While the European Commission keeps repeating that ISDS is necessary because EU companies would not have access to US courts in case of dispute, a recent London School of Economics study , concludes that the Commission concerns about the US judicial system are not substantiated enough to justify the inclusion of ISDS in TTIP . The proposals made in relation to mediation do not contain any new elements, since the disputing parties can always agree to submit to mediation. In addition, according to the reference text, a party would not have to go to mediation before going to arbitration. In that sense, proposals made on mediation are not really discouraging the use of ISDS.

Question 8: Arbitrator ethics, conduct and qualifications

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The EEB considers that the ISDS system by its nature has a perverse incentive effect, which a code of conduct that is not even available for comments, will do nothing to address. Many arbitrators, or the law firms they work for, have a conflict of interest. Their focus is not the public interest but rather the interest of their clients, which are often the private investors using the system . Even when the three arbitrators do not have an individual conflict of interest, which they often do, the system itself remains flawed. It is biased in favour of awarding compensation to investors, as such decisions/results/rulings are likely to encourage the filing of even more – this means more income for arbitrators and the law firms that they represent. The doubling of ISDS cases in the last 10 years means that this is not a theoretical threat.

Question 9: Reducing the risk of frivolous and unfounded cases

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The problem with ISDS is not that it allows for too many frivolous or unfounded claims, rather that it allows for serious claims to

progress in a flawed system. Under the current Commission proposals, cases such as the ones filed by companies Philip Morris against Australia's attempts to introduce anti-tobacco legislation or Lone Pine Resources against Québec's precautionary moratorium on fracking would still be possible. Claims that can easily be dismissed are only the ones without any legal merit according to the text. Furthermore, according to the reference text, the European Commission intends to still allow arbitrators to determine what is frivolous or not. Finally, according to the proposal of the European Commission in the context of CETA, the reforms will only address the issue of costs (case terminated without expensive and long procedures), but in no way the scope of the decisions that would otherwise be made on jurisdiction or the merits.

Question 10: Allowing claims to proceed (filter)

Question:

*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?***

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

The proposal for a filter for financial stability measures is an implicit acknowledgement on the part of the Commission that the ISDS system reduces the regulatory space. Rather than listing sectors for which a filter on ISDS cases would be applied, the ISDS system as a whole needs to be put to an end.

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

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

According to the reference text provided by the Commission, it is up to the committee on services and investment to make a recommendation to the CETA trade committee on the adoption of the interpretations of the agreement. It does not outline an automatic process for concerns to be raised. When it comes to the Commission proposals on how guidance by the parties would look like in CETA, the reference text mentions that "interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter. The CETA Trade Committee may decide that an interpretation shall have binding effect from a specific date", while leaving it unclear what will be the exact process to ensure this interpretation becomes binding on the tribunal. It does not mention to whom arbitrators will be accountable to and what happens in cases when they do not follow the provided interpretation. To underscore the relevance of that point, in the context of NAFTA, there are several examples of arbitrators ignoring the supposedly binding interpretations provided by either the US, Canada, or Mexico.

Question 12: Appellate Mechanism and consistency of rulings

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply- (compulsory)

Although the creation of an appellate mechanism could potentially constitute a small improvement, it would not be sufficient to address the fundamental flaws of ISDS. Moreover there is only a statement of intent on this, no guarantee of result. The CETA reference text provided mentions that "the committee on services and investment shall provide a forum for the parties to consult on issues relation to this section, including [...] whether, and if so, under what conditions an appellate mechanism could be created...". Furthermore, the reference text does not provide details on how such appellate mechanism would work, nor who would sit on it and what the selection criteria would be, if it were created. An appeal system would only contribute to predictability and uniformity if all appeal cases ultimately would be subject to the same final appeal body whose decisions are binding on 'lower' arbitrators.

C. 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?

If you do not want to reply to these questions, please type "No comment".

-open reply- (compulsory)

The EEB is disappointed to note that the Commission continues to refuse to assess other forms of investment protection than ISDS and has limited this consultation to a reform of a system that we consider to be fundamentally flawed. The EEB strongly opposes the inclusion of ISDS within TTIP and request the Commission to take it off the negotiating table. In addition to that and despite CETA has been kept outside the scope of this consultation exercise, the EEB opposes the inclusion of ISDS within the CETA agreement and requests this to be recorded in the analysis and representation of the consultation results. Investors should be able to rely on the national court systems and where there are shortcomings in these systems, these should be addressed through reform instead of installing a parallel and inferior system. Although the EEB is disappointed with the narrow focus of this consultation and the Commissions failure to consider a wider range of options for investment protection, the consultation exercise constitutes a small improvement to the way that the Commission is engaging in these negotiations. We strongly urge the Commission to consider the following further steps: Launch public consultations on all further remaining major areas that are under negotiation, at least on regulatory cooperation, both horizontal and sectoral, energy and raw materials, TBT and SPS. Make publicly available the relevant documents that are the basis for negotiations on these issues. Schedule in a 'pause and reflect' moment, following the results of these consultations as well as the results from the Sustainability Impact Assessment currently being carried out, and consider a wide range of options, including whether to continue with the negotiations at all. Finally, we request that the Commission in its representation of the results of this consultation, builds on a quantitative and not only qualitative analysis and explains how they will address these comments.