

Public consultation on modalities for investment protection and ISDS in TTIP

1. RESPONDENT DETAILS

1.1. Type of respondent -single choice reply-
(compulsory) I am answering this consultation in my own name (as a citizen/individual)

Your details - Individuals

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

1.1.1.1. Contact person -open reply-(compulsory) Stanton A. Glantz, PhD

1.1.1.2. Contact details (address, telephone number, email) - not for publication:
-open reply-(compulsory)

Professor of Medicine Director, Center for Tobacco Control Research and Education University of California San Francisco San Francisco, CA 84143-1390 USA

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

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

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

Academic research on tobacco control and public health.

1.4. Registration: Are you registered in the EU's transparency register? -single choice reply-
(compulsory) No

1.5. Have you already invested in the USA?
-single choice reply-(compulsory) Yes

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)

Tobacco companies have made aggressive use of such provisions in other treaties to block or, through intimidation, prevent, sensible public health measures to reduce the burden of tobacco-induced disease. In addition, there is no reason to expect that other major multinational interests that profit by aggressive promotion of dangerous and unhealthy products will be following tobacco's lead. The EU

should NOT follow recent treaty practice (mostly in bilateral investment agreements) of continuing to broaden the grounds for challenging health, safety and environmental regulations. Any investment provisions should be very narrowly cast, simply protecting physical property from expropriation and specifically excluding any rules, laws, regulations, or private causes of action related to protection of health, safety (including worker safety), and the environment.

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 clarifications and changes proposed by the EU are welcome but insufficient, because they do not have an effect on the main problem, which is removal of resolving disputes to an arbitration process that lacks the competence to understand public interest and the best interest of the state and its citizens. Any conflicts should be resolved in the relevant nation's courts in open public proceedings in which full due process rights to protect the public interest are protected. Member States should in all situations have the right to set the standard of healthcare, consumer protection, protection of employees or the protection of the environment as high as they see fit on a national level. The agreement must guarantee all parties the right to laws and regulations that are as strict as they deem necessary. The EU needs to learn from the experience in other countries that such exceptions need to be very clear and unequivocal. For example, although the Bilateral Investment Treaty between Switzerland and Uruguay excludes reasons related to national health as basis for a lawsuit, Philip Morris has used the treaty to sue the state of Uruguay in an effort to stop sensible regulations on tobacco products. even if Uruguay wins, it will only be at substantial cost and after years of effort. Again, there must be a strong presumption in favor of protecting citizens against major corporate interests in a way that ensures access and transparency to the proceedings.

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 proposed clarifications are welcome but insufficient, and they do not have an effect on the main problem. It is not entirely clear when a state legislation or administration could be considered in to be in breach of this principle. Interpretation of the situations is value-based and includes taking into consideration opposing political goals. The arbitration process is unable to understand the significance of public interest. As noted in the response to Question 3 the arbitration process should be replaced with one that is open and transparent and one in which the public interest is given clear priority over private interests.

Question 4: Expropriation

Question:

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.

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

-open reply-(**compulsory**)

Tobacco companies have been extremely aggressive in expanding what the idea of "expropriation" means, to the point of asserting that sensible public health policies such as graphic warning labels and plain packaging represent "expropriation" of future profits by reducing their ability to market their products without restriction. Any claims of "expropriation" should be limited to the seizure by the government of physical facilities and other areas, notably actions that affect future sales or profits should be specifically excluded from expropriation claims. No health, safety, or environmental regulation or law should be subject to triggering an expropriation claim.

Question 5: Ensuring the right to regulate and investment protection

Question:

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?

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

-open reply-(compulsory)

The right to regulate business in order to protect public health, public and worker safety, and the environment should be broadly and explicitly protected from litigation against EU members (and subnational jurisdictions) using investor provisions. As noted above, there should be no cause of action for claims against a governmental unit for implementing any regulation or law designed to protect public health, safety or the environment. Complexity and nuances in such rules only facilitate litigation that multinational corporations can use to intimidate governments. The rules need to be simple and unambiguous and limit causes of action to the current real value of physical facilities that are expropriated for public use, without any consideration of future profits or sales.

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

Question 6: Transparency in ISDS

Question:

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.

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

-open reply-(compulsory)

As noted in responses to earlier questions, the arbitration process does not meet the criteria of a democratic form of government. Dispute resolution needs to be handled in open proceedings that are accessible to the public in a way that allows civil society and other interested parties to participate through normal open judicial processes in the USA and in Europe.

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)

It is not enough to recommend recourse to domestic courts, or to encourage settling disputes in alternative ways. A private investor should not be able to be a party in such disputes. A dispute should only be considered as between two states, the local state and the investor's state of origin.

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 arbitration process is in essence a commercial process that strives for a "reasonable" solution between profit-seeking parties. It is not applicable to choices based on societal values, such as protection of health, safety, and the environment. Questions concerning the

limits of national legislation should not be handed over to a small elite group of lawyers (often with very weak conflict of interest rules) operating outside public surveillance. Conflicts should not be resolved by arbitration but rather through the open and accountable processes that have developed to serve democratic societies.

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 intent of the proposed amendments is moving in the correct direction in that they seek to make it more difficult for corporate interests, as exemplified by the tobacco industry, to use frivolous litigation as a way to block or deter sensible regulation and legislation that serves the public interest. In addition, "loser pays" rules generally have the effect of protecting the richer more resourced party in a dispute. The best protection would be a process for rapid dismissal of any complaint against measures whose purpose is to protect public health, safety, consumer rights, and the environment.

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 intent of the proposed amendments is moving in the correct direction in that they seek to make it more difficult for corporate interests, as exemplified by the tobacco industry, to use frivolous litigation as a way to block or deter sensible regulation and legislation that serves the public interest. In addition, "loser pays" rules generally have the effect of protecting the richer more resourced party in a dispute. The best protection would be a process for rapid dismissal of any complaint against measures whose purpose is to protect public health, safety, consumer rights, and the environment.

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)

This provision is a step in the right direction, but it does not solve the main problem, namely who is to evaluate public interest and on what criteria. The main course of action should be that a private investor cannot be a party in such a dispute. The settling of disputes should be considered as between two states, the local state and the investor's state of origin. The agreement should also clearly exempt any legislation or regulation to protect public health, safety, consumer rights, or the environment from challenge and provide a method for rapid dismissal of such claims.

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**)

Incorporating an appeal process is a good idea, but it could also have the effect of simply creating new channels for tobacco companies and other corporations that adopt their aggressive use of litigation to block public interest litigation. In addition to an open appeal process that uses the same open judicial processes that form the basis of dispute resolution in democratic states, the grounds for challenge need to be stated clearly in a way that will prevent extensive litigation whose practical purpose is to block or discourage public interest legislation or regulations.

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**)

I am opposed to the agreement. The agreement removes a group of disputes concerning private contracts from the jurisdiction of the state and hands them over to a multinational organ set up separately to handle each case. It is not in the interest of the investor either that the solution to a dispute becomes dependent on who is chosen as the arbitrator. In the arbitration process, the state gives up its competence and agrees to be a party in a dispute, where the other party is not a state, but a private investor. In addition, the process of arbitration is based on general principles that are open to interpretation and have been applied in many, very different ways. The arbitration process in the past has been rife with problems of conflicts of interest by arbitrators, who, in other cases, worked for parties that are appearing before them. Dispute resolution should be done through an open judicial process that is subject to all the protections that apply in a court of law. Even when amended, the arbitration process does not meet the criteria of a democratic form of government. A multinational arbitration process overseen by lawyers is not applicable to the evaluation of the points of public interest that form the basis for the measures used to govern foreign investments. Specific agreements on the treatment of investments and directing disputes to domestic courts in the EU or the USA would be a far better solution. As noted above, the agreement should also severely limit the grounds for challenging legislation or regulation that is designed to promote public health, safety, working conditions, consumer protection or the environment.