

# 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 on behalf of a company/organisation
<b>Your details - Companies/Organisations</b>	
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 Tribune
1.1.3. Contact person - not for publication -open reply-(compulsory)	John Evans
1.1.4. Contact details (address, telephone number, email) - not for publication: -open reply-(compulsory)	
etg@eurotrib.com	
1.1.5 What is your profile? -single choice reply- (compulsory)	Other
1.1.5.6. If you replied "other", please specify: -open reply-(compulsory)	Internet discussion site
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)	France
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)	
Thoughtful discussion on topics to do with European countries and cultures, the European Union, Europe's relationship to the rest of the world.	
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)	No
<b>A. Substantive investment protection provisions</b>	

## 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 "applicable laws" must be stated explicitly to include, beyond financial regulation, those on human rights, environmental and consumer rights, labour rights. Not only the investment, but the investor must be, beyond reasonable doubt, respectful of "applicable laws". An investor's record of corrupt practice, tax avoidance, or violation of human and social rights, within the territories of the Parties or elsewhere, should be grounds for dismissal of a suit.

## 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**)

No comment

## 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**)

Concerning the question of "legitimate expectations": The EU's intention "to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change...that the standard is not understood to be a "stabilisation obligation", in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors" is entirely in the right direction. But clear and specific language should recall on this matter that expectations (notwithstanding "clear, specific representations ... made by a Party to the agreement in order to convince the investor to make or maintain the investment and upon which the investor relied") cannot be deemed legitimate in certain cases. Specifically, sovereign default must always remain outside the jurisdiction of any ISDS system. Likewise, regulation in pursuit of macroeconomic stability, environmental protection, consumer protection, protection of the right to organize and bargain collectively, and a number of other core state functions and core human rights must be categorically exempt from becoming the subject of such disputes. No government can offer an investor legitimate promises of exemption with regard to these fundamental principles, and therefore no investor should be able to claim legitimate expectations as a consequence of any such promises.

## 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**)

We support the EU's wish to "make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment, cannot be considered equivalent to an expropriation," and "to clarify that the simple fact that a measure has

an impact on the economic value of the investment does not justify a claim that an indirect expropriation has occurred." However, the provision of paragraph 3 of the CETA example: "...in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor," opens the paying country to considerable risk, in that it effectively commits signatory states to uncontrolled hard-currency liabilities. The obligation to compensate expropriated properties of foreign residents in foreign currency is (a) discriminatory against own residents (who are generally required to accept the coin of the realm in settlement), and (b) severely destabilizing to foreign exchange policy in the event that compelling public interest requires expropriation of more property than can be covered by the strategic foreign currency reserve. For smaller countries, who all else being equal will have higher foreign investment relative to the size of their economy, maintaining an adequate strategic currency reserve to buy out all foreign direct investment would impose a non-trivial real cost, which the country in question would have no legal means to recover from the principal beneficiaries (the foreign residents owning the properties in question). Further, it is unclear what public purpose is served by shielding foreign investors from currency risk in the event of expropriation. In the ordinary course of business, people who invest in currencies outside their own must themselves bear the risk that said currencies depreciate or are deliberately devalued. Carving out an exemption (at public expense) from the ordinary currency risk assumed by any firm or individual doing business in a currency not his own seems hardly justified. Similarly, the CETA language on indirect expropriation: "c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations" seems at odds with the EU's stated standpoints (above, "the simple fact that a measure has an impact on the economic value of the investment does not justify a claim that an indirect expropriation has occurred", and with regard to "legitimate expectations", "an investor cannot legitimately expect that the general regulatory and legal regime will not change").

## **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)

Though CETA is cited only as an example, we would like to take issue with certain aspects of its provisions. CETA Article X, Prudential Carve-out: The prudential provision for registration of financial service providers, while a step in the right direction, is completely insufficient to maintain an adequate level of macroprudential financial regulation, which requires that all foreign (and domestic) financial service providers comply with all local prudential measures in their entirety, critically including Membership of local deposit insurance. Compliance with local solidity requirements. Compliance with the strictest local solidity requirements of all the countries an entity operates in, unless airtight compartmentalization is established between the balance sheets of business units in different countries. Adherence to whatever other rules and regulations that the local financial regulator might promulgate from time to time. This provision of paragraph 4: "Such a prohibition may not apply to all financial services or to a complete financial services sub-sector, such as banking," seems hard to justify in the light of the record of entire sectors of the financial system that have joined in episodes, including recently, of financial folly. On Safeguard measures: The duration of exceptional safeguard measures should be improved to 36 months. The historical experience is that a major reorganization of a country's financial infrastructure puts the foreign exchange and international credit markets in a state of irrational excitability for 18 to 24 months. A 50 % supplementary security buffer would be advisable. On Balance of Payments: Discrimination should be permitted on grounds of different levels of current account imbalances - it should be permissible to discriminate against countries running overtly predatory CA surpluses. Paragraph 5 on the time schedule should allow for the timetable to be revised, both upward and downward, based on the difference between reality and the expected course of events the timetable is based on. Paragraph 6 is mistaken in calling on the IMF. The IMF's estimates and projections have been repeatedly and recently demonstrated to be at a substantial divergence with observable reality.

## **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](#))

We support the EU's approach.

### **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](#))

No comment

### **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](#))

No comment

### **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](#))

No comment

### **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](#))

Once again, the greatest emphasis must be placed on states' rights to regulate in essential policy areas. The prudential carve-out must again be asserted in clear language. If there is not to be a filter in advance of ISDS proceedings, then it should be clear that complaints

against regulation, particularly macro-prudential, would not be successful. The result would be the same.

### **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)

No comment

### **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)

No comment

## **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)

Whatever the supposed benefits of the TTIP, it seems evident that the core of any such treaty consists of investor rights agreements. Indeed, the overall trend in international economic and trade affairs for many years now has been increasing rights for investors, in other words, principally transnational commercial and financial corporations - to the point where national sovereignty (or supra-national in the case of EU prerogatives) may be weakened or in doubt. Insofar as the TTIP proposes giving supplementary rights to transnational entities (whether they be European-based entities trading in the US, US-based entities trading in the EU, or third parties), we cannot support any such concessions being made, at least until such time as an adequate international tax code has been implemented. If not, then the treaty will have the effect of allowing transnationals to crowd out local operators, offshoring their profits and thus avoiding contributing their share to the communities in which they do business. Increasing penetration of foreign-based and particularly transnational enterprises into any national economic space inevitably leads to increasing pressure from local businesses for lower rates of company tax. This demand is only natural, and perfectly just: they are in competition but the playing field is not level. Therefore, treaties which favour such increased penetration will inevitably place downward pressure on national governments' tax resource, both directly from a reduced tax take (through international tax avoidance) and indirectly, by increasing political pressure for lower rates on national enterprises. Further, ill-advised concessions would bring downward pressure on government's capacity to regulate in the public interest on matters such as human and social rights, the environment, consumer protection, labour rights. Rather than concede further rights to transnational corporations, the TTIP should unambiguously state and protect the fundamental rights of sovereign states and of their citizens. It should be clearly recalled, moreover, that corporations and governments are not the only stakeholders in society. To this end, the dispute resolution system proposed should also permit counter-suits (by governments, corporations, trade unions, NGOs,

private citizens) against states who violate good governance or the human rights of their citizens in order to obtain a competitive advantage. Potential infringements include: \*Restrictions on the right to organize and bargain collectively. \*Restrictions on the right to strike. \*Disproportionate restrictions on the right to blockade. \*Arbitrary restrictions on access to health care (such as restricting access based on medically irrelevant criteria like race, creed, or ability to pay for the treatment). \*Wilful and wanton destruction of environmental commons. \*Enabling of tax fraud and shadow finance. \*Wilful disregard for proven or materially suspected harmful impacts of consumer products. Establishing symmetry between the right of investors to sue over re-regulation and the right of civil society (and investors in other countries who are negatively impacted by regulatory dumping) to sue over deregulation would go a long way towards restoring the neutrality of the proposed treaty with regard to overall levels of regulation. Since, on most questions offered, CETA provisions were cited as an example of treaty language, it seems necessary to point out that those provisions are in our view inadequate, particularly in consideration of the fact that the Party in negotiation with the EU concerning the TTIP is very considerably larger and more powerful than Canada. In other words, if the treaty offers concessions rather than obtaining guarantees, in our view it should not be signed.