

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
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)	Financial Services User Group (FSUG)
1.1.3. Contact person - not for publication -open reply-(compulsory)	Dr. Paul W.J. Coenen
1.1.4. Contact details (address, telephone number, email) - not for publication: -open reply-(compulsory)	
Dr. Paul W.J. Coenen Attorney-at-law / Head Legal Department c/o Dutch Shareholders' Association VEB Amaliastraat 7 2514 JC Den Haag The Netherlands Tel. (00 31) 70 313 00 00 Fax (00 31) 70 313 00 99 Mob. (00 31) 6 54 34 70 30 E-mail: pcoenen@veb.net	
1.1.5 What is your profile? -single choice reply-(compulsory)	Non-governmental organisation
1.1.5.2. If you are a non-governmental organisation, how many members does your organisation have? -single choice reply-(compulsory)	1 - 25
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
1.2. 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)	
<p>In its White Paper on Financial Services Policy 2005–2010, the Commission stated that it attaches great importance to ensuring proportionate user representation in the policy making. In the Communication for the European Council – Driving European Recovery, the Commission put the interests of European investors, consumers and SMEs at the centre of the financial market reform. As a measure to achieve these targets, the Commission set up a Financial Services User Group (FSUG). The group's task is to: advise the Commission in the preparation of legislation or policy initiatives which affect the users of financial services provide insight, opinion and advice concerning the practical implementation of such policies proactively seek to identify key financial services issues which affect users of financial services liaise with and provide information to financial services user representatives and representative bodies at the European Union and national level. FSUG has 20 members, who are individuals appointed to represent the interests of consumers, retail investors or micro-enterprises, and individual experts with expertise in financial services from the perspective of the financial services</p>	

user. FSUG meets 8 times a year in Brussels and its Chair is elected from amongst the group members. The Commission (jointly Internal Market and Services DG and DG Health and Consumers) provide secretarial services for the group.

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

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)

No comment

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)

No comment

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)

No comment

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)

No comment

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)

FSUG underlines the need of an adequate redress system in case the rights of local and foreign investors under TTIP are abused. FSUG is of the opinion that in principle local court systems in most countries offer such adequate redress and the exhaustion requirement is essential. Only when: a. local judicial systems do not comply with basic procedural rules of law; or b. access of investors to such local judicial system is denied; an alternative dispute settlement system would come into consideration. However, such alternative dispute settlement system cannot replace existing and functioning national possibilities for relief. It should only be of an exceptional and alternative nature. For FSUG, ISDS would not be the first option for such alternative settlement system. FSUG could imagine that a state-to-state dispute settlement system could straighten any (legal) barriers of investors via specific provisions that allow an investor whose rights under TTIP are abused to request its home state to initiate a claim towards another state in order to settle the investment barrier. Only in case that such state-to-state settlement wouldn't lead to adequate redress, FSUG could agree to ISDS, however in a far amended form. So far ISDS does not comply with basic procedural principles of law. Principles such as transparency must be laid down in general rules for ISDS. The availability of documentation to the public, public hearings and the possibility of intervention and participation by third parties are logical conditions to be met. In the interest of transparency claims should no longer be handled behind closed doors. Costs, awards, decisions and documents related to the proceedings, including names and information on claimants, attorneys and arbitrators must be made public. FSUG refers to the recent released Uncitral rules on transparency in treaty based investor-to-state arbitration which includes that hearings should be public. More and more states are required to promote transparency in investment arbitration. Furthermore ISDS must be available to all parties: states as well as home and foreign investors.

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)

FSUG underwrites the statement that the EU favours domestic courts. FSUG sets out in its answer to question 6 that it considers ISDS only of a second alternative and complementary nature. Investors should never be allowed forumshopping in order to determine the most favourable court, arbitrator or jurisdiction for their cases and relief. Only in case local courts do not provide for jurisdiction and a state-to-state dispute settlement including the provisions set out above would not work, an amended ISDS system may be applicable. State-to-state dispute settlement and ISDS should include mechanisms that control and deny forum shopping of any party. In case any local court would have jurisdiction, claims must be declared non-admissible and referred to the respective local court.

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**)

As far as ISDS is considered, FSUG agrees to the intention of the EU to establish further rules regarding arbitrator ethics, conduct and qualifications. When establishing these rules, FSUG suggests that the EU has a closer look into other existing arbitration possibilities, such as international arbitration under the ICC-rules and the Arbitration rules of the Netherlands Arbitration Institute. For example: section 3 of the Arbitration Rules of the Netherlands Arbitration Institute. Please see the link below.
<http://www.nai-nl.org/downloads/NAI%20Arbitration%20Rules%201%20January%202010.pdf> Furthermore FSUG is in favour of a system where tribunalists are randomly assigned from a roster of arbitrators in each dispute. The criteria for appointment to the roster must be publicly accountable and must include comprehensive and strong rules on conflict of interest as well as provisions for removal in case of such conflict of interest.

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**)

FSUG agrees to arrangements preventing the risk of frivolous and unfounded cases taking up time and money of the parties and the relevant state(s). Already in an early stage of any ISDS procedure a marginal check/filtering mechanism should be introduced in order to determine whether or not a claim is admissible. Such mechanism should include an explicit rule allowing for early challenge of cases by the respondent and possible dismissal before a full hearing in court will take place (reference is made to equal rules in ICSID).

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**)

In case of a large public interest (such as maintaining the stability and integrity of the financial system or protecting consumers) ISDS should provide adequate mechanisms where (a) individual state(s) together with local and/or EU supervisors can postpone the trial or dismiss the case. FSUG realizes that denying investors access to redress is an ultimate measure only to be used in extraordinary circumstances. ISDS should provide strict conditions in order to protect the interests of both investors and individual states. FSUG is aware that the problem is that investors can challenge whatever they like. However, FSUG believes that the public interest should never be challenged or undermined, so there should be a rule specifying that it is the way that states pursue the public policy objective that may be challenged, but not the objectives themselves.

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**)

In order to protect the consistent interpretation of TTIP FSUG agrees to the introduction of an intervention possibility for non-disputing parties for interpreting the relevant provisions. This supports and results into consistent case law. FSUG denies the right of any party to interpret issues of law by binding statements. Not the Parties, but the ISDS tribunals are exclusively entitled and equipped to decide on the legal merits of a case. Please note that by awarding the intervention possibility for non-disputing parties (including EU and US), these parties can already inform ISDS tribunals on their legal views. Arbitrators will and should never have any jurisdiction to interpret national consumer-related laws or fundamental rights at all, even when the interpretation of the treaty empowers them to interpret national law, or it is necessary to interpret national law in order to understand the treaty. In such cases recourse to the courts of appeal or the supreme court of the national judicial systems should be mandatory.

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**)

FSUG strongly promotes the introduction of an appeal mechanism into ISDS. This increases the quality of the judgments and improves the consistency of interpretations. Such an appeal mechanism for both the investor and the state should be included in TTIP itself and furthermore should not be limited to hear appeals on issues of law covered in the tribunal's decision or award and legal interpretations developed by the tribunal (as CETA provides for). Rather it shall ensure an overall review of the ISDS rulings both in legal and factual terms to ensure consistent rulings.

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**)

FSUG believes that strong investment and investor protection rules are essential to build trust and encourage investment flows among the parties. It believes that foreign investor rights should not be violated or discriminated against national investor ones and that equal treatment should be granted to national and foreign investors. However, while acknowledging that: a. in general ISDS systems could provide due access to justice in cases where local jurisdiction is denied; b. the proposal of the Commission includes improvements compared to current ISDS mechanisms in place under existing Bilateral Investment Treaties; c. in principle, this would positively apply also to small retail investors (such as private bondholders), it considers that the following inner flaws of the system remain to be tackled and that the Commission should find adequate solutions to them: - ISDS confers an advantage to foreign investors, being multinational firms or small private investors, in granting them access to a court where domestic ones cannot resort. The argument that local courts may favor local companies or the applicable rule at national level may discriminate in favor of local governments and companies does not hold in the case of developed judicial systems highly protecting private property and civil liberties as the EU and the US ones, where – for instance - exceptions to the ban on expropriation exists for limited and grounded public interest reasons and therefore should remain in place; - The accessibility to the 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 it. - Measures preventing claimants to challenge public interest policies are not sufficient and

the proposed definition of investment must be specified more in detail in order to avoid the so-called chilling effect of ISDS rulings over the adoption of advanced regulation by governments in the financial and other sectors.