



**Online public consultation on investment protection
and investor-to-state dispute settlement (ISDS) in the
Transatlantic Trade and Investment Partnership
Agreement (TTIP)**

April's response

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A. Allotment of funds for protection of investments

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 ?

The definition of investment that is being proposed by the Commission is too far-reaching: by including subjects such as “intellectual-property rights, contracts, licenses” in the same category as “land, buildings, machines, equipment,” it is grouping the tangible with the intangible, leading one to believe that these subjects are similar to one another and should be treated in the same way. The single set of rules which would then be put in place for subjects that have nothing to do with one another would become inapplicable, especially in the software field. April deplores such a confusion, and asks that the investments be more strictly defined, so that the rules that are laid down might take the particularity of each field into account. What's more, no question really addresses the relevance of establishing ISDS rules. One sole, unsupported statement is proposed in this consultation document; it maintains, “the fundamental principles of treatment correspond to the rights democratic governments grant their own citizens and companies [...] but they are not always guaranteed to foreign nationals or to foreign companies.” However, in democracies like the United States or the European Union member States, the foreign investors are effectively protected by national law. Furthermore, the cross-investments are already very important: there seems, therefore, not to be any need for an arbitral tribunal to set them up.

The mere statements from the Commission on the so-called need of putting in place an arbitral tribunal are not convincing. April asks that the Commission back up its assertions. Furthermore, it underscores the real danger of such a mechanism of dispute settlement:

- a specialized court without any possible recourse before an independent judiciary jurisdiction,
- a court whose decisions are to be imposed on all the others, but to which only certain players would have access, thus establishing a de facto inequality.

Foreign investors will be thus at an advantage compared to domestic investors, but also compared to civil-society stakeholders, NGOs, etc., since they alone will be able to take legal action before the arbitral tribunal, whose decisions will be binding to all and will supersede those of the national and European courts, including the ECHR. In conclusion, the very broad definition for an investor and the specific rights granted to foreign investors allow the latter to benefit from favorable treatment relative to all the other players, including the States.

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

In the proposed ISDS system, the international investors are at an advantage compared to the domestic investors, since the former have access both to national courts and to the arbitral tribunal, at their discretion, while the latter have access to only the national courts. On the contrary, real risks arise from

the establishment of the ISDS tribunals, as presented in question 1: absence of recourse before the non-specialized and impartial judicial institution, but also absence of recourse to the arbitral tribunal for citizens and for civil society.

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?

First of all, the definition of what is a “fair and equitable treatment” lacks specificity: the rights listed are subject to interpretation and could, therefore, see their definition modified by the arbitral tribunal, especially as for-profit arbitrators, with a monetary interest in the expansion of the interpretations of the clauses for protection of the investments, will be interpreting them. As a result, uncertainty is not reduced, contrary to the Commission's claims. April estimates furthermore that one cannot speak of a fair and unbiased treatment when some stakeholders are completely excluded, such as the civil society and NGOs.

In the context of the proposed ISDS mechanism, only the international investors could attack the States, thanks to the mechanisms of dispute settlement between investors and States included in the bilateral investment treaties and in the Investment sections of the free-trade agreements. These attacks could for instance be carried out in the context of a legislation they would not like (indirect expropriation), in order to obtain a judgment that would be imposed on any ruling that the citizens could obtain. This amounts to providing international investors rights superior to those of domestic investors and citizens. Can we still speak of fair and equitable treatment in such a mechanism?

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

The definition of expropriation lacks specificity and creates judicial uncertainty. April particularly laments that it includes indirect expropriation, which is a recurring problem in arbitral tribunals like those the TTIP wishes to put in place. Thus, international investors can threaten the States before the tribunal when they consider that certain public measures have reduced their estimated profits. The Commission offers no satisfactory solution in its proposals regarding these issues: indicative guidelines don't enable us to ensure risk limitation.

The idea of putting in place basic principles limiting indirect expropriation in legitimate public-purpose cases remains dependent on the case law of a future arbitral tribunal, and thus more resembles a declaration of principle than a real guarantee. We can also note that the expertise of arbitrators—as defined by the Commission in question 8—is based on the international investments and not on public-policy objectives. For the States, the risk of lockup is indeed real, with significant costs in case of actions brought by foreign investors. Moreover, this amounts to considering the interests of foreign investors as having priority in the legislative process, since they alone will de facto have a guaranteed recourse against indirect expropriations. This risk of lockup is not hypothetical, and it concerns all areas, including free software.

Question 5: Right to regulate

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?

April notes an absence of sufficient guarantees of the right to regulate, as well as the absence of a precise list of exceptions. Moreover, the right to regulate is presented as an exception to the right of international investors, while, at the same time, the right to regulate remains a fundamental right. Many safeguards that exist today to protect essential rights, like human rights, seem to be excluded. The only human right mentioned in the text is the property right, even though other fundamental rights should also be taken into account and respected. The arbitrators will keep the right to interpret, thereby restricting the right to regulate and providing these same arbitrators with the ability to decide on the States' right to regulate. This will not reduce the chilling effects on the States, since the international investors can still drag them before the tribunal and the arbitrators will be the ones to decide on the legality of the legislation. For April, these mechanisms are all the more unacceptable considering they will not be subjected to any democratic control. Finally, there is no guarantee for the States on the possibility of improving legislation.

Experience shows, however, that there are real risks, particularly regarding patent law, as shown by the current case of *Eli Lilly vs. Government of Canada*. Reforms on such important matters as patents could thus systematically be attacked when they don't satisfy certain international investors, thus allowing the latter to block all evolution of the law that wasn't completely favorable to them, and this to the detriment of consumer rights.

As the European Union considers copyright reform in the digital age, it seems that implementing such a law without displeasing a few large international companies would be difficult. The proposed measures run the risk of locking up the current system by not allowing for improvements in favor of innovation. This issue is of particular concern to April, since it could have a strong impact on existing software-patent law. Indeed, European legislation and US law differ regarding what is patentable and what is not, with European legislation being stricter with regard to software patents.

B. Investors-States 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.

For April, transparency first and foremost relates to negotiations and to the texts being discussed in connection with the TTIP. In the absence of any transparency in the current negotiations, the Commission's statements about a potential transparency of proceedings within the ISDS seem at best wishful thinking. If the Commission wants to make a commitment to the issues of transparency, the latter should relate to the texts currently being discussed and, therefore, it should relate to their publication.

Finally, April regrets that the Commission's proposed rules, the new rules of the United Nations regarding transparency, actually allow an arbitral tribunal several exceptions to the principle of transparency, as regards the publication of documents in particular. This proposal seems, therefore, insufficient in any event.

Question 7: 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.

April supports real and effective recourse to national courts, all the more so because the latter are designed to be independent and unbiased, and to respect the principle of the separation of powers. Thus, the arbitral tribunal proposed as part of the ISDS mechanism could not be a substitute, since the guarantee of rights is not respected. The proposed system is not acceptable, since it prioritizes the arbitral court and allows it to take the place of national courts, despite not offering the same guarantees in terms of the respect of fundamental rights. The mechanisms proposed by the Commission would run the risk of resulting in a two-speed justice: the arbitral tribunal, reserved to foreign investors and biased in their favor, and the independent national courts, whose decisions would be of lesser value, for all other players. Such a difference in treatment, akin to discrimination, is unacceptable.

Question 8: Arbitrator ethics

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?

The announcement of a code of conduct is more like a statement of broad principles—which we can't be sure will be effectively applied—than a real guarantee of ethical conduct, all the more so because the checks on compliance are not broached by the Commission's document. April notes a flagrant lack of guarantees of the effective application of a hypothetical code of conduct. Barring real checks by an independent judicial court of justice, there are no guarantees that the ethical principles will indeed be respected.

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.

The very notion of frivolous cases is not specified, even though the arbitrators have a financial interest in examining a maximum number of cases: if they are in charge of appreciating what constitutes frivolous cases, the notion therefore runs the risk of being reduced to its bare minimum. Moreover, entrusting to arbitrators paid by the case the task of determining whether a case is valid or fraudulent seems illogical, to say the least: they are not in any way encouraged to eliminate abusive or unwarranted use of the justice system.

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?

The filter is insufficient, because it focuses on financial questions exclusively.

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?

Once more, there is no guarantee of the efficiency of such guidance, particularly as there is no procedure set out for ensuring compliance. The arbitral tribunals that exist in the framework of other treaties have not really taken into account such guidance. Such a measure has therefore no real impact and does not provide for tackling the problems raised by the creation of ISDS.

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.

April considers that in any procedure, it is necessary to make provisions for an appeal to a non-specialized and independent judicial court. This is not what is proposed by the Commission, whose proposal remains confined to the arbitral tribunal and does not address the arbitration system's problems and significant deficiencies in terms of respect of rights. There is thus no room left for the rights of citizens and, once again, only the rights of foreign investors are taken into account.

C. The 'open' question

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 ?

In conclusion, April emphasizes that the settlement mechanism for disputes between investors and States is unnecessary, all the more if it involves arbitral tribunals, which lack democratic control and are staffed by judges with a financial interest. The investors can and should appeal to non-specialized national tribunals, which should remain the courts of last resort.

Furthermore, the ISDS's proposed mechanism runs the risk of stifling government attempts at regulation, if not bringing all new general-interest regulations to a standstill, and this without the Commission proposing any efficient solution to the problem.

Finally, April denounces a biased consultation. It should be noted that the question of the necessity of ISDS should have been asked in the preamble, and there should have been a preliminary publication of the negotiation documents, in view of the complex questions that are raised. These failures lead to the conclusion that this is but a sham consultation.