



## Reading Guide

Brussels, 16 September 2015

### **Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP).**

This reading guide sets out the main elements in the draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP). It comprises a short overview of the main reform proposals followed by a more detailed explanation, and the next steps in the process.

#### **1. The text of the proposal at a glance**

##### **- An article on the right to regulate – this is new**

It clearly states that the right to regulate for public policies is fully preserved. It also clarifies that investment protection provisions shall not be interpreted as a commitment from governments not to change their legal framework, including in a manner that may negatively affect the investor's expectations of profits.

A further provision clarifies that TTIP will not prevent the EU from enforcing its state aid law.

##### **- Investment Court System – this is new**

The text proposes the establishment of a new court system composed of:

- a **Tribunal of First Instance** (" **Investment Tribunal**") with 15 publicly appointed judges
- an **Appeal Tribunal** with 6 publicly appointed members

**On the Investment Tribunal**, the 15 judges would be appointed jointly by the EU and the US governments.

- five EU nationals
- five US nationals
- five nationals of third countries.

These judges would be the only ones to hear disputes under TTIP. The judges would have very high technical and legal qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body. Disputes under TTIP would be allocated randomly, so disputing parties would have no influence on which of the three judges will be hearing a particular case.

This is a fundamental change compared to the old ISDS system which operates on an *ad hoc* basis with arbitrators chosen by the disputing parties.

Taken together, the elements proposed for the operation of the Investment Tribunal, are an effective way to insulate judges from any real or perceived risk of bias.

**The appeal tribunal – which is also new** - would be composed of six members appointed jointly by the EU and the United States:

- two EU nationals
- two US nationals
- two nationals of third countries

The members of the Appeal Tribunal would be subject to strict qualifications and ethical requirements. They would ensure that there could be no doubt as to the legal correctness of the decisions of tribunals. Also, in the interest of investors and states, the text proposes strict time limits to ensure swift final ruling.

Significantly, judges of Investment Tribunal and members of the Appeal Tribunal would be **prohibited from taking on work as legal counsel on any investment disputes** and would be subject to strict

ethical rules.

- **Finally – the draft text includes changes that build on existing EU reforms** already included in the EU's free trade agreements with Canada (CETA) and Singapore.

## 2. Detailed explanation – structure and main elements of the text of the proposal

The draft legal text is divided into two sections:

- **A. Investment protection**
- **B. Resolution of Investment Disputes and Investment Court System.**

### A. Investment protection

**The right to regulate.** It clearly states that the right to regulate for public policies is fully preserved. This is a direct instruction to the judges, which the appeal tribunal will ensure is properly respected.

The article also ensures that investment protection provisions shall not be interpreted as a commitment from governments not to change their legal framework, including in a manner that may negatively affect the investor's expectations of profits.

A further provision clarifies that TTIP will not prevent the EU from enforcing its law on state aids.

This section also includes key provisions generally referred to as '*standards of investment protection*'. These are basic guarantees that governments will respect certain fundamental principles of treatment that a foreign investor can rely upon when making a decision to invest.

There are five such guarantees in the text:

- [no expropriation without compensation](#).
- the possibility to [transfer](#) (and eventually repatriate) funds relating to an investment.
- a general guarantee of [fair and equitable treatment](#) and physical security.
- a commitment that governments will [respect their own written](#) (and legally binding) contractual obligations towards an investor.
- a commitment to [compensate for losses](#) in certain circumstances linked to war or armed conflict.

Another guarantee – against nationality-based discrimination – is already included in the European Union's formal proposal to the United States on [Trade in Services, Investment and E-Commerce](#).

These guarantees form the basis for the protection granted to foreign investors. **A foreign investor seeking to use the Investment Court System to resolve an investment dispute could only do so by claiming that one of these guarantees had been breached.**

The standards of protection have been narrowly and clearly defined to prevent abuse. For example, the key standard of '*fair and equitable treatment*' sets out a closed list of government's behaviour that investors are protected from (e.g. denial of justice, targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs or on the grounds of harassment).

Also, a detailed annex has been added that clarifies what constitutes indirect expropriation.

### B. Resolution of Investment Disputes and the Investment Court System

The EU draft text fundamentally transforms the system of investment dispute settlement by proposing a court system comparable to domestic and international courts. This would replace the *ad hoc* Investor-to-State Dispute Settlement System (ISDS). It sets out two main areas of innovation.

**The first element** – and most ground breaking - is the proposal to set up in TTIP an Investment Court System composed of:

- a **Tribunal of First Instance** ("**Investment Tribunal**"), and
- an **Appeal Tribunal**, similar to national or international courts.

This represents a complete transformation of the current system characterised by its *ad hoc* nature with tribunals chosen for each case and the ability of the disputing parties to appoint the arbitrator of their choice.

**The second element are changes that build on existing EU reforms** which have already been included in the EU's free trade agreements with Canada (CETA) and Singapore – including ethical requirements and disclosure obligations.

#### i) Investment Court System under TTIP

The first important element is the establishment of an **Investment Tribunal** or **Court** in TTIP [Article 9 of the text on Dispute Resolution and Investment Court System].

It would be composed of 15 judges appointed jointly by the EU and the US of which five would be EU nationals, five US nationals and five nationals of third countries.

As in domestic or international tribunals, the disputing parties would not choose their judges. Three judges would be assigned randomly to each case, but always one judge from the EU, one judge from the US and one judge from a third country who would also be the Chairman. A randomised system would insulate the judges from any perceived risk of interference from the disputing parties.

Like in domestic courts, the 15 judges would be subject to strict ethical requirements, including a **prohibition from acting as legal counsel in any investment disputes**. The text also proposes giving the judges a monthly retainer fee in order to secure highly qualified individuals and ensure their availability at short notice. The associated costs would be shared between the EU and the US.

The second important element is the creation of a **permanent Appeal Tribunal** composed of six members jointly appointed for a six year term [Article 10 of the text on Dispute Resolution and Investment Court System].

The members of the Appeal Tribunal under TTIP would be subject to:

- **stringent qualifications** comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body
- **strict ethical requirements**
- a **remuneration system** based on that of the WTO Appellate Body (a monthly retainer fee and fees for days worked)

## ii) Building on existing EU reforms

The free trade agreements negotiated with Canada (CETA) and Singapore already bring fundamental changes to how the investment dispute resolution system works. These changes include amongst other:

- full transparency: all documents will be posted on-line, all hearings will be open to the public
- a ban on forum shopping
- government control of interpretation
- a strict code of conduct for arbitrators, including concrete steps on how to manage them
- early dismissal of unfounded claims, and
- the loser pays principle to avoid frivolous and unfounded claims

The draft TTIP text goes beyond CETA by including a strengthened code of conduct making explicit the prohibition that judges also act as legal counsel in investment dispute cases. The TTIP text also widens the ethics obligations to explicitly cover funding arrangements. The disputing parties are required to disclose who is funding their claim (so called 'third party funding').

Finally, the draft TTIP text makes the relationship between investment dispute resolution and domestic remedies clearer. Investors would be able to first seek to obtain redress in domestic courts but if they wanted to submit a claim to the Investment Tribunal they would first have to withdraw from any domestic proceedings they had started. This will prevent parallel claims. This 'No U-turn' approach is intended to encourage resolving a dispute in the domestic courts while leaving the possibility to access the investment dispute resolution system under TTIP where the treatment in the domestic system falls short of the very basic guarantees provided for in the investment protection provisions.

The draft TTIP text also includes provisions clarifying that the Investment Tribunal will apply exclusively to the provisions of TTIP, in accordance with international law. The Investment Tribunal would only be able to take a domestic law of each Party taken into account as a matter of fact. Where the Tribunal would be required to ascertain the meaning of a provision of a domestic law of a Party it would have to follow the interpretation made by that Party's domestic courts. The draft TTIP text further clarifies that the meaning given to domestic law by the Tribunal would not be binding on domestic courts. This further guarantees that the autonomy of the EU legal order is fully preserved.

## 3. A new system to be used for all EU trade and investment agreements

Taken in combination, the proposed changes in the draft TTIP text represent a new era in the settlement of investment disputes. This new system will also be negotiated in other EU trade and investment agreements.

## 4. Next steps

This is not a formal text proposal to the United States in the TTIP negotiations, but **an internal document of the European Union**. The Commission will now consult the EU's Member States in the Council and will discuss the proposal with the European Parliament before presenting a formal text proposal to the United States.

In parallel to the TTIP negotiations, the Commission will start work, together with other like-minded countries, on setting up a permanent International Investment Court. The objective is that over time the International Investment Court would replace all investment dispute resolution mechanisms provided in EU agreements, EU Member States agreements with third countries and in trade and investment treaties concluded between third countries. This would further increase the efficiency, consistency and legitimacy of the international investment dispute resolution system.

## 5. Background and context

The draft text on Investment Protection and the Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) reflects the substance and translates into legal text the ideas presented in the European Commission's Concept paper '*Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*', published on the 5 May 2015 and available [here](#).

It also links in with views expressed by stakeholders in the public consultation on investment in TTIP, organised by the European Commission between 27 March and 13 July 2014. A report on the outcomes of the consultation, released on 13 January 2015, is available [here](#).

The text is guided by the positions expressed by the Council and the European Parliament, notably:

- the *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America* adopted by the Council on the 17 June 2013, available [here](#), and
- the *Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership*, available [here](#).

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