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)	Asociatia pentru Tehnologie si Internet (ApTI)
1.1.3. Contact person - not for publication -open reply-(compulsory)	Matei-Eugen Vasile
1.1.4. Contact details (address, telephone number, email) - not for publication: -open reply-(compulsory)	
Bucharest, Romania 0729130975 matei.vasile@apti.ro	
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)	Romania
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)	
Digital rights advocacy	
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)

The proposed text allows for a broad interpretation of the word investment and investments, therefore there are considerable risks for this approach to lead to forum shopping. The proposed measures do not seem to sufficiently address the problem of shell companies since multinationals can easily afford to establish substantial business activities in other countries. Such companies have enough resources to branch out and to fulfill this requirement. Much more alarming is the fact that the ISDS imposes obligations on states, but not on foreign investors. The ISDS should be further developed in order to include responsibilities for the foreign investors and it should not give them more leveraging power than local investors. Foreign investors should not be awarded the power to negotiate different protection measures and legal provisions. This is the task invested in governments and courts and foreign investors should not be given the power to intervene on such a scale. Investors should not be using ISDS as a pressure instruments in order to force governments to make laws which serve their interests.

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 MFN loophole is closed only for procedural provisions, not for substantive provisions. This can lead to cherry picking protection from any other investment agreement the EU or EU Member State signed or will be signing.

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)

There is still uncertainty regarding the introduced list of rights since there is no explicit exhaustive reference. A fixed and limited list of investors' rights should be included in the text in order for the clause not to be used as a "stabilization clause". As proposed by the Commission, the fair and equitable standard still leaves room for considerable interpretation by the arbitrators and the provision on unpredictable legitimate expectations should be disregarded. This standard is a broader scope than customary international law and such broad clauses should not be encouraged.

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)

The approach given to the expropriation provision is a very broad one and it allows investors to challenge the governments' actions based on any assumption of diminished profits. At the same time it is not acceptable for international arbitrators to decide on what is

legitimate public welfare. It has to be noted that the proposed provision offers investors a more favorable position than citizens. As article 1 of Protocol 1 to the European Convention on Human Rights states, citizens do not have absolute fundamental rights. They are under governmental scrutiny since every natural and legal person is entitled to the peaceful enjoyment of his possessions as long as it shall not in any way impair the right of a state to enforce such laws as it deems necessary. It is not appropriate under the ISDS to allow arbitrators to decide upon what is general interest and public welfare. Investors can take advantage of the indirect expropriation provision and challenge the governments decision when their profits are lower than expected. This provision is in clear contradiction to question 5 which aims at ensuring the right to regulate of the state. As highlighted, the investors are given greater protection than individuals since there is absolutely no limit, insurance and predictability of the arbitrators decisions.

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)

This approach fails to take into consideration that international arbitration cases are expensive and very complex in nature. It is a known fact that governments, in particular those of developing countries, cannot afford to allocate the proper resources necessary for such a trial. It also has to be underlined that such resources are allocated from public budget, therefore, there such funds should only be used in defending the citizens' interests and not defending state policies and decisions against companies which have a different agenda. Moreover, the states right to regulate would be affected because of the imbalance between them and big multinational companies. Such companies may easily decide to start such a cumbersome trial even without substantial prejudice having occurred. They can use these types of complaints in order to put pressure on the decision makers to legislate in their interests instead of the citizens. Specific measures need to be put in place in order to avoid situations where companies are abusing their position. At the same time, the right to regulate is mentioned only in the preamble. The preamble is not binding and arbitrators are not obliged to take it into account. The European Commission should include this right as mandatory and make sure it imposes effective and enforceable obligations for the party in breach of this right. Additionally, the proposal does not include proper safeguards in order to ensure the protection of human rights. Investment and trade rules need to take into account fundamental rights and provide proper and efficient protection. Privacy cannot only be mentioned as an exception to such rules, it needs to be adequately addressed since economic and industry interests cannot override the protection and guarantee of fundamental human rights. Therefore, the European Commission should be firm in respecting its policies and strong rules guaranteeing the rights of the individual irrespective of business interest.

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)

More focus should be put on transparency rules since all the documents, complaint files, decisions should be publicly available. Arbitrators should not be given the possibility to restrict access from such documents under any exceptions. Any interested party should be granted the right to access any document and there should be mechanisms which imply penalties and effective sanctions if such right is being violated.

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 repy to this question, please type "No comment".

-open reply-(compulsory)

The issue with ISDS tribunals is not about how they can be implemented but about whether they should be implemented in the first place. Trying to create some kind of balance between ISDS tribunals and national courts has little chance of success because the incentives for the investors to use the national courts can not outweigh the benefits offered to them by using ISDS tribunals. First, the bias of national courts is being used as justification for the need for ISDS tribunals. Nevertheless, ISDS tribunals are not independent either. It's just that they are biased towards a different constituency. It can be claimed, just as easily, that national courts are independent while ISDS tribunals are not because national courts are designed to be impartial (the principle of separation of powers), they take into account the rights of others that may be affected by the outcome of a case and they have institutional safeguards for independence, such as tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators, while ISDS tribunals do not. Secondly, ISDS arbitrators can review (and overturn) any and all national court decisions, including those of supreme courts and human rights courts. On top of that, the decisions of ISDS arbitrators are final, without any way of recourse. Under the proposed Appellate Mechanism, there would be a way to appeal the ruling of an ISDS tribunal, however, the Appellate Mechanism is not certain to be adopted, even if it adopted, the ISDS arbitrators deciding on an appeal are going to be doing it based on the same rules as the initial ISDS tribunal. On top of this, there is no limit to the damages that ISDS arbitrators can award. When taking into account that just foreign investors can use ISDS, but domestic investors can not, it becomes clear the vast amounts of powers the foreign investors gain through ISDS. Thus, it becomes clear that ISDS is going to be biased towards the foreign investors, so an ISDS tribunal can not, in good conscience, be considered impartial. Finally, under existing treaties (i.e. CETA), an investor can go to an ISDS tribunal after going to a national court (Article x-21 1(f)) but can not go to a national court after going to an ISDS tribunal (Article x-21 1(g)). Moreover, it is stated that “investors cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts” under the “fork in the road” clause. There is nothing said about investors first going to a national court and then going to an ISDS tribunal, just about not going to both national courts and ISDS tribunal at the same time. So, it would appear that the “fork in the road” clause does almost nothing to prevent the type of behavior on the part of the investors that it is claimed to be trying to prevent. Even if the “fork in the road” clause would work and the investors would be prohibited from going to an ISDS tribunal after going to a national court, it would not be much of an improvement because, instead of first going through the national courts, investors would have all the incentives to go straight to ISDS tribunals from the start, without even bothering with national courts.

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)

There are two main issues when it comes to arbitrator ethics and conduct. The first is the code of conduct they are expected to follow and the second is the lack of institutional safeguards. The problem with the code of conduct is that there is no such thing in the reference text. The approach of using a code of conduct to guarantee the independence of the arbitrators depends to a high degree to the quality of said code of conduct. Without having the code of conduct stipulated in the text of the agreement, the whole approach is toothless. The Commission states that the EU will negotiate with the US the code of conduct, outside of the TTIP/ISDS negotiation proper. This is a recipe for, in the best case scenario, agreeing on a weak code of conduct, and in the worst case scenario, never agreeing on any code of conduct whatsoever. On top of this, the reference text states that there is going to be a two years delay allowed between the treaty coming into force and the code of conduct coming into force. Even if, hypothetically, a good code of conduct could be agreed upon, has anybody considered what may happen during these two years of ISDS tribunals employing arbitrators without any kind of ethical constraints? The problem of institutional safeguards is complementary to the problem of the code of conduct. Given that the code of conduct is not included in the text of the treaty, there are no guarantees that it would be enough to ensure arbitrator independence and impartiality. For example, conflicts of interest are not mentioned anywhere, supposedly because the code of conduct will handle this issue. Lacking any kind of certainty about the code of conduct, institutional safeguards, on top of the code of conduct, are direly needed. As it stands now, arbitrators are not neutral because each party chooses one arbitrator and the third one is appointed by the Secretary General of ICSID if the parties do not agree. The Secretary-General of ICSID also decides on conflicts of interest. The ICSID

Secretary-General is appointed by the President of the World Bank who is him-self appointed by the President of the United States. Under ICSID rules the President of the World Bank appoints all three the arbitrators in appeal cases. Under these circumstances, ISDS gives the US an unfair advantage.

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 reference text does not provide a definition of what a frivolous case is, thus creating legal uncertainty. Also, when taking into consideration the broad protections afforded to the investors, it may be the case that frivolous claims would not be considered frivolous. Finally, the arbitrators have a financial incentive not to dismiss cases, so there is a danger that frivolous cases will not be dismissed because of this.

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 filter mechanism is focused exclusively on financial matters. It should not be limited just to financial matters because there are many other issues in which the investors' interest conflicts with that of the public (such as in the case of various types of intellectual property legislation like copyright legislation and patent legislation).

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)

First, the experience of NAFTA (North American Free Trade Agreement) is a testament of how the guidance of the interpretation of the agreement, which should have been binding for the tribunals, has hardly ever been used. Moreover, each party will be dependent on the cooperation of the other party, which, given that the other party is involved in the dispute directly, is a very big assumption to make. Finally, and most importantly, the executive branch will be in charge of the interpretation, not the legislative branch, which is a serious infringement on the separation of powers.

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)

As mentioned previously, in the answer to question 8, in appeal cases, the ICSID rules state that the President of the World Bank appoints all three the arbitrators in appeal cases. The President of the World Bank is not an impartial actor because it is appointed by the President of the United States. Even if this were not the case, the problem with the appellate mechanism is that the arbitrators would decide based on the same rules used by the ISDS tribunal that gave the initial ruling.

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)

We conclude that the proposed system does not provide added value. Quite the opposite, it leads to considerable negative impact on individuals and affects societal welfare. We do not support the adoption and implementation of the ISDS system and we believe that any such system - lacking substantial protection provisions - jeopardizes the protection and guarantee of human rights and should be disregarded. Such international arbitration models create back door mechanisms against the protection of human rights and citizens' interests. The decision to implement such a mechanism would be in clear contradiction with the EU's self-declared leadership to protect European citizens and to be the guardian of fundamental rights.