



**BETTER FINANCE
FOR ALL**

The European Federation of Financial Services Users
Fédération Européenne des Usagers des Services Financiers



Better Finance response to the EC DG TRADE's public consultation on modalities for investment protection and ISDS in TTIP

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Executive Summary

BETTER FINANCE responded to questions 6 to 13 of the public consultation on modalities for investment protection and ISDS in TTIP launched in March 2014 by the European Commission DG Trade.

BETTER FINANCE is in favour of an adequate redress system in case of abuse of local and foreign investors under the TTIP. To this end BETTER FINANCE favours local courts, or in specific cases state-to-state dispute settlement systems, over an Investor-to-State dispute settlement (ISDS).

BETTER FINANCE believes that transparency remains an issue in ISDS. Rules on Conflicts of Interest and rules on the admissibility of cases as well as an appeal system should be included, always keeping in mind public interest and putting consumer protection first.

Whereas the EC proposal represents an improvement on current ISDS mechanisms in place, further improvements are necessary in order to address, for instance, the advantage of foreign investors over domestic ones and the cost and complexity barriers limiting access for small investors.

Investor-to-State dispute settlement (ISDS)

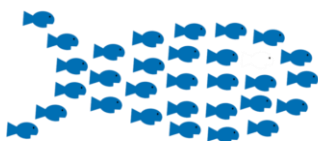
Question 6

BETTER FINANCE underlines the need for an adequate redress system in case the rights of local and foreign investors under TTIP are abused. BETTER FINANCE is of the opinion that in principle local court systems in most countries offer such adequate redress. An alternative dispute settlement system would need to be considered only in case:

- a. local judicial systems do not comply with basic procedural rules of law; or
- b. access to such local judicial system is denied to investors;

However, such an alternative dispute settlement system cannot replace existing and functioning national possibilities for relief. It should only be of an exceptional and alternative nature.

For BETTER FINANCE, ISDS would not be the first option for such an alternative settlement system. BETTER FINANCE could imagine that a state-to-state dispute settlement system could straighten out any (legal) barriers to investors via specific provisions that allow investors whose rights under TTIP are abused to request their home state to initiate a claim towards another state in order to settle the investment barrier.



Only in the case that such a state-to-state settlement doesn't lead to adequate redress, could BETTER FINANCE agree to ISDS, albeit in a significantly 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 still 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 regarding claimants, attorneys and arbitrators, must be made public. BETTER FINANCE refers to the recently released Uncitral rules on transparency in treaty-based investor-to-state arbitration which includes the requirement for hearings to 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

BETTER FINANCE underwrites the statement that the EU favours domestic courts. BETTER FINANCE sets out in its answer to question 6 that it considers ISDS only as a second alternative and of a complementary nature. Investors should never be allowed to engage in forum shopping 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, is not workable, and may an amended ISDS system be applicable. State-to-state dispute settlement and ISDS should include mechanisms that control forum shopping and deny this possibility to any party. In case a local court would be found to have jurisdiction, claims must be declared non-admissible and referred to the respective local court.

Question 8

As far as ISDS is concerned, BETTER FINANCE agrees with the EU's intention to establish further rules regarding arbitrator ethics, conduct and qualifications. When establishing these rules, BETTER FINANCE suggests for the EU to take a closer look at 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 BETTER FINANCE 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 a conflict of interest.

Question 9

BETTER FINANCE agrees to arrangements preventing the risk of frivolous and unfounded cases taking up time and money of the parties concerned 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

In case of significant public interest (such as maintaining the stability and integrity of the financial system or protecting consumers) ISDS should provide adequate mechanisms where individual state(s) together with local and/or EU supervisors can postpone the trial or dismiss the case. BETTER FINANCE realizes that denying investors access to redress is a last resort only to be used in extraordinary circumstances. ISDS should provide strict conditions in order to protect the interests of both investors and individual states.

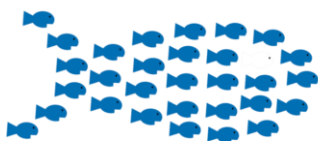
BETTER FINANCE is aware that the problem is that investors can challenge whatever they like. However, BETTER FINANCE believes that the public interest should never be challenged or undermined, so there should be a rule specifying that it is the way that states pursue the public policy objective that may be challenged, but not the objectives themselves.

Question 11

In order to protect the consistent interpretation of TTIP, BETTER FINANCE agrees to the introduction of an intervention possibility for non-disputing parties for interpreting the relevant provisions. This supports and results in consistent case law.

BETTER FINANCE 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 matters relating to the legal merits of a case. Please note that by allowing the intervention possibility for non-disputing parties (including EU and US); these parties are given the option to 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

BETTER FINANCE 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 hearing 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

Question 13

BETTER FINANCE 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 in favour of national investor ones and that equal treatment should be granted to national and foreign investors. This being said, BETTER FINANCE acknowledges 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. whereas 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 favour local companies or the applicable rule at national level may discriminate in favour 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 from challenging public interest policies are not sufficient and the proposed definition of investment must be specified in more 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.

