



EUROPEAN COMMISSION

*Brussels, 20.03.2015*

*C(2015) 1665 final*

*Mr Volker BOUFFIER  
President of the Bundesrat  
Leipziger Straße 3 - 4  
D – 10117 BERLIN*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinion concerning the public consultation on the modalities of an investment protection agreement with investor-state arbitration in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.*

*With this public consultation the Commission offered to the largest extent possible transparency, not only for all stakeholders involved, but also for all potentially interested citizens and gave ample opportunity to comment on the EU's proposed approach on investment in the context of the EU-US TTIP negotiations. The online consultation was launched on 27 March 2014 and closed on 13 July 2014. It received a total of nearly 150 000 replies. The report presenting the received contributions was published on 13 January 2015 and is available on the European Commission's website<sup>1</sup>. The Commission has since started consultations on the results with the Member States, the European Parliament and all interested EU stakeholders.*

*The Commission appreciates that the Bundesrat welcomed the public consultation initiative. Transparency has, and will remain, a stable component in this TTIP negotiation.*

*The Commission would also like to reassure the Bundesrat that its continued aim is to achieve a fair balance between protecting foreign investors' rights and the right to regulate of both Parties at all levels. This is reflected in the proposed approach on investment in TTIP as set out in the public consultation with reference to the explanations and text examples provided. The proposed approach already ensures to a great extent the rights of governments and legislative authorities to regulate in the public interest – and certainly more than in any other existing investment agreement, including in the bilateral investment treaties of EU*

---

<sup>1</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf)

*Member States with one another (intra-EU BITs) and with third countries, as the Bundesrat rightly pointed out.*

*The Commission has taken good note of the fact that the Bundesrat considers some provisions of the investment chapters as redundant or linked with high risks. The Commission takes these concerns very seriously as it also takes very seriously the concerns our investors have when doing business in third countries.*

*The Bundesrat has also requested the Commission to justify the need for investor-state dispute settlement (ISDS) in the context of the TTIP negotiations against the background of existing domestic remedies which are available to investors in the EU and in the United States. The negotiating directives unanimously adopted by the Council state that the TTIP should include provisions on investment protection and ISDS, provided that certain conditions are met. While it is the Commission's view that domestic remedies should indeed be the first and normal institutions to which investors should and will turn when they are affected by governmental measures, domestic courts are bound to apply national law, as international agreements are not necessarily directly enforceable. ISDS is a mechanism to enforce certain commitments foreseen in international agreements. How such a mechanism should interact with available domestic remedies in the context of TTIP was subject to the Commission's public consultation and has been identified as one area where further improvements should be explored. It should be recalled that the proposed EU approach to investment protection and ISDS was also developed in light of the experience of arbitration under the many existing agreements, which has sometimes been controversial. The EU, in exercising a competence provided for by the Lisbon Treaty, has the opportunity to set up a reformed EU wide regime which will replace and phase out the existing bilateral investment treaties of EU Member States.*

*The Bundesrat rightly pointed out that existing ISDS rules, such as those available under the 131 German bilateral investment treaties, do not provide for transparency of ISDS proceedings. The Commission fully agrees with the Bundesrat that ISDS proceedings, which very often involve issues of public interest, cannot be conducted behind closed doors. This is why the Commission has pushed for and played a leading role in the negotiation and adoption of the new UNCITRAL rules on transparency for ISDS during the last years. The Commission has also negotiated, on behalf of the EU, a UN Convention on the application of the UNCITRAL transparency rules to existing investment treaties. This Convention will be open for signature in March 2015 and all EU Member States can adhere to this Convention in order to apply the UNCITRAL transparency rules to their existing investment treaties. The Commission therefore hopes to have the support of the Bundesrat for the promotion of this Convention in Germany.*

*As regards investment agreements which are negotiated by the EU, the Commission has been urging for full transparency of ISDS proceedings since its Communication on the EU's*

*investment policy of 7 July 2010.<sup>2</sup> In all EU investment negotiations launched so far, the Commission's position has been that the UNCITRAL transparency rules must be incorporated as a minimum benchmark. In its negotiations with Canada and Singapore, the Commission has been able to secure a negotiation result which goes beyond the UNCITRAL standards in several respects. The Commission would like to reassure the Bundesrat that it will adopt the same line in all future EU investment negotiations.*

*The Bundesrat also rightly pointed out that the independence, qualifications and ethics of ISDS arbitrators is not sufficiently guaranteed in ISDS proceedings which are conducted under existing investment agreements. One of the most important aspects of the EU's proposed approach on investment policy is to clearly address those issues within the text of ISDS provisions. For example, in the negotiations with Singapore, a stringent and binding code of conduct for arbitrators has been agreed upon and forms an integral part of the agreement. The EU-Canada agreement also requires the highest ethical standards of conduct from arbitrators. Unlike under many existing investment agreements where the co-arbitrators decide on conflict issues of their colleagues, decisions on the conduct of arbitrators will be decided by an independent authority and arbitrators which are found to disrespect the code will be removed from the tribunals. In addition, all EU investment agreements propose to establish, through the Contracting Parties, standing lists of arbitrators from which arbitrators can be chosen. This should ensure that only persons with high professional qualifications and moral qualities will serve as arbitrators under EU agreements. The Commission would also draw to the attention of the Bundesrat that in the TTIP consultation documents the Commission suggested that the establishment of an appellate body should be explored further.*

*The Commission is fully committed to ensuring a fair balance between rights of investors and governments' right to regulate at all levels. The text proposals provided as a reference text for the public consultation are the most advanced in this respect in modern investment law. The outcome of current consultations with various stakeholders will also allow the Commission to draw a conclusion on whether a most favoured nation treatment clause should be included in the TTIP, and if so, what type of clause the EU would deem necessary.*

*Following the results of the public consultation, all the above issues will be the subject of further work by the Commission. Indeed the consultation report identifies four areas where additional improvements should be explored and where the Commission will engage in further discussions with the Member States, the European Parliament and all interested EU stakeholders. These areas include the protection of the right to regulate, the establishment and functioning of arbitral tribunals, the relationship between domestic judicial systems and ISDS and the review of the ISDS decisions through an appellate mechanism.*

---

<sup>2</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Towards a Comprehensive European Investment Policy", 7 July 2010, p. 10.

*The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.*

*Yours faithfully,*

*Frans Timmermans  
First Vice-President*

*Cecilia Malmström  
Member of the Commission*