



Negotiations on a Deep and Comprehensive Free Trade Agreement (DCFTA) between the European Union and Tunisia

The European Union's proposal for an Investment Protection Agreement

EXPLANATORY NOTE

January 2019

This document aims at presenting the main features of the proposal of the European Union (EU) for an Investment Protection Agreement (IPA). This text was present presented to Tunisian experts in December 2018 and is now available on the website of the European Commission.

The IPA, which is negotiated as part for the broader DCFTA negotiations, will replace the existing investment protection agreements between Tunisia and individual EU Member States. Just as the DCFTA, the IPA will be a treaty amending the Association Agreement that is currently in force between the EU and Tunisia.

Investment protection

The provisions proposed by the EU on investment protection reflect the EU's new approach, the main elements of which were designed in the context of the negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

The chapter on investment protection affirms the right of the Parties to regulate to meet legitimate public policy objectives and includes an indicative, non-exhaustive list of these objectives: public health, protection of the environment, consumer protection or cultural diversity (Article 2.2 – Investment and regulatory measures).

In addition, the same article clearly establishes that investment protection rules cannot be interpreted as a commitment of a Party not to amend its legislation

(non-stabilisation clause – Article 2.2.1).

The other articles contain the fundamental guarantees given to investors and to their investments: fair and equitable treatment; protection of physical security; compensation in case of expropriation; compensation in case of losses linked to an armed conflict or civil strife; free transfer of funds; respect of contractual obligations.

To avoid any abuse, these provisions are drafted in a clear and precise manner. In particular, the obligation to grant fair and equitable treatment is defined by an exhaustive list of fundamental rights, such as access to justice (Article 2.6 – Treatment of investors and covered investments). Provisions on expropriations are accompanied by an annex that gives detailed indications on the concept of indirect expropriation, notably in the light of the right of the Parties to regulate (Article 2.8 and Annex 1).

Finally, the provisions on transfers (Article 2.9) will be subject to safeguards, notably in case of macro-economic difficulties, that are listed in

Article 4.5 (Temporary safeguard measures and application of laws and regulations related to capital movements, payments and transfers), as well as exceptions, in

particular prudential measures (Article 4.4).

Resolution of investment disputes and the Investment Court System

The European Union's text proposal on the resolution of investment disputes also reflects the new approach of the EU on the matter.

Under the proposed system, investment disputes are heard by a Tribunal of First Instance (Article 3.9) with the possibility of appeal, in certain cases (Article 3.29), before an Appeal Tribunal. (Article 3.10).

Members of the Investment Court System will be appointed in advance by the EU and Tunisia (Article 3.9 and 3.10). According to the EU's proposal, in order to ensure full impartiality and an appropriate level of expertise to hear disputes, judges must meet strict ethical and qualification requirements (Article 3.11). In order to preserve the integrity and impartiality of the dispute settlement mechanism, a comprehensive code of conduct is proposed for members of the tribunals.

In addition to this innovative institutional structure, the EU is proposing clear procedural rules. These include the absolute transparency of procedures (Article

3.18), the prohibition of parallel proceedings (Article 3.14), early dismissal of unfounded claims (Article 3.16 and Article 3.17) and the "loser pays principle" (Article 3.28).

The text proposed by the EU specifies that in ruling on a dispute, the tribunals must limit themselves to the sole application of the agreement between the parties, in accordance with the principles of international law (Article 3.13).

The proposal also provides for the possibility for Contracting Parties to the Agreement to adopt binding interpretations of how the provisions of the Agreement should be interpreted by the Tribunal (Article 3.13).