

## **WHY ARBITRATORS NOT JUDGES?**

### **Comments on the European Commission’s approach to investor-state arbitration in TTIP and CETA**

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I respond to the European Commission’s invitation for comment on its approach to investment protection and investor-state arbitration in the proposed EU-United States Transatlantic Trade and Investment Partnership (TTIP). I am a Canadian academic specializing in international investment law and am grateful for the opportunity to comment. Further information on the consultation is available here: [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

The consultation does not ask the essential question: why is investor-state arbitration necessary in TTIP or CETA? To answer this question rigorously would require a careful framing of the question and comprehensive assessment of economic, political, and legal aspects of the use and impact of investor-state arbitration. For example, the consultation would need to examine:

- the costs and benefits of investor-state arbitration in broad terms;
- the implications of investor-state arbitration for principles such as democratic choice, regulatory flexibility, and market efficiency;
- the compatibility of investor-state arbitration with values of judicial decision-making including, for example, values of judicial independence, openness, and procedural fairness; and
- the relative utility and role of alternative means – such as domestic and European courts, state-to-state adjudication, and market mechanisms including investment contracts and risk insurance – to protect foreign investors; and

The consultation is not framed to address any of these issues. As a result, it is not designed to obtain a wide range of available evidence and information that would cast doubt on or outright contradict common claims of proponents of investor-state arbitration that:

- treaty-based investor-state arbitration encourages foreign investment, contributes to market freedom, or encourages “good governance”;
- states were well-informed when they entered into large numbers of investment treaties in the past;
- foreign investors are at a political disadvantage relative to domestic investors and other actors;
- domestic courts in any given country mistreat or discriminate against foreign investors;
- arbitrators have applied investment treaties in a balanced way; and
- investor-state arbitration is a neutral and independent process of adjudication.

These claims are all open to significant doubt based on evidence and argument that will not be heard because the Commission has not posed the essential question. Indeed, I am aware of colleagues who have extensive relevant evidence but who have opted not to participate in the consultation because the essential question was not asked.

In turn, without a strong case – based on careful evaluation of evidence and fulsome exchange of views – for granting special rights and privileges to foreign investors relative to all other actors, investor-state arbitration should not be included in the TTIP. Giving a special status to any actor in law or access to public funds, especially the largest (especially U.S.-based) companies in the world,<sup>1</sup> calls for a clear justification based on positive evidence that doing so will deliver a public benefit to outweigh the disadvantages to other actors and costs to the public. Otherwise, the Commission would be proceeding with a major expansion of investor-state arbitration – extending its coverage of international FDI flows by about 300% of its current coverage based on existing treaties – without a careful review of the significant risks to public funds and regulatory capacity; to the principle of a level playing field for European and extra-European companies; and to established structures of public accountability, regulatory flexibility, and judicial independence.

The remainder of this submission is narrowly focused due to the limited parameters of the consultation text. Many of the issues discussed arise from relatively minor concerns about textual clarification and from the Commission's limited proposals to reform investor-state arbitration. In the comment, I have used in-text citations that are easily followed up by an online search; further references for any statement in this comment are available on request.

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<sup>1</sup> Approximately 54% of the total compensation awarded (about \$5.1 billion) in the 38 known investment treaty awards of over \$10 million up to June 2, 2014 was awarded to U.S. companies. 97% of this compensation was awarded to U.S. companies with more than \$1 billion in annual revenue. The U.S. share of total compensation in these cases rises to about 59% after accounting for apparent forum-shopping.

General response to the Commission’s Introduction

In its Introduction, the Commission puts far too much faith in its ability, through textual clarifications, to reign in arbitrators and their expansive tendencies. Investor-state arbitration is a cat-and-mouse game that favours the arbitrators – most importantly, a few dozen repeat players who have driven interpretation of the treaties – who are not subject to judicial override if they interpret a treaty incorrectly or unreasonably and who have a track record of exploiting legal ambiguity to expand their power over states, investors, public money, and so on.

On the state’s right to regulate, if the Commission intends to affirm and protect this right, it must say so clearly and unequivocally in the treaty alongside the treaty’s elaborate rights for foreign investors. It is insufficient, indeed damaging, to affirm the right to regulate only as part of an aspirational statement in a preamble or elsewhere in the treaty. Likewise, the Commission’s statement in the consultation text that it intends to affirm the right to regulate is useless legally and misleading to the public; the statement must be included in the treaty itself as a substantive right of the state which has been agreed by the states parties.

Some of the Commission’s specific statements about textual clarifications are misleading, especially with respect to foreign investors’ expansively-interpreted right to “fair and equitable treatment” and the corresponding impact of this right on the scope and reliability of the state’s ability to take legislative, regulatory, and judicial decisions free from onerous fiscal liability.

Specific response to the Commission’s Introduction

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 2:</i> “Investment protection provisions consist of a limited number of standards guaranteeing that governments will respect certain fundamental principles of treatment that a foreign investor can rely upon when making a decision to invest. <u>These fundamental principles of treatment are reflected in the rights that democratic governments grant to their own citizens and companies (such as no expropriation without compensation, access to justice, protection against coercion and harassment, non-discrimination), but they are not always guaranteed for foreigners or foreign companies.</u>”</p>	<p>If these fundamental principles are granted in democratic countries, then why is investor-state arbitration required as an add-on to domestic courts in those countries?</p> <p><u>Presumably, in many or most cases, foreign investors enjoy protection in relation to these principles in democratic countries.</u> If so, foreign investors should be required, like any other foreign national, to go to domestic courts before bringing an international claim unless they can show that the courts would not guarantee compensation for expropriation, access to justice, and so on.</p> <p>Otherwise, the assumption is that domestic courts in all affected countries systematically do not offer justice to foreign investors. This is</p>

	<p>clearly incorrect even if one assumed that investor-state arbitration itself provided fair and independent adjudication in the manner of a domestic or regional court in a democratic state.</p> <p>If there is a wider concern that domestic courts take too long or are otherwise insufficient to protect foreign investors, then the answer is to replace courts with arbitrators for everyone including domestic persons and foreigners who are not investors. The far-reaching consequences of this proposition itself reveal how radical is the use of investor-state arbitration without any duty to resort to domestic courts where they offer justice and are reasonably-available. To be clear, <u>the Commission’s proposals do not include this basic duty to resort to domestic remedies, which applies in all comparable international courts and tribunals</u> where individuals can bring an international claim against a state in its sovereign capacity.</p>
<p><i>PDF version, page 2:</i> “At the same time <u>foreign investors, just as domestic ones, must fully respect the domestic legal regime</u> of the host country.”</p>	<p>This raises an important question: <u>what if a foreign investor does not fully respect the domestic legal regime and the country’s domestic courts are inadequate to ensure that it does?</u></p> <p>One can imagine many scenarios in which domestic actors, other foreigners, or other foreign investors would suffer because of a foreign companies’ misconduct. Yet these other actors would be limited to the presumed ghetto of domestic courts with no right to opt out of the domestic legal system in favour of individual-state arbitration. <u>This reveals the one-sidedness of investor-state arbitration in favour of foreign investors.</u></p>

<p><i>PDF version, page 2: “<u>The overall purpose of international investment agreements is to ensure that the country hosting an investment treats foreign investors in accordance with these fundamental principles, while maintaining the right to take measures for the public good according to the level of ambition that they deem appropriate.</u>”</i></p>	<p>If the purpose is to ensure treatment of foreign investors in accordance with fundamental principles of justice and non-discrimination, then <u>foreign investors alone should not have special access to an adjudicative process where for-profit arbitrators instead of judges decide the investor’s entitlement to public money.</u></p> <p>If the intent really is to maintain the right of a state to take measures for the public good, according to the level of ambition that the state deems appropriate, then <u>this must be stated clearly and unequivocally in the treaty text as a substantive right of the state.</u> It is not in the Commission’s proposals based on the Canada-EU CETA. It is highly misleading for the Commission to declare this intention in a consultation document but not include it as a substantive right of states in the treaty.</p>
<p><i>PDF version, page 2: “<u>The specific EU objective in our trade and investment agreements, or in the investment protection section of the TTIP, is to strengthen the balance between investment protection and the right to regulate, through clarifying and improving the substantive investment protection provisions while at the same time preserving the right of States to take measures for legitimate public policy objectives.</u>”</i></p>	<p>Again, if this is the intent, it must be stated clearly and unequivocally in the treaty. That is, a clear and unequivocal statement of the right to regulate must be included in the text – not only as an aspirational statement in a preamble or elsewhere – alongside the many elaborate rights for foreign investors.</p> <p>For examples of a clear statement of the right to regulate, see Article 12 of the Havana Charter of 1948 and the second paragraph of Article 1 of Protocol 1 of the European Convention on Human Rights.</p>
<p><i>PDF version, page 2: “More precisely, <u>the EU is introducing modern and innovative provisions clarifying the meaning of those investment protection standards that have raised concerns</u> in the past, notably: fair and equitable treatment (which in the EU’s approach will be limited to a closed list of basic rights for investors) and indirect expropriation (which in the EU’s approach will</i></p>	<p>The Commissions’ clarification in the Canada-EU CETA of some aspects of the substantive standards, primarily indirect expropriation, is an improvement.</p> <p>On the other hand, <u>the Commission’s clarification on fair and equitable treatment codifies a major expansion of this term</u> compared to its widely-accepted customary</p>

<p>ensure that measures taken for legitimate public policy objectives cannot be considered to be an indirect expropriation). <u>Under the EU's approach, the right to regulate is confirmed</u> as a basic underlying principle. The EU also wants to ensure that all necessary exceptions and safeguards are in place, <u>thus retaining essential public policy space</u> for example to deal with a financial crisis.”</p>	<p>meaning before the investor-state arbitrators came on the scene about 15 years ago. In particular, the Commission’s approach expands significantly the meaning of fair and equitable treatment as accepted by Canada, the U.S. and Mexico in the NAFTA context. Thus, the Commission endorses the arbitrators’ power grab on fair and equitable treatment and, in turn, heightens the risk to the right to regulate.</p> <p><u>In this and other ways, the Commission’s approach has undermined, not affirmed, the right to regulate.</u> If the EU wishes to retain policy space for the state, it needs to include a statement of the right to regulate that applies to all standards of investor protection in the treaty and that is not limited to any particular area of decision-making such as financial regulation. <u>The text is far from this basic balancing of the state’s right to regulate and foreign investors’ rights and protections.</u> This makes it more not less likely that arbitrators will continue to erode the right to regulate in their application of the treaty.</p>
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General response to Question 1: Scope of the substantive investment protection provisions

*Question: [W]hat is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?*

The Commission’s approach to the substantive investment provisions is inadequate and in some respects damaging. The Commission alludes to the serious problem of past abuse of investor-state arbitration including by arbitrators themselves. Yet the Commission offers only limited and incomplete fixes based on unsubstantiated (and sometimes erroneous) claims about past arbitrator decision-making.

My coding of awards – with the support of law students acting as research assistants – indicates a strong tendency of the arbitrators to prefer expansive (pro-claimant) approaches even in the face of relatively clear treaty language favouring restraint.<sup>2</sup> The Commission’s proposed clarifications are a weak response to that record. It is as if the purpose of the Commission is to pretend to reform arbitrator power in order, at all costs, to preserve it.

Specific response to Question 1: Scope of the substantive investment protection provisions

Statements in the consultation text	Comments
<p><i>PDF version, page 3: “At the same time, most bilateral investment agreements refer to “investments made in accordance with applicable law”. <u>This reference has worked well</u> and has allowed ISDS tribunals to refuse to grant investment protection to investors who have not respected the law of the host state when making the investment (for example, by structuring the investment in such a way as to circumvent clear prohibitions in the law of the host state, or by procuring an investment fraudulently or through bribery).”</i></p>	<p><u>The Commission does not refer to any treaties or arbitration decisions to substantiate its claim.</u></p> <p>My own systematic research appears not to support the Commission’s claim. With three research assistants, I reviewed publicly-available awards in 140 known cases to May-June 2010 to identify how a tribunal appeared to allocate the onus on the issue of whether an investment was permissible due to alleged non-compliance with domestic law or corruption. <u>We found nine cases in which the issue was decided one way or the other, only three of which appear to support the Commission’s claim</u> that the language noted here “has worked</p>

<sup>2</sup> See G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: OUP, 2013) gb; G. Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) 50 OHLJ 211.

	<p>well” to avoid circumvention of domestic law or counteract fraud or bribery.<sup>3</sup> <u>The remaining six cases appear to contradict the Commission’s claim.</u><sup>4</sup></p> <p><u>If the Commission wished to ensure that investments circumventing domestic law or depending on fraud or bribery are not protected, it should say so clearly and unequivocally in the treaty.</u> The Canada-EU CETA, as presented by the Commission, does not include such statements. If they could not be negotiated with Canada, what likelihood is there that the Commission will negotiate them with the United States?</p>
<p><i>PDF version, page 3:</i> “The EU <u>wants to avoid abuse</u> [i.e. investor claims based on mailbox or shell companies]. This is achieved primarily by improving the definition of “investor”, thus eliminating so –called “shell” or “mailbox” companies owned by nationals of third countries from the scope: in order to qualify as a legitimate investor of a Party, a juridical person must have substantial business activities in the territory of that Party.”</p>	<p>I commend the Commission for recognizing that some investment treaty claims, including under European investment treaties, have been abusive due to the use of shell companies to manipulate investor nationality. Many arbitrators have allowed this abuse with significant implications for public budgets and the reliability of the right to regulate.</p>
<p><i>PDF version, page 3:</i> “At the same time, <u>the EU wants to rely on past treaty practice with a proven track record.</u> The reference to “investments made in accordance with the applicable law” is one such example. Another is the clarification that protection is only granted in situations where investors have already committed substantial resources in the host state - and not when they are simply at the</p>	<p>Again, <u>the Commission does not include references to substantiate its claim</u> about past treaty practice. The results of our systematic coding of awards, mentioned above, appear to contradict the claim.</p> <p>Limiting the scope of investment protection to investors who own assets, rather than those merely planning to do so, is useful. Yet, if the</p>

<sup>3</sup> *Yaung Chi Oo v Myanmar* (31 March 2003, para 27 and 53-63); *Fraport v Philippines* (16 August 2007, para 315, 319, 327, 333, 343-8, 350-6, 394-6, 402, and 404); *Plama v Bulgaria* (27 August 2008, para 112-39).

<sup>4</sup> *Olguín v Paraguay* (8 August 2000, para 28); *Swembalt v Latvia* (23 October 2010, para 32-5); *Aguas del Tunari v Bolivia* (21 October 2005, para 188-92 and 204); *Desert Line Projects v Yemen* (6 February 2008, para 99, 102, 105-6, 109, and 116); *Rumeli v Kazakhstan* (29 July 2008, para 318-29); and *Siemens v Argentina* (where Argentina was reportedly not permitted to introduce evidence and argument on the issue of alleged corrupt activities by the claimant).

stage where they are planning to do so.”	goal was to check abuse of shell companies to manipulate investor nationality, this can and would need to be addressed directly and comprehensively, as discussed below.
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General response to Question 2: Non-discriminatory treatment for investors

*Question: [W]hat is your opinion of the EU approach to non –discrimination in relation to the TTIP? Please explain.*

The Commission’s approach to non-discrimination provisions is flawed. It undermines the goal of a level market playing field and the state’s right to regulate.

On national treatment, the Commission reaffirms the practice of discriminating inappropriately in favour of foreign investors at the expense of domestic investors.

On MFN treatment, the Commission appears unaware of or unconcerned by the threat posed by past expansive interpretations of MFN treatment. In particular, the Canada-EU CETA text does not reflect the Commission’s stated intent to block arbitrators from using the MFN standard to import substantive standards from other treaties. This creates significant uncertainty for states and investors and jeopardizes all of the Commission’s textual clarifications of fair and equitable treatment and indirect expropriation. It provides abundant opportunity for creating lawyering and adventurous interpretation. It raises questions about the Commission’s understanding of MFN treatment and its interaction with other treaty standards.

Specific response to Question 2: Non-discriminatory treatment for investors

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 4:</i> “This [non-discrimination standard] <u>ensures a level playing field</u> between foreign investors and local investors or investors from other countries.”</p>	<p>The non-discrimination standard does not ensure a level playing field between foreign and domestic (or third-state) investors. It guarantees that foreign investors receive “no less favourable treatment” than other investors, thus allowing more favourable treatment for foreign investors. <u>This establishes the principle of an un-level playing field in favour of the foreign investor.</u></p> <p>To ensure a level playing field, investment treaties would need to (a) state this intention clearly and (b) prohibit discrimination based</p>

	<p>on investor nationality. Where a treaty prohibits less favourable treatment for foreign investors, this indicates an intention to allow discrimination against domestic investors.</p>
<p><i>PDF version, page 4:</i> “The standards of national treatment and most-favoured nation (MFN) treatment are considered to be key provisions of investment agreements and therefore they have been consistently included in such agreements, although with some variation in substance.”</p>	<p><u>The language of both national treatment and MFN treatment needs to be overhauled so as not to favour foreign over domestic investors.</u> For example, MFN treatment has been used by arbitrators to transplant dispute resolution and substantive provisions from other treaties. This needs to be controlled in clear and unequivocal terms, as discussed below.</p>
<p><i>PDF version, page 4:</i> “The situation is different with regard to the right of establishment, where the Parties may choose whether or not to open certain markets or sectors, as they see fit.”</p>	<p>It is positive that the Commission has committed to accept this flexibility in relation to pre-establishment national treatment (so-called right of establishment). It is an open question whether the U.S. would agree to this position given its past insistence on pre-establishment national treatment, subject to investor-state arbitration.</p>
<p><i>PDF version, page 4:</i> “Regarding MFN, most investment agreements do not clarify whether foreign investors are entitled to take advantage of procedural or substantive provisions contained in other past or future agreements concluded by the host country. Thus, <u>investors may be able to claim that they are entitled to benefit from any provision of another agreement that they consider to be more favourable, which may even permit the application of an entirely new standard of protection that was not found in the original agreement. In practice, this is commonly referred to as ‘importation of standards’.</u>”</p> <p><i>PDF version, page 4:</i> “On the “importation of standards” issue, <u>the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements.</u>“</p>	<p>If this is the Commission’s intent, it has failed to achieve its goal in the Canada-EU CETA. The CETA text precludes the importation of procedural <u>but not substantive</u> provisions from other agreements. As a result, any steps by the Commission to clarify the scope and content of investment protection to preserve the right to regulate have been undermined by the treaty’s approach to MFN treatment.</p> <p>Even if the treaty precluded the importation of new standards from other treaties, this would not address the arbitrators’ use of MFN treatment to import more favourable descriptions of a standard from one treaty into another treaty that contains the same substantive provision. <u>This approach to MFN jeopardizes the “modernizing” language promoted by the Commission in the consultation text,</u> given that member states</p>

	<p>have other treaties with language that is more open to abuse.</p> <p>In light of past adventurous interpretations, <u>the MFN treatment standard should be excluded from the treaty or limited strictly to domestic regulatory treatment of foreign investors</u> rather than any treatment in another treaty.</p>
<p><i>PDF version, page 5:</i> “The EU also includes <u>exceptions</u> allowing the Parties to take measures relating to the protection of health, the environment, consumers, etc. Additional <u>carve-outs</u> would apply to the audio-visual sector and the granting of subsidies. These are typically included in EU FTAs and also apply to the non-discrimination obligations relating to investment. Such exceptions allow differences in treatment between investors and investments <u>where necessary to achieve public policy objectives.</u>”</p>	<p><u>Exceptions and carve-outs are an inherently limited way to preserve regulatory flexibility.</u> First, they establish regulatory space as an exception to the principle of investment protection rather than an equal partner. Second, they typically do not extend to all standards of investment protection in the treaty, thus allowing arbitrators other ways to find a violation and award compensation. Third, they are usually limited to a particular sector or area of decision-making, thus exposing other sectors and areas to all of the threats that the exception was meant to safeguard against.</p> <p><u>Exceptions and carve-outs are not a substitute for a clear and unequivocal statement of the state’s right to regulate</u> in the treaty.</p>

General response to Question 3: Fair and equitable treatment

*Question: [W]hat is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?*

The Commission’s approach to fair and equitable treatment (FET) is extremely unfortunate and even duplicitous. The Commission claims to have provided for a closed list in the definition of the standard. Yet it has not adopted clear (and obvious) language to remove the arbitrators’ power to decide that the FET standard is not closed. The Commission also states its intent to preclude FET from being used as a stabilization clause. Yet this is not stated in the Canada-EU CETA although it would have been easy to do.

In fact, while claiming that it wants to contain the arbitrators’ expansiveness, the Commission has expanded the scope of FET – relative to its widely-accepted customary meaning before the arbitrators arrived on the scene about 15 years ago. The Commission appears to have insisted that Canada move away from the NAFTA states’ well-established commitment to limiting FET

to its customary meaning. Perhaps most troubling, the Commission has decided to allow the same arbitrators who wildly expanded the meaning of FET to keep control via ambiguous language in the Commissions’ definition.

Specific response to Question 3: Fair and equitable treatment

Statements in the consultation text	Comments
<p><i>PDF version, page 5:</i> “The obligation to grant foreign investors fair and equitable treatment (FET) is one of the key investment protection standards. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable <u>because it is arbitrary, unfair, abusive, etc.</u>”</p>	<p>The Commission avoids the troubling history of arbitrator awards. That history reveals FET as the most dangerous standard for taxpayers and regulators in that it has been used by tribunals more often than any other standard to find a treaty violation and compensate foreign investors. <u>The vagueness of the standard has allowed the arbitrators to import a wide range of new concepts that expand the arbitrators’ power over legislatures, governments, and courts.</u><sup>5</sup></p> <p>For example, the arbitrators invented or transplanted new and broadly-framed foreign investor rights to regulatory stability (putting a high price on democratic regulatory change), to be compensated for breach of their legitimate expectations of foreign investors (as measured by arbitrators), and to “good faith” in their dealings with government (another broad concept that no doubt all of us would love to receive). <u>Which of these new concepts in the Commission’s view fall within its “etc.” in the consultation text?</u></p> <p>The Commission should acknowledge that FET has been abused by arbitrators under the treaties and take unambiguous steps to address this problem.</p>

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<sup>5</sup> See book.

<p><i>PDF version, page 5:</i> “The FET standard is present in most international investment agreements. However, in many cases the standard is not defined, and it is usually not limited or clarified. Inevitably, this has given arbitral tribunals significant room for interpretation, and the <u>interpretations adopted by arbitral tribunals have varied from very narrow to very broad</u>, leading to much controversy about the precise meaning of the standard. <u>This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states’ right to regulate</u>. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.”</p>	<p>It is positive that the Commission acknowledges the history mentioned above although it still understates the extent of the arbitrators’ expansiveness.</p> <p>On the other hand, <u>the Commission does not question the role of the arbitrators in causing the problem or the solution of replacing them with financially-disinterested judges</u>. As well, the Commission does not propose to address other flaws in the process and structure of investor-state arbitration. It is a missed opportunity.</p>
<p><i>PDF version, page 5:</i> “Certain investment agreements have narrowed down the content of the FET standard by linking it to concepts that are considered to be part of customary international law, such as the minimum standard of treatment that countries must respect in relation to the treatment accorded to foreigners. However, <u>this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.</u>”</p>	<p><u>The Commission does not substantiate its claim in the second part of this paragraph</u>. It is true that the attempt to link the FET standard to international custom was far from a complete success in containing the arbitrators. Yet the attempt did at least put potential limits on the meaning of FET as measured against the widely-understood customary meaning of the international minimum standard before the explosion of investor-state arbitration about 15 years ago.</p>
<p><i>PDF version, page 5:</i> “An issue sometimes linked to the FET standard is the respect by the host country of its legal obligations towards the foreign investors and their investments (sometimes referred to as an “umbrella clause”), e.g. when the host country has entered into a contract with the foreign investor. Investment agreements may have specific provisions to this effect, which have</p>	<p>This is a good example of how many arbitrators have used FET to expand their power and take investor protection well beyond its reasonable limits. I commend the Commission for identifying the problem.</p> <p>Unfortunately, as discussed below, the Commission has not addressed the problem. Indeed, <u>in the Canada-EU CETA text, the</u></p>

<p>sometimes been interpreted broadly as implying that every breach of e.g. a contractual obligation could constitute a breach of the investment agreement.”</p>	<p><u>Commission is apparently pushing (over Canada’s objections) a broad umbrella clause that runs along the lines of what the Commission laments here.</u> This will invite more adventures by arbitrators. <u>It suggests that the Commission is playing a double-game by reassuring the public while burying, in the treaty text, major concessions to arbitrator power.</u></p>
<p><i>PDF version, page 6:</i></p> <p><u>“The main objective of the EU is to clarify the standard, in particular by incorporating key lessons learned from case-law. This would eliminate uncertainty for both states and investors.</u></p> <p>Under this approach, a state could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment.”</p>	<p>If the intent is to clarify the standard, why leave the power to interpret a still-ambiguous text in the hands of those who took the standard too far?</p> <p><u>At best, the Commission is going half-way with the arbitrators.</u> It is adopting some of their expansive interpretations – i.e. interpretations that have gone beyond the previously-accepted customary meaning – as “lessons learned from case law”. This most certainly will not “eliminate uncertainty” for states or investors. Rather, it rejects an alternative narrower and clearer meaning of FET.</p> <p><u>Indeed, the FET standard is arguably unnecessary alongside the other standards in investment treaties that protect foreign investors against uncompensated expropriation, discrimination, and failure to protect the investor’s physical security. I say “almost” because the only necessary role of FET in light of these other standards is to safeguard against denial of justice in the host country’s domestic courts.</u> Denial of justice is easily defined in a treaty cover situations where a foreign investor suffers targeted discrimination or denial of due process.</p> <p>Added to the other standards of investor protection, FET goes well beyond “a limited set of basic rights”. It includes additional concepts which enhance arbitrator power dramatically to favour foreign investors. <u>In essence, FET allows compensation without</u></p>

	<p><u>expropriation, discrimination, or denial of justice.</u></p>
<p><i>PDF version, page 6:</i> “This list <u>may be extended only where the Parties (the EU and the US) specifically agree</u> to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law.”</p>	<p><u>This statement is inaccurate.</u> It would be easy to make clear that the relevant list is a closed list but the Canada-EU CETA does not do so. In that text, the relevant clause (Article X.X(2)) omits the word “only” when compared to the Commission’s consultation text. To make the list closed, as described in the consultation text, this Article would need to include the word “only” after “A Party breaches the obligation of fair and equitable treatment...” and before “where a measure or series of measures constitutes:...”. Or the Article would need to say, for example, that FET “includes and is limited to” the listed elements.</p> <p>These are basic points of legal drafting if the Commission wanted to ensure the list was closed to expansion by arbitrators. Instead, the clause’s ambiguity allows arbitrators to infer that the list was not intended by both states parties to be closed. Statements to the contrary in the consultation text are misleading.</p>
<p><i>PDF version, page 6:</i> “The “legitimate expectations” of the investor may be taken into account in the interpretation of the standard. However, this is possible <u>only where clear, specific representations have been made by a Party to the agreement in order to convince the investor to make or maintain the investment and upon which the investor relied, and that were subsequently not respected</u> by that Party. <u>The intention is to make it clear</u> that an investor cannot legitimately expect that the general regulatory and legal regime will not change.”</p>	<p>This aspect of FET was invented or transplanted by arbitrators in numerous past cases. By including it in the Canada-EU CETA, the Commission invites further arbitrator expansiveness.</p> <p>For example, must the state’s representations that create legitimate expectations be in writing? Presumably the answer is yes if the investor is to be compensated for relying on them. Yet this is not stated in the consultation text or the Canada-EU CETA.</p> <p>As a result, <u>the Commission’s approach allows undocumented oral communications between an investor and a single official</u>, on which there is no reliable written evidence, <u>to create</u></p>

	<p><u>potentially massive public liability</u>. This has occurred in past cases where legitimate expectations were found based on flimsy evidence.<sup>6</sup> It is a recipe not only for misunderstanding but also possible fraud and corruption.</p> <p>It is reasonable to expect a foreign investor to wait for written confirmation before relying on a state’s representation. Any sophisticated adult, let alone major company, should know that promises should come in writing.</p> <p><u>The broad problem with the notion of legitimate expectations, backed by a right of retrospective public compensation for economic loss, is that it can frustrate or preclude legitimate regulatory change.</u></p>
<p><i>PDF version, page 6:</i> “Thus <u>the EU intends to ensure that the standard is not understood to be a “stabilisation obligation”</u>, in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors.”</p>	<p><u>I find it hard not to read this statement as an attempt to mislead non-specialists</u>. If this is the Commission’s intent, why is it not stated clearly and unequivocally in the treaty? It is not stated at all in the investment chapter of the Canada-EU CETA let alone clearly and unequivocally.</p>

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<sup>6</sup> Van Harten (2013) p gb on legitimate expectations being found on flimsy evidence.

<p><i>PDF version, page 6:</i> “In line with the general objective of clarifying the content of the standard, the EU shall also strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice.”</p>	<p>Here the Commission signals again that it wants to expand FET beyond its accepted customary meaning.</p> <p>By implication, the Commission is making the right to regulate less reliable than in the NAFTA context where Canada, the U.S., and Mexico have sought to check the arbitrators’ approach by requiring a link to international custom based on evidence of state practice and <i>opinio juris</i>.</p> <p><u>This indicates that the Commission wants to expand investment protection yet further at the expense of the reliability of the right to regulate.</u></p>
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*General response to Question 4: Expropriation*

*Question: [W]hat is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.*

Drawing on the post-2001 practice of the U.S. and Canada, the Commission has included useful language on indirect expropriation (see Canada-EU CETA, Article X (Annex)). However, as an attempt to protect the right to regulate, this approach is flawed because: (a) it does not apply to other standards in the treaty; (b) it contains qualifiers that allow the arbitrators to retain an unduly expansive approach; (c) it is open to a significant loophole due to the Commission’s approach to MFN treatment; and (d) it keeps power in the hands of arbitrators, instead of judges, who in many past awards have demonstrated themselves unsuited for ensuring a balanced approach to indirect expropriation and other concepts.

The Commission’s reform on this issue thus falls well short of an effective safeguard for the right to regulate.

*Specific response to Question 4: Expropriation*

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 6:</i> “<u>The right to property is a human right, enshrined in the European Convention of Human Rights, in the European</u></p>	<p>The Commission’s reference to the right to property, enshrined in the European Convention on Human Rights, is telling. The</p>

<p>Charter of Fundamental Rights as well as in the legal tradition of EU Member States. This right is crucial to investors and investments. Indeed, the greatest risk that investors may incur in a foreign country is the risk of having their investment expropriated without compensation. This is why the guarantees against expropriation are placed at the core of any international investment agreement.”</p>	<p>relevant right is in Article 1 of Protocol 1 of the Convention. This Article has two parts, the second of which affirms the state’s right to regulate alongside the protection of property:</p> <p style="padding-left: 40px;">“The preceding provisions [on property protection] shall not, however, in any way impair <u>the right of a State</u> to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”</p> <p>Yet this aspect of the human right to property – or a similar affirmation of the right to regulate – is missing from the Canada-EU CETA and other European investment treaties.</p> <p><u>This reveals how treaties like CETA and TTIP revise the existing human rights framework and the balance between property rights and the state’s right to regulate (including to promote and protect other human rights).</u></p>
<p><i>PDF version, page 7:</i> “Direct expropriations, which entail the outright seizure of a property right, do not occur often nowadays and usually do not generate controversy in arbitral practice. However, arbitral tribunals are confronted with a much more difficult task when it comes to assessing whether a regulatory measure of a state, which does not entail the direct transfer of the property right, might be considered equivalent to expropriation (indirect expropriation).”</p>	<p>The question of what qualifies as indirect expropriation is critical in any legal system, that involves far-reaching power to decide when the state’s sovereign activity requires public compensation for an affected actor.</p> <p><u>The Commission understates the arbitrators’ record of expansiveness on this point.</u> An example on this issue is the very broad statement by the early NAFTA tribunal in <i>Metalclad</i> which is one of the most frequently cited awards in investment treaty arbitration:</p> <p style="padding-left: 40px;">“Thus, expropriation... includes... covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably to be expected economic benefit of property even if not</p>

	<p>necessarily to the obvious benefit of the host State.”<sup>7</sup></p> <p>This statement was characterized as extremely broad by a Canadian court:</p> <p>“The Tribunal gave an extremely broad definition of expropriation.... This definition is sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority. However the definition of expropriation is a question of law with which this Court is not entitled to interfere....”<sup>8</sup></p> <p>However, the reviewing court in <i>Metalclad</i> could not interfere with the tribunal’s approach due to the limited role of judicial review in investment treaty arbitration (in <i>Metalclad</i>, limited judicial review took place under the UNCITRAL Rules and related implementing legislation in Canada; the ICSID Rules do not allow for any judicial supervision of awards but rather for limited review by three World Bank-appointed arbitrators).</p>
<p><i>PDF version, page 7:</i> “Indirect expropriation has been a source of concern in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements do not provide details or guidance in this respect, <u>which has inevitably left arbitral tribunals with significant room for interpretation.</u>”</p>	<p>The Commission mentions the unsurprising tendency of foreign investors to support an expansive approach to indirect expropriation. However, <u>the Commission does not mention the arbitrators’ expansive record on this point.</u></p> <p>With a research assistant, I coded all awards in known cases to May-June 2010 to assess whether the arbitrators took an expansive approach to the concept of indirect expropriation (a) by focusing exclusively or primarily on the effect of a state decision on the investor and putting aside other relevant factors such as the purpose of a non-discriminatory general measure, (b) by finding an expropriation where there was merely a “significant” or “substantial” effect on the</p>

<sup>7</sup> *Metalclad v Mexico* (Award of 30 August 2000, NAFTA) para 103.

<sup>8</sup> *United Mexican States v Metalclad Corporation*, 2001 BCSC 664 (2 May 2001) para 99.

	<p>investor, or (c) by severing the investor’s economic interest into segments thus elevating the degree of impact of the measure.</p> <p>We found that in 72.5% of 120 resolutions (per arbitrator) of this issue as either expansive or restrictive, the arbitrators took an expansive approach. Thus, the usual approach was to resolve the ambiguity in favour of a less reliable right to regulate. This tendency toward expansiveness was observed in general across 14 jurisdictional and substantive issues.<sup>9</sup></p>
<p><i>PDF version, page 7:</i> “The objective of the EU is to clarify the provisions on expropriation and to provide interpretative guidance with regard to indirect expropriation in order to avoid claims against legitimate public policy measures. The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment, cannot be considered equivalent to an expropriation, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an impact on the economic value of the investment does not justify a claim that an indirect expropriation has occurred.”</p>	<p>The Commission again leaves the keys with those who crashed the car. <u>Besides clarifying the text, arbitrators need to be replaced with financially-disinterested judges.</u> Otherwise, the resolution of the inevitable trade-offs between investment protection and the right to regulate is stacked in favour of the former.</p> <p>In addition, <u>the Commission’s textual clarifications on indirect expropriation have important limitations.</u> First, they are <u>vulnerable to the MFN loophole</u>, outlined above, because virtually all European states have treaties with third-states that do not contain the limiting language on indirect expropriation. To address this, the Commission would need to remove MFN treatment from the treaty or state clearly and unequivocally that MFN treatment is limited to domestic regulatory treatment of investors and does not extend to treatment in another treaty.</p> <p>Second, the clarifying language on indirect expropriation has <u>qualifiers</u> that allow arbitrators to continue their expansive approach.</p> <p>Third, to be effective, <u>the clarifications on indirect expropriation would need to apply to all standards in the treaty.</u> Otherwise, a tribunal</p>

<sup>9</sup> Van Harten (2012) gb; Van Harten (2013) gb.

	can avoid the language by finding a violation of another standard (most likely FET). In one past case, an arbitrator said in his reasons that the tribunal should find a violation of FET instead of indirect expropriation because this allowed the tribunal to reach the same outcome while avoiding political controversy. <sup>10</sup>
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General response to Question 5: Ensuring the right to regulate and investment protection

*Question: [W]hat is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?*

The Commission does not mention the contradiction between investor-state arbitration and human rights protection. In turn, its approach to investor-state arbitration endorses an elevation of property rights over both the right to regulate and other human rights.

In the CETA text, the right to regulate has not been affirmed clearly and unequivocally (it appears not to be mentioned in the investment chapter). For a meaningful balance between investment protection and the right to regulate – including to promote and protect human rights – the treaty would require a clear and unqualified affirmation of the right alongside the many elaborate rights for investors and responsibilities for states. The Commission's only "procedural improvement" on the right to regulate actually intensifies the pressure on states to change their decisions in order to appease arbitrator power and avoid financial liability.

The Commission continues to give for-profit arbitrators, who have an exceptional financial interest to favour prospective claimants (i.e. foreign investors, especially deep-pocketed companies), the power to interpret and apply virtually all treaty provisions. States cannot initiate claims under the Canada-EU CETA or other investment treaties and are for this reason not the "customers" of the arbitration industry. As discussed above, the Commission downplays the role of arbitrator power and its control over public money by inflating the usefulness of its textual clarifications.

The Commission should acknowledge that arbitrator decisions are "only as good" as the process by which arbitrators are appointed and make their decisions. The lack of institutional independence and procedural fairness in investor-state arbitration – which the Commission leaves untouched – means that all outcomes of investor-state arbitration under the CETA or TTIP would lack integrity regardless of the underlying text.

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<sup>10</sup> *SD Myers v Canada* (Schwartz separate opinion, 12 November 2000) para. 222 (where the arbitrator commented that the tribunal should find a violation of the NAFTA minimum standard, instead of the NAFTA expropriation standard, because 'it makes no practical difference to [the claimant] whether the expropriation label is attached' and 'seems unlikely that the measure of damages would be any greater'; on the other hand, 'a finding of expropriation might contribute to public misunderstanding and anxiety about both this decision and the wider implications of the investment chapter of NAFTA').

*Specific response to Question 5: Ensuring the right to regulate and investment protection*

Statements in the consultation text	Comments
<p><i>PDF version, page 7-8: “In democratic societies, the right to regulate of states is subject to principles and rules contained in both domestic legislation and in international law. For instance, <u>in the European Convention on Human Rights, the Contracting States commit themselves to guarantee a number of civil and political rights.</u> In the EU, the Constitutions of the Member States, as well as EU law, <u>ensure that the actions of the state cannot go against fundamental rights of the citizens.</u> Hence, public regulation must be based on a legitimate purpose and be necessary in a democratic society.”</i></p>	<p>There are two major problems with this statement. First, there is a stark contrast between the Commission’s handling of the right to regulate in the Canada-EU CETA and the handling of property rights and the right to regulate in the European Convention of Human Rights, as noted under Question 4 above.</p> <p>Second, <u>investor-state arbitration contradicts a basic principle of human rights in democratic societies: one actor should not be discriminated against inappropriately to favour another.</u> By definition, investor-state arbitration discriminates in favour of foreign asset owners and against other persons whose rights may be affected by state decisions (including decisions concerning the regulation and conduct of foreign investors). Unlike foreign investors, all other rights-holders are limited to human rights adjudication in domestic and regional institutions to protect their property and other rights. Indeed, the presumption of the CETA is that these other institutions are so inadequate – albeit for foreign investors only – that even the usual duty to exhaust reasonable-available domestic remedies should never apply!</p> <p>This creates <u>major advantages for foreign investors.</u> Their special access to investor-state arbitration allows them, among other things, (a) <u>much more widely enforceable awards</u> than in human rights adjudication; (b) the potential for <u>vastly more public compensation</u> – to date, billions of dollars – than in human rights adjudication; (c) the ability to call on standards of protection that are <u>not balanced</u> by countervailing features of human rights adjudication including a clear statement of the state’s right to regulate or of the need to</p>

	<p>balance investment protection against human rights; (d) the power, unlike human rights complainants, to play <u>a direct role in the make-up of the tribunal</u>; and (e) a decision-making process in which the adjudicator has <u>an apparent interest to favour claimants</u> (i.e. foreign investors, especially deep-pocketed companies), assuming that arbitrators who want to be re-appointed may encourage claims in order to support the arbitration industry.</p> <p>The Commission does not acknowledge this basic conflict between investor-state arbitration and human rights. Instead, <u>it accepts unjustified discrimination in favour of foreign investors by granting them special substantive and procedural rights and by giving arbitrators the power to put investor rights and interests ahead of those of other actors and ahead of the public interest.</u></p> <p>An example illustrates the problem. In the era of investor-state arbitration, <u>if a foreign national were tortured by state officials, he or she would be able to bring an international claim against the state – without having to resort first to domestic courts, where reasonably-available – only if he or she owned assets in the state and only to the extent that the torture affected his or her position as an asset owner.</u></p> <p>On the other hand, if a foreign investor’s officials were to torture their domestic employees with the collaboration of the state, the employees could not bring an international claim against the company or its officers, and could bring a claim against the state for failing to protect them only after resorting first to domestic remedies. <u>This is an absurd elevation in law of foreign investors over everyone else.</u> The Commission’s approach entrenches and expands it.</p>
<p><i>PDF version, page 8: “Investment agreements</i></p>	<p>Instead of acknowledging the contradiction</p>

<p>reflect this perspective. Nevertheless, wherever such agreements contain provisions that appear to be very broad or ambiguous, there is always a risk that the arbitral tribunals interpret them in a manner which may be perceived as a threat to the state's right to regulate. <u>In the end, the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply.</u>”</p>	<p>between investor-state arbitration and human rights, the Commission returns to the weak option of textual clarifications. In the last sentence of this statement, <u>the Commission downplays the past role of the arbitrators in exploiting treaty ambiguity to expand their power and undermine the right to regulate.</u> The Commission’s textual clarifications always leave behind a degree of ambiguity.</p> <p><u>A more accurate statement would be that the arbitrators’ decisions are “only as good” as the process by which they are appointed and make decisions.</u> The lack of institutionalized independence and procedural fairness in investor-state arbitration means that <u>all outcomes of investor-state arbitration lack integrity regardless of the underlying text on substantive provisions.</u></p>
<p><i>PDF version, page 8:</i></p> <p>“<u>The objective of the EU is to achieve a solid balance</u> between the protection of investors and the Parties’ right to regulate.</p> <p><u>First of all, the EU wants to make sure that the Parties’ right to regulate is confirmed as a basic underlying principle.</u> This is important, as arbitral tribunals will have to take this principle into account when assessing any dispute settlement case.”</p>	<p>As discussed above, the Commission does not affirm, clearly and unequivocally, the right to regulate. As a result, the Commission has not balanced that right with the elaborate rights of foreign investors and the corresponding responsibilities of states.</p> <p>It is not enough for the Commission to declare its intent to balance or confirm the right to regulate in a consultation text, in the treaty’s preamble, or in a substantive provision that has major qualifications such as a circular clause providing that the right to regulate is protected so long as it is exercised consistently with the treaty. Indeed, <u>mention of the right to regulate in these contexts is harmful because it supports an inference</u> that the states parties intended not to make the right to regulate clearly applicable and effective alongside the treaty’s rights for foreign investors.</p>
<p><i>PDF version, page 8:</i> “Secondly, the EU will introduce clear and innovative provisions with regard to investment protection standards that</p>	<p>This is not credible. The FET and indirect expropriation provisions in the Canada-EU CETA were discussed under Questions 3 and 4</p>

<p>have raised concern in the past (for instance, the standard of fair and equitable treatment is defined based on a closed list of basic rights; the annex on expropriation clarifies that non-discriminatory measures for legitimate public policy objectives do not constitute indirect expropriation). <u>These improvements will ensure that investment protection standards cannot be interpreted</u> by arbitral tribunals in a way that is detrimental to the right to regulate.”</p>	<p>above. To reiterate, they are vulnerable to the MFN loophole, have unacceptable qualifiers, are broader (in the case of FET) than comparable standards in other treaties including NAFTA, and are left to the discretion of arbitrators instead of judges. <u>There is no way to “ensure” that the treaty “cannot be interpreted” by anyone in a way that harms the right to regulate. However, the Commission could at least remove the unacceptable financial interests of the adjudicator in this respect.</u></p>
<p><i>PDF version, page 8-9:</i> “Third, the EU will ensure that all <u>the necessary safeguards and exceptions</u> are in place. For instance, foreign investors should be able to establish in the EU only under the terms and conditions defined by the EU. A list of horizontal exceptions will apply to non-discrimination obligations, in relation to measures such as those taken in the field of environmental protection, consumer protection or health (see question 2 for details). Additional carve-outs would apply to the audiovisual sector and the granting of subsidies. <u>Decisions on competition matters will not be subject to investor-to-state dispute settlement (ISDS)</u>. Furthermore, in line with other EU agreements, nothing in the agreement would prevent a Party from taking measures for prudential reasons, including measures for the protection of depositors or measures to ensure the integrity and stability of its financial system. In addition, EU agreements contain general exceptions applying in situations of crisis, such as in circumstances of serious difficulties for the operation of the exchange rate policy or monetary policy, balance of payments or external financial difficulties, or threat thereof.”</p>	<p><u>The reliance on exceptions and carve-outs to safeguard the right to regulate gives that right an inferior legal status to foreign investors’ rights and protections.</u> The general principle of the treaty is one of investment protection unless the state can make an exceptional case for the right to regulate. <u>This is prioritizing not balancing.</u></p> <p>Exceptions or reservations also have other limitations. Usually they apply only to some substantive provisions in the treaty or only to particular sectors or areas of decision-making. For example, why do “competition matters” but not, for example, public health matters call for exemption from investor-state arbitration? Put differently, <u>why does investor-state arbitration present an unacceptable threat to the right to regulate in competition but not in other areas of regulation?</u></p>
<p><i>PDF version, page 9:</i> “In terms of the procedural aspects relating to ISDS, the objective of the EU is to build a system</p>	<p>An express mechanism for agreed interpretations by the states parties is not new. It has been part of NAFTA for 20 years. In that</p>

<p>capable of adapting to the states' right to regulate. Wherever greater clarity and precision proves necessary in order to protect the right to regulate, the Parties will have the possibility to adopt interpretations of the investment protection provisions which will be binding on arbitral tribunals. <u>This will allow the Parties to oversee how the agreement is interpreted in practice and, where necessary, to influence the interpretation.</u>”</p>	<p>context, the mechanism has been used twice, and only once to reign in expansive approaches to a substantive standard. Further, the option to issue subsequent agreements about the meaning of a treaty is available generally to all states as a matter of treaty law. To my knowledge, outside NAFTA, it never been used successfully in investor-state arbitration.</p> <p>Overall, this mechanism of shared interpretation is a rarely-used and bureaucratic process that requires the consent of all states parties. <u>In the cat-and-mouse game between states and arbitrators, it is a lumbering way to react to arbitrator frolics. For-profit arbitrators should not have the power to interpret the treaties and re-direct public funds in the first place.</u></p>
<p><i>PDF version, page 9:</i> “The procedural improvements proposed by the EU <u>will also make it clear that an arbitral tribunal will not be able to order the repeal of a measure, but only compensation for the investor.</u>”</p>	<p>This is not new and should not be described as a “procedural improvement”.</p> <p>In investor-state arbitration, the primary remedy is monetary compensation; i.e., a backward-looking damages award to the investor. This distinguishes investor-state arbitration from courts, where the primary remedy for unlawful sovereign conduct is usually non-monetary (partly to protect the fiscal powers of legislative and executive actors). It also distinguishes investor-state arbitration from the World Trade Organization (WTO) where, if a state is found to have violated the agreement, the state has an opportunity to correct the illegality before facing an economic remedy.</p> <p><u>Thus, the Commission’s approach avoids the key problem</u> that, in the face of uncertain but potentially costly liability, states may pull back from important decisions when threatened with an investor-state claim, especially if the investor is a deep-pocketed company and large amounts are at stake.</p>

	<p>The Commission’s main innovation in this context of regulatory chill (sometimes called “good governance”), is to instruct tribunals when calculating damages to take into account “any repeal or modification” of the state’s original decision (see CETA Article x-36(3), which the Commission did not include among the CETA excerpts in its consultation text).</p> <p>I have not seen a clause like this before in an investment treaty. In effect, it institutionalizes the pressure for a state to change its decisions in favour of foreign investors. Thus, <u>it expands the advantages given to foreign investors in their relations with the state relative to anyone who would benefit if the state’s decision was not changed.</u></p>
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*Response to the Commission’s Introduction to Questions 6 to 12 (investor-to-state dispute settlement (ISDS))*

Throughout this comment, I refer to “investor-state arbitration” or “investment treaty arbitration” instead of “investor-state dispute settlement”. This is because the latter term downplays the key role of arbitration – in contrast to mediation or negotiation/ settlement under threat of arbitration – as the key compulsory and binding element of investment treaties.

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 9:</i> “Investor-to-state dispute settlement (ISDS) is a legal instrument that allows investors to bring a claim before an arbitration tribunal that the host state has not respected the investment protection rules under TTIP. <u>Domestic remedies would be preferable, but TTIP provisions cannot be invoked directly in front of a national court.</u>”</p>	<p><u>This is a dubious justification for investor-state arbitration.</u> In many countries, treaties in general are often not directly applicable in domestic law. Yet this does not support the use of investor-state arbitration, to protect foreign investors alone, in situations where (a) domestic law nonetheless ensures sufficient protection and (b) domestic courts offer justice and are reasonably-available. This is discussed further below.</p>
<p><i>PDF version, page 9:</i> “Despite the general solidity of developed court systems such as the</p>	<p>If the concern is that a foreign investor may sometimes not have effective access to justice</p>

<p>US and the EU, <u>it is possible that investors will not be given effective access to justice</u>, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy. <u>ISDS is therefore necessary to allow legitimate claims to be pursued</u>. In such cases, the investors would have to prove that the measures have breached the investment protection provisions and that it caused them damage.”</p>	<p>in the U.S. or EU, the solution is to allow an international claim only in such cases. <u>Yet the Commission plans to allow investor-state arbitration without any obligation at all for a foreign investor to resort to reasonably-available domestic remedies</u>.</p> <p><u>In effect, this implies that domestic courts do not offer effective access to justice in all cases, everywhere, in the U.S. and EU</u>. It is ridiculous to claim that this is so in the absence of any systematic evidence that domestic courts in the U.S. or EU fail to offer justice to foreign investors.</p>
<p><i>PDF version, page 9:</i> “The possibility for investors to resort to ISDS is a standard feature of <u>virtually all the 3000 investment agreements in existence today</u>, including the 1400 signed by EU Member States. Most of these agreements contain a standard paragraph stating that investors can go to ISDS in case of a breach of the investment protection provisions.”</p>	<p>Proponents of investor-state arbitration often refer to the figure of about 3000 existing treaties that provide for investor-state arbitration to support the case for more such treaties.</p> <p><u>First, the figure is not as large as it seems</u>. To match the legal effect of a multilateral agreement on investment, for example, one would need over 19,000 bilateral investment treaties (196 countries * 195 countries / 2). On this measure, 3000 treaties is about 16% of potential coverage.</p> <p><u>Second, most existing treaties do not govern significant investment flows and appear unlikely to lead to claims</u>. Over half of known cases (129 of 249) to May-June 2010 arose under NAFTA, the Energy Charter Treaty, and just 15 bilateral investment treaties of the U.S.<sup>11</sup></p> <p><u>Third, investor-state arbitration based on existing treaties</u> (not including potential forum-shopping via shell companies) covers only a</p>

<sup>11</sup> This includes 61 cases under NAFTA, 24 cases under the Energy Charter Treaty, and 44 cases under U.S. BITs with Argentina, Zaire, the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Jordan, Kazakhstan, Moldova, Romania, Sri Lanka, Trinidad and Tobago, Turkey, and Ukraine. The dataset consisted of all 249 known cases that had led to a publicly-available award on jurisdiction (or, for NAFTA cases, a notice of intent to arbitrate) as of cut-offs during May-June 2010.

	<p>minority of international FDI flows. For example, investment-state arbitration <u>covered 15-20% of inward and outward FDI flows for the U.S. in 2012. The TTIP would cover an additional 50-60% of those FDI flows.</u><sup>12</sup></p> <p>A few treaties now pursued by the Commission or the U.S. – the Trans-Pacific Partnership, EU-China, and U.S.-China – would expand coverage of investor-state arbitration dramatically (to over 80% of international FDI flows based on U.S. flows as a proxy). Thus, <u>one or two new treaties, especially TTIP, would expand arbitrator power by far more than all existing treaties combined.</u></p> <p>Overall, it lacks credibility to justify a major new treaty providing for investor-state arbitration – especially in the <u>relatively untouched domain of investment relations among developed countries</u> – by referring to many relatively-inconsequential existing treaties.</p>
<p><i>PDF version, page 9-10:</i> “The agreements themselves do not contain any precise procedural framework for how an ISDS case should be handled by a tribunal. The ISDS tribunal must work on the basis of international arbitration rules that set a general procedural framework. The most common are the rules of the International Centre for the Settlement of Investment Disputes (“ICSID”, a World Bank body) or those of the United Nations Commission for International Trade Law (“UNCITRAL”). However, these rules only partially address the <u>problems which have come to light over the last years with the ISDS</u></p>	<p>This is an incomplete statement of the procedural and institutional problems that follow from the <u>use of for-profit arbitration to resolve, on a final basis, some of the most profound questions of public law and public policy.</u> The statement does not mention (a) the <u>lack of institutional safeguards of judicial independence</u> in investor-state arbitration, (b) the <u>lack of procedural fairness</u> due to the selective and arbitrary approach to full standing rights, (c) the <u>inappropriate role of retrospective public compensation</u> as a remedy, and (d) the <u>essential imbalance both between investor rights and investor responsibilities</u> (the</p>

<sup>12</sup> These approximate figures were calculated based on existing investment treaty coverage of country-by-country inward and outward FDI flows for the U.S. in 2012 from the data provided in Organization for Economic Cooperation and Development (OECD), “StatExtracts: FDI flows by partner country”, available online: [http://stats.oecd.org/Index.aspx?DataSetCode=FDI\\_FLOW\\_PARTNER](http://stats.oecd.org/Index.aspx?DataSetCode=FDI_FLOW_PARTNER). The figures do not account for the possibility of forum-shopping by foreign investors which is difficult to measure, and handled in different ways by arbitrators and existing treaties, but may expand existing coverage of investor-state arbitration by a significant proportion.

<p><u>system, notably on transparency, the conduct of arbitrators and the absence of any appeal mechanism.”</u></p>	<p>treaties institute the former not the latter) <u>and between state rights and state responsibilities</u> (the treaties institute the latter not the former).</p>
<p><i>PDF version, page 10:</i> “The EU is working to develop an efficient and modern ISDS mechanism which is equipped to deal with these problems. The EU will improve the ISDS mechanism under TTIP compared to existing investment agreements. The improvements are explained in the questions that follow where we ask you to comment and make suggestions. <u>Through these improvements, the EU aims to ensure a transparent, accountable and well-functioning ISDS system that reflects the public interest and policy objectives.”</u></p>	<p>The “improvements” discussed by the Commission – other than on transparency – are minor and sometimes detrimental, as I discuss below.</p> <p>In its last sentence, the Commission does not refer to the fundamental adjudicative values of independence, including at an institutional level, and procedural fairness. <u>The failure to discuss these values helps the Commission to sidestep the importance of replacing arbitrators with judges and of allowing all parties whose rights or interests are affected to have full standing in the adjudicative process.</u></p>
<p><i>PDF version, page 10:</i> “The EU will encourage the amicable settlement of disputes, through a required period for consultations, and the possibility of mediation.”</p>	<p>As discussed below, the settlement of an investor-state dispute, whether or not based on formal mediation, lacks integrity where a party agrees to settlement under the threat of an arbitration process that itself lacks integrity. Investor-state arbitration lacks integrity because it is not institutionally independent, procedurally fair, open to the public, and balanced in the allocation of rights and responsibilities.</p>
<p><i>PDF version, page 10:</i> “The EU also aims to enhance consistency of rulings, including by the establishment of an appeal mechanism and by allowing for the governments to provide guidance and interpretation so that their intentions are respected. A further consideration is how to avoid frivolous or unfounded claims; the EU will introduce mechanisms to allow for a quick dismissal of such claims. Transparency and the possibility for stakeholders to make their views heard in the process underpin these improvements and are essential for an accountable and credible</p>	<p><u>Other than for transparency, none of the Commission’s reforms would make a meaningful difference to the lack of independence, fairness, and balance in investor-state arbitration.</u> On transparency, the Commission’s reforms are positive with room for improvement.</p>

ISDS system.”	
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General response to Question 6: Transparency in ISDS

*Question: [P]lease provide your views on whether [the Commission’s] 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.*

The Commission’s approach to transparency is positive. Some Western European countries have been opponents of transparency in investor-state arbitration for reasons that seemed hypocritical and short-sighted. It is positive that the European Commission has chosen to defend the principle of openness in adjudication where the adjudication affects interests of third parties and the public.

To elaborate, in investor-state arbitration, the arbitrators have the power to decide finally what a sovereign may do lawfully in its legislative, executive, or judicial role and, in turn, what should happen where the sovereign is found to have acted unlawfully. These are among the highest powers of any adjudicator. Clearly, they should be a matter of public record for reasons of accountability, independence, and fairness.

On the other hand, there are limitations to the Commission’s process to ensure transparency. Most importantly, it leaves to arbitrators not judges the decision whether documents or hearings should be public. This is a problem because, among other things, all arbitrators may view claimants – i.e. foreign investors, especially deep-pocketed companies – at some level as their customers and because claimants may oppose public access for self-serving reasons.

The Commission alludes briefly to, but does not address, the lack of procedural fairness in investment treaty arbitration. The lack of fairness arises most clearly because anyone – other than the claimant investor and respondent national government – whose rights or interests are affected by the adjudication is not permitted to have full standing in the process. The Commission’s reference to an ability for civil society actors to “file submissions” at the discretion of the arbitrators is clearly insufficient to address this concern.

Specific response to Question 6: Transparency in ISDS

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 10:</i></p> <p>“In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to</p>	<p>This is a very good statement of the current inadequacies and essential role of transparency in investor-state arbitration. Yet it also highlights the problem that, even when an investment treaty award must be made public,</p>

<p>intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side.</p> <p>This lack of openness has given rise to concern and confusion with regard to the causes and potential outcomes of ISDS disputes. <u>Transparency is essential to ensure the legitimacy and accountability of the system.</u> It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.</p> <p>Under the rules that apply in most existing agreements, both the responding state and the investor need to agree to permit the publication of submissions. If either the investor or the responding state does not agree to publication, documents cannot be made public. As a result, <u>most ISDS cases take place behind closed doors and no or a limited number of documents are made available to the public.</u>”</p>	<p>it is possible for claims to be brought, tribunals established, and settlements reached (entailing payment of public money and regulatory chill) without public knowledge.</p> <p>Despite its positive approach on transparency, the Commission does not address this problem. <u>The Commission should make clear in the treaty that the fact and terms of any settlement reached by a state, following the invocation of the treaty by a foreign investor in any verbal or written communications with the government, will be public.</u> The Commission should also ensure that all documents, including evidence submitted to the tribunal, will be public.</p> <p>Vitally, <u>any non-disclosure of documents or closure of hearings should be permitted only after a judicial process.</u></p>
<p><i>PDF version, page 11:</i> “The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP, <u>all documents will be publicly available</u> (subject only to the protection of confidential information and business secrets) and hearings will be open to the public.”</p>	<p>In essence, the Commission has adopted the transparency reforms of the NAFTA states after early NAFTA tribunals did not permit openness in the face of ambiguous treaty language on this point.</p> <p>That said, there are limitations to the Commission’s approach. Most importantly, it still allows arbitrators instead of judges to decide whether to allow documents and hearings to be public. This is a problem among other things because, in a one-way system of arbitration, all the arbitrators may at some level view claimants as their “customers” and because claimants have sometimes opposed public access to documents or hearings for</p>

	<p>self-serving reasons.</p> <p>Lastly, the Commission needs to make clear the presumption that all evidence submitted to the arbitrators is public.</p>
<p><i>PDF version, page 11:</i> Interested parties from civil society <u>will be able to file submissions</u> to make their views and arguments known to the ISDS tribunal.”</p>	<p><u>This reform falls well short of ensuring procedural fairness in the arbitration.</u></p> <p>There are many reasons why investor-state arbitration may be said to be unfair. The most precise one is that the system denies parties whose rights or interests (including reputational interests) are affected by the adjudication – such as a local government alleged to have done wrong or a private party alleged to be corrupt – the right to full standing in the process so that their evidence and arguments can be heard.</p> <p>The Commission’s statement refers to a mechanism by which parties other than the claimant investor and respondent government will be able, at the arbitrators’ discretion, to apply for a limited right “to file submissions” to a tribunal. This does not address the lack of procedural fairness in the system. <u>For a fair process, any party whose rights or interests are affected by the adjudication must have a right to full standing to the extent of the party’s interest.</u></p>
<p><i>PDF version, page 11:</i> “The EU took a leading role in establishing new <u>United Nations rules on transparency in ISDS</u>. The objective of transparency will be achieved by incorporating these rules into TTIP.”</p>	<p>As an aside, the new UNCITRAL rules on transparency unfortunately apply only to claims under treaties that were concluded after the UNCITRAL transparency rules came into effect. This approach differs from other amendments to arbitration rules, such as the ICC Rules, which after their amendment applied presumptively to all new claims under existing treaties, contracts, or other instruments that allowed for claims under the ICC Rules. The same principle should have applied to the new UNCITRAL transparency rules.</p>

	<p>My understanding is that members of the arbitration industry played a role in promoting this unfortunate outcome, including while acting as representatives of governments at relevant UNCITRAL meetings. In light of this history, I suggest that <u>European institutions should commit to making public any internal or external lobbying role played by members of the arbitration industry</u> in the Commission’s work on investor-state arbitration.</p>
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*General response to Question 7: Multiple claims and relationship to domestic courts*

*Question: Please provide your views on the effectiveness of [the Commission’s] 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.*

The Commission has not taken obvious steps to “favour” domestic courts despite its statement to the contrary in the consultation text. The Commission’s approach also does not address the widespread issue of investor-state arbitrators refusing to stay their proceedings in the face of a parallel proceeding in domestic courts, another international forum, or a contractually-agreed forum. This leads to waste of resources on parallel litigation and to conflicting decisions. It also contradicts principles of party autonomy, sanctity of contract and the avoidance of parallel proceedings.

The Commission could easily address the concern. It could require foreign investors, before an international claim can be brought, to exhaust remedies in domestic courts where they offer justice and are reasonably-available. It could direct investment treaty arbitrators to stay their proceedings where a parallel claim has been or could be brought in a contractually-agreed forum or another international forum, where the dispute is factually connected to the other forum, and where the foreign investor or a closely related party is or could be a claimant in the other forum. The Commission could also address the arbitrators’ creative interpretations that have facilitated parallel treaty proceedings in factually-similar disputes.<sup>13</sup> Lastly, the Commission could replace the arbitrators with judges in order to remove the adjudicator’s financial interest in allowing parallel treaty claims.

Mediation under investment treaties takes place under the threat of investor-state arbitration. That is, the state’s agreement to mediate is premised on the threat or fact of an arbitration claim. In turn, the lack of independence and fairness in investor-state arbitration taints the integrity of a

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<sup>13</sup> Van Harten (2013) p gb – creative interpretations.

mediation or settlement in the shadow of investor-state arbitration. For these reasons, mediation and settlements in this context are not “useful”, other than for those who already benefit from investor-state arbitration.

Specific response to Question 7: Multiple claims and relationship to domestic courts

Statements in the consultation text	Comments
<p><i>PDF version, page 11:</i> “Investors who consider that they have grounds to complain about action taken by the authorities (e.g. discrimination or lack of compensation after expropriation) often have different options. They may be able to go to <u>domestic courts</u> and seek redress there. They or any related companies may be able to go to <u>other international tribunals</u> under other international investment treaties.”</p>	<p>Arbitrators commonly allow treaty claims by foreign investors that run parallel to other forums including domestic courts, treaty-based forms, and contractually-agreed forums.</p> <p><u>The Commission has done virtually nothing to address this problem.</u> As a result, it has left in place the risk of wasteful litigation and conflicting decisions. The Commission has also endorsed the arbitrators’ rejection of important principles such as party autonomy, sanctity of contract, and the avoidance of parallel proceedings.</p>
<p><i>PDF version, page 11:</i> “It is often the case that <u>protection offered in investment agreements cannot be invoked before domestic courts and the applicable legal rules are different.</u> For example, discrimination in favour of local companies is not prohibited under US law but is prohibited in investment agreements. There are also concerns that, <u>in some cases domestic courts may favour the local government</u> over the foreign investor e.g. when assessing a claim for compensation for expropriation or may deny due process rights such as the effective possibility to appeal. Governments may have immunity from being sued.”</p>	<p><u>This is a weak argument for investor-state arbitration in the absence of a duty to exhaust domestic remedies.</u></p> <p>For one, investment-state arbitration is not justified by the general fact that in many countries a treaty cannot be invoked directly before domestic courts (without implementing legislation to incorporate the treaty into domestic law) or that legal rules differ between domestic law and treaty law or among domestic legal systems. These are basic characteristics of the existence of states and the distinction between the domestic and international legal spheres. They do not themselves justify giving a foreign investor the special right to bring international claims without going first to domestic courts, where the courts offer justice and are reasonably-available.</p>

	<p>Subject to the duty to exhaust local remedies, a foreign investor anywhere – who has suffered from inappropriate discrimination, expropriation without compensation, an unfair process, or an inability to enforce a judicial order (and who did not receive full protection in domestic courts) – could bring a treaty claim based on denial of justice. Put differently, <u>all of the concerns identified by the Commission can be addressed without assuming that domestic courts everywhere are systematically unable to protect foreign investors.</u></p> <p>The Commission offers no evidence or rationale to support allowing foreign investors to avoid domestic courts in all situations. Investor-state arbitration is an over-reaction – putting it mildly – to general concerns that arise in all countries for everyone from the inapplicability of international rules or inevitable differences in domestic legal rules.</p>
<p><i>PDF version, page 11:</i> “In addition, <u>the remedies are often different.</u> In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. <u>ISDS tribunals cannot order governments to reverse measures.</u>”</p>	<p>As discussed under Question 5 above, this statement highlights how the primary remedy in investor-state arbitration – a retrospective award for potentially vast amounts of public money– creates problems for the right to regulate. <u>For good reason, domestic and international courts are cautious about awarding large amounts of monetary compensation for past decisions of a legislature, government, or court that are later found to be unlawful.</u></p> <p>For example, the Commission and European member states expressed this concern in ECJ proceedings on a related issue of state liability in European Community law:<sup>14</sup></p> <p>“If questions of interpretation are shrouded in uncertainty and a Member State exercises its discretion in a</p>

<sup>14</sup> *Brasserie du Pêcheur SA v Germany; Secretary of State for Transport, ex parte Factortame Ltd and Others* (No 46 & 48/93), Report for the Hearing, [1996] ECR I-1034, (1996) 1 CML Rev 889, para 57 [here reproducing a statement by the Commission and by the Danish and UK governments].

	<p>reasonable way, it would seem unreasonable for it to incur liability if it is later held that Community law precludes the national law or administrative practice in question. Unblameworthy legal mistakes should not lead to liability to make reparation.”</p>
<p><i>PDF version, page 12:</i> “Existing investment agreements generally do not regulate or address the relationship with domestic courts or other ISDS tribunals. Some agreements require that the investor chooses between domestic courts and ISDS tribunals. This is often referred to as ‘fork in the road’ clause.”</p>	<p>The Commission’s model, as reflected by the CETA, does not include a fork-in-the-road clause. This is discussed further below.</p> <p>Incidentally, arbitrators have in most cases not given effect to fork-in-the-road clauses. This is another example of why it is a bad idea to continue to rely on arbitrators to apply the treaties.</p> <p>In particular, the arbitrators have in the great majority of cases not applied fork-in-the-road clauses to preclude a treaty claim (where the claimant or a related party had previously resorted to domestic courts).<sup>15</sup> <u>This highlights the arbitrators’ tendency to adopt expansive approaches even in the face of express language that appears to limit the arbitrators’ power.</u></p>
<p><i>PDF version, page 12:</i> “As a matter of principle, <u>the EU’s approach favours domestic courts.</u>”</p>	<p><u>This is a misleading statement unless one reads a lot into the Commission’s qualifier “[a]s a matter of principle”.</u></p> <p>If the Commission wanted to “favour” domestic courts, it could easily do so. It could require foreign investors – like any other foreign national – to go first to domestic courts where the courts offer justice and are reasonably-available. Instead, the Commission has declined to include this duty. This assumes that domestic courts are potentially biased, unreliable, etc. in all situations where a foreign investor brings a claim. This aspect of the</p>

<sup>15</sup> Van Harten (2013) p gb forks in road.

	<p>CETA contrasts starkly with the Commission’s statement in the consultation text.</p>
<p><i>PDF version, page 12:</i> “The EU aims to provide <u>incentives for investors to pursue claims in domestic courts or to seek amicable solutions</u> – such as mediation. The EU will suggest different instruments to do this. One is to <u>prolong the relevant time limits if an investor goes to domestic courts or mediation</u> on the same matter, so as not to discourage an investor from pursuing these avenues.”</p>	<p><u>This is a weak way to “provide incentives” for investors to pursue claims in domestic courts or reach “amicable settlements”</u>. Indeed, the Commission says only that it seeks “not to discourage” foreign investors from resorting to domestic courts or settlement. To incent the use of domestic courts, a foreign investor should be required to show that domestic courts are not reasonably-available.</p> <p>On settlements, <u>one person’s amicable settlement is another person’s regulatory chill. Even the fact of a settlement may not be public</u> if the settlement was reached before the foreign investor filed its formal request for consultations (see Canada-EU CETA, Article x-33(2)). In this way, the Commission’s approach is “not to discourage” governments from <u>secretly paying public funds or chilling decisions in order to appease a foreign investor</u>.</p>
<p><i>PDF version, page 12:</i> “Another important element is to make sure that investors cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts. The EU will also ensure that companies affiliated with the investor cannot bring claims in front of an ISDS tribunal and domestic courts on the same matter and at the same time.”</p>	<p><u>The Commission’s approach allows foreign investors to have their cake and eat it too</u>. Foreign investors will be free to pursue public compensation in investor-state arbitration (where compensation is the primary remedy). They will also be free to pursue non-monetary orders in domestic courts (where compensation is usually a secondary remedy in claims against the state).</p> <p>Thus, the Commission entrenches and expands the advantages for foreign investors, relative to all others, due to their special right to pursue investor-state arbitration.</p> <p>The Commission’s approach essentially tracks NAFTA, which also requires foreign investors to pursue monetary remedies in investor-state arbitration or domestic courts but not both.</p>

	<p>That is all. <u>To be clear, this is not a duty to exhaust reasonably-available local remedies or a true fork-in-the-road clause.</u> By the way, based on the existing record of arbitrator decision-making,<sup>16</sup> the former and especially the latter should not be treated as a reliable way to avoid parallel treaty proceedings if left in the hands of arbitrators who have a financial stake in allowing a treaty claim to proceed.</p>
<p><i>PDF version, page 12: “<u>If there are other relevant or related cases, ISDS tribunals must take these into account.</u> This is done to avoid any risk that the investor is over-compensated and helps to ensure consistency by excluding the possibility for parallel claims.”</i></p>	<p><u>This is another weak response to the problem of parallel treaty proceedings.</u> It is standard practice in any adjudicative process for the adjudicator to be able to take into account other relevant cases. That the Commission would find it necessary to make this statement is revealing of the track record of arbitrators.</p> <p>Above all, <u>an arbitrator can easily take into account (and distinguish) other cases to suit some instrumental purpose.</u> What is needed is a judicial system that is subject to jurisdictional review, appeals, conflict-of-interest challenges, and so on based on the usual judicial standards.</p>

*General response to Question 8: Arbitrator ethics, conduct and qualifications*

*Question: [P]lease 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?*

The Commission’s proposals on this issue are a major disappointment. They do not acknowledge the institutional reasons for the lack of independence and impartiality in investor-state arbitration. In turn, they lead only to limited and inadequate tweaks.

In particular, the Commission makes no commitment to incorporate the essential safeguards of judicial independence that are present in other adjudicative systems that review sovereign conduct. These include:

- (a) secure tenure for the adjudicator instead of case-by-case appointments,
- (b) set remuneration by the state instead of for-profit case-by-case appointment,

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<sup>16</sup> Van Harten (2013) p Gb record on parallel claims.

- (c) an objective method of case assignment instead of executive discretion over case-by-case appointment,
- (d) prohibitions on outside lawyering by the adjudicators instead of widespread double-dipping and issue conflict, and
- (e) a judicial process to resolve conflict-of-interest claims instead of a process controlled by executive officials.

Clearly, the Commission is not going to ensure that investor-state arbitration is made independent and impartial at an institutional level. Thus, there will remain a basis for reasonable suspicions of bias in the system.

The Commission needs to do the obvious: replace financially-dependent arbitrators with proper judges. Why has it not done so?

*Specific response to Question 8: Arbitrator ethics, conduct and qualifications*

Statements in the consultation text	Comments
<p><i>PDF version, page 12:</i> “There is <u>concern that arbitrators on ISDS tribunals do not always act in an independent and impartial manner</u>. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or conflicts of interest.”</p>	<p>The Commission states the concern about lack of arbitrator independence and impartiality in narrow terms. <u>The real concern arises from the institutional structure of investor-state arbitration. It is not just a matter of the conduct of individual arbitrators.</u></p> <p>In the absence of the usual institutional safeguards of judicial independence – such as secure tenure, set remuneration, objective case assignments, prohibitions on outside lawyering, and a judicial process to resolve conflict-of-interest claims – reasonable perceptions of arbitrator bias arise. <u>The perceptions of bias may operate in favour of an investor or a state depending on the circumstances.</u></p> <p>For example, because arbitrators are appointed on a case-by-case basis (and paid lucratively by the appointment), all of them – and all lawyers who litigate the cases – depend on whoever has the ability to make the claims and trigger the arbitrators’ appointments. In the present one-way system, only foreign investors have this ability.</p>

	<p>Also, if they want to be re-appointed, the arbitrators depend on those with the power to appoint an arbitrator when the disputing parties do not agree or do not appoint. In the Canada-EU CETA, the Commission would give this vital power to the Secretary General of ICSID. This person is an international executive official appointed via a nomination of the World Bank President and a majority vote of the states-parties to the ICSID Convention.</p> <p><u>It offends judicial independence to give an executive official the power to choose who will decide a case after the official knows who has sued whom and in what context.</u> The issue here is not actual bias. It is the reasonable suspicion that the executive official will favour investors over states, some investors over other investors, or some states over other states. For example, the ICSID Secretary-General owes his or her position to the World Bank President who is largely and effectively an appointee of the U.S. Administration.</p> <p>This allocation of appointing power is comparable to historical contracts between U.S. firms and Caribbean countries that provided for arbitration (under the contract) with default appointing power exercised by to the U.S. Secretary of State. At present, the Commission proposes to give appointing power – in arbitrations by U.S. companies against Europe or by European companies against the U.S. – to an executive official who is connected to the U.S. Administration. <u>It is an open question why the EU would take this approach instead of an independent process in which judges were assigned to cases by an objective method such as lottery or rotation.</u></p> <p>These are not the only inappropriate dependencies of arbitrators. One may reasonably suspect – based on the economic incentives of arbitrators – that arbitrators also depend on senior gatekeepers in the arbitration</p>
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	<p>industry or on powerful governments that push treaties providing for investor-state arbitration. The resulting suspicions may operate in favour of some investors or states and against others.</p> <p><u>The essential problem arises from the decision not to have institutional safeguards of judicial independence in the final resolution of disputes about public law, public policy, and public finances.</u> Institutional safeguards are vital in this context because the disputes always affect third parties and the public. There is no compelling reason to use arbitrators instead judges to make the important decisions in investor-state arbitration.</p> <p>As an aside, it is important to highlight <u>a form of conflict of interest – so-called issue conflict – that is widespread in the system.</u> Issue conflict arises because arbitrators are allowed to work concurrently as lawyers in investor-state arbitration. Many arbitrators act regularly as arbitrators and lawyers and, presumably, often rule on issues that are of interest to a paying client in another case.</p> <p><u>It is impossible to know whether issue conflict has arisen in any particular case because many investor-state arbitrations are confidential.</u> Unless the arbitrator declares it, a party or member of the public will not be able to examine the arbitrator’s role as counsel in another case. Indeed, all of the cases arguably raise similar issues because all of them require the arbitrators to resolve jurisdictional issues such as the definition of “investment” and “investor”.</p> <p><u>In this respect, the absence of a basic institutional safeguard of independence puts all arbitrators who work as arbitrators and lawyers in the system in a conflict-of interest.</u></p> <p>The Commission does not discuss these and other problems arising from the institutional structure. The Commission does not avert to</p>
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	<p>the role of institutional safeguards as a basis for judicial independence. Instead, the Commission focuses on the conduct of individual arbitrators. This is a bad sign. It signals that <u>none of the Commission’s reforms will address the systemic taint that follows from a process that lacks integrity in this basic way.</u></p>
<p><i>PDF version, page 13:</i> “Most existing investment agreements do not address the issue of the conduct or behaviour of arbitrators. International rules on arbitration address the issue <u>by allowing the responding government or the investor to challenge the choice of arbitrator</u> because of concerns of suitability.”</p>	<p>Clearly, the Commission is not proposing to adopt the necessary institutional safeguards of independence other than some very limited measures.</p> <p>For example, the provision for conflict-of-interest challenges is a re-packaging of existing processes in ICSID arbitration. It allows the Secretary General of ICSID, an executive official, to decide conflict-of-interest challenges against arbitrators. This offends judicial independence. <u>A judicial process requires that judges make the decisions and, in turn, that a conflict-of-interest challenge to a judge is decided by other judges.</u></p> <p>A related problem is that there are no rules of procedure in investor-state arbitration that reproduce the independence and fairness of a judicial proceeding. For reasons of independence and fairness, the rules must be applied by judges. Such rules could be included in a new treaty like the CETA but they have not been.</p>

<p><i>PDF version, page 13:</i> “The EU aims to establish <u>clear rules to ensure that arbitrators are independent and act ethically</u>. The EU <u>will introduce specific requirements in the TTIP on the ethical conduct of arbitrators</u>, including a code of conduct. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes <u>procedures to identify and deal with any conflicts of interest</u>.”</p>	<p>The utility of a code of conduct depends on its content and enforcement. For example, will the Commission’s proposed code be applied by an independent judge or an executive official? Will it preclude the dual roles of arbitrator as lawyers? Unfortunately, the Commission has not released any code of conduct or, it appears, included a code in the CETA.</p> <p>If the Commission could not manage a code of conduct in a treaty with Canada (whose own Agreement on Internal Trade has a code of conduct written into its mechanism for person-to-government arbitration), why would one think that the Commission would include a code in the TTIP?</p> <p><u>Most importantly, a code of conduct, even if binding, is not a substitute for other institutional safeguards of judicial independence.</u></p>
<p><i>PDF version, page 13:</i> “Failure to abide by these ethical rules will result in the removal of the arbitrator from the tribunal. For example, if a responding state considers that the arbitrator chosen by the investor does not have the necessary qualifications or that he has a conflict of interest, <u>the responding state can challenge the appointment</u>. If the arbitrator is in breach of the Code of Conduct, he/she will be removed from the tribunal. In case the ISDS tribunal has already rendered its award and a breach of the code of conduct is found, the responding state or the investor can request a reversal of that ISDS finding.”</p>	<p><u>The integrity of any process for conflict-of-interest challenges depends on who decides the challenges</u>. The Commission does not mention here that, <u>in the Canada-EU CETA (Article x-25(10)), the challenges will be decided by an executive official</u>, the Secretary-General of ICSID.</p> <p>This highlights the lack of integrity in investor-state arbitration. In essence, it re-assigns judicial power from courts to a mix of for-profit arbitrators and executive officials. These other actors do not have the claims to institutional independence of a judge who is subject to the usual safeguards.</p>
<p><i>PDF version, page 13:</i> “In the text provided as reference (the draft EU-Canada Agreement), the Parties (i.e. the EU and Canada) have agreed for the first time in an investment agreement to include <u>rules on the conduct of</u></p>	<p><u>The Commission should have released the rules of conduct as part of the consultation.</u></p>

<p>arbitrators, and have included the possibility to improve them further if necessary. <u>In the context of TTIP these would be directly included in the agreement.</u>”</p>	
<p><i>PDF version, page 12:</i> “Some have also expressed concerns about the qualifications of arbitrators and that they may not have the <u>necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection....</u>”</p> <p><i>PDF version, page 13:</i> “As regards the qualifications of ISDS arbitrators, the EU aims to set down detailed requirements for the arbitrators who act in ISDS tribunals under TTIP. <u>They must be independent and impartial, with expertise in international law and international investment law and, if possible, experience in international trade law and international dispute resolution.</u> Among those best qualified and who have undertaken such tasks will be <u>retired judges</u>, who generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues.”</p>	<p>First, the Commission identifies a legitimate concern that arbitrator lack “the necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection.” Yet it responds by continuing the usual practice of requiring arbitrators to have expertise in international law, international investment law, and international trade law. <u>The Commission does not institute any requirement for qualifications in the affected area of decision-making, such as environment, health or consumer protection.</u></p> <p>Second, the Commission suggests that retired judges may be well-suited to the role of investor-state arbitrator or may have relevant experience in deciding policy disputes. <u>Yet the Commission does not take the logical step of requiring all arbitrators to be judges and to have relevant policy expertise.</u></p> <p>Third, the Commission does not mention the problem that <u>a retired judge who actively seeks re-appointment as an arbitrator is affected by the same economic interest that gives rise to appearances of bias among other arbitrators.</u></p> <p>Fourth, <u>a statement that someone will be independent is obviously not a substitute for institutional safeguards of their independence.</u> Thus, a declaration by states, an arbitrator, or anyone else that arbitrators “must be independent and impartial” is of little value where the institutional structure creates reasonable suspicions of bias.</p>

<p><i>PDF version, page 13:</i> “The EU also aims to set up a <u>roster</u>, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson. The purpose of such a roster is to ensure that the EU and the US have agreed to and vetted the arbitrators to ensure their abilities and independence. In this way the responding state chooses one arbitrator and has vetted the third arbitrator.”</p>	<p>A roster could be a key element of a project to judicialize investor-state arbitration. Yet the Commission’s proposal for a roster has fatal flaws.</p> <p>First, <u>we are told little about the roster</u>. This makes it impossible to evaluate its effectiveness to ensure independence and proper qualifications. Will the roster members have secure tenure and a set salary? Will they be barred from work as a lawyer during and after their service on the roster?</p> <p>Second, <u>what we are told in the Canada-EU CETA is not reassuring. The roster will apply to presiding arbitrators only</u>. This leaves it open to states, investors, and appointing authorities to choose unqualified individuals who have not been vetted and have inappropriate economic incentives.</p> <p>Also, <u>an executive official</u> (the Secretary General of ICSID) <u>will choose who is appointed from the roster to individual cases</u>. As a result, the roster is not judicial. It lacks an objective method of case assignment.</p> <p>Further, <u>the Secretary General of ICSID will be able to appoint arbitrators from outside the roster</u> if the states parties to the treaty have not agreed on the roster members. In the NAFTA context, a similar roster of presiding arbitrators was proposed but left un-filled and then never used. This is a major loophole in the CETA.</p> <p>Thus, even based on what little we know about the roster, it will not address the lack of institutional independence in the system.</p>
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General response to Question 9: Reducing the risk of frivolous and unfounded cases

*Question: Please provide your views on [the Commission’s proposed] 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.*

The Commission’s approach leaves it to arbitrators – who would earn significant income if the claim proceeded – to weed out frivolous claims. Obviously, frivolous claims should be vetted by someone who does not have a financial stake in the outcome of the decision to vet. The Commission has also not addressed similar issues that arise in the context of parallel treaty proceedings.

The Commission’s provision for cost-shifting is helpful but will not affect the key cases: those in which a deep-pocketed company brings a claim involving large sums. Whether frivolous or not, such cases create pressure on governments to settle – including by regulatory chill – to avoid even a low risk of potentially vast fiscal liability. This is an essential feature of the special rights and advantages of foreign investors in investor-state arbitration.

Specific response to Question 9: Reducing the risk of frivolous and unfounded cases

Statements in the consultation text	Comments
<p><i>PDF version, page 14: “As in all legal systems, cases are brought that have little or no chance of succeeding (so-called “frivolous claims”). Despite eventually being rejected by the tribunals, such cases take up time and money for the responding state. There have been concerns that protracted and frequent litigation in ISDS could have an effect on the policy choices made by states.”</i></p>	<p>The Commission is right to highlight this concern. That said, it is not always the case, as suggested by the Commission, that frivolous claims are rejected by tribunals.</p> <p>Further, <u>the rationale for weeding out frivolous claims also applies to parallel treaty proceedings</u>. In many cases, arbitrators have taken advantage of ambiguous treaty language to allow parallel claims. As discussed under Question 7 above, the Commission has not addressed this problem.</p>
<p><i>PDF version, page 14: “Another issue is the cost of ISDS proceedings. In many ISDS cases, even if the responding state is successful in defending its measures in front of the ISDS tribunal, it may have to pay substantial amounts to cover its own defence.”</i></p>	<p>The Commission is right to highlight the excessive cost of investor-state arbitration. The costs are partly the result of arbitrators’ expansive interpretations. The weeding out of frivolous claims does not address this larger issue.</p>

<p><i>PDF version, page 14:</i> “Under existing investment agreements, there are generally no rules dealing with frivolous claims.”</p>	<p>This is misleading. Any adjudicator has an ability to weed out frivolous claims. It is not a new step to give tribunals this power. The only novelty of the Commission’s approach, following the U.S. lead in other treaties such as CAFTA, is to include an express mechanism for reviewing frivolous claims.</p> <p>Incidentally, this reform highlights that virtually any procedural or substantive problem in the system can be addressed by express language in the treaty.</p>
<p><i>PDF version, page 14:</i> “Some arbitration rules however do have provisions on frivolous claims. As a result, there is a risk that frivolous or clearly unfounded claims are allowed to proceed. <u>Even though the investor would lose such claims</u>, the long proceedings and the implied questions surrounding policy can be problematic.”</p>	<p><u>It is highly doubtful that all frivolous claims have been lost by the investor.</u> For example, did the investor lose in the <i>St. Mary’s</i> NAFTA arbitration against Canada, which was settled after the federal government argued that the claimant had manufactured its U.S. nationality and had no right to sue? In the settlement of that case, a provincial government paid \$15 million to <i>St. Mary’s</i> to settle all ongoing and future litigation in the dispute.<sup>17</sup> If the NAFTA claim was frivolous, as the federal government argued, it certainly was also fruitful for the investor.</p> <p>The arbitrators have taken an expansive approach to many issues in the treaties. This raises the question of what one means by frivolous. It also highlights the link between the arbitrators’ extension of their power into new areas and, as the Commission puts it, “implied questions surrounding policy”.</p>
<p><i>PDF version, page 14:</i></p> <p>“The EU will introduce several instruments in TTIP to quickly dismiss frivolous claims.</p> <p><u>ISDS tribunals will be required to dismiss</u></p>	<p>This is a weak response to the in-built structural bias in favour of claimants and, specifically, frivolous claims. First, tribunals will not be “required” to dismiss claims; they will only be given an express power and process to do so.</p>

<sup>17</sup> Government of Ontario, press release (Ministry of Municipal Affairs and Housing, 8 March 2013).

<p>claims that are obviously without legal merit or legally unfounded. For example, this would be cases where the investor is not established in the US or the EU, or cases where the ISDS tribunal can quickly establish that there is in fact no discrimination between domestic and foreign investors. This provides an early and effective filtering mechanism for frivolous claims thereby avoiding a lengthy litigation process.”</p>	<p>Second, <u>the Commission gives arbitrators the power to decide whether a case in which they will earn significant income should go ahead. This creates an obvious conflict-of-interest.</u> Frivolous claims should be vetted by one who has no financial stake in the outcome of the decision to vet.</p>
<p><i>PDF version, page 14:</i> “To further discourage unfounded claims, the EU is proposing that the losing party should bear all costs of the proceedings. So if investors take a chance at bringing certain claims and fail, they have to pay the full financial costs of this attempt.”</p>	<p>This is a positive development, especially due to the growth in speculative financing of claims by outside actors. On the other hand, it will not affect the most important scenario where a deep-pocketed company brings a claim involving large sums. Whether frivolous or not, <u>such cases always create pressure on the state to settle – including by regulatory chill – to avoid even a low risk of massive financial liability.</u></p>

General response to Question 10: Allowing claims to proceed (filter)

*Question: [W]hat are your views on the use and scope of such filter mechanisms in the TTIP agreement?*

The Commission’s filter mechanisms, following the U.S. lead, are positive. However, there is no principled reason to defend the right to regulate for the financial sector only. Joint screening of claims by relevant regulators in the host state and home state should be available for all claims. This would put a useful check against abuse of arbitrator power, especially since the Commission plans to rely on for-profit arbitrators and does not affirm the right to regulate effectively. The filter mechanisms are also limited because they require the consent of both states parties. They are not a substitute for a clear and unequivocal statement of the state’s right to regulate in the treaty.

Specific response to Question 10: Allowing claims to proceed (filter)

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 15:</i> “The majority of existing investment agreements privilege the original intention of such agreements, which was to <u>avoid the politicisation of disputes</u>, and therefore do not contain provisions or mechanisms which allow the Parties the possibility to intervene under particular circumstances in ISDS cases.”</p>	<p><u>Investor-state arbitration is not depoliticized when an executive official has the power to decide who should be the judge in a particular case.</u> This allows the priorities of the executive to infiltrate the adjudicative process. Depoliticization requires a process that is independent of the executive (and other powerful actors).</p> <p>At present, investor-state arbitration depends on the actual or perceived preferences of executive officials. <u>All the arbitrators are chosen either by executive officials directly or by the disputing parties against the backdrop of executive appointing power.</u></p>
<p><i>PDF version, page 15:</i> “The EU like many other states considers it <u>important to protect the right to regulate in the financial sector</u> and, more broadly, the overriding need to maintain the overall stability and integrity of the financial system, while also recognizing the speed needed for government action in case of financial crisis.”</p>	<p>Presumably the Commission considers it important to protect the right to regulate beyond the financial sector. Why has it not allowed joint screening, by the relevant regulators in the host and home states, for all claims by investors?</p>

General response to Question 11:

Guidance by the Parties (the EU and the US) on the interpretation of the agreement

*Question: [P]lease provide your views on [the Commission’s proposed] 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?*

It should be standard practice to allow submissions and agreed interpretations by the states parties, using express terms in the treaty. That said, neither mechanism is reliable to ensure uniformity and predictability.

In the NAFTA context, where these mechanisms have a long history, tribunals have decided against the joint submissions of states parties. Also, agreed interpretations have been used only twice under NAFTA; in a third instance, a proposed interpretation was blocked by one state party. Thus, the mechanisms have proven to be a limited response to the lack of uniformity and predictability and to other concerns about arbitrator decision-making.

Most importantly, neither mechanism addresses the lack of independence, fairness, and balance in investor-state arbitration.

Specific response to Question 11:

Guidance by the Parties (the EU and the US) on the interpretation of the agreement

Statements in the consultation text	Comments
<p><i>PDF version, page 15-16:</i> “When countries negotiate an agreement, they have a common understanding of what they want the agreement to mean. However, there is a risk that any tribunal, including ISDS tribunals interprets the agreement in a different way, upsetting the balance that the countries in question had achieved in negotiations – for example, between investment protection and the right to regulate. This is the case if the agreement leaves room for interpretation.”</p>	<p>The Commission is right to highlight this issue. Yet <u>the Commission downplays the tendency of arbitrators to expand their power</u>. It has been common for arbitrators to adopt expansive approaches even in the face of relatively clear language in the treaty.</p> <p>This emphasizes the need to replace arbitrators with judges who are institutionally independent of a financial incentive to favour claimants, executive officials, senior gatekeepers, etc.</p>
<p><i>PDF version, page 16:</i></p> <p>“It is therefore necessary to have mechanisms which will allow the Parties (the EU and the</p>	<p>This is prudent in the face of unchecked arbitrator power. However, <u>neither mechanism is reliable to ensure uniformity and predictability</u>. Also, neither mechanism is new;</p>

<p>US) to <u>clarify their intentions</u> on how the agreement should be interpreted....</p> <p>The EU will make it possible for the non-disputing Party (i.e. the EU or the US) to intervene in ISDS proceedings between an investor and the other Party. This means that in each case, the Parties can explain to the arbitrators and to the Appellate Body how they would want the relevant provisions to be interpreted. Where both Parties agree on the interpretation, such interpretation is a very powerful statement, <u>which ISDS tribunals would have to respect</u>.</p> <p>The EU would also provide for the Parties (i.e. the EU and the US) to adopt <u>binding interpretations</u> on issues of law, so as to correct or avoid interpretations by tribunals which might be considered to be against the common intentions of the EU and the US. Given the EU’s intention to give clarity and precision to the investment protection obligations of the agreement, <u>the scope for undesirable interpretations by ISDS tribunals is very limited</u>. However, this provision is an additional safety-valve for the Parties.”</p>	<p>both have been a part of the U.S. approach since at least 1994.</p> <p>On submissions by the states parties, in the NAFTA context, tribunals in various cases have declined to adopt the shared interpretations of the affected states (i.e. the home and host state of the investor, or even all states parties).</p> <p>Second, the mechanism of agreed interpretations has been a limited way to manage the arbitrators’ power. In the NAFTA context, the mechanism has been used very rarely and has always left room for an arbitrator to avoid the intended effect in future cases.</p> <p><u>To make the process more credible and uniform, judges should be charged with interpreting and applying the treaties – including any agreed interpretations.</u></p> <p>Finally, the Commission’s statement that “the scope for undesirable interpretations by ISDS tribunals is very limited” is not credible. It reminds me of the king who sent the palace guard to defend against a sand storm. There are numerous examples of arbitrators’ taking advantage of treaty ambiguity in order to expand their power in questionable ways.</p>
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General response to Question 12: Appellate Mechanism and consistency of rulings

*Question: [P]lease 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.*

The idea of an appellate body is not new. It has been floated in the U.S. for at least 10 years but now appears to be a dead issue there. If the Commission was serious about an appellate body, why not insist on one in the Canada-EU CETA? Canada is a much weaker negotiating partner than the U.S.

Even if an appellate body could be negotiated, it would leave intact the role of for-profit arbitrators in deciding disputes. For this and other reasons, it would not address the lack of independence and fairness in the system. The arbitrators should be replaced with judges throughout the process with at least one level of appellate judicial review. Otherwise, one may have more uniformity and predictability that remains tainted by the lack of basic integrity in the decision-making process.

Specific response to Question 12: Appellate Mechanism and consistency of rulings

<b>Statements in the consultation text</b>	<b>Comments</b>
<p><i>PDF version, page 16: “In existing investment agreements, <u>the decision by an ISDS tribunal is final</u>. There is no possibility for the responding state, for example, to appeal to a higher instance to challenge the level of compensation or other aspects of the ISDS decision except on very limited procedural grounds. There are concerns that this can lead to <u>different or even contradictory interpretations</u> of the provisions of international investment agreements. There have been calls by stakeholders for a mechanism to allow for appeal to increase legitimacy of the system and to ensure uniformity of interpretation.”</i></p>	<p>The Commission does not mention that there is no possibility for review in any domestic or international court under the ICSID Rules. Instead, the arbitrators’ decisions are reviewed by a committee of three other arbitrators, all appointed by the World Bank President. The World Bank President is an executive official who is chosen primarily and effectively by the U.S. Administration. This challenge to judicial independence is a bigger problem than the lack of uniformity of interpretation.</p> <p>In any event, <u>the Commission could address both problems by replacing arbitrators with judges in both first-instance proceedings and appeals.</u></p>
<p><i>PDF version, page 17: “No existing international investment agreements provide for an appeal on legal issues. International arbitration rules allow for annulment of ISDS rulings under certain very restrictive conditions</i></p>	<p>The Commission is right to highlight the limited options for review of arbitrator decisions. As discussed earlier, the arbitrators’ powers are among the most profound of any adjudicator.</p>

<p>relating to procedural issues.”</p>	
<p><i>PDF version, page 17:</i> “The EU <u>aims to establish an appellate mechanism</u> in TTIP so as to allow for review of ISDS rulings. It will help ensure consistency in the interpretation of TTIP and provide both the government and the investor with the opportunity to appeal against awards and to correct errors. This legal review is an additional check on the work of the arbitrators who have examined the case in the first place.</p> <p>In agreements under negotiation by the EU, the possibility of creating an appellate mechanism in the future is envisaged. However, <u>in TTIP the EU intends to go further and create a bilateral appellate mechanism immediately through the agreement.</u>”</p>	<p>An appellate body would be a positive step. Yet it would not address the lack of independence and fairness in investor-state arbitration if the arbitrators were not replaced with judges throughout the process.</p> <p>The Commission has not obtained an appellate mechanism in the Canada-EU CETA. This was presumably an ideal context in which to introduce such a mechanism in anticipation of TTIP. <u>Why would one expect the Commission to deliver an appellate mechanism with the U.S. where it did not with Canada?</u></p>

*Response to Question 13 (General assessment)*

*Question: 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?*

The Commission’s approach has a few positive elements. Overall, it is a failure. The Commission does not affirm clearly and unequivocally the state’s right to regulate. It does not introduce actionable responsibilities for foreign investors alongside their elaborate rights. It does not require foreign investors to resort to domestic courts where the courts offer justice and are reasonably-available. In turn, the Commission’s approach discriminates in favour of foreign investors – by giving them a special status in their relationship to legislatures, governments, and courts – and against other rights holders and the public interest. The Commission takes positive steps on transparency but does not address the lack of institutional independence and procedural fairness in investor-state arbitration. In important respects, the Commission makes these problems worse.

*Question: Do you see other ways for the EU to improve the investment system?*

The clearest and most defensible step is to remove investor-state arbitration from the treaties. The exceptional use of arbitration to resolve disputes about sovereign conduct and access to public funds is flawed due to the lack of the usual safeguards of independence, openness, and fairness and the lack of balance in the allocation of rights and responsibilities. The Commission’s

proposed reforms take meaningful steps only on openness. They do little to address the other flaws and in important respects make them worse.

*Question: Are there any other issues related to the topics covered by the questionnaire that you would like to address?*

The consultation should have addressed the key question of whether to include investor-state arbitration in the TTIP. This flaw in the consultation was discussed at the outset of this comment.