



PROTECTING DIGITAL FREEDOM

Response to the ISDS consultation

European Digital Rights (EDRi)

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Question 1

Scope of the substantive investment protection provisions

Opinion on the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP.

The EC should exclude the ISDS from every trade agreement, in this case from the TTIP, as it is not necessary and detrimental for democracy, human rights and the rule of law.

Regarding the concept of investment, the European Commission (EC) uses the so-called “Salini criteria”^[1] in the EU-Canada agreement (CETA) as the basis of the definition, but the EC is neither clear nor precise and omits some characteristics, such as the “significant contribution for the host State’s economic development”.^[2]

First, the definition set forth is too broad, vague and subjective. It gives too much discretion to the Tribunal. Experience under the International Centre for Settlement of Investment Disputes (ICSID) shows how diverse interpretations of the notion of investment^[3] have left governments with no choice but to compensate foreign investors even when they had not made a sizeable investment within their frontiers.

Secondly, the text of reference incorporates a list of forms of investment, but it is not a closed list. Even the EC seems to recognise its lack of certainty because it adds a provision for ‘claims to money’, breaking the coherence of the text.

Thirdly, point d) of the definition of ‘covered investment’ does not clearly limit the application of the CETA in time. Point d) should end with “and always before the eventual termination of the Agreement”. This is particularly relevant if we put it in relation to Article X.18 of the leaked draft of the CETA of 21 November 2013, which states that in case of termination of the CETA, the latter “shall continue to be effective for a further period of 20 years” for the investments carried out before the termination.^[4] Any ‘survival clause’ should be deleted from the final text.

In short, the EC did not narrow the scope of the investment protection provisions, is not accurate and does not avoid vague expressions such as “assumption of risk” to serve as exclusive means to determine the existence of investments.

Concerning the definition of investor, it is also unsatisfactory. To avoid abuses, the EC requires undertakings to have substantial business activities before being able to resort to the Investor-state dispute settlement (ISDS). The EC does not define ‘substantial’, so many investors could be covered. Hence, that

measure is insufficient to avoid forum shopping, as evidenced in the case of Philip Morris Asia, which set up a subsidiary in Hong Kong to sue the Australian government under the ISDS agreement Hong Kong had with Australia.

As a result, protection should not be granted if the activities or instruments in question do not enjoy the same substantive protection under national law. Otherwise, foreign investors would have greater rights in comparison with national investors. The proposal does not offer any balance between the rights and obligations of foreign investors and put them in an advantageous position as compared to domestic investors. That gives the former a huge bargaining power before legislators, governments and courts. Governments do not even enjoy equivalent rights within the agreement, but are placed in a defensive position.

If the EC truly seeks to learn from “past treaty practice” and “avoid abuses”, as stated in the Consultation document, it must eliminate the ISDS from the TTIP. Otherwise, the aforementioned risks shall remain, to the detriment of the public interest.

Question 2

Non-discriminatory treatment for investors

Opinion on the EU approach to non –discrimination in relation to the TTIP? Please explain.

The objectives set forth by the EC are welcomed. However, the changes suggested by the EC fail to address the many loopholes of the non-discrimination clause.

On the one hand, the wording of the reference text regarding 'national treatment' is not specific enough as to exclude indirect or 'de facto' discrimination claims. Even if a measure does not directly discriminate between national and foreign investors, it can still be challenged by a foreign investor. If the investor can prove the measure in question has an equivalent effect to a directly discriminatory measure, it could challenge it. In other words, this broadens the scope of the investment protection provisions in TTIP. The wording proposed would confer ISDS arbitrators a far-reaching discretion to decide when a State measure is de facto discriminatory without no guarantees of independence or impartiality.

On the other hand, the Commission did not close a major well-known loophole, the most favoured nation clause. The wording suggested by the Commission is neither clear nor accurate. It seems to solve the problem for procedural rights, but not for substantive ones. In fact, companies would not only be able to use the substantive investment protection provisions in TTIP, but contrary to the EC's attempts, they would be able to cherry-pick protection from any other investment agreement the EU or EU Member States signed or will be signing.

Moreover, the EC incorporates Article XX GATT and Article XIV GATS to the text of reference so as to provide respondents with the right to invoke exceptions. As evidenced by the WTO case law in relation to the aforementioned Articles, these provisions impose a higher burden on states since they have to pass multiple tests in order to justify the measures adopted, namely, the fulfilment of legitimate objectives as well as the necessity and proportionality tests. Yet, the proposed exception provisions would fail to include the most used claims under ISDS mechanisms, i.e. 'expropriation' and 'fair and equitable treatment'. This becomes especially relevant once we acknowledge that "[f]ully 74 percent of "successful" investor claims under" US FTAs and BITs succeeded on the basis of 'fair and equitable treatment' breaches.[\[5\]](#)

Question 3

Fair and equitable treatment

Opinion on the approach to fair and equitable treatment of investors and their investments in relation to the TTIP.

Prior ISDS experience shows that case law on fair and equitable treatment has brought a shift in treaty practice, this standard should be clarified and narrowed.

The European Commission argues that a closed list of rights would solve the issues that may arise from a provision on fair and equitable treatment of investors and their investments. However, from the text provided one cannot infer it is a closed list. There is no limitation in the list proposed by the European Commission and the terms used are open-ended and vague. The list is drafted in a way that leaves much discretion to arbitrators to interpret it. Experience shows arbitrators interpret this type of provisions in the widest way possible, which undermines the right to regulate of the EU and the US on behalf of the public interest.

The EC wishes to limit the 'fair and equitable treatment' claims to only cover "breaches of a limited set of basic rights". However, companies like Hong-Kong-based company Philip Morris Asia^[6] and the US firm Lone Pine^[7] have brought their claims on this basis, arguing the 'manifest arbitrariness' of the respondent state. Both cases show how the clarifications provided by the EC do not offer much protection.

We welcome the intention of the EC not to consider the fair and equitable standard as a synonym of a 'stabilisation clause'. However, it is not clear what a tribunal should understand by the fact that the state cannot have made a "specific representation" to a foreign investor which could have "created a legitimate expectation". In other words, the EC is not precise enough in the text of reference provided as to exclude arguments as the one invoked by Lone Pine in its case against Canada pursuant to the NAFTA. In fact, Lone Pine argued that Canada's revocation to its 'right to mine for oil and gas' violated its 'legitimate expectation of a stable business and legal environment'.

Due to the risks and abuses committed pursuant to this standard, we consider the ISDS should be excluded from the TTIP.

Question 4

Expropriation

Opinion on the approach to dealing with expropriation in relation to the TTIP. Please explain.

The scope of the substantive provision is very broad. In fact, the suggested approach entails that foreign investors could sue the government when they are directly or indirectly expropriated, provided their profits are believed to be reduced by the actions of the latter.

In case of indirect expropriation, foreign investors are offered wide margin of manoeuvre to lodge a claim on the ground their profits are lower than expected. The basis for such kind of assertions is not clear because the definition provided for indirect expropriation is too broad. Accordingly, that would have a clear chilling effect over the measures adopted by legislators.

This is an open-ended right that could be very risky, indeed. As it is drafted, foreign investors are not solely given the right to be compensated for an indirect expropriation, but also a right to launch a claim over their 'investments'. The way in which 'indirect expropriation' is defined encompasses more than real property. It would include forms of intangible property, such as copyrights or even trade secrets. What is more, the notion provided goes beyond measures affecting property in a direct manner, since it includes the "right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure". As a result, foreign investors would be granted a compensation that would not be given if the claim was brought pursuant to the national laws of some of the EU Member States.

The Commission solely proposes a limit affecting the above-mentioned right, that is, foreign investors shall be entitled to enjoy protection unless the measures in question protect "legitimate public welfare objectives". Additionally, the text of reference also allows the affected investor to invoke that the measure in question is 'manifestly excessive' or discriminatory. The problem here is that ISDS arbitrators, whose expertise is generally related to investment and not to public welfare, would decide on what legitimate public welfare objectives are and whether or not measures are 'manifestly excessive'.

The Commission's proposal gives investors much stronger protection than Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR). Under Article 1 of Protocol 1 to the ECHR every natural or legal person is entitled to the peaceful enjoyment of his/her/its possessions. This "shall not, however, in any way impair the right of a State 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.” In these circumstances it is up to the states to decide what is “deem[ed] necessary”. However, under ISDS, the arbitrators would conduct the assessment.

Finally, throughout the Consultation document, we noticed the EC assumes that foreign investors shall have rights that deserve to be protected under the ISDS. However, the public is not requested to provide its input on why corporate rights should be addressed by the TTIP without matching obligations. Available evidence shows that companies infringe human rights at a global scale. Yet, corporate social responsibility is not included within the issues raised by the EC, which is worrisome.

In virtue of the above, we strongly urge the EC to not include ISDS in TTIP due to the risks exposed, whose gravity increases if we take into account that the US is a country embedded in a culture of litigation.

Question 5

Right to regulate

Opinion on the way the right to regulate is dealt with in the EU's approach to TTIP.

The inclusion of the ISDS within the TTIP would impair democracy, indeed. Legislative decisions would not be fully based on the interest of the population of the country, but would be constrained by the power of foreign investors. Even the mere fact of filing a case can have a chilling effect. E.g. Peru reversed its decision to regulate toxic waste and close a heavy metal smelter when US Renco Corporation launched an ISDS claim for \$800 million.^[8] In the EC's proposal there are not enough guarantees to prevent governments from enacting laws which would risk a claim by foreign investors that would damage the public purse.

In fact, compensation under TTIP is of a pecuniary nature and the amounts awarded are exorbitant. Whereas under the WTO state-to-state dispute settlement the remedy imposed is to bring the infringing State in conformity with the treaty, the punishment here is always monetary compensation. This is detrimental because not only damages awards can be significant, but costs of bringing an action as well. The fact that the losing party bears the costs is a way to limit speculation, but it is not enough, as evidenced in the Philip Morris Asia case (cf. question 3).

More precisely, the definition of the 'right to regulate' is vague and would contribute to create legal uncertainty. The reference text proposed by the EC does not expressly grant a general right to regulate, but solely "RECOGNIS[ES]" its existence for legitimate objectives. Such "recognition" solely appears in the Preamble of the reference text, which is not binding. Consequently, arbitrators could disregard its application.

Moreover, the right to regulate is solely an exception to investment protection. The right to regulate is limited to 'legitimate' objectives. The lack of clarification on what constitute a legitimate objective creates even more legal uncertainty. It is up to the arbitrators to decide how narrowly they interpret the exception. Experience shows that arbitrators follow a very broad interpretation of investor protection.

On the other hand, the proposed text does not ensure human rights will be protected. The mere referral to Article 14 GATS is not enough, as it replicates the flaws contained therein. For instance, Art. 14 GATS only mentions privacy as an exception to trade and investment rules, but not as a human right.

Finally, EDRi is highly concerned for the fact that the text provided does not guarantee the legisla-

tion to evolve in accordance with innovation, raising issues linked to copyright and patent law. This can be seen in the Eli Lilly case against Canada. Following a minor adjustment to Canadian patent law, to facilitate better access to medicine, the US pharmaceutical company Eli Lilly claimed \$500 million of damages in ISDS arbitration. Eli Lilly lambasted the Canadian patent policy framework for being “discriminatory, arbitrary, unpredictable and remarkably subjective”, and accused Canada of expropriation.

If a minor adjustment already leads to such accusations, bigger reforms will certainly be attacked. The chilling effect caused will prevent new models to evolve, getting a lock-down of existing and outdated legislation. For instance, the envisaged EU copyright reform to adapt it to the digital age could be at stake. If legislation cannot be changed in fear of high damages being imposed by ISDS tribunals, innovation will be clearly impaired.

Due to the wide discretion given to arbitrators and the lack of safeguards under the ISDS, we urge the EC to move aside from entering into an agreement which would impair or even nullify the enjoyment of human rights, innovation and would not solve the chilling effect described above.

Question 6

Transparency in ISDS

Views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have.

We welcome the EC's recognition that transparency is essential. However, such objective would not be fully achieved by importing the UNCITRAL rules on transparency. We welcome the nuances introduced in the text of reference, but encourage adopting more changes, as explained below.

In the Consultation notice, the EC does not refer to any restriction on the publicity and transparency of the process. However, it does so in the Consultation document and, more precisely, in the reference text attached.

Point 2 of Article x-33 (transparency of proceedings) of the text developed in the CETA mentions the documents which shall be disclosed to the public. Fortunately, the EC realised that Article 3(1) of the UNCITRAL rules expressly exclude exhibits from the documents to be made available to the public and solely requests the disclosure of a list of them. Accordingly, the EC included the disclosure of exhibits in point 3 of Article x-33. As long as this point is interpreted that way and is not dropped from the TTIP negotiations, we welcome the EC's proposal in this regard. Yet, we urge the Commission not to solely include exhibits, but to create an open-ended list. In order to do that, the EC could simply add "and any other documents presented to the proceedings" at the end of point 2 of the proposed Article. Otherwise, the disputing parties could easily circumvent the obligation of transparency contained therein by submitting documents under different labels to those mentioned in Article 3 of the UNCITRAL rules.

Article 7 of the UNCITRAL rules include exceptions empowering tribunals to block the publication of documents related to a large variety of measures. By incorporating this article, arbitrators would be entitled to still block the access to documents or restrict public hearings so as to "protect the integrity of the arbitration process". (cf. Article 7.7 of the UNCITRAL rules). In the same vein, Article 4.5 of the UNCITRAL rules state that "[t]he arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party". Such wording gives arbitrators a wide margin of discretion, whose limits are not clarified by the EC and may lead to abuses. For instance, Article 7.5 of the UNCITRAL rules would permit the respondent (i.e. the EU or the US) not to disclose information or documents that could be considered to be "contrary to its essential SECURITY interests." Point 6 of Article x-33 of the text proposed by the EC goes in line with it but is more confusing and ambiguous than the former. It omits the word

“security”, and broads the scope of the provision by making the laws of the State in question to apply to “confidential or protected information”. Who is going to make that balance between national security interests, for instance, and transparency?

In addition, Article 7.7 of the UNCITRAL rules would allow ISDS arbitrators to apply analogy to enlarge the list of exceptions contained therein. Therefore, the expression “or in comparably exceptional circumstances” should be expressly excluded from application by the EC.

On the other hand, transparency in other aspects of the ISDS, such as the appointment of arbitrators, are not included in the UNCITRAL rules. Furthermore, the fact that the TTIP negotiations are not transparent themselves may confront the honourable aim pursued by the EC.

Finally, the EC recognises in the Consultation notice that the aforementioned rules shall be subject to negotiations with the US, which means that the EC will probably have to make concessions to the detriment of its original proposal. For instance, we would like to remind that the UNCITRAL rules are applicable as of April 2014 unless otherwise agreed by the Parties to the agreement (cf. Article 1(1) of the UNCITRAL rules on transparency). EDRi believes that any promise that such a rule would be applied after the possible adoption of TTIP is entirely devoid of credibility.

Question 7

Relationship to domestic courts

Views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP.

Please indicate any further steps that can be taken.

Please provide comments on the usefulness of mediation as a means to settle disputes.

The EC's proposal has the effect of promoting ISDS to the detriment of national courts. Alternative dispute resolution (ADR) has proved to be efficient in many cases. However, ISDS does not offer the same guarantees as the latter (e.g. the need for the award to be recognised or enforced by a national court) or the safeguards embedded in the judiciary. In other words, it can be used as a means to circumvent judicial systems. This has been experienced by Ecuador. In February 2011, a court of Lago Agrio (Ecuador) condemned the US oil company Chevron to pay \$9.5 billion allegedly for environmental and social harms to indigenous people in the Amazon. In March 2014, the US District Court for the Southern District of New York declared the Ecuadorian ruling unenforceable in the US, allegedly for fraud. Currently, the dispute has brought to the investor-state dispute settlement established under the BIT between Ecuador and the US. Chevron argues that its right to fair and equitable treatment has been violated and is thus seeking compensation.^[9] In other words, an ISDS can be misused and be a means to evade justice. Arbitrators themselves have already recognised this threat. In the words of Mr. Juan Fernández-Armesto, "[w]hen I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."^[10]

In fact, whereas national legal systems are ruled by the principle of separation of powers, the ISDS system is neither independent nor impartial. ISDS systems do not provide institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators are not guaranteed.

The judiciary must follow rules regarding procedural fairness, such as the legal standing of those whose rights or interests are affected by the outcome of the case. Under the ISDS system, undertakings can circumvent national courts remedies since there is no

need to exhaust domestic remedies in order to resort to the ISDS. Under the ISDS the requirement to exhaust local remedies is waived, indeed. Accordingly, the Commission's assertion that the ISDS favours national courts is dubious. Actually, once an investor uses the ISDS, it cannot bring an action before a national court afterwards. That means that the arbitral awards acquire the force of res iudicata without the procedural or material guarantees we can find under national and international legal systems.

Finally, we welcome the EC's initiative to encourage mediation. However, any mediation mechanisms should ensure both institutional and personal safeguards are in place.

In virtue of the above, the EC should drop the ISDS from its TTIP agenda and implement a state-to-state dispute resolution mechanism.

Question 8

Arbitrator ethics

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?

As previously stated, we encourage the EC to drop the adoption of an ISDS.

The proposal of the EC to adopt a binding code of conduct for arbitrators and a set of qualifications' requirements could be helpful, but not enough to remedy the flaws of ISDS systems in this regard, namely the flagrant lack of conventional institutional safeguards for independence and accountability.

First, arbitrators usually have a private-law background and have been involved in prior commercial and investment cases, being thus predisposed and biased to the arbitration.

Secondly, the exorbitant compensatory sums awarded are a high incentive to accept "frivolous and unfounded cases", following the wording used by the EC.

Thirdly, the lawfulness of the appointment of arbitrators is highly questionable. Each party chooses one arbitrator and the third one is appointed by the Secretary General of ICSID if the parties do not reach an agreement. The Secretary-General of ICSID also decides on conflicts of interest. It is worth noting that the ICSID Secretary-General is appointed by the President of the World Bank, who is himself appointed under the influence of the US Administration.

Regarding the eventual appeal mechanism and in view of the current ICSID rules, the President of the World Bank appoints the three arbitrators in appeal cases. ISDS therefore gives the US an unfair advantage.

More precisely, the Consultation document does not provide a set of provisions which would be included in the code of conduct. It does not even provide guidance on the content the EC would like to see included therein. Likewise, the proposal does not foresee any guarantees of enforcement. It even confers a margin of two years to put it into place after the entry into force of the trade and investment agreement, without explaining what would happen in the transition.

Once again, the EC is assuming they will adopt a credible, complete and enforceable code as well as comprehensive qualification requirements, without giving any safeguards or hints on its position. It is neither clear what the position of the US would be.

In sum, the proposal on arbitrator ethics is very lax. Until a finalised code is presented to us, we cannot form a full opinion on it.

Question 9

Reducing the risk of frivolous and unfounded cases

Views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

The approach chosen by the EC to reduce the risk of frivolous and unfounded case leaves many questions behind and, unfortunately, does not solve the problems raised. EDRi once again emphasises the need to exclude the ISDS from TTIP .

To begin with, the texts of reference do not provide a definition for “unfunded” or “frivolous” claims, which creates legal uncertainty and gives wide discretion to arbitrators to decide what frivolous or unfounded cases are. Regarding “frivolous” objections, for instance, the reference text presumably allows a party to lodge them in the “manifest” absence of legal merits. Conversely, most of the claims will not be considered as “frivolous” or “unfounded” because they would not actually violate the vague and ambiguous language of the agreement. In other words, many cases might not be frivolous or unfounded under the rules put in place, but the legal merit is still dubious. If the TTIP negotiations do not result in a more accurate and clearer text, the risk of frivolous and unfounded cases will not be reduced.

In addition, we disagree with clause 5 of the proposed Article x-29 when it sets forth that “the Tribunal shall ASSUME the alleged facts to be true”, wording which is also included in clause 1 of Article x-30. The aforementioned claims and objections need to be reviewed in an impartial and independent way, not surmising the veracity of the facts, unless the parties provide sufficient, lawful and adequate evidence to prove the facts alleged.

Moreover, the EC stated that the EU wishes to introduce measures to “quickly dismiss frivolous claims”. Yet, arbitrators have a personal financial incentive not to dismiss claims on this basis.

Other agreements included these preliminary remedies, but failed to encourage the Parties to the agreements to use it.^[11] The EC further proposes to include a provision stating that “the losing party should bear all costs”. While that can indeed have a deterrent effect, the provision proposed, Article x-36 (final award), once again gives wide discretion to the arbitrators to decide when the apportionment of the costs is unreasonable and thus serve as an exception to the arbitration costs’ rule mentioned in the Consultation.

None of the measures proposed are sufficient, as evidenced by previous experience under other trade and investment agreements. In fact, such mechanisms have not helped reducing the number of disputes under an ISDS. Contrary to the wishes of the EC, the number of disputes has grown from fewer than 50 cases between 1950s and 2000 to 514 known cases between 2000 and 2012.^[12]

Question 10

Allowing claims to proceed (filter)

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?

The objective set by the EC in this regard is to be welcomed, but the means deployed are not sufficiently adequate to reduce costs and increase regulatory autonomy of the EU or the US. In the following lines we explain why:

First, the filter mechanism proposed has a very limited scope as it solely focuses on financial aspects. In this sense, the text provided in the annex continuously refers to other Articles whose content is unknown since they are not included in the Consultation document. Such absence prevented us to provide a more complete analysis in that regard. What is clear is that other investor-claims are not included. Here, the EC is giving more importance to financial stability measures, forgetting about other public interest measures, such as those related to the protection of human rights or the environment.

According to the text of reference, in order to filter an undeserving claim, the governments would have to demonstrate that the public measure challenged by investors was taken for “prudential reasons”. That sets forth an additional legal burden for the governments because they would be forced to further justify the validity of the legislation.

The EC should acknowledge that this also means that the legislation shall pass the scrutiny of an opaque arbitration process. Arbitrators shall be given an enormous power to bindingly review executive, legislative and judicial decisions. No safeguards are put in place. For instance, the text of reference establishes that if the disputing parties do not agree otherwise, the arbitrators will be appointed by the Secretary-General of the ICSID from the names contained in a list that will be created by virtue of another article whose content is not provided. Such measure is worrisome.

Finally, the filter proposed is dependent on other parties and does not help against the chilling effect of anticipated cases or threats to sue the State in question.

Question 11

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

Views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance. Are these elements desirable, and if so, do you consider them to be sufficient?

In order for the tribunal not to interpret the treaty in a way different from the original intentions of the Parties (i.e. the EU and the US), the EC proposed two solutions.

The first one entitles the non-disputing party to intervene in the proceedings. In the case both the US and the EU agree on the interpretation of the provision under scrutiny, the EC says the “ISDS tribunals would have to respect” it. However, “to respect” is not a synonym of “to follow” or “to be bound by” it. In other words, arbitrators would be able to find ways to circumvent their interpretations.

What is more, we find another problem as regards the timing. On the one hand, the text of reference is not sufficiently clear as to the concrete procedural moment in which the non-disputing Party would be entitled to intervene, using vague words like “or promptly after”, “may” or “reasonable opportunity”. How compatible would this solution be with mediation (cf. question 7)? On the other hand, this solution is risky. The original intentions of the Parties could have changed over time. The interpretation agreed by the Parties in the proceedings in question could respond to various interests which may differ from the original intentions of the Parties in the negotiations and could be inconsistent under the circumstances of other cases.

The second solution allows the Parties to issue binding interpretations on the legal matters of a provision to “correct or avoid interpretations by tribunals” “which might be considered to be against the common intentions of the EU and the US”. Both the wording of the reference text and the open way in which such proposal is drafted are troublesome.

First, it seems that the executives of both the EU and the US would have a similar role as the Advocate General has before the European Court of Justice, but with no guarantees whatsoever. The executives will not even be independent themselves because they will depend on the other Party’s willingness to cooperate. Secondly, the proposed solution triggers the democratic decision-making process. This means that the executive will interpret the treaty provisions and not the legislator. Furthermore, national supreme courts are embedded in a constitutional and legal culture and tend

to respect the legislator's intentions. Conversely, experience under the North American Free Trade Agreement (NAFTA) shows this mechanism is rarely used and arbitrators have barely taken such interpretations into account. ISDS tribunals are mostly constituted by foreign arbitrators and have multiple motivations to use a broad interpretation of the texts.

Even under the best of the intentions, the EC does not propose an enforcement mechanism for the "binding interpretations" on arbitrators. The text of reference limits the use of this measure to situations in which "serious concerns arise"; a Committee "may recommend the adoption of interpretations" to another Committee set up under the CETA, which has the ultimate word to decide if an interpretation will have a binding effect and the date in which it will be binding. On this last point, such draft is not clear as to the application of the interpretations in time. For instance, would retro-active application be allowed?

Question 12

Appellate Mechanism and consistency of rulings

Views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

If we compare the WTO resolution system with the ISDS, we realise that foreign investors are given the status of sovereign nations, being entitled to privately enforce a public treaty. In this sense, the right conferred to foreign investors is not reciprocal for the Parties to the TTIP; they are only offered the defence position. We thus encourage the EC to replace an ISDS mechanism for a state-to-state dispute settlement.

Unless otherwise agreed by the Parties later on, the ICSID rules would apply. There is no certainty whether this will happen and the outcome is dependent on both Parties.

Under the ICSID rules there is no appeal available, as the EC seems to acknowledge. The awards issued by ISDS tribunals have the same status as final judgements of national courts. There is only a mere possibility of annulment, whose grounds to seek it are extremely limited. Following the ICSID rules, the three arbitrators would be appointed by the President of the World Bank, who, in turn, is appointed by the President of the United States. Interestingly enough, the US has never lost an ISDS case, as stated by the U.S. Trade Representative.^[13] “In our current negotiations, we are working to expand upon this approach to ISDS”, he added. Such statements should worry and alarm the EC.

In accordance with the reference texts, other arbitrators would decide on the basis of the same broken rules of the ISDS system. The proposal of the Commission is vague and ambiguous. “[I]n TTIP the EU intends to go further and create a bilateral appellate mechanism through the agreement”, the EC stated in the Consultation document. However, the Articles provided as reference are inconsistent with the purported goal of the EU.

The text developed in the CETA sets forth a possibility to establish a forum “to CONSULT [...] whether, AND IF SO, under what conditions, an appellate mechanism COULD be created”. With this approach, the EU would end up as with the Central American - Dominican Republic Free Trade Agreement (CAFTA-DR). Even if the latter included a binding provision to establish an appeal mechanism within three months after the entry into force of the CAFTA-DR (cf. Annex 10-F)^[14], such commitment has not been materialised yet. In sum, lack of credibility of the intentions of the Parties in this type of agreements is thus considerable.

In conclusion, the draft proposed by the EC does not solve the issues raised. It offers neither a solution nor a real appellate review. In fact, "Article XX (award)" solely creates a mechanism in which an "Appellate Body" issues a "REPORT" in which it may "modify or reverse" the award of the Tribunal. Nevertheless, it is not clear whether the findings of the Appellate Body would be binding on the Tribunal since the Appellate Body shall refer the case back to the original Tribunal. Furthermore, it is not clear whether the Appellate Body could hear the disputing parties before issuing its report. Only the Tribunal, if "appropriate", shall allow that possibility to the disputing parties, with the effect that they may persuade the Tribunal not to adopt the Appellate Body's findings.

Question 13

The 'open' question

Assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US. Do you see other ways for the EU to improve the investment system? Are there any other issues related to the topics covered by the questionnaire that you would like to address?

In both the Consultation document and Consultation notice, the European Commission makes challengeable assumptions. The EC seems to replicate many of the flaws evidenced in previous trade agreements. Although it conveys honourable objectives, its proposal is not as innovative as it claims to be.

First, the need of an ISDS in the TTIP is not justified. The public is not aware of the purposes for which this public consultation is going to be used, which undermines its value and adds more uncertainty to the whole TTIP process. The EC assumes the ISDS is necessary to encourage investment, but stating that "Europe's prosperity depends in large part on foreign investment" is not a valid justification. Brazil is a clear example that policy alternatives are available for the EU: even if no BIT has entered into force^[15], it stills widely attracts foreign investment.^[16]

Secondly, the EC does not clarify the impact of the CETA on the TTIP negotiations. It just implies that the CETA and the TTIP will have a similar drafting. Yet, since the reference texts are solely illustrative and do not represent a final draft of the actual agreements, the public cannot properly address the issues raised by the Commission. The lack of transparency on the TTIP negotiations has a lot to do with that.

Thirdly, the ISDS is a flawed mechanism, putting the rule of law principle at risk. The proposed text does not solve the problem of lack of conventional institutional safeguards for independence and impartiality of arbitrators, harmful incentives and risk for the right to regulate (cf. questions 5, 7 and 8), indeed. Since Article 207 TFEU gives an exclusive competence on direct foreign investment to the EU, adding the ISDS to the TTIP would create a lock-in for EU Member States. What is more, the ISDS gives the US and US companies a clear and unjustifiable advantage (cf. question 12). Hence, the EU should not only NOT include ISDS in TTIP, but also ensure that existing ISDS agreements with the US are terminated, in line with paragraph 1 of Article X.04 (termination) of the leaked CETA draft.^[17]

On the other hand, in the Commission's proposal, the rights of investors trump human rights and threaten our privacy and the reform of copyright and patent law (cf. question 5).

The EU aims to create a global standard. Presently, a minority of foreign investments is covered by ISDS; after ISDS agreements between the major capital exporting countries, a majority of global foreign investments would be covered by ISDS. This seems unrealistic and dangerous. To honour its values and comply with the Treaties, the EU has to acknowledge the system's fundamental flaws and act accordingly. The EU should endeavour to abolish and not strengthen this system. In doing so, the EU would give global leadership in the debate and create room to strengthen alternatives.

Finally, we kindly ask the European Commission to take into consideration the responses to the present consultation, retracting from statements like the one made by the Chief of Cabinet of European Trade commissioner Mr Karel de Gucht at the Forum for Agriculture on 1 April 2014, when he stated that "a public consultation is not the same as a referendum. It's not so that if you have 60 contributions say 'away with ISDS' that then we are going to do away with ISDS". If the EC does not set that view aside, it will undermine the rights of the EU citizens and will not succeed in defending the public interest and common good for the EU.

- [1] Cf. The Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco
- [2] <http://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/>
- [3] [https://coursewebs.law.columbia.edu/coursewebs/cw_14S_LAW_L8133_001.nsf/0f66a77852c3921f852571c100169cb9/A48182E48387550C85257C700079FC8C/\\$FILE/Notion+of+Investment+Cheatsheet.pdf?OpenElement](https://coursewebs.law.columbia.edu/coursewebs/cw_14S_LAW_L8133_001.nsf/0f66a77852c3921f852571c100169cb9/A48182E48387550C85257C700079FC8C/$FILE/Notion+of+Investment+Cheatsheet.pdf?OpenElement)
- [4] http://eu-secretdeals.info/upload/COM-doc-CETA_-_investment-protection-newText-Nov-21-2013_clean.pdf
- [5] <http://www.citizen.org/documents/MST-Memo.pdf>
- [6] Case brought against Australia against its tobacco plain packaging act under the Australia-Hong Kong BIT <http://italaw.com/sites/default/files/case-documents/ita0665.pdf>
- [7] Case brought under the NAFTA on behalf of a Canadian enterprise they had set up in Canada. The claim was brought against Canada for 'arbitrarily' revoking its 'right to mine for oil and gas'. <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>
- [8] <http://justinvestment.org/2012/04/fact-sheet-la-oroya-peru/>
- [9] <http://www.chevron.com/ecuador/>
- [10] <http://globalarbitrationreview.com/journal/article/30399/stockholm-arbitrator-counsel-double-hat-syndrome>
- [11] <https://groups.google.com/forum/#!topic/canada-eu-ceta/ZWMCxkXXb4g>
- [12] http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf
- [13] <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>
- [14] http://www.sice.oas.org/trade/cafta/caftadr_e/chapter6_12.asp#Annex10-F
- [15] http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf
- [16] <http://www.deloitte.dbbrazil.com.br/show.aspx?idCanal=Tap1ogfxsUipt3uYP2l7JA==>
- [17] http://eu-secretdeals.info/upload/2014/02/EU-Canada-FTA-Negotiations-Investment-chapter-4-April-2014_clean.pdf



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