

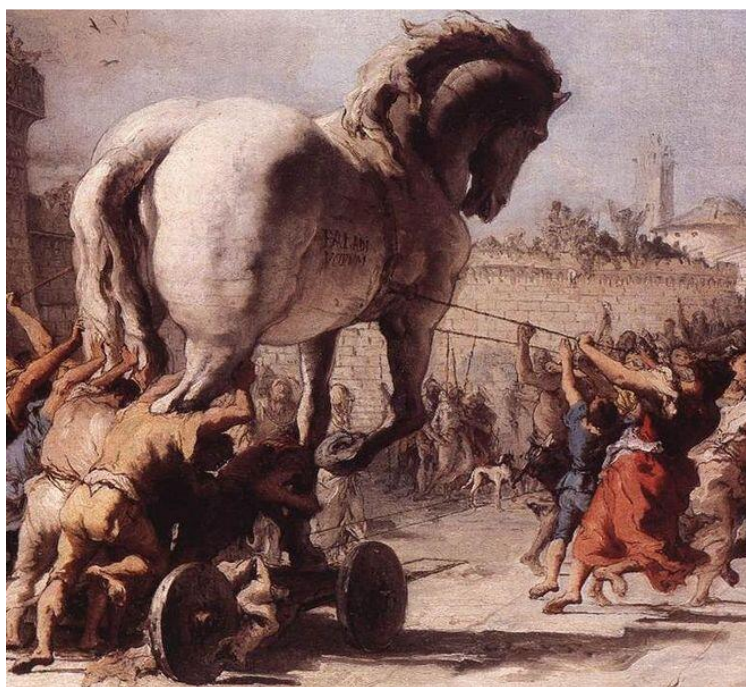
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A Supplementary Submission on Trojan Horse Clauses: Investor-State Dispute Settlement

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A SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN PARLIAMENT

TROJAN HORSE CLAUSES: INVESTOR-STATE DISPUTE SETTLEMENT



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BIOGRAPHY

Dr Matthew Rimmer is an Australian Research Council Future Fellow. He is an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University, and a PhD (Law) from the University of New South Wales. He is a member of the ANU Climate Change Institute. Dr Rimmer is the author of [*Digital Copyright and the Consumer Revolution: Hands off my iPod*](#), [*Intellectual Property and Biotechnology: Biological Inventions*](#), and [*Intellectual Property and Climate Change: Inventing Clean Technologies*](#). He is an editor of [*Patent Law and Biological Inventions*](#), [*Incentives for Global Public Health: Patent Law and Access to Essential Medicines*](#), and [*Intellectual Property and Emerging Technologies: The New Biology*](#). Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. His work is archived at [*SSRN Abstracts*](#) and [*Bepress Selected Works*](#).

Executive Summary

This supplementary submission considers a number of new developments in Investor-State Dispute Settlement in Canada, North America, the European Union, and Africa. This supplementary submission highlights the application of Investor-State Dispute Settlement in the context of water rights, intellectual property, and media regulation. This supplementary submission also highlights the conflict between domestic courts and international tribunals in Investor-State Dispute Settlement, raising significant issues about the rule of law and justice.

Recommendation 14

In light of the work of Maude Barlow and the Council of Canadians, it is evident that Investor-State Dispute Settlement has a significant impact upon water rights.

Recommendation 15

There have been reservations expressed about Investor-State Dispute Settlement by both Canada and Germany in discussions over the *Comprehensive Economic and Trade Agreement* (CETA).

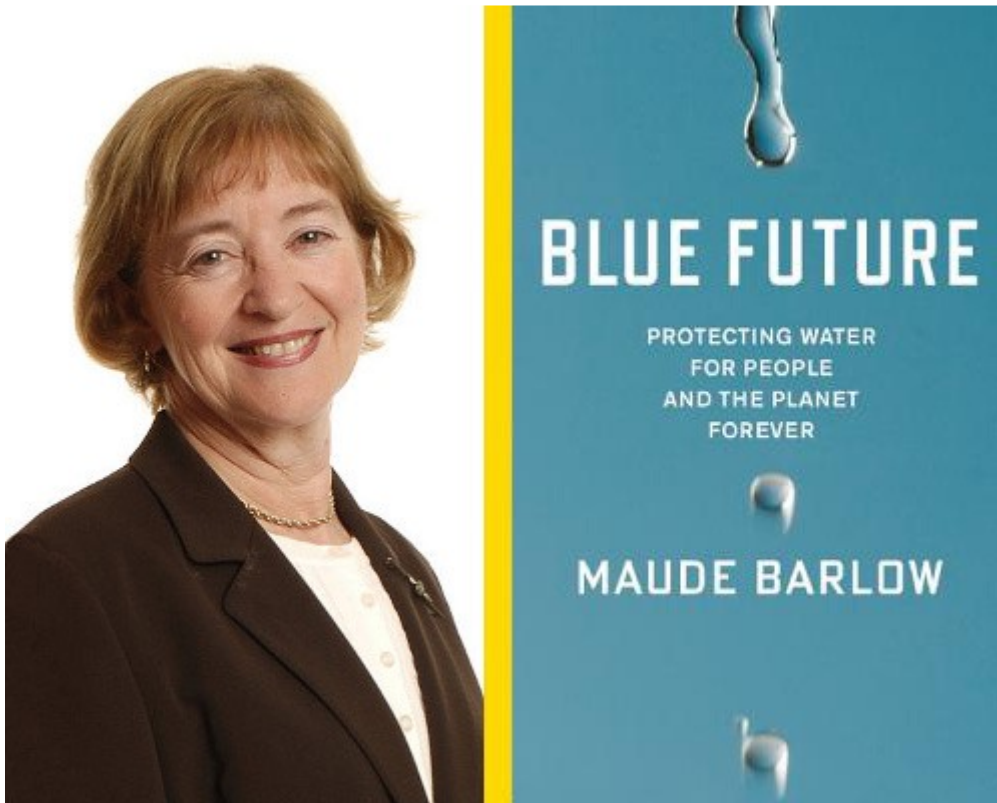
Recommendation 16

There has been great controversy in the European Union during consultations over the possible inclusion of Investor-State Dispute Settlement in the *Trans-Atlantic Trade and Investment Partnership*.

Recommendation 17

In light of the Al-Jazeera dispute, Investor-State Dispute Settlement could have a significant impact upon Australian media and communications law – particularly in respect of the regulation of media ownership, diversity, and content.

14. Water Rights



Maude Barlow is the chairperson of the Council of Canadians, and the founder of the Blue Planet Project. She is a recipient of Sweden's Right Livelihood Award, and a Lannan Cultural Freedom Fellowship. As well as being a noted human rights and trade activist, Barlow is the author of a number of books on water rights – including *Blue Gold*,¹ *Blue Covenant*,² and *Blue Future*.³ She has been particularly vocal on the impact of trade and investment agreements upon water rights. Barlow has been critical of the push to include investor-state dispute settlement clauses in trade agreements – such as the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union, the *Trans-Pacific Partnership* (TPP), and the *Trans-Atlantic Trade and Investment Partnership*

¹ Maude Barlow and Tony Clarke, *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water*, New York and London: The New Press, 2002.

² Maude Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water*, New York: The New Press, 2007.

³ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013.

Agreement (TTIP). She has also been concerned by the *Trade in Services Agreement* (TISA) leaked by WikiLeaks.

In her book *Blue Future*, Maude Barlow reflects upon the recognition by the United Nations General Assembly of the human right to safe and clean drink water and sanitation as ‘essential for the full enjoyment of the right to life’.⁴ She observed:

Recognizing a right is simply the first step in making it a reality for the millions who are living in the shadow of the greatest crisis of our era. With our insatiable demand for water, we are creating the perfect storm for an unprecedented world water crisis: a rising population and an unrelenting demand for water by industry, agriculture, and the developed world; over-extraction of water from the world’s finite water stock; climate change, spreading drought; and income disparity between and within countries, with the greatest burden of the race for water falling on the poor.⁵

Barlow enunciates several principles for a water-secure future. First, she emphasizes that water is a human right. Second, Barlow emphasizes that water is a common heritage, and must not be allowed to become a commodity to be bought and sold on the open market. Third, she makes the case for the protection of source water and watershed governance. Finally, she hopes that communities can ‘come together around a common threat – the end of clean water – and find a way to live more lightly on this planet’.⁶ Barlow maintains that ‘the grab for the planet’s dwindling resources is the defining issue of our time.’⁷ She contends: ‘Water is not a resource put here solely for our convenience, pleasure, and profit; it is the source of all life.’⁸

Barlow is concerned about how water rights will be affected trade and investment agreements – such as *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union, the *Trans-Pacific Partnership* (TPP), and the *Trans-Atlantic Trade and Investment Partnership Agreement* (TTIP), and the *Trade in Services Agreement* (TISA).

⁴ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 1.

⁵ Ibid., 2.

⁶ Ibid., 4.

⁷ Ibid., 4.

⁸ Ibid., 4-5.

A. Investor-State Dispute Settlement

In her book, Barlow expresses concerns about how ‘increasingly the International Centre for Settlement of Investment Disputes (ICSID) is being used to challenge the rights of governments to introduce new environmental or health regulations.’⁹ She mentions the action by Philip Morris against Australia’s plain packaging of tobacco products;¹⁰ and the action by the Swedish company, Vattenfall, against Germany’s decision to phase out nuclear power.¹¹

In light of such significant controversies, Barlow explores the use of investor-state dispute settlement in respect of water resources:

Water companies are using this court to fight governments that try to regain public control of their water services. In 1999, Azurix, a subsidiary of Enron Corporation, agreed to purchase the exclusive right to provide water and sanitation services to parts of Buenos Aires for thirty years. When the Argentine government issued a warning to citizens to boil their water after an algae outbreak, some customers refused to pay their water bills; the company withdrew from the contract and sued the government. A 2007 ICSID tribunal found in favour of the company and ordered the government of Argentina to pay \$165 million in compensation.¹² In 2010 the ICSID again ruled in favour of a water company, in a dispute involving the French transnational Suez.¹³ This time it was the Argentine government that rescinded the contract, because of concerns over water quality, lack of wastewater treatment, and mounting tariffs.¹⁴

⁹ Ibid., 94.

¹⁰ Philip Morris v. Australia, ‘Tobacco Plain Packaging – Investor-State Arbitration’, <http://www.ag.gov.au/tobaccoplainpackaging>

¹¹ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, <http://www.italaw.com/cases/1654> and *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (formerly *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany*) <http://www.italaw.com/cases/1148>

¹² *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 <http://www.italaw.com/cases/118>

¹³ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (formerly *Aguas Provinciales de Santa Fe S.A, Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A.*) <http://www.italaw.com/cases/1048>

¹⁴ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 94-95.

In the view of Barlow, investor-state dispute settlement has been used to entrench and protect the privatisation of water projects, and the commodification of water.

Barlow has been disturbed by the operation of investor-state dispute settlement clauses under the *North America-Free Trade Agreement 1994* (NAFTA). She has commented on a number of controversies:

Canada's freshwater heritage, for instance, has been directly affected by Chapter 11, the investor-state clause of NAFTA, which allows American corporations operating in Canada to sue for financial compensation if any changes are made to the policies or practices under which they first invested. In 2002, S.D. Myers, an American company specializing in disposal of hazardous waste, including PCBs, was awarded more than \$8 million from the Canadian government for loss of profit after Canada banned trade in PCBs to protect the environment and human health.¹⁵ Currently Lone Pine Resources,¹⁶ an American energy company, is suing the government of Canada for \$250,000 because in 2011 the province of Quebec passed a moratorium on shale-gas fracking in order to protect its water reserves.¹⁷

Of particular concern to Barlow is the potential use of investor-state dispute settlement in respect of Alberta's Tar Sands: 'If the government of Alberta were ever to limit the current water access of energy companies operating in the tar sands, say legal experts, the American companies could sue for huge sums of compensation from the government of Canada'.¹⁸ She is concerned that such a measure could have a chilling effect upon government regulation: 'Equally worrisome, they say, is that the threat of such compensation might prevent the Alberta government from taking such a step in the first place, allowing American energy corporations to dictate Canadian policy.'¹⁹

¹⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL <http://www.italaw.com/cases/969>

¹⁶ *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL <http://www.italaw.com/cases/1606>

¹⁷ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 215.

¹⁸ Ibid., 215.

¹⁹ Ibid., 215.

Barlow has also been disturbed by the Government of Canada awarding compensation to a United States company, Abitibi Bowater, for water rights after it abandoned its Canadian operations.²⁰ Barlow commented:

After running a pulp and paper mill in Newfoundland for more than a century, U.S. forestry giant Abitibi Bowater declared bankruptcy and left the province in 2008. The Newfoundland government expropriated the company's assets in the province, including its water rights, in order to help pay for environmental cleanup and pensions for laid-off workers. The Newfoundland government argued that the water belonged to the province and was allocated to the company only as it operated a mill there. Abitibi Bowater sued the Canadian government under Chapter 11 of NAFTA, and the Harper government settled without going to a NAFTA tribunal, giving the company \$130 million in compensation. This has set a dangerous precedent whereby corporations from one country operating in another can now claim ownership of local water supplies, thus providing one more way in which the world's water is becoming commodified and privatized.²¹

In her view, the investment regime in NAFTA undermines water rights and water sovereignty in Canada.

There has been a larger concern as to whether Canadian companies will invoke investor-state dispute settlement if the Keystone XL Pipeline is blocked or delayed. TransCanada Corp. CEO Russ Girling has commented on the issue:

Those are issues that are sort of well beyond what we're contemplating at the current time and not something we've spent a whole bunch of time analysing. Down the road that's something that hopefully we don't have to take a look at, but obviously something that we would have to look at if we end up in a situation where the pipeline's delayed indefinitely or denied. "Our view is this pipeline looks no different than other pipelines that have been approved, that continue to be approved in the United States. We can't think of a legitimate reason why we can't move forward with this pipeline at the current time... Our focus is on getting a pipeline built and doing what's necessary to provide the authorities with the information they need to make a positive decision."²²

²⁰ *AbitibiBowater Inc., v. Government of Canada* <http://www.italaw.com/cases/39>

²¹ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 215.

²² Lauren Krugel, 'TransCanada says no NAFTA Challenge to Keystone XL Delays – for Now', The Canadian Press, CTV News, 2 May 2014, <http://www.ctvnews.ca/business/transcanada-says-no-nafta-challenge-to-keystone-xl-delays-for-now-1.1803702#ixzz30uRJfDco>

There has also been discussion as to whether the Canadian Government would bring a country-to-country action against the United States if the Keystone XL Pipeline was delayed or blocked.²³ There has been discussion as to whether free trade agreements will fast-track the controversial proposal.²⁴

Maude Barlow has also expressed concerns about the use of investor-state dispute settlement clauses in disputes over mining – such as in El Salvador.²⁵

B. Trade Agreements



²³ Claudia Cattaneo, 'Ottawa Mulls Keystone XL Challenge Under NAFTA After U.S. Dodges Decision Again', *Financial Post*, 30 April 2014.

²⁴ Mark Lippman, 'Will Free trade Fast-Track Keystone XL with Investor-State Dispute Settlements?', *Daily Kos*, 14 January 2014, <http://www.dailykos.com/story/2014/01/14/1269654/-CRUDE-PT-2-Will-Free-trade-fast-track-Keystone-XL-with-Investor-State-Dispute-Settlements#>

²⁵ Maude Barlow and Jennifer Moore, 'New Salvadoran Government Inherits Unfair Liability Rules', *The Huffington Post*, 20 March 2014, http://www.huffingtonpost.ca/maude-barlow/new-salvadoran-government_b_5002534.html

Maude Barlow has questioned the inclusion of investor-state dispute settlement in NAFTA. In a letter to *The Globe and Mail* on the 30 July 2014, she questioned:

If investor-state dispute settlements were designed “to protect developed-world companies from capricious actions by governments of countries without developed-world legal standards,” why were they necessary in NAFTA? And why is Canada facing over \$2.5-billion in challenges from American corporations?²⁶

The Council of Canadians has been critical of the secrecy surrounding the *Trans-Pacific Partnership*.²⁷ Trade campaigner, Stuart Trew, has stressed: ‘There can be no honest talk of improving NAFTA while all three countries are busy making it worse in a *Trans-Pacific Partnership* that will, for all intents and purposes, replace the North American agreement.’²⁸ He commented: ‘From every leaked text, it’s clear the TPP will just entrench NAFTA’s corporate privileges and an unsustainable trade model that is getting in the way of addressing poverty, inequality and climate change.’²⁹ Harris recommended: ‘If North American leaders wanted to do something truly important for trade on the continent, they would come out of the dark and open up the negotiating process to public input.’³⁰

Maude Barlow has expressed concerns that CETA poses a threat to local democracy.³¹ She observed that ‘the Harper government is ideologically driven by a belief in the privatization, deregulation and strengthened corporate power that attend trade deals like CETA and others it is negotiating, and does not encourage debate on any of them.’³² Maude Barlow has been heartened by the concerns of Germany about the inclusion of investor-state dispute settlement

²⁶ Maude Barlow, ‘Why in NAFTA Then?’, *The Globe and Mail*, 30 July 2014, <http://www.theglobeandmail.com/globe-debate/letters/july-30-babies-by-design-and-other-letters-to-the-editor/article19838726/#dashboard/follows/>

²⁷ Council of Canadians, ‘The Council of Canadians urges North American leaders to publish TPP Text, Democratize NAFTA-Plus Trade Talks’, Media Release, 19 February 2014, <http://www.canadians.org/media/council-canadians-urges-north-american-leaders-publish-tpp-text-democratize-nafta-plus-trade>

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Maude Barlow, ‘CETA: A Threat to Local Democracy’, *The Huffington Post*, 22 October 2011, http://www.huffingtonpost.ca/maude-barlow/ceta_b_1021782.html

³² Ibid.

in CETA and TTIP.³³ She commented: ‘We are pleased that the German government has listened to critics of the investor-state dispute settlement provisions of the deal that give foreign corporations the right to dictate domestic policy.’³⁴ Scott Harris, trade campaigner with the Council of Canadians, observed that European policy-makers had informed about the history of investor-state dispute settlement actions in Canada: ‘We’ve told them about all the lawsuits Canada has faced under NAFTA for legitimate regulations that protect our health and environment.’³⁵

Maude Barlow’s Council of Canadians has engaged in the public consultation on investment protection and investor-to-state dispute settlement in the *Trans-Atlantic Trade and Investment Partnership Agreement* (TTIP).³⁶ The Council of Canadians expressed its opposition ‘to the inclusion of expansive investment protections which favour the rights of foreign investors over government policy, and to the inclusion of investor-state dispute settlement (ISDS) processes in trade and investment agreements.’³⁷ The Council of Canadians observed: ‘These measures unnecessarily subject legitimate domestic regulatory and other policy decisions to the risk of challenge by foreign investors and to the decisions of unaccountable arbitrators’.

The Council of Canadians commented: ‘Based on two decades of Canadian experience we are of the opinion that such measures constitute an undemocratic constraint on domestic policy, and that the focus of this consultation on minor reforms avoids the more fundamental question about the legitimacy of investor rights and investor-state arbitration.’³⁸ The Council of Canadians insisted: ‘ISDS and investment provisions which place the rights of investors above the sovereign rights of states to govern in the public interest should not be included in

³³ Council of Canadians, ‘Germany Rejects CETA and TTIP; Council of Canadians Applauds Germany’s Decision’, Press Release, 26 July 2014, <http://canadians.org/media/germany-rejects-ceta-and-ttip-council-canadians-applauds-germanys-decision>

³⁴ Ibid.

³⁵ Ibid.

³⁶ Council of Canadians, ‘Submission to the Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’, June 2014, <http://www.tradejustice.ca/wp-content/uploads/2014/07/2014-06-EC-ISDS-consultation-CofC-submission.pdf>

³⁷ Ibid.

³⁸ Ibid.

either the US-EU TTIP or the Canada-EU CETA.’³⁹ The group emphasized: ‘We see no reason why governments –and by extension, taxpayers –should be held responsible in any way for bearing the cost of insuring foreign corporations against the risks inherent in choosing to invest in a foreign country.’⁴⁰

Maude Barlow has also expressed concerns about the *Trade in Services Agreement* (TISA) released by WikiLeaks, fearing that it could be used to lock in water privatisation.⁴¹

C. Fair Trade

Thinking about such investor-state dispute settlement controversies, Maude Barlow expresses concerns over corporations, writing the rules for trade: ‘There are almost three thousand bilateral deals between governments, most giving corporations these extraordinary rights, and many of them are used to gain access to the commons resources of other countries, placing the world’s forests, fish, minerals, land, air, and water supplies under direct control of transnational corporations.’⁴²

Barlow observed: ‘Australia [under the Rudd and Gillard Governments] banned the negotiation of trade deals that include any type of investor-state clauses, and Brazil, which now has the tenth largest GDP in the world, is not a party to any bilateral investment treaties and has not ratified the ICSID.’⁴³ She insisted that ‘Australia and Brazil must become a model for every country in the world.’⁴⁴ Barlow feared that ‘investor-state clauses that give corporations the right to sue foreign governments for compensation or to place a chill on governments considering new laws and practices to protect their environment, the health and safety of their people, or social rights must go.’⁴⁵

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Brett Patterson, ‘TISA Threatens to Lock In Water Privatization’, the Council of Canadians, 3 May 2014, <http://www.canadians.org/blog/tisa-threatens-lock-water-privatization>

⁴² Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 215.

⁴³ Ibid., 230.

⁴⁴ Ibid., 230.

⁴⁵ Ibid., 230.

Supporting the work of Thomas McDonagh from the Democracy Center,⁴⁶ Barlow argued that there was a need to completely overhaul investment agreements. She emphasized the need for restrictions on the definition of ‘investment’ to ‘prevent investors from interfering in a country’s right to set social and environmental standards.’⁴⁷ She maintained that certain principles should be embedded in such agreements – including the primacy of human rights before corporate rights; the recognition of the role of domestic courts; binding obligations on corporations; policy space for local economic development; and capital controls to stem financial speculation. Barlow also supported the efforts of Jerry Mander and John Cavanagh to develop an alternative model of trade and development.⁴⁸ In particular, she emphasized that economic development and trade activity and policy should enhance the core labour rights and human rights included in the *Universal Declaration of Human Rights*, and the two covenants ensuring economic, social, and cultural rights as well.’⁴⁹

In the conclusion, Maude Barlow maintains that there is a need to ensure that trade protects water:

Given the threat to water from existing and proposed trade and investment agreements, it is urgent to remove all references to water as a service, good, or investment in all present and future treaties. Water is not like anything else on earth. There is no substitute for it, and we and the planet cannot survive without it. Water must not be a tradable good, service, or investment in any treaty between governments and corporations should have no right to stop domestic or international protection of water.⁵⁰

⁴⁶ Thomas McDonagh, *Unfair, Unsustainable, and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future*, San Francisco: Democracy Center, May 2013, <http://democracyctr.org/new-report-unfair-unsustainable-and-under-the-radar/>

⁴⁷ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 230.

⁴⁸ John Cavanagh and Jerry Mander (ed.), *Alternatives to Economic Globalization*, San Francisco: Berrett-Koehler, 2002, <http://www.amazon.com/Alternatives-Economic-Globalization-Better-Possible/dp/1576753034>

⁴⁹ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto and New York: The New Press, 2013, 231.

⁵⁰ Ibid., 233.

Barlow maintains that ‘trade negotiations should take into account the effect on water of all trade activities’.⁵¹ She concludes that ‘removing water as a tradable good, service, or investment from all trade and investment treaties would provide a better framework to protect water in international trade.’⁵²

Recommendation 14

In light of the work of Maude Barlow and the Council of Canadians, it is evident that Investor-State Dispute Settlement has a significant impact upon water rights.

⁵¹ Ibid., 233.

⁵² Ibid., 235.

14. CETA – The Canada-Europe Trade Agreement



There has been much controversy over investor-state dispute settlement in the trade negotiations between Canada and the European Union, with significant objections from both Canada and Germany. *Inside Trade* reported that one of the ‘biggest obstacles to concluding a deal in time for the May 7 bilateral meeting was Canada’s request to exclude certain intellectual property (IP) policies from the scope of an investor-state dispute settlement (ISDS) mechanism, which the EU strongly opposes.’⁵³

⁵³ Mike Palmedo, ‘Eli Lilly’s NAFTA Dispute Against Canadian Patent Ruling Affecting Other Trade Negotiations’, *InfoJustice.Org*, 12 May 2014, <http://infojustice.org/archives/32724>

Moreover, Germany has expressed concerns about the inclusion of an investor-state dispute settlement regime. Glyn Moody noted that the newspaper *Süddeutsche Zeitung* reported: ‘German EU diplomats confirmed in Brussels on Friday that the [German] federal government could not sign the agreement with Canada "as it is now negotiated."’⁵⁴ Moreover, Moody reported from the German paper: ‘Although Germany was, in principle, ready to initial the agreement in September, the chapter on the legal protection of investors is however ‘problematic’ and currently not acceptable.’⁵⁵ There has been much discussion about whether investor protection will unravel the Canada-EU trade deal.⁵⁶ There has been debate about whether Germany will try to limit the scope of Investor-State Dispute Settlement, or block the regime altogether.⁵⁷

The Government of Canada has been particularly disturbed by the action brought by Eli Lilly under an investor-state dispute settlement mechanism over the rejection of drug patents. In June 2014, Canada published a statement of its defence in the Eli Lilly dispute.⁵⁸ In its preliminary statement, the Government of Canada observed:

Eli Lilly and Company (“Lilly” or “Claimant”) is a disappointed litigant. Having lost two patent cases before the Canadian courts, it now seeks to have this Tribunal misapply NAFTA Chapter Eleven and

⁵⁴ Glyn Moody, ‘TTIP Update XXXIV’, *Computer World*, 30 July 2014, <http://blogs.computerworlduk.com/open-enterprise/2014/07/ttip-update-xxxiv/index.htm>

⁵⁵ Ibid.

⁵⁶ Les Whittington, ‘Investor Protection Fears Could Unravel Canada-EU Trade Deal’, *The Toronto Star*, 26 July 2014, http://www.thestar.com/news/canada/2014/07/26/investor_protection_fears_could_unravel_canadaeu_trade_deal.html

⁵⁷ Jeevan Vasagar and Christian Oliver, ‘Germany seeks to Limit Investor Protection to Save Trade Deal’, *Financial Times*, 4 August 2014, <http://www.bilaterals.org/?germany-seeks-to-limit-investor>

⁵⁸ *Eli Lilly v. Government of Canada*, Statement of Defence, Defence, 30 June 2014, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4672_En&caseId=C3544

transform itself into a supranational court of appeal from reasoned, principled, and procedurally just domestic court decisions. Claimant argues that the domestic court decisions invalidating its patents are measures that violate NAFTA Chapter Eleven. Claimant does this on the basis of misstatements of the content of Canadian law and of Canada's international obligations. Its claim is wholly without merit and should be dismissed, with full costs to Canada.⁵⁹

In its Statement of Defence, Canada provides: '(1) an overview in Canadian patent law, to provide context for Claimant's misstatements regarding Canadian law on utility; (2) a description of the specific role played by the Federal Court in applying the Patent Act, establishing that the court is responsible for determining the validity and existence of the intellectual property right; (3) an outline of the facts relevant to the two court proceedings, demonstrating that Claimant received full due process and reasoned and principled decisions; and (4) brief comments on Canada's international intellectual property obligations under NAFTA Chapter Seventeen, TRIPS and the Patent Cooperation Treaty ("PCT"), confirming that these have no bearing on this case'.⁶⁰ Canada maintains that 'nothing in the two court decisions at issue in any way violates Canada's obligations under Chapter Eleven of NAFTA.'⁶¹

Professor Richard Gold and Michael Shortt have provided a comprehensive analysis of the patent issues at stake in the controversy.⁶²

In a recent commentary, Professor Michael Geist from the University of Ottawa considers the controversy over the Eli Lilly dispute, Investor-State Dispute Settlement Rules, and the Canada-EU Trade Agreement.⁶³

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² E. Richard Gold and Michael Shortt, 'The Promise of the Patent in Canada and Around the World', (2014) 30 Canadian Intellectual Property Review 35
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361146

⁶³ Professor Michael Geist, 'Crumbling CETA Investor-State Dispute Settlement Rules Threaten to Take Down the Canada-EU Trade Agreement', the University of Ottawa, 28 July 2014,
<http://www.michaelgeist.ca/2014/07/crumbling-ceta-investor-state-dispute-settlement-rules-threaten-to-take-canada-eu-trade-agreement/>

[Crumbling CETA?: The Investor-State Dispute Settlement Rules Threaten to Take Down the Canada – EU Trade Agreement](#)

Professor Michael Geist

July 28, 2014

On September 12, 2011, the Council of the European Union issued a [20-page press release](#) that provided updates on the 3109th Council meeting. On page 13, there was single sentence on EU trade policy:

The Council authorised the Commission, on behalf of the EU, to open negotiations on investment with Canada, India, and Singapore within the framework of the ongoing bilateral negotiations with these countries on trade liberalisation.

The Canada – EU trade negotiations had started several years earlier and the late addition of investment did not attract significant attention at the time (the [major focus](#) was on the divide over intellectual property and procurement issues). Yet months after Canada and the EU [announced](#) that they had reached agreement on CETA, it is the investment provisions, particularly the investor-state dispute settlement (ISDS) rules, that could seemingly [derail the entire agreement](#).

[Reports](#) out of Germany now indicate that it is not willing to sign CETA if it includes ISDS provisions. While both the Canadian government (which says [negotiations continue](#)) and the German government (which now says it will [“meticulously” examine the agreement](#)) have downplayed the report, the ISDS issue has clearly been brewing for months.

Canadian activists had flagged it [weeks ago](#), noting the mounting opposition to ISDS rules in Germany arising as a result of 2012 claim by a Swedish company seeking billions in compensation for Germany’s decision to phase-out nuclear power. Moreover, the issue has taken hold throughout Europe with the growing realization that the CETA provisions are likely to be matched in the far larger U.S. – Europe Union agreement called the Transatlantic Trade and Investment Partnership (TTIP). The linkage of CETA and TTIP has been disastrous for Canadian officials who had hoped to conclude CETA before the U.S. deal captured the limelight. Now that the two agreements are viewed as linked (the above photo is

taken from German protests that explicitly combine CETA and TTIP), the Canadian deal may be held up by the controversy associated with TTIP alone.

While European opposition mounts, it is important to note that Canada was also delaying finalizing CETA due to ISDS concerns. In Canada's case, the [\\$500 million Eli Lilly lawsuit](#) over Canadian patent law awoke the government to the enormous risk associated with ISDS provisions. Canada has a strong case in defending against the lawsuit, but the risk that one [lawsuit](#) could expand to others means that [billions may be at stake](#). That is why the Canadian government has been pushing for inclusion of the [following clause in CETA](#) to remove the risk of replicating the Eli Lilly lawsuit:

For greater certainty, this Article does not apply to a decision by a court, administrative tribunal, or other governmental intellectual property authority, limiting or creating an intellectual property right, except where the decision amounts to a denial of justice or an abuse of right.

The two sides have yet to reach agreement on the issue, but given the opposition in Europe, the risk to Canada, and the [mediocre Canadian track record](#) on ISDS claims in NAFTA, it may be in everyone's interest to go back to the drawing board on CETA by eliminating ISDS altogether.

Recommendation 15

There have been reservations expressed about Investor-State Dispute Settlement by both Canada and Germany in discussions over the *Comprehensive Economic and Trade Agreement* (CETA).

16. The *Trans-Atlantic Trade and Investment Partnership* (TTIP)



Since the call for submissions, there have been significant developments in respect of investor-state dispute settlement in the European Union.

In Germany, there has been a reaction against investor-state dispute settlement clauses in the context of the *Trans-Atlantic Trade and Investment Partnership*. Glyn Moody reported that senior members of the German Government were highly critical of such measures:

The German federal government rejects special rights for corporations in the free trade agreement between the EU and the USA. ‘The federal government is doing all it can to ensure that it doesn't come to this,’ said the Secretary of State in the Federal Ministry of Economics, Brigitte Zypries, on Wednesday during question time in parliament. ‘We are currently in the consultation process and are committed to ensuring that the arbitration tribunals are not included in the agreement,’ said Ms Zypries.

‘The German federal government's view is that the U.S. offers investors from the EU sufficient legal protection in its national courts,’ said the SPD politician Zypries. Equally, U.S. investors in Germany have sufficient legal protection through German courts. ‘From the beginning, the

federal government has examined critically whether such a provision should be included in the negotiations for a free trade agreement,' Zypries said.⁶⁴

Glyn Moody commented: 'Germany's leaders obviously feel the need to distance themselves from ISDS, which is fast turning into a serious political liability.'⁶⁵

Martin Khor has identified a number of reasons for disillusionment with investor-state dispute settlement clauses in the European Union:

ISDS cases are also affecting the countries. Germany has been taken to ICSID by a Swedish company Vattenfall which claimed it suffered over a billion euros in losses resulting from the government's decision to phase out nuclear power after the Fukushima disaster. And the European public is getting upset over the investment system. Two European organisations last year published a report showing how the international investment arbitration system is monopolised by a few big law firms, how the tribunals are riddled with conflicts of interest and the arbitrary nature of tribunal decisions. That report caused shock waves not only in the civil society but also among European policy makers.⁶⁶

There is both a concern here about government liability in respect of investor-state dispute settlement clauses; and an anxiety about the independence and the legitimacy of the international tribunal system.

⁶⁴ Glyn Moody, 'Even the German Government Wants Corporate Sovereignty out of TAFTA/ TTIP', *TechDirt*, 17 March 2014, <http://www.techdirt.com/articles/20140313/10571526568/even-german-government-wants-corporate-sovereignty-out-taftattip.shtml>

⁶⁵ Ibid.

⁶⁶ Martin Khor, 'Investor Treaties in Trouble', *The Star*, 24 March 2014, <http://www.thestar.com.my/Opinion/Columnists/Global-Trends/Profile/Articles/2014/03/24/Investor-treaties-in-trouble/>

In the European Union, there has been a great deal of controversy over the Vattenfall cases.⁶⁷ In the first dispute, the Swedish energy company Vattenfall initiated an investor-state dispute settlement procedure against Germany. After constructing a coal fired power plant, Vattenfall claimed that the quality standards for waste water of Hamburg's Environmental Authority made the project unviable. The company demanded compensation totalling €1.4 billion. Vattenfall and the city of Hamburg eventually settled the case with an agreement. In the second dispute, Vattenfall brought an investor-state dispute settlement action against Germany in respect of its decision to close down its nuclear power plants, in the wake of the Fukushima accident in Japan. According to press sources, the claim for compensation by Vattenfall could amount up to €3.7 billion

In 2014, the European Commission has held separate consultations about the inclusion of the investor-state dispute settlement regime, given the controversy over the topic:

EU Trade Commissioner Karel De Gucht today announced his decision to consult the public on the investment provisions of a future EU-US trade deal, known as the Transatlantic Trade and Investment Partnership (TTIP). The decision follows unprecedented public interest in the talks. It also reflects the Commissioner's determination to secure the right balance between protecting European investment interests and upholding governments' right to regulate in the public interest. In early March, he will publish a proposed EU text for the investment part of the talks which will include sections on investment protection and on investor-to-state dispute settlement, or ISDS. This draft text will be

⁶⁷ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, <http://www.italaw.com/cases/1654> and *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 (formerly *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany*) <http://www.italaw.com/cases/1148>

accompanied by clear explanations for the non-expert. People across the EU will then have three months to comment.

EU Trade Commissioner Karel De Gucht said: ‘Governments must always be free to regulate so they can protect people and the environment. But they must also find the right balance and treat investors fairly, so they can attract investment. International investment agreements like TTIP should ensure they do both. But some existing arrangements have caused problems in practice, allowing companies to exploit loopholes where the legal text has been vague. I know some people in Europe have genuine concerns about this part of the EU-US deal. Now I want them to have their say. I have been tasked by the EU Member States to fix the problems that exist in current investment arrangements and I’m determined to make the investment protection system more transparent and impartial, and to close these legal loopholes once and for all. TTIP will firmly uphold EU member states’ right to regulate in the public interest.’⁶⁸

The European Commission still seems to be pushing for an investment clause – but there is concerted opposition to the regime from nation-states, political parties, and civil society groups. There remains great concern about the drastic increase in government liability under investor-state dispute settlement.⁶⁹

The European Commission received 149,399 submissions in respect of the inclusion of an investor-state dispute settlement regime in the *Trans-Atlantic Trade and Investment Partnership*.⁷⁰

There has been heavy criticism of investment-state dispute settlement clauses in the European consultations. Jan Kleinheisterkamp from the London School of Economics provided a useful

⁶⁸ European Commission, ‘Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement’, 21 January 2014, http://europa.eu/rapid/press-release_IP-14-56_en.htm

⁶⁹ Melinda St. Louis, ‘Public Interest Critique of ISDS: Drastic Increase in Government Liability’, *Public Citizen’s Global Trade Watch*, 17 March 2014.

⁷⁰ Glyn Moody, ‘TTIP Update XXXIII – 150,000 ISDS Submissions’, 21 July 2014, <http://blogs.computerworlduk.com/open-enterprise/2014/07/ttip-update-xxxiii/index.htm>

critique of the weak justifications for the regime.⁷¹ The academic questions the need for investor-state dispute settlement:

It is uncontroversial that the implementation of the TTIP obligations relating to investment in the US will be politically difficult. But this circumstance cannot, in itself, provide a justification for a rather **fundamental policy choice**, i.e. to accept the creation of a new jurisdiction that would allow US investors in the EU to take regulatory disputes out of European courts – with the reverse discrimination that this entails for EU investors in the EU. The question to be asked is ultimately whether there is something fundamentally wrong with the judicial systems on both sides of the Atlantic. And even if that were the case, the real question would be whether any structural deficiencies in the U.S. or EU judiciaries should be reformed by the creation of a parallel new jurisdiction, for which there is less than a good arguable case. Whereas there might be good justifications for inserting ISDS in future EU agreements, those presented by the Commission in relation to the United States so far are not really convincing.⁷²

The academic makes the point that there is no broader problem with the judicial systems to justify an investor-state dispute settlement regime: ‘Whereas some few cases may have been unfortunate, they **do not reveal any systemic deficiency** capable of proper remediation’.⁷³ The academic observes: ‘On the contrary, those cases cited by the Commission, if anything, rather suggest weaknesses of investor-state arbitration as well as a lack of efficiency of ISDS mechanisms to overcome the foreign investors’ problem.’⁷⁴

⁷¹ Jan Kleinheisterkamp, ‘Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?’ (February 14, 2014), SSRN: <http://ssrn.com/abstract=2410188>

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

It is particularly worth highlighting the submission of over 100 leading academics on investor-state dispute settlement.⁷⁵ This statement of concern was written by Harm Schepel (Kent Law School) Peter Muchlinski (SOAS School of Law), Horatia Muir Watt (Sciences Po Law School), and Gus Van Harten (Osgoode Hall Law School). The submission expressed ‘deep concern about the planned Treaty in general and voicing strong criticism of the proposed provisions in particular’. The authors were joined by ‘nine members of academic staff from Kent Law School and over a hundred other prominent scholars from all over Europe and across the globe with expertise in trade and investment law, public international law and human rights, European Union law, global political economy, comparative law, public law and private law’. The writers noted that ‘Investment arbitration law, after all, is far too important to leave to just investment lawyers.’⁷⁶

It is worth reproducing the key summary in this submission:

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? 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?

The Commission’s consultation document is an extraordinary text. On the one hand, the document contains fierce (and, in our opinion, fully justified) criticism of the international investment treaty arbitration regime as it has developed over the last two decades or so in a rapidly expanding number of awards under some 2800 Bilateral Investment Treaties, NAFTA, and the Energy Charter. Both explicitly and implicitly, the document disapproves of widespread expansive interpretations of nearly every provision found in investment treaties: from Most Favored Nation to umbrella clauses, from National Treatment to Fair and Equitable Treatment, from indirect expropriation to threshold issues of corporate nationality. The document also implicitly condemns the investment arbitration community for its failure to police itself adequately in matters of ethics, independence, competence, impartiality, and conflicts of interest. By implication, the document acknowledges that the institutional design of investment arbitration has given rise to reasonable perceptions that the decision-making process is biased against some states and investors as well as various interests of the general public.

And yet, on the other hand, the Commission seems content to entrust to these same actors the vital constitutional task of weighing and balancing the right to regulate of sovereign states and the property rights of foreign

⁷⁵ Harm Schepel, Peter Muchlinski, Horatia Muir Watt and Gus van Harten, ‘Statement of Concern about Planned Provisions of Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)’, 2014 https://www.kent.ac.uk/law/isds_treaty_consultation.html

⁷⁶ Ibid.

investors. This task is one of the most profound roles that can be assigned to any national or international judicial body. The proposed text requires arbitrators to determine whether discriminatory measures are ‘necessary’ in light of the relative importance of the values and interests the measures seek to further; whether the impact of non-discriminatory ‘indirect expropriations’ have a ‘manifestly excessive impact’ on investors in light of the regulatory purpose of these measures; whether other non discriminatory measures amount to arbitrariness or fall short of standards of due process and transparency, and whether prudential regulations are ‘more burdensome than necessary to achieve their aim’. To entrust these decisions to the very actors who have an apparent financial interest in the current situation and moreover remain unaccountable to society at large is a contentious situation. In light of the criticism inherent in the consultation document, not to mention the fundamental concerns of many observers of the system, there seems to be consensus that the regime falls short of the standards required of an institutionally independent and accountable dispute settlement system.

In our view, the logical implication of the Commission’s stance is to raise the key question that is not asked in the consultation document: why consider including investor-state arbitration in the TTIP at all? The rationale for bilateral investment treaties was traditionally linked to views about the potential impact on foreign investment of uncertainty caused by weak legal and judicial systems in host countries. While such a vision of failed statehood should in itself be examined further, it suffices to point out, in the context of the relationship between the US and the EU, that it is difficult to argue realistically that investors have cause to worry about domestic legal systems on either side of the Atlantic. Above all, with FDI stocks of over €1,5 trillion either way, it is implausible to claim that investors in fact have been deterred. It is true, as the Commission points out, that nine Member States already have BITs in place with the US. It may also be true that, for these nine Member States, the new arrangement might be a better alternative than ‘doing nothing.’ That, however, hardly seems enough reason to impose on the other two thirds of Member States a Treaty that profoundly challenges their judicial, legal and regulatory systems. The consultation document comes up with one additional argument: that the rights each party grants to its own citizens and companies ‘are not always guaranteed to foreigners and foreign investors.’ The claim is unsubstantiated. Even if it is accepted, there is no obvious reason why the incorporation in TTIP of a simple norm of non discriminatory legal protection and equal access to domestic courts could not address the problem perfectly adequately.

Commissioner De Gucht has announced an ambitious programme to ‘re-do’ investment law, make the system ‘more transparent and impartial’, ‘build a legally water-tight system’, and ‘close these legal loopholes once and for all.’ As we have shown in detail, the consultation document and reference text fail to achieve this. Specifically, the text:

- Fails to exclude acquisitions of sovereign debt instruments from the scope of the Treaty
- Allows anyone with a substantial business activity in the home state who holds any ‘interest’ in an enterprise in the host state to bring a claim
- Fails to spell out legal duties of investors in host states
- Fails to control the expansion of investment arbitration to purely contractual claims
- Fails to protect the ‘right to regulate’ as a general right of states alongside the many elaborate rights and protections of foreign investors, let alone as a component of the FET and Expropriation standards

- Allows for unwarranted discretion for arbitration tribunals in various ‘necessity’ tests
- Fails to further the stated principle of favoring domestic court proceedings
- Fails to regulate conflicts of interest in the adjudicative process
- Fails to formulate a policy on appellate mechanisms with any precision
- Fails to formulate a policy on avoiding ‘Treaty shopping’ with any precision
- and Fails to formulate a policy on third party submissions with any precision.

The text, in fairness, is rather better than many Investment Treaties. Some of its flaws, as we have discussed, could be addressed. But the nature of the problems associated with investor-state arbitration is not quite as straightforward as the Commission presents it. In a strange cat-and-mouse game, the Commission’s objective seems to be to ‘outwit’ arbitrators by closing down ‘loopholes’, eradicating discretion, and putting in place firm ‘rules’ on transparency of proceedings and impartiality of arbitrators. Analysis of the consultation document and the reference text, however, does not allow for the conclusion that this objective is likely to be achieved.

Yet investor-state arbitration raises some profoundly troublesome political issues regardless of arbitrator discretion. Investor-state arbitration delivers undue structural advantages to foreign investors and risks distorting the marketplace at the expense of domestically-owned companies. The benefits to foreign investors include their exclusive right of access to a special adjudicative forum, their ability to present facts and arguments in the absence of other parties whose rights and interests are affected, their exceptional role in determining the make-up of tribunals, their ability to enforce awards against states as sovereigns, the role of appointing bodies accountable directly to investors or major capital-exporting states, the absence of institutional safeguards of judicial independence that otherwise insulate adjudicators in asymmetrical adjudication from financial dependence on prospective claimants, and the bargaining advantages that can follow from these other benefits in foreign investors’ relations with legislatures, governments, and courts. At root, the system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions.

In our view, this public consultation offers a good opportunity for the European Union to reflect seriously on its competences in matters of FDI under the Common Commercial Policy. As the Consultation Notice mentions, EU Member States have some 1400 BITs in place. The vast majority of them are concluded with developing countries. There is little evidence linking the conclusion of the Treaties to increased flows of FDI, and there is little evidence that they contribute to other development goals, such as encouraging good governance. In our view, these Investment Treaties and their arbitration mechanisms are in clear tension with the values of Articles 2 and 3 of the TEU that the Union is to promote in its relations with the wider world. Instead of seeking to extend the system of investment arbitration to relations with the United States, the Commission should be working towards redefining its policy on Investment Treaties, both new and existing, in ways that make it compatible with the founding values of the European Union. This requires a clearer balancing between investor rights and responsibilities and the preservation of national policy space to ensure that the interests of other stakeholders such as workers, consumers and the wider community as a whole are upheld by government.

Q1: Scope of the substantive investment protection provisions

What is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in the Transatlantic Trade and Investment Partnership (TTIP)?

1. **Sovereign debt instruments:** In light of the reasoning of (majorities of) the Tribunals in the recent *Abaclat* and *Ambiente* cases ¹, it is clear that the definition of ‘investment’ proposed by the Commission will not suffice to exclude acquisitions of sovereign debt instruments, including those on secondary markets. It could, perhaps, be argued that the provisions of prudential carve-outs and safeguard measures discussed under Question 5 stand against claims brought by (speculative) investors in, for example, Greek government bonds complaining about ‘haircuts’ and the general handling of the sovereign debt crisis in the Eurozone. But the prudential carve-out only allows measures to ensure the integrity and stability of a party’s financial system in so far as these measures are ‘not more burdensome than necessary to achieve their aim’, and the safeguard clause only allows ‘strictly necessary’ measures in exceptional circumstances of serious difficulties for the operation of the economic and monetary union. It will, hence, fall on arbitration Tribunals to decide whether the measures involved were ‘necessary’, a task that should not properly be assigned to such bodies. In light of the social misery and hardship the sovereign debt crisis has brought, it requires little discussion to conclude that the mere thought of speculative investors in government bonds seeking damages before investment arbitration Tribunals is utterly unacceptable. The only appropriate way of excluding this possibility is clearly and unequivocally to exclude acquisitions of sovereign debt from the definition of ‘investment.’

¹*Abaclat and Others v Argentina*, ICSID Case No ARB/07/05, *Decision on Jurisdiction and Admissibility*, 4 August 2011, and *Ambiente Ufficio v Argentina*, ICSID Case No ARB/08/09, *Decision on Jurisdiction and Admissibility*, 8 February 2013.

2. **‘Substantial business activities’:** The requirement to have ‘substantial business activities’ in the home country may become a useful check against ‘forum shopping’. Yet it also highlights that the problem of forum-shopping originates in the refusal of the majority of arbitrators to pierce the corporate veil, or otherwise put reasonable limits on manipulation of corporate chains of nationality by claimants.² That this reference is even necessary should prompt the parties to reconsider their confidence in the system. If the Commission really wants to avoid abuse, moreover, it is surely not enough to focus on the extent of claimant activities in the home country. The reference text defines ‘a covered investment’ as an investment ‘owned or controlled’ by an investor of the other Party. But ‘investment’ itself is defined broadly and includes, for example, any equity stake, corporate bonds, loans and indeed ‘any other kinds of interest in an enterprise.’ Given the realities of modern financial markets, including equity and bond markets, it is difficult to imagine any company of any size and importance on either side of the Atlantic in which there is no financial ‘interest’ at all on the other side. It cannot be desirable to allow any US holder of a corporate bond issued by a European company to launch an investor-state claim against the home state of that European company.

3. **‘In accordance with applicable law’:** The Commission is worryingly confident about the reference to investments ‘made in accordance with applicable law.’ This, it is said, ‘has worked well’ and has a ‘proven track record’ in enforcing duties of investors. Yet the Commission offers no references to support the claim and the strategy is unlikely to deliver what the Commission seems to expect. It should at the very least be amended to make clear that investors are expected to respect the law of the host country for the duration of the investment². In any event, the claim of a ‘proven track record’ does not explain why the provision is not more explicit about what is expected of investors before they can launch a claim. References to an absolute prohibition of any form of bribery and an absolute obligation to respect human rights as they are reflected in the law of the host country and in international law would seem to be the bare minimum. Where the applicable law does not – for reasons inherent to the race for foreign capital on the part of host states – provide adequate protection, the applicable law clause should not shield the private investor from liability for human rights violations.

According to the Commission, the reference ‘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.’ It seems obvious that the clause should not ‘allow’ but oblige tribunals to refuse investment protection in such circumstances.

² See for example *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, *Decision on Jurisdiction*, 29 April 2004, and *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/03, *Decision on Respondent’s Objection to Jurisdiction*, 21 October 2005. For a case where the corporate veil was lifted, see *TSA Spectrum v Argentine Republic*, ICSID Case No. ARB/05/5, *Award of 19 December 2008*.

Q2: Non-discriminatory treatment for investors

What is your opinion of the EU approach to non –discrimination in relation to the TTIP? Please explain.

1. **MFN and Investor-State Arbitration:** The reference text usefully excludes access to investor-state arbitration from MFN, contrary to numerous contentious holdings in investment arbitration starting with *Maffezini*.³ That this reference is necessary should also give the parties reason to reconsider their confidence in the system. The reference also does not extend to the arbitrators’ practice, which the Commission claims to want to avoid, of importing new substantive standards (beyond dispute settlement provisions) from other treaties. To be safe, the treaty should make very clear that MFN applies only to domestic regulatory treatment of foreign investors and not to any other treaty.

³ *Maffezini v Spain*, ICSID Case No ARB/97/7, *Decision on Objections to Jurisdiction*, 25 January 2000.

2. **Article XX GATT:** The incorporation of Article XX GATT, according to the Commission, ‘allows the Parties to take measures relating to the protection of health, the environment, consumers, etc.’ To that end, the CETA reference text usefully emphasizes that Parties share an understanding of Article XX (b) GATT as including environmental measures and of Article XX (g) GATT as including measures aimed

at the protection of living exhaustible natural resources. However, this importation of Article XX GATT also includes the proportionality test under the provision's chapeau. Investment arbitrators will hence decide what is 'necessary' for the protection of health, the environment, consumers etc., an assessment which involves a process of 'weighing and balancing' which begins with an assessment of the relative importance of the interests or values that the challenged measures intend to pursue, and further includes an inquiry into the contribution the contested measure makes towards the stated objectives, and a determination as to whether the measure's restrictive effect is proportionate to its effect towards the protection of those interests and values.⁴ This interpretation is contentious enough in inter-state litigation before the WTO Appellate Body, a serious judicial institution: it involves, after all, a judicial determination of the 'relative importance' of such values or interests as the environment, consumer safety, or public health. It is clear that the test is bound to lead to serious trouble when administered by investment arbitration tribunals tasked with striking 'a balance' between an individual company's economic interests and the democratic collective choice of a body politic. In any event, the incorporation of Article XX GATT will not safeguard adequately a 'right to regulate'. Indeed, a public policy exception clause modeled on Article XX GATT creates a perception that regulatory action which restricts investor rights is *prima facie* inconsistent with these rights unless the respondent State can discharge the burden of proving that its measures come within the exception. To safeguard a right to regulate of states would require a clear and unequivocal statement of the right in the treaty alongside the many elaborate rights and protections of foreign investors, which would place the burden of proving an infringement upon the claimant investor.

3.

⁴ *This is the test as summarized by the WTO Panel in Brazil-Tyres, WT/DS332/R, Report of 12 June 2006, para 7.104, imported wholesale by the Tribunal in Continental Casualty v Argentina, ICSID Case No ARB/03/9, Award, 5 September 2008.*

Q3: Fair and equitable treatment

What is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

1. **FET:** The traditional understanding of the FET standard was systematic: under normal circumstances, foreign investors are not entitled to different, let alone better, treatment than domestic investors. The FET standard was seen as a back-up standard, operating only in the exceptional circumstances where the political and legal systems of the host country disintegrate to such an extent that the non-discrimination norm fails to protect investors from outrageous governmental behavior that is shockingly insufficient as measured by international standards. In the hands of investment arbitrators, the standard has been radically transformed into an autonomous source of wide-ranging obligations for governments. As summed up by one tribunal, the standard is now understood to demand 'consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.'⁵

The Commission rightly seeks to curtail this unwarranted interpretation. The idea is to propose a closed

list of basic obligations, and to insert a separate clause that purports to limit the doctrine of ‘legitimate expectations’ to instances where those expectations are generated by specific representations, which need not be in writing, made by the host state in order to induce the investment upon which the investor relied when making the investment. History suggests that the Commission’s approach is unlikely to have the desired effect. States have tried before to curtail the expansive interpretation of FET by explicitly stipulating that it does not require treatment that goes beyond the customary international law minimum standard of treatment of aliens and does not create additional substantive rights.⁶ These efforts, however, have turned fruitless in the face of Tribunals’ insistence that, for example, ‘in fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.’⁷ If this line of reasoning is continued,⁸ Tribunals will likely consider the doctrine of ‘legitimate expectations’ to flow from – and give meaning to – components of the various ‘basic obligations’ that the Commission proposes, such as ‘due process’ and the prohibition of ‘arbitrariness.’ In that case, the Commission’s efforts to remove the risk of expansive interpretations of the FET standard and the concept of an investor’s ‘legitimate expectations’ will have very little effect.

⁵ *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, *Decision on Liability*, 3 October 2006, para 131.

⁶ See for example Article 5 (2) of the 2012 US Model BIT.

⁷ *CMS Gas v Argentina*, ICSID Case ARB/01/8, *Award*, 12 May 2005, para 284. *The Tribunal’s reasoning under the FET standard was one of the few passages of the Award that survived the Annulment Committee’s scrutiny. See the Decision of the Ad hoc Committee on the Application for Annulment of Argentina*, 25 September 2007, para 85.

⁸ In fairness, some recent Tribunals have accepted that the FET standard applies only to the most egregious cases of maladministration and that it is to be defined in accordance with the international minimum standard and its emphasis on the exceptional nature of governmental misconduct. See for example *Glamis Gold Ltd v United States*, UNCITRAL, *Award* 8 June 2009, and generally UNCTAD *Fair and Equitable Treatment: A Sequel* (New York and Geneva, United Nations, 2012).

2. **Contract claims:** More problematic still, the Commission apparently suggests that the widespread tendency in investment law to elevate any breach of contract to a breach of treaty obligations is,⁹ by and large, a good idea. By assuming authority over contractual disputes that are subject to their own contractually-agreed forum for dispute settlement, numerous investment treaty tribunals have disregarded principles of party autonomy, sanctity of contract, and avoidance of duplicate litigation which are the hallmarks of arbitration or adjudication generally. The Commission’s text does nothing to address this challenge to markets based on legal equality of all investors and contracting parties, domestic or foreign. The proposal seeks to exclude only ‘ordinary contractual breaches, like the non-payment of an invoice.’ From the systematic point of view described above, there is no justified reason at all to consider contractual claims under the investment treaty unless the breach amounts to a breach

of one the ‘basic obligations’; that is, denial of justice, manifest arbitrariness, targeted discrimination and so on.

⁹ *The locus classicus is SGS v Philippines, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004.*

Q4: Expropriation

What is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

The consultation document rightly notes that ‘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.’ The document then goes on say that ‘the objective of the EU is to avoid claims against legitimate public policy measures.’ The CETA reference text, however, does no such thing. The formulation of the relevant clause is as follows:

For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

All this achieves is to invite arbitration tribunals to engage in yet more discretionary proportionality analysis with, arguably, a somewhat stricter standard of review: ‘manifestly excessive’ rather than ‘not necessary.’

Tribunals will have a license to substitute their opinion for that of a democratic government on the relative importance of the purpose the measures at issue seek to achieve, and to engage in cost-benefit analysis to see whether the costs imposed on investors are ‘excessive.’ In the process, they will also feel empowered to analyze, as part of the determination of whether the impact of a measure is ‘excessive’ in light of its purpose, whether the measure at issue ‘substantially advances’ that stated purpose.¹⁰

It may be grounded in several awards of investment tribunals,¹¹ but to bring proportionality analysis into the definition of what constitutes an ‘indirect expropriation’ is, quite simply, conceptually flawed. The norm governing direct expropriations demands compensation for takings that are (a) for a public purpose, (b) non-discriminatory, and (c) taken under due process of law. The logical implication is that governments are required to pay compensation for every measure that constitutes an ‘expropriation,’ however laudable and beneficial to a society as a whole the measure may be.¹² This decoupling of the definition of ‘expropriation’ and the purpose and effect of the measure at issue logically works both ways however: the fact that a non-discriminatory measure designed and applied to protect legitimate public welfare objectives may be thoroughly misguided, may be badly designed, may have unfair distributive consequences, or is not rationally suited to achieve those objectives has no bearing whatsoever on the question of whether it constitutes an ‘expropriation’ or has an effect

equivalent to expropriation. Under international law, non-discriminatory measures taken in the exercise of a State's regulatory powers aimed at the general welfare, and which involve the exercise of States' 'police powers', are simply not 'expropriations' requiring compensation.¹³

¹⁰ *The reference is to the test that a unanimous US Supreme Court banned from takings jurisprudence in Lingle v Chevron, 544 US 528 (2005), for its failure to 'help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property' and for empowering and requiring courts to 'substitute their predictive judgments for those of elected legislatures and expert agencies.'*

¹¹ *See eg Tecmed v Mexico, ICSID Case No ARB (AF)00/2, Award, 29 May 2003, para 122.*

¹² *Santa Elena v Costa Rica, ICSID Case No ARB/96/1, Final Award, 17 February 2000, para 72.*

¹³ *See eg Saluka v Czech Republic, UNCITRAL, Partial Award, 17 May 2006, para 255.*

Q5: Ensuring the right to regulate and investment protection

What is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

The issues dealt with under this section have little to do with a 'right to regulate' and serve mainly to legitimize the carve-outs for the audiovisual sector and prudential regulations. We have dealt with the carve-out and the safeguard clause under Question 2. Allowing investment arbitration Tribunals the discretion to determine whether measures taken for prudential reasons are not 'more burdensome than necessary to achieve their aim' or whether safeguard measures are 'strictly necessary' does not amount to a 'right to regulate.' By its omissions, the consultation text actually confirms boldly that the right to regulate has not been affirmed and preserved, by a clear and unequivocal statement of the right, alongside the rights and protections of foreign investors.

Q6: Transparency in ISDS

Please provide your 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.

Where they apply, the UNCITRAL Rules are reasonable, and their incorporation by reference seems a good idea. The Treaty could usefully clarify the nature of a Tribunal's obligations under Article 3 (4) of the UNCITRAL Rules: that provision instructs Tribunals to take into account a) whether the amicus has a 'significant interest' in the proceedings and b) whether the amicus would be able to assist the Tribunal by bringing a particular and different perspective when 'deciding to allow' third-party submission.' What form this 'decision' should take, and the extent to which it should be motivated, is left open. At the very least, the proposed Treaty should demand of Tribunals to provide a written account of its reasoning under this provision.

Finally, the Commission should ensure that any settlement of a threatened claim, including before the filing of a formal notice of consultations, will be made public.

Q7: Multiple claims and relationship to domestic courts

Please provide your 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.

1. **Domestic proceedings:** ‘As a matter of principle’, the document states, ‘the EU approach favors domestic courts.’ There is nothing in the text, however, that suggests any action to further that principle. The referenced CETA text contains only a limited ‘fork in the road’ provision, not materially different from the one found in NAFTA or the US Model BIT. The provision does not oblige or even provide an incentive for investors to seek redress in domestic courts, but merely sets out to oblige investors to choose between domestic courts and international arbitration. As is the case with most such provisions, this one too is bound to prove of limited effect even for its limited purpose; for example, it excludes claims or proceedings initiated in domestic courts for monetary damages only, and not claims or proceedings seeking injunctions or declarations of unlawfulness, and it will not exclude (counter-) claims brought by investors in domestic proceedings for the purpose of preserving their rights and interests. The ‘fork in the road’ provision also, rightly, demands claimants to waive their rights to ‘initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.’ This, too, fails to exclude domestic proceedings or claims seeking redress other than monetary damages. Indeed, it allows foreign investors to pursue monetary remedies (not the primary remedy in domestic public law) under the treaty and non-monetary orders (not the primary remedy in investment treaty arbitration) in domestic courts. The waiver, moreover, ceases to apply the moment the arbitration tribunal rejects the investor’s claim on any procedural or jurisdictional grounds, even when the claim is found to be frivolous and ‘manifestly without legal merit.’ This, it is submitted, severely undermines the intention as per Question 9 of preventing abuse of the arbitration system.

But what of the ‘matter of principle’ of favoring domestic courts? The Commission explains the drawbacks of seeking redress in domestic courts as follows:

‘It is often the case that protection offered in investment agreements cannot be invoked before domestic courts and the applicable legal rules are different. 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, in some cases domestic courts may favour the local government 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. In addition, the remedies are often different. In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. ISDS tribunals cannot order governments to reverse measures.’

If this is the extent of the problem, then the solution is fairly straightforward. The Commission should insist on the time-honored principle of exhaustion of local remedies, with the qualification that investors may be given the opportunity to make the case that domestic proceedings do not offer justice or are not reasonably-available according to a set list of criteria having to do with remedies, immunities, procedural rules, and other objective grounds. If there are grounds to believe that, in the course of domestic judicial proceedings, local companies or local governments have been ‘favored’ or ‘due process rights such as the right to appeal’ have been denied, the investors may be given the right to argue before investment arbitration tribunals that the treatment they have been given by the domestic judicial system falls short of the standards of treatment under the Treaty; for example, that it constitutes discrimination or ‘denial of justice.’

2. **Treaty shopping:** The CETA reference text also contains a provision seeking to prevent the pernicious phenomenon of ‘Treaty shopping’. The language is extraordinarily weak, instructing the Tribunal to ‘stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award.’ If the Commission is serious about avoiding investors being grossly over-compensated and about ensuring consistency, it should seek to clarify what is expected of Tribunals to ‘otherwise ensure’ that parallel proceedings are ‘taken into account.’

Q8: Arbitrator ethics, conduct and qualifications

Please 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?

1. **Rosters:** The Commission proposes to set up a roster from which Chairpersons of tribunals are to be appointed. As it explains:

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.

These benefits, obviously, would only arise systematically if the Treaty would break the tradition of allowing parties (or, formally, the other two arbitrators) to agree on a Chairperson themselves. From the CETA text, moreover, it seems that the intention would be to entrust the task of appointing Chairpersons from the roster to the Secretary-General of ICSID a choice that is not explained and for which there appears little justification given the lack of any formal accountability of this officer under the constitutional orders of the US or EU.

The Commission also states that ‘among those best qualified and who have undertaken such tasks will be retired judges.’ The investment arbitration community is composed overwhelmingly of international commercial arbitrators, with the addition of a few international law professors and a handful of former

(and, imprudently, current) ICJ judges: ‘retired judges’ are few and far between, unless one counts as ‘retired judges’ people who have served in such institutions as the International Chamber of Commerce’s International Court of Arbitration, the Iran-U.S. Claims Tribunal, the World Bank’s Administrative Tribunal, the Dubai International Financial Court, or Ad hoc divisions of CAS for the Olympic Games.

2. **Conflicts of interest:** The Commission, rightly, has misgivings about the standards of ethical behavior and conflicts of interest that prevail in the investment arbitration regime. The reference text from CETA does not assuage the fears. While it envisages an unresolved or undisclosed code of conduct to be adopted by Parties, it relies for the time being on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. This instrument, despite being elaborated under the aegis of the IBA, is an act of self-regulation by and for the international arbitration community. The text puts the power to decide on challenges of arbitrators in the hands of the ICSID Secretary-General instead of a judicial official. In light of what was said above this is inappropriate.¹⁴

The Commission’s stated intention is to introduce a code of conduct in the text of the new Treaty. It is so vague on the contents of this code that it is difficult to come to any judgment. For example, even if the document mentions concerns arising from the fact that arbitrators often appear in various roles in different proceedings, the document falls short of proposing what is clearly the one single most important rule that is necessary: that arbitrators appointed in cases under the present Treaty may not themselves simultaneously be involved in any capacity other than as an adjudicator in any other investment arbitration, nor have any professional association – whether in the context of a law firm, Barrister’s chambers, or any other similar relationship – with anyone who is involved as counsel or party-appointed expert in any investment arbitration. A few arbitrators self-impose this rule. Other arbitration systems, such as, for example the Court of Arbitration for Sport, have versions of this rule.¹⁵ Its absence in a process to review decisions by legislatures, governments, and courts in matters of profound importance to large numbers of people, at potentially vast cost to the public purse, is totally unacceptable.

One consideration underlying this rule has its basis in the economic interests involved with the (generously compensated) arbitrator appointments themselves. Here, the suspicion is that arbitrators, when they act as counsel, will appoint another arbitrator who may in turn in a subsequent case, when acting as counsel, appoint the first. This is certainly a concern, but the more important consideration sees to the economic interests involved with the representation of claimants: law-firms involved in this work have a clear interest in making sure that claims under investment treaties have a good chance of success, and, given the practice of working on contingency fees, a clear interest in higher rather than lower awards. It is imperative, from this point of view, to make sure that no one who stands to profit in any way from the income generated by the representation of parties to investment disputes acts as an arbitrator.

More broadly, in a system where only one side, foreign investors, can bring claims, does not everyone – such as a retired judge – who works in the system and wants to continue doing so have an apparent economic interest to encourage more claims? Even with the most robust code of conduct, the absence of basic institutional safeguards of judicial independence undermines fundamentally the claims of investor-state arbitration to neutrality and impartiality.

¹⁴ *Mandatory reading in this regard is Professor Dalhuisen's postscript in Vivendi v Argentina, ICSID Case No ARB/97/3, Decision on Argentina's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010.*

¹⁵ *Article S18 (3) of the CAS-TAS Statutes of the Bodies Working for the Settlement of Sports-related Disputes states that 'CAS Arbitrators and mediators may not act as counsel for a party before the CAS.' This obviously leaves the gaping loophole of partners and associates of the arbitrator's law firm acting as counsel.*

Q9: Reducing the risk of frivolous and unfounded cases

Please provide your 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 Commission proposes a kind of summary judgment system to provide 'an early and effective filtering mechanism for frivolous claims.' It seems unlikely that this approach will have any effect. Especially in light of the fact that the reference text instructs tribunals to consider the alleged facts to be true, arbitrators will have a hard time dismissing claims as 'manifestly without legal merit' under the necessarily vague and open-ended provisions of an investment treaty.

Q11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement.

Please provide your 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?

As an 'additional safety-valve', the Commission plans to introduce a system where the EU and the US can issue binding interpretations. The reference text from CETA further provides the possibility for the non-respondent State party to intervene in a dispute. From the consultation text, it appears that the Commission wants to combine these two elements. Where, in a given case, the non-respondent State agrees with the interpretation of the respondent State, 'such interpretation is a very powerful statement, which ISDS tribunals would have to respect.' For the parties to a Treaty that confers rights on private parties to intervene directly in an ongoing case and issue binding interpretations is a drastic measure. Above all, the planned clause raises once more the question: if the Commission has so little confidence in arbitration tribunals, why confer on them the highly sensitive task of 'weighing and balancing' States' rights to regulate with the property rights of investors in the first place?

Recommendation 16

There has been great controversy in the European Union during consultations over the possible inclusion of Investor-State Dispute Settlement in the *Trans-Atlantic Trade and Investment Partnership*.

17. Media Law

There has been debate over the application of investor-state dispute settlement to the area of regulation of media ownership and diversity.

In a striking dispute in 2014, Al-Jazeera has lodged a \$150 million claim for compensation against Egypt in an international investor arbitration tribunal.⁷⁷ The lawyers for Al-Jazeera – Carter-Ruck - notified the Egyptian government that they would seek compensation under the investor-state dispute mechanism included in a 1999 investment treaty between Egypt and Qatar. The lawyers argued that the Egyptian Government had violated Al Jazeera's rights as a foreign investor in the country by seizing the broadcaster's property, jamming its signal, and arresting and attacking Al Jazeera journalists. Cameron Doley, a senior partner at Carter-Ruck, commented: 'There has been a prolonged and sustained attack on Al Jazeera in Egypt.'⁷⁸ He maintained: 'A media entity is a commercial entity like any other.'⁷⁹ Doley observed: 'If your business is wiped out in a given country it doesn't matter if you are Al Jazeera, the FT or a manufacturer of car parts – you suffer the loss of your investment.'⁸⁰ An Al-Jazeera spokesman observed that 'Egypt has severely disrupted Al-Jazeera's business activities' and the military regime was in breach 'its obligation to respect the right of journalists to report freely.'⁸¹ The dispute is a fascinating one. The action by Al Jazeera is a response to the Egyptian Government's lack of respect for free speech and a free press. Nonetheless, it seems unlikely that the use of an investor-state dispute settlement mechanism alone will be a suitable remedy to restore the rule of law, and press freedom in Egypt.

The dispute raises larger questions about the use of investor-state dispute settlement in respect of the regulation of media law, ownership, diversity, and content. It would appear that investor-state dispute settlement could be deployed both in respect of mass media (such as television broadcasting, radio broadcasting, and newspapers) and new media (such as

⁷⁷ Shawn Donnan, 'Al Jazeera Sues Egypt \$150 m after Crackdown on Journalists', *Financial Times*, 28 April 2014, <http://www.ft.com/cms/s/0/7ff2210c-cec0-11e3-ac8d-00144feabdc0.html#ixzz30FnxPsmI>

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Roy Greenslade, 'Al-Jazeera demands \$150m compensation from Egypt government', *The Guardian*, 29 April 2014, <http://www.theguardian.com/media/greenslade/2014/apr/29/al-jazeera-egypt>

broadband, the Internet, search engines, social media, blogs, and micro-blogs, such as Twitter).

In the context of Australia, foreign investors could bring actions in respect of a wide of regulatory decisions in respect of the Communications Portfolio – including:

- * the National Broadband Network
- * Media Ownership – including Foreign Ownership
- * Media Competition and Diversity
- * regulation of television, radio, and newspapers
- * regulation of telecommunications, internet service providers, and new media; and
- * local content rules

The investor-state dispute settlement regime could be relied upon by foreign investors in a range of media disputes and controversies.

Historically, there has been a great deal of conflict over local content rules in trade agreements and discussions. In its review of bilateral agreements, the Productivity Commission considered restrictions on trade in cultural goods.⁸² The Commission noted:

In examining the case for the inclusion of special restrictions or provisions in Australia's trade agreements on cultural grounds, it should first be recognised that, at least up to some point, Australians typically do enjoy and value — and indeed are willing to pay for — representations of their own culture or the presentation of material or stories from an Australian perspective or 'through Australian eyes'. While market forces will accordingly go some way towards ensuring an optimum supply of culturally-valuable Australian output, the Commission has previously identified forms of market failure that may arise in relation to some cultural goods and services, causing an underprovision of such material. These provide an economic rationale to consider government actions to off-set these effects.⁸³

⁸² The Productivity Commission, *Bilateral and Regional Trade Agreements*, Melbourne: The Productivity Commission, November 2010, 283, http://www.pc.gov.au/data/assets/pdf_file/0010/104203/trade-agreements-report.pdf

⁸³ Ibid.

The Productivity Commission observed: ‘While some public support for ‘cultural’ goods and services may thus be warranted, restrictive trade measures will not necessarily be the best mechanism for supporting the production of cultural goods and services, or pursuing cultural objectives.’⁸⁴ However, the Commission was also opposed to the inclusion of investor-state dispute settlement clauses in trade agreements.

Recommendation 17

In light of the Al-Jazeera dispute, Investor-State Dispute Settlement could have a significant impact upon Australian media and communications law – particularly in respect of the regulation of media ownership, diversity, and content.

⁸⁴

Ibid.