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Investor-State Dispute Settlement in the TTIP and CETA

Submission to the European Commission's Public Consultation

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Investor-State Dispute Settlement in the TTIP and CETA

Submission to the European Commission's Public Consultation

A reply to the European Commission's Public Consultation on Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement (TTIP) and the Canada-EU Comprehensive and Economic Trade Agreement (CETA)

Introduction

One of the most controversial elements in modern trade treaties is the investor-state dispute settlement (ISDS) mechanism, which allows foreign investors to bypass domestic courts to directly challenge government measures before unaccountable arbitration tribunals.

ISDS was slated to be a key feature of the Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the European Union (EU) and the U.S. But faced with unprecedented levels of public criticism, in January 2014 the European Commission (EC) paused the TTIP negotiations on ISDS in order to consult the public.[1]

A central part of this public process was a 90-day on-line consultation, launched in March 2014. Remarkably, the EC used portions of the still-secret Canada-EU Comprehensive and Economic Trade Agreement (CETA) investment protection chapter to illustrate its proposed approach in the TTIP.

In Europe, it is increasingly understood that approving an ISDS mechanism in the CETA would set the stage for its inclusion in the TTIP. The formerly low-profile CETA is now being drawn into the heated controversy surrounding the TTIP.

The European on-line consultation was open to respondents from all countries. CCPA trade senior trade policy researcher Scott Sinclair replied on behalf of the CCPA's Trade and Investment Research Project.[2]

Question 1: Scope of the Substantive Investment Protection Provisions

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?[3]

To begin, we wish to stress that there is no convincing justification for including investor-state dispute settlement (ISDS) in either the CETA or the TTIP. We emphatically oppose its inclusion in the CETA and strongly recommend against its inclusion in the TTIP for reasons elaborated in our reply to this questionnaire.

The court systems in Canada, the European Union and the United States already grant high levels of legal protection to all investors, regardless of their nationality. If investment protection rules must be included in the CETA and the TTIP, any disputes concerning their application should be resolved solely at a government-to-government level.

The Commission's introductory explanation to Question 1 states that the EC objective is to ensure: "that protection is only granted in situations where investors have already committed substantial resources in the host state — and not when they are simply at the stage where they are planning to do so." Contrary to this objective, the addition of the terms "establishment" and "acquisition" to the proposed definition of national treatment (see Question 2 below) broadens the scope of the national treatment obligation beyond "the approach commonly found in European bilateral investment treaties", whose scope is more clearly limited to post-establishment. Furthermore, the Commission's preferred definition of investor reads "a Party, a natural person or an enterprise of a Party, that seeks to make, is making or has made an investment in the territory of the other Party." Again, this language, which is derived from the NAFTA and North American-style bilateral investment treaties, tends to extend the scope of investor protections to the pre-establishment phase.

The proposed definition of investment (drawn from the CETA and provided in the annex) is overly broad and open-ended. This approach results in less clarity and legal certainty than, for example, a closed list of covered investments. The Commission's proposed definition of investment extends the scope of protection far beyond what is advisable from a regulatory or public interest perspective.

For example, intellectual property rights such as monopoly protection for patents are privileges granted by governments for a public purpose (in the case of patents to encourage innovation). These rights are already subject to detailed rules and obligations under the WTO's Agreement on Trade-Related Intellectual Property Rights (TRIPS) and in the proposed intellectual property rights chapters of the CETA and the TTIP. They should not be covered under the investment protection provisions or subject to ISDS. The EC's pressure on Canada to submit patent-related decisions of courts and administrative tribunals to ISDS is particularly objectionable, constituting unwarranted interference with the Canadian courts' interpretation of the internationally accepted utility doctrine.[4]

Similarly, concessions are contractual-style arrangements, whereby governments grant access to a publicly owned resource, or the right to provide a service to the public, contingent upon the concession holder fulfilling its obligations to the public. Disputes related to concessions should be resolved in the domestic courts, or according to the dispute resolution mechanisms specified in the concession agreement. They should not be subject to the investment protection provisions or to ISDS.

It is unclear from the discussion paper whether the market access provisions and performance requirements prohibitions of the CETA will be enforceable through ISDS. If they are, state and local governments in Europe will be exposed, for the first time, to investor-state suits regarding concession agreements in areas such as the provision of services of general interest. Foreign investors are far more likely than foreign governments to test the scope of the "public utilities" exception, which purports to protect the ability to re-establish public services where privatization has been tried and failed. Similarly, requirements for local content, hiring, training and other local development conditions in concession agreements could be contested by foreign investors as prohibited performance requirements. If such disputes are subject to ISDS, foreign investors and their lawyers can be expected to fully exploit any flaws or ambiguities in the reservations protecting European national, state and local public services.

Question 2: Non-Discriminatory Treatment for Investors

Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non–discrimination in relation to the TTIP? Please explain.

Contrary to explanations offered by the Commission, national treatment violations under investment protection agreements such as NAFTA's chapter 11 have not been exclusively related to nationality-based discrimination. National treatment obligations have been interpreted to provide protection against both formal and de facto discrimination. Even government measures that do not discriminate on the basis of nationality and are neutral in their treatment of investors can be argued to violate national treatment if they adversely affect a foreign investor's (or an investment's) equality of competitive opportunity vis-a-vis their domestic counterparts.

For example, under NAFTA's chapter 11, SD Myers, a U.S. waste disposal firm, successfully challenged a temporary Canadian ban (Nov. 1995 to Feb. 1997) on the export of toxic PCB wastes. Even though the ban applied generally without discriminating on the basis of nationality, the arbitral tribunal ruled that Canada had violated NAFTA articles 1102 (national treatment) and 1105 (minimum standards of treatment). The tribunal also dismissed the Canadian government's arguments that the export ban on PCB wastes was necessary to fulfil its *Basel Convention* obligations to dispose of hazardous wastes in Canada. The investor was awarded compensation of CAD$6.05 million plus interest.

Differing treatment of investors or investments should not be equated with nationality-based discrimination. Governments frequently treat investors differently for perfectly legitimate reasons. An investment in an environmentally sensitive region, for example, may be treated differently than an investment in another less fragile region. The qualification “in a similar situation” in the Commission’s proposed text acknowledges such concerns to some extent. However, despite NAFTA’s “in like circumstances” qualification to national treatment, investor-state tribunals have interpreted the agreement’s national treatment obligation in a manner that impinges on the ability of governments to treat investors differently for legitimate reasons.

Over time (and the duration of an investment), successive governments may treat different investors, or even the same investor or investment, differently for entirely legitimate reasons. Within democratic societies, successive governments may treat investors and investments differently from a regulatory perspective depending on the ideology of the party in power and reflecting the electorates’ evolving tolerance for risk and/or an increasing awareness and understanding of the science surrounding the issue.

These interpretive issues are accentuated by the proposed top-down or negative-list approach, whereby all sectors and measures are covered unless specifically exempted. Once again, the basic issue is that such a broad category of difficult and sensitive judgements regarding public policy and regulation should not be ceded to unaccountable arbitral tribunals.

Regarding most-favoured-nation (MFN) treatment, the description of the EU objectives states that: “On the ‘importation of standards’ issue, the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements.” If this description is accurate then it would be best not to include an MFN clause at all or to exclude other investment agreements from MFN treatment altogether.

In the draft CETA investment chapter, Canada and the EU have included a clause that stipulates that MFN treatment “does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements.” If included in the final text, this clause should ensure that ISDS disputes are conducted under the procedural provisions of the CETA alone, without importing ISDS provisions from other agreements.

However, as regards substantive provisions, it is difficult to understand how it would be practical to prevent investors covered by the CETA from invoking their MFN rights to the most favourable treatment granted to other foreign investors under other agreements. If an MFN clause is included, it would be prudent to ensure that it is forward-looking, with MFN treatment applying only to the most favourable treatment granted under future trade and investment agreements.

In certain of its recent Foreign Investment and Protection Agreements, Canada has limited the application of MFN treatment to exclude investment agreements in force prior to Jan. 1, 1994. This is an attempt by Canada to ensure that NAFTA's investment protection standards are not imported into the more recent FIPAs. It must be noted, however, that contrary to the Commission's stated goals, recent drafts of the CETA investment chapter contain a backward-looking MFN treatment clause.[5] Only procedural provisions are limited, all substantive provisions under other investment agreements are included under MFN treatment.

The proposal to incorporate the GATT Article XX and GATS Article XIV exceptions into the investment chapter would provide defendant governments with a last line of defence against claims related to certain, but not all, provisions in the investment chapter. As has been noted in other submissions, the scope of the proposed investment chapters is far broader than either the GATT or the GATS, and simply importing these trade-related exceptions by reference utterly fails to protect the right to regulate across this far broader range of investment-related matters.[6] Moreover, such general exceptions have been interpreted restrictively in the WTO context. Empowering investment arbitration tribunals to second-guess whether democratically-decided regulatory measures are "necessary" is foolhardy and unacceptable.

Question 3: Fair and Equitable Treatment

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

The EC's proposed approach regarding ***fair and equitable treatment* (FET)** is highly problematic. This provision is one of the most abused in investor-state arbitrations. For example, NAFTA Article 1105 (Minimum standards of treatment) is the most commonly invoked provision in NAFTA investor-state claims. It has been cited by investors in 88% (66 of 75) of NAFTA chapter 11 claims.

Based on its negative experience under NAFTA chapter 11, Canada had proposed in the CETA negotiations that *minimum* standards of treatment be limited to "treatment in accordance with the customary international law minimum standard of treatment of aliens." A 2001 interpretive note, agreed to by all three NAFTA parties, also attempted to restrict the meaning of minimum standards of treatment along these lines.[7]

The EC, however, has insisted on stronger investor protections in the CETA, than under the already highly controversial NAFTA Article 1105. The EC is now proposing this expansive language as a model for the TTIP.

The EU approach proposes additional standards of investor protection beyond that which is required by the customary international law minimum standard of treatment of aliens. Far from adding clarity, the proposed grounds (manifest arbitrariness, breach of due process, targeted discrimination, denial of justice, abusive treatment) are ambiguous and susceptible to unpredictable interpretations. Any transgression would constitute a breach of the article, providing arbitrators with ample latitude to second-guess regulators and the ability to impugn government legislative, regulatory or administrative measures. It is also important to note that no reservations protecting regulatory measures or regulatory authority from the FET provision are permitted.

The incorporation of "legitimate expectations" of the investor into the interpretation of the FET standard is particularly troubling, and poses a clear threat to the rights of governments to regulate, and especially to alter and strengthen regulatory approaches in response to changing circumstances, new knowledge, investor behaviour, public perceptions of risk and democratic decision-making.

The EC has publicly proclaimed a desire "to ensure that the standard is not understood to be a 'stabilisation obligation' — in other words, a guarantee that the legislation of the host state will not change in a way that might negatively affect investors". Yet the explicit incorporation of the legitimate expectations of the investor, especially if combined with an umbrella clause as the EC has advocated in the CETA negotiations, will have just the opposite effect. The proposed language on FET will greatly exacerbate precisely the sorts of problems for democratic regulation that the EC avows it wants to avoid. In both the CETA and TTIP contexts, this approach to FET is unwarranted, reckless and unacceptable.

Question 4: Expropriation

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

The issue of determining when a regulatory or other measure constitutes "indirect expropriation" resulting in compensation for affected foreign investors is best left to the domestic courts and legal systems of the involved countries.

The experience with ISDS under the NAFTA should raise red flags. Arbitral tribunal rulings on "indirect expropriation" have been all over the map, ranging from the alarming (Metalclad v. Mexico) to the reasonable (Methanex v. the U.S.). Even in cases won by the defendant government (such as Glamis v. the U.S) tribunals have developed their own elaborate tests for regulatory or creeping expropriation, based on the financial impact of regulation on the foreign investor, that have little or no basis in domestic law and would rightly not be given credence in the domestic courts.

The proposed interpretive language drawn from post-NAFTA U.S. and Canadian bilateral investment treaties is an improvement over previous EU BITs and NAFTA chapter 11. But despite the limiting language, arbitral panels still have far too much leeway in determining whether or not a contested measure is a bona fide measure "designed and applied to protect legitimate public welfare objectives" and, even if it is, whether it falls within those "rare circumstances" requiring compensation.

For example, a series of increasingly stricter environmental or safety measures applied to a specific investment or project could be construed as "indirect expropriation." This regulatory scenario — where environmental or safety measures are strengthened to safeguard citizens — is played out continually in every advanced society, as public and scientific awareness grows about the environmental, health or safety risks associated with a particular operation or industry. Examples include the Quebec government's ban on fracking under the St. Lawrence River or Romania's decision to block the controversial Rosia Montana gold mining project, which are both threatened by investor-state claims.[8]

A basic threshold issue is that the Commission has not been able to furnish any credible examples of where the domestic courts of Canada or the U.S. have not provided adequate protection and compensation to investors in the event of an expropriation for a public purpose. Indeed, the examples that have been provided demonstrate the opposite.

In its answer to a written question in the European Parliament, the Commission cites two cases of alleged expropriation without compensation of foreign investors in Canada.[9] These were related to two NAFTA chapter 11 cases: AbitibiBowater v. Canada and Gallo v. Canada. The Commission uses these two cases, to justify the inclusion of an investor-to-state dispute settlement mechanism in the CETA.

The AbitibiBowater case involved a bankrupt investor that had closed its last timber mill in the province of Newfoundland and Labrador, leaving behind a host of problems including unpaid bills, unemployed workers, unhonoured pension obligations, and highly contaminated industrial sites. Provincial legislation expropriating the abandoned mill provided a process for determining appropriate compensation for the expropriated assets, but the investor did not avail itself of this process. Instead, it turned to NAFTA chapter 11 through which it was successful in getting a $130 million payout from the Canadian federal government. This payout reportedly included compensation for rights to publicly owned timber and water rights, which are not normally considered compensable under Canadian law.

The Adams Lake enterprise, at the heart of the Gallo claim, was a high-risk, environmentally irresponsible scheme to dispose of Toronto's garbage in a man-made lake on an abandoned mine-site far north of the city. The controversial project was rightly and properly rejected by democratic means. By the time the Ontario legislation banning the project was passed, the venture was essentially worthless. Nonetheless, the legislation provided for compensation for all reasonable expenses incurred by the investors, hence compensating the primary investors at above fair market value. The NAFTA claim involved an alleged foreign investor (Gallo) with only a tenuous, shadowy relationship to the project. The NAFTA arbitral tribunal rejected the Gallo claim on jurisdictional grounds, because the claimant could not even demonstrate control of the enterprise prior to the challenged measure, and by its own admission had made no financial contribution to the failed enterprise. It is astonishing, indeed appalling, that the EC would cite such a case in its efforts to secure ISDS in the CETA.

The two cases picked by the Commission to support their contention that ISDS is justified to protect investors from "expropriation without compensation" in the CETA actually make the opposite case: that ISDS is a system of corporate privilege and power run amok.

There is no problem facing foreign investors in the domestic courts that needs to be solved here. On the contrary, ceding the authority to arbitral tribunals to make sensitive judgements about expropriation, including so-called indirect or “regulatory expropriation”, along with the power to levy binding damage awards would create a host of serious problems for regulators, governments acting in good faith to protect the public interest, citizens encouraging them to do so, and for the democratic process itself.

Question 5: Ensuring the Right to Regulate and Investment Protection

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU’s approach to TTIP?

Affirmations of the right to regulate in the preamble have little legal effect. Regulatory measures must still conform to the substantive provisions of the investment chapter or agreement. Provisions that affirm the right to regulate “in a manner consistent with the agreement” (such as NAFTA Article 1114.1.) actually confirm this priority of investor rights over the right to regulate.

For reasons elaborated above, we reject the Commission’s assertion that its proposed “improvements” to substantive investor protections (such as FET and indirect expropriation) “will ensure that investment protection standards ***cannot*** be interpreted by arbitral tribunals in a way that is detrimental to the right to regulate” (emphasis added). The Commission’s assertion is pure hubris.

As the Commission’s introductory text points out, in a democratic society the right to regulate is not unlimited. But there is a very big difference between limits on the right to regulate that are embedded in the democratic system and reviewable by the domestic courts, and those imposed by broadly worded investment treaties that serve only foreign investors and are interpreted by arbitral tribunals beyond the review and reach of domestic courts and lawmakers. The former limits are legitimate, while the latter are not and must be rejected. In a democratic society, the authority to decide whether public regulation is based on a “legitimate purpose” and is “necessary” should never be ceded to unaccountable investor-state tribunals that intrinsically privilege the particular interests of foreign investors over the public good.

Question 6: Transparency

Taking into account the above explanation and the text provided in annex as a reference, 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.

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. Increased transparency can be expected to make the fundamental flaws in the ISDS system more evident, but only after it is too late for the public or governments to do anything meaningful about them. The far more desirable course of action is to not include ISDS in the CETA or the TTIP.

Question 7: Multiple Claims and Relationship to Domestic Courts

Taking into account the above explanation and the text provided in annex as a reference, 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.

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. If the Commission is sincere in its claim that, in principle, it favours domestic courts and amicable solutions such as mediation, then the appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 8: Arbitrator Ethics, Conduct and Qualifications

Taking into account the above explanation and the text provided in annex as a reference, 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?

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. No persons, whatever their qualifications, should be entrusted with the anti-democratic authority inherent in the ISDS procedure. The appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 9: Reducing the Risk of Frivolous and Unfounded Cases

Taking into account the above explanation and the text provided in annex as a reference, 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.

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. The suggested reform to reduce frivolous claims (which is left to the arbitration tribunals themselves to enforce) would have minimal impact. It is unclear if the EC proposal to require the losing party "to bear all costs of the proceedings" would include covering the full legal costs of the winning party, or just the tribunal's expenses. In any event, it is the *serious* investor-state claims, not the *frivolous* ones, which pose the greatest threat to the public interest. Therefore, the appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 10: Allowing Claims to Proceed (Filter)

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

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. Filter mechanisms may discourage foreign investors from challenging prudential measures aimed at protecting consumers or ensuring the stability of the financial system. Indeed, as the 2008 global financial crisis demonstrated, such regulatory measures, which must often be swift and decisive, are absolutely vital to ensure the stability of the financial system and the international economy. Given these high stakes, however, it makes no sense to give foreign investors the power to challenge such measures through ISDS. Therefore, the appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 11: Guidance by the Parties (the EU and the US) on the Interpretation of the Agreement

Taking into account the above explanation and the text provided in annex as a reference, 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?

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. The authority of the parties, through consensus, to issue binding authoritative interpretations of provisions is a feature of the NAFTA (Article 1131). Nevertheless, the unanimous consent required to exercise this authority has been achieved only twice in the over 20-year history of the treaty. In July 2001 the Free Trade Commission, comprised of Cabinet-level representatives of the three parties, reached agreement on increased transparency in investor-state disputes and an interpretive note on minimum standards of treatment. It must also be noted that prominent investment lawyers and some arbitrators maintain the view that the NAFTA Commission's interpretive note simply expresses the *preferences* of the parties, and that tribunals are obliged to interpret the actual text of the treaty itself as they see fit. Accordingly, the appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 12

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

We do not wish to comment extensively on the Commission's limited procedural reform proposals. They avoid the essential issue: investor-state arbitration is not needed in the CETA or the TTIP. Even if an appellate body could be established, which is extremely unlikely in either the CETA or the TTIP negotiating context, it would merely legitimize an ISDS process which is fundamentally flawed and anti-democratic. Therefore, the appropriate course of action is not to include ISDS in the CETA or the TTIP.

Question 13

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 proposed approach ignores the most obvious and fundamental question: should ISDS be included in the CETA and TTIP at all? This glaring omission calls into question the validity and bona fides of the entire consultation.

Both the European Parliament and the official EU sustainability impact assessment of the CETA have questioned the need for including investor-state dispute settlement in the CETA. Thousands of European citizens, many elected representatives, and even some EU member states, oppose the inclusion of ISDS in the TTIP and the CETA. Yet the Commission does not even ask the basic question whether ISDS should be included. Clearly, it has already thrown its weight behind ISDS in the CETA and the TTIP.

The Commission's approach asks citizens and governments to put far too much faith in technical fixes and procedural adjustments in order to salvage a fundamentally flawed and anti-democratic process. As noted previously, North America and Europe have highly regarded court systems that protect the rights of all investors, regardless of their nationality. There is no need for and no credible justification for including investor-state arbitration in the CETA or the TTIP.

Under the Commissions' approach, arbitration can still be invoked unilaterally by investors. Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching an investor-state claim. Governments give their "unconditional, prior consent" to submit investor claims to binding arbitration, allowing investors to simply bypass the domestic courts. In effect, this establishes a private justice system exclusively for foreign investors, including the world's largest and most powerful multinational corporations.

Canada's NAFTA experience amply illustrates the dangers of this system. There have been 35 investor-state claims against Canada under the NAFTA's ISDS mechanism and the number continues to grow. To date, Canada has lost or settled six claims and paid damages to foreign investors totalling over $171.5 million. Canadian taxpayers have paid tens of millions of dollars in legal costs defending against these claims.

Currently, Canada faces eight active ISDS claims, challenging a wide range of government measures that allegedly diminish the value of foreign investments. The challenged measures include a moratorium on fracking under the St. Lawrence River by the Quebec provincial government, a moratorium on offshore wind projects in Lake Ontario, provisions under the Ontario Green Energy Act to promote the rapid adoption of renewable energies, and a decision by a Canadian federal court to invalidate a pharmaceutical patent on the basis that it was not sufficiently innovative or useful. Cumulatively, these foreign investors are seeking several billions of dollars in damages from the Canadian government.

If the EC proceeds with its planned approach, EU member governments will face similar challenges, to the detriment of the public interest. Sensitive judgments about the acceptability of public interest regulations and other government measures will be made by unaccountable arbitrators, who, as has been pointed out many times, have a financial interest in perpetuating this type of system. While the tribunals cannot overturn a measure, the threat of incurring large financial penalties to compensate foreign investors for losses stemming from regulatory measures casts a significant chill over democratic policy-making.

For all these reasons, and the ones contained in earlier replies, ISDS should be rejected in the CETA and the TTIP.

Notes

1 "European Commission launches public online consultation on investor protection in TTIP." March 27, 2014. http://europa.eu/rapid/press-release_IP-14-292_en.htm.

2 For further information on the Trade and Investment Research Project see: https://www.policyalternatives.ca/projects/trade-and-investment-research-project/about-us.

3 The full EC questionnaire and supporting text are accessible at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

4 "EU, Canada Fail To Close CETA; Stuck Over Issue Related To Eli Lilly Case", *Inside U.S. Trade*, May 9, 2014.

5 See Nathalie Bernasconi-Osterwalder and Howard Mann, *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)."* February 2014. p. 15. Accessible at: http://www.iisd.org/publications/response-european-commissions-december-2013-document-investment-provisions-eu-canad.

6 Nathalie Bernasconi-Osterwalder. *Reply to the European Commission's Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement.* International Institute for Sustainable Development. June 2014. Available at: http://www.iisd.org/publications/reply-european-commission-public-consultation-investment-protection-and-investor.

7 The interpretive notes are accessible at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx.

8 Eric Reguly. "Gabriel may seek billions in arbitration over stalled Romanian mine." *Globe and Mail*. April 30 2014. Accessible at: http://www.theglobeandmail.com/report-on-business/gabriel-may-seek-billions-in-arbitration-over-stalled-romanian-mine/article18341095/.

9 The written question E-001132/2013 is accessible at: http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-001132&language=EN.

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