

IIED submission to the EU public consultation on the Transatlantic Trade and Investment Partnership

Lorenzo Cotula and Thierry Berger

Introduction

This report collates the comments submitted by IIED to an online public consultation on the investment chapter of the proposed Transatlantic Trade and Investment Partnership (TTIP). The European Union (EU) and the United States (US) are negotiating TTIP, a comprehensive economic partnership agreement covering both trade and investment. Negotiations started in July 2013. Public concerns about the investment chapter of TTIP, particularly about investment protection standards and investor-state arbitration, have led the European Commission to organise the public consultation.

The European Commission launched the consultation in March 2014 for a period of 90 days. Participation involved completing an online questionnaire. The questionnaire sought comments on the broadly formulated 'objectives and approach' proposed by the Commission for the TTIP negotiation, and on a reference text relating to another investment chapter being negotiated with Canada (as part of a wider Comprehensive Economic and Trade Agreement, CETA). Draft text from the investment chapter of TTIP was not available, if it exists, and could therefore not be commented on. Strict word count limits applied to replies.

The questionnaire was organised in three parts:

- Part A (five questions) covered substantive investment protection provisions
- Part B (seven questions) covered investor-state dispute settlement (ISDS)
- Part C (one question) was an opportunity to provide a general assessment and raise any issues related to the topics of the questionnaire but not adequately covered by other questions.

IIED made a submission to the consultation and is making it more widely available because of the far-reaching implications that TTIP can have. It not only sets standards for investment relations between the EU and the US, which together are estimated to account for 40 per cent of global investment flows, but also, given the economic weight of the two parties, it has the potential to influence future directions in wider investment treaty making.

Due to word count restrictions, language had to be concise, and some of the replies may be difficult to follow for the uninitiated. The submission should be read in conjunction with the following IIED policy briefings, which cover the issues discussed in the consultation:

- Investment treaties and sustainable development: an overview: <http://pubs.iied.org/17238IIED.html>
- Investment treaties and sustainable development: investment liberalisation: <http://pubs.iied.org/17239IIED.html>

- Investment treaties and sustainable development: investment protection:
<http://pubs.iied.org/17240IIED.html>
- Investment treaties and sustainable development: investor-state arbitration:
<http://pubs.iied.org/17241IIED.html>

Most questions included in the questionnaire concerned relatively narrow technical issues, with the only exception of Part C (Question 13). We used our reply to that question to raise wider issues about the investment chapter and the consultation – issues that can affect the reading of the other replies. For that reason, the report starts with our reply to Question 13, and continues with our replies on substantive standards and investor-state arbitration.

General Assessment

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 the 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?

Reply

We welcome the public consultation. Given lack of transparency and consultation in the negotiation of most investment treaties, this consultation is in itself an important step towards improving the investment system. We encourage the Commission to pursue consultative approaches in future negotiations, especially as the EU consolidates its approach to investment treaties.

We regret the significant limitations imposed on the consultation. Important issues that might be negotiated are not covered – including any provisions on performance requirements or state-state arbitration. Even more strikingly, the questionnaire includes 7 questions on ISDS aspects but not a question on whether ISDS should be included in the first place. Yet public concerns about inclusion of ISDS were a major factor leading to the consultation.

We question whether the case for including ISDS (and more generally a chapter on investment protection) in TTIP has been properly made. Conventional justifications for investment treaties and arbitration do not hold, as the US and the EU have well-functioning legal and judicial systems based on the rule of law.

There are already extensive stocks of EU FDI in the US, and US FDI in the EU. There are 9 BITs between the US and individual EU member states – but all of these are with former socialist countries (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovak Republic), and were concluded before their accession to the EU. These investment treaties cover only 1% of US FDI stock in the EU and 0.1% of the EU FDI stock in the US (UNCTAD 2014).

A survey of general counsels from leading US companies (Yackee 2010) found that many of them knew little about investment treaties or thought that the legal protection afforded in them did not have a significant impact on investment decisions. We are not aware of empirical evidence unequivocally indicating that lack of an investment treaty or ISDS is holding back prospective investors.

On the other hand, we expect the proposed investment chapter to increase exposure to investor-state arbitration. Only 9 *known* claims have been brought under treaties between the US and a EU member state (UNCTAD 2014). All of them were submitted by US investors. Even with the more careful approach to treaty drafting proposed by the Commission, the sheer volume of US investment in the EU, and of EU investments in the US, makes it very likely that the TTIP will expose authorities to a substantially greater number of investor-state arbitrations. As an indication of likely future trends,

NAFTA states have been respondents in at least 47 known arbitrations in total since 1994 (Canada: 23, Mexico: 13, the US: 11); in contrast, France, Germany or the UK have so far faced very few claims (1, 2 and 1 respectively) (italaw.com).

We welcome the overall approach proposed by the Commission for the drafting of the investment chapter, which reflects a concern about balancing investment protection and policy space. This is broadly in line with treaties already concluded by the US. We hope that, beyond this negotiation, the more careful approach will frame future EU investment negotiations, over time phasing out the more succinct treaties concluded by EU member states. We do have concerns about aspects of the proposed approach, and have provided comments under Questions 1-12.

To avoid treaty-shopping, it is important that TTIP terminates the 9 existing treaties between the US and EU member states. There is also the issue of existing intra-EU treaties, as US investors might channel their investments via a EU member state other than the host EU state (a practice that has already resulted in arbitrations) to obtain more favourable protection than TTIP – an advantage not available to EU companies operating in the US.

Question 1: 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 TTIP?

Reply

The Commission states that it wants to avoid abuse, namely by excluding shell companies owned by third-country nationals from the protection provided by TTIP. The definition of ‘investor’ in the CETA reference text seems to deal effectively with this issue, and will probably help reduce treaty shopping. Should this definition be revised during the negotiation, TTIP should at least include a denial of benefits clause providing that treaty benefits be denied to a shell company owned or controlled by investors from a non-party state. Given arbitral jurisprudence under the Energy Charter Treaty, a denial of benefits clause would need to be formulated in automatic terms for it to be effective.

The exclusion of shell companies from the definition of ‘investor’ does not address the risk that US companies might structure investments via a EU member state other than the host state, thereby enjoying more generous protection under an existing intra-EU treaty (see our reply to Question 13).

With regard to the definition of protected investment, the reference text from CETA uses an open-ended list, defining investment as ‘every kind of asset’ and adding a broadly formulated illustrative list. This means that TTIP will protect a very wide range of assets. Both direct and portfolio investments are included, meaning the treaty will cover a very substantial amount of economic activity.

If the stated aim of TTIP is to promote cross-border investments between the EU and the EU, scope should be circumscribed to investments in an economic sense, rather than all ‘assets’. To this effect, the reference text does include welcome innovations compared to many treaties concluded by EU member states. For example, a provision seemingly inspired by some arbitral jurisprudence and treaty practice requires that protected assets have ‘the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, and a certain duration’.

However, the effectiveness of this provision is doubtful, not least because of its loose formulation: use of ‘such as’ suggests the characteristics listed are merely illustrative. Use of ‘or’ before ‘the assumption of risk’ is confusing and compounds impression of a merely illustrative list. It is unclear how arbitral tribunals might interpret this provision, and a tighter formulation would be warranted.

Inclusion of a legality requirement in the reference text (‘made in accordance with the applicable law at that time’) is helpful as it excludes from TTIP protection investments made in breach of applicable law. The terms ‘at that time’ appear unnecessary. Some arbitral tribunals have interpreted legality

requirements in restrictive ways, eg restricting their scope to a breach by the investor of fundamental principles of national law. A clearer formulation that removes potential for these restrictive interpretations is likely to be more effective.

Question 2: Non-discriminatory treatment for investors

What is your opinion of the EU approach to non-discrimination in relation to the TTIP?

Reply

The EU's objective and approach appear to restrict non-discrimination to the post-establishment phase. However, the reference text from CETA is formulated in pre-establishment terms: both national treatment and MFN clauses refer to the 'establishment' and 'acquisition' of an investment. This text is at odds with the position outlined in the EU's objective and approach. Like Canada, the US routinely includes pre-establishment obligations in its investment treaties, and would be expected to negotiate to that effect.

Pre-establishment obligations in TTIP can have very far-reaching implications, given the size of the economies of both parties. We encourage the Commission to maintain its post-establishment focus (removing 'establishment' and 'acquisition' from the non-discrimination clause), and to ensure that treaty language is aligned with that objective.

Even in relation to post-establishment obligations, the size of the two economies makes use of MFN provisions problematic, as the parties would have to extend to each other any treatment accorded by treaties they each conclude with third countries presenting very different economic conditions. If excluding MFN provisions is not an option, the EU's proposed approach of at least precluding the importation of procedural and substantive standards from other investment treaties (importation that has been routinely effected in arbitral jurisprudence) can help prevent investors from cherry-picking out of context any more favourable provisions that may be contained in other treaties.

However, the reference text from CETA is again not in line with the Commission's approach on this point. CETA excludes from the scope of the MFN treatment *procedural* provisions arising from treaties with third parties (ie access to arbitration), but not the importation of *substantive* standards. Investors might still rely on more favourable substantive provisions included in other treaties concluded by the EU or, with regard to an individual member state, by that member state.

TTIP should explicitly exclude substantive provisions too. This is particularly important given that EU member states have already signed hundreds of investment treaties that tend to contain more succinct, less carefully balanced provisions, which could be invoked by US investors via MFN – thereby undermining the Commission's stated objective and approach, which emphasise a more balanced text. As the US has developed a more careful approach to treaty negotiation since 2004, scope for EU investors to import less balanced substantive standards from other US treaties might be more limited (though one older treaty is enough).

In relation to both national and MFN treatments, to avoid disputes about treaty interpretation, the meaning and implications of the wording 'in like situations' could be clarified through an explicit definition and through requiring an examination of all the circumstances of an investment, including eg its effects on the environment.

Question 3: 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?

Reply

In the approach proposed by the Commission, a party ‘could be held responsible for a breach of the fair and equitable treatment obligation **only for breaches of a limited set of basic rights**’ (emphasis in the original). Clarifying the nature of these breaches is important, because unspecific formulation of fair and equitable treatment (FET) clauses has traditionally given arbitral tribunal significant discretion on how to construe and apply this standard, and exposed states to substantial liabilities. FET is the substantive standard most frequently relied on by investors in arbitrations, including in claims relating to policy measures where a public interest was directly at stake.

We welcome the precise identification, in the reference text, of the specific instances where FET can be breached (denial of justice; ‘fundamental breach of due process’; ‘manifest arbitrariness’; ‘targeted discrimination on manifestly wrongful grounds’; ‘abusive treatment of investors’). The formulation appears to protect investors against abuses while also preserving policy space.

Given this, the added value of referring to fair and equitable treatment seems limited. A flexible FET standard might have been useful as a residual catch-all standard in early BITs. But there is now much experience to build upon for developing more tailored standards dealing with more specifically identified concerns. Reference to FET could be dropped altogether and the treaty could merely refer to the specific obligations listed in section 2 of the CETA reference text on FET. This option would reduce the risk that arbitral jurisprudence on FET might be imported to expand interpretation of the specific obligations listed in the reference text.

If removing reference to FET is not an option, the text could at least clarify that fair and equitable treatment does not go beyond the minimum standard of treatment under customary international law, as was done in several Canadian and US treaties. While the precise contours of the customary standard are unclear, and while arbitral jurisprudence has found that standard to be evolving, reference to the customary standard would provide additional security. The treaty could also provide an indication of the parties’ understanding of the content of the customary standard.

The reference text builds into the treaty an explicit reference to the doctrine of ‘legitimate expectations’. This doctrine was not included in older treaties – rather, it was developed by arbitral tribunals. Broad interpretations of legitimate expectations can have far-reaching repercussions for the ability of governments to act in the public interest without incurring liabilities. The reference text merely refers to legitimate expectations being ‘subsequently frustrated’ – without requiring this frustration to be caused by arbitrary measures. This is potentially very broad, and can cover bona fide regulation. To improve certainty and predictability in the application of the FET clause, we recommend dropping any reference to legitimate expectations, consistently with the above recommendation to tie FET to the minimum standard under customary international law.

Question 4: Expropriation

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

Reply

The ‘explanation of the issue’ in the consultation document frames the regulation of expropriation as a human rights / right to property issue. We object to this framing. While the European Court of Human Rights has developed extensive case law on the right to property, including in claims brought by companies, other regional human rights systems have tended to limit scope to natural persons. We address Question 4 as a question about investment protection, not human rights, although we also

encourage the Commission to draw insights from ECHR case-law on ways to balance private and public interests (see below).

We welcome the Commission's approach on indirect expropriation, particularly the annex in the reference text that clarifies the boundaries of indirect expropriation. This is useful innovation compared to investment treaties negotiated by EU member states – though it is broadly in line with the approach taken by Canada and the US, and the US would be expected to seek inclusion of a similar annex.

Many arbitral awards have emphasised that indirect expropriation requires 'substantial deprivation' of property, partly allaying concerns raised by some earlier jurisprudence on the extent to which regulatory measures might be covered, but also emphasising the impact of a measure to the exclusion of its purpose. In relation to the latter, we welcome the clarification in the annex that 'the sole fact that a measure or series or measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred'.

We also welcome the clarification: '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'. Compared to similar texts already used by US and Canada, we welcome the introduction of the reference to 'manifestly excessive', which should further reduce uncertainty.

However, we find the expression 'the extent to which the measure or series of measures interferes with distinct, reasonable investment-based expectations' to be very broad, as it effectively integrates the concept of 'legitimate expectations' into the expropriation test. Some recent treaties contain tighter language, requiring specific commitments in writing to an investor (eg the ASEAN Comprehensive Investment Agreement).

The ECHR has developed a proportionality test to establish whether interference with enjoyment of possessions warrants compensation. A few arbitral tribunals have applied this test, but most have not. Some recent investment treaties do include explicit reference to proportionality as a criterion for assessing 'the character of the measure' (eg ASEAN Comprehensive Investment Agreement). The proportionality test lends itself to balancing public and private interests, and to being more deferential towards state action. In contrast with its framing of expropriation as a right to property issue, the Commission does not explain why the ECHR approach was not considered for TTIP.

Question 5: 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?

Reply

We support the EU's approach of balancing investment protection and the Parties' right to regulate, especially in relation to policy issues such as health and the protection of the environment.

However, having read the Commission's approach, we were expecting innovative legal drafting of substantive provisions on the right to regulate: the Commission's approach refers to ensuring that 'the Parties' **right to regulate is confirmed as a basic underlying principle**' (emphasis in the original). But the reference text only mentions the parties' right to regulate ('the right of the Parties to take measures to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate') in the preamble.

The more effective option would be to also include the right to regulate in the body of the treaty. Article 60(4) of the CARIFORM-EU EPA ('[...] the Parties and the Signatory CARIFORUM States retain the right to regulate and to introduce new regulations to meet legitimate policy objectives') might provide a starting point. Alongside the reference to 'legitimate public policy objectives', the TTIP provision could

also provide illustrative examples, including the host state's right to regulate in pursuit of sustainable development (currently also only mentioned in the preamble).

We welcome the more careful framing of provisions on fair and equitable treatment and expropriation, which have direct repercussions for the right to regulate, and made suggestions on those provisions (see our replies to Questions 3 and 4).

Reference in the preamble to internationally recognised CSR standards is unlikely to have any practical implications, as the text merely states: 'Desiring to encourage enterprises operating within their territory [...] to respect internationally recognized standards'. The more effective option would be to include reference to compliance with international standards in the treaty text, framed as a condition for enterprises to enjoy protection provided by the treaty.

Question 6: 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.

Reply

We welcome the EU's approach to increase transparency and openness in ISDS, particularly the incorporation and expansion of the UNCITRAL Transparency Rules. We expect this provision to go a long way towards improving transparency in arbitral proceedings.

However, we query whether ISDS provisions as contemplated in the Consultation Document are necessary in the first place (see also our reply to Question 13). While the Consultation Document acknowledges that domestic remedies would be preferable, the Introduction to Part B of the questionnaire mentions two reasons to justify ISDS, namely i) the fact that TTIP could not be invoked directly before national courts; and ii) the possibility that investors might not be given effective access to justice.

The first point raises complex issues but we dispute the Commission's somewhat blunt assertion: potential for relying on international treaties before domestic courts varies in 'monist' and 'dualist' countries, for example. In any case, the option of dealing with this problem through incorporating TTIP into national law deserves proper consideration as the complications involved may well be outweighed by the costs associated with ISDS.

Concerning effective access to justice, we consider that both the EU and the US have well-functioning judiciaries. One problem might lie in the lack of international instruments concerning the mutual recognition and enforcement of judgments between the EU and the US. We consider that negotiating provisions on mutual recognition of judgments into TTIP, or in connection with TTIP, is also an option that deserves to be fully explored as an alternative to ISDS.

Question 7: Multiple claims and relationship to domestic courts

Please provide your views on the effectiveness of the EU 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.

Reply

We welcome the EU's concern about limiting multiple claims and encouraging use of domestic courts, but question the effectiveness of the measures proposed.

We support several specific features of the reference text, including for example:

- The clarification that non-fulfilment of the various requirements is a jurisdictional issue (draft CETA Article x-21(4)), addressing trends in the opposite direction within the arbitral jurisprudence.
- Draft CETA Article x-23 dealing with proceedings brought under different investment agreements – an important issue given potential for US investors to structure investments in ways that provide protection under intra-EU treaties. This provision rightly does not require the parties or the claim to be identical (a requirement often difficult to meet).

We make the following remarks:

- The EU's stated approach is to favour domestic courts, and to create incentives to that effect. However the reference text makes no mention of any incentives.
- Draft CETA Article x-21(1)(f) requires a final judgment only *if* the investor has initiated domestic proceedings – a requirement to exhaust domestic remedies in all circumstances would be preferable, given that both the EU and the US have well-functioning judiciaries.
- To prevent liabilities accumulating, TTIP could include a 'limitations' clause, whereby claims must be brought within a specified period from the date on which investor knew, or ought to have known, of the alleged breach. Should an exhaustion of domestic remedies requirement be introduced, the duration of the limitations clause would need to be calibrated accordingly.
- Draft CETA Article x-23 provides that, if another claim is brought under another BIT, the tribunal shall stay its proceedings OR otherwise ensure that proceedings under the other BIT are taken into account. This means that tribunals are in fact under no obligation to stay proceedings. Given the reluctance displayed by some tribunals to decline jurisdiction or stay proceedings, the second option may well become the default. Yet this second option sets a low bar, as it is unspecific on the ways in which other 'proceedings' must be taken into account. Overall, this provision risks having relatively little practical impact.
- The Commission may want to consider provisions to facilitate the consolidation of parallel arbitrations.
- The usefulness of mediation as a means to settle disputes cannot be overstated, so we welcome the inclusion of the provision whereby '[t]he disputing parties may at any time agree to have recourse to mediation'. But whether this provision will actually help to limit use of arbitration remains to be seen. If the EU is serious about favouring dispute settlement mechanisms other than ISDS, TTIP would need to create real incentives favouring mediation, for instance by taking into account unreasonable refusals to engage in mediation when allocating costs.
- There is an inherent tension between making a deliberate choice to include ISDS on the one hand, and laboriously identifying mechanisms and incentives for limiting its use on the other. The latter suggests that the EU is concerned about the risks and costs associated with ISDS. This begs the question as to why it would not be more sensible to drop ISDS altogether (see our replies to Questions 6 and 13).

Question 8: Arbitrators ethics, conduct and qualifications

Please provide your views on the procedures in the reference text 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?

Reply

The Commission has identified an important concern. We welcome the introduction of a Code of Conduct but find it hard to respond to the question without a clearer sense of what will be included in this Code of Conduct. Establishing a roster (ie a list of qualified individuals) seems a positive step

forward, but the approach and reference text only envisage the roster as a back-up system for cases where the parties fail to appoint arbitrators.

The novel requirements that arbitrators have expertise or experience in international investment law respond to the very technical nature of investment arbitration. However, investment disputes can also raise important public policy issues in a range of other areas, which would call for a degree of diversity in the skillsets represented in the tribunal. Contrary to the EU's approach, which expressly refers to arbitrator disqualification for lack of qualifications, draft CETA Article x-25(7) restricts arbitrator challenges to lack of independence only.

We welcome the vesting of decisions about arbitrator challenges with the ICSID Secretary-General: arbitral tribunals have often been reluctant to disqualify one of their own. The EU's approach refers to the possibility that a state or an investor seek reversal of an award if a breach of the Code of Conduct is found after the award has been rendered. However, we cannot see such a provision in the reference text.

We support the requirement whereby arbitrators need to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and therefore the inclusion of an objective test to determine whether or not a conflict of interest has arisen. While not without critics, the guidelines, which are ten years old, have been tried and tested and have been relied on by a number of international tribunals. The fact that the Committee can supplement the guidelines would provide openings to take account of case law relating to the interpretation of the guidelines.

To protect the credibility of the system, it is important that *appearance* of conflict of interest, and *doubt* about impartiality, are properly addressed – applying and expanding guidance from the International Bar Association Guidelines. It is also important not to allow legal professionals to sit as arbitrators in treaty-based arbitration proceedings and at the same time act as counsel in other treaty-based arbitration proceedings.

Question 9: 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.

Reply

We welcome the Commission's concern about avoiding wasting time and money on frivolous or unfounded claims. We wonder however whether what is proposed is workable. The two main mechanisms proposed are from the CETA reference text, namely the summary disposal of claims and costs provisions.

These provisions are meant to save time and money but the opposite result might be achieved if objections are systematically raised as a delaying tactic, taking advantage of the automatic stay of the proceedings on the merits provided for in the CETA reference text, and then systematically rejected.

Systematic dismissal of objections does not seem an unlikely scenario. In the past, tribunals have been reluctant to dismiss cases early on. Also, tribunals may prove reluctant to entertain these objections out of concern their award could be challenged on the ground that due process was not respected (eg if the claimant alleges not to have been given a fair opportunity to present its case). For example, the Consultation Document refers to the situation where 'ISDS tribunal can quickly establish that there is in fact no discrimination between domestic and foreign investors'. However determining whether or not there has been discrimination is often a complex issue which might not be able to be established 'quickly'.

We welcome the introduction of a 'costs follow the event' (or 'loser pays') type provision whereby the unsuccessful disputing party will normally bear the costs of the proceedings unless the tribunal

determines that apportionment between the parties is appropriate. As noted in the Consultation Document, there has been an unfortunate tendency with tribunals in investment treaty arbitrations ordering that each party shall bear its own costs, regardless of the outcome of the dispute. Given the significant amounts often involved, ordering the losing party to pay the costs of the other party in addition to its own can deter bringing unfounded claims.

We note the distinction between ‘costs of the arbitration’ and ‘other reasonable costs, including costs of legal representation and assistance’. The ‘costs follow the event’ rule will not apply to the former only ‘in exceptional circumstances’ where the tribunal determines that apportionment between the parties is appropriate. Examples of what these exceptional circumstances might involve could help improve predictability.

The exceptional circumstances criterion will not apply to the latter category of costs and the tribunal may decide not to order the losing to pay the costs if the tribunal determines that it would be unreasonable to do so. The greatest proportion of the costs incurred by the parties will usually be in this second category. The different tests applied mean that it will be easier to convince a tribunal not to follow the ‘loser pays’ rule in relation to the second category of costs. This would limit the effectiveness of the approach proposed. At the very least, TTIP should clarify precisely what costs relate to the first and the second category.

Question 10: Allowing claims to proceed (filter)

What are your views on the use and scope of such filter mechanisms in the TTIP agreement?

Reply

No comment.

Question 11: 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?

Reply

We welcome the provisions that will allow the Parties to adopt binding interpretations on issues of law. This type of provisions has proved useful within the context of NAFTA. The advantages of such a provision are i) the fact that parties can correct unintended broad interpretations of treaty provisions by arbitral tribunals by adopting a binding position, thereby avoiding the cumbersome procedure to amend the treaty; ii) and they can do so at a relatively low cost (UNCTAD 2011). The provision would also help ensure uniformity and predictability in the interpretation of TTIP.

Provisions allowing the non-disputing Party to intervene in ISDS proceedings between an investor and the other Party can also contribute to ensuring uniformity and predictability in the interpretation of TTIP.

It would be sensible for TTIP to include state-state arbitration (adjusted to the EU) for disputes on the interpretation and application of TTIP. However there is no mention of this in the Consultation Document.

Question 12: Appellate Mechanism and consistency of ruling

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.

Reply

We would welcome the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement. This is one of the most innovative aspects of the Commission's approach, and it is much needed innovation – to correct errors in the interpretation and application of the law, and also to promote uniformity and predictability in treaty interpretation.

The CETA reference text opted for a different solution – empowering the Committee on Services and Investment to discuss 'whether, and if so, under what conditions' an appellate mechanism could be created in future. As a result, the reference text provides no indication about what the TTIP appellate mechanism might look like, how it might work, who might sit on it, and what interface there might be with the ICSID annulment procedure, where relevant.

The solution suggested for TTIP is preferable to CETA, as there is no guarantee that any appellate mechanism will ever be established under CETA. That said, the creation of an appellate mechanism specific to one treaty raises systemic issues that need to be thought through.

A treaty-specific appellate mechanism might make sense for a treaty covering the scale of economic activity that will be covered by TTIP. But the prospect of creating appellate mechanisms for all future treaties seems unviable – yet the need for an appellate mechanism has been raised in relation to arbitration the world over. Also, fragmented appellate mechanisms may not lead to greater uniformity in arbitral jurisprudence at systemic level.

At some point, the establishment of a multilateral appellate mechanism will need to be seriously considered. Thought to this prospect, and to proper articulation that may be developed with the TTIP mechanism, should be given when designing modalities for the proposed TTIP appellate mechanism.

About the IIED and the authors

The International Institute for Environment and Development (IIED) is a policy research institute based in the UK. IIED promotes sustainable development, linking local priorities to global challenges.

Founded in 1971 by economist Barbara Ward, who forged the concept and cause of sustainable development, IIED works with partners on five continents. It builds bridges between policy and practice, rich and poor communities, the government and private sector, and across diverse interest groups. IIED contributes to many policy processes and frameworks at national, regional and global levels.

IIED leads ‘Legal Tools for Citizen Empowerment’, a collaborative initiative to test approaches, document lessons and share tools and tactics among practitioners on how to strengthen local rights and voices within natural resource investments. Legal Tools also promotes public scrutiny and debate on the national and international legal frameworks regulating investment processes.

The replies to the questionnaire were drafted by Lorenzo Cotula and Thierry Berger. Lorenzo is a principal researcher in law and sustainable development at IIED. He leads IIED’s Legal Tools Team. Thierry Berger is a qualified solicitor and Legal Tools Consultant at IIED focusing on law and sustainable development.

Acronyms

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CARIFORUM	Caribbean Forum
CETA	Comprehensive Economic and Trade Agreement
ECHR	European Court of Human Rights
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
IIED	International Institute for Environment and Development
ISDS	Investor-state dispute settlement
MFN	Most-favoured nation
NAFTA	North American Free Trade Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America

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