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European Union's public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)

BritishAmerican Business (BAB) and the British-American Business Council (BABC) welcome the opportunity to provide comments on the European Union's (EU) public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP).

BAB is the leading transatlantic business organisation, headquartered in London and New York City, with a membership that brings together more than 500 of the world's leading multinational and middle-market companies across sectors and geographies and an advisory board that includes more than 100 of the world's most successful CEOs. The BABC is the largest transatlantic business network, with more than 2,000 member companies based in more than 22 major business centres throughout the US and UK.

BAB and the BABC have been strong supporters of a comprehensive EU-US trade and investment agreement and are playing a leadership role in promoting the ongoing negotiations for a Transatlantic Trade & Investment Partnership (TTIP).

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1. Introduction

It is not surprising that the EU and the US are negotiating a transatlantic trade and investment agreement with investment as a fundamental pillar for



common ambition. In 2012, EU-US trade accounted for 25 per cent of global exports and 31 per cent of global imports¹. Our mutual investment ties are even bigger and more important. They are the key driving force for a transatlantic economy which sustains, through thick and thin, jobs and prosperity. Investment is a good thing, and not just *vis-à-vis* our national and transatlantic economic self interest. Investment foments innovation, creates jobs, drives progress and builds better societies. Investment plays a key role globally in increasing living standards, reducing poverty, and improving the overall quality of life.

US investors are the biggest investors in the UK economy and UK investors are the biggest investors in the US economy. Those investors sustain roughly a million jobs in each other's economies. That's important.

It is right that TTIP should focus on investment. It is also right that the TTIP negotiators should focus on using this opportunity to agree on things that can nurture and strengthen the case for investment between our countries, and with the rest of the world. TTIP should seek to set a benchmark set of conditions for both investments between Europe, the US and for global investment, wherever it is made.

Part of the TTIP investment opportunity is to reduce and eliminate barriers to investment in key sectors and areas of economic activity such as aviation, telecommunication and media, and we have presented views separately in relation to what TTIP can and needs to do here.

Sometimes investments can go wrong. Investment protection, in particular when the state is involved in an investment, is a bedrock upon which investor confidence is built, and investment risk taken. We are strongly in favour of both being treated as priorities for negotiation in TTIP. When commercial mistakes and misjudgements are made then the principle of 'let the investor beware' is applied. Rightly so, because the basis for investment and risk is reward, and mistakes and misjudgements do not deserve to be rewarded. But sometimes, but not very often, circumstances change in ways that would make it unfair not to compensate the investor. In private contracts the contract will specify what happens when the person who has asked for the investment changes their mind, but where large complex investments involving the state are concerned the situation is more complex.

When citizens' money is being spent by public entities it is right and proper that prevailing policy priorities reflect changing public views over time. Local investors are stakeholders present, consulted and represented in country as those changes emerge in ways unlike international investors, whose views are often less likely to be heard. On rare occasions, this can lead to large scale investments, where capital has been risked, no longer being wanted, or where the basis of the original promise to the investor changes. It is only fair that in such circumstances, where a promise can no longer be honoured, that an investment should be compensated.

¹ John Hopkins University 2013: The Transatlantic Economy



In a world of increasing public private collaboration and cross border investment, providing a separate and meaningful class of protection designed to protect and support international investment is key. We see a mechanism that depoliticises disputes between states and investors by submitting them to the consideration of trained arbitrators as an essential ingredient. We are thus in support of the inclusion of an ISDS mechanism in TTIP. ISDS in TTIP can be a strong underpinning for increasing cross border investment flows, in Europe, in the US and as a template for the rest of the world.

2. Executive summary

BAB and BABC strongly believe that investment protections and ISDS provisions should be included in TTIP. The EU received the competence to negotiate investment treaties with Lisbon in 2009. It has an opportunity to safeguard and develop the system. We favour a broad definition of investments and fair and equitable treatment. We call for firm protection against discrimination and expropriation with a narrow range of exceptions and carve-outs. We support the idea of the proposed "right to regulate" alongside a "right to invest" in TTIP as key tools for communicating the specific norms that will be developed.

We welcome the EU's proposal to strengthen transparency, but we would caution against overly limiting the choice of arbitrators and mediators or as between domestic courts and international tribunals in ways that could in effect restrict access to justice. For similar reasons, we urge caution with provisions against frivolous cases and excessive carve-outs under the rubric to regulate during crises. We believe that the suggestion of having an appellate body works against the primary benefit of arbitration as an efficient and speedy system to resolve disputes. We appreciate the Commission's decision to freeze negotiations on investment protection and ISDS mechanisms in TTIP in order to initiate this consultation. We are looking forward to a timely resumption of the negotiations with the US of the investment chapter in TTIP with strong ISDS content.

3. Response to Online Questionnaire

Substantive Investment Protection Provisions

Question 1: Scope of the substantive investment protection provisions

We welcome the EU's approach that references an investment as a "complex operation". We believe TTIP would be best served with a definition of "investment" for the purposes of investment protection and investment treaty arbitration that is intentionally broad. TTIP will have to stand the test of time and capture and protect investments as they develop over the course of the 21st century. The definition of investment is important since it is the



foundation for the adjudicative power of ISDS proceedings that are there to enforce the protection of investments.

Whilst there is scope for discussion to improve the definition of investment, we would urge caution at the outset against simply transplanting into TTIP the EU's proposal from the CETA reference text, which excludes claims to money that arise solely from commercial contracts for sale of goods and services. Only in exceptional circumstances have multilateral treaties previously excluded claims to money under such restrictions.

By the same token, TTIP needs to be consensus driven and exclusions of certain types of investment are best avoided as a general principle. Codified exclusions can lead to unintended consequences and miss investments that should have been protected. The definition of investment and the applicability of the term can also be revisited by the arbitral process of the ISDS mechanism.

Similar to the exclusion of claims to money, we urge caution on the EU's usage and application of the term "covered investment", which is referenced in the CETA text. TTIP should seek to deliver a global standard, the attempt to qualify how, where and when an investment is made (and subsequently restrict access to justice, see question 9 on frivolous claims) carries the potential to set a negative, and less useful precedent.

Investments are complex operations by the EU's own admission and often structured in complex ways. As a result, consideration should be given to avoid artificially excluding investments, which in the past have been made to many intents and purposes, but which in some degree are still planned. Any qualification that restricts protections to established investment only by overly narrow definition would be unsatisfactory.

We further suggest reconsidering the usage of the term "made in accordance with applicable law". This broadly undefined provision could be abused in ISDS proceedings and allow for a prejudiced position, which presumes an investor to have acted in an illegal way. Domestic criminal processes provide sufficient remedies for the host state to act when there is suspicion of fraudulent or other criminal activity. Such provisions should not be merged with the purpose of investment protection by TTIP since it carries the danger of wrongfully denying investment protection to investors that are launching a claim on the genuine grounds of expropriation, unfair treatment or discrimination.

Finally, we advocate a broad definition of "investor". Restrictions on the term "investor" do not necessarily solve the problem of shell and mailbox companies that have launched a limited number of recorded ISDS claims. Branch and representative offices of an enterprise, which are excluded by the CETA text from the term investor, are often key to the operations of transatlantic business. Just as with the applicability of the term investment, the arbitral process (instead of the treaty) will allow for the exploration of usage



and interpretation of the term “substantial business activity” when defining an investor.

Question 2: Non-discriminatory treatment for investors

We welcome the EU's approach to protect foreign investors under TTIP from discrimination “as a matter of principle”. The provisions of “treatment no less favourable” than the treatment the host state accords to its own investors (national treatment) and investors of any third country (most-favoured nation (MFN)) are the cornerstones of the international investment protection regime. We support the objective to ensure through TTIP a “level playing field” between foreign investors, national investors and investors from third countries.

We further welcome the EU's commitment to confer a set of pre-establishment rights (Article X.1 of the CETA reference text) under the provisions on non-discrimination to ensure open access to markets under TTIP. Market access is key for TTIP to deliver on the promised macro-economic growth and job creation. We caution the EU, however, on restricting again the application of non-discrimination provisions to the aforementioned “covered investments” (see question 1 on scope). Provisions for non-discrimination should be available for all types of investments, including pre- and post-establishment investment.

We are also concerned about any broad based attempt for the EU to actually “envisage discrimination in certain rare cases and in some very specific sectors”, which it leaves undefined in the consultation document. Any such “non-conforming measures” with the principle of non-discrimination and national treatment would require further consultation. The creation of a “negative list” for specific sectors to be excluded from market liberalisation could also adversely affect individual companies or a group of companies.

We ask the EU to dispense with restrictions on MFN provisions and what is called “the importation of standards” in the explanatory text. MFN provisions are essential for the functioning of the global trading system and together with the principle of national treatment constitute one of the building blocks of WTO trade law. We advocate against the inclusion of Article X.2 (3) and (4) in TTIP from the CETA reference text, which specifically restricts application, by referencing MFN, of investment protections and ISDS procedures from other international investment agreements.

We believe that investors should be entitled to benefit from investment protection provided by other agreements, which they consider more favourable and that have been concluded by the host state with third countries. We also believe that inclusions of MFN provisions in TTIP will help reinvigorate trade negotiations at the multilateral level. Any restrictions on MFN provisions in TTIP could have adverse effects on investment protection for European and American companies in third countries. For investment protection to function effectively, investors have to be able to draw freely from multiple jurisprudential sources.



Finally, we call for caution when including exceptions and carve-outs in the non-discrimination section of the investment chapter. Measures that address aspects as they relate to the environment, health or consumers can be adequately delivered without suspending the principle of national treatment of foreign investments. Any measure adopted should apply to all – national and foreign investors.

Question 3: Fair and equitable treatment

The obligation to grant “Fair and Equitable Treatment” (FET) to foreign investors guarantees a minimum level of protection, when necessary, beyond the principle of national treatment (as covered by question 2) in ISDS proceedings. FET also provides for additional safeguards against overreach with regulatory behaviour, which appears abusive or arbitrary. FET provisions as developed in other BITs as a broad standard will be central for the investment relationship between the EU and the US to expand to full capacity under TTIP.

We welcome the EU's approach to engage extensively with FET provisions. But with reference to the previous answer provided for question 1 on scope and definition of investment, we are against Article X.X restricting FET standards to “covered investment” only. Furthermore, we are concerned about the adoption of Article X.X (6) in TTIP, which exempts intended FET from application as MFN provisions when separate international agreements are breached. The same is true for the restriction of application of F&E treatment to breaches of other provisions in the present agreement (TTIP or CETA).

We also urge caution on the approach to develop a “closed list” under Article X.X (2) and a “review process” under Article X.X (3) that narrows down FET to a limited (imagined) set of breaches, which only the parties (ie the EU and US) can discretionally alter after the conclusion of TTIP as they see appropriate with new standards that have emerged from international law. The EU's own ambition to seek clarity of the FET standard falls short of defining in the closed list vague terms such as a constitution of “manifest arbitrariness” in Article X.X (2) (c). It is more feasible and desirable to leave FET as a broad based investment protection provided through TTIP. This will create certainty, which is the purpose of investment protections, whether under TTIP or future trade agreements with third countries.

Definitions of FET provisions can be reviewed in the arbitral process in accordance with developed case law and international legal custom. This would allow for continued development of the system. The EU's proposition of “limiting” the room for interpretation of FET by an arbitral tribunal could have unintended consequences and affect the ISDS system negatively.

We are generally supportive of the EU's approach to develop a “representative scheme” under the FET provision to explore “legitimate expectations” of the investor when making an investment under the presumption that a regulatory regime might change over time. We are also



supportive of the proposition in Article X.X. (4) that an ISDS tribunal may take into account such representation on legitimate expectation.

Question 4: Expropriation

We support the EU's acknowledgement of the right to property as a human right. We believe that expropriations should not occur except in circumstances of well defined public purpose and against payment of prompt, adequate and effective compensation, and on a non-discriminatory basis. It is true that EU law possibly like no other legal regime provides, through instruments such as the European Convention of Human Rights and the European Charter, for strong and effective protection against expropriation without compensation. The EU has together with the US, which also boasts a comparable domestic legal regime for property rights, a great opportunity through TTIP to set a global benchmark that enshrines the right to property as a human right into international law.

As with question 2 and 3, we advocate that protections against expropriation, whether direct or indirect, should apply to all investments, not just "covered investments" (CETA reference text Article X). We urge caution, however, about Annex X.9.1, which attempts to clarify the term expropriation by giving definitional characteristics to both direct (nationalisation) and indirect (other measures) expropriation, and also creates a general exception for certain types of measures [Annex X.9.1 (3)].

Finally, we question the need by the parties to provide "interpretative guidance" with regard to indirect expropriation because it has been a "source of concern". Arbitrations initiated by investors on alleged acts of indirect expropriation without compensation have been limited in number. In the circumstances where indirect expropriation has been the source for arbitration, the ISDS tribunal and its adjudicative process were able to resolve what was meant and what constitutes an indirect expropriation.

Question 5: Ensuring the right to regulate and investment protection

We welcome the EU's proposal that emphasizes the state's ability to regulate fairly and equitably as well as without discrimination and with adequate compensation in situations of the expropriation of investments. We believe the state has a natural "right to regulate". We understand that the proposition of a "right to regulate" in TTIP is not an action that actually confers a "right" to the state to do so. This is provided for by the social contract that the state has entered into with the individual (in our case corporation) in society. Instead, we understand that the term is used as an umbrella term that encapsulates a range of measures. The provisions in the preamble of the text that address matters of regulation in the public interest sound reasonable primarily as terms communicating these observable phenomena.

We would like to urge caution again about extensive reservations, exceptions as well as prudential carve-outs under the umbrella clause. We also would like to raise the question how a "right to regulate" sits in line with a coherent set of



investment protections specifically and a trade and investment agreement generally. As a hypothesis we propose consideration of the idea that the EU should award investors a “right to invest” as part of TTIP. Such a right could be understood as an innovative continuation of the affirmative provisions found under the fair and equitable treatment clause (versus protective provisions that are against discrimination and expropriation). Arguably, a “right to invest” would attract more investment than a “right to regulate”. It would also fit with the goal of a “trade and investment” agreement as opposed to a “trade and regulation” agreement. Provisions as planned under a “right to regulate” could be sub-ordinated under the umbrella term of a “right to invest”.

Investor-to-state dispute settlement (ISDS)

Question 6: Transparency in ISDS

We welcome the EU's objective to ensure transparency and openness in the ISDS mechanism under TTIP. We view transparency as a key element to build confidence and acceptance of ISDS proceedings. It is especially on transparency that the EU and the US have an unprecedented opportunity with TTIP to set new global standards that can help reform the ISDS mechanism as a whole. Greater transparency will foster accountability of the arbitrators and their decisions and therefore reduce the need for an appellate body (Question 12).

We noted with interest the EU's leading role in establishing the United Nations Commission on International Trade Law (UNCITRAL) rules on transparency in treaty-based investor-state arbitration. The UNCITRAL transparency rules must apply in TTIP as referenced in the model text of the CETA. Modification of the rules by the parties to TTIP should be undertaken with prudence. Clear provisions based on Article 7 of the UNCITRAL rules that would strengthen the non-disclosure of commercial information are a desirable requirement for our members. Transparency cannot become a gateway for the state and third parties to either harm the investor or subvert the process of the claim brought under the ISDS procedure.

We applaud the EU for the proposal to fund a new international transparency database for ISDS. An accessible and manageable source for case law will allow investors to assess the merits and possible outcomes of cases. Transparency creates predictability and overall certainty before, during and after ISDS proceedings. Access to documents and proceedings are necessary for organisations like ours to effectively follow and contribute as stakeholders in a particular case. We support a clear procedure for *amicus curiae* interventions, which would enable us to take measures in cases that would involve either one of our members or that raise issues of concern, affecting a group of our membership. Article 4 of the UNCITRAL rules on third person involvement provides procedure for the *amicus curiae* process. Article 5 provides procedure for submissions by a non-disputing party to the treaty.



We urge the EU to adhere to provisions under Article 5 especially as it pertains to issues raised by question 11 of this consultation.

Question 7: Multiple claims and relationship with domestic courts

We believe that access to international justice for disputes has to be an integral part of a transatlantic partnership on trade and investment. We view the EU's proposal to "favour domestic courts as a matter of principle" with some concern and we urge the EU not to proceed with it as a starting point when exploring and codifying the relationship between the ISDS mechanism and domestic courts. Investors that have endured an act of discrimination or that were expropriated without compensation by the state need a choice to seek compensation either internationally or domestically.

We acknowledge the EU's concerns that multiple claims should not lead to an overcompensation of an investor. We would like to add, however, that in reality investors have lost the vast majority of ISDS cases. Even in the case of a win, investors are often granted only a fraction of the amount of compensation originally sought. We support a genuine attempt by the parties to TTIP to seek clear rules that balance concurrent domestic and international proceedings and define clearly and narrowly criteria for restricting the pursuit of multiple claims for the purpose of overcompensation. We believe the relevant Article x-23 in the CETA text is a good starting point, but it needs improvement by TTIP as it pertains to both substance (what constitutes a concurrent claim) and process (how a tribunal takes into account the decision from a concurrent claim).

We are concerned about the proposal to introduce a "fork in the road" provision, which would require companies to make a choice between either the domestic or international path. Whilst we value the recourse to justice in domestic courts, we urge further caution on a procedural restriction to "exhaust domestic remedies" before the recourse to ISDS proceedings. International arbitration must be available as a free choice from the start regardless of whether an investor decides to pursue domestic remedies or not.

We also urge the EU to be prudent with the types of "incentives" for domestic proceedings it proposes in the CETA text under Article x-21. We view with concern the introduction of "time limits" to "prolong" the overall process. Pre-arbitration consultations should be a choice for the parties and not a requirement. The proposed 180 days elapsement period is lengthy (possibly excessive). The rationale of international arbitration is to ensure the expeditious and efficient resolution of investment disputes. Effective ISDS procedure will ensure for the attraction of new and continued flow of existing investments.

We are strong supporters of mediation and of finding of amicable solutions. We support Article x-19 (1), which encourages the parties to come to a negotiated settlement that resolves a dispute. We oppose, however, the EU's proposal to centralize the appointment of mediators from a roster and/or on



the authority of the International Centre for Settlement of Investment Disputes (ICSID) Secretary General to be established by Article x-25. This proposition is dealt with in more depth in question 8 with particular reference to the restricted qualifications requirements of individuals on the rosters and the deliberate exclusion of possible mediators with commercial expertise. Whilst we acknowledge that the EU proposal does not confer a direct obligation upon the investor to choose a mediator from the roster, we believe any indirect pressure by stating that appointment “may” be made from the roster can cause unintended prejudice and harmful bias in the appointment process.

Question 8: Arbitrator ethics, conduct and qualifications

Conflict-free individuals that are independent and act ethically are the foundation for any process whether that is for arbitration or judicial proceedings. The ISDS mechanism was conceived precisely to safeguard an investor from a domestic court or system that might be prejudiced and rule without independent judgement in favour of the local government. The assertion by the Commission that “arbitrators on ISDS tribunals do not always act in an independent and impartial manner” does need further substantiating. There is consensus among the business community that the majority of arbitrators in ISDS proceedings so far have been fit for purpose. In cases where there was doubt about an arbitrator’s conflict of interest and potential bias towards the investor or the state, ISDS processes allowed for challenging the arbitrators legitimacy and seek his/her removal and replacement.

We support to that effect the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. We note however that the Commission in the CETA reference text does not provide a specific code of conduct in Article x-42 that it wants to negotiate in TTIP. We are open to a code of conduct between the EU and the US that would allow proposed measures, such as reversal of an ISDS finding, but we call for further scrutiny and further consultation with stakeholders.

We are concerned about the EU’s envisioned qualification requirements for a controlled list of arbitrators to be made available as chairpersons of tribunals by a vetted roster that is under the sole discretionary authority of the ICSID Secretary General. It is not necessarily true that arbitrators are best recruited among “retired judges” in accordance with Article x-25 (5), which requires expertise in public international law, in particular international investment law and desirable expertise in international trade law and the resolution of disputes under international investment or trade agreements. Arbitrators with commercial expertise could serve equally well in an ISDS tribunal.

The centralisation of discretionary power with the ICSID Secretary General also takes attention away from commercial venues such as Stockholm, Paris or London as potential desired arbitral institutes for investment disputes that would arise under TTIP. We see that as a potential and potentially unwelcome market distortion.



These lines of propositional inquiry together with the Commission acknowledgement that “the purpose of such a roster is to ensure that the EU and the US ... as the responding state [in ISDS cases] chooses one arbitrator and has vetted a third arbitrator” require further consultation. The odds of a satisfactory decision in such a tribunal would be potentially 2:1 for the state and against the investor. This defies the very ethical, independent and conflict-free (global standard setting) ISDS system the EU wants to achieve with TTIP.

The procedure whereby the investor and the state both appoint one arbitrator and those two arbitrators designate a final third arbitrator without any of the aforementioned restrictions is best practice and would serve TTIP very well, as it has served other trade agreements previously.

Question 9: Reducing the risk of frivolous and unfounded cases

There is general consensus that cases without legal merit do not serve the business community well. Unfounded ISDS claims diminish the seriousness of the system and therefore threaten overall access to international justice for investors that have endured genuine acts of discrimination, unfair treatment and loss from expropriation without compensation.

That being said, we would suggest that the EU's understanding that the current ISDS system is subjected to “frequent” claims deemed “frivolous” needs further substantiating; and that the assertion that “frivolous” cases are brought by an investor to evoke regulatory chill (“have an effect on the policy choices made by states”) be reviewed against the background of the relevant facts. The EU's explanation suggests that cases have been brought with long proceedings against government policy in the knowledge that “the investor would lose such claims”.

Our evidence shows that ISDS is at present an underused system to resolve investment disputes. The EU stated itself in the introduction to the series of questions it posed on ISDS that “the possibility for investors to resort to ISDS is a standard feature of virtually all the 3000 investment agreements in existence today, including 1400 signed by EU member states.” It is a well-attested fact that the amount of recorded ISDS cases, some 500-600, is surprisingly small compared to the total number of investment agreements in place with ISDS mechanisms. Investors, like the state, are typically prudent about costs and time that such cases can take up.

We believe that TTIP should have no provisions on so-called “frivolous” claims. The provisions as proposed by the EU in Article x-29 and Article x-30 of the attached CETA reference text are open to abuse by the state. Article x-29 (4) provides for an automatic suspension of proceedings to consider an objection by the state against the merits of the claim brought by the investor.

Skilled lawyers employed by the state in ISDS proceedings would typically make use of such a provision. It is common practice in any international



dispute settlement, whether that is state vs. state at the International Court of Justice or other, to attack jurisdiction of tribunals and admissibility of cases as the first line of defence. By codifying a binding system in ISDS proceedings under TTIP to prevent “frivolous” cases the EU and the US would actually give credence to what could be “frivolous” defences for government regulation that genuinely discriminated against and/or expropriated an investor without compensation.

Question 10: Allowing claims to proceed (filter)

We acknowledge the need for the EU to have safeguards to act in times of financial crisis. We further commend the EU for referencing the need to avoid the politicisation of disputes in this section. Whilst the management of financial crisis is a key responsibility for both the investor and the state, we urge prudence by the EU in relation to the production of further excessive prudential carve-outs whilst evoking “its right to regulate during times of financial crisis”. We are also concerned that the financial services industry is unfairly singled out for exclusion in the ISDS provisions through the development of this filtering mechanism.

Further we want to urge caution at transplanting this provision from CETA into TTIP. We also believe that transatlantic cooperation on the regulation of financial services through TTIP is of greater purpose in the prevention of crisis than the desire to exclude (filter) financial services from the enforcement of generally awarded investment protections to all sectors across the Atlantic.

Question 11: Guidance by the parties (the EU and the US) on the interpretation of the agreement

The participation of the non-disputing party in ISDS proceedings under TTIP similar to the standing of *amicus curiae* submissions (see question 6) is a welcome proposition. Interventions along the lines of Article x-35 of the CETA reference text by the non-disputing party on interpretations of treaty provisions, as meant at the time of the conclusion of TTIP, will provide constructive assistance to an the ISDS tribunal when working towards an arbitral decision.

The text could be strengthened, however, with a clear reference to Article 5 (2) of the UNCITRAL rules on transparency, which highlights the “need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection”. Furthermore, TTIP would do well by also referencing Article 5 (4) of the same rules, which stipulates that “the arbitral tribunal shall ensure that any submission [by the non-disputing party] does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.” This provision as a matter of fact is essential.

ISDS proceedings were conceived by states negotiating investment agreements to bring an end to the politicisation of investment disputes. Politicised interventions by the non-disputing party are not in the interest of



our members and we would be grateful for further clarity on the propositions in Article x-35.

We urge the EU to be cautious with the proposition as developed in Article x-27 of the reference CETA text. The idea of allowing the parties that concluded the treaty to intervene with binding interpretations on issues of law so as to “correct or avoid interpretations by tribunals” may work against the principle of an independent judiciary. Submission by the parties should certainly be heard and are welcomed in the arbitration process. But any requirement by TTIP to make any such submissions binding on how the agreement should be interpreted by the ISDS tribunal could set a negative precedent for other treaties.

Question 12: Appellate mechanism and the consistency of rulings

We understand the desire for an appellate system but advocate against the introduction of such a mechanism in TTIP since it defies, as a matter of principle, the purpose of arbitration, which is to bring expeditious resolution to an investment dispute. An appellate mechanism also defies the reason behind appointing an arbitrator who is to provide quick and efficient judgement on the matter at hand. Investors are already more often on the losing side in ISDS cases and appellate process would only increase costs further and complicate the overall process. In order to ensure against error in law or procedure, the parties to TTIP would be better placed to strengthen the provisions for investment protection and the mechanism for the establishment ISDS tribunals.

If an appellate mechanism is to be adopted by the EU as part of its negotiation position, then this proposition would require further consultation.