

# Public consultation on modalities for investment protection and ISDS in TTIP

Public consultation on modalities for investment protection and ISDS in TTIP .....	1
PUBLIC CONSULTATION .....	2
ANNEX: TEXT PROVIDED AS A REFERENCE.....	18
Question 1: Scope of the substantive investment protection provisions.....	18
Question 2: Non-discriminatory treatment for investors .....	19
Question 3: Fair and equitable treatment.....	22
Question 4: Expropriation.....	23
Question 5: Ensuring the right to regulate and investment protection.....	25
Question 6: Transparency in ISDS .....	30
Question 7: Multiple claims and relationship to domestic courts.....	31
Question 8: Arbitrator ethics, conduct and qualifications .....	34
Question 9: Reducing the risk of frivolous and unfounded cases.....	36
Question 10: Allowing claims to proceed (filter) .....	38
Question 11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement ..	41
Question 12: Appellate Mechanism and consistency of rulings .....	43

## **PUBLIC CONSULTATION**

### **A. Substantive investment protection provisions**

#### **INTRODUCTION**

*Investment protection provisions consist of a limited number of standards guaranteeing that governments will respect certain fundamental principles of treatment that a foreign investor can rely upon when making a decision to invest. These fundamental principles of treatment are reflected in the rights that democratic governments grant to their own citizens and companies (such as no expropriation without compensation, access to justice, protection against coercion and harassment, non-discrimination), but they are not always guaranteed for foreigners or foreign companies. At the same time foreign investors, just as domestic ones, must fully respect the domestic legal regime of the host country.*

*The overall purpose of international investment agreements is to ensure that the country hosting an investment treats foreign investors in accordance with these fundamental principles, while maintaining the right to take measures for the public good according to the level of ambition that they deem appropriate.*

*The specific EU objective in our trade and investment agreements, or in the investment protection section of the TTIP, is to strengthen the balance between investment protection and the right to regulate, through clarifying and improving the substantive investment protection provisions while at the same time preserving the right of States to take measures for legitimate public policy objectives.*

*More precisely, the EU is introducing modern and innovative provisions clarifying the meaning of those investment protection standards that have raised concerns in the past, notably: fair and equitable treatment (which in the EU's approach will be limited to a closed list of basic rights for investors) and indirect expropriation (which in the EU's approach will ensure that measures taken for legitimate public policy objectives cannot be considered to be an indirect expropriation). Under the EU's approach, the right to regulate is confirmed as a basic underlying principle. The EU also wants to ensure that all necessary exceptions and safeguards are in place, thus retaining essential public policy space for example to deal with a financial crisis.*

*The EU approach is further explained through the following background information and questions. For each relevant issue, we invite your comments and suggestions. Each issue is illustrated using reference texts as examples, taken from other investment agreements and from the approach developed in the EU-Canada (CETA) negotiations, which is the most recent text negotiated by the EU.*

## ***Question 1: Scope of the substantive investment protection provisions***

### ***Explanation of the issue***

The scope of the agreement responds to a key question: *What type of investments and investors should be protected?* Our response is that investment protection should apply to those **investments** and to **investors** that **have made** an investment in accordance with the laws of the country where they have invested.

### ***Approach in most investment agreements***

Many international investment agreements have broad provisions defining “investor” and “investment”.

In most cases, the definition of “investment” is **intentionally broad**, as investment is generally a complex operation that may involve a wide range of assets, such as land, buildings, machinery, equipment, intellectual property rights, contracts, licences, shares, bonds, and various financial instruments. At the same time, most bilateral investment agreements refer to “investments made in accordance with applicable law”. This reference has worked well and has allowed ISDS tribunals to **refuse to grant investment protection** to investors who **have not respected the law of the host state** when making the investment (for example, by structuring the investment in such a way as to circumvent clear prohibitions in the law of the host state, or by procuring an investment fraudulently or through bribery).

In many investment agreements, the **definition of “investor”** simply refers to natural and juridical persons of the other Party to the agreement, without further refinement. This has allowed in some cases so-called “**shell**” or “**mailbox**” **companies**, owned or controlled by nationals or companies not intended to be protected by the agreement and having no real business activities in the country concerned, to make use of an investment agreement to launch claims before an ISDS tribunal.

### ***The EU's objectives and approach***

The EU wants to avoid abuse. This is achieved primarily by improving the definition of “investor”, thus eliminating so-called “shell” or “mailbox” companies owned by nationals of third countries from the scope: in order to qualify as a legitimate investor of a Party, a juridical person must have substantial business activities in the territory of that Party.

At the same time, the EU wants to **rely on past treaty practice** with a proven track record. The reference to “investments made in accordance with the applicable law” is one such example. Another is the clarification 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.

### **Question:**

***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?***

***[\(click here to see the reference text in the original English version: Table 1\)](#)***

## Question 2: Non-discriminatory treatment for investors

### *Explanation of the issue*

Under the standards of non-discriminatory treatment of investors, a state Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (national treatment), as well in the same way in which it treats investors from other countries (most-favoured nation treatment). This ensures a **level playing field** between foreign investors and local investors or investors from other countries. For instance, if a certain chemical substance were to be proven to be toxic to health, and the state took a decision that it should be prohibited, the state should not impose this prohibition only on foreign companies, while allowing domestic ones to continue to produce and sell that substance.

Non-discrimination obligations may apply after the foreign investor has made the investment in accordance with the applicable law (**post-establishment**), but they may also apply to the conditions of access of that investor to the market of the host country (**pre-establishment**).

### *Approach in most existing investment agreements*

The standards of national treatment and most-favoured nation (MFN) treatment are considered to be **key provisions** of investment agreements and therefore they have been consistently included in such agreements, although with some variation in substance.

Regarding **national treatment**, many investment agreements do not allow states to discriminate between a domestic and a foreign investor once the latter is **already established** in a Party's territory. Other agreements, however, allow such discrimination to take place in a limited number of sectors.

Regarding **MFN**, most investment agreements do not clarify whether foreign investors are entitled to take advantage of procedural or substantive provisions contained in other past or future agreements concluded by the host country. Thus, investors may be able to claim that they are entitled to benefit from any provision of another agreement that they consider to be more favourable, which may even permit the application of an entirely new standard of protection that was not found in the original agreement. In practice, this is commonly referred to as "**importation of standards**".

### *The EU's objectives and approach*

The EU considers that, as a matter of principle, **established investors should not be discriminated** against after they have established in the territory of the host country, while at the same recognises that in certain rare cases and in some very specific sectors, discrimination against already established investors **may need to be envisaged**. The situation is different with regard to the right of **establishment**, where the Parties **may choose whether or not to open certain markets or sectors**, as they see fit.

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**.

The EU also includes **exceptions** allowing the Parties to take measures relating to the protection of health, the environment, consumers, etc. Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. These are typically included in EU FTAs and also apply to the non-discrimination obligations relating to investment. Such exceptions allow differences in treatment between investors and investments where necessary to **achieve public policy objectives**.

**Question:**

*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.*

*[\(click here to see the reference text in the original English version:](#) Table 2)*

<b><i>Question 3: Fair and equitable treatment</i></b>
--

***Explanation of the issue***

The obligation to grant foreign investors fair and equitable treatment (FET) is **one of the key investment protection standards**. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is **arbitrary, unfair, abusive**, etc.

***Approach in most investment agreements***

The FET standard is **present in most international investment agreements**. However, in many cases the standard is **not defined**, and it is usually **not limited or clarified**. Inevitably, this **has given arbitral tribunals significant room for interpretation**, and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.

Certain investment agreements have narrowed down the content of the FET standard by linking it to concepts that are considered to be part of **customary international law**, such as the minimum standard of treatment that countries must respect in relation to the treatment accorded to foreigners. However, this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.

An issue sometimes linked to the FET standard is the respect by the host country of its legal obligations towards the foreign investors and their investments (sometimes referred to as an “umbrella clause”), e.g. when the host country has entered into a contract with the foreign investor. Investment agreements may have specific provisions to this effect, which have sometimes been interpreted broadly as implying that every breach of e.g. a contractual obligation could constitute a breach of the investment agreement.

### *EU objectives and approach*

The main objective of the EU is **to clarify the standard**, in particular by incorporating key **lessons learned from case-law**. This would **eliminate uncertainty** for both states and investors.

Under this approach, a state could be held responsible for a breach of the fair and equitable treatment obligation **only for breaches of a limited set of basic rights**, namely: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. This list may be extended only where the Parties (the EU and the US) specifically agree to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law.

The “**legitimate expectations**” of the investor may be taken into account in the interpretation of the standard. However, this is possible **only where clear, specific representations have been made by a Party** to the agreement in order to convince the investor to make or maintain the investment and upon which the investor **relied**, and that were subsequently **not respected** by that Party. The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change. Thus the EU intends 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.

In line with the general objective of clarifying the content of the standard, the EU shall also strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice.

#### *Question:*

*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?*

*([click here to see the reference text in the original English version](#): Table 3)*

<b><i>Question 4: Expropriation</i></b>
---

#### *Explanation of the issue*

The **right to property is a human right**, enshrined in the European Convention of Human Rights, in the European Charter of Fundamental Rights as well as in the legal tradition of EU Member States. This right is **crucial to investors and investments**. Indeed, **the greatest risk** that investors may incur in a foreign country is the risk of having their investment **expropriated without compensation**. This is why the guarantees against expropriation are placed at the core of any international investment agreement.

**Direct expropriations**, which entail the outright seizure of a property right, do not occur often nowadays and usually do not generate controversy in arbitral practice. However, arbitral tribunals are confronted with a much more difficult task when it comes to assessing whether a regulatory measure of a state, which does not entail the direct transfer of the property right, might be considered **equivalent to expropriation** (indirect expropriation).

### *Approach in most investment agreements*

In investment agreements, expropriations are permitted if they are for a **public purpose, non-discriminatory**, resulting from the **due process of law** and are accompanied by prompt and effective **compensation**. This applies to both **direct expropriation** (such as nationalisation) and **indirect expropriation** (a measure having an effect equivalent to expropriation).

**Indirect expropriation** has been a **source of concern** in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements **do not provide details or guidance in this respect**, which has inevitably left arbitral tribunals with significant room for interpretation.

### *The EU's objectives and approach*

The objective of the EU is **to clarify** the provisions on expropriation and to **provide interpretative guidance** with regard to indirect expropriation in order to **avoid claims against legitimate public policy measures**. The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect **health or the environment**, **cannot be considered equivalent to an expropriation**, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an **impact on the economic value** of the investment does not justify a claim that an indirect expropriation has occurred.

### Question:

*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.*

*([click here to see the reference text in the original English version:](#) Table 4)*

## **Question 5: Ensuring the right to regulate and investment protection**

### *Explanation of the issue*

In democratic societies, the **right to regulate of states is subject to principles and rules** contained in both domestic legislation and in international law. For instance, in the **European Convention on Human Rights**, the Contracting States commit themselves to guarantee a number of civil and political rights. In the EU, the **Constitutions** of the Member States, as well as EU law, ensure that the actions of the state cannot go against fundamental rights of the

citizens. Hence, public regulation must be based on a legitimate purpose and be necessary in a democratic society.

**Investment agreements reflect** this perspective. Nevertheless, wherever such agreements contain provisions that appear to be very broad or ambiguous, there is always a **risk** that the arbitral tribunals interpret them in a manner which may be perceived as a threat to the state's right to regulate. In the end, **the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply.**

### *Approach in most investment agreements*

Most agreements that are focused on investment protection are **silent about how public policy issues, such as public health, environmental protection, consumer protection or prudential regulation, might interact with investment.** Consequently, the relationship between the protection of investments and the right to regulate in such areas, as envisaged by the contracting Parties to such agreements, is not clear and this creates uncertainty.

In more recent agreements, however, **this concern is increasingly addressed** through, on the one hand, **clarification** of the key investment protection provisions that have proved to be controversial in the past and, on the other hand, carefully drafted **exceptions** to certain commitments. In complex agreements such as free trade agreements with provisions on investment, or regional integration agreements, the inclusion of such safeguards is the usual practice.

### *The EU's objectives and approach*

The objective of the EU is to achieve a **solid balance** between the **protection of investors** and the Parties' **right to regulate.**

First of all, the EU wants to make sure that the Parties' **right to regulate is confirmed as a basic underlying principle.** This is important, as arbitral tribunals will have to take this principle into account when assessing any dispute settlement case.

Secondly, the EU will introduce **clear and innovative provisions** with regard to investment protection standards that have raised concern in the past (for instance, the standard of fair and equitable treatment is defined based on a closed list of basic rights; the annex on expropriation clarifies that non-discriminatory measures for legitimate public policy objectives do not constitute indirect expropriation). These improvements will ensure that investment protection standards cannot be interpreted by arbitral tribunals in a way that is detrimental to the right to regulate.

Third, the EU will ensure that **all the necessary safeguards and exceptions are in place.** For instance, foreign investors should be able to **establish** in the EU only under the terms and conditions defined by the EU. A list of horizontal exceptions will apply to non-discrimination obligations, in relation to measures such as those taken in the field of environmental protection, consumer protection or health (*see question 2 for details*). Additional carve-outs would apply to the audiovisual sector and the granting of subsidies. Decisions on competition matters will not be subject to investor-to-state dispute settlement (ISDS). Furthermore, in line with other EU agreements, nothing in the agreement would prevent a Party from taking measures for **prudential reasons**, including measures for the protection of depositors or



measures to ensure the integrity and stability of its financial system. In addition, EU agreements contain general exceptions applying in **situations of crisis**, such as in circumstances of serious difficulties for the operation of the exchange rate policy or monetary policy, balance of payments or external financial difficulties, or threat thereof.

In terms of the procedural aspects relating to ISDS, the objective of the EU is to build a system capable of adapting to the states' right to regulate. Wherever greater clarity and precision proves necessary in order to protect the right to regulate, the Parties will have the possibility to **adopt interpretations** of the investment protection provisions which will be **binding on arbitral tribunals**. This will allow the Parties to oversee how the agreement is interpreted in practice and, where necessary, to influence the interpretation.

The procedural improvements proposed by the EU will also make it clear that an arbitral tribunal **will not be able to order the repeal of a measure**, but only compensation for the investor.

Furthermore, **frivolous claims will be prevented** and investors who bring claims unsuccessfully will **pay the costs** of the government concerned (*see question 9*).

**Question:**

*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?*

*([click here to see the reference text in the original English version](#): Table 5)*

## **B. Investor-to-state dispute settlement (ISDS)**

### **INTRODUCTION**

*Investor-to-state dispute settlement (ISDS) is a legal instrument that allows investors to bring a claim before an arbitration tribunal that the host state has not respected the investment protection rules under TTIP. Domestic remedies would be preferable, but TTIP provisions cannot be invoked directly in front of a national court. Despite the general solidity of developed court systems such as the US and the EU, it is possible that investors will not be given effective access to justice, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy. ISDS is therefore necessary to allow legitimate claims to be pursued. In such cases, the investors would have to prove that the measures have breached the investment protection provisions and that it caused them damage.*

*The possibility for investors to resort to ISDS is a standard feature of virtually all the 3000 investment agreements in existence today, including the 1400 signed by EU Member States. Most of these agreements contain a standard paragraph stating that investors can go to ISDS in case of a breach of the investment protection provisions. The agreements themselves*

*do not contain any precise procedural framework for how an ISDS case should be handled by a tribunal. The ISDS tribunal must work on the basis of international arbitration rules that set a general procedural framework. The most common are the rules of the International Centre for the Settlement of Investment Disputes (“ICSID”, a World Bank body) or those of the United Nations Commission for International Trade Law (“UNCITRAL”). However, these rules only partially address the problems which have come to light over the last years with the ISDS system, notably on transparency, the conduct of arbitrators and the absence of any appeal mechanism.*

*The EU is working to develop an efficient and modern ISDS mechanism which is equipped to deal with these problems. The EU will improve the ISDS mechanism under TTIP compared to existing investment agreements. The improvements are explained in the questions that follow where we ask you to comment and make suggestions. Through these improvements, the EU aims to ensure a transparent, accountable and well-functioning ISDS system that reflects the public interest and policy objectives. The EU will encourage the amicable settlement of disputes, through a required period for consultations, and the possibility of mediation. The EU also aims to enhance consistency of rulings, including by the establishment of an appeal mechanism and by allowing for the governments to provide guidance and interpretation so that their intentions are respected. A further consideration is how to avoid frivolous or unfounded claims; the EU will introduce mechanisms to allow for a quick dismissal of such claims. Transparency and the possibility for stakeholders to make their views heard in the process underpin these improvements and are essential for an accountable and credible ISDS system.*

#### **Question 6: Transparency in ISDS**

##### ***Explanation of the issue***

In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side.

This **lack of openness** has given rise to **concern and confusion** with regard to the causes and potential outcomes of ISDS disputes. **Transparency is essential** to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.

##### ***Approach in most existing investment agreements***

Under the rules that apply in most existing agreements, both **the responding state and the investor need to agree to permit the publication** of submissions. If either the investor or the responding state does not agree to publication, documents **cannot be made public**. As a result, most ISDS cases take place behind closed doors and no or a limited number of documents are made available to the public.

### *The EU's objectives and approach*

The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP, all **documents will be publicly available** (subject only to the protection of confidential information and business secrets) and **hearings will be open to the public**. Interested parties from **civil society will be able to file submissions** to make their views and arguments known to the ISDS tribunal.

The EU took a leading role in establishing **new United Nations rules on transparency**<sup>1</sup> in ISDS. The objective of transparency will be achieved by incorporating these rules into TTIP.

#### **Question:**

*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.*

*([click here to see the reference text in the original English version](#): Table 6)*

<b><i>Question 7: Multiple claims and relationship to domestic courts</i></b>
---

#### ***Explanation of the issue***

Investors who consider that they have grounds to complain about action taken by the authorities (e.g. discrimination or lack of compensation after expropriation) often have different options. They may be able to go to domestic courts and seek redress there. They or any related companies may be able to go to other international tribunals under other international investment treaties.

It is often the case that protection offered in investment agreements **cannot be invoked before domestic courts** and the applicable **legal rules are different**. For example, discrimination in favour of local companies is not prohibited under US law but is prohibited in investment agreements. There are also concerns that, in some cases domestic courts may **favour the local government** over the foreign investor e.g. when assessing a claim for compensation for expropriation or may deny due process rights such as the effective possibility to appeal. Governments may have **immunity from being sued**. In addition, the remedies are often different. In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. ISDS tribunals **cannot order governments to reverse measures**.

These different possibilities raise important and complex issues. It is important to make sure that a government **does not pay more** than the correct compensation. It is also important to ensure **consistency between rulings**.

---

<sup>1</sup> UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration  
<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

### *Approach in most existing investment agreements*

Existing investment agreements **generally do not regulate or address** the relationship with domestic courts or other ISDS tribunals. Some agreements require that the investor chooses between domestic courts and ISDS tribunals. This is often referred to as "**fork in the road**" clause.

### *The EU's objectives and approach*

As a matter of principle, the EU's approach **favours domestic courts**. The EU aims to provide incentives for investors to pursue claims in domestic courts or to seek **amicable solutions** – such as mediation. The EU will suggest different instruments to do this. One is to prolong the relevant time limits if an investor goes to domestic courts or mediation on the same matter, so as not to discourage an investor from pursuing these avenues. Another important element is to make sure that investors **cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts**. The EU will also ensure that companies **affiliated with the investor cannot bring claims** in front of an ISDS tribunal and domestic courts on the same matter and at the same time. If there are other relevant or related cases, ISDS tribunals must take these into account. This is done to **avoid any risk that the investor is over-compensated** and helps to **ensure consistency** by excluding the possibility for parallel claims.

### *Question:*

*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.*

*([click here to see the reference text in the original English version](#): Table 7)*

<b><i>Question 8: Arbitrator ethics, conduct and qualifications</i></b>
---

### *Explanation of the issue*

There is **concern** that arbitrators on ISDS tribunals do not always act in an **independent and impartial manner**. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or **conflicts of interest**.

Some have also expressed concerns about the **qualifications of arbitrators** and that they may not have the necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection.

### *Approach in existing investment agreements*

Most existing investment agreements **do not address the issue** of the conduct or behaviour of arbitrators. International rules on arbitration address the issue by allowing the responding government or the investor to challenge the choice of arbitrator because of concerns of suitability.

Most agreements allow the investor and the responding state to select arbitrators but **do not establish rules on the qualifications** or a list of approved, qualified arbitrators to draw from.

### *The EU's objective and approach*

The EU aims to establish clear rules to **ensure that arbitrators are independent and act ethically**. The EU will introduce specific requirements in the TTIP on the ethical conduct of arbitrators, including a **code of conduct**. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes procedures to identify and deal with any conflicts of interest. Failure to abide by these ethical rules will result in the **removal of the arbitrator** from the tribunal. For example, if a responding state considers that the arbitrator chosen by the investor does not have the necessary qualifications or that he has a conflict of interest, the responding state can challenge the appointment. If the arbitrator is in breach of the Code of Conduct, he/she will be removed from the tribunal. In case the ISDS tribunal has already rendered its award and a breach of the code of conduct is found, the responding state or the investor **can request a reversal** of that ISDS finding.

In the text provided as reference (the draft EU-Canada Agreement), the Parties (i.e. the EU and Canada) have agreed for the first time in an investment agreement to include rules on the conduct of arbitrators, and have included the possibility to improve them further if necessary. In the context of TTIP these would be directly included in the agreement.

As regards the qualifications of ISDS arbitrators, the EU aims to set down detailed requirements for the arbitrators who act in ISDS tribunals under TTIP. They must be **independent and impartial**, with **expertise** in international law and international investment law and, if possible, **experience** in international trade law and international dispute resolution. Among those best qualified and who have undertaken such tasks will be retired **judges**, who generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues. The EU also aims to set up a **roster**, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson. The purpose of such a roster is to ensure that the EU and the US have agreed to and vetted the arbitrators to ensure their abilities and independence. In this way the responding state chooses one arbitrator and has vetted the third arbitrator.

### *Question:*

*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?*

*(click here to see the reference text in the original English version:* Table 8)

### **Question 9: Reducing the risk of frivolous and unfounded cases**

#### ***Explanation of the issue***

As in all legal systems, cases are brought that have little or no chance of succeeding (so-called “**frivolous claims**”). Despite eventually being rejected by the tribunals, such cases take up **time and money** for the responding state. There have been concerns that protracted and frequent litigation in ISDS could have an **effect on the policy choices** made by states. This is why it is important to ensure that there are mechanisms in place to weed out frivolous disputes as early as possible.

Another issue is the **cost of ISDS proceedings**. In many ISDS cases, even if the responding state is successful in defending its measures in front of the ISDS tribunal, it may have to pay substantial amounts to cover its own defence.

#### ***Approach in most existing investment agreements:***

Under existing investment agreements, there are generally **no rules** dealing with frivolous claims. Some **arbitration rules** however do have provisions on frivolous claims. As a result, there is a risk that frivolous or clearly unfounded claims are allowed to proceed. Even though the investor would lose such claims, the long proceedings and the implied questions surrounding policy can be problematic.

The issue of **who bears the cost** is also **not addressed** in most existing investment agreements. Some international arbitration rules have provisions that address the issue of costs in very general terms. In practice, ISDS tribunals have often decided that the investor and responding state pay their own legal costs, regardless of who wins or loses.

#### ***The EU's objectives and approach***

The EU will introduce several instruments in TTIP to **quickly dismiss frivolous claims**.

ISDS tribunals will be required to dismiss claims that are obviously without legal merit or legally unfounded. For example, this would be cases where the investor is not established in the US or the EU, or cases where the ISDS tribunal can quickly establish that there is in fact no discrimination between domestic and foreign investors. This provides an early and effective filtering mechanism for frivolous claims thereby avoiding a lengthy litigation process.

To further discourage unfounded claims, the EU is proposing that **the losing party should bear all costs** of the proceedings. So if investors take a chance at bringing certain claims and fail, they have to pay the full financial costs of this attempt.

#### **Question:**

***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.***

***([click here to see the reference text in the original English version:](#) Table 9)***

## Question 10: Allowing claims to proceed (filter)

### *Explanation of the issue*

Recently, concerns have been expressed in relation to several ISDS claims brought by investors under existing investment agreements, relating to measures taken by states affecting the financial sector, notably those taken **in times of crisis in order to protect consumers or to maintain the stability and integrity of the financial system**.

To address these concerns, some investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called “**filter**” to ISDS) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.

### *Approach in most existing investment agreements*

The majority of existing investment agreements privilege the original intention of such agreements, which was to **avoid the politicisation of disputes**, and therefore do not contain provisions or mechanisms which allow the Parties the possibility to intervene under particular circumstances in ISDS cases.

### *The EU’s objectives and approach*

The EU like many other states considers it **important to protect the right to regulate in the financial sector** and, more broadly, the overriding need to **maintain the overall stability and integrity of the financial system**, while also recognizing the speed needed for government action in case of financial crisis.

### **Question:**

*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?***

*([click here to see the reference text in the original English version](#): Table 10)*

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

### *Explanation of the Issue*

When countries negotiate an agreement, they have a **common understanding** of what they want the agreement to mean. However, there is a risk that any tribunal, including ISDS tribunals **interprets the agreement in a different way**, upsetting the balance that the countries in question had achieved in negotiations – for example, between investment

protection and the right to regulate. This is the case if the agreement **leaves room for interpretation**. It is therefore necessary to have mechanisms which will allow the Parties (the EU and the US) to clarify their intentions on **how the agreement should be interpreted**.

### *Approach in existing investment agreements*

Most existing investment agreements **do not permit** the countries who signed the agreement in question to take part in proceedings nor to give directions to the ISDS tribunal on issues of interpretation.

### *The EU's objectives and approach*

The EU will make it possible for the non-disputing Party (i.e. the EU or the US) to **intervene in ISDS proceedings** between an investor and the other Party. This means that in each case, the Parties can explain to the arbitrators and to the Appellate Body **how they would want the relevant provisions to be interpreted**. Where both Parties agree on the interpretation, such interpretation is a very powerful statement, which ISDS **tribunals would have to respect**.

The EU would also provide for the Parties (i.e. the EU and the US) to adopt **binding interpretations on issues of law**, so as to correct or avoid interpretations by tribunals which might be considered to be against the common intentions of the EU and the US. Given the EU's intention to give clarity and precision to the investment protection obligations of the agreement, the scope for undesirable interpretations by ISDS tribunals is **very limited**. However, this provision is an **additional safety-valve** for the Parties.

### *Question:*

*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?*

*([click here to see the reference text in the original English version](#): Table 11)*

## **Question 12: Appellate Mechanism and consistency of rulings**

### *Explanation of the issue*

In existing investment agreements, the **decision by an ISDS tribunal is final**. There is **no possibility** for the responding state, for example, **to appeal** to a higher instance to challenge the level of compensation or other aspects of the ISDS decision except on very limited procedural grounds. There are concerns that this can lead to different or even contradictory interpretations of the provisions of international investment agreements. There have been calls by stakeholders for a mechanism to **allow for appeal to increase legitimacy of the system and to ensure uniformity of interpretation**.



### *Approach in most existing investment agreements*

No existing international investment agreements provide for an appeal on legal issues. International arbitration rules allow for annulment of ISDS rulings under certain very restrictive conditions relating to procedural issues.

### *The EU's objectives and approach*

The EU aims to **establish an appellate mechanism** in TTIP so as to allow for review of ISDS rulings. It will help **ensure consistency** in the interpretation of TTIP and provide both the government and the investor with the opportunity to **appeal against awards** and to **correct errors**. This legal review is an additional check on the work of the arbitrators who have examined the case in the first place.

In agreements under negotiation by the EU, the possibility of creating an appellate mechanism in the future is envisaged. However, in TTIP the EU intends to go further and create a bilateral appellate mechanism immediately through the agreement.

### *Question:*

*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.*

*([click here to see the reference text in the original English version](#): Table 12)*

### *C. General assessment*

<i>Question 13</i>
--------------------

*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?*

**ANNEX: TEXT PROVIDED AS A REFERENCE**

**A. Substantive investment protection provisions**

***Question 1: Scope of the substantive investment protection provisions***

**Reference text:**

**Table 1**

<b><i>Example of provisions commonly found in bilateral investment agreements (BITs)</i></b>	<b><i>Text developed in the EU-Canada agreement (CETA)</i></b>
<p>“<b>Investment</b>” means every kind of asset, owned or controlled directly or indirectly by an investor of the other Party, including:</p> <p>a) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges;</p> <p>b) an enterprise, shares, stocks and other forms of equity participation in an enterprise including rights derived therefrom;</p> <p>c) bonds, debentures, loans, other debt instruments, including rights derived therefrom;</p> <p>(v) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;</p> <p>(vi) concessions pursuant to domestic law, including to search for, cultivate, extract or exploit natural resources,</p> <p>(vii) claims to money, or to other assets or any contractual performance having an economic value;</p> <p>(vii) intellectual property rights.</p>	<p><b>'investment'</b> means:</p> <p>Every kind of asset that an investor owns or controls, directly or indirectly, which has 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. Forms that an investment may take include:</p> <p>a) an enterprise;</p> <p>b) shares, stocks and other forms of equity participation in an enterprise;</p> <p>c) bonds, debentures and other debt instruments of an enterprise;</p> <p>d) a loan to an enterprise;</p> <p>e) any other kinds of interest in an enterprise;</p> <p>f) an interest arising from:</p> <p>i. a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources,</p> <p>ii. a turnkey, construction, production, or revenue-sharing contract, or</p> <p>iii. other similar contracts;</p> <p>g) intellectual property rights;</p> <p>h) any other moveable property, tangible or intangible, or immovable property and related rights;</p> <p>i) claims to money or claims to performance under a contract;</p> <p>For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.</p>

<p><b>Scope</b> The provisions in this Treaty shall apply to investments made by investors of one Party in the territory of the other Party, in accordance with the applicable laws, whether made before or after the entry into force of this Treaty.</p> <p><b>“Investor”</b> means: i) a natural person having the nationality of a Party, in accordance with its applicable law; (ii) a juridical person/company or other organization organized in accordance with/under the law of a Party;</p>	<p>Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment.</p> <p><b>covered investment</b> means, with respect to a Party, an investment: a) in its territory; b) made in accordance with the applicable law at that time; c) directly or indirectly owned or controlled by an investor of the other Party; and d) existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.</p> <p><b>investor</b> means 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.</p> <p>But "investor" does not mean: a) an enterprise of a Party, if the enterprise is owned or controlled by an investor of the other Party or of a non-Party and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized; or, b) a branch or representative office of an enterprise of a Party or a non-Party.</p>
---	--

**Question 2: Non-discriminatory treatment for investors**

Reference text:

Table 2

<i>Example of provisions commonly found in bilateral investment agreements (BITs)</i>	<i>Text developed in the EU-Canada agreement (CETA)</i>
<p><b>"Article X. Non-discrimination</b></p> <p>1. Each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the operation, management, maintenance, use, enjoyment and sale or other disposition of the investments.</p>	<p><b>"Section X: Non-Discriminatory Treatment</b></p> <p><b>Article X.1: National Treatment</b></p> <p>1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations, to its own investors and to their investments with respect to the establishment, acquisition, conduct, operation, management,</p>

2. Each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords to investors of any third country and to their investments with respect to the operation, management, maintenance, use, enjoyment and sale or other disposition of the investments.

maintenance, use, enjoyment and sale or disposal of their investments in its territory.

The treatment accorded by a Party under paragraph 1 means, with respect to measures adopted or maintained by a government in Canada other than at federal level, or by a government of or in an European Union Member State, treatment no less favourable than the most favourable treatment accorded by that government, in like situations, to investors of the other Party and to covered investments of Canada or of the European Union respectively, including jurisdictions of that government.

**Article X.2: Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. The treatment accorded by a Party under paragraph 1 means, with respect to measures adopted or maintained by a government in Canada other than at federal level, or by a government of or in an European Union Member State, treatment no less favourable than the most favourable treatment accorded by that government, in like situations, to investors and to covered investments of Canada or of the European Union respectively, including jurisdictions of that government.

3. Paragraph 1 shall not be construed to oblige a Party to extend to the investors of the other Party the benefit of any treatment resulting from existing or future measures providing for recognition.

4. For greater certainty, the “treatment” referred to in Paragraph 1:

a. does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements, including compensation granted through such procedures, and

b. shall only apply with respect to treatment

3. The provisions of paragraph 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

- its participation in any existing or future customs union, economic union, regional economic integration agreement or similar international agreement, or

- any international agreement or arrangement relating wholly or mainly to taxation.

accorded by a Party through the adoption, maintenance or application of measures.

3. Paragraph 1 shall not be construed to oblige a Party to extend to the investors of the other Party the benefit of any treatment resulting from:

(a) treatment granted as a process of economic integration, which includes commitments to abolish substantially all barriers to investment, together with the approximation of legislation of the parties on a broad range of matters within the purview of this Agreement.

(b) any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation.

#### **Article Y: General exceptions**

1. For the purposes of Chapters X through Y and Chapter Z (National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation), Section 2 (Establishment of Investments) and Section 3 (Non-discrimination of Investment), GATT 1994 Article XX is incorporated into and made part of this Agreement.

The Parties understand that the measures referred to in GATT 1994 Article XX (b) include environmental measures necessary to protect human, animal or plant life or health. The Parties further understand that GATT 1994 Article XX (g) applies to measures for the conservation of living and non-living exhaustible natural resources.

2. For the purposes of Chapters X, Y, and Z (Cross-Border Trade in Services, Telecommunications, and Temporary Entry and Stay of Natural Persons for Business Purposes), Section 2 (Establishment of Investments) and Section 3 (Non-discrimination of Investment)) GATS Article XIV (a), (b) and (c) is incorporated into this Agreement.

The Parties understand that the measures referred to in GATS Article XIV (b) include environmental measures necessary to protect human, animal or plant life or health.

**Question 3: Fair and equitable treatment**

**Reference text:**

**Table 3**

<i>Example of provisions commonly found in bilateral investment agreements (BITs)</i>	<i>Provisions in the EU-Canada agreement (CETA)</i>
<p>"Each Party shall accord investors of the other Party and their investments fair and equitable treatment." [no further specifications]</p>	<p>Section X: Investment Protection</p> <p>Article X.X.: Treatment of Investors and of Covered Investments</p> <ol style="list-style-type: none"><li>1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 7.</li><li>2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:<ol style="list-style-type: none"><li>a. Denial of justice in criminal, civil or administrative proceedings;</li><li>b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.</li><li>c. Manifest arbitrariness;</li><li>d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;</li><li>e. Abusive treatment of investors, such as coercion, duress and harassment;</li><li>or</li><li>f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.</li></ol></li><li>3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.</li><li>4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate</li></ol>

	<p>expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.</p> <p>5. For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.</p> <p>6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.</p>
--	---

***Question 4: Expropriation***

**Reference text:**

**Table 4**

<b><i>Example of provisions commonly found in bilateral investment agreements (BITs)</i></b>	<b><i>Text developed in the EU-Canada agreement (CETA)</i></b>
<p><b>Article X: Expropriation</b></p> <p>1. Investments by investors of a Party in the territory of the other Party shall not be expropriated, nationalized or subjected to any measure equivalent to expropriation or nationalization, except for a purpose that is in the public interest, on a non-discriminatory basis, in accordance with due process of law and against prompt, adequate and effective compensation.</p> <p>2. Such compensation shall amount to the fair market value of the investment immediately before the expropriation or impending expropriation became public knowledge, whichever is earlier. Compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall be paid without</p>	<p><b>Article X: Expropriation</b></p> <p>1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except:</p> <ul style="list-style-type: none"> <li>(a) for a public purpose;</li> <li>(b) under due process of law;</li> <li>(c) in a non-discriminatory manner; and</li> <li>(d) against payment of prompt, adequate and effective compensation.</li> </ul> <p>For greater certainty, this paragraph shall be interpreted in accordance with Annex X.9.1 on the clarification of expropriation.</p> <p>2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to</p>

delay, shall be effectively realisable and fully transferable.

determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

4. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement').

#### **Annex: Expropriation**

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:



	<p>a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;</p> <p>b) the duration of the measure or series of measures by a Party;</p> <p>c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and</p> <p>d) the character of the measure or series of measures, notably their object, context and intent.</p> <p>3. 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.</p>
--	---

***Question 5: Ensuring the right to regulate and investment protection***

***Reference text***

**Table 5**

<b><i>Example of provisions commonly found in bilateral investment treaties (BITs)</i></b>	<b><i>Text developed in EU-Canada agreement (CETA)</i></b>
<p>Most BITs contain no specific provision.</p>	<p><b>Preamble</b> [Extract]</p> <p>"REAFFIRMING their commitment to sustainable development and convinced of the contribution of international trade and investment to sustainable development,</p> <p>RECOGNISING 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,</p> <p>DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner</p>

mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements to which they are Parties,

DESIRING to encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles of corporate social responsibility notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct,

SEEKING to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to mutual trade and investment ,

BUILDING on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements to which they are party,".

#### **Article X: Reservations and Exceptions**

"1. Articles X- (National Treatment), X- (Most-Favoured-Nation Treatment), (...) do not apply to:

(a) an existing non-conforming measure that is maintained by a Party at the level of:

(i) the European Union, as set out in its Schedule to Annex I;

(ii) a national government, as set out in its Schedule to Annex I;

(iii) a provincial, territorial, or regional government, as set out in its Schedule to Annex I; or

(iv) a local government.

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X- (National Treatment), X- (Most-Favoured-Nation Treatment), (...).

2. Articles X- (National Treatment), X- (Most-Favoured-Nation Treatment), (...) do not apply to

measures that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

3. Without prejudice to Article X [Expropriation] and Article X [Treatment of Investors and Covered Investments], no Party may adopt any measure or series of measures after the date of entry into force of this Agreement and covered by its schedule to Annex II, that require, directly or indirectly, an investor of the other Party, by reason of nationality, to sell or otherwise dispose of an investment existing at the time the measure or series of measures becomes effective.

4. In respect of intellectual property rights, a Party may derogate from Article X.3 (National Treatment), Article X.4 (Most-Favoured-Nation Treatment) where permitted by the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement.

5. (...) Articles X.3 (National Treatment), X.4 (Most-Favoured-Nation Treatment) (..) do not apply to:

(a) procurement by a Party or a State Enterprise for goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of goods and services for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article II of (Chapter XX - Public procurement); or

(b) subsidies or government support provided by a Party including direct or potential transfer of funds, the foregoing of government revenue (such as a tax credit), and the provision of goods or services."

***Audiovisual:***

"For the EU, the Section on Establishment and Section on Non-Discriminatory Treatment do not apply to measures with respect to Audiovisual services."

***ARTICLE X: PRUDENTIAL CARVE-OUT***

1. Nothing in this Agreement shall prevent a Party from adopting or maintaining measures for prudential reasons, including:

(a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier;

(b) ensuring the integrity and stability of a Party's financial system.

2. These measures shall not be more burdensome than necessary to achieve their aim.

3. Without prejudice to other means of prudential regulation of cross-border trade in financial services, a Party may require the registration of cross-border financial service suppliers of the other Party and of financial instruments.

4. Subject to Article X [National Treatment] and Article Y [Most Favoured Nation], a Party may, for prudential reasons, prohibit a particular financial service or activity. Such a prohibition may not apply to all financial services or to a complete financial services sub-sector, such as banking.

#### **Article X Safeguard measures**

In exceptional circumstances of serious difficulties for the operation of monetary and exchange rate policy, in the case of Canada, or for the operation of the economic and monetary union, in the case of the European Union, or threat thereof, safeguard measures that are strictly necessary may be taken by the concerned Party with regard to capital movements or payments, including transfers, for a period not exceeding six months. The Party having adopted or maintained such measures shall inform the other Party forthwith and present, as soon as possible, a time schedule for their removal.

#### **Article X Balance of Payments**

1. Nothing in this Agreement shall be construed to prevent the Parties from adopting or maintaining safeguard measures with regard to capital movements or payments, including transfers, in case of serious balance-of-payments or external financial difficulties, or under threat thereof.

2. The measures referred to in paragraph 1 shall:

a) not discriminate among countries;

b) be consistent with the Articles of the Agreement of the International Monetary Fund, as applicable;

c) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;

d) be temporary and phased out progressively as the situation specified in paragraph 1 improves.

3. In the case of trade in goods, nothing in this Agreement shall be construed to prevent a Party from adopting restrictive measures in order to safeguard its balance-of-payments or external financial position. Such measures shall be in accordance with the General Agreement on Tariffs and Trade (GATT) and the Understanding on Balance of Payment Provisions of the GATT 1994.

4. In the case of trade in services, nothing in this Agreement shall be construed to prevent a Party from adopting restrictive measures in order to safeguard its balance-of-payments or external financial position. Such measures shall be in accordance with the General Agreement on Trade in Services (GATS).

5. Any Party maintaining or having adopted measures referred to in paragraph 1 or 2 shall promptly notify the other Party of them and present, as soon as possible, a time schedule for their removal.

6. Where the restrictions are adopted or maintained under this Article, consultations shall be held promptly in the Trade Committee, if such consultations are not otherwise taking place outside of this Agreement. The consultations shall assess the balance-of-payments or external financial difficulty that led to the respective measures, taking into account, *inter alia*, such factors as:

(a) the nature and extent of the difficulties;

(b) the external economic and trading environment; or

(c) alternative corrective measures which may be available.

The consultations shall address the compliance of any restrictive measures with paragraphs 1 and 2. All findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and balance-of-payments shall be accepted and conclusions shall be based on the assessment by the IMF of the balance-of-payments and the external financial situation of the Party concerned.

**B. Investor-to-state dispute settlement (ISDS)**

**Question 6: Transparency in ISDS**

**Reference text:**

**Table 6**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
<p>Existing investment agreements generally do not include provisions on transparency.</p>	<p><b>Article x-33: Transparency of Proceedings</b></p> <ol style="list-style-type: none"> <li>1. The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.</li> <li>2. The request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.</li> <li>3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.</li> <li>4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.</li> <li>5. Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part</li> </ol>

	<p>of the hearing requiring such protection.</p> <p>6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.</p>
--	--

**Question 7: Multiple claims and relationship to domestic courts**

**Reference text:**

**Table 7**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
<p>Most investment agreements do not address the relation between ISDS and domestic courts.</p>	<p><b>Article x-21: Procedural and Other Requirements for the Submission of a Claim to Arbitration</b></p> <p>1. An investor may submit a claim to arbitration under Article x-22 (Submission of a Claim to Arbitration) only if the investor:</p> <ul style="list-style-type: none"> <li>a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;</li> <li>b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination;</li> <li>c) fulfils the requirements of the notice requesting a determination of the respondent;</li> <li>d) fulfils the requirements related to the request for consultations;</li> <li>e) does not identify measures in its claim to arbitration that were not identified in its request for consultations;</li> <li>f) provides a declaration, where it has initiated a claim or proceeding, seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, that: <ul style="list-style-type: none"> <li>i. a final award, judgment or</li> </ul> </li> </ul>

- decision has been made; or
- ii. it has withdrawn any such claim or proceeding;

The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and

- g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

**2.** Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).

**3.** The requirements of paragraphs 1(f), (g) and 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling the requirements in subparagraph 1(f), (g) or 2.

**4.** Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.

**5.** The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:

- i. where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
  - ii. where the Tribunal dismisses the claim pursuant to Article x-29 (Claim manifestly without legal merit) or Article x-30 (Claims Unfounded as a Matter of Law);
- or

where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the



	tribunal.
	<p><b>Article x-23: Proceedings under different international agreements</b></p> <p>Where claims are brought both pursuant to this Section and another international agreement and:</p> <ul style="list-style-type: none"> <li>a) there is a potential for overlapping compensation; or</li> <li>b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,</li> </ul> <p>a Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award.</p>
	<p><b>Article x-19: Mediation</b></p> <ol style="list-style-type: none"> <li>1. The disputing parties may at any time agree to have recourse to mediation.</li> <li>2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Services and Investment Committee pursuant to Article x-42(5)(d).</li> <li>3. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to Article x-25 (Constitution of the Tribunal) or requesting the Secretary General of ICSID to appoint a mediator from the list of chairpersons established pursuant to Article x-25 (Constitution of the Tribunal).</li> <li>4. Disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator.</li> <li>5. If the disputing parties agree to have recourse to mediation, Articles x-18(5) and x-18(7) (Consultations) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either</li> </ol>

	disputing party decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.
--	---

**Question 8: Arbitrator ethics, conduct and qualifications**

**Reference text:**

**Table 8**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
No provisions on ethics, or a code of conduct. International arbitration rules may be relied upon and feature some provisions.	<p><b>Article x-25: Constitution of the Tribunal</b></p> <p><b>1.</b> Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator.</p> <p><b>2.</b> If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, a disputing party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. The Secretary General of ICSID shall appoint the remaining arbitrators from the list established pursuant to paragraph 3. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her own discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise.</p> <p><b>3.</b> Pursuant to Article x-42(2), the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who</p>

meet the qualifications set out in paragraph 5. The Committee on Services and Investment shall ensure that the list includes at least 15 individuals.

**4.** The list established in paragraph 3 shall be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals, who are neither nationals of Canada nor the Member States of the European Union, to act as presiding arbitrators. Each sub-list shall include at least five individuals. The Committee on Services and Investment may agree to increase the number of arbitrators for the list.

**5.** Arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements.

**6.** Arbitrators shall be independent of, and not be affiliated with or take instructions from any disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article x-42 (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party.

**7.** If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 6, it shall send a notice of its intent to challenge the arbitrator within 15 days after:

- a) the appointment of the arbitrator has been notified to the challenging party; or,
- b) the disputing party became aware of the facts giving rise to the alleged failure to meet such requirements.

**8.** The notice of an intention to challenge shall be promptly communicated to the other disputing party, to the arbitrator or arbitrators, as applicable, and to the Secretary General of ICSID. The notice of challenge shall state the reasons for the challenge.

**9.** When an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge, in which case the disputing parties may request the challenged arbitrator to resign.

	<p>The arbitrator may also, after the challenge, elect to resign. In neither case does this imply acceptance of the validity of the grounds for the challenge.</p> <p><b>10.</b> If, within 15 days from the date of the notice of challenge, the challenged arbitrator has elected not to resign, the Secretary-General of ICSID shall, after hearing the disputing parties and after providing the arbitrator an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators, as applicable.</p> <p><b>11.</b> A vacancy resulting from the disqualification or resignation of an arbitrator shall be promptly filled pursuant to the procedure provided for in this Article.</p> <p><b>Article x-42: Committee</b></p> <p>The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties, decide to:</p> <ul style="list-style-type: none"> <li>a) establish and maintain the list of arbitrators pursuant to Article x-25(3)(Constitution of the Tribunal);</li> <li>b) adopt a code of conduct for arbitrators to be applied in disputes arising out of this chapter, which may replace or supplement the rules in application, and that may address topics including: <ul style="list-style-type: none"> <li>i. disclosure obligations;</li> <li>ii. the independence and impartiality of arbitrators; and</li> <li>iii. confidentiality.</li> </ul> </li> </ul> <p>The Parties shall make best efforts to ensure that the decisions referred to in (a) and (b) are adopted no later than the entry into force of the Agreement, and in any event no later than two years after the entry into force of the Agreement.</p>
--	--

***Question 9: Reducing the risk of frivolous and unfounded cases***

**Reference text:**

**Table 9**

<b><i>Example of provisions commonly found in bilateral investment treaties (BITs)</i></b>	<b><i>Text developed in EU-Canada agreement (CETA)</i></b>
--	--

<p>Most international investment agreements do not have any provisions that allow for a quick dismissal of frivolous or unfounded claims.</p>	<p><b>Article x-29: Claims Manifestly Without Legal Merit</b></p> <ol style="list-style-type: none"> <li>1. The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.</li> <li>2. An objection may not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article x-30 (Claims Unfounded as a Matter of Law).</li> <li>3. The respondent shall specify as precisely as possible the basis for the objection.</li> <li>4. On receipt of an objection pursuant to this article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering any objections consistent with its schedule for considering any other preliminary question.</li> <li>5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award, stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.</li> <li>6. This article shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.</li> </ol>
	<p><b>Article x-30: Claims Unfounded as a Matter of Law</b></p> <ol style="list-style-type: none"> <li>1. Without prejudice to a tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article x-22 (Submission of a Claim to Arbitration), even if the facts alleged were assumed to be true.</li> <li>2. An objection under paragraph 1 shall be submitted to the Tribunal no later than the date the Tribunal fixes for the respondent to submit its counter-memorial.</li> <li>3. If an objection has been submitted pursuant to Article x-29 (Claim Manifestly Without Legal Merit), the Tribunal may, taking into account the circumstances of that objection, decline to</li> </ol>

	<p>address an objection submitted pursuant to paragraph 1.</p> <p>4. On receipt of an objection under paragraph 1, and subject to paragraph 3, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.</p>
--	---

**Reference text (on costs):**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
No specific provisions.	<p><b>Article x-36: Final Award</b></p> <p>5. A tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.</p>

**Question 10: Allowing claims to proceed (filter)**

**Reference text:**

**Table 10**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in the EU-Canada agreement (CETA)</i>
Most BITs contain no specific provision	<p>1. The provisions of [Investor-to-State Dispute Settlement] apply, as modified by this Article and Annex XXX, to:</p> <p style="padding-left: 40px;">a. investment disputes pertaining to measures to which this Chapter applies in which an investor</p>

claims that a Party has breached Articles X.12 (Investment – Transfers), X.11 (Investment – Expropriation), X.10 (Investment - Compensation for Losses), X.9 (Investment – Treatment of Investors and of Covered Investments), X.15 (Investment – Denial of Benefits), X.3 (Financial Services - National Treatment) or X.4 (Financial Services - Most-Favoured Nation Treatment); or

b. investment disputes commenced pursuant to [Investor State Dispute Settlement] in which Article 15.1 (Prudential Carve-Out/Exceptions) has been invoked.

2. Unless the disputing parties agree otherwise, in the case of an investment dispute under sub-paragraph 1(a), or where the respondent invokes Article 15.1 (Prudential Carve-Out/Exceptions) within 60 days of the submission of a claim to arbitration under Article X-22 (Submission of a Claim to Arbitration), the Tribunal shall be constituted from the list established under Article X-19 (Financial Services – Dispute Settlement). Where the respondent invokes Article 15.1 (Prudential Carve-Out/Exceptions) within 60 days of submission of a claim, with respect to a measure to which this Chapter does not apply, the time period applicable to the constitution of the Tribunal under Article X-25 (Constitution of the Tribunal) shall commence on the date the respondent invokes Article 15.1 (Prudential Carve-Out/Exceptions). In the event that the disputing parties are unable to agree on the composition of the Tribunal within the time frame laid down in Article X-25 (Constitution of the Tribunal) either disputing party may request the Secretary-General of ICSID to select the arbitrators from the list established under Article X-19 (Financial Services – Dispute Settlement). In the event that disputing parties are unable to constitute the Tribunal from the list, or that the list has not been established under Article X-

19 (Financial Services – Dispute Settlement) on the date the claim is submitted to arbitration, the Secretary-General of ICSID shall select the arbitrators from the individuals proposed by one or both of the Parties in accordance with Article Article X-19 (Financial Services – Dispute Settlement).

3. The respondent may refer the matter in writing to the Financial Services Committee for a decision as to whether and, if so, to what extent the exception under Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to the claim. Such a referral cannot be made later than the date the Tribunal fixes for the respondent to submit its counter-memorial. Where the respondent refers the matter to the Financial Services Committee under paragraph 3 the time periods or proceedings specified in [Investor-to-State-Dispute Settlement] shall be suspended.
4. In a referral under paragraph 3, the Financial Services Committee or the CETA Trade Committee as the case may be, may make a joint determination on whether and to what extent Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to the claim. The Financial Services Committee or the CETA Trade Committee as the case may be, shall transmit a copy of any joint determination to the investor and the Tribunal, if constituted. If such joint determination concludes that Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to all parts of the claim in their entirety, the investor shall be deemed to have withdrawn its claim and proceedings shall be discontinued in accordance with Article X-32 (Discontinuance). If such joint determination concludes that Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to only parts of the claim, the joint determination shall be binding on the Tribunal with respect to those parts of the claim, the suspension of the timelines or proceedings in paragraph 4 shall no longer apply, and the investor may proceed with any remaining parts of the claim.



	<p>5. If the CETA Trade Committee has not made a joint determination within 3 months of referral of the matter by the Financial Services Committee, the suspension of the time periods or proceedings referenced in paragraph 4 shall no longer apply and the investor may proceed with its claim.</p> <p>6. At the request of the respondent, the Tribunal shall decide as a preliminary matter whether and to what extent Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to the claim. Failure of the respondent to make such a request is without prejudice to the right of the respondent to assert Article 15.1 (Prudential Carve-Out/Exceptions) as a defence in a later phase of the arbitration. The Tribunal shall draw no adverse inference from the fact that the Financial Services Committee or the CETA Trade Committee has not agreed on a joint determination in accordance with Annex XXX.</p>
--	--

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

**Reference text:**

**Table 11**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
	<p><b>Article x-27: Applicable Law and Rules of Interpretation</b></p> <p>2. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may recommend to the CETA Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter. The CETA Trade Committee may decide that an interpretation shall have binding effect from a specific date.</p>

**Article x-35: The non-disputing Party to the Agreement**

**1.** The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party:

- a) a request for consultations referred to in Article x-18 (Consultations), a notice requesting a determination referred to in Article x-20 (Determination of the respondent for disputes with the European Union or its Member States), a claim referred to in Article x-22 (Submission of a Claim to Arbitration) and any other documents that are appended to such documents;
- b) on request:
  - i. pleadings, memorials, briefs, requests and other submissions made to the tribunal by a disputing party;
  - ii. written submissions made to the tribunal pursuant to Article 4 (Submission by a third person) of the UNCITRAL Transparency Rules;
  - iii. minutes or transcripts of hearings of the tribunal, where available; and
  - iv. orders, awards and decisions of the tribunal.
- c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal unless publicly available.

**2.** The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement. The non-disputing Party may attend a hearing held under this Section.

**3.** The tribunal shall not draw any inference from the absence of a submission pursuant to paragraphs 1 or 2.

**4.** The tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party to the Agreement.

**Question 12: Appellate Mechanism and consistency of rulings**

**Reference text:**

**Table 12**

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
No provisions	<p>The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:</p> <ul style="list-style-type: none"> <li>a) difficulties which may arise in the implementation of this chapter;</li> <li>b) possible improvements of this chapter, in particular in the light of experience and developments in other international fora; and,</li> <li>c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others: <ul style="list-style-type: none"> <li>i. the nature and composition of an appellate mechanism;</li> <li>ii. the applicable scope and standard of review;</li> <li>iii. transparency of proceedings of an appellate mechanism;</li> <li>iv. the effect of decisions by an appellate mechanism;</li> <li>v. the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article x-22 (Submission of a Claim to Arbitration); and</li> <li>vi. the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.</li> </ul> </li> </ul>
	<p><b><i>Possible draft provisions establishing an appellate mechanism</i></b></p> <p>Article xx (Award)</p> <p>Either disputing party may appeal the award to the Appellate Body within 90 days of the issuance of</p>

the award. In such an event, if the Appellate Body modifies or reverses the award of the Tribunal then the Tribunal shall, after hearing the disputing parties if appropriate, revise its award to reflect the findings of the Appellate Body. The Tribunal shall seek to issue its revised award within 90 days of receiving the report of the Appellate Body.

Article xx (Appellate review)

A standing Appellate Body is hereby established. The Appellate Body shall hear appeals on issues of law covered in the Tribunal's decision or award and legal interpretations developed by the Tribunal.