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CEO

Annex 2: Reality check of the Commission's plans for 'reform' of "investor-state dispute settlement"

When European Trade Commissioner Karel de Gucht launched the public consultation on the investor rights in the proposed EU-US trade deal (TTIP), he said: "I fully agree with the many critics who claim that investor-to-state-dispute settlement (ISDS) up until now has resulted in some very worrying examples of litigation against the state." The problem, according to de Gucht, lies in some problematic features of existing investment agreements – which the Commission claims to "re-do" to build a "legally water-tight system".

This Annex looks into the Commission plans to "re-do" the investor-state dispute settlement process (ISDS) through which EU and US companies could directly sue governments for alleged violations of TTIP's "substantive" investor rights (analysed in Annex 1). The Commission promises to "improve" the mechanism "to ensure a transparent, accountable and well-functioning ISDS system that reflects the public interest and policy objectives," (section B in the Commission's consultation document).

PR-speak: **what the Commission claims in its consultation document**	**Reality check:** **what the Commission really does – and what it means in practice**
The EU will introduce a "binding **code of conduct"** for arbitrators in investor-state dispute tribunals to ensure that they are independent and act ethically. If an arbitrator violates this code "he/she will be removed from the tribunal," (from question 8 in the consultation document).	This responds to concerns about conflicts of interest among the 3-lawyer panels which decide investor-state claims. Unlike judges, they have no flat salary but earn more the more claims they rule on – a strong incentive to side with the only one side which can bring claims (the investors). Existing rules and codes have sometimes led to the disqualification of arbitrators (see here for a recent case & an overview of existing rules). But they have not prevented a small club of arbitrators from ruling on the majority of disputes, allowing for more business in the future with investor-friendly interpretations of the law. It is unlikely that the EU's code of conduct will ban this global elite club of 'entrepreneurial arbitrators' (as Singapore's attorney general called them). A 20 February leaked version of the Commission's proposal from the EU-Singapore talks does not even define what a "conflict of interest" is.
The EU wants to set up a list (**roster**) of qualified arbitrators, from which the chairperson of an ISDS tribunal will be picked if the parties cannot otherwise agree on one. This would "ensure" the "abilities and independence" of these arbitrators whom the EU and the US vetted and agreed to, (from question 8).	A similar roster already exists at the tribunal most often used for investor-state claims, the International Centre for Settlement of Investment Disputes (ICSID). According to this analysis by the International Institute for Sustainable Development (IISD, p.22), it "has not helped mitigate concerns of impartiality and independence of arbitrators". Like the ICSID roster, the one proposed by the EU will only be a "backup" for the third arbitrator – not an "exclusive roster for all the arbitrators fulfilling strict conditions of experience, independence and impartiality". So, concerns about arbitrator bias will not really be addressed by the roster.
The EU's aim is "to ensure **transparency** and **openness**" in	In most investor-state disputes, little or no information is released to the public. But opacity has become the achilles heel of the

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investor-state disputes. It will guarantee that hearings are open and that "all documents" are available to the public – "subject only to the protection of confidential information and business secrets," (from question 6).	system's legitimacy, which is why the veil of secrecy in ISDS proceedings is gradually being lifted around the world. The US and Canada in fact started this process over a decade ago. So, the EU is swimming with the tide. Still, exceptions for the "protection of confidential information and business secrets" could severely hamper access to information. Under the UNCITRAL transparency rules referred to by the EU, tribunals can also limit public access to hearings for "logistical reasons" and withhold information that "would jeopardize the integrity of the arbitral process", giving them wide discretion for non-transparency.
The EU will introduce "an early and effective filtering mechanism" to "quickly **dismiss frivolous claims**" as well as unfounded ones. This avoids lengthy and costly legal proceedings and reduces the risk of abuse of the system, (from questions 5 & 9).	The egregious investor challenges of sound policies by corporations such as Philip Morris, Lone Pine, and Vattenfall, for example, would *not* be dismissed under such a mechanism. They are alleged *real* violations of the sweeping investor rights granted in investment treaties (see annex 1). Claims are only considered frivolous when there is a complete lack of legal merit. Under existing rules, states can already ask tribunals to swiftly dismiss frivolous claims, but not a single such case is known.
A tribunal deciding an investor-state dispute "will not be able to order the **repeal of a measure**", but only **compensation** for the investor, (from question 5).	This can result in a serious raid on public budgets. The highest known compensation to date, US$2.3 billion, was awarded against Ecuador. In 2003, the Czech Republic had to compensate a media corporation with US$ 354 million – the equivalent of the country's entire health budget. The mere threat of a multi-million-dollar lawsuit may also be enough for governments to repeal the disputed measure 'voluntarily' (see reason 2).
The EU "aims to establish an **appellate mechanism** in TTIP so as to allow for review of ISDS rulings". This would help ensure consistency of interpretation and serve as a "check" on the work of arbitrators, (from question 12).	Unlike in proper court systems, decisions by investor-state arbitration panels are non-reviewable (except for annulment proceedings which address a narrow range of procedural errors and are heard by another arbitration tribunal). An appeal mechanism could contribute to more coherent decisions and rein in arbitrator adventurism, but as things currently stand, this is a long way from becoming reality: in the draft EU-Canada deal, for example, there are only vague suggestions that a future joint committee may consult on "whether, and if so, under what conditions, an appellate mechanism could be created". In TTIP, the EU states it wants to directly create such a mechanism, but according to reports from EU-US negotiation rounds on file with CEO, the US is "reluctant". The US has referred to the possibility of an appeal mechanism in its treaties for many years – but this has led to nothing.
The EU's approach "favours domestic courts". The Commission aims to "provide incentives for investors to pursue claims in **domestic courts** or to seek **amicable solutions** – such as mediation". "Different instruments" will be suggested "so as to not discourage an investor from pursing these avenues," (from question 7).	The Commission does not *dis*courage investors from mediation and claims in local courts. But it does not give an incentive either. The recourse to mediation is entirely voluntary ("the disputing parties may at any time agree to have recourse to arbitration"). There is neither a requirement for mediation nor a duty of foreign investors to exhaust local remedies before bringing an ISDS claim. This is what one would expect if the EU really "favoured" domestic courts and amicable solutions. By not demanding the exhaustion of local remedies, the EU grants foreign investors greater rights than anyone else – and risks undermining the validity of its own legal system.

All in all, the Commission does little to “re-do” the investor-state dispute settlement process. Contrary to what it claims in its consultation notice, its approach is not “very different” from the process foreseen in existing investment agreements. Nearly all of its proposals are already out there in the world of international investment law and have not made any real difference (the trend towards transparency, codes of conduct for arbitrators, the ICSID roster of arbitrators, protection from frivolous claims, mediation...). Others might never materialise (as with the appellate mechanism).

As was pointed out by a previous analysis of the Seattle to Brussels Network, the investor-state arbitration system that the Commission wants to establish “is far inferior to the domestic legal system of the EU and North America” from a public interest and a rule of law viewpoint. It will “forever surrender […] the judgement over what policies are right or wrong” to a small club of for-profit lawyers, who are unconstrained by fear of appeal and have a strong incentive to rule in favour of the one side which can bring claims: the investors.

This bias is a systemic flaw that the Commission does not deal with – and that arguably cannot be tackled without abandoning the privatised system of investor-state arbitration.