TTIP Consultation Submission
EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION

European Federation for Investment Law and Arbitration (EFILA) is the main voice of the investment arbitration users community, including the EU Member States, investors and providers of legal services, at the European level. EFILA has been established to promote at the European level investment law and the use of and knowledge about arbitration as a preferred dispute resolution mechanism in investor-State disputes and to serve as a platform for a meaningful discussion on relevant and timely issues vital to the development of the European market. As such, its purpose is to contribute to the more favorable investment climate in Europe and beyond through a dialogue with the European policy makers, stakeholders and the society at large.

Q1 - Scope of the substantive investment protection provisions

1. In principle it is EFILA's position that an investment should be made in accordance with the domestic laws (this includes EU Law) of the host-State of the investment as applicable at the time the investment is made. Changes in the law made after the investment was made, cannot make the investment illegal with retroactive effect for purposes of investment protection and should not have the effect of taking away the investment protection. "In accordance with the host law" should be limited to:
(i) non-trivial, fundamental violations of the host state's legal order,
(ii) material violations of the host state's foreign investment regime, and
(iii) fraud.
As a result, merely administrative omissions should not lead to exclusion of the investment from investment protection.

2. EFILA submits that a broad, asset-based, "investment" definition is preferable. With a broad investment definition, also assets that came into use after the investment instrument came into effect will be covered by such a definition. In case Contracting Parties want to exclude certain type of investments, specific, limited, carve-outs should be included in the definition.

3. It is EFILA position that the definition of investor should not be limited. In the particular case of the "mail-box" companies exclusion, if desired, Contracting Parties can include a "denial of benefits" clause for entities controlled or substantially owned by investors established in a third state. EFILA reminds the EU on the importance to keep in mind the anti-discrimination principles under EU-law when agreeing to a "denial of benefits" clause. Thus, the "denial of benefits" clause can only relate to entities controlled or substantially owned by investors established in a non-EU member state.

4. EFILA considers that TTIP has the potential of setting the new global standard for investment protection and ISDS. However, TTIP must not only address the perceived concerns of civil society, but must keep in mind the main purpose of the investment protection provisions, which is to ensure legal certainty, respect for the rule of law and maximum protection for *bona fide* investors and investments against biased measures. The starting point for the European Commission should be as the Council has consistently stated "the best practice of the Member States".
The NAFTA, CETA and US model BIT approach is not appropriate because they focus on maximum policy space for the contracting parties instead of investment protection. Also in

terms of negotiation tactics it is advisable if the European Commission would add more "European" elements taken from the "best practice of the Member States", otherwise the EU will be forced to swallow all American demands.

Q2 - Non-discriminatory treatment for investors

1. EFILA recommends that non-discrimination obligations should apply in the post-establishment stage; this is because investments are more vulnerable with regard to discriminatory treatment at this stage. With regard to application of non-discrimination obligations at the pre-establishment stage, States should have more discretion (see 2 below).

2. It is EFILA's position that States should have the possibility to exclude certain markets and sectors from the scope of application of the right of establishment. The exclusion of certain sectors from the scope of application, however, should not be left to the Contracting Parties "as they see fit". Rather, the specific sectors have to be clearly defined and limited, leaving no room for subsequent extension or dispute about those sectors.

3. The importation of standards through the MFN-clause should not be prohibited. EFILA sees in the purpose of an MFN clause the creation of a level playing field. However, we understand that the negotiation of specific standards would be circumvented, if all standards in other agreements would be automatically included. Therefore, the temporary element should be clearly defined. We suggest to exclude the importation of standards from BITs/MITs signed before the current treaty is concluded, but to allow the importation of standards from later BITs/MITs. We note that CETA does exclude the importation of investor-to-state dispute settlement procedures. Such exclusion should be clearly defined.

4. EFILA agrees with the need for Parties to exclude specific sectors from the scope of application of the standard of non-discrimination, provided that these exceptions are defined in a limited, precise manner. In this sense, we observe that probably not all of these sectors deserve an equal level of exception. For example, the health-care sector might deserve a wider exception than the audio-visual sector. Further, it is important to exclude specific business sectors only, rather than mechanisms that can be relevant in all business sectors, such as the granting of subsidies. Subsidies can theoretically be granted in any sector and would, if excluded from the non-discrimination principle, distort the core tenets of non-discrimination.

5. EFILA urges the Commission to introduce clear language that suits the protection of non-discrimination. With regard to the exclusion of sectors from the protection, we furthermore perceive a danger of abuse if definitions are not clear and limited.

6. EFILA notes with concern that CETA foresees the inclusion of Art. XX GATT-type justifications into the non-discrimination protection in the investment context. This language is not helpful to draw a line between the deference owed to the host state and the protection provided to the investor. The language of this provision, while helpful in the trade context, does - as such- not clarify any potential conflicts in the investment arena. As it stands, such exceptions have no additional value.

Q3 – Fair and Equitable Treatment (FET)

1. EFILA considers that FET standard should not be defined at the legislative level because it has been already clarified by the arbitral practice. FET has developed dynamically and occupies an empty space left by other investor protection instruments. FET is an important general

clause and gap-filling device. In this respect, the important role of evolutionary dynamic interpretation exercised by arbitral tribunals should be appreciated. In practice, is impossible to anticipate in abstract the range of possible types of infringements upon the investor's legal position. However, a number of arbitral tribunals have dealt with the FET, yielding a fair amount of practice clarifying the standard. Arbitral tribunals have used the FET to establish the appropriate balance of interests between the parties in a particular case. They have proven to be able to apply the FET in case specific situations to identify certain forms of behavior contrary to fairness and equity in most legal systems. At the same time, FET – as applied by the tribunals – is much more limited than critics suggest and represents a narrow set of common sense rules, versions of which can often be found in the domestic legal systems. EFILA submits that the definition proposed in CETA may create ambiguity and confusion that is likely to increase the number of disputes.

2. EFILA submits that narrowing the definition of the FET is not a desirable legislative technique. The idea of creating a uniform jurisprudence in international investment arbitration law is illusory as long as there is no multilateral treaty with a standing court system and appeal body. Competing decisions of different tribunals ensure that tribunals develop dynamic jurisprudence, which evolves over time. EFILA would caution the Commission against the concept of a closed list as this could hamper further development of this instrument of investor protection.

3. There is no need to undertake specific legislative steps to eliminate the alleged uncertainty concerning FET application. It is misleading to assume that all the uncertainty in investment arbitration can be addressed by defining concepts and principles in detail. For example, both the CJEU and the European Court of Human Rights successfully work on the basis of broadly defined provisions; their use of open terms does not seem to raise any concerns.

4. Legislative limitation of FET to a narrow set of basic rights is likely to open the door for contracting parties to regularly change the protection standards as they see fit, which can undermine legitimate expectations of investors.

5. EFILA is of the opinion that a change in the general regulatory and legal regime of the host state should suffice for a claim for breach of legitimate expectations provided that an investor can prove breach of the specific FET obligation. Otherwise states could always escape responsibility by changing the regulatory framework at any time as they see fit without taking due account of the legitimate expectations of investors.

6. EFILA encourages the Commission to take the fact into account that an investment chapter in TTIP is going to set a precedent for future trade agreements & investment affecting EU investors. Relatively low standard of protection afforded to EU companies in TTIP is likely to provide them with disincentives to engage in cross-border commercial activity. It would be detrimental to the EU as one of the most developed capital exporting markets.

7. In sum, EFILA considers that the current practice of arbitral tribunals in regard to FET is appropriate. Thus, the approach proposed by the Commission seems to be misguided and unlikely to solve any of the perceived uncertainty or inconsistency in the ISDS and leading to more disputes and claims. Setting up an appropriate institutional framework is more likely to achieve the EU policy goals with respect to trade policy than changing the substantive rules of the investor protection.

Q4 – Expropriation

1. Indirect expropriation will always require a case-specific evaluation by a tribunal. The factors for such evaluation are clarified in the case law of arbitral tribunals and are flexible enough to be adapted to specific circumstances. Any further restrictions will just increase uncertainty and further disputes.

2. EFILA submits that the "proportionality test" should not be introduced. It creates uncertainty and is abundantly unclear. It also does not cover cases where the measure in general might not be excessive, but where one investor bears a special burden, which should be compensated. This corresponds to the jurisprudence of domestic courts under the ECHR, see e.g. the recent judgment of the Dutch Hoge Raad concerning the need to pay compensation for the prohibition of fur farms.

3. Defining indirect expropriation too narrowly poses some risks for investors as this might reduce the scope of protection under an agreement. In fact, the definitions used in CETA to define indirect expropriation are rather vague. Concepts such as economic impact, duration of the measure, character of the government action, substantially deprives etc. leave ample room for interpretation. If interpreted generously, they could work out in favor of the State. If interpreted narrowly, they could strengthen the investor's rights. A more precise definition might, however, not always be possible.

4. With regard to duration, for example, case law indicates this might be anything from two to five years. Case law offers a further interpretation to duration: The duration of the measure must normally be long enough to make the interference/deprivation economically permanent. While some might argue for a more precise definition, this could prove difficult, as duration might be different case by case. A stricter definition would thus be inapposite. Therefore, it should be better left out.

Q5 - Ensuring the right to regulate and investment protection

1. EFILA is of the opinion that the approach chosen by the Commission is not well suited for the purpose of balancing the right to regulate and protection of investments and investors. Its main flaws are that it opens the door for abuses by Contracting Parties and limits the rights of investors and the freedom of interpretation of arbitral tribunals. In order for the ISDS to serve its purpose, arbitral tribunals' freedom of interpretation of the treaties' should be safeguarded. The process of appointment ensures selection of independent and impartial arbitrators and there is no need to limit their freedom of interpretation. The current practice clearly indicates that arbitral tribunals faithfully follow rules of interpretation prescribed in the Vienna Convention on the Law of Treaties.

2. The relationship between the protection of investments and the right to regulate should be clarified as to elucidate the rights and obligations of Contracting Parties in order to avoid abuse of the "right to regulate". This right should be exercised in full observance of the rule of law and in full respect for the rights of investors.

3. There is no need to include explicit provisions concerning the right to regulate as this can be done through careful drafting of the protection standards and exceptions. Furthermore, the arbitral tribunals have always balanced the rights of the state involved with the rights of the investor.

4. EFILA submits that no new legislative techniques concerning investment protection standards be introduced. There is a risk that those techniques may inevitably be interpreted detrimental to the rights of investors, whereas, the main purpose of investment agreements is to protect their rights.

5. Article 34 of ILC's Articles on Responsibility of States provides that 'full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination'. In certain cases monetary compensation is not sufficient to make the reparation full and it may be more appropriate to combine financial compensation with the order to repeal the contested measure or modify the underlying law. Limiting the power of arbitral tribunal in this regard may be contrary to international law.

6. EFILA is extremely concerned about the Commission's proposal to introduce the use of binding interpretations. This could lead to abuse of powers and amount to denial of justice. It can lead to interpretations amounting to *de facto* amendment of the agreement or violations of the principle of retroactivity.

7. Moreover, there is no need to introduce procedural mechanisms to prevent frivolous claims, as this would unduly politicize ISDS and, in many instances, may prevent access to justice. The concept of frivolous claims has not been defined and it is extremely difficult to assess whether a claim is or is not unfounded from the outset and without proper document production and hearings. The current practice shows that arbitral tribunals are very well equipped to discern frivolous claims from the material ones and already have imposed costs on parties who institute frivolous claims. Therefore, the determination on whether a claim is frivolous and thus the decision on costs should be left entirely to the tribunal.

Q6 – Transparency

1. EFILA believes that transparency rules are welcome, but should not go beyond the new UNCITRAL Transparency Rules. The approach laid out by the Commission in the explanation for question six and the accompanying annexed text would, as it includes widespread transparency provisions, of course contribute to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. However, it is also important to take into account the expectations of the parties actually involved in a dispute and the current practice in the field of arbitration, as well as the general idea of confidentiality of arbitrations. When the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "UNCITRAL Transparency Rules") came to being on 1 April 2014, they created a new dynamic, because they contained transparency rules that went beyond the industry practice at that time. These practices have now become the standard for investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an investment treaty concluded on or after 1 April 2014, and if states really wanted to move beyond the transparency standards in the UNCITRAL Transparency Rules, that would be something that they would address with a multilateral agreement so that widespread industry practice and expectations could be taken into account and reflected. This would serve the important purpose of respecting the expectations of the parties and create a balance between transparency and those expectations. However, as states decided to adopt the UNCITRAL Transparency Rules as they currently stand, it appears that these reflect the will of states and the common practice and, therefore, EFILA's position is that the envisioned ISDS mechanism should not contain provisions which go beyond the transparency already covered by the UNCITRAL Transparency Rules.

2. Along those lines, it is of note that the text provided as an annex to question six does go beyond the UNCITRAL Rules with regard to the publicity of documents. It is EFILA's position that making (virtually) all documents related to an arbitration available is not entirely desirable. Some particularly sensitive documents, for example, should have their publicity limited. Therefore, EFILA is of the opinion that the transparency of documents should be limited to that laid out in the UNCITRAL Rules.

3. Furthermore, the explanation to question six also mentions the possibility for interested parties and civil society to file submissions and make their views and arguments known to the ISDS tribunal. Although this approach can contribute to transparency in the process, it is important that such submissions be regulated in order to avoid that they would upset or delay the proceedings, or be used as a tactical move in order to increase costs for the claimant.

4. Ultimately, although the approach in the explanation to question six and the accompanying annex would contribute to the aim of increased transparency, this could come at the cost of the legitimate expectations of the parties involved in a dispute. As transparency is a dynamic issue in the arbitration field at the moment, EFILA is of the opinion that the transparency rules in the envisioned ISDS mechanism should not contain provisions which go beyond the transparency already covered by the UNCITRAL Rules.

Q7 - Multiple claims and relationship to domestic courts

1. EFILA submits that there would, in theory, be a need to clarify the relationship between ISDS Tribunals and domestic Courts. As EU law currently stands, however, and in light of Opinion 1/09 of the Court of Justice of the European Union concerning the draft agreement on the creation of a unified patent litigation system – European and Community Patents Court, it is unclear how this can be done via secondary EU law. The risk would be opening the Pandora's box of the "as such" incompatibility of the ISDS system with EU law. Secondary EU law, even in the form of bilateral free trade agreements, cannot detract from the jurisdiction of the Court of Justice concerning preliminary ruling matters as well as restricting judicial protection which is a general principle of EU law higher in ranking than the future TTIP itself. The Court of Justice clarified in the above-mentioned Opinion that the legislator has no such power at all. Therefore it would be more prudent if the relationship between domestic Courts and ISDS Tribunals be left for such bodies to be arranged in the future via their own case law and judicial dialogue. As an alternative, it is suggested that the Commission seek an Advisory Opinion by the Court of Justice concerning such an issue to be sure the system is EU law-compliant.

2. That being said, EFILA considers that the approach of incentivizing investors to bring claims in domestic Courts is probably not the right one. The function of ISDS Tribunals is to make sure that a given dispute is examined impartially and by a neutral body which is not part of the judicial system of the TTIP member. As EU law currently stands, the proposal to restrict judicial access to companies affiliated with an investor who brings a claim before ISDS Tribunals is, technically speaking, impossible. The legislator has no power via secondary EU law to restrict the general principle of judicial protection which under EU law is considered a fundamental principle of EU law being primary source higher in ranking than the future TTIP itself. Case law of the Court of Justice of the EU supports such a view in light of the ECHR and the Charter of Fundamental Rights.

3. Therefore, EFILA concludes that it would be wiser for the Commission and the legislator to concentrate on the powers they have instead of speculating on issues, which fall outside

their remit. In order to modify the relationship between domestic Courts and other tribunals as well as the judicial protection principle under EU law, a change in the Treaty on the Functioning of the European Union is needed. However, EFILA considers such a Treaty changes as unrealistic. In any case, it is important that the ISDS system at issue is solid, independent and EU law-compliant in order to avoid unfortunate results like the one of the Patent Court mentioned above.

Q8 - Arbitrator ethics, conduct and qualifications

1.It is EFILA's position that the proposal to regulate arbitrators' conduct is not necessary in that there exists several other sources of "regulation". However, proposals for reform are welcome.

2. In particular, EFILA submits that is not necessary to implement binding codes of conduct for arbitrators, since the promotion of independence and impartiality is already a core element in the mandate and practice of all investment arbitrators and tribunals. Indeed, impartiality and independence are key features and central characteristics of the arbitral mandate and hence they are widely recognised and consistently regulated by the ICSID Convention, the ICSID Arbitration Rules, the UNCITRAL Model Law, the UNCITRAL Rules and most, if not all, national arbitration laws and rules of national and international arbitration institutions. In addition significant soft law instruments exist, namely the IBA Guidelines on Conflict of Interest. Therefore EFILA does not consider that the TTIP and its ISDS need to regulate the arbitrator conduct far beyond the current arbitration rules and recognised soft law. The existing code of conducts for mediators was necessitated because of the frequent involvement of weaker parties and consumers in mediation and the quest for increased consumer protection. Most participants in the investment treaties disputes are quite sophisticated and arbitrators are well aware of the need to comply with high ethical standards (see also ICSID Convention Article 14) so that a new code of conduct for arbitrators may create unnecessary conflicts of regulatory sources.

3. In addition, EFILA sees difficulties in the current CETA text in relation to the pre-set list of candidates in terms of (1) practicality and (2) party equality (at least as far as investors are concerned.

4. In terms of practicality the intended CETA roster for arbitrators will contain a very limited number of candidates to be the presented for consideration as chairperson of the arbitral tribunal; this can result in repeat appointments occasionally causing inevitable conflicts of interests; it is also doubtful whether some of the top arbitrators would accept nominations as this may restrict their capacity to take on other cases. Moreover, the "party equality"-principle will be affected and create an additional unnecessary asymmetry, since only Contracting Parties are allowed to fill up the list of the roster, whereas investors will have no opportunity to contribute to the composition of the arbitrators' roster with nominations of suitable candidates. The roster would create a quasi judicial system. Currently there is a large number of suitable arbitrators for investment disputes and if anything the question is how to increase that pool rather than limit it.

Q9 - Reducing the risk of frivolous and unfounded cases

1. EFILA submits that a provision dealing with frivolous claims lacks effectiveness. The investor's decision to bring a claim is significant and is not reached lightly. The justifications found in domestic systems for a summary procedure do not apply in the case of ISDS. An

investor, bringing a claim, inevitably damages the commercial relationship with the host state. There is considerable reputational risk to an investor in bringing a claim, not only in the host state but also in relation to other states in which the investor has interests, or wish to invest. A recent study (221 awards) has shown that the average length of investment proceedings from request to final award is 3 years and 8 months with an cost to the claimant of USD 4,437,000 approx. (excluding tribunal's costs). Thus, EFILA considers that frivolous claims are likely to be very rare. This is supported by the very limited use of ICSID Rule 41.
There is a substantial risk that the state party will argue that the claim is "frivolous" or "unfounded", with manifest lack of legal merit. This will add a further layer of procedure, causing delay and costs, thereby undermining ISDS legitimacy process. A summary dismissal procedure needs to afford claimant (and respondent) proper opportunity to be heard, and this will need oral and written submissions. Taking ICSID Rule 41(5) as example, the tribunal (ICSID Case No. ARB/09/11) observed: "There may be cases in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions, but they will be rare, and the assumption must be that, even then, the decision will be one not to uphold the objection, rather than the converse".
Additionally, "manifestly without legal merit" is not a universally recognized standard and is open to interpretation. It is difficult to see how tribunals would assess whether a claim is "manifestly without legal merit" without reaching at the same time conclusions on the facts. Whilst the text states that a tribunal shall "assume the alleged facts to be true", the likelihood is that the facts will be in controversy. To the extent that a tribunal accepts one version of the alleged facts for the purposes of reaching a decision, it would have to be the facts alleged by the investor. The instances in which a claim would be dismissed as frivolous would undoubtedly be extremely rare and the process would therefore serve no more than causing additional costs and delay for the claimant.

2. EFILA does not agree that a summary procedure for frivolous claims is warranted. However, to the extent that a procedure is introduced, it should tackle the cost allocation issue to avoid inconsistency between awards of costs (shown in the cases brought using Rule 41(5) of the ICSID Rules). Further, as noted above, there is a risk that a summary procedure could be abused by states, notwithstanding the high hurdle which it poses. Without facing the risk of bearing the costs of such a process, there is no deterrent for the state seeking to have a claim thrown out at this early stage.

3. EFILA does not think the introduction of cost allocation provisions intended to deter claims is necessary. EFILA recognizes that there has been a degree of inconsistency in the jurisprudence of investment tribunals concerning cost allocation. To the extent that a provision on costs allocation would the increase predictability of tribunal decision-making in relation to costs, it is welcome. However, discretion to allow apportionment of costs could provoke lengthy (and expensive) submissions, and will likely bring in existing jurisprudence as to where the costs should fall. Commission's approach emphasizes the implications of costs following the event to the investor and ignores the implications of State's costs allocation. An unsuccessful State would likewise be required to meet all costs. The approach does not accommodate the domestic and administrative laws of a number of states, which mandate the state to defend vigorously all claims.

Q10 - Allowing claims to proceed (filter)

1. EFILA is of the opinion that introducing the filter mechanism into investment arbitration will set a very dangerous precedent, which will inevitably open the door to abuses of the system by Contracting Parties. While, the main purpose of ISDS is to reduce political risk, the

filter mechanism will inevitably politicize disputes by increasing the direct involvement of Contracting Parties. Moreover, it will create an inherent incentive for contracting States to interfere in order to thwart any claims, including those well founded. EFILA believes that any interference into arbitral proceedings by contracting parties should always be avoided. Whereas ISDS promotes legal certainty and rule of law by guaranteeing access to independent and impartial tribunals, which nowadays constitute a basic human right enshrined in the ICCPR and the ECHR, the Commission proposes to establish panels composed of state officials equipped with the power to make determinations without giving any opportunity to the investor to present its case. Paragraph 4 of the example to Article 10 states that 'In a referral under paragraph 3, the Financial Services Committee or the CETA Trade Committee as the case maybe, 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 (…) 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).' The proposed solution risks undermining access to justice and may therefore constitute a violation of international human rights as well as the breach of the contracting States' constitutions.

2. Moreover, EFILA notes that the example given by the Commission in question 10 makes cross-references to provisions which have not been published by the Commission. We would welcome opportunity to comment on the entire text before it is adopted.

3. EFILA believes that introducing exceptions and carving out certain areas from the investment protection is not a desirable way forward as it may not only lead to more disputes relating to the extent and real meaning of the exceptions, but it can also give incentive to contracting States to expand the list of exceptions and in so doing to defeat the very idea behind ISDS. Moreover, as mentioned in answer to question 5 above, investors should always have the right to compensation; this entails access to independent tribunals composed of independent and impartial arbitrators and not state officials. Bearing this in mind, EFILA opposes the different treatment of the financial sector for the purpose of ISDS. Investors in the financial sector should have the same right to pursue their claims, to determine the composition of arbitral tribunals and to receive just compensation as any other investors in any other sectors.

Q11 – Guidance by the Parties (the EU and the US) on the interpretation of the agreement

1. Regarding the need to provide for mechanisms, which will allow Contracting Parties (CPs) (the EU and the US), to clarify their intentions on how the agreement should be interpreted, EFILA accepts that CPs are the "Masters of the Treaties". In accordance with the Vienna Convention on the Law of the Treaties, arbitral tribunals should identify the intentions of the CPs when interpreting treaty provisions, in particular when the meaning of a provision is unclear and/or disputed. Moreover, investment treaties are concluded with the intention to stay in effect for decades, if not forever.

Consequently, over time the original intention of the CPs may become vague or even lost. Therefore, it may be good that investment treaties include a mechanism, which allows CPs to inform arbitral tribunals about their intention regarding a specific treaty provision. While such an interpretative statement, in particular if given by all CPs, is of significant weight and thus should be taken into account by the respective arbitral tribunal, the arbitral tribunal should nonetheless always be free to make its own assessment, including the possibility of

not taking it account. Consequently, such interpretations should not be binding on the arbitral tribunals.

2. It is EFILA view that there is no need for binding interpretations, as the way binding interpretations are allowed in Article x-27 of CETA would unduly limit the freedom of interpretation of arbitral tribunals. Moreover, the CETA Trade Committee, which consists of representatives of all CPs (CAN, EU and all MS), is a political organ that will be able to re-politicize on-going investor-state investment disputes, thereby undermining the very essence of independent, international arbitration. Even more disturbing is the fact that CPs can set a specific date for the entering into force of a binding interpretation, which includes also a date in the past, i.e. CPs would be allowed to make such binding interpretations applicable with retroactive effect. Such interference would violate the rule of law, unduly interfere into the independence of arbitral tribunals and undermine the legal expectations of investors.

3. In response to Question 11 asked by the Commission, EFILA submits that the whole approach is misguided since it presumes that uniform and predictable jurisprudence is achievable, while this is not possible with 3,000 BITs and FTAs. The whole approach only aims at restricting the freedom of interpretation of arbitral tribunals and increasing the direct influence of CPs in arbitration proceedings. This approach goes against the very essence of independent judicial proceedings because it fails to acknowledge that investment treaties are "living instruments" and that the treaty provisions need to be formulated in general terms in order to allow arbitral tribunals to apply them in case/fact-specific situations. It is also important that arbitral tribunals retain sufficient freedom to develop the law and to interpret the treaty provisions in accordance with the needs in several decades time, which cannot be foreseen now. Finally, the rule of law and the legitimate expectations of the investor, who is the user of ISDS-mechanism, should be protected. Therefore, any retroactive effect or application of interpretations to on-going disputes must be excluded.

Q12 – Appellate Mechanism and consistency for rulings

1. EFILA considers that the introduction of an appeal mechanism may foster consistency and predictability in the interpretation of the law. However, EFILA questions whether an appellate mechanism is suitable for ISDS.

2. The lack of an appeal mechanism is one of the greatest advantages of arbitration. The insertion of an appeal body may burden the process with an extra procedural step. According to the CETA appellate mechanism, the arbitral process will be longer (appeal of the award in 90 days from the day being issued + revision of the award by the Tribunal within 90 days of receiving the report of the Appellate body). Moreover, in the event that third parties would also be given the possibility to file written submissions (WTO Rule 24 of the Working Procedures), the process will be even lengthier.

3. The establishment of an appeal body could drive the ISDS away from a case-specific approach focusing on the resolution of a particular dispute. The reason that most international investment agreements do not provide for an appeal possibility on legal issues but only allow for annulment is connected with the controversy regarding the need to take into account factors other than those strictly connected to the relationship between the parties (calls for consistency and predictability).

4. The two-pronged aim of the EU, to clarify and improve the regime of substantive investment protection and ensure the transparent operation of the dispute settlement system, should

be achieved without sacrificing the effectiveness and finality of the system. In case the appellate mechanism – assuming that there would be a standing Appeal body rather than ad hoc bodies – will issue binding interpretations, this will restrict the decision-making of arbitrators to the mere repetition of the already interpreted legal provisions. Pre-empting the interpretation of the rules could undermine the elasticity of the process and the autonomy of the arbitrators in the interpretation of an investment treaty. If the interpretations given by the Appellate body would be binding only upon the parties and future tribunals will have the discretion whether or not to refer to these interpretations, the role of the appellate mechanism will be merely restricted to enhance what already happens in practice without offering something new. Arbitral tribunals use awards as a persuasive source when interpreting the law, despite the absence of a binding obligation to follow prior awards.

5. From a US policy perspective, the Chile-U.S. FTA (Art.20.5) and DR-CAFTA (Art.18.5) call for Parties to establish judicial, quasi-judicial or administrative tribunals or mechanisms where final administrative actions covered by the Agreements could be reviewed and, if warranted, corrected. However, these agreements also have recourse to other means able to promote consistency in the interpretation. The US-Chile FTA provides for the circulation of a draft of the award to allow parties to make comments and check possible errors (Art. 10.19.10) and for the non-disputing party the ability to make a submission to the tribunal regarding the interpretation of the agreement (Art 10.19.2). CAFTA (Art. 19.1.3(c) authorizes the Free Trade Commission, consisting of cabinet-level representatives of the Parties, to issue interpretations of the provisions of the Agreement and in Art. 10.22.3 it requires that awards of investor-State tribunals be consistent with interpretations adopted by Free Trade Commission. In addition, the NAFTA FTC published a Note on the interpretation of certain provisions of Chapter 11, which was used as an interpretative guidance (Loewen v. USA).

6. Consistency and predictability are indispensable for the credibility and legitimacy of the dispute resolution system. An appellate mechanism would be a departure of existing ISDS culture and would have to be designed very carefully both in terms of adequately populating the appellate body and not depriving arbitration tribunals of their decision-making powers.

Q13 – General Assessment

1. EFILA appreciates the Commission's initiative to consult on the TTIP investment chapter, and we appreciate the Commission's commitment to include investment provisions in its trade & investment agreements. However, EFILA has a number of serious concerns about the proposed investment protection and ISDS provisions as included in CETA and envisaged in TTIP and their ramifications for EU investors.

2. EFILA trusts that its comments will be helpful in reconsidering or even dropping some of the proposed aspects of the TTIP investment chapter; and would welcome the opportunity to discuss these issues with Commission officials in due course.

3. EFILA would like to highlight the importance of high investment protection standards and effective ISDS in all EU trade & investment agreements. EFILA - being the new association of investment & arbitration users - very much hopes that the Commission will take its comments into consideration when shaping its policy approach in relation to the investment chapter within TTIP and other EU investment agreements.

4. Implementing strong investment protection standards and effective ISDS should be a policy priority for all governments in order to promote new waves of prosperity-enhancing

FDI. European and foreign investors need effective protection of their investments, effective access to ISDS, protection of their legal expectations and the rule of law in order to be able to invest (again) in Europe and beyond.

5. The benefits of a strong TTIP investment chapter and effective ISDS should not be viewed in isolation. As the largest bilateral trade deal ever negotiated, third countries will look to TTIP as a model for future free trade & investment agreements. A gold-standard agreement will play a central role in fostering improved conditions for a much-needed expansion of global investment flows. A lowering of standards of protection would conversely be a very negative signal and have a negative impact on the investment climate in Europe. The negative impact would be even stronger as some of the standards, which are now proposed, seem to lower or even abolish what has been in effect between the US and Europe for almost one hundred years.

6. EFILA thinks that the present consultation is a step forward in the process of consolidating investment protection and ISDS, but as we have explained in our answers to this questionnaire, it should take into account the possible impact, which the proposed EU approach would have on the EU investors. Thus, EFILA suggests that the work on TTIP be accompanied by an ex ante impact assessment of the proposed EU approach may have on EU investors.

7. EFILA believes that any reforms of the current ISDS system should be preceded by an extensive legal analysis and thorough discussions with the relevant ISDS users in order to ensure that the impact of any changes is fully understood. Indeed, EFILA has been established as a think tank pooling together the investment law & arbitration expertise to serve exactly this purpose.

8. EFILA's expertise in investment law & arbitration remains at the disposal of the Commission. We are very much looking forward to assist the Commission in drafting the appropriate investment protection and ISDS provisions for TTIP and all other future trade & investment agreements of the EU.

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