

**A SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING  
COMMITTEE ON TREATIES**

**THE KOREA-AUSTRALIA FREE TRADE  
AGREEMENT**



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## **Overview**

This supplementary submission responds to new developments regarding Investor-State Dispute Settlement; questions about transparency and the enforcement of labor and environmental standards in trade agreements; and the role of copyright exceptions in Korea.

### **1. New Developments regarding Investor-State Dispute Settlement**

Since the hearing, there have been significant developments in respect of investor-state dispute settlement.

First, the European Commission received 149,399 submissions in respect of the inclusion of an investor-state dispute settlement regime in the Trans-Atlantic Trade and Investment Partnership.

It is particularly worth highlighting the submission of over 100 leading academics on investor-state dispute settlement: [https://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](https://www.kent.ac.uk/law/isds_treaty_consultation.html)

### **Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)**

In July 2013, the European Commission started negotiations with the United States on the subject of Investment Protection and ISDS in the framework of wider talks on the Transatlantic Trade and Investment Partnership (TTIP). In the face of growing interest and public concern, the Commission decided to launch a public consultation on the matter in March 2014.

Together with Peter Muchlinski (SOAS School of Law), Horatia Muir Watt (Sciences Po Law School), and Gus Van Harten (Osgoode Hall Law School), Harm Schepel (Kent Law School) has authored a submission expressing deep concern about the planned Treaty in general and voicing strong criticism of the proposed provisions in particular.

The authors are joined by nine members of academic staff from Kent Law School and over a hundred other prominent scholars from all over Europe and across the globe with expertise in

trade and investment law, public international law and human rights, European Union law, global political economy, comparative law, public law and private law (a list of their names is available to view at the bottom of this page). Investment arbitration law, after all, is far too important to leave to just investment lawyers.

**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?**

The Commission's consultation document is an extraordinary text. On the one hand, the document contains fierce (and, in our opinion, fully justified) criticism of the international investment treaty arbitration regime as it has developed over the last two decades or so in a rapidly expanding number of awards under some 2800 Bilateral Investment Treaties, NAFTA, and the Energy Charter. Both explicitly and implicitly, the document disapproves of widespread expansive interpretations of nearly every provision found in investment treaties: from Most Favored Nation to umbrella clauses, from National Treatment to Fair and Equitable Treatment, from indirect expropriation to threshold issues of corporate nationality. The document also implicitly condemns the investment arbitration community for its failure to police itself adequately in matters of ethics, independence, competence, impartiality, and conflicts of interest. By implication, the document acknowledges that the institutional design of investment arbitration has given rise to reasonable perceptions that the decision-making process is biased against some states and investors as well as various interests of the general public.

And yet, on the other hand, the Commission seems content to entrust to these same actors the vital constitutional task of weighing and balancing the right to regulate of sovereign states and the property rights of foreign investors. This task is one of the most profound roles that can be assigned to any national or international judicial body. The proposed text requires arbitrators to determine whether discriminatory measures are 'necessary' in light of the relative importance of the values and interests the measures seek to further; whether the impact of non-discriminatory 'indirect expropriations' have a 'manifestly excessive impact' on investors in light of the regulatory purpose of these measures; whether other non discriminatory measures amount to arbitrariness or fall short of standards of due process and

transparency, and whether prudential regulations are ‘more burdensome than necessary to achieve their aim’. To entrust these decisions to the very actors who have an apparent financial interest in the current situation and moreover remain unaccountable to society at large is a contentious situation. In light of the criticism inherent in the consultation document, not to mention the fundamental concerns of many observers of the system, there seems to be consensus that the regime falls short of the standards required of an institutionally independent and accountable dispute settlement system.

In our view, the logical implication of the Commission’s stance is to raise the key question that is not asked in the consultation document: why consider including investor-state arbitration in the TTIP at all? The rationale for bilateral investment treaties was traditionally linked to views about the potential impact on foreign investment of uncertainty caused by weak legal and judicial systems in host countries. While such a vision of failed statehood should in itself be examined further, it suffices to point out, in the context of the relationship between the US and the EU, that it is difficult to argue realistically that investors have cause to worry about domestic legal systems on either side of the Atlantic. Above all, with FDI stocks of over €1,5 trillion either way, it is implausible to claim that investors in fact have been deterred. It is true, as the Commission points out, that nine Member States already have BITs in place with the US. It may also be true that, for these nine Member States, the new arrangement might be a better alternative than ‘doing nothing.’ That, however, hardly seems enough reason to impose on the other two thirds of Member States a Treaty that profoundly challenges their judicial, legal and regulatory systems. The consultation document comes up with one additional argument: that the rights each party grants to its own citizens and companies ‘are not always guaranteed to foreigners and foreign investors.’ The claim is unsubstantiated. Even if it is accepted, there is no obvious reason why the incorporation in TTIP of a simple norm of non discriminatory legal protection and equal access to domestic courts could not address the problem perfectly adequately.

Commissioner De Gucht has announced an ambitious programme to ‘re-do’ investment law, make the system ‘more transparent and impartial’, ‘build a legally water-tight system’, and ‘close these legal loopholes once and for all.’ As we have shown in detail, the consultation document and reference text fail to achieve this. Specifically, the text:

- Fails to exclude acquisitions of sovereign debt instruments from the scope of the Treaty

- Allows anyone with a substantial business activity in the home state who holds any ‘interest’ in an enterprise in the host state to bring a claim
- Fails to spell out legal duties of investors in host states
- Fails to control the expansion of investment arbitration to purely contractual claims
- Fails to protect the ‘right to regulate’ as a general right of states alongside the many elaborate rights and protections of foreign investors, let alone as a component of the FET and Expropriation standards
- Allows for unwarranted discretion for arbitration tribunals in various ‘necessity’ tests
- Fails to further the stated principle of favoring domestic court proceedings
- Fails to regulate conflicts of interest in the adjudicative process
- Fails to formulate a policy on appellate mechanisms with any precision
- Fails to formulate a policy on avoiding ‘Treaty shopping’ with any precision
- and Fails to formulate a policy on third party submissions with any precision.

The text, in fairness, is rather better than many Investment Treaties. Some of its flaws, as we have discussed, could be addressed. But the nature of the problems associated with investor-state arbitration is not quite as straightforward as the Commission presents it. In a strange cat-and-mouse game, the Commission’s objective seems to be to ‘outwit’ arbitrators by closing down ‘loopholes’, eradicating discretion, and putting in place firm ‘rules’ on transparency of proceedings and impartiality of arbitrators. Analysis of the consultation document and the reference text, however, does not allow for the conclusion that this objective is likely to be achieved.

Yet investor-state arbitration raises some profoundly troublesome political issues regardless of arbitrator discretion. Investor-state arbitration delivers undue structural advantages to foreign investors and risks distorting the marketplace at the expense of domestically-owned companies. The benefits to foreign investors include their exclusive right of access to a special adjudicative forum, their ability to present facts and arguments in the absence of other parties whose rights and interests are affected, their exceptional role in determining the make-up of tribunals, their ability to enforce awards against states as sovereigns, the role of appointing bodies accountable directly to investors or major capital-exporting states, the absence of institutional safeguards of judicial independence that otherwise insulate adjudicators in asymmetrical adjudication from financial dependence on prospective claimants, and the bargaining advantages that can follow from these other benefits in foreign

investors' relations with legislatures, governments, and courts. At root, the system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions.

In our view, this public consultation offers a good opportunity for the European Union to reflect seriously on its competences in matters of FDI under the Common Commercial Policy. As the Consultation Notice mentions, EU Member States have some 1400 BITs in place. The vast majority of them are concluded with developing countries. There is little evidence linking the conclusion of the Treaties to increased flows of FDI, and there is little evidence that they contribute to other development goals, such as encouraging good governance. In our view, these Investment Treaties and their arbitration mechanisms are in clear tension with the values of Articles 2 and 3 of the TEU that the Union is to promote in its relations with the wider world. Instead of seeking to extend the system of investment arbitration to relations with the United States, the Commission should be working towards redefining its policy on Investment Treaties, both new and existing, in ways that make it compatible with the founding values of the European Union. This requires a clearer balancing between investor rights and responsibilities and the preservation of national policy space to ensure that the interests of other stakeholders such as workers, consumers and the wider community as a whole are upheld by government.

Second, there has been much controversy over investor-state dispute settlement in the trade negotiations between Canada and the European Union, with significant objections from both Canada and Germany.

Professor Michael Geist, 'Crumbling CETA Investor-State Dispute Settlement Rules Threaten to Take Down the Canada-EU Trade Agreement', the University of Ottawa, 28 July 2014,

<http://www.michaelgeist.ca/2014/07/crumbling-ceta-investor-state-dispute-settlement-rules-threaten-take-canada-eu-trade-agreement/>

### **Crumbling CETA?: The Investor-State Dispute Settlement Rules Threaten to Take Down the Canada – EU Trade Agreement**

Professor Michael Geist

July 28, 2014

On September 12, 2011, the Council of the European Union issued a [20-page press release](#) that provided updates on the 3109th Council meeting. On page 13, there was single sentence on EU trade policy:

*The Council authorised the Commission, on behalf of the EU, to open negotiations on investment with Canada, India, and Singapore within the framework of the ongoing bilateral negotiations with these countries on trade liberalisation.*

The Canada – EU trade negotiations had started several years earlier and the late addition of investment did not attract significant attention at the time (the [major focus](#) was on the divide over intellectual property and procurement issues). Yet months after Canada and the EU [announced](#) that they had reached agreement on CETA, it is the investment provisions, particularly the investor-state dispute settlement (ISDS) rules, that could seemingly [derail the entire agreement](#).

[Reports](#) out of Germany now indicate that it is not willing to sign CETA if it includes ISDS provisions. While both the Canadian government (which says [negotiations continue](#)) and the German government (which now says it will [“meticulously” examine the agreement](#)) have downplayed the report, the ISDS issue has clearly been brewing for months.

Canadian activists had flagged it [weeks ago](#), noting the mounting opposition to ISDS rules in Germany arising as a result of 2012 claim by a Swedish company seeking billions in compensation for Germany's decision to phase-out nuclear power. Moreover, the issue has taken hold throughout Europe with the growing realization that the CETA provisions are likely to be matched in the far larger U.S. – Europe Union agreement called the Transatlantic Trade and Investment Partnership (TTIP). The linkage of CETA and TTIP has been disastrous for Canadian officials who had hoped to conclude CETA before the U.S. deal captured the limelight. Now that the two agreements are viewed as linked (the above photo is taken from German protests that explicitly combine CETA and TTIP), the Canadian deal may be held up by the controversy associated with TTIP alone.

While European opposition mounts, it is important to note that Canada was also delaying finalizing CETA due to ISDS concerns. In Canada's case, the [\\$500 million Eli Lilly lawsuit](#) over Canadian patent law awoke the government to the enormous risk associated with ISDS provisions. Canada has a strong case in defending against the lawsuit, but the risk that one [lawsuit](#) could expand to others means that [billions may be at stake](#). That is why the Canadian government has been pushing for inclusion of the [following clause in CETA](#) to remove the risk of replicating the Eli Lilly lawsuit:

*For greater certainty, this Article does not apply to a decision by a court, administrative tribunal, or other governmental intellectual property authority, limiting or creating an intellectual property right, except where the decision amounts to a denial of justice or an abuse of right.*

The two sides have yet to reach agreement on the issue, but given the opposition in Europe, the risk to Canada, and the [mediocre Canadian track record](#) on ISDS claims in NAFTA, it may be in everyone's interest to go back to the drawing board on CETA by eliminating ISDS altogether.



## **2. Modern Challenges in Trade Policy**

The Chairman of the United States Senate Committee on Finance, Senator Ron Wyden, recently discussed the need for transparency in trade policy, and for strong protection of a free and open internet, labor rights, and the environment.

Ron Wyden, ‘Hearing Statement on Modern Challenges and the Need for Transparency in Trade Policy’, the United States Congress, 1 May 2014, <http://www.finance.senate.gov/newsroom/chairman/release/?id=c73c8e64-3615-438f-8187-1babc7bf203f>

### **Hearing Statement of Senator Ron Wyden, D-Ore., On Modern Challenges and the Need for Transparency in Trade Policy**

For decades, American trade policy has been a story of adaptation and change. In particular, the extraordinary economic changes of the last generation demonstrate how important it is that future trade policies are reformed to reflect the times.

For example, consider how technology has transformed the American and global economic landscapes. In the 1990s, an entire month’s worth of Internet traffic data would fit on a single hard drive that you can buy today for 50 bucks at any electronics store. More than two billion people now log onto the net regularly. But Vietnam has a law on its books that calls into question the ability of U.S. businesses to move their data in and out of the country. Governments in China, Brazil and Europe are also considering developing systems that would effectively build digital barriers to trade that nobody could have foreseen a few decades ago.

And when it came to enforcing our laws, enforcement officials used to watch out for criminals fleeing offices with armloads of trade secrets printed on sensitive documents. Now hackers can break into a company’s servers and steal data from the comfort of their own desks in classrooms or military facilities thousands of miles away.

Next, a generation ago, American workers and businesses also competed against a smaller, very different China. Today, bolstered by enormous advantages provided to state-owned and

-run enterprises, Chinese government-backed steel and solar firms are able to take entire segments of the American economy out at the knees. They can do so because they sit on seemingly bottomless wells of cash, hide their paper trails with opaque accounting, and dodge the risks and borrowing costs that American companies face.

A third transformational change was the advent of unfair policies like indigenous innovation that target American innovators. In the 1990s, India and China had limited technical capacity. Now they are able to use highly technical standards to advantage their domestic firms and extract American companies' intellectual property for their own use – a shakedown, plain and simple.

Fourth, over the previous decade, currency manipulation has reemerged as a major concern for the U.S. economy. China made commitments to follow global trade rules when it joined the World Trade Organization in 2000. But when it comes to currency, as in so many other areas, China is keeping a finger firmly planted on the scale and undermining those commitments. Pick a product manufactured in China and imported to the U.S. – any product – and currency manipulation makes it artificially cheaper. That is hurting American workers' ability to compete.

Finally, unlike 20 years ago, Americans expect to easily find online the information they want on key issues like trade. Yet too often, there is trade secrecy instead of trade transparency. It's time to more fully inform Americans about trade negotiations and provide our people more opportunity to express their views on trade policy. Bringing the American people into full and open debates on trade agreements that have the effect of law is not too much to ask.

At present, many Americans are questioning if trade developments have contributed to persistent long-term unemployment, stagnant wages for far too many, and students with good degrees unable to find high-quality jobs while they're saddled with debt. Last week's report showing that America's middle class is no longer the best-off in the world produced additional questions. Responding effectively to the trade changes of the last generation is absolutely essential to instilling more confidence that trade policy will be good for America's working families and bring more of them into the economic winners' circle.

Fortunately, America has big advantages to work with in trade. We have the most skilled, productive workforce in the world – one that foreign students want to join. The dollar remains the dominant currency of the global marketplace. And with the Internet’s “big bang” and the boom in high-speed networks, the U.S. exports \$350 billion worth of digital goods and services each year on what amounts to a new, virtual shipping lane. The Internet also makes it easier than ever for a craftsman from Fossil, Oregon – population 470 – or a barbecue sauce maker from Memphis, Tennessee, to reach customers around the world. So policy makers have a lot to work with.

We do have classic issues that remain. There are overseas tariffs to bring down and other barriers to eliminate. We’ve had an open market, so when America negotiates, we can get more of an advantage out of it than other trading partners. That is particularly good for American products like wheat, dairy and footwear that need to be able to compete on a level playing field.

Here’s my bottom line. The new breed of trade challenges spawned over the last generation must be addressed in imaginative new policies and locked into enforceable, ambitious, job-generating trade agreements. They must reflect the need for a free and open Internet, strong labor rights and environmental protections. Nations don’t dismantle protectionist barriers or adopt these rules on their own. They do so with reciprocal agreements hammered out through negotiation. America must establish new rules to reflect today’s trade norms and enforce them.

We’re looking forward to hearing from Ambassador Froman, who we’re fortunate to have joining us today, how the administration’s trade agenda will accomplish what today’s American economy needs, in part through trade negotiations with countries across the Pacific and in Europe. I’ll continue working with my colleagues to develop an approach toward trade and globalization that meets the test of producing more good-paying American jobs.

### 3. Intellectual Property

In respect of copyright exceptions, Australia is at a comparative disadvantage – not only with the United States, but also with Korea.

In respect of copyright exceptions, Korea has a hybrid system, with specific fair dealing exceptions (like Australia), and a general defence of fair use (like the United States). Jaewoo Cho provides a useful summary of Korea's reforms in respect of copyright exceptions.

Jaewoo Cho, 'Newly Implemented Korean Fair Use and the Three Step Test', *InfoJustice*, 28 February 2013, <http://infojustice.org/archives/28766>

#### Newly Implemented Korean Fair Use and the Three Step Test

Posted by [Jaewoo Cho](#) on February 28, 2013

The approach to copyright limitations and exceptions differs significantly in each country depending on what models they are following. Generally speaking, there are three models of limitations and exceptions to copyright<sup>[1]</sup>: 1) the U.S. fair use model, 2) the fair dealing model in most U.K Commonwealth and Continental European countries, and 3) a combination of the U.S. and European models found in recently amended Korean Copyright Act.<sup>[2]</sup>

The U.S. fair use system allows for open-ended lists of permissible use based on statutory factors<sup>[3]</sup> that leave the task of identifying each case of exempted unauthorized use to the courts. On other hand, the Continental European countries provide a closed catalog of defined copyright limitations and exceptions. The newly amended Korean Copyright Act offers both 1) a closed list of permissible use (as with the European model) and 2) an open-ended consideration based on statutory factors (as with the U.S. model).

Article 9(2) of the Berne Convention<sup>[4]</sup>, as known as the three-step test, states that copyright limitations are permissible in “certain special cases” that “do not conflict with the normal exploitation” and “do not unreasonably prejudice the legitimate interest of the author.”

There is a debate whether the three-step test is primarily designed to be restrictive to copyright limitations and exceptions or meant to be open and flexible.<sup>[5]</sup> Some scholars argue that a national fair use system did not qualify as a “certain special cases” as enumerated in the three-step test.<sup>[6]</sup> On the same line of thought, some contend that the three-step tests limits the freedom of national legislators to legislate with expectations of economics and social welfare uncertainty, particularly with the fast-changing dynamics of technological process.<sup>[7]</sup>

However, the new amendment to the Korean Copyright Act, Article 35-3.1, states that works not falling into enumerated categories may be used in cases where “there is no conflict with the normal exploitation of copyrighted work and does not prejudice the legitimate interest of the copyright holder.” The South Korean legislators suggested that this language provides the general guideline for determining whether a particular use falls under fair use.<sup>[8]</sup> Then Article 35-3.2 provides four statutory factors to determining whether a particular use is fall in to this exception, which are almost the same assertion 107 of the U.S. Copyright Act.

Therefore, this new South Korean copyright registration shows that it is not impossible to incorporate the three-step test with an open and flexible fair use clause. The South Korea fair use provision has clearly provided an enumerated list of permissible uses with the specific language from the three-step test, and then also provided flexibility by an open-ended list of permissible uses based on statutory factors when such uses are not found in the enumerated categories. This new South Korean fair use amendment challenges the theory that the three-step test is primarily designed to restrict this kind of copyright limitation.

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<sup>[1]</sup> See Seagull Haiyan Song, *Revaluating Fair Use in China – A Comparative Copyright Analysis of Chinese Fair Use Legislation, The U.S. Fair Use Doctrine, and The European Fair Use Dealing Model*, 51 IDEA 453, 454-445.

<sup>[2]</sup> Article 35-3 (Fair Use of Copyrighted Material):

1. Except for situations enumerated in art. 23 to art. 35-2 and in art. 101-3 to 101-5, provided it does not conflict with a normal exploitation of copyrighted work and does not unreasonably prejudice the legitimate interest of the copyright holder, the copyrighted work may be used, among other things, for reporting, criticism, education, and research.

2. In determining whether art. 35-3(1) above applies to a use of copyrighted work, the following factors must be considered: the purpose and character of the use, including whether such use is of a commercial nature or is of a nonprofit nature; the type or purpose of the copyrighted work; the amount and importance of the portion used in relation to the copyrighted work as a whole; the effect of the use of the copyrighted work upon the current market or the current value of the copyrighted work or on the potential market or the potential value of the copyrighted work.

[3] 17 U.S.C. § 107 (2006).

[4] Berne Convention for the Protection of Literary and Artistic Works art. 9(2), *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P140\\_25350](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350).

[5] *Compare* Martine Senftleben, *Bridging the Difference Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. Copyright Soc'y U.S.A 521 *with* Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 39 IIC 707 (2008).

[6] *See supra* note 5.

[7] *See* Geiger, Griffiths & Hilty, *supra* note 5; *see also* Guido Westkamp, *The "Three-Step Test" and Copyright Limitations In Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. Copyright Soc'y U.S.A 1, 64 (2008).

[8] *See* an explanation of amended Copyright Act for the implementation of KOURS FTA (2011), *available at* <http://www.mcst.go.kr/web/dataCourt/reportData/reportView.jsp?pSeq=585>.

## Copyright Act – Korea – Copyright Exceptions – English Translation

[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=25455&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25455&lang=ENG)

Sub-Section 2 Limitation on Author's Property Right

Article 23 (Reproduction for Judicial Proceedings, etc.)

Article 24 (Use of Political Speech, etc.)

Article 25 (Use for Purpose of School Education)

Article 26 (Use for Current News Reporting)

Article 27 (Reproduction, etc. of Current News Articles or Editorials)

Article 28 (Quotation from Works Made Public)

Article 29 (Public Performance and Broadcasting for Non-Profit Purposes)

Article 30 (Reproduction for Private Use)

Article 31 (Reproductions, etc. in Libraries, etc.)

Article 32 (Reproduction for Examination Questions)

Article 33 (Reproduction, etc. for Visually Handicapped, etc.)

Article 34 (Temporary Sound or Video Recordings by Broadcasting Service Providers)

Article 35 (Exhibition or Reproduction of Works of Art, etc.)

Article 35-2 (Temporary Reproduction in Course of Using Works, etc.)

**[This Article Newly Inserted by Act No. 11110, Dec. 2, 2011]**

**Article 35-3 (Fair Use of Works, etc.)**



- (1) Except as provided in [Articles 23 through 35-2](#) and [101-3 through 101-5](#), where a person does not unduly harm an author's legitimate profits without conflicting with the usual method of using works, etc., he/she may use such works, etc. for the purposes of coverage, criticism, education, research, etc.
- (2) In determining whether an act of using works, etc. falls under paragraph (1), the following matters shall be considered:

  1. Purposes and characters of use, such as for-profit or non-profit;
  2. Types and uses of works, etc.;
  3. Proportions of used parts in the entire works, etc. and their importance;

**4. Influence of the use of works, etc. over the current market or value or potential market or value of such works, etc.**

Article 36 (Use by Means of Translation, etc.)

Article 37 (Indication of Sources)

Article 37-2 (Exclusion from Application)

[Articles 23](#), [25](#), [30](#) and [32](#) shall not apply to programs.

Article 38 (Relationship with Author's Moral Rights)