EU Public consultation on investor-state arbitration in TTIP – Comment – Gus Van Harten

WHY ARBITRATORS NOT JUDGES?

Comments on the European Commission’s approach to investor-state arbitration in TTIP and CETA

Summary

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This is a summary of my response to the European Commission’s invitation for comment on its approach to investment protection and investor-state arbitration in the proposed EU-U.S. TTIP. Further information on the consultation is available on the Commission’s website here: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

The consultation does not ask the essential question: why is investor-state arbitration necessary in TTIP (or the Canada-EU CETA)? To answer this rigorously, one would need a careful and comprehensive framing of the questions including economic, political, and legal aspects of the use and impact of investor-state arbitration. As a result, it is not designed to gather available information that would cast doubt on or contradict claims of proponents of investor-state arbitration. I am aware of colleagues with relevant evidence who have declined to participate because this essential question was not asked.

As a central premise, then, investor-state arbitration clearly should be rejected. In the absence of a strong case, based on careful evaluation of evidence and fulsome exchange of views, for granting special rights and privileges to foreign investors relative to all other actors, investor-state arbitration should not be included in the TTIP. Giving a special status to any actor in law or in access to public funds, especially the largest companies in the world, calls for a clear and positive justification and for evidence that it delivers a public benefit to outweigh the disadvantages to other actors and costs to the public.

Otherwise, the Commission would be proceeding with a major expansion and entrenchment of investor-state arbitration – extending its coverage of international FDI flows by approximately 300% of the current coverage based on existing treaties – without a careful review of the significant risks to public funds and regulatory capacity; to the principle of a level playing field for European and extra-European companies; and to established structures of public accountability, regulatory flexibility, and judicial independence.

The rest of this submission is narrow in its focus due to the limited parameters of the consultation text. Many of the issues arise from relatively minor concerns about textual clarification and from the Commission’s limited proposals to reform investor-state arbitration. In
the comment, I have used in-text citations that are easily followed up with an online search; further references for any statement in the comment are available on request.

Response to the Commission’s Introduction

1. The Commission puts far too much faith in its ability, through textual clarifications, to reign in the arbitrators. Investor-state arbitration is a cat-and-mouse game that favours the arbitrators – most importantly, the repeat players who have driven interpretation of the treaties – who are not subject to judicial override if they interpret a treaty incorrectly or unreasonably and who have a track record of exploiting legal ambiguity to expand their power over states, investors, public finances, and so on.

2. Some of the Commission’s statements about textual clarifications are misleading. In particular, its clarification on fair and equitable treatment serves to codify the arbitrators’ wildly expansive approach to this concept and goes well beyond the position accepted previously by Canada, the U.S. and Mexico. Thus, the Commission endorses an arbitrator power grab that has eroded significantly the reliability of states’ right to regulate.

3. On the state’s right to regulate, the Commission declares its intent to affirm and protect this right. Yet the right is not affirmed clearly and unequivocally as a substantive right in the treaty – not merely as an aspirational statement in a preamble or elsewhere – alongside the treaty’s elaborate rights for foreign investors. A statement of intent about the right to regulate is useless and therefore misleading when put in a consultation document but not the treaty. For examples of a clear statement of the right to regulate, see Article 12 of the Havana Charter of 1948 or the second paragraph of Article 1 of Protocol 1 of the European Convention on Human Rights.

4. Foreign investors enjoy extensive protection in democratic and in other countries. Therefore, they should be required to resort to domestic courts before bringing an investor-state claim, unless they can show that the courts would not offer justice or are not reasonably-available. Otherwise, it is assumed absurdly – in the Commission’s proposals for both TTIP and CETA – that domestic courts and domestic laws in all of the affected countries systematically fail to protect foreign investors. This is incorrect even if one were to assume that investor-state arbitration offered a fair and independent process in the manner of courts in democratic societies. It clearly does not.

5. If there is a concern that domestic courts take too long or are otherwise insufficient to protect foreign investors, why not replace courts with for-profit arbitration for everyone including domestic persons and foreigners who are not investors? The question itself reveals the degree of the change that is contemplated by the Commission.

6. A related question is: what if foreign investors do not respect domestic laws and domestic courts are inadequate to ensure that they do? One can imagine scenarios in which domestic actors, other foreigners, or other foreign investors would suffer greatly because of a foreign companies’ misconduct. Yet these other actors would be limited to the supposed ghetto of
domestic courts even where the courts are shown not to offer justice. This is an aspect of the imbalances inherent in investor-state arbitration.

**Scope of the substantive investment protection provisions**

7. The Commission’s clarifications of substantive investment provisions are inadequate to affirm the right to regulate. In the face of serious abuse of arbitrator power in past cases, the Commission proposes minor fixes based on unsubstantiated and sometimes erroneous claims about the arbitrators’ record. Systematic coding of awards indicates a clear tendency of the arbitrators to adopt expansive (pro-claimant) approaches even in the face of express treaty language supporting restraint. It is almost as if the purpose of the Commission is to pretend to reform arbitrator power in order, at all costs, to save it.

**Non-discriminatory treatment for investors**

8. The Commission’s statement that the TTIP would ensure a level playing field between foreign and local investors is misleading. The treaty’s non-discrimination standard requires that foreign investors receive “no less favourable treatment” than other investors. Thus, it allows an un-level playing field so long as it favours foreign investors.

9. The Commission appears to be poorly informed on non-discrimination, especially MFN treatment. The Canada-EU CETA text does not reflect the Commission’s intent to stop arbitrators from using MFN treatment to import substantive standards from other treaties. This jeopardizes the Commission’s limited steps to clarify fair and equitable treatment and indirect expropriation in relation to the right to regulate. It offers an opportunity for yet more creating lawyering and adventurous interpretation. To be safe, MFN treatment should be excluded from the treaty or limited strictly to domestic regulatory treatment of foreign investors rather than treatment in another treaty.

10. The Commission relies heavily on reservations, exceptions, and carve-outs to preserve the state’s regulatory flexibility. This is not a good sign. First, these devices establish the right to regulate as an exception to investment protection rather than an equal partner. Second, they usually do not extend to all of the state’s responsibilities to protect foreign investors in the treaty, allowing arbitrators other ways to find a violation and re-direct public funds. Third, they are usually limited to a particular sector or area of decision-making, thus exposing other sectors and areas to the threats that the reservation or exception was supposed to counter. Simply, these devices are not a substitute for a clear and unequivocal statement of the right to regulate alongside the state’s responsibilities.

**Fair and equitable treatment**

11. The Commission’s approach to fair and equitable treatment (FET) is extremely unfortunate and perhaps duplicitous. First, the Commission claims to have provided for a closed list in the definition of FET. Yet it has not adopted obvious language to remove the arbitrators’ flexibility to decide that the FET standard is not closed. Second, the Commission states its intent to preclude FET from being used as a stabilization clause. Yet this is not stated in turn
in the Canada-EU CETA text although it would be easy to do. Third, while claiming that it wants to reign in the arbitrators’ expansiveness, the Commission has expanded the scope of the FET standard relative to its widely-accepted customary meaning before the arbitrators arrived on the scene about 15 years ago. Indeed, the Commission appears to have insisted that Canada move away from the NAFTA states’ commitment to limiting FET to its customary meaning. This indicates that the Commission prefers to expand investment protection even further in relation to the right to regulate.

12. Some of the Commission’s statements suggest that it is playing a double-game by reassuring the public while including major concessions to arbitrator power. Most troubling, the Commission has allowed the same group of arbitrators who wildly expanded FET and other concepts to keep control over a range of ambiguous language. FET has been the primary device for the arbitrators’ power grab under the treaties; the Commission is endorsing this unfortunate history.

13. The Commission’s approach codifies an aspect of FET – legitimate expectations – that was invented or transplanted by the arbitrators. By endorsing it, the Commission invites more expansiveness. Besides technical problems with the Commission’s definition, such as its failure to limit expectations to written representations on the part of the state, the concept of legitimate expectations can be used by arbitrators to frustrate or preclude legitimate changes to legislative, government, and judicial decisions.

14. The FET standard is almost unnecessary alongside other treaty provisions that protect foreign investors against uncompensated expropriation, discrimination, and threats to their physical security. I say “almost” because the only necessary role of FET alongside these other provisions is to protect against denial of justice in domestic courts. In essence, the Commission’s approach to FET allows arbitrators to award compensation without expropriation, discrimination, or denial of justice.

Expropriation

15. Drawing on the post-2001 practice of the U.S. and Canada, the Commission has included useful language on indirect expropriation. Yet this approach to protecting the right to regulate is flawed because: (a) it does not apply to other substantive provisions in the treaty such as FET; (b) it contains qualifiers that allow the arbitrators to continue an unduly expansive approach; (c) it is open to a significant loophole due to the Commission’s application of MFN treatment to third-state treaties; and (d) it keeps power in the hands of arbitrators, instead of judges, who in general have demonstrated themselves to be unfit to ensure an appropriate balance between investment protection and the right to regulate.

16. The Commission’s approach to expropriation thus falls well short of an effective safeguard for the right to regulate in relation to indirect expropriation and the overall treaty. This re-affirms that the Commission is codifying a revision of longstanding compromises between property rights and other rights (including the right to regulate) as framed, for example, in Article 1 of Protocol 1 of the European Convention on Human Rights.
The right to regulate and investment protection

17. In various ways, the Commission has undermined, not affirmed, the right to regulate. If the Commission wants to retain public policy space, it must include a clear and unequivocal statement of the right to regulate that applies to all of the state’s responsibilities to protect foreign investors and that is not limited to particular areas of decision-making. The Canada-EU CETA is far from this basic balancing of the right to regulate and foreign investor rights. This allows arbitrators to continue to erode the right to regulate in their interpretation and application of the treaty.

18. In the CETA, the right to regulate has not been affirmed clearly and unequivocally as a substantive right (it appears not even to be mentioned in the CETA investment chapter). For a meaningful balance between investment protection and the right to regulate, the treaty would need to affirm clearly the right to regulate alongside the treaty’s elaborate investor rights. Indeed, the Commission’s only “procedural improvement” on this point intensifies the pressure on states to change their decisions to avoid financial liability to a foreign investor. The Commission thus exacerbates the key problem that, in the face of an uncertain but potentially massive liability, states may change decisions when threatened with a claim, especially if the investor is a deep-pocketed company and large amounts are at stake.

19. The Commission claims that its purpose is to protect fundamental rights. There are two key problems with this claim. First, the Commission’s approach to investor-state arbitration elevates property rights over the right to regulate and other human rights. For example, there is a stark contrast between the Commission’s handling of investment protection and the right to regulate in the CETA and the handling of property rights and the right to regulate in the European Convention of Human Rights.

20. Second, the Commission does not mention, let alone address, the contradiction between investor-state arbitration and human rights. By definition, investor-state arbitration discriminates inappropriately in favour of foreign investors and against other persons whose rights may be affected by state decisions (including decisions concerning the regulation and conduct of foreign investors). Unlike foreign investors, all other rights-holders are limited to human rights adjudication in domestic and regional institutions to protect their property and other rights.

21. This creates major advantages for foreign investors. For example, their special access to investor-state arbitration allows them (a) more widely enforceable awards against states than in human rights adjudication, (b) the potential for vastly more public compensation – to date, billions of dollars – than in human rights adjudication, (c) the ability to call on protections that are not balanced by a clear statement of the state’s right to regulate or of the need to balance investment protection against human rights, (d) the power, unlike a human rights complainants, to play a direct role in the make-up of the tribunal, and (e) a decision-making process in which the adjudicator has an apparent interest to favour claimants, assuming that arbitrators who want to be re-appointed may encourage claims to support the arbitration industry.
22. An example illustrates the problem. In the era of investor-state arbitration, if a foreign national were tortured by state officials, he or she would be able to bring an international claim against the state – without having to resort first to the domestic courts – only if he or she owned assets in the state and only to the extent that the torture affected his or her position as an asset owner. On the other hand, if a foreign investor’s officials were to torture their domestic employees with the collaboration of the state, the employees could not bring an international claim against the company or its officers, and could bring a claim against the state for failing to protect them only after resorting first to domestic remedies. This is an absurd elevation of foreign investors over everyone else.

Investor-state arbitration

23. The Commission leaves power over interpretation of the treaty to arbitrators who are unsuited for the task in light of their past record and the institutional context in which they operate. The Commission downplays the arbitrators’ power by over-stating the reliability of its textual clarifications. The Commission should acknowledge that arbitrator decisions are “only as good” as the process by which arbitrators are appointed and make their decisions. The lack of institutional independence and procedural fairness in investor-state arbitration – which the Commission leaves untouched – means that all outcomes of investor-state arbitration under the TTIP or CETA will lack integrity regardless of the underlying text.

24. The Commission’s justifications for investor-state arbitration are extremely dubious. First, as the Commission says, treaties in many countries are not directly applicable in domestic law. Yet this does not support the use of investor-state arbitration, to protect foreign investors alone, where (a) domestic law nonetheless ensures sufficient protection and (b) domestic courts offer justice and are reasonably-available. Instead, the Commission plans to allow investor-state arbitration without any obligation at all for foreign investors to resort to domestic remedies. In effect, this assumes that domestic courts would not offer justice, systematically, in all of the affected countries.

25. Like many proponents of investor-state arbitration, the Commission refers to the figure of 3000 existing treaties that provide for investor-state arbitration in order to support the case for more treaties. This is misleading.

26. First, measured by the amount of FDI flows to which the treaty would apply, the TTIP alone is more significant than all existing treaties combined. For example, TTIP alone would cover 50-60% of investment flows in and out of the U.S.¹ Besides TTIP, a few other treaties pursued by the Commission or the U.S. – the Trans-Pacific Partnership, EU-China investment treaty, and U.S.-China investment treaty – appear likely to expand the coverage of investor-state arbitration from 15-20% to more than 80% of investment flows. Second, the figure of 3000 treaties is not as large as it seems. To match a global multilateral agreement, one would require over 19,000 bilateral treaties. Third, most existing treaties do not govern significant investment flows and appear unlikely ever to lead to claims. Over half of known

¹ This was calculated based on the existing treaty coverage of country-by-country inward and outward investment flows for the U.S. as a proxy for world investment flows. See OECD statistics. The figure is approximate.
cases to cut-offs in 2010 arose under NAFTA, the Energy Charter Treaty, and 15 bilateral investment treaties of the U.S.²

27. Thus, it lacks credibility to justify a major new treaty – especially in the relatively untouched domain of investment relations among developed countries – by referring to many relatively-inconsequential existing treaties. With a few new treaties, the Commission with the U.S. are proposing to expand the scope of investor-state arbitration massively.

28. The Commission’s discussion of problems with investor-state arbitration does not discuss, let alone address, (a) the lack of independence and impartiality in investor-state arbitration due to the absence of the usual safeguards of judicial independence, (b) the lack of procedural fairness due to a selective approach to full standing rights, (c) the inappropriate role of full monetary compensation as a remedy in the relevant legal context, and (d) the essential imbalance between investor rights and investor responsibilities (the treaties institute the former not the latter) and between state rights and state responsibilities (the treaties institute the latter not the former). Many of these problems follow from the original decision to use arbitrators instead of judges to resolve, on a final basis, profound questions of public law and public policy.

Transparency in ISDS

29. The Commission’s approach to transparency is positive but has important limitations. Most importantly, arbitrators are left to decide whether documents or hearings should be public. All arbitrators who seek re-appointment may view claimants at some level as “customers” and claimants may oppose public access for self-serving reasons.

30. The Commission has not addressed the lack of procedural fairness in investor-state arbitration. This unfairness arises because any party – other than the claimant investor or respondent government – whose rights or interests are affected by the adjudication cannot obtain full standing to participate in the process. The Commission’s reference to civil society actors’ ability to “file submissions” is insufficient to address this basic concern.

Multiple claims and relationship to domestic courts

31. The Commission says that it wants to “favour” domestic courts. It clearly has not done so. Foreign investors have not been required to go to domestic courts where the courts offer justice and are reasonably-available. The Commission’s rationales for not imposing this typical requirement are weak. First, investment-state arbitration is not justified by the fact that, in many countries, a treaty cannot be invoked directly before domestic courts or that legal rules differ between domestic law and treaty law or among legal systems. These are basic facts of the existence of states and the distinction between domestic and international law. Second, the Commission’s argument that the treaties create new rights and obligations that would be otherwise protected by the courts is not convincing. Moreover, the Commission has not addressed the fundamental unfairness of a legal process that enhances the investor’s rights but imposes only minimal obligations on the state. A fair and equitable process must be one that respects the rights and responsibilities of both parties.

² This includes 61 cases under NAFTA, 24 cases under the Energy Charter Treaty, and 44 cases under U.S. BITs with Argentina, Zaire, the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Jordan, Kazakhstan, Moldova, Romania, Sri Lanka, Trinidad and Tobago, Turkey, and Ukraine. The data reflects all 249 known cases with a publicly-available award on jurisdiction (or, for NAFTA cases, a notice of intent to arbitrate) as of May-June 2010.
legal spheres. They do not justify giving foreign investors a special right to bring an international claim without going to domestic courts. All of the concerns raised by the Commission about potential mistreatment of foreign investors can be addressed without assuming that domestic courts are systematically unreliable to protect foreign investors.

32. Remarkably, arbitrators usually allow foreign investors to bring treaty claims in parallel with other forums including domestic courts, treaty-based forms, contractually-agreed forums. The Commission has not addressed this problem and the corresponding risk of wasteful litigation and conflicting decisions. In doing so, it has endorsed indirectly the arbitrators’ rejection of principles of party autonomy, sanctity of contract, and the avoidance of parallel proceedings. Among other things, the Commission also needs to replace for-profit arbitrators with financially-disinterested judges in order to remove the suspicion that arbitrators sometimes allow parallel treaty claims to earn more income.

33. On the issue of a potential fork-in-the-road between investor-state arbitration and domestic courts, the Commission’s approach allows foreign investors to have their cake and eat it too. Foreign investors will be free to seek monetary compensation in investor-state arbitration (where compensation is the primary remedy) and to pursue non-monetary orders in domestic courts (where compensation is usually a secondary remedy in claims against the state). The Commission’s approach thus accentuates the advantages of investor-state arbitration for foreign investors relative to all other actors.

34. On mediation, the lack of independence and fairness in investor-state arbitration taints the integrity of any mediation, and any mediated or unmediated settlement, that arises under the shadow of investor-state arbitration.

35. On the role of domestic courts, the Commission does not, as it claims, “provide incentives” for investors to pursue claims in domestic courts or to reach settlements. All the Commission does is seek “not to discourage” foreign investors from these other options. To incent the use of domestic courts, a foreign investor should be required to show that domestic courts do not offer justice or are not reasonably-available before the investor can bring a treaty claim.

36. Notably, one person’s “amicable settlement” is another person’s regulatory chill. Moreover, the fact of a settlement may not be public (under the Canada-EU CETA) if the settlement was reached before the foreign investor filed its formal request for consultations. In this way, the Commission’s approach is “not to discourage” confidential settlements that involve payment of public funds and regulatory chill to appease a foreign investor.

Arbitrator ethics, conduct and qualifications

37. The Commission proposals on this issue do not acknowledge the institutional roots of the lack of independence in investor-state arbitration. In particular, the Commission does not commit to incorporate the safeguards of judicial independence that are present in domestic and international courts. These include:

(a) provision for secure tenure for the adjudicator instead of case-by-case appointment,
(b) set remuneration for the adjudicator instead of for-profit case-by-case remuneration, 
(c) an objective method of case assignment instead of executive discretion over case-by-
    case appointment, 
(d) binding prohibitions on outside lawyering by adjudicators instead of double-dipping 
    and issue conflict, and 
(e) a judicial process to resolve conflict-of-interest claims instead of a process controlled 
    by executive officials.

Having excluded these safeguards, the Commission clearly is not going to make investor- 
state arbitration independent at an institutional level.

38. For TTIP, the Commission evidently has decided that appointing power should rest with an 
executive official who is a nominee of the President of the World Bank who, in turn, is 
chosen by the U.S. government: the Secretary-General of ICSID. Why would the 
Commission prefer this approach (in arbitrations initiated by U.S. companies against Europe 
or by European companies against the U.S.) rather than a process in which judges are 
assigned to cases in an objective way such as by lottery or rotation.

39. The Commission’s proposals on arbitrator conduct and ethics are inadequate because they 
address only limited aspects of the independent problem. For example, the provision for 
conflict-of-interest challenges against arbitrators allows an executive official to decide the 
challenges. An independent process would require challenges against a judge to be decided 
by other judges. Likewise, the Commission’s proposal for a code of conduct is not a 
substitute for institutional safeguards. For example, will the code be applied by a judge or an 
executive official? Will it preclude the dual roles of arbitrator as lawyers? It is impossible to 
say because the Commission has not released a code or the rules of conduct.

40. The Commission acknowledges that arbitrators may (usually) lack of qualifications on 
relevant policy matters such as health, environment, or consumer protection. Yet it response 
is to require arbitrators to have expertise only in international law, international investment 
law, or international trade law. Further, the Commission suggests that retired judges may be 
well-suited to the role of arbitrator but does not take the logical step of requiring arbitrators 
to be judges or to have relevant policy expertise. The Commission also does not mention that 
a retired judge who actively seeks re-appointment is affected by the same financial interests 
as other arbitrators.

41. The Commission’s proposal for a roster has major problems. First, we know little about the 
roster. Will roster members have secure tenure and a set salary? Will they be barred from 
work as a lawyer during and after their time on the roster? Second, what we are told about 
the roster in the Canada-EU CETA is not reassuring: (a) the roster will apply to presiding and 
state-appointed arbitrators only; (b) an executive official will choose who is appointed from 
the roster instead of an objective method of case assignment; and (c) the executive official 
will be able to appoint arbitrators from outside the roster if the states parties do not agree on 
roster membership. This last loophole has foiled a similar roster under NAFTA for two 
decades.
42. There is no compelling reason to use arbitration instead of a judicial process to make the profound decisions that arise often in investor-state arbitration. The Commission should do the obvious: replace the arbitrators with judges who are free from financial incentives to favour claimants, executive officials, industry gatekeepers, and so on.

Frivolous and unfounded cases

43. Remarkably, the Commission’s approach leaves it to arbitrators – who earn significant income if a claim proceeds – to weed out frivolous claims. Clearly, frivolous claims should be vetted by someone who does not have a financial stake in the outcome of the decision to vet.

44. The Commission’s provision for cost-shifting will not affect the most troubling situations: those in which a deep-pocketed company brings a claim in a dispute involving large sums. Whether frivolous or not, these cases create pressure on the state to settle – including by regulatory chill – to avoid even a low risk of massive liability. This is an essential aspect of the special status of foreign investors in investor-state arbitration.

Allowing claims to proceed (filter)

45. There is no principled reason to defend the right to regulate in this way in the financial sector alone. Joint screening of claims by the relevant regulators of the host and home states should be extended to all claims by foreign investors. This would provide a check against arbitrator power over the right to regulate. Even so, the filter mechanism requires the consent of both states parties and, for this reason, is not a substitute for a clear unequivocal statement of the state’s right to regulate.

Guidance by the Parties on the interpretation of the agreement

46. The mechanisms of third-state submissions and agreed interpretations are not reliable to ensure uniformity and predictability. On submissions by the states parties, in the NAFTA context, tribunals have in various cases not adopted the shared interpretations of the affected states. On the mechanism of agreed interpretations, this is a limited and cumbersome way to manage arbitrator adventurism. For example, it requires the consent of all the states parties to the treaty. In the NAFTA context, the mechanism has been used very rarely and has always left room for the arbitrators to avoid or limit the states parties’ intended effect. For-profit arbitrators should not have the power to interpret the treaties, and re-direct public funds, in the first place.

Appellate mechanism

47. The idea of an appellate body has been floated in the U.S. for at least 10 years and now appears dead there. If the Commission was serious about an appellate body, why did it not insist on one in the Canada-EU CETA? The CETA was negotiated with a much weaker party. Also, even if it was staffed by judges, an appellate body would leave the role of for-
profit arbitrators largely intact. Arbitrators should be replaced with judges throughout the decision-making process not simply at the appeals stage.

**Overall assessment**

48. The Commission’s approach has positive elements but overall it is a failure. The Commission does not affirm clearly and unequivocally the state’s right to regulate. It does not introduce actionable responsibilities for foreign investors alongside their elaborate rights. It does not require foreign investors to resort to domestic courts where the courts offer justice. In turn, the Commission’s approach discriminates in favour of foreign investors – by giving them a special status in their relations with legislatures, governments, and courts – and against all other actors.

49. The next step for the Commission should be to remove investor-state arbitration from the TTIP and CETA. This unique form of adjudication is deeply flawed due to its lack of institutional independence, lack of openness, lack of procedural fairness, and lack of balance. The Commission’s proposed reforms take meaningful steps on the lack of openness but do not address the other problems. In important respects, they make them worse.