Bungenberg / Reinisch

CETA Investment Law

Article-by-Article Commentary

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edited by

Marc Bungenberg
August Reinisch

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Preface

We have been following the development of European Union (EU) Investment Policy-making from the very beginning, contributed several academic articles to this topic and organised conferences on EU Investment Law. We have also tried to 'look into the future' by drafting a Statute of a Multilateral Investment Court, which is the final result of a research study on the path from bilateral arbitral tribunals to a Multilateral Investment Court. The Comprehensive Economic and Trade Agreement (CETA) Investment Court System represents an intermediary step on this path.

With the CETA negotiations having come to an end and the Court of Justice of the European Union (CJEU) having decided that the CETA Investment Chapter is in conformity with the EU constitutional framework, we consider that the time is ripe for a first comprehensive commentary on EU Investment Law-making. The CETA Investment Chapter will most likely serve as a blueprint for future negotiations.

Compared to previous approaches in international investment law, the CETA changes the paradigm regarding the scope of application, substantive standards as well as investor-state dispute settlement, as the different contributions to this commentary will show. We have been fortunate to assemble a group of distinguished experts in the field who have commented on the provisions of the CETA Investment Chapter in an article-by-article fashion, highlighting the specifics of each provision and putting them into a broader context.

We are most thankful for the support in this project we had from NOMOS, especially from Dr. Matthias Knopik, as well as from our Institutes at Vienna and Saarland University. During the different stages of the project, we relied on the support of Isabel Zewe, Michelle Diehl, Andrés E. Alvarado Garzón, Johannes Tropper and Afolabi Adekemi.

Saarbrücken and Vienna, October 2021

Marc Bungenberg and *August Reinisch*

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(2016) C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44; Gus Van Harten, 'ISDS in the Revised CETA: Positive Steps, But Is It a 'Gold Standard'?' (2016) CIGI Investor-State Arbitration Commentary Series No. 6; Stephan Wilske, Raeesa Rawal and Geetanjali Sharma, 'The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?' (2018) 6(2) *Indian J. Arb. L.*, 79; Stephen Woolcock, 'The EU Approach to International Investment Policy after the Lisbon Treaty', Study for the EP Committee on International Trade 2010.

An Overview of the CETA – Investment Chapter (Chapter 8)

A. Introduction

With the entry into force of the Treaty of Lisbon,[1] the European Union (EU) has gained new competences in the area of international investment law and politics. Article 207 Treaty on the Functioning of the European Union (TFEU) provides for an external treaty-making power in the field of foreign direct investment.[2] Overall, the inclusion of investment protection in the common commercial policy is seen as a 'step forward' from an EU law perspective.[3] **1**

After the entry into force of the Treaty of Lisbon on 1 December 2009, investment protection chapters have become part of the negotiation of new economic agreements **2**

[1] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

[2] Article 207(1) Consolidated version of The Treaty on the Functioning of the European Union [2008] OJ C115/47 reads: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

[3] Specifically in the field of direct investment, see Herrmann and Müller-Ibold, 'Die Entwicklung des europäischen Außenwirtschaftsrechts' (2016) *EuZW*, 646 (646 f.); Bungenberg, 'Europäischer Internationaler Investitionsschutz', in von Arnauld (eds), *Europäische Außenbeziehungen*, EnzEuR Bd. 10 (2014), 743; Reinisch, 'The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements' (2013) 12 *SCJIL*, 111 (115 f.); Dimopoulos, *EU Foreign Investment Law* (2011), 66 f.; Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in Herrmann and Terhechte (eds), *EYIEL 2010* (2010), 123 (143 f.).

with third countries. A negotiating mandate was promptly issued on investment protection for the agreements with Canada, India, and Singapore.[4] Until the Court of Justice of the European Union's (CJEU) *Singapore* Opinion (→ mn. 10) it was a matter of debate whether the EU had the exclusive competence to negotiate and conclude 'stand-alone investment agreements' – comparable to international investment agreements (IIAs) that were concluded by the EU Member States 'before' the entry into force of the Treaty of Lisbon on 1 December 2009 – as well as Free Trade Agreements (FTAs) comprising chapters on investment law.[5] In its *Singapore* Opinion, the CJEU found a fairly clear answer to this question,[6] insisting on the limitation of the EU's power to foreign 'direct' investment (FDI) and holding that agreements comprising portfolio investment and dispute settlement fall under the shared powers of the EU and its Member States.[7] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) is an exception to this, as this agreement was already signed before the *Singapore* Opinion was rendered.[8]

3 The EU is currently negotiating[9] investment agreements with China and Myanmar, as well as investment chapters as part of larger FTAs with India, Libya, Egypt, Jordan, Morocco, Tunisia, Malaysia and Thailand. Besides the negotiation with Canada leading to CETA, also those agreements with Singapore,[10] Vietnam[11] and Mexico[12] have already been concluded.

4 The outcome of the negotiations between the EU and Canada is likely to set the stage for the conclusion of subsequent treaties with other partners. Together with Canada the EU shaped a new template of international investment treaties that is

[4] See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en (For an overview of FTA and Other Trade Negotiations). Also negotiation directives for CETA are partially published, for instance, Council of the EU, *Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada,* 15 December 2015.

[5] See Hoffmeister and Ünüvar, 'From BITs and Pieces towards European Investment Agreements' in Bungenberg et al. (eds), *EU and Investment Agreements* (2013), 57 (65 f.); Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon' (2009) 83 *BTW*, 16; Reinisch, 'The Division of Powers between the EU and its Member States "after Lisbon"' in Bungenberg et al. (eds), *Internationaler Investitionsschutz und Europarecht* (2010), 99 (107); Mayer, *Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?* ('Is the planned free trade agreement of the EU with Canada (Comprehensive Economic and Trade Agreement, CETA) a mixed agreement?'), Expert Opinion for the German Federal Ministry for Economic Affairs and Energy, published on 22 September 2014, 10 f., available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

[6] CJEU, Opinion 2/15, 16.05.2017, ECLI:EU:C:2017:376.

[7] See further on this, Bungenberg, 'The Common Commercial Policy, Parliamentary Participation and the Singapore Opinion of the CJEU' (2017) 4 *ZEuS*, 383; Hindelang and Baur, *Stocktaking of investment protection provisions in EU agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy*, Committee on International Trade (INTA) – European Parliament (2019); Usynin and Szilárd, 'The Growing Tendency of Inducing Investment Chapters in PTAs' in Amtenbrink et al. (eds), *NYIL 2017* (Springer 2017), 267.

[8] CETA Agreement OJ L 11/25, signed 30 October 2016; CJEU, Opinion 2/15, 16.05.2017, *Singapore FTA,* ECLI:EU:C:2017:376.

[9] The Overview of FTA and other Trade Negotiations of the Commission shows the current state of negotiations of international agreements currently negotiated by the EU, available at: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.

[10] EU-Singapore Investment Protection Agreement (IPA), signed 15 October 2018 *(not in force)*.

[11] EU-Vietnam Investment Protection Agreement (IPA), signed 30 June 2019 *(not in force)*.

[12] New EU-Mexico Agreement 23 April 2018: The Agreement in Principle (Investment), available at: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf.

likely to influence a new generation of IIAs in regard to ISDS as well as substantive standards of investment protection, and thus also promote the rule of law via international agreements. Irrespective of the multiple ongoing negotiations and already concluded agreements, the CETA Investment Chapter is seen as the blueprint on both sides of the Atlantic for future trade as well as investment agreements.[13] The EU has not adopted a model investment agreement, but the CETA standard will likely provide a template also for future negotiations.[14]

In relation to dispute settlement, the question of the past decade has been how to achieve a balance between investor and State interests and to ensure that tribunals do not extend their jurisdiction beyond the scope of the ISDS clause explicitly agreed to by treaty Parties. Accordingly, CETA Chapter 8 features the following elements intended to limit the powers of ISDS tribunals. The more precise determination of the applicable standards as well as a potential, proactive and/or corrective interpretative function of the Contracting Parties, and the creation of an appellate mechanism are all intended to enable such balance. The CETA text integrates all of these aspects. CETA's investment dispute settlement mechanism will most probably set the standard for future agreements to which the EU is Party. This is already evident in the EU-Singapore and EU-Vietnam Investment Protection Agreements. **5**

This introduction to the CETA Investment Chapter will highlight its background – with regard to treaty-making powers as well as conditions stemming from the EU's 'constitutional framework', outlining the paradigm change of EU investment law. **6**

B. The Economic Background: Benefits of a CETA Investment Chapter

The EU is Canada's second most important trading partner after the US. In 2018, the EU's outward FDI in Canada amounted to EUR 392.2 billion, on the flip side, Canadian FDI in the EU was valued at EUR 397.3 billion.[15] While bilateral investment flows did already represent a notable share of Canada's, the EU's and the EU Member States' total FDI, the CETA Parties recognised opportunities in increasing bilateral investment flows through the introduction of an investment chapter in the CETA.[16] In assessing the costs and benefits of a closer EU-Canada Economic Partnership, a joint study between the EU and Canada, released in 2008, indicated a desire to remove existing barriers to trade and investment.[17] **7**

Another study on the impact of the CETA Investment Chapter pointed out that economic benefits including trade-stimulating effects and fostering intangible busi- **8**

[13] Banks, 'Justin Trudeau: CETA could be bluebrint for all future deals', *The Parliament Magazine*, 16.02.2017, available at: https://www.theparliamentmagazine.eu/news/article/justin-trudeau-ceta-could-be-blueprint-for-all-future-trade-deals; Laugier, 'CETA's Investment Chapter: Blueprint for a Global Investment Reform?', *Le Petit Juriste*, 02.01.2018, available at: https://www.lepetitjuriste.fr/cetas-investment-chapter-blueprint-for-a-global-investment-reform/; German Federal Ministry for Economic Affairs, 'CETA – The European Canadian Economic and Trade Agreement', available at: https://www.bmwi.de/Redaktion/EN/Dossier/ceta.html.

[14] See Reinisch, 'Putting the Pieces Together … an EU Model BIT?' in Bungenberg and Reinisch (guest eds), *The Anatomy of the (Invisible) EU Model BIT* in (2014) 15 *JWIT*, 679.

[15] European Parliament, 'Transatlantic Relations: The USA and Canada', Fact Sheets on the European Union – 2021, p. 6, available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_5.6.1.pdf.

[16] Joint Report on the EU-Canada Scoping Exercise, 5 March 2009, p. 5.

[17] Global Affairs Canada, 'Assessing the costs and benefits of a closer EU-Canada economic partnership: A Joint Study by the European Commission and the Government of Canada', see https://www.international.gc.ca/trade-agreements-accords-.

ness linkages in Canada could be encouraged, although the significance of these would likely be only minor. It found that impact in the EU would likely follow these trends, but on an even lower level of significance. Positive environmental impacts would result from increased investment in green technologies, yet negative impacts would likely result from increased FDI in the oil, sand and mining sectors in Canada.[18]

C. The EU and Canada Investment Policy

9 By reason of their constitutional framework, economic policymaking in both the EU and Canada is quite complex. At the heart of this complexity is the issue of competences. Constitutionally, legislative competence in both the EU and Canada is granted either as an exclusive or shared competence between different levels of government. In the EU, legislative competence can be exclusive or shared between the EU and its Member States, while in Canada a similar situation applies as legislative competence can be exclusive or overlapping between the Federal and Provincial governments.

I. EU Investment Policy after the Treaty of Lisbon

1. The Question of Competences

10 With the entry into force of the Treaty of Lisbon,[19] the EU has gained new treaty-making powers in the area of international investment law and politics. It was initially unclear which competences in the field of external trade actually belong to the European Union, i.e. which areas of competence are so-called exclusive competences, and which are shared competences of the European Union and its Member States.[20] It was widely discussed which investment aspects are covered by the EU's now enlarged, external 'trade competences' and thus are exclusive competences of the European Union.[21] In its partly ambiguous *Singapore* Opinion published on 16 May 2017, the CJEU decided that the EU's exclusive competence in the field of investment is limited to the area of FDI.

11 In the area of so-called portfolio investments, in which foreign investors do not have controlling interests, but merely want to participate in the form of returns on economic success, the CJEU rejected an exclusive competence of the EU.[22] Thus, whenever an agreement also includes investment protection relating to portfolio in-

[18] Chapter 7.3 in 'A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada', Final Report, June 2011, published as part of the Directorate General of Trade of the European Commission's Trade Sustainability Impact Assessment Series. Full report available at the following link: http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf.

[19] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

[20] See for instance Herrmann and Müller-Ibold, 'Die Entwicklung des europäischen Außenwirtschaftsrechts' (2016) *EuZW*, 646 (646 f.); Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon' (2010) *EuZW*, 207 (207 f.); Hoffmeister, 'Aktuelle Rechtsfragen in der Praxis der europäischen Außenhandelspolitik' (2013) *ZEuS*, 385 (385 f.); Dimopoulos, *EU Foreign Investment Law* (2011), 94 f.

[21] Cf. Herrmann and Müller-Ibold, 'Die Entwicklung des europäischen Außenwirtschaftsrechts' (2016) *EuZW*, 646 (646 f.); Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon' (2010) *EuZW*, 207 (207 f.); Hoffmeister, 'Aktuelle Rechtsfragen in der Praxis der europäischen Außenhandelspolitik' (2013) *ZEuS*, 385 (385 f.); Dimopoulos, *EU Foreign Investment Law* (2011), 94 f.

[22] CJEU, Opinion 2/15, 16.05.2017, *Singapore FTA,* ECLI:EU:C:2017:376, para. 238.

vestment, it partly falls within the area of 'shared competences'. The CJEU also found a shared competence in the case of investor-State dispute settlement.[23] The CJEU thus found that the agreement with Singapore could not be concluded by the EU alone, particularly because of the chapter on investment protection.[24]

12 As a result of the *Singapore* Opinion of the CJEU,[25] the EU's investment policy is now separated from its trade policy. Hence, investment protection is removed from 'comprehensive' treaty texts and transposed into separate investment protection agreements. The aim is to prevent trade aspects that are indisputably the exclusive competence of the European Union from becoming infected by the 'confused' distribution of competences in the area of investment protection, which requires the participation of the Member States of the European Union in the ratification process. This is certainly the case with the agreements with Vietnam[26] and Singapore.[27] Only in the CETA Agreement with Canada and the FTA with Mexico, the investment protection chapter as part of the overall agreement has been preserved. This is explained by the fact that the agreement with Canada was already in the ratification process at the time the CJEU rendered its *Singapore* Opinion, and that the EU-Mexico Agreement[28] modernised a 2000 Global Agreement.

13 Nevertheless, it should be noted that although there is a shared competence in some areas, this does not necessarily lead to a mixed agreement.[29] Whether an 'EU-only' or a mixed agreement will be concluded is a political decision to be taken jointly by the Commission and the Council.[30] In fact, this process also decides whether national parliaments should participate in the ratification process or not. The approach of 'facultative mixity' thus also remains after the *Singapore* Opinion. The CJEU did not clarify in what way the Member States should participate as a consequence of shared competences. Subsequent rulings were needed to clarify that the EU can conclude EU-only agreements in fields of shared competences.[31] It should be noted that in the future, the EU may conclude trade and investment protection agreements without the consent of the Member States if the investment protection only covers foreign direct investment and no provisions on dispute settlement.

14 But so far no EU IIA or investment chapter as part of a broader FTA has entered into force; the 1200 Member States' bilateral investment treaties (BITs)[32] therefore still form the basis for international investment protection of EU investors abroad.[33]

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[23] CJEU, Opinion 2/15, 16.05.2017, *Singapore FTA,* ECLI:EU:C:2017:376, para. 304.

[24] CJEU, Opinion 2/15, 16.05.2017, *Singapore FTA,* ECLI:EU:C:2017:376, para. 305.

[25] CJEU, Opinion 2/15, 16.05.2017, *Singapore FTA*, ECLI :EU:C:2017:376.

[26] EU-Vietnam Investment Protection Agreement (IPA), signed 30 June 2019 *(not in force)*.

[27] EU-Singapore Investment Protection Agreement (IPA), signed 15 October 2018 *(not in force)*.

[28] EU-Mexico Modernisation Agreement, available at: http://trade.ec.europa.eu/doclib/press/.

[29] See for instance Opinion of Advocate General Kokott in joined cases C-626/15 and C-659/16, 31.05.2018, *Commission v. Council*, ECLI:EU:C:2018:362, para. 105.

[30] Bungenberg and Reinisch, 'From Arbitral Tribunals to a Multilateral Investment Court: The European Union Approach' in Chaisse et al. (eds), *Handbook of International Investment Law and Policy* (2020), 1 (7).

[31] CJEU, Case C-600/14, 05.12.2017, *Germany v. Council*, ECLI:EU:C:2017:935, para. 68; CJEU, joined cases C-626/15 and C-659/16, 20.11.2018, *Commission v. Council*, ECLI:EU:C:2018:925, para. 126.

[32] Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet* (November 2013), p. 4, available at https://www.italaw.com/sites/default; See also the UNCTAD database with a list of all known IIAs worldwide available at: https://investmentpolicy.unctad.org/international-investment-agreements; for detailed numbers see also UNCTAD, *Investor-State Dispute Settlement: An Information Note on The United States and the European Union*, IIA Issues Note 2/2014, p. 3, available at: http://unctad.org/en/PublicationsLibrary.

[33] See in this regard Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between

2. (New) EU Investment Policy Approaches

15 After the transfer of competences from the EU Member States to the EU, the EU Commission's first statements seemed to suggest to 'reproduce' the European 'gold standard' in Member States' BITs.[34] Shortly after, it was made clear by different actors involved in EU policy-making that they considered that the time was ripe for new approaches. The European Parliament is very often seen as the advocate of innovative and more policy-oriented approaches. The Commission initiates all negotiations and generally is responsible for all negotiations, and the Council finally has to adopt the agreements. Because the European Parliament has to ratify international agreements, it stressed that it wanted new approaches to be introduced in economic agreements, and thus also into the one under negotiation with Canada. Therefore, all three institutions were involved in the treaty negotiations and ratifications. From the onset, the EU outlined its policy approaches in various papers, communications, resolutions, background papers, such as:

- Commission, Towards a European international investment policy, 7 July 2010.[35]
- Council (Foreign Affairs), Conclusions on a comprehensive European international investment policy, 25 October 2010.[36]
- European Parliament, Resolution on the future European international investment policy, 6 April 2011.[37]

Member States and third countries [2012] OJ L351/40. On the EU Member States' approach to international investment law, see, *inter alia,* Gaffney and Akçay, 'European Bilateral Approaches' in Bungenberg et al. (eds), *International Investment Law – A Handbook* (2015), 186 (186 f.); Trakman and Ranieri, *Regionalism in International Investment Law* (2013).

[34] See on this Titi, 'International investment law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26(3) *EJIL* 639 (640).

[35] Commission Communication, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010) 343 final: 'In order to ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement, which permits an investor to take a claim against a government directly to binding international arbitration [footnote: The Energy Charter Treaty, to which the EU is a party, equally contains investor-state dispute settlement.]. Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives from Member State BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment. Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others. For these reasons, future EU agreements including investment protection should include investor-state dispute settlement. This raises challenges relating, in part, to the uniqueness of investor-state dispute settlement in international economic law and in part to the fact that the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither. In approaching investor-state dispute settlement mechanisms, the Union should build on Member State practices to arrive at state-of-the art investor state dispute settlement mechanisms.'

[36] Council of the EU, *Conclusions on a comprehensive European international investment policy*, 25 October 2010: '[…] stresses, in particular, the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements […]'.

[37] European Parliament, *European Parliament Resolution of 6 April 2011 on the future European international investment policy*, (2010/2203 (INI)), para. 32: 'Takes the view that, in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection'.

- Council, Negotiating Directives of 12 September 2011 concerning the negotiations with Canada, India and Singapore.[38]
- Council, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013.[39]
- Common blueprint by the EU and the US for future open and stable investment climates, 10 April 2012.[40]
- Resolutions adopted by the European Parliament in regard to specific negotiations demanding the implementation of an effective investor-state-dispute settlement mechanism.[41]
- Resolution by the European Parliament calling for the establishment of a permanent Investment Court System (ICS) with a built-in appellate structure.[42]
- Commission Concept Paper "Investment in TTIP and beyond – the path for reform, enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", May 2015.[43]
- Council of the European Union mandate to the EU Commission to negotiate a Multilateral Investment Court (MIC).[44]

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[38] See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en: 'Enforcement: the agreement shall aim to provide for an effective investor-to-state dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).'

[39] Council of the EU, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,* 9 October 2014, available at: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf: '[…] Enforcement: the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies […].'

[40] Statement of the European Union and the United States on Shared Principles for International Investment, 10 April 2012, available at: https://2009-2017.state.gov/p/eur/rls/or/2012/187618.htm, 'Fair and Binding Dispute Settlement: Governments should provide access to effective dispute settlement procedures, including investor-to-State arbitration, and ensure that such procedures are open and transparent, with opportunities for public participation.'

[41] See, for example, European Parliament, *European Parliament Resolution of 9 October 2013 on the EU–China negotiations for a bilateral investment agreement* (2013/2674(RSP)), para 42, available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-411: 'Considers that the agreement should include, as a key priority, effective state-to-state and investor-to-state dispute settlement mechanisms in order, on the one hand, to prevent frivolous claims from leading to unjustified arbitration, and, on the other, to ensure that all investors have access to a fair trial, followed by enforcement of all arbitration awards without delay.'

[42] European Parliament, A new forward-looking and innovative future strategy for trade and investment, Resolution of 05.07.2016, P8_TA-PROV 2016/0299, para. 68.

[43] European Commission, 'Investment in ttip and beyond – the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', May 2015, p.11.

[44] Council of the EU, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, 20 March 2018.

- European Union and its Member States – 'Establishing a standing mechanism for the settlement of international investment disputes', submission to UNCITRAL, 18 January 2019.[45]
- EU Proposal for WTO disciplines and commitments relating to investment facilitation for development, 25 February 2020.[46]
- New Investment Protection Agreements, 31 July 2020.[47]
- European Union text proposal for the modernisation of the Energy Charter Treaty, 27 May 2020.[48]
- European Union text proposal for the modernisation of the Energy Charter Treaty, 15 February 2021.[49]

16 These EU documents and negotiation mandates indicated a move from the traditional investment law policy inspired by the so-called European 'gold standard', a new investment policy approach which reformulated the old standards with new substantive and procedural standards, intending to offer more clarity and certainty with respect to the regime governing the promotion and protection of foreign investment between the EU and third states. The compatibility of the new EU investment policy approach with the EU legal order was subsequently confirmed by the CJEU when seised to clarify the compatibility of the CETA Investment Chapter with the EU constitutional framework.

3. Clarifications on the Compatibility of the CETA Investment Chapter with the EU's Constitutional Framework

17 Before the CJEU rendered its *CETA* Opinion, it was unclear whether the CETA Investment Chapter, as well as other negotiated dispute settlement mechanisms, would fulfil the conditions defined by the CJEU in the *EEA*-, *ECHR*- and *Patent-Court*-Opinions as well as in the *Achmea*-Judgement. The decisive element was the principle of autonomy of EU Law – with the CJEU being the only competent institution to give a final and binding interpretation to EU Law. The autonomy of EU law is used to deny an international court jurisdiction for a binding interpretation of EU law. Thus, it precludes the EU or its Member States from concluding agreements that allow the final interpretation of EU law by a forum other than the CJEU.[50] Member States and the EU itself are therefore prevented from negotiating agreements that confer jurisdiction to a court or tribunal which have the effect of depriving national courts of their task to apply and interpret EU law or abrogate their power to seek preliminary rulings under Article 267 TFEU.[51]

18 In the case of the planned accession of the EU to the European Convention on Human Rights (ECHR), this principle of the autonomy of EU law also presented itself as an insurmountable obstacle. In particular, the planned accession agreement was incompatible with Article 344 TFEU because it did not exclude the European Court of Human Right's (ECtHR) jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU.[52]

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[45] https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.
[46] WTO INF/IFD/RD/46, February 2020, https://trade.ec.europa.eu/doclib/docs.
[47] Commission, https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158908.pdf.
[48] https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.
[49] Commission, https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf.
[50] CJEU, Opinion 2/13, 18.12.2014, ECLI:EU:C:2014:2454, paras. 201 f.; CJEU, Case C-459/03, 30.05.2006, *Commission v. Ireland*, para. 177.
[51] CJEU, Opinion 1/09, 08.03.2011, ECLI:EU:2011:123.
[52] CJEU, Opinion 2/13, 18.12.2014, ECLI :EU:C:2014:2454, paras. 201 f.

19 In the context of *ad hoc* investment arbitration tribunals, the CJEU's *Achmea* judgment[53] also provides guidance. Therein, the Court ruled in March 2018 that so-called intra-EU investment agreements were fundamentally not in line with EU law. Arbitration would call into question the autonomy of EU law. The CJEU noted that investment arbitration tribunals adjudicating intra-EU disputes might be required to rule on the basis of domestic law as well as international agreements applicable between the Contracting Parties, which included EU law, but that they could not make a referral to the CJEU under Article 267 TFEU, and were subjected to only limited judicial review before competent national courts. The limited review of arbitral awards provided, for example, by German Arbitration Law, was considered to be insufficient to guarantee the autonomy of EU law.[54] Thus, the CJEU found that intra-EU investment arbitration bypassed the preliminary ruling mechanism foreseen in Article 267 TFEU, which was necessary for the autonomy, proper application, and full effectiveness of EU law.

20 In 2019, the CJEU confirmed the application of these principles to the Investment Court System (ICS) introduced under CETA. In its Opinion dated 30 April 2019, the CJEU stresses that the Union or its Member States might only submit disputes to a mechanism that respected the autonomy of the EU legal order and met the conditions that emanated from this autonomy.[55] The CJEU pointed out that the final objective of the other EU institutions was to seek a multilateral dispute settlement solution after the interim stage of the bilateral investment court system.[56]

21 According to the CJEU, 'the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.'[57] However, the CJEU made it clear that such submission to an international jurisdiction was possible only under certain conditions. From an EU law perspective, the *CETA* Opinion is remarkable in at least two respects: First, its discussion on the constitutional principles and framework that guide the EU in its external action, such as when the Union concludes international agreements that must be consistent with the Charter of Fundamental Rights, and notably Article 47 of the Charter. Second, it implies that what the *Kadi* Judgment[58] meant for outside acts 'entering' the internal EU legal order, the *CETA* Opinion outlines for the EU's participation in international dispute settlement, which is possible *as long as* a set of conditions are met.

22 In the *CETA* Opinion, the CJEU specifically stated that investment courts were under no circumstances entitled to interpret EU law,[59] meaning that such an international judicial body must respect the CJEU's monopoly in interpreting EU law.[60] This principle of autonomy exists both towards the law of the Member States as well as towards international law.[61] Therefore, neither the CETA ISDS mechanism nor the future Multilateral Investment Court (MIC) should prevent the Union from operating

[53] CJEU, C-284/16, 06.03.2018, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.
[54] CJEU, C-284/16, 06.03.2018, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 53.
[55] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341.
[56] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, paras. 108 and 118.
[57] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 106.
[58] CJEU, Joined Cases C-402/05 P and C-415/05 P, 03.09.2008, *Kadi & Al Barakaat International Foundation v. Council and Commission*.
[59] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, paras. 120 f.
[60] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, paras. 107 f.
[61] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 109.

according to its own constitutional framework. The CJEU considered that all these points were fulfilled with the ICS.

23 A further condition resulted from the fact that the Union has its own constitutional framework, including the values set out in Article 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, the general principles of EU law, the provisions in the Charter of Fundamental Rights and the rules of the Treaties,[62] in particular, that the envisaged ISDS mechanism must ensure the right of access to an independent court.[63]

24 The *CETA* Opinion also took up the debate about the 'level of protection of the public interest', or in other words the right to regulate. The starting point for the discussion was Article 2 of the TEU. Systems of institutionalised dispute settlement to which the EU wanted to adhere had to be in conformity with the EU's 'constitutional framework' and 'principles'. Concerning the discussion about the legitimacy of investment law and ISDS in particular, the CJEU underlined that the CETA standards of protection respect state sovereignty and the right to regulate.[64] It is important to highlight that regulatory space is part of all negotiated EU IIAs.[65] In addition, even in arbitration, tribunals are increasingly mindful of the States' right to regulate.[66] It is also significant that under CETA, tribunals may impose compensation, but they are not empowered to enjoin States to 'amend or withdraw legislation'.[67] Thus, they do not undermine States' capacity to 'operate autonomously' (as per the CJEU's *dicta*).[68] Article 28.3.2 CETA provides that nothing in the Agreement can be interpreted in a manner to prevent a Party from adopting and applying measures necessary to protect public interests.

25 The *CETA* Opinion further made it clear that the applicable law in IIAs must be only international law.[69] If domestic law came into play, it could present a direct threat to the autonomy of EU law. Tribunals set up under international agreements with binding effect on the EU cannot be entrusted to interpret EU law – only the agreement itself. But they can apply EU law as a fact.[70] Moreover, the ICS cannot have the competence to decide on the legality of an EU measure.

26 Another issue of a more general and systemic interest concerns the lessons to be drawn from the CJEU's *CETA* Opinion in relation to the Charter of Fundamental Rights. The CJEU underlined that the Charter was binding on the EU also in regards to its external relations and therefore any agreement that the EU wished to ratify needs to comply with it. The analysis in the *CETA* Opinion concerned only the compatibility of the treaty's ISDS provisions with Article 47 of the Charter. These conditions mirror the fundamental rights guarantees developed by the CJEU in the past 45 years as an internal component of the rule of law within the EU,[71] now also laid down – for clarification – in the Charter of Fundamental Rights. Article 47 relates

[62] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 110.

[63] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, paras. 189 f.

[64] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 17.

[65] Bungenberg and Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS', *EJIL:Talk!*, 5 June 2019, available at: https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/.

[66] Bungenberg and Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS', *EJIL:Talk!*, 5 June 2019.

[67] Bungenberg and Titi, 'CETA Opinion – Setting Conditions for the Future of ISDS', *EJIL:Talk!*, 5 June 2019.

[68] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 150.

[69] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, paras. 121 f.

[70] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 130.

[71] See, Lenaerts, 'The autonomy of European Union Law' (2019) 1 *I Post di Aisdue*, available at: http://www.aisdue.eu/web/wp-content/uploads/2019/04/001C_Lenaerts.pdf.

to the *Right to an effective remedy and to a fair trial*, including access to an independent and impartial tribunal and legal aid for those without sufficient resources to access justice. For the time being, the CJEU has made important points in relation to (a) the access to justice and (b) the neutrality and independence of adjudicators. Therefore, the issue of cost apportionment and funding possibilities especially for natural persons and small and medium-sized enterprises has to be kept in mind when considering to go beyond CETA's ICS, e.g. by designing a future MIC. In addition, it will be useful to review the Charter carefully in order to determine whether other fundamental rights, beyond those in Article 47 of the Charter, may become relevant.

27 To summarise, the CJEU held that the following conditions have to be fulfilled to allow the EU to participate in an international dispute settlement mechanism:

- the principles of autonomy and primacy of EU law do not permit the creation of dispute settlement mechanisms that may issue decisions preventing the EU institutions (including the CJEU) from operating or realising their functions in accordance with the EU constitutional framework.
- it is the autonomous right of the EU to define the level of public interests it seeks to secure under the autonomous EU legal order, this right cannot be undermined by any international legal obligation.[72]
- the substantive investment protection standards of IIAs must leave enough room for the Contracting Parties to regulate within their territories to achieve legitimate policy objectives. Its investment protection standards cannot call into question the level of protection of public interest determined by the Union following a democratic process.[73]
- whenever the EU enters into an international agreement encompassing the establishment of judicial bodies, the EU is subject to Article 47 of the EU Charter on Fundamental Rights.[74] This refers especially to respecting the rules governing access to judicial bodies and their independence. Any dispute settlement system must be financially accessible.[75]

28 If these conditions are not respected by a future agreement, the CJEU will not allow the EU to become a Party to such an agreement on dispute settlement. It will be interesting to see at the multilateral level, whether the EU will be able to convince other states to endorse all these aforementioned conditions, notably in the context of prospective negotiations for a MIC Statute. Therefore, although the CJEU only dealt with the narrow question of whether CETA's ICS was compatible with EU primary law, its Opinion will likely have consequences well beyond this context, including in relation to a future MIC. When the CJEU decided on CETA's compatibility with EU law, the MIC was the elephant in the room: first, because in CETA, the EU commits to pursuing the establishment of a MIC; second, because the European Commission in its contributions to UNCITRAL's WG III promotes this option as the only possible future for ISDS involving the EU.[76]

29 A similar question, involving the compatibility of the CETA ISDS mechanism with the German Constitution is currently pending before the German Constitutional

[72] Riffel, 'The CETA Opinion of the European Court of Justice and its Implications – Not that Selfish After All' (2019) 22(3) *J. Int'l Econ. L.*, 503 (with reference to CETA Opinion, paras. 148, 160).
[73] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 160.
[74] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 190.
[75] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 206.
[76] See on this Article 8.29 CETA.

Court (BVerfG).[77] While the CJEU stressed the constitutional foundations of the EU in its CETA Opinion, the BVerfG discusses the (German) constitutional identity.[78]

II. Canadian Investment Policy

30 Canada is one of the countries with a model BIT that guides its investment policy towards third states. Canada's model BIT is known as the 'Model Foreign Investment Promotion and Protection Agreement (FIPA)', with the latest update published in May 2021.[79] At present, Canada has concluded 47 FIPAs – out of these, 37 are in force, four are signed (but not in force), one suspended and five terminated.[80] Furthermore, Canada is recorded to have in force 15 FTAs, with another nine under negotiation.[81] Canada has been a respondent state in about 30 ISDS cases, all of which except one has been initiated on the basis of NAFTA Chapter 11. The ISDS tribunals have decided against Canada in at least five of these cases, while the rest is either pending, discontinued, settled or dismissed.[82]

31 From the multiple FIPAs and FTAs that Canada is a Party to, it is accurate to state that Canada is one of the main advocates of international agreements on the promotion and protection of foreign trade and investment. However, due to its constitutional framework, it is impossible for the federal government of Canada to implement international agreements without the approval of the provincial governments if the international agreement touches on areas of provincial competence. According to the Canadian Constitution (British North America Act 1867), the federal government has competence to legislate over matters concerning trade and commerce,[83] this includes entering into international trade agreements concluded between Canada and another Party.[84] However, the provincial governments have competence over matters concerning property and civil rights,[85] which includes the regulation of 'contracts' on the basis of which international trade is conducted.[86] This division of power limits the federal autonomy to enter into international trade agreements since provincial approval will ultimately have to be sought for the successful implementation of an international agreement such as the CETA.

32 The EU-Canada negotiations have demonstrated how difficult it is to successfully negotiate an agreement such as CETA without including the Canadian provinces in the discussions. In an earlier attempt to improve the trade and investment relationship between the Parties, negotiations on an 'EU-Canada Trade Investment Enhancement

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[77] See, German Constitutional Court, 'Applications for a preliminary injuction in the "CETA" proceeding unsucessfull', Press Release No. 71/2016 of 13 October 2016, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html;jsessionid=633DB1C391D93AEC0A343F2CD3711354.2_cid361.

[78] BVerfG, 13.10.2016 - 2 BvR 1368/16, paras. 1-73, available at https://www.bundesverfassungsgericht.de/e/rs20161013_2bvr136816en.html.

[79] On the 2021 Model FIPA, see https://www.international.gc.ca/trade-commerce/trade-agreements; See also, https://www.international.gc.ca/trade.

[80] For details, see https://treaty-accord.gc.ca/result-r.

[81] For details, see https://www.international.gc.ca/trade-commerce/trade-agreements.

[82] For details, see https://investmentpolicy.unctad.org/; https://www.international.gc.ca/.

[83] Article 91(2) British North America Act 1867.

[84] Hübner et al., *CETA: the Making of the Comprehensive Economic and Trade Agreement between Canada and the EU*, Notes de l'Ifri (2016), 19 f.

[85] Article 92(13) British North America Act 1867.

[86] Kukucha, 'Provincial pitfalls: Canadian Provinces and the Canada-EU trade negotiations' in Hübner (ed), *Europe, Canada and the Comprehensive Economic Partnership Agreement* (2016), 130 (133).

Agreement (TIEA)' were commenced in 2004.[87] Like the CETA, some of the sectors covered by the TIEA extended into areas of Canadian provincial competence, but the provinces were not brought in until the final stages of negotiations. This ultimately led to the failure of the TIEA, two years into the process.[88] As a result of this experience, prior to the commencement of CETA negotiations, the EU through its then Trade Commissioner, Peter Mandelson, made it clear that Canada should not bother to talk about the CETA if its provinces were not on board.[89] Thus, clearly from the EU position, the participation of Canadian provincial territories was a precondition to be met before the CETA negotiations could commence, even though the provinces were not direct signatories like the EU Member States.

In general, Canada's investment law policy can be considered as centred around **33** its Model FIPA after taking into consideration the critical role played by its provincial territories towards its international treaty commitments. However, the difference between the policy standards set in its Model FIPA and the policy standards finally agreed upon in the CETA, for example with respect to Investor-State dispute settlement, suggests that Canada is equally open to new approaches, particularly those inspired by the current EU preferences on investment policy lawmaking.

D. Negotiation and Outcome of CETA's Investment Chapter

Soon after the shift of competences from its Member States to the EU in 2009, **34** the EU made clear that it would start to take advantage of this. A first negotiating mandate given to the Commission to include investment law protection into a Free Trade Agreement did concern the negotiations with Canada, India and Singapore.[90]

Investment law has become an almost permanent topic of negotiations of interna- **35** tional agreements in economic matters as the examples of TTIP, CPTPP, USMCA or ASEAN show. In North America, the North American Free Trade Agreement (NAFTA)[91] concluded in 1992 between Canada, the US and Mexico provided for ISDS in its Chapter 11 and was frequently used as a legal basis for arbitral proceedings against the US as well as against Canada.[92] NAFTA can be seen as the first broad Mega Regional Trade Agreement containing an investment chapter. An investment chapter was also included in Part III of the Energy Charter Treaty (ECT) that entered into force in April 1998 and that the EU is also a Party to.[93] Since early 2014, it was discussed whether ISDS should be made part of the FTA under negotiation

[87] For details on the TIEA, see https://www.international.gc.ca/trade-agreements-.

[88] Hübner et al., *CETA: the Making of the Comprehensive Economic and Trade Agreement between Canada and the EU*, Notes de l'Ifri (2016), 16.

[89] Hübner et al., *CETA: the Making of the Comprehensive Economic and Trade Agreement between Canada and the EU*, Notes de l'Ifri (2016), 16.

[90] See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment (12 September 2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en: 'Enforcement: the agreement shall aim to provide for an effective investor-to state-dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).'

[91] See, Chapter 11 NAFTA, available at: https://investmentpolicy.unctad.org.

[92] Details on NAFTA Investor-State Arbitrations available at: http://www.state.gov/s/l/c3439.htm.

[93] See, Chapter Part III Energy Charter Treaty, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3281/download.

between the EU and the US (Transatlantic Trade and Investment Partnership, TTIP) or whether it should be excluded from the negotiation agenda.[94]

36 In May 2009 Canada and the EU announced the launch of trade negotiations at the Canada-EU Summit in Prague, Czech Republic.[95] During the CETA negotiations, the first version of an investment chapter was already 'leaked' as part of a Consolidated CETA Draft of 13 January 2010,[96] so only a few weeks after the entry into force of the Lisbon Treaty and well before a mandate was given to the Commission to start negotiations on this issue. Here, investment arbitration was retained as the mechanism for settling Investor-State disputes. On the European side, the Council adopted Negotiating Directives on investment issues on 12 September 2011 concerning the negotiations with Canada, India and Singapore.[97]

37 Further leaked versions were circulated inter alia in 2011,[98] 2012,[99] on 15 and 21 November 2013,[100] on 1 August 2014,[101] and September 2014.[102] The September 2014 version was the released agreement's text completed at Canada-EU Summit in Ottawa.

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[94] See, for example, the EU Commission President Jean Claude Juncker '[…] Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context', in Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (15 July 2014), p. 8, available at: https://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf; In Germany, the German Federal Council rejected the inclusion of a specific ISDS-mechanism in TTIP in its Resolution of 11 July 2014, BR-Drs. 295/14, available at: http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1: '[…] 9. Der Bundesrat hält spezielle Investitionsschutzvorschriften und Streitbeilegungsmechanismen im Verhältnis Investor und Staat zwischen der EU und den USA für verzichtbar und mit hohen Risiken verbunden. Gründe dafür sind insbesondere: – Beide Partner gewährleisten für Investoren einen hinreichenden Rechtsschutz vor unabhängigen nationalen Gerichten. – Durch Investor-Staat-Schiedsverfahren können allgemeine und angemessene Regelungen zum Schutz von Gemeinwohlzielen, die in demokratischen Entscheidungen rechtsstaatlich zustande gekommen und rechtmäßig angewandt wurden, ausgehebelt oder umgangen werden. […].'

[95] Kellogg, 'NAFTA unplugged?: Canada's three economies and free trade with the EU, in Hübner (ed), *Europe, Canada and the Comprehensive Economic Partnership Agreement* (2011),107 (108).

[96] Investment Chapter, leaked version of the CETA draft text of 13 January 2010, 'Draft Consolidated Text: Canada-EU Comprehensive Economic and Trade Agreement', available at: https://wiki.laquadrature.net/images/3/33/CETA_draft_jan_2010.pdf.

[97] See the leaked negotiating mandate 'EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en: 'Enforcement: the agreement shall aim to provide for an effective investor-to state- dispute settlement mechanism. State-to-state dispute settlement will be included, but will not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).'

[98] Article X.18 (Investment/Establishment Chapter), leaked version of the CETA draft text of January 2011, 'Canada-EU CETA Draft Consolidated Text – Post Round VI', available at: https://wiki.laquadrature.net/images/6/69/CETA_draft_jan_2011.pdf.

[99] Article X.18 (Investment/Establishment Chapter), leaked version of the CETA draft text of February 2012, 'Draft CETA Investment Text', available at: https://wiki.laquadrature.net/images/c/cc/CETA-Draft_Consolidated_text-February_2012.pdf.

[100] Article X.-1 (Investor-to-State Dispute Settlement Text), leaked version of the CETA draft text of 15 November 2013, available at: https://www.laquadrature.net/files/Draft-CETA-DisputeSettlement-nov-15.pdf.

[101] Article X.17(3) (Investor-State Dispute Settlement Text), leaked version of the consolidated CETA draft of 1 August 2014, 'Consolidated CETA Text', available at: https://old.laquadrature.net/files/ceta-complet.pdf; Article X.17(4) (Investor-to-State Dispute Settlement Text), leaked version of the consolidated CETA draft of 1 August 2014, 'Consolidated CETA Text', available at: https://old.laquadrature.net/files/ceta-complet.pdf.

[102] Article 8.18(5) (Resolution of Investment Disputes), Finalised CETA Draft Text September 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

In August 2014, Canada and the EU announced the complete text of the Canada-EU Trade Agreement, marking the conclusion of negotiations. The most dramatic change then took place between the 2014 and 2016[103] versions. In a public consultation held by the EU Commission in 2014,[104] an overwhelming lack of support for ISDS by European stakeholders was revealed, this later culminated in the European Parliament (EP) issuing a resolution to the Commission containing a number of stipulations directing the reform of the investment protection provisions under the CETA.[105] With the EP's competences strengthened by the Treaty of Lisbon,[106] it became imperative that the EU Commission negotiating on behalf of EU Member States approaches its Canadian counterpart to address the recommendations set out in the EP's resolution. Although this EP Resolution was primarily directed towards the TTIP negotiations, its adverse effects on the CETA Investment Chapter were obvious.

38 In February 2016, Canada and the EU announced the completion of the legal review of the agreement's English text. The outcome of the legal review saw the previous Article X.17 evolved into Article 8.18 reflecting the new EU approach for settling Investor-State disputes through an Investment Court System (ICS), as opposed to ad-hoc arbitration contemplated in earlier CETA Drafts pre-dating 2016.

39 After over seven years of intensive negotiations, the finalised CETA Draft was eventually signed by the Parties on 30 October 2016.[107] The European Council President Donald Tusk and the Canadian Prime Minister Justin Trudeau signed the agreement. By February 2017, the European Parliament approved the CETA, while on the other side of the Atlantic, the Canadian bill to implement the CETA was granted royal assent in May 2017. On 21 September 2017, the CETA provisionally entered into force, with the exception of some parts of the Investment Chapter. The agreement will take full effect once all EU member states have formally ratified it.[108] This process is ongoing.

I. The Necessity of ISDS in CETA

40 While it has been widely accepted that both substantive and procedural protection for enterprises investing in developing countries or emerging markets offers substantial benefits[109] and respond to the actual need to correct deficiencies of the legal

[103] CJEU, *Press Release No 52/19*, 30 April 2019 (Opinion 1/17); Hübner et al., *CETA: the Making of the Comprehensive Economic and Trade Agreement between Canada and the EU* (2016).

[104] Commission Staff Working Document, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, 13 January 2015, SWD(2015) 3 final, available at: https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[105] See in this regard, European Parliament, *European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 2014/2228(INI). See, 'Regarding the Rules, para. (xv)'.

[106] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, OJ C306/01 of 17 December 2007; On the strengthening of the EP by the Treaty of Lisbon see, Craig and Búrca, *EU Law: Text, Cases, and Materials* (2015), 50; Rittberger, *Building Europe's Parliament* (2005); Judge and Earnshaw, *The European Parliament* (2008); Corbett et al., *The European Parliament* (2011).

[107] CJEU, *Press Release No 52/19*, 30 April 2019 (Opinion 1/17); Hübner et al., *CETA: the Making of the Comprehensive Economic and Trade Agreement between Canada and the EU* (2016).

[108] See, https://eur-lex.europa.eu/content/news/eu_canada_trade_agreement-ceta.html.

[109] UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' in *UNCTAD Series on International Investment Policies for Development* (2009), available at: http://unctad.org/en/docs/diaeia20095_en.pdf; For a summary of different argumentation on the effects of BITs see Vandevelde, *Bilateral Investment Treaties* (2010), 115-120.

protection available in some host states, the current debate about ISDS questions the necessity of investment protection and especially of Investor-State arbitration between developed OECD countries.[110]

41 However, it has to be stressed that there have been about 250 investment disputes against EU Member States until the end of 2020; 60 of these known cases involve non-EU investors claiming against an EU Member State, and 25 of these cases are specifically transatlantic, with Poland having the highest share of the disputes at seven cases, Romania and Spain with five cases respectively, Estonia three cases, Croatia and the Czech Republic two cases respectively, and Slovakia in one case.[111] Out of these 25 investment disputes against EU Member States, 20 have been initiated by US or Canadian investors with only a very low success rate. This high aggregate number of claims especially against Central and Eastern European countries appears to show the mistrust in the judicial system of these countries.

42 Legal protection is necessary when obligations are not complied with; the fact that certain types of obligations are habitually complied with, e.g. because the domestic legal system of a host state conforms to rule of law requirements and offers adequate rule of law guarantees in case of violations, does not mean that there should not be a fall-back protection option available in the rare instances where this is not the case. It is a fact that even in OECD countries the legal protection of foreign investors does not always live up to the demands of the rule of law.

43 In the 2020 'Rule of Law Index' of the World Justice Project (WJP), Canada is ranked in the 9th position globally, while the US is ranked 21st.[112] Nevertheless, there is also evidence that US courts, especially civil juries, can show prejudice against foreign investors. The most frequently cited example in this context is the *Loewen*-case,[113] where a foreign investor was faced with punitive damages awarded by a jury in a civil litigation. But, as is clear from the facts of this NAFTA decision, the problem was not the fact that 'excessive' punitive damages (four times the amount of the actual damage) were awarded, but that in the course of the jury trial the court failed to provide a fair trial.[114] Thus, foreign investors may be subject to discrimination,[115] may not receive a fair trial in the domestic courts,[116] or may otherwise be deprived

[110] See, e.g., Schäfer, 'Investitionsschutzklausel in Freihandelsabkommen zwischen USA und EU?' (2014) 5 *ZRP*, 154 (154 f.); Pernice, 'Politisierung der EU nach der Europawahl – Politik zwischen TTIP und TTU' (2014) *EuZW*, 521 (521 f.).

[111] For details, see the UNCTAD database, available at: https://investmentpolicy.unctad.org/.

[112] See, WJP Rule of Law Index 2020, p. 16 available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

[113] *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).

[114] *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 119: 'By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due'.

[115] *S. D. Myers v. Canada*, UNCITRAL (NAFTA), Award (13 November 2000), para. 252: 'The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: - whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals; - whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty'; see also in regard to favoritism in decisions of government officials, The Global Competitiveness Report 2013–2014 (2013), 416; on this index the US lists as No. 54 – behind Turkey, Iran Costa Rica or Serbia.

[116] *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 137: '[…] [T]he whole trial [before a Mississippi court] and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.'

of fundamental rule of law guarantees even in highly developed OECD countries.[117] Furthermore, corruption is taking place not only in developing countries, but also in OECD Member States.[118] As reflected in the 'Corruption Perceptions Index 2020' (CPI) of Transparency International, some of the EU Member States still score below 50% in the corruption perception index.[119]

44 In fact, several EU Member States are listed low in different indexes on corruption, the rule of law and judicial independence. While it may be politically expedient to consider all EU States to conform to the rule of law and to provide sufficient legal protection to their own citizens and to foreigners (including foreign investors), it is a fact that a number of them do not fully live up to the standard of good governance and the rule of law expected from an OECD country: Especially judicial independence is a requirement stemming from the right to an effective remedy (also enshrined in Article 47 of the Charter of Fundamental Rights of the EU[120]) assuring the fairness, predictability, certainty and stability of the legal system in which businesses operate.[121] In the WJP rule of law index, 2020 report, the 'civil justice' system of a number of EU Member States ranked above 50, with Croatia being ranked at 52, Italy at 54, Bulgaria at 56 and the poorest rank been Hungary at 96.[122] According to the ICSID database at the time of writing, these EU Member States are respondents in approximately 49 ISDS disputes either pending or concluded before ICSID, with Croatia and Hungary each involved in 15 cases respectively, while Italy is a respondent in ten cases and Bulgaria in nine cases.[123] This data clearly suggests that foreign investments in these EU Member States are subject to a high risk of future disputes compared to the other Member States with lesser or no record of Investor-State dispute. With a below-par record of access to justice in the aforementioned EU States, the availability of ISDS as a means to an efficient justice system for foreign investors cannot be overemphasised. On adherence to the rule of law, the WJP rule of law index, 2020 report,[124] lists 128 countries in total, of which Bulgaria ranked as number 53, Croatia 39, Romania 32, Greece 40, Hungary 60, Italy 27 and Slovenia 24.

45 It is also worth mentioning that in the 2020 EU Justice Scoreboard, one of the core findings noted is the 'persistent challenges regarding the perception of judicial independence'.[125] Therein, it is further reported that political and governmental interference followed by economic pressure and other specific interests has resulted in a perceived lack of judicial independence in about two-fifths of EU Member States.

[117] See references and examples for misconduct Pahis, 'Corruption in Our Courts: What It Looks Like and Where It Is Hidden' (2009) 118 *Yale L. J.*, 1900.

[118] Liu and Mikesell, 'The Impact of Public Officials' Corruption on the Size and Allocation of US State Spending' (2014) 74(3) *Public Adm. Rev.*, 346.

[119] Transparency International's 'Corruption Perceptions Index 2020', available at: https://www.transparency.org/en/news/cpi-2020-western-europe-eu.

[120] Article 47, Charter of Fundamental Rights of the EU [2000] OJ C364/01: '(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented […].'

[121] Commission Communication, *The 2015 EU Justice Scoreboard*, 9 March 2015, COM(2015) 116 final, 37, available at: http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf.

[122] See, WJP Rule of Law Index 2020, p. 29.

[123] See ICSID Case Database, available at: https://icsid.worldbank.org/cases/case-database.

[124] See, WJP Rule of Law Index 2020, p. 7.

[125] Commission, *2020 EU Justice Scoreboard – Questions and Answers*, available at: https://ec.europa.eu/commission.

Furthermore, the CPI 2020 of Transparency International[126] lists the CPI score of Latvia at 57, Italy and Malta at 53, Greece at 50, Slovakia at 49, Croatia at 47, Bulgaria, Hungary and Romania at 44. Among the accession candidates, Serbia ranks at number 38, Montenegro at number 45, Macedonia at 35, Turkey at 40, and Albania at 36.

46 Different mechanisms of dispute settlement strengthen the degree of compliance in general, and the availability of any means of legal recourse for the individual serves the protection of legal rights. Ideally, such availability alone will contribute to compliance.[127] This is also one of the main ideas of strong individual (subjective) rights in EU economic law, as they are also found in procurement or state aid law as well as in the entire area of fundamental freedoms and their enforcement.[128] Furthermore, the fact that obligations are usually complied with in Canada and most EU Member States as well as the EU itself does not mean that an additional compliance mechanism would be irrelevant.

47 Finally, even sophisticated legal systems in Canada and most parts of the EU alone do not guarantee that non-commercial risk will be dealt with in a non-discriminatory and fair manner before national courts. Therefore, ISDS can serve as a last option for foreign investors. The availability of particular legal remedies is of importance when disputes emerge. The large amount of EU investments in Canada and *vice versa* indicates that investment provisions in FTAs are not a one-way street in favour of either Party. ISDS therefore performs a protective function by helping to reduce non-commercial risks for European investors.

48 The size and complexity of the EU and its Member States, as well as the Canadian government with multiple functions (legislative, executive/administrative and judicial) on different levels (municipal, state/provincial and federal), can act in a number of combinations to the detriment of foreign investors. All political sub-units such as states/provinces and municipalities are bound by investment agreement terms, though.

49 Furthermore, domestic courts enforce domestic rights, but they often do not have jurisdiction to enforce international law directly. In this context, it has to be noted that CETA just like the EU-Singapore FTA explicitly excludes the direct applicability of the agreement.[129] This is particularly noticeable because in many European legal systems – such as those of Germany, the Netherlands and Austria – treaties normally do not only become part of domestic law but can also be directly applied and enforced by domestic courts and tribunals as long as they are sufficiently clear and precise. Thus, such legal orders would generally permit the direct invocation of investment protection standards before their courts. However, the possibility of such direct invocation is explicitly excluded in the CETA by the 'no direct effect' rule. Therefore, because the direct applicability of CETA is excluded, chapters including substantive investment

[126] Transparency International's 'Corruption Perceptions Index 2020', available at: https://www.transparency.org/en/cpi/2020/index/nzl.

[127] See also Gaukrodger and Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', *OECD Working Papers on International Investment, 2012/03* (2012), 10, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

[128] Masing, *Die Mobilisierung des Bürgers zur Durchsetzung des Rechts* (1997); Everling, 'Durchführung und Umsetzung des europäischen Gemeinschaftsrechts im Bereich des Umweltschutzes' (1993) *NVwZ*, 209 (215).

[129] Article 30.6 CETA: 'Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties'; similar, Article 16.16 EU-Singapore FTA 'No Direct Effect': 'For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.'

protection standards are – from an investor's perspective – almost useless without a corresponding ISDS mechanism. In the absence of domestic courts and tribunals being able to directly apply such standards, only recourse to ISDS will effectively permit the invocation and enforcement of investment protection standards. At the same time, the exclusion of direct applicability of CETA standards makes clear that no national court can set aside national legislative measures even if these are not in conformity with CETA's substantive investment protection standards. Thus, the direct relevance of CETA for the national lawmaker is only a limited one.[130] As already mentioned, the ICS cannot set aside national law that is not in conformity with CETA Chapter 8, but can only award compensation.

50 In regard to attracting foreign investment from the EU as well as from Canada, investment protection is at least to be seen as a neutral factor, many economists even argue in favour of a FDI-stimulating effect of ISDS.[131] Thus, in a competition of governments and economic systems, ISDS has to be seen as one (out of many) factor(s) to promote economic activity and attractiveness; more efficient and effective protection will most likely increase FDI into the EU.[132] Often the mere availability of legal recourse for individual investors will deter host states from acting in violation of basic due process principles and will thus contribute to compliance (→ mn. 46). A functioning legal system complying with basic rule of law criteria will in turn be more attractive to foreign investors than a system devoid of such attributes.

51 Furthermore, it is most questionable if in a regulatory competition between the economic superpowers, i.e. the EU, China and the US, the EU can afford to exit the negotiating floor and leave the shaping of a future ISDS mechanism to other players. With a global economic weight equal to one-quarter of global GDP and nearly half of global FDI outflows,[133] the EU's potential in investment negotiations is more than evident. Currently, there is the unique possibility for the EU to influence the development of an ISDS Model Chapter with other countries following suit.

II. Future Termination of EU Member States – Canada Investment Agreements

52 Canada has concluded seven BITs with EU Member States (Croatia, the Czech Republic, Hungary, Latvia, Poland, Romania and the Slovak Republic).[134] Based on these EU Member States-Canada IIAs, there have been approximately seven arbitral

[130] Thym, 'Verhinderte Rechtsanwendung: deutsche Gerichte, CETA/TIIP und Investor-Staat-Streitigkeiten', *Verfassungsblog*, 4 January 2015, available at: http://www.verfassungsblog.de/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten.

[131] For a positive effect within North-South-relations, see UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' in *UNCTAD Series on International Investment Policies for Development* (2009).

[132] On this Bungenberg, 'Internationaler Investitionsschutz im Wettbewerb der Systeme' (2011) *KSzW*, 116.

[133] UNCTAD, *World Investment Report 2012 – Towards a New Generation of Investment Policies* (2012), 85.

[134] Canada – Croatia BIT (1997), entered into force January 2001; Canada – Czech Republic BIT (2009), entered into force January 2012; Canada – Hungary BIT (1991), entered into force November 1993; Canada – Latvia BIT (2009), entered into force November 2011; Canada – Poland BIT (1990), entered into force November 1990; Canada – Romania BIT (2009), entered into force November 2011; Canada – Slovakia BIT (2010), entered into force March 2012.

proceedings up to date, two of which are against Romania,[135] two against Croatia,[136] then one each against Poland,[137] Slovak Republic[138] and the Czech Republic.[139] There have been no arbitral proceedings from EU investors against Canada. Notably, as an outcome of the finalised CETA text in Chapter 8, the existing EU Member States-Canada BITs will have to be terminated once the CETA Investment Chapter enters into force.

53 Following the rules of customary international law as codified in Article 54 of the Vienna Convention on the Law of Treaties (VCLT):

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting States.

54 As far as the existing EU Members States-Canada IIAs are concerned, the consent of all Parties involved to terminate the existing agreements between them is already foreseen in the CETA. According to Article 30.8 (1) CETA:

> The agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.

55 Annex 30-A CETA lists the existing BITs between Canada and the EU Member States identified above, and including the 'Exchange of Notes between Canada and Malta Constituting an Agreement Relating to Foreign Investment Insurance, done at Valletta on 24 May 1982.'[140]

56 Although the CETA has been provisionally applied since 21 September 2017, this provisional application of Chapter 8 is limited to specific provisions which in particular do not include the ISDS provisions.[141] The ISDS provisions along with other provisions of the CETA will only fully and definitively come into force upon final ratification of the agreement by all the EU Member States.

57 Notably, a sunset clause is provided in Article 30.8(2) CETA which guarantees that notwithstanding the termination of the agreements listed in Annex 30-A, a claim may still be submitted under the defunct BITs if the 'challenged treatment' occurred before the agreement was terminated, and not more than three years have elapsed since the termination. Consequently, this provision preserves existing claims pending before ISDS tribunals arising under the BITs listed in Annex 30-A, including future claims provided they meet the aforesaid conditions.

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[135] *Edward and Jak Sukyas v. Romania*, UNCITRAL Ad-Hoc (legal basis, Canada – Romania BIT 2009, case pending); *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31 (legal basis: Canada – Romania BIT, case pending).

[136] *Haakon Korsgaard v. Croatia*, UNCITRAL (legal basis, Canada – Crotia BIT 1997, case pending); *Mr. Nedjeljko Ulemek v. Croatia*, UNCITRAL (legal basis: Canada-Croatia BIT 1997, Award of May 25, 2008 (not public, IAReporter 16/2011 states that all claims were dismissed).

[137] *Lumina Copper v. Republic of Poland*, UNCITRAL (legal basis Canada – Poland BIT 1990, case pending).

[138] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic,* ICSID Case No. ARB/14/14 (legal basis: Slovak Republic/Czechoslovakia-US BIT; Canada-Slovak Republic BIT, case pending).

[139] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL (legal basis: Canada-Czech Republic BIT; all of claimants' claims were dismissed).

[140] See, Annex 30-A CETA.

[141] Notice Concerning the Provisional Application of the CETA, OJ L 238/9, 16 September 2017.

E. The CETA Substantive and Procedural Framework – A Paradigm Change?

I. The CETA Substantive Framework

During the negotiation of CETA, it has been argued by some that this agreement and especially its Investment Chapter would undermine democratic principles of the participating States, especially the right to regulate. An overly-broad investment protection which could be enforced by investors themselves would lead to a 'regulatory chill',[142] whereby sovereign states would be deprived of their right to act and to implement their public policy considerations.[143] During negotiations, all actors and thus also the negotiating teams were obviously constantly reminded that any investment protection should reflect a more balanced approach between public and private interests, and thus limit the Contracting Parties in the exercise of their sovereign 'right to regulate' as little as possible. This 'more balanced approach' that was also pointed out by the CJEU in the *CETA* Opinion (→ mn. 24) is reflected throughout the entire investment chapter, be it the scope of application, the substantive standards or the dispute settlement system. Already Article 8.2 discussing the general scope of application of the Investment Chapter is a balancing exercise between guaranteeing the protection of investors in as many sectors as possible, while ensuring that national interests in sensitive industries, such as entertainment and aviation, are protected and local regulations could continue to determine their functioning. Furthermore, a broad exception for 'activities carried out in the exercise of governmental authority' from market access provisions, performance requirements, and key investment protection standards such as national treatment and most-favoured nation treatment indicates that the Parties wanted to protect their right to regulate and ensure a wide leeway in performance of

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[142] In this vein, see, e.g., the Seattle to Brussels Network in a brief from January 2014, entitled 'Seattle to Brussels Network refutes European Commission's defense of controversial investor-to-state dispute settlement' available at: http://www.tni.org/sites/www.tni.org/files/download/s2b_response_to_dg trade_long.pdf: 'There is clear evidence that proposed and even adopted laws on public health and environmental protection have been abandoned or watered down because of the threat of corporate claims for damages. […] Through regulatory chill effects and the cost of arbitration and awards, ISDS provisions constitute a considerable and growing policy and financial risk. The exponential growth in the number of ISDS cases spurred on by international trade lawyers; frivolous claims; and pressures to shelve regulation under threat of investment claims are systemic flaws'; further on this issue, see Neumayer, 'Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing "Regulatory Chill"' (2001) 4(3) *Int'l. J. Sustain. Dev.*, 231; Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) *J. Int'l Arb.*, 469; Tienhaara, 'Regulatory chill and the threat of arbitration: A view from political science' in Brown and Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011), 606 (607).

[143] See, e.g., a report released on 6 March 2015 by the Sierra Club, Issue Brief, 'No fracking way: how the EU-US trade agreement risks expanding fracking', 5, available at: http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241: 'The proposed investment chapter in the TTIP is expected to include far-reaching rights for foreign investors that could undermine government decisions to ban and regulate fracking. US companies investing in Europe could directly challenge fracking bans or regulations at private international tribunals – potentially paving the way for millions of euro in compensation, paid by European taxpayers'; further on this issue, see The Council of Canadians, 'The CETA Deception 2.0 – How the Trudeau government is misrepresenting CETA' available at: https://canadians.org/sites/default/files/publications/ceta-deception.pdf; see also Eberhardt et al., 'The right to say no: EU–Canada trade agreement threatens fracking bans', The Council of Canadians, *Issue Brief* (May 2013) available at: http://corporateeurope.org/sites/default/files/publications/ceta-fracking-briefing.pdf.

any actions, which are normally considered a part of sovereign functions (→ Art. 8.2 mn. 127).

1. The Scope of Application

59 CETA Chapter 8 contains multiple clarifications and also limitations to the scope of its application compared to previous generations of investment agreements. One of the central issues concerning the scope of application is the question to what extent an IIA should cover different types of investments. On the one hand, CETA retains the broad asset-based definition found, for example, in German and Austrian BITs comprising both portfolio and FDI.[144] Albeit unsurprising, it is an interesting inclusion given the above mentioned limited exclusive competences as regards internal EU powers to negotiate and conclude agreements.

60 Remarkable is the fact that the introductory '*chapeau*' of the investment definition contains language reminiscent of the so-called *Salini* elements,[145] but only in a reduced way, the 'contribution to the development of the host State' is left out, in line with recent investment jurisprudence.[146] Chapter 8 thus can be regarded as a manifestation of the political will of the negotiating Parties to create an additional hurdle ensuring that only a more limited number of 'true' investments will be protected. On the other hand, bondholder claims as controversially discussed since the *Abaclat*[147] and subsequent Argentinian bondholder cases[148] are not excluded. At the same time, Chapter 8 excludes Investor-State claims for debt restructuring.[149]

61 Regarding the scope of application *ratione personae*, Chapter 8 refers to an investor as 'a Party, a natural person or an enterprise of a Party, that seeks to make, is making or has made an investment in the territory of the other Party.'[150] As regards natural persons, the text refers to citizenship; concerning enterprises the main criterion appears to be incorporation. With respect to the latter, Chapter 8 makes clear that mere shell companies incorporated in either of the Parties should not benefit from the investment protection under the agreement. This is done by a definitional clarification excluding enterprises without any 'substantial business activities' in either of the Parties.[151] Notably, Article 8.1 CETA expressly states that an investor also means a 'Party', which suggests that a CETA Party (i.e. Canada, EU or any of its Member States) may also come under the *ratione personae* scope of Chapter 8. However, unlike a 'natural person' or an 'enterprise of a party', the CETA has not clarified the circumstances that must exist for 'a Party' to qualify as an investor within the scope of Chapter 8. In the absence of a clear meaning, the most probable hypothesis is that a Party may qualify

[144] Article 8.1 CETA (Definition of Investment).

[145] See Bungenberg, 'The Scope of Application of EU (Model) Investment Agreements' (2014) 15(3-4) *JWIT*, 402 (415).

[146] See Reinisch, 'From a "*Salini*-light" Test and New Disagreement on Waiting Periods to Clarifications on Expropriation and Fair and Equitable Treatment – ICSID Arbitration in 2013' in Capaldo (ed), *The Global Community. Yearbook of International Law and Jurisprudence 2014: Volume II* (2015), 837.

[147] *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

[148] *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, tribunal constituted on 3 July 2008; *Ambiente Ufficio S.p.A. and others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

[149] Annex 8-B CETA, para. 2.

[150] Article 8.1 CETA (Definition of Investor).

[151] Article 8.1 CETA: 'For the purposes of this definition, an enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or […]'.

as an investor if it concerns a State-Owned Enterprise (SOE) driven by purely commercial objectives (→ Art. 8.18 mn. 51 ff.).

2. Extension of Scope of Application to Admission/Market Access

62 While it was clear that the EU institutions were generally determined to continue a policy of market liberalisation,[152] it was less clear which course to adopt for the future: whether to have separate provisions on market access or to extend national treatment to the pre-investment stage.[153] The CETA text shows that it is primarily the Canadian approach that was pursued. Its national treatment obligation extends to 'establishment, acquisition (and possibly expansion) of investments'.[154] Explicit provisions on market access and the extension of the scope of application of IIAs to the pre-establishment phase is not the norm in international investment law. In this regard, the CETA thus stands in sharp contrast with traditional IIAs by not only extending the scope of application of its non-discrimination standards of protection to the pre-establishment phase but also by including an explicit provision on market access in its investment chapter (→ Art. 8.4 mn. 53). The EU and Canada are prepared to extend market access clauses to the pre-investment phase of foreign investment, and the 'negative list' approach adopted by Article 8.4, in particular, can be interpreted as a strong signal that the Parties seek to achieve rapid and broad market access for their respective investors. Nevertheless, market access remains closely linked to the economic sovereignty of states, which the Parties want to protect. This is especially apparent from the second paragraph of Article 8.4 as well as from its exclusion from the scope of ISDS under the CETA (→ Art. 8.4 mn. 54).

63 The extensive prohibition of mandatory performance requirements in relation to both goods and services is also an innovative step.[155] Moreover, advantage conditioning requirements/non-mandatory performance requirements are prohibited. Article 8.5 of the CETA thus has the features of a so-called 'TRIMS+' Clause pre- and post-establishment.[156] This article clearly reduces the scope of the Parties' possible use of regulatory powers and limits the possible obligations which may be imposed on foreign investors (→ Art. 8.5 mn. 52).[157] Nevertheless, the prohibition of performance requirements is seen as less problematic when an agreement is concluded between Par-

[152] See only Commission Communication, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010) 343 final, 4 f., '[…] our trade policy will seek to integrate investment liberalisation and investment protection'.

[153] See also the discussion in Stephen Woolcock, 'The EU Approach to International Investment Policy after the Lisbon Treaty', Study for the EP Committee on International Trade 2010, 31 f.

[154] See, Article 8.6 CETA; See also, Article 4 Canada 2014 Model FIPA, available at: https://www.italaw.com/sites/default/files/files/italaw8236.pdf.

[155] See, Article 8.5 CETA (Performance Requirements).

[156] For further reference on the different types of prohibition of performance requirements see Nikièma, 'Performance Requirements in Investment Treaties', *IISD Best Practices Series*, December 2014, 7 f. As regards Article 8.5 of the CETA particularly see Bernasconi-Osterwalder and Mann, 'CETA and Investment: What Is It About and What Lies Beyond?' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 339 (354): '[...] Art. 8.5 imposes an extensive series of prohibitions on governments to impose performance requirements on foreign investors. While some of these are already contained in the WTO Agreement on Trade related Investment Measures (TRIMS), they are reiterated and broadened here [...]'.

[157] See also, Bernasconi-Osterwalder and Mann 'CETA and Investment: What Is It About and What Lies Beyond?' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 339 (353).

ties with equal economic strength.[158] Furthermore, the text foresees carve-outs where certain sectors are explicitly exempted from the prohibition of performance requirements such as governmental procurement; air-services; cultural industries (Canada) and audio-visual industries (EU); the Parties' regulatory space can be increased in a tailor-made way (→ Art. 8.5 mn. 55).[159]

64 Finally, Article 8.5 is only subject to State-to-State dispute settlement and not to ISDS. Investors thus cannot claim a violation of Article 8.5 before a CETA tribunal.This is also likely to attenuate the effects of the – substantively – far-reaching performance requirements in Article 8.5 accordingly.

3. The Standards of Protection

65 The very purpose of BITs is to eliminate certain unwelcome State measures, like uncompensated, discriminatory and arbitrary expropriation of foreign investments, violations of basic notions of fairness and equity, as well as a lack of basic protection of foreigners, as they are laid down in the typical IIA provisions of fair and equitable treatment (FET) and full protection and security (FPS), or discriminatory action outlawed by most-favoured-nation (MFN) and national treatment (NT).[160]

66 Every treaty obligation entails some limitation on the actual exercise of sovereignty.[161] But it is also true that investment tribunals have so far emphasised the sovereign right to regulate of host States and held that changes in the regulatory environment or legitimate regulatory actions as such do not normally constitute violations of FET[162]

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[158] See respectively → Art. 8.5 mn. 54; Bernasconi-Osterwalder and Mann, 'CETA and Investment: What Is It About and What Lies Beyond?' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 339 (354).

[159] See also, Nikièma, 'Performance Requirements in Investment Treaties', *IISD Best Practices Series*, December 2014, 16.

[160] Generally on these protection standards, see, e.g., Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *JWIT* 357; Reinisch (ed), *Standards of Investment Protection* (2008); Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (2008), 259 ff., 363 f.; Dolzer and Schreuer, *Principles of International Investment Law* (2012), 130 f.; Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2013); Bungenberg et al. (eds), *International Investment Law – A Handbook* (2015).

[161] See Case of *The S.S. 'Wimbledon'*, *United Kingdom and ors v. Germany*, Judgment, 17 August 1923, PCIJ Series A no 1, (PCIJ 1923), 35: 'The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'

[162] See, e.g., *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 332: 'It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power'; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 177: 'The stability of the legal framework has been identified as *"an emerging standard of fair and equitable treatment in international law.*" However, the State maintains its legitimate right to regulate, and this right should also be considered when assessing the compliance with the standard of fair and equitable treatment'; *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award (21 June 2011), para. 290: '[…] In the Tribunal's understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements'; *Mobil Investments Canada Inc & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 153: 'This applicable [FET] standard

or indirect expropriation. This public policy emphasis is now underlined by the wording of the substantive standards of protection together with an explicit article on the right to regulate.[163] Article 8.9 CETA 'sets the tone' (→ Art. 8.9 mn. 2) for the application and interpretation of the investment protection standards, especially Article 8.9 paras. 1 and 2 CETA operating as a reaffirmation of the sovereign right of States to regulate in the public interest. Although Article 8.9(1-2) CETA does not prevent liability for regulatory measures, it makes simply clear that governments may adopt and maintain the measure – but are obliged to pay compensation if they violate any of the investment protection standards (→ Art. 8.9 mn. 38).

67 The core standards of investor rights may impede regulation where it would lead for example to uncompensated (indirect) expropriation. But they merely restate what host States owe to foreign investors under general international law, especially what is owed under customary international law. The current limited scope of investment protection standards in the CETA is not likely to seriously affect the 'right to regulate' of the states Parties to this agreement. As also the CJEU has confirmed, it is in general unlikely that these standards will compromise the 'right to regulate' of host States.

68 In the unlikely case that an individual investment award could be regarded as such an encroachment on the States Parties' right to regulate, the CETA provides for an immediate treaty remedy, the possibility to correct such an interpretation either by the appellate instance[164] in the specific case or via an agreed interpretation of the Contracting Parties.[165]

69 The core of any IIA or BIT concluded by EU Member States in the past has always been a rather similarly phrased set of substantive treatment standards, that are also all more or less part of CETA Chapter 8: the obligations of FET as well as FPS, the two non-discrimination obligations of NT and MFN, the prohibitions of arbitrary or discriminatory treatment, a guarantee that investors are not expropriated – directly or indirectly – except in the public interest, in a non-discriminatory way, according to due process and under the condition that they receive adequate, prompt and effective compensation. Finally, a 'free transfer of funds' guarantee is also found in Chapter 8, but not the so-called umbrella clause. The Draft CETA contained an EU suggestion[166] on an umbrella clause; however, in the final version, there was no agreement on such

does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Art. 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Art. 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Art. 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.'

[163] Article 8.9 CETA.

[164] See Article 8.28 CETA.

[165] See Article 8.31(3) CETA.

[166] EU: Inserted in square brackets after Article X.9 (Treatment of Investors and of Covered) in the Draft CETA Investment Text of 21 November 2013, see leaked version of the CETA draft text, available at: https://www.laquadrature.net/files/CETA-Draft-Investment-Text-Nov21-2013-203b-13.pdf. The EU has proposed what may have been intended a rather limited umbrella clause, according to which: Article X, '[e]ach Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor'.

a clause. This is not surprising given Canada's general policy not to include umbrella clauses in its IIAs.[167]

70 Nevertheless, the substantive protection standards in CETA's Investment Chapter embody a paradigm shift away from the traditional European BIT text, with almost no explanations, towards a very detailed specification of core concepts of investment protection, such as indirect expropriation, FET, FPS and MFN. Thus, also in this respect, CETA Chapter 8 displays a very cautious approach to investment protection, extending only a low level of protection which inversely implies a large freedom of host States to act and regulate, as will be summarised in this section. Thus, the entire chapter is an interesting example of the potential feedback between treaty-makers and investment tribunals. It is evident that the CETA drafters have incorporated many elements found in arbitration practice, and clarified to which extent they would like to see this practice to be followed – or not – in ISDS cases under CETA.

71 **National Treatment:**[168] With regard to the formulation of the national treatment clause, the CETA text evidences a clear departure from the traditional European national treatment clauses, limited to the so-called post-establishment phase[169] and extends the scope of the national treatment obligation to establishment, acquisition (and eventually expansion) of investments.[170] This clearly shows an attempt to ensure market access/admission obligations by adopting the Canada/US approach to extend national treatment to the establishment phase (→ Art. 8.6 mn. 63). The CETA national treatment clause also departs from the European tradition in so far as it is not fully unqualified, but rather incorporates language, triggering the non-discrimination obligation only 'in like situations'. This also follows US/Canadian BIT traditions[171] and is in line with the wishes of the European Parliament.[172] While useful, this addition will probably not change much, since many investment tribunals adopt a 'like circumstances' or 'like situations' test even in the absence of specific wording.[173] However, Investor-State dispute settlement with respect to breaches of national treatment is only available for the post-establishment phase. The inclusion of the pre-investment phase may have a 'liberalisation' effect, re-enforcing the effects expected from the inclusion of access to the national treatment obligation.

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[167] See Lévesque and Newcombe, 'Canada' in Brown (ed), *Commentaries on Selected Model Investment Treaties* (2013), 53 (60 f.).

[168] See Article 8.6 CETA.

[169] See in general Baetens, 'Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law' in Schill (ed), *International Investment Law and Comparative Public Law* (2010), 279; Bjorklund, 'National Treatment' in Reinisch (ed), *Standards of Investment Protection* (2009), 29.

[170] Article X.7: National Treatment in the Draft CETA Investment Text of 21 November 2013: '1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment [EU: and], acquisition [EU: of an enterprise], [CAN: expansion], conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.'

[171] See e.g. Article 3(1) of the Canadian Model FIPA 2004.

[172] European Parliament, *European Parliament Resolution of 6 April 2011 on the future European international investment policy*, (2010/2203 (INI)), para. 19: 'non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate "in like circumstances"'

[173] See, e.g. *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003), para. 53; see also Reinisch, 'National Treatment' in Bungenberg et al., *International Investment Law – A Handbook*, 846.

Most favoured Nation Treatment:[174] The CETA text clearly limits the scope of the agreement's MFN clause. In the past, non-discrimination clauses requiring host states to extend to foreign investors treatment not less favourable than that given to investors of any third Party have been interpreted by some tribunals to also include procedural or even jurisdictional issues under the so-called *Maffezini* doctrine, with the result that investors could avoid waiting periods before instituting investment claims[175] or even access ISDS by 'importing' the required jurisdiction from third country BITs.[176] While the jurisprudence is unclear in this regard,[177] clarification of the intended scope of MFN clauses in the CETA text gives guidance to dispute settlement under the CETA's ICS. It is clarified that MFN treatment 'does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements.'[178] This clarification will have an important practical impact and, from the perspective of predictability and certainty, will help avoid unnecessary litigation. The CETA MFN text[179] furthermore states that '[s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.'[180] Thus, the provision ensures that tribunals cannot 'import' more favourable substantive treatment obligations from other IIAs.[181] The specifically negotiated limitations of the scope of FET, FPS and indi- 72

[174] See Article 8.7 CETA.

[175] *Emilio Agustín Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000), para. 54: '[…] if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause […].'; several tribunals have adopted this approach, see, e.g., *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (11 May 2005); *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) or *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisiction (3 August 2006); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012).

[176] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction (1 October 2007).

[177] See e.g. *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008), para. 168: 'In the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State' is that the investor's *substantive* rights in respect to the investments are to be treated no less favourable than under a BIT between the host State and a third State. It is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause showing an intention to do this'; see also *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005); *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction (22 August 2012).

[178] Article 8.7(4) CETA: 'For greater certainty, the "treatment" referred to in Paragraph 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements'.

[179] The EU-Singapore Investment Chapter does not contain a MFN-clause at all.

[180] Article 8.7(4) CETA. This clarification was added to an earlier CETA version which did not contain such language. Apparently, it was the Commission's explict intention to deprive an MFN clause of this standard-importing function that investment tribunals have usally attributed to it. See on this issue, Reinisch, 'Putting the Pieces together … an EU Model BIT?' in Bungenberg and Reinisch (guest eds), *The Anatomy of the (Invisible) EU Model BIT* in (2014) 15 *JWIT* 679 (696).

[181] It should be noted that this is contrary to the ordinary understanding of MFN clauses in BITs and multilateral IIAs by investment tribunals. See e.g. *Berschader v. Russian Federation*, SCC Case No.

rect expropriation discussed below cannot be circumvented by reliance on more favourable provisions in Third-Party IIAs.[182] Furthermore, MFN will also be applicable in the pre-investment phase.[183] With this, CETA's MFN clause departs from the MFN provisions traditionally found in bilateral and multilateral investment treaties: the inclusion of the pre-investment phase may have a 'liberalisation' effect, re-enforcing the effects expected from the inclusion of access to the national treatment obligation. However, the explicit exclusion of the 'importation' of more favourable procedural treatment and better substantive treatment will considerably limit the practical use of CETA's MFN clause. Only a standard ensuring that *de facto* treatment of investors of the other Party be no less favourable than that enjoyed by investors from third states is left (→ Art. 8.7 mn. 64).

73 **Expropriation:**[184] Similarly, the right to regulate has been emphasised in the CETA's approach to indirect expropriation. The CETA definition of expropriation expressly acknowledges the 'right to regulate' and makes clear that non-discriminatory measures designed to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

74 The agreement contains a novelty for European investment treaty practice in so far as it includes – like the Model BITs of the US[185] and Canada[186] - an annex on expropriation,[187] which expressly specifies that an indirect expropriation occurs only if 'it substantially deprives the investor of the fundamental attributes of property in its investment.'[188] Additionally, the annex specifically reserves the right to regulate by stating the Parties' shared understanding that:

> […] except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.[189]

75 This CETA understanding sets out that a finding of indirect expropriation requires a case by case, fact-based inquiry and provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with 'distinct, reasonable investment-backed expectations', and the character of the

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080/2004, Award (21 April 2006), para. 179: 'It is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties.'; *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 100: '[…] [T]he Tribunal considers it appropriate to examine the MFN clause in the BIT and satisfy itself that its terms permit the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision.' But it is clearly within the power of the treaty-making Parties to agree on an alternative meaning.

[182] See Hoffmeister and Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT' in Bungenberg and Reinisch (guest eds), *The Anatomy of the (Invisible) EU Model BIT* in (2014) 15 *JWIT* 379 (388): 'Accordingly, while looking restrictive at first sight, excluding the incorporation of other normative standards into the operation of an MFN clause is actually preserving the political freedom of the EU to strive for the best available standards on the basis of full reciprocity with all its treaty partners.'

[183] In the November 2013 version of the leaked CETA text, it is indicated that the current formulation is '[s]ubject to agreement by EU on inclusion of an MFN obligation regarding "establishment, acquisition, expansion of an investment"'. Article X.8: Most-Favoured-Nation Treatment in the Draft CETA Investment Text of 21 November 2913.

[184] See Article 8.12 CETA and Annex 8-A CETA.

[185] Annex B of the US Model BIT 2012.

[186] Annex B.13(1) of the Canada Model BIT 2004.

[187] Annex 8-A CETA.

[188] Annex 8-A(1)(b) CETA.

[189] Annex 8-A(3) CETA.

measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation. Finally, the understanding contains police powers doctrine-inspired language, trying to ensure that *bona fide* regulation in the public interest should not be considered expropriatory.[190] This is in line with the November 2013 Commission Factsheet on 'Investment Protection and Investor-to-State Dispute Settlement in EU agreements' which specifically stated that:

> future EU agreements will provide a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation. In particular, when the state is protecting the public interest in a non-discriminatory way, the right of the state to regulate should prevail over the economic impact of those measures on the investor.[191]

But it seems that not only the Canadian approach was adopted, but at the same time, the wishes of the European Parliament to find a 'clear and fair balance between public welfare objectives and private interests' in defining indirect expropriation were taken into consideration.[192] As a consequence, the CETA adopts an approach on indirect expropriations that allows for a certain balancing between the interests of the investor and the State, which implies a proportionality test (→ Art. 8.12 mn. 152). **76**

Fair and Equitable Treatment:[193] The novel definition of FET makes this standard more predictable. It ensures that only a low-intensity scrutiny will be performed and that states retain broad regulatory freedom. The CETA Investment Chapter contains a clarification of the meaning of FET which is based on past investment awards, but emphasises those elements that give host states greater regulatory freedom. The usual short FET clause stipulating that '[e]ach Party shall accord in its territory to investors and to covered investments of the other Party fair and equitable treatment'[194] is accompanied by a paragraph defining a breach of the FET obligation. This provision underlines that only egregious violations of basic rule of law obligations by host States, such as: **77**

> Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; [or] Abusive treatment of investors, such as coercion, duress and harassment,

will qualify as breaches of FET.[195] Similar to the annex on indirect expropriation, these specifications of FET are supposed to make the standard more predictable. States at the same time retain large regulatory freedom and are also subjected to only a low rule of law-scrutiny as regards their judicial and administrative acts. The fact that the notion 'stability', an element usually found in attempts to define the content of FET,[196] is

[190] Annex 8-A(3) CETA: 'For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.'

[191] Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements - Fact Sheet* (November 2013), p.2, available at https://www.italaw.com/sites/default.

[192] European Parliament, *European Parliament Resolution of 6 April 2011 on the future European international investment policy*, 2010/2203 (INI), para. 19, calling for 'protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests'.

[193] See Article 8.10 CETA.

[194] See Article 8.10(2) CETA.

[195] Article 8.10(2) CETA.

[196] Dolzer and Schreuer, *Principles of International investment Law* (2008), 145 f.

missing in the CETA text could be viewed as an indication that the Parties intended not to make the CETA's FET version too 'investor-friendly'. It seems to underline the intention, expressed in the November 2013 Commission Factsheet, to 'reaffirm the right of the Parties to regulate to pursue legitimate public policy objectives' and to 'set out precisely what elements are covered and thus prohibited' by FET in EU investment agreements.[197] Such mutual interdependence of treaty-makers and investment tribunals is also emphasised by a provision in the CETA FET clause that offers the Contracting Parties a possibility to review and clarify the specific content of FET by adding further elements.[198] Thus, under the CETA FET clause, the FET 'evolution' has effectively been *stopped* with the specific enumeration of elements contained in the FET clause (→ Art. 8.10 mn. 34). Especially, the establishment of a permanent Tribunal of first instance and an Appellate Tribunal[199] will ensure that the same adjudicators decide on every case, thereby allowing for a more consistent and coherent jurisprudence with regards to the FET standard (→ Art. 8.10 mn. 35).[200]

78 **Full Protection and Security:**[201] CETA's FPS standard has limiting elements as well. 'Full protection and security' is limited to 'physical security',[202] apparently countering jurisprudence according to which some tribunals held that the standard would go 'beyond physical security.'[203] It is questionable though whether this will imply a significant reduction of protection for investors since most non-physical interferences often constitute violations of the FET standard.

79 **Transfer Provisions:**[204] There has always been a broad consensus that EU investment treaties should include free transfer of funds-provisions.[205] Thus, Chapter 8

[197] Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements - Fact Sheet* (November 2013), p. 2, 7 f.

[198] See Article 8.10(3) CETA: 'The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment', in conjunction with Article 8.44(3)(d) CETA.

[199] Articles 8.27, 8.28. See, Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals' (2016) 7(3) *J. Int'l Disp. Settlement*, 628 (631); Van Harten, 'ISDS in the Revised CETA: Positive Steps, But Is It a 'Gold Standard'?' (2016) CIGI Investor-State Arbitration Commentary Series No. 6; Van Duzer, 'Investor-State Dispute Settlement in CETA: Is It the Gold Standard?' (2016) C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44.

[200] See on this also Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals' (2016) 7(3) *J. Int. Dispute Settlement*, 628 (631).

[201] See Article 8.10(1),(5) CETA.

[202] Article 8.10(5) CETA: 'For greater certainty, "full protection and security" refers to the Party's obligations relating to physical security of investors and covered investments.'

[203] See, e.g., *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award (6 February 2007), para. 303: 'the obligation to provide full protection and security [was] wider than "physical" protection and security' because it was 'difficult to understand how the physical security of an intangible asset would be achieved'; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award (20 August 2007), para. 7.4.15: 'If the parties to the BIT had intended to limit the obligation to "physical interferences", they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.'

[204] See Article 8.13 CETA.

[205] Commission Communication, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010) 343 final, 4, 9, 'EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.'; see also Council Negotiating Directives (Canada, India and Singapore), 'EU-Canada (CETA), India and Singapore FTAs - EC negotiating mandate on investment (2011)', available at: http://www.bilaterals.org/spip.php?article20272&lang=en.

contains a standard transfer clause according to which '[e]ach Party shall permit all transfers relating to a covered investment to be made without restriction or delay and in a freely convertible currency.'[206] Compared with other transfer clauses found in BITs and IIAs, the CETA provision contains a number of exceptions that have become more widespread in recent times,[207] such as those exempting measures relating to bankruptcy, trading in securities, criminal offences and administrative and adjudicatory proceedings.[208]

4. Exemptions, Reservations and Denial of Benefits

80 Furthermore, reservations, exceptions and denial of benefits clauses can be seen as proof for the 'Return of the State' in International Investment Law. Also, CETA's Reservations and exceptions article ensures the right to regulate. A Party is able to reserve for itself any regulatory space it needs for its own policy planning, recognises and maintains the flexibilities found in the TRIPS Agreement and further exempts procurement and subsidies from the Investment Chapter's non-discrimination disciplines (→ Art. 8.15 mn. 69). Finally, the CETA's denial of benefits clause in Article 8.16 stands out in a number of ways when compared to the ones included in key agreements that Canada and the EU have entered into (→ Art. 8.16 mn. 83). The CETA Parties were willing to let go of the benefits of a discretionary mechanism in favour of a clear right to deny investor protection under the treaty if the enterprise is owned or controlled by investors from a third country, not one of the Contracting Parties and/or if the Party has security or other measures in place against the third country that 'prohibit transactions' (e.g. no diplomatic relations, embargo).

5. Interim Conclusion

81 Thus, it can be summarised that the still existing relative indeterminacy of investment protection standards in other IIAs, which might give rise to a broad discretion of investment tribunals, has been reduced in the CETA text (as well as the EU-Singapore IPA, which contains clarifications of the meaning of expropriation as well as FET). All this will limit the discretion of the adjudicators in future disputes. CETA thus witnesses significant changes at least compared to the previous EU Member States' approaches. Thus, the question is not whether investment chapters and ISDS reduce the sovereign discretion of States to act as they see fit; but the question rather is whether they do so to a degree that unduly limits the legitimate interests of states to exercise their right to regulate. As pointed out above (→ mn. 24), the CJEU denied such an effect.

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[206] Article 8.13(1) CETA.

[207] UNCTAD, *Bilateral Investment Treaties 19952006: Trends in Investment Treaty Rulemaking* (2007), 62.

[208] Article X.12(5): Transfers in the Draft CETA Investment Text of 21 November 2013:

Notwithstanding paragraphs 1, 2 or 3, nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

II. The CETA Procedural Framework (Investor-State Dispute Settlement)

1. General Considerations and Background

82 ISDS has long been considered a crucial ingredient of effective investment protection. The direct access of private Parties to seek remedies for violations of substantive investment treatment standards has been regarded as an important contribution to enhancing the effectiveness of investment protection[209] by eliminating the need for an espousal of claims under the traditional diplomatic protection paradigm. At the same time, avoiding the political harassment factor of such inter-State claims is considered to lead to a general de-politicisation of investment disputes.[210] ISDS has de-politicised the traditional protection of foreign investments through diplomatic protection on the inter-State level and contributed to the legalisation and judicialisation of such disputes. Instead of depending on the political discretion of States which, once they espouse the claims of their national investors, may exercise very intensive pressure on host States, investors have the option to enforce their rights directly through ISDS.

83 Despite the general recognition of these advantages, it was initially, i.e. after the entry into force of the Lisbon Treaty's new investment powers of the EU, unclear whether the EU would strive for ISDS or rather settle for inter-State dispute settlement, along the trade law paradigm to which the Commission has become accustomed over years of GATT and WTO experience. After an initial orientation phase, the EU institutions finally came out in favour of adopting ISDS,[211] though the European Parliament, in particular, voiced concern against it.[212] Coupled with increased pressure from various NGOs, lobbying against ISDS in 2013, this led to a political momentum that in early 2014 the EU Commissioner called for a reflection period to consult the European public on investment and ISDS.[213]

84 The charges against ISDS are not new and consist of a mix of serious concerns and irrational assumptions. Among the standard points of criticism are the lack of transparency of ISDS procedures, the impossibility to appeal against investment decisions, the alleged pro-investor bias of tribunals, and overly broad investor rights

[209] See e.g. *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007), para. 165: 'Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state'; *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006), para. 49: '[…] assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.'

[210] See already Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Rev.–FILJ*, 1.

[211] See e.g., Commission Communication, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010) 343 final, 4, 10: 'ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.'

[212] European Parliament, *European Parliament Resolution of 6 April 2011 on the future European international investment policy*, (2010/2203 (INI)), para. 24: 'Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements.'

[213] See Commission, 'Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement', *Press Release*, 21 January 2014, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_56.

which would lead to a chilling effect on legitimate regulation by sovereign States.[214] This debate questioning the need for ISDS in future EU IIAs is surprising since EU Member States have a long-standing practice of concluding BITs.

85 What the critics of Investor-State arbitration appear to overlook are the multiple developments in investment arbitration over the past years. In 2006, the ICSID Arbitration Rules were amended to provide more transparency, now permitting *amicus curiae* participation and more general publication of awards.[215] In a similar effort, UNCITRAL adopted Rules on Transparency in Investor-State Arbitration in 2013.[216] Though the lack of an appellate structure is typical in international dispute settlement as well as in transnational arbitration, much time and effort have been spent on considering whether some form of appeal would be feasible. While grand designs of amending the ICSID Convention have not been pursued,[217] many small steps have been taken to ensure the ultimate goal of more consistency, such as appellate mechanisms in individual IIAs and the use of joint commissions consisting of representatives of the Contracting Parties empowered to give authoritative interpretations of IIAs.[218]

86 Already the CETA draft chapter on investment before the change towards an Investment Court System was a good example of this tendency. The November 2013 Draft CETA text on ISDS[219] clearly demonstrated mutual efforts of the negotiators to agree on a balanced and modern version of investment dispute settlement, including alternative dispute resolution mechanisms like mediation, non-disputing Party participation through *amicus curiae* briefs, a standing 'ISDS Committee',[220] tasked with interpreting the investment chapter, preventing investors from bringing multiple or frivolous claims by imposing heavy litigation cost risks, and introducing a binding code of conduct for arbitrators in order to reduce conflicts of interest.[221]

87 Further, all official documents published by the EU have included ISDS as an integral part of future investment chapters to be concluded by the EU. Since CETA and the EU-Singapore IPA explicitly exclude their direct applicability, the rights contained therein cannot be invoked before national courts and tribunals. Thus, an investment chapter without a corresponding ISDS mechanism is, from an investor's perspective, of limited use.

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[214] See e.g., Monbiot, 'This transatlantic trade deal is a full-frontal assault on democracy', *The Guardian*, 4 November 2013, available at: http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy.

[215] *Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, effective 10 April 2006, available at http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf (17 February 2014). See also Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 *ICSID Rev.–FILJ*, 427.

[216] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, adopted by UN GA Res. 68/109, 16 December 2013, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf.

[217] See ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper, 22 October 2004; Sauvant and Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (2008).

[218] See e.g. NAFTA Article 1131 or Article 31 of the 2012 US Model BIT.

[219] CETA 'Investor-to-State Dispute Settlement Draft Text', leaked version of the CETA draft text of 15 November 2013, available at: https://www.laquadrature.net/files/Draft-CETA-DisputeSettlement.

[220] CETA 'Investor-to-State Dispute Settlement Draft Text', leaked version of the CETA draft text of 15 November 2013, Article X-12(3) Applicable Law and Rules of Interpretation and Article X-26(3) Committee, ISDS Draft Text.

[221] See also Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements - Fact Sheet* (November 2013), p. 2, evidencing the Commission's intention to continue this course of action.

88 As mentioned above, since late 2015, the EU Commission has included in all proposals for Investment Protection and Resolution of Investment Disputes (TTIP,[222] CETA,[223] EU-Vietnam[224]) an ICS which is a two-tier mechanism for ISDS, combining elements of traditional ISDS with judicial features.[225] In CETA, the ICS was included only during the 'legal scrubbing' and was found the first time in the very final version of CETA Chapter 8. Preceding that, the classical arbitration based ISDS was the negotiated CETA option.

2. Scope of Application and Jurisdiction of the ICS

89 Article 8.18 sets out the scope of the CETA Investor-State dispute settlement regime, expressly limiting actionable investment claims to specific treaty breaches. This approach differs from the ISDS clause found in older IIAs like the ECT.[226] An investor cannot bring claims relating to the acquisition or establishment of an investment.[227] Having a business activity in the territory of a Party is a critical condition to qualify as a protected 'investor'.[228] A 'shell' or 'mailbox' company cannot bring a claim under Chapter 8, and an investor who seeks access to the ICS for a claim must come with 'clean hands', as investments tainted by fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process, may not be submitted under Article 8.18.[229] The scope of actionable investment claims curtails the discretionary power of CETA tribunals in exercising jurisdiction over unintended claims falling outside the scope of Article 8.18 CETA.[230]

90 The mediation provisions were inserted in order to respond to a growing desire for settling Investor-State disputes and, more generally, disputes arising under CETA through alternative settlement mechanisms (→ Art. 8.20 mn. 78). Article 8.20 CETA serves the purpose of facilitating the finding of a mutually agreed solution of a dispute between an investor and a State through a comprehensive and expeditious procedure with the assistance of a mediator.[231]

91 Article 8.25 states explicitly the Parties consent to ISDS via the ICS, thus, it attempts to ensure that the respondent's consent in Paragraph 1 and the matching consent of the investor meet the respective criteria for arbitration agreements under the ICSID Convention and the New York Convention (NYC).

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[222] Bungenberg and Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2020), para. 42.

[223] See Article 8.29 CETA, Establishment of a multilateral investment tribunal and appellate mechanism.

[224] See Article 3.41 EU-Vietnam IPA (Final Text as on 2 April 2019).

[225] Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? — The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19(4) *J. Int'l Econ. L.*, 761.

[226] Article 26(1) ECT provides for the submission of disputes '*relating to an Investment*', this is a broad term without specifiying particular treaty claims.

[227] Canada's statement on the implementation of CETA, Chapter 8 (Section f), available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/canadian_statement-enonce_canadien.aspx?lang=eng#a13.

[228] Article 8.1 CETA (See: Definition, an enterprise of a Party).

[229] Article 8.18 para. 3 CETA.

[230] Article 8.18 para. 5 CETA, confirms that a CETA tribunal shall not decide a claim that falls outside the scope of Article 8.18.

[231] Article 1, Annex 29-C CETA.

3. Establishment of the ICS – A General Overview

The ICS is composed of the 'Tribunal' as a tribunal of first instance[232] and the 'Appellate Tribunal'[233] or 'Appeal Tribunal'.[234] Members of these tribunals are selected in a manner different from that in traditional investor-State arbitration (ISA), with investors losing their influence on the appointment of adjudicators. Article 8.27(2) CETA stipulates that the 15 Members of the Tribunal shall be appointed by the bilateral high-level CETA Joint Committee,[235] for a renewable five-year term. Five of the Members of the Tribunal shall be nationals of EU Member States, five shall be nationals of Canada, and the other five shall be third-country nationals. Similar mechanisms are foreseen in the EU-Singapore,[236] and EU-Vietnam-Agreements,[237] only that there we find a different number of adjudicators. **92**

Qualifications for appointment resemble those of other international courts and tribunals by requiring specific knowledge in the field. In particular, Article 8.27(4) CETA warrants that the Members of the Tribunal shall possess 'qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence', and they shall have demonstrated expertise in the field. The adjudicators should especially be capable of balancing public and private interests.[238] Similar provisions are contained in the EU–Vietnam IPA and are suggested for TTIP.[239] **93**

In recent years ethical issues emerged in ISDS. In the CETA, adjudicators are prevented from having any governmental affiliation and from taking instructions from others concerning matters related to disputes. Tribunal Members are to avoid conflicts of interest and are explicitly required to comply with the ethical rules derived from the IBA Guidelines on Conflicts of Interest and supplemental rules such as a CETA Code of Conduct; similarly, 'double hatting' is excluded[240]. Notably, including the IBA Guidelines in the CETA framework 'is a kind of daring experiment, which has rarely been replicated within the investment regulatory field.' (→ Art. 8.30 mn. 113). **94**

Individual cases shall be adjudicated by 'divisions' of three Members of the Tribunal with third-country nationals presiding over such tribunals.[241] These three Members of the Tribunal are to be appointed by the President of the Tribunal on a yet-to-be specified 'random and unpredictable' rotation system.[242] This case-allocation mechanism is a truly novel feature and is similar to that found in some domestic judicial systems.[243] It is clearly different from the traditional ISA approach where the disputing Parties are **95**

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[232] See Article 8.27 CETA.

[233] See Article 8.28 CETA.

[234] See Article 3.39, Section B - EU–Vietnam IPA.

[235] Pursuant to Article 26.1 CETA, the CETA Joint Committee shall be composed of 'representatives of the European Union and representatives of Canada' and 'co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees'.

[236] Article 3.9 para. 2, EU-Singapore IPA, available at https://eur-lex.europa.eu/resource.html?uri=/DOC_2&format=PDF#page=29.

[237] Article 3.38 para. 2, EU-Vietnam FTA.

[238] See Article 8.28 CETA.

[239] Article 3.38 para. 4, Section 3 EU–Vietnam IPA; Article 9(4), Section 3, Commission draft text TTIP – Investment, 16 September 2015, available at:https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[240] See Article 8.30 para. 1 CETA.

[241] See Article 8.27(6) CETA.

[242] See Article 8.27(7) CETA.

[243] Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? — The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19(4) *J. Int'l Econ. L.*, 761 (764).

free to select 'their' arbitrators,[244] partly subject to the condition that they should not be nationals of the disputing Parties.[245]

96 The ICS also incorporates the 2013 UNCITRAL Rules on Transparency in Treaty-based ISA.[246] Under these Rules, the repository promptly makes 'available to the public information regarding the name of the disputing Parties, the economic sector involved and the treaty under which the claim is being made' upon commencement of the arbitration proceedings.[247] A broad range of documents relating to the case should be published, including the statement of claim and defence, any written submission and the award.[248] Canada aimed for a high degree of transparency already in the past, while the EU Member States have always showed more reluctance (→ Art. 8.36 mn. 18 f.). The ICS also provides for Third-Party and *amicus curiae* participation. This permits, for instance, a non-disputing Party to the treaty (i.e. usually the home State of the investor) to participate,[249] and also 'any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party.'[250] Further, tribunals may allow NGOs to submit *amicus curiae* briefs.[251] Overall, such transparency may contribute to the legitimacy of the investment treaty regime, even as it also catalyses the regime's more fundamental transformation (→ Art. 8.36 mn. 66). There is an obligation to disclose Third-Party-Funding (TPF) as well.[252]

97 Awards rendered by the Tribunal (of first instance) can be appealed to the 'Appellate Tribunal' within 90 days of their issuance.[253] The appeal system enlarges the annulment grounds of the ICSID Convention[254] with the power to review errors of law and manifest errors in the appreciation of facts.[255] Based on these grounds, the Appellate Tribunal may uphold, modify or reverse the Tribunal's award. If the Appellate Tribunal rejects the appeal, the Tribunal's award becomes final.[256] If the appeal is upheld, the Appellate Tribunal can wholly or partially modify or reverse

[244] See e.g. Article 9 UNCITRAL Arbitration Rules, as revised in 2013, available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[245] See e.g. Article 38, 39 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, signed on 18 March 1965, entered into force 14 October 1966, 575 UNTS 160. Section 39 ICSID provides: 'The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.'

[246] UNCITRAL, Rules on Transparency in Treaty-based Investor–State Arbitration (2013), available at:
https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf; Article 18, Section 3 – Commission Draft Text TTIP; Article 8.36 CETA; Article 3.46, Section 3 - EU–Vietnam IPA.

[247] Article 2, UNCITRAL Transparency Rules (2013).

[248] Article 3(1), UNCITRAL Transparency Rules (2013).

[249] Article 22, Section 3 - Commission Draft Text TTIP; Article 8.38 CETA.

[250] Article 23(1), Section 3 - Commission Draft Text TTIP.

[251] Article 23(5), Section 3 - Commission Draft Text TTIP.

[252] See Article 8.26 CETA.

[253] See Article 8.28(9)(a) CETA; Article 29(1), Section 3 - Commission Draft Text TTIP; Article 28(1), Section 3 – EU–Vietnam IPA.

[254] See Article 52(1) ICSID Convention, in force 14 October 1966.

[255] Article 8.28(2) CETA; Article 29(1), Section 3 - Commission Draft Text TTIP; Article 28(1), Section 3 - EU–Vietnam IPA.

[256] Article 29(2), Section 3 – Commission Draft Text TTIP; Article 8.28(9)(c)(ii) CETA; Article 29(2), Section 3 - EU–Vietnam IPA.

the legal findings and conclusions in the original award.[257] However, the Appellate Tribunal does not itself render a modified final award. Rather, the first instance Tribunal subsequently has to issue a revised award within 90 days of receiving the report of the Appellate Tribunal.[258]

Introducing a 24-month time limit in Article 8.39 for the issuance of the final award may provide a useful tool to request more time discipline, from the Tribunal and the Parties (→ Art. 8.39 mn. 112). **98**

4. Applicable Law, Content of Awards and their Enforceability

The applicable law-limitations in Article 8.31 are a reaction to the backlash against ad hoc investment arbitration and the CJEU jurisprudence on the autonomy of EU law (→ Art. 8.31 mn. 75 f.). This provision makes clear that the Contracting Parties have specific expectations on how claims under Section F should be settled and implicitly bars domestic and EU law from the set of laws potentially applicable. Together with the explicit reference to the VCLT, this is meant to limit the power of the Tribunal; furthermore, it provides methodological guidance on how the Tribunal must consider issues related to domestic law (→ Art. 8.31 mn. 76). The requirements set out by the CJEU in the *CETA* Opinion 1/17 will shape the functioning of the provision in practice (→ Art. 8.31 mn. 77). Article 8.31 provides directives and formulates expectations towards the Tribunal. Furthermore, the Contracting Parties can always use their interpretative powers as a remedy. **99**

Also Article 8.39 - dealing with the 'final award' - is 'remarkably extensive in comparison to traditional BITs and other FTAs', again reflecting 'the heated debates, which accompanied the CETA negotiations in particular in the last phase' (→ Art. 8.39 mn. 108). Punitive damages are not allowed, any monetary damages must not be greater than the loss suffered by the investor, and any restitution of property, or repeal or modification of the measure will have to be taken into account in the calculation of damages. Overcompensation should thus be avoided. With respect to costs, the 'loser pays'-principle is opted for and should provide comfort to governments when defending themselves against unmeritorious claims (→ Art. 8.39 mn. 111). **100**

Whether Article 8.41 CETA gives sufficient enforcement options of ICS awards in the hopefully exceptional case that the losing Party to a dispute is not willing to comply with its obligation is questionable and remains to be seen. Whether courts in third states are willing to regard ICS awards as being covered by at least the NYC is an open question. **101**

The ICS approach taken by the CETA Contracting Parties is ambiguous; it seeks to abandon investment arbitration, while striving to use its enforcement instruments. At the outset, in case of enforcement under the ICSID Convention as well as the NYC, the enforcing courts are responsible for the interpretation and application of those conventions. As long as enforcement is sought within the EU or Canada, investment dispute settlement under CETA might work. On the European side, if an EU Member State is not willing to comply with an award, this could even lead to infringement proceedings under Article 258 and 259 TFEU, launched either by the Commission or other EU Member States. Moreover, if a CETA Party does not comply with its **102**

[257] Article 29(2), Section 3 – Commission Draft Text TTIP; Article 8.28(2) CETA; Article 28(3), Section 3 - EU–Vietnam IPA.

[258] Article 28(7), Section 3 – Commission Draft Text TTIP; Article 29(4), Section 3 - EU–Vietnam IPA; Article 8.28(7)(b) CETA.

obligation under the Agreement, the possibility of State-to-State Arbitration under Chapter 29 CETA could also be triggered.

103 As a step towards a totally new and innovative approach, the idea of a Multilateral Investment Court (MIC) was introduced in the spring of 2016 by the European Commission. This new international dispute settlement mechanism should provide a response to various criticisms made in recent years, especially in connection with CETA and TTIP, of international investment law in general and of ad hoc arbitration between investors and States in particular. The MIC was first mentioned by Commissioner *Malmström* in the INTA Committee on 18 March 2015 and at the informal Foreign Affairs Council on 25 March 2015.[259] On 10 July 2017, UNCITRAL also decided to work on a reform of investment arbitration, including the possible establishment of a MIC.[260] On 20 March 2018, the Council gave the EU Commission a mandate to negotiate the establishment of such a multilateral court for investment disputes.[261]

104 Some of the recent trade agreements of the European Union (Canada, Mexico, Singapore, Vietnam) have already provided that the Parties are seeking a multilateral system to transfer the bilateral investment court system:

> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[262]

105 The European Parliament also 'shares the ambition of establishing, in the medium term, a multilateral solution to investment disputes'.[263] At the same time, it rejected the possibility of continuing the classic ad hoc arbitration.[264] The new EU approach is currently being explained to the trading partners of the EU to convince them of an MIC. However, this task will also come to the EU Member States when civil society pressure continues to grow. Certainly, the only way to an institutionalised system is one that makes Member State investment protection agreements compatible with the EU constitutional law requirements.

106 Therefore, many discussions and publications are currently revolving around this MIC.[265] However, according to the CJEU's *CETA* Opinion, the EU can only participate

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[259] Malmström, Speech: Remarks at the European Parliament on Investment in TTIP, 18.3.2015, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1279&title=Speech-Remarks-at-the-European-Parliament-on-Investment-in-TTIP.

[260] See UNCITRAL Working Group III discussions on ISDS reform, available at: https://uncitral.un.org/en/working_groups/3/investor-state.

[261] See Council of the EU, Negotiating Directives for the Establishment of a Multilateral Court for the Resolution of Investment Disputes, 20 March 2018, available at: http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/de/pdf.

[262] Article 8.29 CETA. Similarly, see Article 15, Section 3 EU-Vietnam IPA; Article 3.12 EU-Singapore IPA.

[263] European Parliament, *European Parliament Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment*, (2015/2105(INI)), available at: https://www.europarl.europa.eu/doceo/document/A-8-2016-0220_EN.html, para. 68.

[264] European Parliament, *European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, (2014/2228(INI)), para. 2.d)xv).

[265] Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', CIDS Supplemental Report (2017); Bungenberg and Reinisch, *Von bilateralen Schieds- und Investitionsgerichten zum multilateralen Investitionsgerichtshof* (2018); Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 *YB. Eur. L.*, 209; Happ and Wuschka, 'From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma' (2017) 6(1) *Indian J. Arb. L.*, 113; Calamita, 'The (In)Compati-

in such a MIC if this new dispute settlement mechanism fulfils certain conditions.[266] Even before this Opinion, the Court had very clearly emphasised the autonomy of EU law.[267] This meant, among others, that the EU could not accede to the ECHR.[268] With the *Achmea* decision,[269] the CJEU recently ruled against the admissibility of bilateral intra-EU investment treaties and the settlement of disputes based thereon, largely on grounds of upholding the autonomy of EU law. Consequently, approximately 150 intra-EU BITs must now be terminated by the Member States.[270]

Up to now, the reform discussions in UNCITRAL WG III are still ongoing; the authors of this contribution have submitted a first Draft Statute to UNCITRAL in October 2020.[271] The draft Statute is meant to stimulate discussions and to demonstrate that it is possible to create a MIC on the basis of a treaty. The institutional and general legal setting of this Draft Statute advocates for the establishment of an international organisation based on a treaty, open to States as well as to international organisations. The Statute prescribes the MIC's jurisdiction over investor-State as well as State-to-State disputes. By joining the MIC, Members recognise its international and domestic legal personality, accord it with the privileges and immunities required for its independent functioning and contribute to its budget. The Draft Statute also provides for a bench of judges (sitting as a Court of First Instance and an Appellate Court), a Secretariat, a Plenary Body and an Advisory Centre. The Statute envisages that judges will be appointed for a longer period of time, be independent as well as impartial, and highly qualified. The proposed mechanism for the selection of judges is premised on the need to ensure that all regions and major legal systems are adequately represented. The Draft Statute expressly enshrines the rule of law, transparency, efficiency, consistency and Members' right to regulate. It contains the fundamentals of procedure and incorporates, inter alia, the UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration. The MIC may regulate its own rules of procedure in greater detail and adapt to the specific needs of future disputes. With regard to the enforceability of MIC decisions, the Statute foresees a treaty-based obligation of all MIC Members to recognise and enforce them. Arrangements on enforcement in third States can be foreseen in a separate treaty. The new enforcement system also provides for the establishment of an enforcement fund. **107**

5. Interim Conclusion

Not only is this agreement giving a new approach by shifting from arbitration to a court-like system of adjudication, but also various new elements are introduced in the ISDS Part of the Chapter, be it the general transparency obligations, including TPF, the scope of the applicable law, the content of the award and finally the cost allocation. **108**

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bility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 *JWIT*, 585; Wilske et al., 'The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?' (2018) 6(2) *Indian J. Arb. L.*, 79.

[266] See on the CJEU CETA Opinion 1/17: Bungenberg and Titi, CETA Opinion – Setting Conditions for the Future of ISDS, *EJIL:Talk!*, 5 June 2019, available at: https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/#more-17254.

[267] See already CJEU, Opinion 1/91, 14.12.1991, ECLI:EU:C:1991:490, paras. 30 f.; CJEU, Opinion 1/09, 8.3.2011, ECLI :EU:C:2011:123, para. 67.

[268] CJEU, Opinion 2/13, 18.12.2014, ECLI:EU:C:2014:2454.

[269] CJEU, Case C-284/16, 6.3.2018, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.

[270] Commission, *Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment*, 19 July 2018, COM(2018) 547 final.

[271] Bungenberg and Reinisch, *Draft Statute of the Multilateral Investment Court* (2021), available at : https://www.nomos-elibrary.de/10.5771/9783748924739.pdf?download_full_pdf=1.

Some of these new elements can be attributed to a more 'rule of law'-oriented system, some others can be seen as more State-friendly provisions, for instance, the explicitly limited scope of claims that may be submitted against a Party.

F. Conclusion: The New EU Approach – A Change of Paradigms?

109 The CETA Investment Chapter may serve as an important template also for future EU investment agreements and thus deserves close scrutiny. A careful consideration of the CETA Chapter 8 text indicates that a change of paradigms did take place, that needs to take effect with the Chapter's full entry-into-force (→ mn. 39).

110 The first EU investment chapter in a broader trade agreement is taking up a number of 2004 US/Canada Model BIT-inspired additions, as well as new features such as further details concerning the exact meaning of FET and other standards, as well as a completely new ISDS approach. The additional wording within the substantive standards will probably serve as useful guidance to adjudicators in determining whether breaches of investment standards have occurred. But whether the modifications will lead to an overall increase or decrease of investment protection and whether they will enlarge or narrow down the regulatory space of host States will ultimately depend upon the application of the agreement by individual investment adjudicators.

111 An even more drastic step would be the establishment of a MIC – but this fundamental change of ISDS is a long way down the road.