SEMINAR PAPER

THE ‘RIGHT TO REGULATE’ IN CETA’S INVESTMENT CHAPTER - FAIR AND EQUITABLE TREATMENT, EXPROPRIATION AND INTERPRETATIVE POWERS.

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ABBREVIATIONS

Art.	Article
BIT	Bilateral Investment Treaty
CA Model BIT	Canadian Model Bilateral Investment Treaty
CETA	Comprehensive Economic Trade Agreement (between Canada and the EU)
ECJ	European Court of Justice
EU	European Union
FET	Fair and equitable treatment
FTC	Free Trade Commission (NAFTA)
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership (between the EU and the US)
UNCTAD	United Nations Conference on Trade and Development
US Model BIT	U.S. Model Bilateral Investment Treaty
VCLT	Vienna Convention on the Law of Treaties

ABSTRACT

This paper focuses on three specific problems of investment law, which are addressed in the light of the Comprehensive and Economic Trade Agreement (CETA)[1] between Canada and the EU. The European Commission claims that the CETA draft published in September 2014 would "bring very significant clarifications to the key substantive provisions"[2] in regard to a 'right to regulate'.

In CETA, a list of criteria for fair and equitable treatment as well as a definition of indirect expropriation should provide more legal clarity and should guide arbitrators to better balance state regulatory interests and investor rights. The CETA Joint Committee, once CETA is agreed by the parties' parliaments, is able to adopt binding interpretations of the CETA text.

The paper discusses problems and inconsistencies drawing on experience from case law and other international investment agreements such as NAFTA. This paper concludes that these provisions are largely state-friendly formulated as promised by the European Commission, but stresses open questions and possible shortcomings, particularly in the light of the fair and equitable treatment standard.

INTRODUCTION

This paper focuses on three specific problems of investment law, which are addressed in the light of the Comprehensive and Economic Trade between Canada and the EU (CETA).[3] According to the European Commission the current CETA draft would "bring very significant clarifications to the key substantive provisions"[4] in regard to a 'right to regulate'. These provisions would "mean(…) that arbitrators will now have strict and detailed guidance when these provisions are invoked by an investor"[5], assuring that public policy goals are not subsidiary to investment protection.[6]

[1] see EU-Canada Comprehensive Trade Agreement (CETA), Consolidated CETA Text, published on September 26, 2014 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed on October 20, 2014.

[2] European Commission, *Investment Provisions in the EU-Canada free trade agreement (CETA)* (2013) 1 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/tradoc_151918/tradoc_151918en.pdf accessed on December 30, 2014.

[3] see *supra* note 1.

[4] *supra* note 2.

[5] *ibid.*

[6] see *ibid*.

In this regard two main areas are underlined by the Commission:

1. Fair and equitable treatment
2. Indirect expropriation

In the following, this paper examines the latest draft of CETA published in September 2014[7] on these two substantive provisions within the investment chapter and adds a chapter on the interpretation of the agreement by the so-called CETA Joint Committee.

In regard to fair and equitable treatment (FET), the paper looks into the new approach of CETA listing measures constituting a breach of FET and establishing high thresholds through the use of qualifiers. In a second section, this approach is compared with case law of the North Atlantic Free Trade Agreement (NAFTA). The CETA provision is in some points identical with existing arbitration practice of NAFTA and reflects - it with exceptions - to a large extent. Similarities and differences are discussed. To a great extent the provision is drafted favourably for states to adopt new policies, but the vague phrasing of legitimate expectations puts the whole standard at stake.

Before analysing the approach in CETA's provision on expropriation, the second chapter deals with differences between direct and indirect expropriation and the difficulty to distinguish legitimate regulatory takings from situations of indirect expropriation. In the analysis, CETA's attempt to give a detailed definition on indirect expropriation and the effects of a very generously drafted exception clause for public welfare objectives are discussed. In conclusion, it is argued that the provision on expropriation is in favour for state regulatory action.

The CETA Joint Committee is the subject of the third chapter and particularly its interpretative powers are addressed. It is not uncommon to allow a body composed by the parties to interpret substantive provisions on FET or expropriation. It is new, however, that the CETA Joint Committee is not only able to issue binding interpretations on all provisions, it might also set the point of time when the interpretation is binding. This challenges due process requirements and rule of law aspects. Its effects and consequences are elaborated in this chapter.

All three chapters have in common that CETA is contextualised in two ways: First, it is contextualised in the light of other treaty and case law practice. Second, particular interest is

[7] EU-Canada Comprehensive Trade Agreement (CETA), Consolidated CETA Text, published on September 26, 2014 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed on October 20, 2014.

given to the question of how a 'right to regulate' of states is considered.

It may be noted that there are a few other areas impacting on the 'right to regulate'. For an outright analysis it is necessary to complete the approach of this paper with an examination of other substantive provisions, such as MFN or umbrella clauses and the procedural architecture of state-investor dispute settlement as well as trade law provisions. Given the legal character of this paper and the focus on selected provisions, a useful completion might be an interdisciplinary approach to fully examine the impacts of the 'right to regulate'. Given the fact that the public debate concentrates on political aspects, and the scope of this research paper is limited, it focuses on an analysis of the often invoked protection standards - FET and expropriation - in CETA.

I. FAIR AND EQUITABLE TREATMENT

A. GENERAL REMARKS

Fair and equitable treatment (FET) has taken a central role in international investment treaties and is one of the most often invoked standards by investors claiming a breach of an agreement by a state. Traditionally this concept helps protect a certain level of transparency towards an investor, as well as his access to basic formal procedural rights in the host state. FET often includes protection of legitimate expectations of an investor in a host state. The exact content however is subject to interpretation by each tribunal.[8] Usually tribunals deal with a FET provision without further elaborations on its substantive content. FET clauses are known from International Investment Agreements as well as bilateral investment treaty (BIT) practice.[9] In the latter, FET clauses serve the aim "to fill gaps that may be left by the more specific standards, in order to obtain a level of investor protection intended by the treaties"[10], and by doing so "narrow down the discretionary space available to the host state."[11] In this understanding FET seeks to enable a satisfactory level of investment protection. The interest of

[8] see eg. Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford monographs in international law, Lowe V ed., Oxford University Press, 2007) 121-151.
[9] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) xiii *et sqq*..
[10] Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 122.
[11] *ibid*. 149.

the investor is reflected by the "fundamental goal of legal stability"[12] which can be found in some treaties.[13] By focusing on investor protection the original idea of FET does not consider regulatory interests or a balancing between interests of state regulatory action and those of investors.

The question of what is 'fair' or 'equitable' has been interpreted very differently by tribunals and it is hard to predict how the FET standard might be applied in a certain context. In regard to state action it remains unclear what does constitute an excess over a legitimate threshold. This is however decisive for whether an agreement has been breached or not. Given the quantity of cases where FET clauses are invoked, it is feared that states have to cover the costs for the development of a pro-investor environment with little consideration for public policy aims.[14]

B. STATUS QUO

There is a vast heterogeneity[15] of treaty language in regard to the standard of fair and equitable treatment: There is hardly a treaty not mentioning FET at all; often it is drafted as a stand-alone clause without reference to any other source of law and without further clarifications of its substantive content. The latter would be the typical European approach - the exclusive mentioning of FET - applied by the EU as well as its member states. CETA is untypical. It includes a list of examples clarifying the content of the standard of fair and equitable treatment. This means a departure from the traditional European approach by the CETA drafters, as will be elaborated in the following section.[16] [17]

[12] *ibid.* 122.
[13] see *ibid.*
[14] see Nathalie Bernasconi-Osterwalder, Howard Mann, 'A Response to the European Commission's December 2013 Document „Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"' (International Institute of Sustainable Development 2014) 6.
<http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf> accessed on December 30, 2014.
[15] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) 17 *et sqq*..
[16] see Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 121-122; see also Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 468 *et sqq*.; Roland Kläger R, *Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2013) 9 and 21; Frank Hoffmeister, Günes Ünüvar, 'From BITS and Pieces towards European Investment Agreements, in Marc Bungenberg, August Reinisch, Christian Tietje ed., *EU and Investment Agreements* (Nomos Verlagsgesellschaft 2013) 71-72.
[17] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) 17-18.

Beside stand-alone clauses or the list approach of CETA, there are also other kinds of FET treaty language: A FET provision can be tied to international law or, to be more specific, to the so-called minimum standard under customary international law. In both cases customary international law is to be consulted to define FET. In the case where a clause refers to international law only, other sources apart from custom should be consulted or might set a floor to the content of FET. In the case where the minimum standard under customary international law is mentioned explicitly, fair and equitable treatment is determined by international custom. Customary law itself is rather fluid and difficult to define. The burden of proof lies with the claimant, who has to present the two elements of customary international law, state practice and *opinio iuris*. Despite the lack of clarity that lies in custom, the minimum standard under customary international law might assure a higher threshold towards an effective breach of FET, however it only sets a floor and does not protect behaviour which goes beyond it.[18]

Without an explicit reference to the minimum standard under customary international law the question remains to which effect states with no explicit references to the minimum standard in FET clauses are bound by it. The existence of a minimum standard under international law is by now, a well-established norm of customary international law and is, by doing so, binding for all states, regardless whether they sign an investment treaty or not. The relationship between international customary law and FET clauses in international investment agreements as well as bilateral investment treaties remains unclear.[19]

C. NEW APPROACH

The manner in which CETA drafters have included a provision on fair and equitable treatment is new. In Article X.9 of the investment chapter[20] a list of measures that define breaches of fair and equitable treatment is added. The measures include access to justice, due process and transparency requirements, prohibition of arbitrariness and discrimination based on grounds,

[18] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) 23-29.
[19] see Patrick Dumberry, The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105 (Kluwer Law International 2013) 29.
[20] see Article X.9 of EU-Canada Comprehensive Trade Agreement (CETA), Consolidated CETA Text, published on September 26, 2014 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed on October 20, 2014.

such as gender, race or religious belief as well as prohibition of abusive treatment of investors, such as coercion, harassment or duress. Content-wise, these elements largely reflect international jurisprudence.[21] However it does not cover all elements of differing existing jurisprudence.[22]

The first part of this section analyses the CETA text in regard to its wording and particularly the effects of the use of qualifiers. In a later stage, it is shown to what extent the provisions build on recent NAFTA case law.

1. High thresholds and a possible weakening through legitimate expectations?

The use of qualifiers sets a high threshold for the measures listed in the CETA draft from September 2014[23]. These measures clarify the content of the FET standard and determine when a breach of this standard is established by a host state. The use of qualifiers for these measures falling in the scope of FET is quite noteworthy as they set high thresholds in favour of host states.

In the case of due-process requirements, a breach of due process has to be fundamental - as opposed to a simple one - to constitute a breach of FET. It will be up to the arbitral practice to decide whether this provision requires the breach of a fundamental rule, or a serious breach, or both, by the state.[24]

> "Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings."[25]

Similarly, arbitrary conduct of a state has to be manifest according to CETA. Such a provision has not been used by an agreement before, and thus, it has received little reflection in jurisprudence. Arbitrariness was discussed in a few awards and found through different

[21] see Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 133 *et sqq.*; see also Marc Jacob and Stephan Schill, 'Standards of Protection. Fair and Equitable Treatment: Content, Practice, Method', in Bungenberg M, Griebel J, Hobe S and Reinisch A (ed.), International Investment Law. A Handbook (C.H.Beck/Hart/Nomos 2015) 709.

[22] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 473.

[23] see *supra* note 1.

[24] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 474-75.

[25] Article X.9 Consolidated CETA text.

methods applied by different arbitration tribunals.[26] The qualifier might indicate that the arbitrary measure has "to be obvious (…) not only doubtful".[27]

> "Manifest arbitrariness;"[28]

Looking at the CETA draft, discrimination is included in the list. Interestingly, nationality as ground inducing a breach of FET is not mentioned here. According to Kriebaum, it makes systemically sense to mention nationality in an own provision. However, in her analysis she wonders why the three elements where chosen and why in the provision dedicated to nationality no targeted discrimination is required.[29]

> "Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;"[30]

The provision on abusive treatment contains a non-exhaustive list of examples and is in principle in line with previous case-law.[31] [32]

> "Abusive treatment of investors, such as coercion, duress and harassment;"[33]

Despite of a few uncertainties around how a tribunal might interpret the listed measures and their qualifiers, "(t)his closed list seems very reasonable and also useful to provide the investor with clear protection from unacceptable treatment by the state."[34] It presumably makes the FET standard easier and more predictable to apply.[35] "(...)For many experts who take a more conservative view of the scope of FET, this list would (even) seem to cover the full content it is meant to embody."[36] In contrast the CETA draft does not limit FET to this closed list only.

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[26] see eg *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see also Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 474; see this chapter 10 *et sqq*..
[27] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 474 *et sqq*..
[28] Article X.9 Consolidated CETA text.
[29] see *supra* note 27, 276.
[30] Article X.9 Consolidated CETA text.
[31] see Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 147.
[32] see *supra* note 27, 276.
[33] Article X.9 Consolidated CETA text.
[34] Nathalie Bernasconi-Osterwalder, Howard Mann, 'A Response to the European Commission's December 2013 Document „Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"' (International Institute of Sustainable Development 2014) 6.
<http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf> accessed on December 30, 2014.
[35] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) 29.
[36] see *supra* note 34.

In a previous draft from November 2013[37], the closed list approach was weakened by a reference to customary international law. This would have introduced the notion of fair and equitable treatment as recognised under customary international law and would have made the list approach possibly redundant. In the final September draft from 2014 there was no reference to a minimum standard of customary international law.[38]

A paragraph on legitimate expectations following the one with the measures and impacting on the scope of FET in CETA remains in the final draft. This opens a few additional questions on its interpretation and application and a possible weakening of the high thresholds through the backdoor.

> "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[39]

The concept of legitimate expectations is based on the protection of expectations of individuals with regard to states' conduct. It is an important part of FET, its scope however remains controversial.[40] In regard to CETA the following issues are to be discussed:

First, the language of the provision leaves it up to the tribunal whether legitimate expectations have to be considered or not.[41]

Second, it remains unclear what a „specific representation"[42] is. Neither its form nor its character or purpose is specified, which produces a very open term. A report of the International Institute of Sustainable Development points out the vagueness of this provision by a comparison with a previous draft for an umbrella clause. This clause specifically mentioned "any specific written obligation".[43] In comparison with the reference in paragraph 4

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[37] see Draft CETA text, November 2013 <http://www.tradejustice.ca/wp-content/uploads/2013/08/CETA-Draft-Investment-Text-Nov21-2013-203b-13.pdf> accessed on April 4, 2015:
"In addition to paragraph 2, a breach of fair and equitable treatment may also arise from any other treatment of covered investments or investors which is contrary to the fair and equitable treatment obligation recognized in the general practice of States accepted as law."

[38] see *supra* note 34; see also Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 473 *et sqq*.; see Article X.9 Consolidated CETA text.

[39] Article X.9.4 Consolidated CETA text.

[40] see *supra* note 35, 62 *et sqq*..

[41] see Article X.9.4 Consolidated CETA text „(...)a tribunal may take into account(...)"; see also Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 476.

[42] Article X.9 (3) Consolidated CETA text.

[43] Nathalie Bernasconi-Osterwalder, Howard Mann, 'A Response to the European Commission's December 2013 Document „Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"' (International Institute of

of the fair and equitable treatment provision to a 'specific representation', it shows clearly that "a specific representation is more open than a specific written obligation."[44]

Third, there is a lot of jurisprudence on the question of legitimate expectations based on objective criteria. Decisive is what a „reasonable investor is entitled to expect on the basis of the host State's representations".[45] Fourth, the expectation must be present at the time of the investment or maintenance of the investment.[46] This is in line with existing case-law.[47]

The vagueness of the paragraph on legitimate expectations within CETA is absorbed by ostensible case law. As it will be up to arbitral tribunals to interpret at what point an investor's expectations has been legitimate and needs to be considered, the possibility to conduct a review on the content of the FET obligation by the parties – Canada and the EU – gains importance. This type of provision of paragraph 3 is not unusual[48], but is able to have an important impact on the application and scope of the FET standard. It would allow the parties to amend the exhaustive list of measures and determine situations where the protection of legitimate expectations undermines or exceeds the high thresholds established by the CETA drafters.[49]

2. Codification of existing NAFTA practice?

This section discusses how CETA's approach to list measures included in FET builds on arbitration practice applied by NAFTA tribunals and points out that the FET standard is directly influenced by NAFTA jurisprudence in regard to some elements and has an overall strong impact on the FET elements in CETA.

A comparison between the CETA draft[50] and case law of the North American Free Trade Agreement (NAFTA)[51], which entered into force in 1994, is helpful to determine the origins of

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<http://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf> accessed on December 30, 2014.

[44] *ibid.*

[45] *supra* note 27, 476-75.

[46] see *supra* note 27, 478.

[47] see *supra* note 27, 477, 479; see also Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 164.

[48] see *supra* note 27, 477.

[49] see chapter 3 of this paper.

[50] see *supra* note 1.

[51] see North American Free Trade Agreement (NAFTA)

some FET wording used in CETA. NAFTA is the first multilateral treaty as well as the first treaty between two developed states, namely Canada and the United States of America, including an investor-state dispute settlement mechanism.[52] The NAFTA provisions only mention FET in a self-standing clause, tying it to the minimum standard under international customary law[53], but do not list measures to define the scope of the standard.

I. Features of FET in the light of Article 1105 NAFTA

In the following NAFTA case law is discussed in the light of CETA's FET provision based on Patrick Dumberry's analysis on Article 1105 NAFTA as well as an analysis by the elements listed in CETA within NAFTA case law.[54] The NAFTA FET standard reflects to a great extent the following elements or measures. Similarities and differences with CETA are underlined by element:

i) Prohibition of arbitrariness

The vast majority of NAFTA tribunals opines that the prohibition of arbitrary conduct by a state is a stand-alone element of FET.[55] In regard to this prohibition some case law of NAFTA tribunals, such as in the case *Glamis Gold Ltd v. US*[56], establish a threshold of severity using even the same qualifiers – 'manifest' arbitrariness – as CETA does:

> „an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards"[57]

<https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> accessed on October 20, 2014.

[52] see Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency', in Muchlinski P, Ortino F and Schreuer C (ed.), The Oxford Handbook on International Investment Law (Oxford University Press 2008), 741-742; see also Patrick Dumberry, The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105 (Kluwer Law International 2013), 127 *et sqq*..

[53] see Article 1105 NAFTA "Article 1105: Minimum Standard of Treatment
1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security"

[54] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 164.

[55] see *supra* note 54, 82.

[56] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009.

[57] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009, arbitration award of June l8, 2009 [616].

In other NAFTA cases[58] this threshold for arbitrary conduct is applied too; however it is only in *Glamis Gold Ltd v. US*[59] and *International Thunderbird v. Mexico*[60] that the terminology "manifest arbitrariness"[61] is explicitly mentioned. Other cases such as *Cargill v. Mexico*[62] use language like the following example to establish the high threshold of manifest arbitrariness:

> "measures were (...) arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety"[63]

Others omit a qualifier, but apply a high threshold based on the international minimum standard implicitly.[64] Looking back it is *Waste Management v. Mexico* establishing arbitrariness as a stand-alone part of FET in NAFTA case law.[65] It already included a high threshold of severity and has been referred to by numerous NAFTA tribunals[66] since then. Still the concept of arbitrariness has been inconsistently applied and mixed with other elements of FET, such as legitimate expectations[67] or denial of justice[68]. In summation, CETA lists the prohibition of manifest arbitrariness as a self-standing measure and borrows the terminology of

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[58] see *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009 [293]; see also *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [197].
[59] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009.
[60] see International Thunderbird v. The United Mexican States, UNCITRAL, 2006.
[61] see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006[194]; „For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or *manifest arbitrariness falling below acceptable international standards* (*emphasis added)"*
[62] see *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009.
[63] see *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009 [296].
[64] see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 as well as dissenting opinion of Prof. Donald McRae, March 10, 2015; see *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014.
[65] see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [98]: "*the minimum standard of treatment of fair and equitable treatment is infringed* by conduct attributable to the State and harmful to the claimant *if the conduct is arbitrary*, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process (*emphasis added*)."
[66] see Glamis Gold Ltd. v. US, UNCITRAL, 2009; see Cargill v. Mexico, ICSID Case 2009; see International Thunderbird v. The United Mexican States, UNCITRAL, 2006; see Clayton v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015.
[67] see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [594] „Tribunal considers the breach (of the prohibition of arbitrary conduct) here to rise to that threshold, in light of the Investors' reasonable expectations and major consequent investment of resources and reputation in a process that is the most rigorous, public and extensive kind provided under the laws of Canada"
[68] see *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002.

NAFTA cases *Glamis Gold Ltd v. US*[69] and *International Thunderbird v. Mexico*.[70]

ii) Due process and transparency

Breaches of due process are broadly claimed and discussed under Article 1105 NAFTA on fair and equitable treatment.[71] In regard to CETA there is no single case under NAFTA using the same wording, namely a "fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings".[72] As shown in a later paragraph, some tribunals apply a high threshold - similar to CETA which uses the expression "fundamental breach"[73] - and refer to due process requirements to judicial as well as administrative proceedings.[74]

Content-wise, a host state is in breach of due process requirements if one of the following incidents occurs: a serious delay in processing[75]; a procedural error, which is not „corrected quickly and effectively through domestic channels"[76]; not simply an "erroneous or mistaken decision"[77]; a failure to pursue an administrative review except if the host state is already "defending an arbitration with respect to the same review"[78]; rejecting a "full opportunity to be heard and to present evidence"[79] at an administrative hearing; not "adequately detailed and

[69] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009.
[70] see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006.
[71] see *Chemtura Corporation v. Government of Canada*, UNCITRAL, 2010; see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015; see *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 2002; see *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Government of Canada Statement of Defense of June 30, 2014; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006; see *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2002; see *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003; see *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, 2011; see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award December 13, 2000; see *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, 2014.
[72] Article X.9 Consolidated CETA text.
[73] *ibid*.
[74] For reference to high threshold see this paper, 13; for reference to judicial and admin. proceedings see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [435 *et sqq*.]; see also *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Government of Canada Statement of Defense of June 30, 2014 [b.99]; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [200] eg. "As acknowledged by Thunderbird, the SEGOB proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process."
[75] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009 [24].
[76] *Glamis Gold Ltd. v. US*, UNCITRAL, 2009 [771].
[77] *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003 [189].
[78] Glamis Gold Ltd. v. US, UNCITRAL, 2009 [24] *e contrario*.
[79] *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [198].

reasoned" grounding of an order[80]; court decisions which is not "rational, principled, and offer(s) full due process".[81]

It is generally accepted that FET under NAFTA safeguards elements of due process, but weighs their importance differently: *Chemtura Corporation v. Canada*[82] and similarly *Apotex v. US*[83] examine the facts of the case under the assumption of a possible stand-alone element of due process under FET, whereas a breach of FET in the majority of NAFTA case law is only established if non-compliance with a set of other elements under FET occurs.[84] This goes usually along with the application of a high threshold, which amounts to a "fundamental breach"[85], but is expressed in example as "complete lack of due process"[86] or "(m)anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"[87] or similarly "lack of due process leading to an outcome which offends judicial propriety".[88]

Again, it is necessary to apply the high threshold to a cumulative set of elements amounting to a breach of Article 1105 NAFTA.[89] In *Apotex v. US*[90], one of the only cases where the possibility of sole standing procedural rights of investors under the international minimum standard is at least discussed, the NAFTA tribunal omits to decide on the exact content and

[80] *ibid.*
[81] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Government of Canada Statement of Defense of June 30, 2014 [7]; see *inter alia* Patrick Dumberry, The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105 (Kluwer Law International 2013), 225 *et sqq*..
[82] see *Chemtura Corporation v. Government of Canada*, UNCITRAL, 2010 [145] "To this first inquiry, the Tribunal must however add a second one, namely whether the review of lindane (even if in good faith), breached the due process rights of the Claimant." as well as [97] "(iv) in any event, the facts overwhelmingly demonstrate that Canada has accorded the Claimant ample due process, conducted itself lawfully and treated the Claimant fairly, and that Canada has complied with Article 1105 of NAFTA in every respect"
[83] see Apotex Holdings Inc. and Apotex Inc. v. United States of America ICSID Case No. ARB(AF)/12/1, 2014.
[84] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010; see *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2002; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006.
[85] Article X.9 Consolidated CETA text.
[86] *Glamis Gold Ltd. v. US*, UNCITRAL, 2009 [24].
[87] *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003 [132] on what constitutes a breach of FET.
[88] *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [98].
[89] see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010; see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Government of Canada Statement of Defense of June 30, 2014 [99-100]; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [197].
[90] see Apotex Holdings Inc. and Apotex Inc. v. United States of America ICSID Case No. ARB(AF)/12/1, 2014.

concludes that the general high threshold would not be reached in the case.[91]

Looking at transparency, CETA is in line with NAFTA case law[92] including transparency as a non-stand-alone element of FET. CETA does mention a transparency requirement, but not as an autonomous feature of FET. In the CETA provision transparency appears under the chapeau of due process requirements: "fundamental breach of due process, including a fundamental breach of transparency".[93] Due process and transparency are applied simultaneously[94] in some cases, but occur also without even mentioning the other element in NAFTA case law.[95]

A high threshold seems to be applied to transparency in NAFTA case law. One example can be found in *Waste Management v. Mexico*[96] which states that the minimum standard in international law under Article 1105 NAFTA does not cover situations of a "complete lack of transparency and candour in an administrative process".[97] In this case, transparency is listed together with due process as well as other elements of FET. This supports the argument of a non-stand-alone element of transparency under FET in NAFTA.

In regard to transparency as non-alone standing element of FET, CETA is in line with NAFTA case law. NAFTA's FET standard is composed by due process as well as transparency elements, however in numerous differing variations. In this context, CETA's provision on due process including transparency as part of FET does not reflect the wording and NAFTA case law as a whole.

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[91] see *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, 2014 [9.49]; see also *Chemtura Corporation v. Government of Canada,* UNCITRAL, 2010, acknowledges due process as principal feature of FET, but does not mention any threshold requirement.

[92] see eg. *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010; see *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2002 eg. [99] "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA."

[93] Article X.9 Consolidated CETA text.

[94] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010; see *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2002.

[95] on due process: see *Chemtura Corporation v. Government of Canada,* UNCITRAL, 2010; see *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003; see *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, 2014; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006; on transparency: see Methanex Corporation v. United States of America, UNCITRAL, 2005 [8].

[96] see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004.

[97] *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [98].

iii) Discrimination

Following *Cargill v. Mexico*[98] or *Glamis Gold Ltd v. US*[99], the prohibition of discriminatory behaviour by a state is a stand-alone element under the FET standard.[100] The latter is the only NAFTA case which uses almost the same language on discrimination as CETA does. After referring to the *Glamis Gold*-formula of the international minimum standard[101], the tribunal states that "(t)he Imperial Project (...) was not the subject of discriminatory targeting"[102] and concludes that the necessary high threshold could not be met in that case.[103] Similarly, *Waste Management v. Mexico*[104] includes – without mentioning explicitly CETA's wording - a prohibition of 'discriminatory' measures exposing "the claimant to sectional or racial prejudice"[105] in the minimum standard of treatment under FET.

CETA drafts the prohibition of discrimination as a stand-alone measure saying that a breach of FET is composed by "targeted discrimination on manifestly wrongful grounds, such as gender,

[98] see *Cargill v. Mexico*, ICSID Case 2009.
[99] see Glamis Gold Ltd. v. US, UNCITRAL, 2009.
[100] see *ibid.* [208 *et sqq.*]; see also *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009 2009 [300]; see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009, arbitration award of June l8, 2009 [620].
[101] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009 [828]: „Thus addressing the record as a whole, the Tribunal holds that Claimant has not established that the acts complained of fall short of the customary international law minimum standard of treatment. The complained-of acts were not egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."
[102] see *ibid.*: "There was no specific inducement of Claimant's expectations. There was no causal focus on the nationality of the investor. There was no corruption exhibited at any level of government. The Imperial Project, although certainly highlighted as a triggering event for some of the measures, was not the subject of discriminatory targeting."
[103] see *ibid.* [829]: „There is simply not the egregiousness necessary to breach the fair and equitable treatment standard of Article 1105 as it currently stands. The State Parties to the NAFTA can always choose to negotiate a higher standard against which their behavior will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination."
[104] see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004.
[105] see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [98]: „(…) general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and *exposes the claimant to sectional or racial prejudice*, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant (*emphasis added*)"; see also *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014; see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [132] „But neither the decisions themselves nor other evidence before the Tribunal suggest that these proceedings involved discrimination, bias on grounds of sectional or local prejudice, or a clear failure of due process. The CANACO arbitration, which alone held the prospect of complete relief for Acaverde in respect of its claims against the City, was not pursued, and the Tribunal has already held that this fact did not of itself entail a breach of Article 1105."

race or religious beliefs".[106] Nationality is not mentioned in this list. NAFTA tribunals in their majority do not protect nationality based discrimination in Article 1105 NAFTA on FET either:

> "neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments"[107]

In NAFTA however, nationality based discrimination is covered by Article 1102 NAFTA on national treatment and restricted by Article 1105 (2) NAFTA[108] as well as customary international law.[109] Other grounds for discrimination were claimed by investors[110], but have been rejected.[111]

It remains unclear at which point discriminatory conduct in breach of Article 1105 NAFTA must be intended by the host state.[112] The tribunal in *Cargill v. Mexico*[113] found a breach of FET because of a "willful targeting"[114] of suppliers of a specific product, whereas under

[106] Article X.9 Consolidated CETA text.

[107] see eg. Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, 2011. [209].

[108] see Article 1105 (2) NAFTA: "2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife."

[109] see Methanex Corporation v. United States of America, UNCITRAL, 2005 [15,16,26].

[110] see eg. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, 2011. [190]: „The Claimants next contended that the Respondent violated obligations of good faith treatment and of non-discrimination against "*special or disadvantaged groups*" under Article 1105, in that U.S. state officials failed "to proactively consult Claimants, as First Nations investors with commercial activities likely to be significantly affected by their measures (*emphasis added*)"; see also *Clayton v. Government of Canada,* UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [389]: „Claimant on discrimination: It is the Investors' position that the JRP was wrongly antagonistic toward them during the proceedings.545 The Investors argue that the values of the majority of community members who supported the project were ignored.546 Moreover, the Investors submit that the JRP reasoning suggests an "*undercurrent of xenophobia or anti-Americanism* (*emphasis added*)"'

[111] see eg. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, 2011. [183]: The Tribunal, with the exception of one of its members, considers it important, before turning to the specific claims under Article 1105 of NAFTA, to point out that it finds force in certain aspects of Mr. Montour's and the other Claimants' arguments asserting a lack of fair and equitable treatment."; see also ibid [213]: „Nonetheless, the possible existence of a customary rule calling for expanded consultation between governments and indigenous peoples does not assist Arthur Montour as an individual investor."; see also *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015.

[112] see *Cargill v. Mexico,* ICSID Case 2009; see also *Chemtura Corporation v. Government of Canada,* UNCITRAL, 2010 [215, 224]: It appears that discrimination is not applied as a stand alone element of FET, but taken into account when establishing the breach of Art 1105 NAFTA through „bad faith or lack of fairness".

[113] see *ibid*.

[114] see *Cargill v. Mexico,* ICSID Case 2009 [550]: „With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS, all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment."; see also *ibid.* [220]: „the Tribunal also concludes that the discrimination was based on nationality" both in intent and effect.

Article 1102 NAFTA usually no intent to establish a discriminatory conduct is required.[115]

The CETA provision proves to be influenced by NAFTA case law as similar language can be found in one NAFTA case.[116] In regard to the grounds establishing discrimination it borrows the structure of NAFTA by omitting nationality based discrimination from the scope of FET.

iv) Abusive treatment

Investors often claim abuse in regard to NAFTA[117], however there is no single NAFTA tribunal which found a breach of FET based on this ground. Abusive treatment often is brought forward in conjunction with FET elements of due process[118] or good faith[119]. Still NAFTA case law includes a certain level of investor protection from abusive treatment by a host state, but does not interpret it as a stand-alone element of FET. This is contrary to CETA, where "abusive treatment"[120] is explicitly mentioned and illustrated by a non-exhaustive list of examples - "coercion, duress and harassment".[121] Looking at these illustrations, NAFTA reflects elements of harassment[122], duress[123] and coercion[124] scarcely and only in regard to

[115] see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [719 *et sqq*.]; see also *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, 2008 [138].
[116] see Glamis Gold Ltd. v. US, UNCITRAL, 2009.
[117] see *inter alia Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002; see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006; see *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004; see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [357]; see *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003 [7]; see *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Arbitration Award of January 9, 2003 [114]; see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010 [155]; see *Vito G. Gallo v. The Government of Canada*, UNCITRAL, PCA Case No. 55798, 2011 [146]; see Methanex Corporation v. United States of America, UNCITRAL, 2005 [24]; see *Chemtura Corporation v. Government of Canada*, UNCITRAL, 2010 [2].
[118] see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [197]; see also *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014 [275]; see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [357].
[119] see *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002 [103]; see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, arbitration award, 2015 [357]; see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010 [155].
[120] Article X.9 Consolidated CETA text.
[121] *ibid.* „Abusive treatment of investors, such as coercion, duress and harassment"
[122] see *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014 [402] „THE CLAIMANTS'MEMORIAL (…) (ix) Harassment of Claimants' witnesses and Venezuelan counsel"; see *Clayton v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, REPLY MEMORIAL OF THE INVESTORS, December 21, 2011 [211] „A recent UNCTAD study summarizes these elements: …the overall result of the arbitral decisions to date is that the fair and equitable treatment standard no longer prohibits solely egregious abuses of government power, or disguised uses of government powers for untoward purposes, but any open and deliberate use of government powers that fails to meet the requirements of good governance, such as transparency, protection of the investor's legitimate expectations, *freedom from coercion and harassment* (*emphasis added*)"

alleged breaches of FET by investors. No NAFTA tribunal has yet found a breach solely based on abusive treatment by a host state. In this context, CETA does not to seem to borrow language of the poor NAFTA experience when establishing abusive treatment as stand-alone element under FET.

v) Prohibition of a denial of justice

The prohibition of denial of justice as a part of FET is an established rule under customary international law[125]. Of particular interest is the US Model BIT 2012[126] which reflects this standard explicitly using the same wording as CETA does.[127] CETA establishes a "(d)enial of justice in criminal, civil or administrative proceedings"[128] as an autonomous element of FET.

In NAFTA it remains unclear if denial of justice is an autonomous element of FET. Some cases suggest that it is one element of FET[129], others require additional breaches of other elements too, to establish a breach of FET.[130] Often a denial of justice is discussed in connection with due process requirements under NAFTA. The relation between denial of

[123] see *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014 [142] "(iii) negotiation under alleged duress"; see *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 2003 [7] "Claimants allege that Loewen was then forced to settle the case "under extreme duress"."

[124] see *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 2014 [275] on coercion in the light of expropriation: "In respect of the claims regarding the alleged coercion of the Claimants into migration and the claim relating to the expropriation measures, the Tribunal has found that the expropriation was conducted in accordance with due process (…), that it was not carried out contrary to undertakings given to the Claimants in this respect (…) and that the Claimant have not established that the offers made by Venezuela were incompatible with the "just" compensation requirement of Article 6(c) of the BIT (…). The Tribunal has concluded that the expropriation itself was conducted in a lawful manner"

[125] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 225.

[126] see Article 5 (2a) US Model BIT 2012: "(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"

[127] see Article X.9 Consolidated CETA text: "Denial of justice in criminal, civil or administrative proceedings"

[128] *ibid*.

[129] see *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, 2014 [9.41] "past NAFTA tribunals generally have interpreted the minimum standard in NAFTA Article 1105 as being comprised of a limited number of defined elements (denial of justice, failure to accord full protection and security, etc.)"; see also *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, 2004 [e] „Was there a denial of justice?"; see *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002; see *Azinian v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, 1999.

[130] see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010; see also *Glamis Gold Ltd. v. US*, UNCITRAL, 2009; see also *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [9.3] "Subject to the answer to Issue 9.1 above, was there a failure to provide due process, constituting an administrative denial of justice, in the proceedings relating to the ruling of 10 October 2001, and if so, did it constitute a breach of Article 1105 NAFTA?" or [186] „Thunderbird alleges further a failure by Mexico to provide due process, constituting an administrative denial of justice, in the proceedings (...) which constituted a breach of Article 1105 of the NAFTA"

justice and due process requirements remain unclear.[131] For example, in *Grand River Enterprise v. US*[132], the tribunal discusses a joint application[133], in other NAFTA cases due process might be a part of denial of justice.[134] Article X.9 of the CETA lists both elements – denial of justice and fundamental breach of due process – as autonomous elements of FET.

In addition, NAFTA tribunals require levels of severity of a denial to establish a breach of Article 1105: Often a "gross (!) denial of justice (*emphasis added*)" [135] is required, whereas in *Cargill v. Mexico* no particular severity established a breach of the FET standard by the state.[136]

Given the similar language between CETA and the provision on denial of justice in the US Model BIT 2012[137], it seems that the variety of NAFTA case law on denial of justice only had a minor influence on the drafting of CETA. NAFTA case law and CETA however, have in common that both elements are part of a FET standard, but where CETA drafts it as stand-alone measure, NAFTA tribunals are not clear on this point.

vi) Legitimate expectations

In NAFTA[138] as well as in the CETA draft[139], legitimate expectations are protected as a part of FET. Simultaneously, legitimate expectations do not constitute a separate element of FET.

Glamis Gold Ltd v. US[140] is the only award where legitimate expectations are perceived as a

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[131] see *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America,* UNCITRAL, 2011; see *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, 2014 [9.42]; see *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 2002 [140]; see *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, 2010 eg. [171, 204].
Waste Management v. US, ICSID, Arbitration award of April 30, 2004 [97].

[132] see Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, 2011 [209].

[133] see *ibid.;* see see *supra* note 125, *231 et sqq*..

[134] see *International Thunderbird v. The United Mexican States*, UNCITRAL, 2006 [186] „provide due process, constituting an administrative denial of justice, in the proceedings"; see Apotex [9.41] „due process is one of the elements of the minimum standard (or is an aspect of denial of justice (...)"

[135] inter alia Apotex Holdings Inc. and Apotex Inc. v. United States of America ICSID Case No. ARB(AF)/12/1, 2014 [9.43]; see Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, 2011 [560]; Glamis Gold Ltd. v. US, UNCITRAL, 2009 [223], [616]; International Thunderbird v. The United Mexican States, UNCITRAL, 2006 [194].

[136] see supra note 125, 260; see Cargill v. Mexico, ICSID Case 2009, Arbitration Award of September 18, 2009 [296].

[137] see U.S. Model Bilateral Investment Treaty (US Model BIT) (2012) <http://www.state.gov/documents/organization/188371.pdf> accessed on November 15, 2014.

[138] see NAFTA Free Trade Commission Note related to NAFTA Chapter 11,
Decision of 31 July 2001, <http://www.state.gov/documents/organization/38790.pdf> accessed on Aptil 4, 2015.

[139] see *supra* note 1.

[140] see *Glamis Gold Ltd. v. US*, UNCITRAL, 2009.

stand-alone element.[141] This means that the non-compliance with only this element constitutes a breach of the FET standard. Most NAFTA cases request the breach of a contractual or quasi-contractual obligation to fulfill a breach of legitimate expectations.[142] CETA has the same approach and perceives legitimate expectations of investors only as completion to define whether a breach of FET occurred.[143]

vii) Elements not mentioned

Interestingly neither CETA nor NAFTA tribunals presume legal stability as an investor right under FET. *Mobil v. Canada*[144] for example states that the FET "standard does not require a State to maintain stable legal and business environment for investments".[145]

As previously discussed, CETA also omits to consider a good faith requirement in its listing of measures leading to a breach of FET. This is however often part of NAFTA jurisprudence.[146]

viii) Level of severity

CETA requires a high level of severity to establish a breach of FET by using qualifiers. This has already become substantially part of FET under NAFTA: Not only the *Glamis Gold Ltd. v. US*[147] case sets a high threshold for the establishment of a FET breach.[148] More recent cases such as *Apotex v. US*[149] assume that a '"high threshold of severity and gravity" (is) required to

[141] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 157; in contrast to *Glamis Gold Ltd. v. US,* UNCITRAL, 2009 see *Mobil Investments v. Canada,* ICSID, Arbitration award of May 22, 2014 [152].

[142] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 166; see *Mobil Investments v. Canada,* ICSID Case No. ARB(AF)/07/4, 2014 [152].

[143] see Article X.9 Consolidated CETA text: "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

[144] see *Mobil Investments v. Canada*, ICSID, Arbitration award of May 22, 2014.

[145] see *Mobil Investments v. Canada*, ICSID, Arbitration award of May 22, 2014 [153]; see also Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 473.

[146] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013).

[147] see *Glamis Gold Ltd. v. US,* UNCITRAL, 2009.

[147] see *Glamis Gold Ltd. v. US,* UNCITRAL, 2009.

[148] see *Glamis Gold Ltd. v. US,* UNCITRAL, 2009, arbitration award of June l8, 2009 [22]: „to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitutes a breach of Article 1105 (1)."

[149] see *Apotex v. US,* ICSID, Arbitration award of August 25, 2014.

establish a violation of Article 1105'[150], the FET provision with NAFTA. Often tribunals refer to a mix of requirements, such as the following example in *Cargill v. Mexico*:

> "a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety."[151]

This quote shows how the tribunal in *Cargill v. Mexico*[152] establishes a few high thresholds through the use of language like 'grossly', 'beyond', 'unexpected', 'shocking' 'very' or 'utter' – building on earlier NAFTA cases. This general trend of high thresholds under NAFTA is set differently from measure to measure. In the case of the FET element prohibiting a denial of justice, arbitrators applied different level of severity.[153] In principle, high thresholds remain popular and are established by customary international law as well as its application by NAFTA tribunals.[154] CETA reflects this trend.

I. Conclusion: NAFTA case law influences CETA.

NAFTA case law includes - or at least discusses explicitly - all elements that can be found in CETA's provision on FET.

In regard to arbitrariness and discrimination, (parts of) the CETA provision are even identical to the wording found in NAFTA case law.[155]

The prohibition of denial of justice is discussed extensively by NAFTA tribunals, but the exact wording and its quality as stand-alone element of FET are more influenced by US Model BIT

[150] *Apotex v. US*, ICSID, Arbitration award of August 25, 2014 [9.49].
[151] *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009 [296].
[152] see *ibid*.
[153] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013); see also *Cargill v. Mexico*, ICSID Case 2009, Arbitration Award of September 18, 2009 [296]; see *Waste Management v. US*, ICSID, Arbitration award of April 30, 2004 [97].
[154] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013), 262.
[155] For arbitrariness see this chapter, 10 *et sqq.*; see 14 *et sqq.* for discrimination.

2012 as previously shown.[156]

CETA's provisions on due process and transparency requirements as well as abusive treatment show similarities with NAFTA case law, but might be more influenced by a source other than NAFTA in regard to its wording as well as their feature as separate elements of FET in CETA.[157]

Generally, all elements discussed are drafted in CETA as autonomous elements of FET. A breach of such an alone-standing measure establishes a breach of FET whereas a non-autonomous element usually requires another non-compliance with one of the other FET features. The only element in CETA which is explicitly drafted as a subsidiary element is the protection of legitimate expectations. This is in line with NAFTA case law.[158]

NAFTA case law requires a high level of severity for most of the measures. So does CETA, which uses qualifiers to set high thresholds and which is not bound to customary international law through a reference in its FET clause. Such a clause binds NAFTA tribunals to the so-called minimum standard of treatment of foreign investors under customary international law, sometimes increasing the protection standard for investors.[159]

In summation, the FET standard in CETA is strongly influenced by NAFTA jurisprudence. The level of influence however is not identical in regard to the different elements of FET.

D. DISCUSSION AND CONCLUSION

This chapter summarises features of the fair and equitable treatment standard in the CETA draft published in September 2014.[160] FET has become a central standard in international investment treaties and is one of the most often invoked standards by investors in investor-state arbitration.

[156] see this chapter, 18.
[157] see this chapter, in particular for abusive treatment, 17; for transparency and due process, 12 *et sqq*..
[158] see this chapter, 19.
[159] see this chapter, 20.
[160] see *supra* note 1.

CETA uses a new approach to draft the FET standard.[161] This has been a change to the current EU drafting tradition of EU Member states in regard to BITs.[162] CETA's FET clause encompasses measures in breach with the fair and equitable treatment obligation. This obligation protects the investor against unfair and inequitable state conduct. The use of qualifiers in Article X.9 of CETA sets high thresholds requiring the establishment of a breach of FET. This treaty language might make the FET standard of CETA more predictable and can be seen as a friendly approach towards regulatory interests and activities.

The original idea of fair and equitable treatment does hardly consider regulatory interests or a balancing between these and interests of investors.[163] Where investors are protected by the obligation to treat them and their investments fair and equitably, neither NAFTA case law, a comparable other international investment agreement between developed states comprising and investor-state dispute settlement instrument, nor CETA includes an explicit requirement for legal stability for investors under FET.[164] This again could demonstrate that CETA negotiators tried to carefully draft an agreement that considers regulatory action and public policy goals.

However, the vague language in regard to legitimate expectations might open the possibility for investors to claim their rights even if state conduct does not fulfill the requirement of the high thresholds required by CETA. On the other hand, it might strengthen the role of public interest during arbitral deliberations. It will be up to arbitral tribunals to decide on the application of this subsidiary feature of FET.

The analysis of previous case law of NAFTA arbitral tribunals showed that CETA is influenced by NAFTA case law. Concrete similarities, overlappings and influences are discussed in the latter section of the chapter, which compares the CETA provisions on FET with NAFTA case law. The new approach of the CETA provisions on FET borrows to a large extent from recent case law on FET. The comparison with existing NAFTA case law showed evidence for this argument, particularly in regard to the FET elements arbitrariness as well as

[161] see Article X.9 Consolidated CETA text.
[162] see UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2011) 20 *et sqq.;* see also *supra* note 16.
[163] see chapter I on FET in this paper, A. General remarks, 3-4; see also Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 122.
[164] ie. see *Mobil v. Canada*, ICSID, 2014 [153]: *Mobil v. Canada* ie. states that the FET "standard does not require a State to maintain s stable legal and business environment for investments".

discrimination, and concludes that CETA is strongly influenced by NAFTA jurisdiction. The previous experiences of NAFTA tribunals might serve as a guideline on how the more detailed CETA provisions on FET might be operated in the future.

II. INDIRECT EXPROPRIATION

A. GENERAL REMARKS

Indirect expropriation is a second central standard of international investment agreements often invoked by investors against a host state. In International Investment Law expropriation is – under certain requirements – an established right of the host state. Contrarily to other investment standards does the protection of the investor not include the prohibition of expropriation, but limits its legality to the four recurring criteria. So does CETA:

"(a) for a public purpose;
(b) under due process of law;
(c) in a non-discriminatory manner; and
(d) against payment of prompt, adequate and effective compensation."[165]

In the case of a classical expropriation - where an investor suffers a loss through the transfer of a legal title -, the application proves without difficulties and is accompanied by the obligation to compensate the investor on a fair market value-level.

It is more challenging when indirect expropriation is at stake. In the latter, we talk about a situation where a state measure has a negative impact on the property position of an investor[166]. BITs and IIAs draft articles on indirect expropriation in different ways. Also this non-coherent practice proves the existence of an established rule of indirect expropriation in customary international law.[167]

[165] see Article X.11 (1) Consolidated CETA text.
[166] see Markus Perkams, International Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionschutz und staatlichem Gemeinwohl (Marc Bungenberg, August Reinisch, Christian Tietje ed., Nomos Verlagsgesellschaft 2011) 130.
[167] see *ibid*. 401.

The respective tribunal however decides the detailed scope of such a clause based on its legal text. This is a difficult task where regulatory interests often face investors' rights. The missing coherence among different tribunals and cases is a recurring point of critique and challenges legal certainty. The standard(s) of indirect expropriation are outlined in the following. In Section 2 of this chapter this previous experience will be reflected with the new CETA draft.

B. STATUS QUO

In International Investment Agreements indirect expropriation is drafted in various forms. Usually indirect expropriation is briefly mentioned in a clause including requirements for a legitimate expropriation (see CETA draft). A few agreements add in annexes or additional protocols more detailed provisions on the scope of the clause and possible exceptions.[168] Despite this widespread tendency to integrate such clauses and to regulate indirect expropriation explicitly, the details of such provisions vary. The word "indirect" can be found as well as expression such as "having an effect equivalent to direct expropriation"[169]. Meanwhile, the broad dissemination of drafted clauses delivers the basis for a general accepted existence of indirect expropriation as a uniform matter of fact.

At the same time, there is no common standard of how to distinguish legitimate regulatory takings and indirect expropriation, which decides whether there is an obligation to compensate the investor. Generally it is referred to as "a total or at least substantial deprivation of an investment".[170]

There are three different approaches used by arbitral tribunals: [171]

a) Sole effects doctrine

Regulatory measures impacting on property of an investor are analysed relying exclusively "on the effects of a measure to decide whether an expropriation has occurred."[172] In cases where interference is substantial, an expropriation occurs. The purpose of the public measure is not considered at all.

[168] see *ibid*. 220; see also US Model BIT 2004 as well as CA Model BIT 2004.
[169] see annex X.11 Consolidated CETA text.
[170] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 458.
[171] see *ibid*.
[172] *ibid*. 460.

b) Police powers doctrine

This approach does not foresee compensation if a state measure in favour of a public purpose is conducted under the principles of due process and in a non-discriminatory manner. The consequence is quite radical: While a direct expropriation is legitimate if - among others - a public purpose requirement is met, an indirect expropriation does not qualify at all if the state measure is based on a public purpose.

c) The balancing approach

A third approach tries to balance the element of the purpose and effect when answering the question whether a substantial deprivation of a property right has appeared. This approach becomes possible through the application of a proportionality test, where different factors – such as reasonableness of the government measures with respect to their goal, the deprivation of economic rights or the legitimate expectations of the investors – are considered.

The arbitral practice remains not coherent and cases are decided on a case-to-case basis by various tribunals.[173]

C. NEW APPROACH

Regarding indirect expropriation, the CETA draft[174] again differs from the traditional EU approach. Instead of including only a concise treaty text on direct and indirect expropriation[175], its annex X.11 limits the scope of indirect expropriation through further clarifications as well as a definition for indirect expropriation[176]. The way how the CETA provision is drafted can be found already in more current documents, particularly the US and Canadian Model BITs 2004.[177] There, similarly drafted annexes complete a more general article on expropriation and define more detailed indirect expropriation.

[173] see Peter Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 No 2 The Global Business Law Review, 193 and 209.
[174] see Article X.11 (1) Consolidated CETA text.
[175] see August Reinisch, 'Future Shape of EU Investment Agreements' (2013) 28 No 1 ICSID Review, 185; see also Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 467.
[176] Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 455 *et sqq*.
[177] see annex B US model BIT; annex B.13(1) CA model BIT.

In the annex to the CETA provision, the first paragraph gives a definition of indirect expropriation. Reading the definition and following Perkams[178], the privation of property is key; enrichment of a state or a third party however is not constitutive to expropriation in this context. The use of the term "indirect" as well as a "measure or series of measures of a Party (with) an effect equivalent to direct expropriation" should be analysed by the effect of the measure on the investment. Regulatory change can be considered if the analysis remedies the intensity of the interference, while not concentrating on the form of the measure.[179] The annex explicitly emphasises this investment-orientated approach.[180]

> "(…) in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure."[181]

The second paragraph resembles to a great extent the annex of the expropriation clause of the US and Canadian Model BITs 2004[182], but does not copy-paste it outright.
All three texts emphasise the consideration of the circumstances of the specific case, require interference in the investor's property rights and list criteria describing the impacts on the investment. The latter have to be taken into consideration by the arbitrators when designating whether a compensatory indirect expropriation has taken place or not. The CETA draft lists four criteria, which make clear that it is not the form of the regulatory measure which is key to an expropriation, but its effects on the investment. However, an interpretation in the sense of the sole effects doctrine is inhibited by the added criteria.

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[178] see Markus Perkams, International Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionschutz und staatlichem Gemeinwohl (Marc Bungenberg, August Reinisch, Christian Tietje ed, Nomos Verlagsgesellschaft 2011) 221.
[179] see *ibid*. 223-224.
[180] see *supra* note 172, 197 *et sqq*.
[181] see annex X.11 Consolidated CETA text.
[182] see ie. annex B.13(1) CA model BIT 2004 "Expropriation
The Parties confirm their shared understanding that:
a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
ii) the extent to which the measure or series of measures interfere with
distinct, reasonable investment-backed expectations; and
iii) the character of the measure or series of measures (...)"

The following criteria listed in the annex distinguish an expropriation from a legitimate regulatory measure. CETA reflects the three criteria 1) economic impact of the measure, 2) legitimate expectations of the investor and 3) character of the measures which do have their origin in US jurisprudence[183]. In addition to the US Model BIT as well as the Canadian Model BIT, it adds the criterion 4) duration of the measure.

1) Economic impact of the measure

The first criterion refers to the impact of a measure on the economic value of the investment, but does not specify which level of impact is required to constitute an expropriation. It explicitly states that a negative effect alone does not constitute an expropriation. The wording is the same as in the Canadian Model BIT and very similar to the one of the US Model BIT. It further reflects the standard found with direct expropriation.[184]

> "the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; "[185]

2) The next criterion protects legitimate expectations of the investor. As already discussed earlier in this paper under the fair and equitable treatment standard[186], this concept remains mostly rather vague. Usually a causality between the investment and an undertaking effected by a state is a prerequisite to invoke this concept as well as a temporal correlation between an expectation of the investor and the state conduct. Further, there are transparency requirements to consider.[187] It allows for differentiation between interferences in already realised or forthcoming positions of the investor.[188]

[183] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 463, referring to case *Penn Central Transportation Co. v New York City* (1978) of US Supreme Court.
[184] see annex B US Model BIT 2004 as well as annex B.13(1) CA Model BIT 2004; see also Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 No 5 The Journal of World Investment & Trade, 731.
[185] *supra* note 182.
[186] see chapter I in this paper on FET, 3.
[187] see Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 No 5 The Journal of World Investment & Trade, 736 *et sqq.*.
[188] see Markus Perkams, International Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionsschutz und staatlichem Gemeinwohl (Marc Bungenberg, August Reinisch, Christian Tietje ed, Nomos Verlagsgesellschaft 2011) 231.

> "the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations;"[189]

3) The character of a measure as another criterion puts the measure opposed to its effects at stake.[190] Interestingly, the CETA negotiators agreed to specify that "character of a measure" should be understood in the sense of the object, context and intent.[191] This latter specifications are not part of the previous model BITs. In this regard the measure might be examined if it is adequate to the realisation of general welfare objectives, which are not listed in the annex. Previous tribunals have applied proportionality analysis to balance public welfare purposes and the effect on the investor.[192] The question remains whether this criterion implies such a proportionality test.

Kriebaum highlights that "the mentioning of 'intent' is highly problematic"[193]: An indirect expropriation would imply that the state does not want to have an (compensatory) expropriation discovered. The intent would hence be almost impossible to prove. A more state-friendly approach supports the inclusion of this element under the 'doctrine of "unmistakability"'.[194] In contrast to the first concerns this doctrine requires the intent of an expropriating state after its "unmistakable" promise not to do so. Without these prerequisites no expropriation would occur.[195] This discussion shows that the role of the character of a measure, particularly considering intent, as a criterion to define whether an expropriation of an investor has occurred remains unclear.

> "the character of the measure or series of measures, notably their object, context and intent."[196]

4) The emphasis on the duration of a measure through an own criterion in the second paragraph of annex X.11 of the CETA draft might refer to the so-called creeping expropriation

[189] see annex X.11 Consolidated CETA text.
[190] see Peter Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 No 2 The Global Business Law Review, 200.
[191] see annex X.11 Consolidated CETA text.
[192] see *supra* note 172.
[193] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 465.
[194] Lise Johnsons, Oleksandr Volklov, 'State liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law' (2014) Investment Treaty News – International Institute for Sustainable Development, 2 <http://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law> accessed on Nov 10, 2014.
[195] see *ibid*.
[196] see annex X.11 Consolidated CETA text.

as well as the intensity of a measure. A creeping expropriation is the phenomenon where an investor suffers from an expropriation through a few minor measures, which on an aggregate level affect the investor equivalently to a direct expropriation.[197]

> "the duration of the measure or series of measures by a Party;"[198]

The third paragraph excludes non-discriminatory measures protecting legitimate public welfare objectives from the scope of indirect expropriation. It lists three examples – health, safety and the environment – without limiting the exception to these three areas. Again the CETA text readopts a similar version like the Canadian Model BIT. The Model BIT however puts it slightly differently and excludes not "(…) rare circumstance(s) where the impact of the measure (…) is so severe in light of its purpose that it appears manifestly excessive"[199], but

> "rare circumstances, such as when a measure (is) so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith".[200]

According to Perkams, the Canadian Model BIT would have reduced the scope of indirect expropriation only to cases of abusive situations. By doing so all general regulatory measures, which are not abusive, would be excluded.[201] The version of the CETA draft relies on measures protecting public welfare, which are not manifestly excessive in the light of their purpose. This requires implicitly a proportionality test to investigate "whether measures are so severe in light of their goal that they appear manifestly excessive."[202] In manifestly excessive cases this results in an indirect expropriation.

The major consequence of the third paragraph is that "measures adopted in the public interest will only exceptionally be considered indirect expropriations".[203] The reason is that public interest and non-discrimination are usually used to justify an expropriation. Their mentioning

[197] see Peter Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 No 2 The Global Business Law Review, 195.
[198] see annex X.11 Consolidated CETA text.
[199] Annex X.11 para 3 Consolidated CETA text.
[200] Annex B.13(1) CA Model BIT 2004.
[201] see Markus Perkams, International Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionschutz und staatlichem Gemeinwohl (Marc Bungenberg, August Reinisch, Christian Tietje ed., Nomos Verlagsgesellschaft 2011) 232.
[202] see Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 466.
[203] *ibid*. 465.

in the CETA annex causes that these criteria decide on the question whether an expropriation occurs at all. This results in the situation that only illegal regulatory takings will be considered indirect expropriations. Compensation for non-illegal public measures would not be required.[204]

Interestingly, the EU, rather than excluding measures protecting legitimate public welfare objectives from the scope of indirect expropriation in CETA, wanted to introduce a proportionality test to balance investors' rights and regulatory measures. This demand was not considered in the exception clause.[205]

D. DISCUSSION AND CONCLUSION

Regarding indirect expropriation, the CETA draft is based on previous model BITs of Canada and the United States of America. Instead of including only a concise treaty text on direct and indirect expropriation[206], its annex X.11 limits the scope of indirect expropriation through further clarifications as well as a definition of indirect expropriation[207]. This is a new approach for the EU.

The role of annexes is perceived differently among scholars. While Perkams claims that the US Model BIT 2004 reflects current international customary law, Kriebaum argues that annexes are often used to deviate from these standards. In the case of CETA there is no reference to customary international law, which is the case in the US Model BIT 2004.[208]

In conclusion, an analysis of the policy space of a state has to be described from two angles distinguishing direct from indirect expropriation: Regulatory measures in the framework of

[204] see *ibid.* 466; see *supra* note 200, 227.
[205] see Nathalie Bernasconi-Osterwalder, 'The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?' (2013) Investment Treaty News – International Institute for Sustainable Development <http://www.iisd.org/itn/2013/06/26/the-draft-investment-chapter-of-canada-eu-comprehensive-economic-and-trade-agreement-a-step-backwards-for-the-eu-and-canada/> accessed on November 28, 2014.
[206] see August Reinisch, 'Future Shape of EU Investment Agreements' (2013) 28 No 1 ICSID Review, 185; see also see Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 467.
[207] see Ursula Kriebaum 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15 The Journal of World Investment & Trade, 405.
[208] see Markus Perkams, *International Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionschutz und staatlichem Gemeinwohl* (Marc Bungenberg, August Reinisch, Christian Tietje ed., Nomos Verlagsgesellschaft 2011) 230; see also annex B US Model BIT 2004.

direct expropriation – that is a transfer of a legal position – are always possible as long as it is non-discriminatory, in line with due process requirements and against compensation. There is no balancing of the public purpose with the rights of the investors and prompt, adequate and effective compensation is due. When it comes to an indirect expropriation the situation is different: expropriation can only be established in a case-by-case inquiry where factors listed in the annex of CETA - the economic impact, the duration of a state measure, investment-backed expectations as well as the character of a measure – are taken into account. A generous regulation exception clause in the same annex limits the scope of indirect expropriation only to illegal regulatory takings. In other words, this would encompass the rare situation where a measure of a state is abusive and does not have a public welfare objective. In all other cases, compensation for non-illegal public measures would not be required.

The new way how the CETA text is drafted raises a lot of questions. On the one hand, the definition and clarifications on indirect expropriation in the annex of the CETA draft give us more ideas on how to apply expropriation standards. On the other hand the generous exception clause excluding public welfare objectives and using legality criteria to define the existence of an indirect expropriation will almost make indirect expropriation disappear. A few questions on meanings remain unclear. An interpretation in the sense of the sole effects doctrine might be prohibited by the added criteria of paragraph two. It is unclear whether the regulation exception in paragraph three allows for a balanced approach, rather than the police powers doctrine when distinguishing a compensatory indirect expropriation from a legitimate regulatory measure.

Titi on the other hand talks about an "illusion that the 'right to regulate' is taken into account".[209] Saying this in 2013, this claim could not consider the later published draft of CETA directly. However, the draft's language and systematic approach on expropriation draw on previous drafting experiences, and CETA might be addressed indirectly by her critique too. It would be worth to investigate Titi's claim in regard to CETA on a broader scope taking into account all investment standards as well as other substantial provisions of the 1,600 pages document.

Looking only at the expropriation provision explicitly and from a 'right to regulate'

[209] Catherine Titi, *The Right to Regulate in International Investment Law* (Marc Bungenberg, August Reinisch, Christian Tietje ed, Nomos Verlagsgesellschaft 2013) 149.

perspective, the drafting of the provision on expropriation seems to take into account an autonomous regulatory space for a state: In regard to direct expropriation, state powers to expropriate against compensation are not questioned; in regard to indirect expropriation the generous exception clause might make indirect expropriation in the case of a public welfare object disappear. Simultaneously, no duty to compensate an investor would appear. This seems to embed a pro-state approach in CETA.

III. THE CETA JOINT COMMITTEE

A. GENERAL REMARKS

The previous two chapters have shown that interpretation is often crucial and of decisive importance for the meaning of a provision. In the case of an investor-state dispute, a constituted arbitration tribunal interprets an International Investment Agreement. Members of the tribunal will decide on how investment standards will be applied taking into consideration general rules of interpretation, such as the Vienna Convention on the Law of the Treaties, as well as special provisions of the respective agreement.

B. NEW APPROACH AND STATUS QUO

In the light of CETA, such a provision introduces a committee constituted of both parties – Canada and the EU – which is able to issue binding decisions on the interpretation of CETA provisions, including fair and equitable treatment as well as expropriation.[210]

From a general international treaty law perspective, this approach corresponds with Article 31

[210] see August Reinisch and Lukas Stifter, 'European Investment Policy and ISDS' (2014) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564018> accessed on April 4, 2015; see also Chapter X Administrative and Institutional Provisions, Article X.01 Consolidated CETA text "The Parties hereby establish a CETA Joint Committee comprising representatives of the European Union, on the one hand, and representatives of Canada, on the other. The CETA Joint Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees." as well as "Either Party may refer to the CETA Joint Committee any issue relating to the implementation and *interpretation* of the CETA (…) The CETA Joint Committee shall:
(…) or of resolving disputes that may arise regarding the interpretation or application of the CETA; (…) The CETA Joint Committee may (…) Adopt interpretations of the Provisions of the CETA, which shall be binding on tribunals established under Chapter X (Dispute Settlement) and Chapter X (Investment) as it relates to investor-state dispute settlement"

Vienna Convention on the Law of Treaties (VCLT).[211] Moreover, the inclusion of such an interpretative body follows a prominent example under NAFTA.[212] Similarly to CETA, NAFTA's Free Trade Commission (FTC) is entitled to issue binding interpretations on investment standards.[213] The FTC's Note in 2001[214] on the relation between its FET standard and customary international law showed the weight of such an interpretative declaration. In this context, the FTC concluded that the FET standard in NAFTA reflects the minimum standard of the treatment of aliens under customary international law.[215] The substantial content of this note has been adopted by numerous BITs and other legal documents.[216]

The EU-South Korea Free Trade Agreement[217] has a similar body too. Its trade committee „adopts interpretations of the provisions of this Agreement".[218] Interestingly, the chapter on dispute settlement is excluded from its scope.[219]

This is not the case in CETA. Its Joint Committee might interpret provisions of the whole agreement. Article X.01 of CETA's chapter on administrative and institutional provisions explicitly mentions that it may „(a)dopt interpretations of the Provisions of CETA, which shall

[211] see Article 31(3) VCLT „There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties."; see also August Reinisch and Lukas Stifter, 'European Investment Policy and ISDS' (2014) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564018> accessed on April 4, 2015, 9.

[212] North American Free Trade Agreement (NAFTA) (1994) <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> accessed on October 20, 2014.

[213] see Article 2001 NAFTA „The Parties hereby establish the Free Trade Commission"; see also Article 1131(2) NAFTA "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[214] NAFTA Free Trade Commission Note related to NAFTA Chapter 11, Decision of 31 July 2001, <http://www.state.gov/documents/organization/38790.pdf> accessed on April 4, 2015.

[215] *ibid*. "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."; see also Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2008) 125; see Rudolf Kläger, *Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2013) 62 *et sqq*..

[216] see Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 127 *et sqq*..

[217] see EU-South Korea Free Trade Agreement (2011)

[218] Article 15 (1) 4.d EU-South Korea Free Trade Agreement.

[219] see Article 15 para 6 of EU-South Korea free trade agreement: "Without prejudice to the rights conferred in Chapter Fourteen (Dispute Settlement) and Annex 14-A (Mediation Mechanism for Non-Tariff Measures), either Party may refer to the Trade Committee any issue relating to the interpretation or application of this Agreement."

be binding on tribunals established“[220] under the dispute settlement chapter as well as the Investment chapter „as it relates to investor-state dispute settlement“.[221]

In addition to this comprehensive mandate, it seems that there are no limits on *ratione temporis* of the Joint Committee's interpretations. It might thus be determined that the binding effect of an interpretation has this effect „from a specific date“.[222] The committee determines the moment in time from which its interpretation is valid.
The interpretation of the Joint Committee does not only bind the parties to the treaty, but also arbitral tribunals established in investor-state disputes. It could happen that an interpretation interferes with ongoing proceedings, what makes the Joint Committee in CETA a powerful body.

C. DISCUSSION AND CONCLUSION

The institution of a body that has the capacity to issue binding interpretations of an international investment agreement is neither new nor uncommon.[223] The scope of the interpretative powers of the CETA Joint Committee includes the whole treaty, including the chapters on investment and investor-dispute settlement. These interpretative powers raise however issues from a procedural as well as from a substantial point of view, which are discussed in the following.

Substantially, the possibility to issue binding interpretations allows the CETA parties to define the ultimate meaning of a CETA provision. From a 'right to regulate' perspective, this can be seen as an improvement, because it underlines the role of the state and their prospective policy goals.[224]

[220] Chapter X Administrative and Institutional Provisions, Article X.01 Consolidated CETA text.
[221] *ibid*.
[222] Article X.27 Consolidated CETA text "The Trade Committee may decide that an interpretation shall have binding effect from a specific date."
[223] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 176; see also August Reinisch and Lukas Stifter, 'European Investment Policy and ISDS' (2014) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564018> accessed on April 4, 2015, 9-10.
[224] see Christoph Schreuer and Matthew Weininger, 'A Doctrine of Precedent?' in Muchlinski P, Ortino F and Schreuer C (ed.), *The Oxford Handbook on International Investment Law* (Oxford University Press 2008), 1200-1201.

The previous chapters have shown that central investment standards often require further interpretation due to their relative vagueness.[225] In this context, existing case law can merely provide for an orientation as there is no system of binding precedent in international investment law.[226] Therefore, it is the task of the arbitral tribunal to give specific meaning to the notions of fair and equitable treatment or expropriation. As for the latter, it is crucial to distinguish a regulatory taking from an indirect expropriation constituting a duty to compensate. In regard to fair and equitable treatment, arbitrators have to define situations as manifestly arbitrary or evaluate legitimate expectations of an investor. In the case that the Joint Committee of CETA issues an interpretation, it might rather be unsure whether it would be in line with previous arbitral practice. This gives concerns regarding the issue of predictability.

From a procedural point of view, the issuance of an interpretation with binding effect by the Joint Committee does not seem to comply with the international minimum standard on the treatment of aliens in regard to due process and rule of law requirements.[227] This diverse set of principles requires the "establishment of a decent and civilized system of justice as reflected in accepted international and national practice".[228] These principles include procedural norms before and during legal proceedings, such as "access to justice, fair procedure and the prohibition of denial of justice"[229] as well as principles such as the principal of non-retroactivity, the principle *nemo judex in parta sua* as well as the guarantee of an equal treatment of the parties before any tribunal established under international law.[230] These principles assuring a stable legal system based on the rule of law are challenged by the interpretative powers of the Joint Committee for the following reasons:

[225] see eg. Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford monographs in international law, Lowe V ed., Oxford University Press, 2007) 121-151.
[226] see Article 1136 (1) NAFTA "1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case"; see also Article X.39 Consolidated CETA text "An award issued by a Tribunal pursuant to this Section shall be binding between the disputing parties and in respect of that particular case."; see also Article 53(1) ICSID "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."; see Christoph Schreuer & Matthew Weininger, 'A Doctrine of Precedent?' in Muchlinski P, Ortino F and Schreuer C (ed.), *The Oxford Handbook on International Investment Law* (Oxford University Press 2008), 1189.
[227] see Christoph Schreuer and Matthew Weininger, 'A Doctrine of Precedent?' in Muchlinski P, Ortino F and Schreuer C (ed.), *The Oxford Handbook on International Investment Law* (Oxford University Press 2008), 1201.
[228] see Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 179.
[229] see *ibid.*
[230] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 188-189.

First, an interpretation might touch upon the principle of non-retroactivity and breach fundamental procedural rights by influencing the outcome of a pending case.[231] There is extensive debate in the literature whether the note of the Free Trade Commission[232] under NAFTA in 2001 is to be qualified as interpretation of Article 1105 NAFTA or a treaty amendment.[233] This paper is not going to discuss this question in detail, but in the latter the note would not comply with the general rule of inter-temporal application. This general rule in investment law applies treaties after their entry into force and an amendment would hence not be applicable to a matter of facts before its de-facto issuance. Such interpretative powers – regardless whether a NAFTA or CETA body renders it – shall constitute a clarification, not a creation of a (new) treaty provision to be in line with the principle of non-retroactivity.[234]

A second issue is the role of the states with the Joint Committee challenging the principle *nemo judex in parta sua*, meaning that nobody should be his or her own judge. This principle is based on the idea of an independent and impartial justice. In CETA, the Joint Committee is constituted of representatives of the treaty parties Canada and the EU. Again, investment law does not freeze the content of norms adopted at the initial stage of a treaty, but should protect investments of aliens in a host state. A binding interpretation effected by the treaty parties and potentially a party in an ongoing proceeding might undermine the protection of an investor by limiting the substantive content of protection standards. Once again the point in time of the interpretation's effect is crucial. It allows a party of a pending proceeding the applicable law to a certain extent in its favour and would annul the principle that no one may be judge of its own cause.[235]

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[231] see *ibid*. 194.
[232] NAFTA Free Trade Commission Note related to NAFTA Chapter 11, Decision of 31 July 2001, <http://www.state.gov/documents/organization/38790.pdf> accessed on April 4, 2015.
[233] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 183, 190; see also Patrick Dumberry, *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 75-80.
[234] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 194; see Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 181; see also Andrea K. Bjorklund, 'NAFTA's Contribution to Investor-State Dispute Settlement', in Bungenberg M, Griebel J, Hobe S and Reinisch A (ed.), *International Investment Law. A Handbook*. (C.H.Beck/Hart/Nomos 2015) 265.
[235] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 189; see also Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 33.

The third point of critique touches upon similar issues: the principle of equal parties includes the opportunity to be heard by the other party. The sole opportunity to initiate an interpretation by a body of the Free Trade Commission under NAFTA puts the state as party of arbitration in to an advantageous position. With this possibility, information and participation is not equally accessible during the further elaboration of a provision. In the wake of the FTC note in 2001, it was criticised that there was neither prior consultation of the investor party, nor an announcement of the FTC in regard to the upcoming interpretation. This imbalance between the disputing parties challenges the principle of equal treatment of the parties and limits the opportunity of a party to be heard.[236]

Nevertheless NAFTA tribunals consequently accepted the FTC note.[237] However, the tribunal of an intensively discussed NAFTA case in this regard, *Pope & Talbot v. Canada*,[238] was reluctant in considering the interpretation of the FTC issued at a time the case was already pending. Without clearly deciding on the nature of the interpretation and its effect, it concluded that its findings could be sustained under the clarification given by the FTC. This again shows the difficulty with the division of interpretative powers between an impartial and independent tribunal and a body constituted of the treaty state parties which are thus able to influence the result of arbitral proceedings through their interpretation.[239]

Binding interpretations adopted by the parties to a treaty by definition are not automatically in contradiction with the rule of law and due process requirements of international law. Kaufmann-Kohler[240] concludes that interpretative statements of bodies such as the FTC under NAFTA are generally beneficial to the rule of law as long as they is "understandable and clear".[241]

However, in the case that this process of interpretation does not give due regard to fundamental procedural rights, particularly when it interferes with a pending case, the "arbitral

[236] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 189; see also Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 33; see also NAFTA Free Trade Commission Note related to NAFTA Chapter 11, Decision of 31 July 2001, <http://www.state.gov/documents/organization/38790.pdf> accessed on April 4, 2015.

[237] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 182; see also Rudolf Dolzer, Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 3.

[238] *Pope & Talbot Inc. v. The Government of Canada,* UNCITRAL, Award in Respect of Damages of May 31, 2002.

[239] see August Reinisch, 'The Interpretation of International Investment Agreements', in Bungenberg M, Griebel J, Hobe S, Reinisch A (ed.), *International Investment Law. A Handbook.* (C.H.Beck/Hart/Nomos 2015) 405-407.

[240] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 187, 194.

[241] see *ibid.*

tribunal (may) disregard the interpretation".[242] In her analysis she draws attention to multiple lines of the international minimum standard of the treatment of aliens not to be surpassed and shows that even a minor interpretation could be decisive for the outcome of arbitration. One possible solution would be a mechanism of a preliminary ruling similar to the one of the European Court of Justice (ECJ)[243], where the original proceeding is suspended and the tribunal, not the parties, requests a ruling on a question of law. In the case of the ECJ, the ruling has to be applied by the domestic court.[244] This proposal set forth by Dolzer and Schreuer would considerably reduce the contradiction of a body with interpretative powers such as the Joint Committee and the rule of law and due process requirements.

Looking at the CETA draft and its explicit provision on the temporal effect of an interpretation[245] CETA does not exclude potential breaches with the minimum standard on the treatment of aliens under international law. Even if an institution such as the Joint Committee, which underlines a strong role of the treaty parties, is not uncommon in IIAs, this chapter discusses how CETA challenges the fundamental principles of a rule-of-law-based legal system, such as the principle of non-retroactivity, the principle *nemo judex in parta sua* as well as the guarantee of an equal treatment of the parties. The analysis in this chapter borrows from previous experience of the FTC of NAFTA, where state parties enjoy a similar strong role in interpreting the treaty text. Both the FTC of NAFTA as well as the Joint Committee of CETA have a state-friendly stance, which can be interpreted in favour for a 'right to regulate', but omit fundamental due process and rule of law requirements.

IV. CONCLUSION

All three chapters of this paper look for stances on the 'right to regulate' in CETA. A draft published in 2014 by the European Commission[246] is the result of long negotiations between

[242] see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *in* Gaillard E, Bachand F (ed.), *Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute 2011) 194.
[243] see Article 267 TFEU
[244] see Rudolf Dolzer and Christoph Schreuer, *Principles in International Investment Law* (Oxford University Press 2012) 35.
[245] see Article X.27 Consolidated CETA text: It might be determined that the binding effect of an interpretation of the Joint Committee has effect „from a specific date".
[246] see *supra* note 1.

Canada and the EU, which raised a lot of public attention. Particular interest has focused on its investor-state dispute settlement mechanism. It seems that there is a general suspicion that CETA would limit the capacity of a state to adopt regulatory action for public purposes.

Having looked at two substantive standards in investment law very often invoked by investors as well as the CETA Joint Committee, the following conclusions can be drawn regarding the 'right to regulate' and fair and equitable treatment, indirect expropriation as well as the interpretation in CETA.

CETA uses a new approach in regard to the fair and equitable treatment standard, which is at the first glimpse overall state-regulation friendly. Measures in breach with FET influenced by recent NAFTA case law are listed and are able to guide arbitrators in regard to the substantive content as well as the required level of severity. However, the consideration of legitimate expectations might open up the floor for contradictions. It is not clear what kind of representation of a state is required to trigger legitimate expectations of an investor and might be an entry point for investor claims which would have been rejected before. This is the reason why in the end the European Commission is not right in claiming "significant clarifications to the key substantive provisions" [247] to protect a 'right to regulate' in regard to the FET standard of CETA.

Unlike the FET standard, the provision on expropriation assures a 'right to regulate'. An annex provides a definition on indirect expropriation and lists factors to consider for the determination of an indirectly expropriatory conduct of states. This practice can be already found in model BITs of Canada and the US. The 'right to regulate' for a state is particularly considered in a generous exception clause, excluding "legitimate public welfare objectives, such as health, safety and the environment"[248] from the application of the provision. This would make indirect expropriation and the joint duty to compensate an investor in such circumstances almost disappear. Questions on how to distinguish a legitimate regulatory taking from an indirect expropriation and general interpretations issues remain, but CETA seems to consider a strong role of a state in the provisions on expropriation.

[247] European Commission, 'Investment Provisions in the EU-Canada free trade agreement (CETA)' (2013) 1 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/tradoc_151918/tradoc_151918en.pdf> accessed on December 30, 2014.
[248] Annex B Consolidated CETA text.

Both previous discussions on FET and expropriation show that the question on interpretation of CETA is crucial. In regard to investor-state dispute settlement, the so-called CETA Joint Committee penetrates the exclusive right of arbitration tribunals. It emphasises the role of the state parties to CETA in enabling them to interpret any provision of the agreement, including the investment chapter. This is no uncommon practice, as NAFTA shows, however it is highly questionable in regard to its compliance with the principle of non-retroactivity, the principle that no one may be judge of its own cause as well as the principle of equal parties, particularly because of an express provision allowing the Joint Committee to define the point in time from which an interpretation has binding effect on arbitration proceedings. This proves problematic with due process and rule of law requirements under international law protecting the rights of an investor, not only but particularly in the case of pending proceedings. This legally problematic situation seems to strengthen a state regulation-friendly approach in CETA.

Putting the pieces together, CETA's approach is more state regulation-friendly than previous (EU) investment agreements. At the same time, the aim of the European Commission to sufficiently protect the 'right to regulate' against investor claims is overshadowed by inconsistencies in regard to fair and equitable treatment. It is to be underlined that this paper only focused on three areas inspired by claims of the European Commission to introduce a strong stance of the 'right to regulate' into CETA. This claim however cannot be fully approved by the elaborations in this paper.

CETA might already guide arbitrators to balance state regulatory interests and investor rights to some extent, but it seems to be far from assuring that regulations in the public interest are not in legal contradiction with rights of investors. The draft text of CETA is currently under legal review and might be adopted in 2015. It is to be handled as a blue print for following EU investment agreements, such as the Transatlantic Trade and Investment Partnership Agreement (TTIP). In both cases, it will be ultimately a political question to what extent state regulatory space is protected through investment chapters.

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