

“Putting the Pieces Together ... an EU Model BIT?”

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Abstract

Although the EU Commission as negotiation leader in the field of external trade matters which, after Lisbon, also include investment will not issue a Model Investment Treaty, a number of its statements together with reactions by the Council and the Parliament allow the observer to draw conclusions as to the likely content of such future agreements. In addition, those trade agreements with investment chapters which are already close to finalization, like the Canada-EU Comprehensive Economic and Trade Agreement (CETA), provide telling insights concerning the main features of an EU agreement on investment protection.

This article provides a general overview of the expected content of EU treaties in the field of investment, comprising scope of protection, substantive standards, and dispute settlement. It concludes that future EU investment agreements are likely to contain the traditional short EU BIT standards to which a number of specifications inspired by North-American practice will be added.

Keywords

EU – common commercial policy – investment treaties – model BITs – substantive investment standards – CETA – investor-State dispute settlement

1 The Reluctance of EU Institutions to Adopt a Model BIT

The search for an EU Model BIT may seem doomed from the beginning. It is well known that the EU Commission expressly renounced the idea to adopt a

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Model BIT/IIA, as used by most OECD members concluding investment treaties, in order to avoid any limitation of its negotiation freedom.¹ Nevertheless, there is the legitimate question, asked not only by EU member states, but also by potential negotiating partners, the investment community, NGOs, academia as well as the public at large how the Commission intends to use its new powers under the Lisbon Treaty.

2 The Search for an 'Ersatz'-Model BIT

It is thus not surprising that, in the absence of an EU Model BIT/IIA or other negotiating platform, other generic or even specific forms expressing the EU's approach to shape investment agreements are taken into account when trying to 'predict' the likely content of future EU IIAs.

In the past a prototype that has found particular attention was the rather shadowy Minimum Platform on Investment,² shadowy not because of its content, but because of the aura of secretiveness that surrounded its existence. Formally, it was never published, but still it was widely commented upon as a template to use the pre-Lisbon external trade powers in the most efficient way, which basically meant to employ investment admission provisions that could be regarded as covered by a broad understanding of trade in services powers.³

1 See European Commission, Communication, *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010)343 final, 4, 6 ("a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable"). <trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (5 March 2014). One may question whether the unsuitability of a one-size-fits-all BIT is really a valid argument against a model BIT. After all, model BITS, as used by numerous BIT concluding states, are nothing more than negotiating templates which need to be adapted in specific cases, reflecting the needs and political wishes of particular contracting parties.

2 Council of the EU, *Minimum Platform on Investment*, 15375/06, 27 November 2006 (unpublished).

3 The content was considered confidential by the Council and never officially published. Requests for documents release by scholars were regularly denied. See N. Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 *Legal Issues of Economic Integration* 301, 305–306, footnote 20. For details of the content of the Minimum Platform see Niklas Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence' in A. Reinisch and C. Knahr (eds.), *International Investment Law in Context* (Eleven 2008) 73–92. See also Wenhua Shan and Sheng Zhang, 'Market Access Provisions in the Potential EU Model BIT: Towards a "Global BIT 2.0"?', in this Issue.

With the entry-into-force of the Lisbon Treaty,⁴ the assertion of the new extended Common Commercial Policy powers⁵ of the EU led to a series of documents adopted in the institutional triangle shedding some light on the likely future use of these powers in the investment field. In July 2010, the Commission adopted a Policy Communication, entitled "Towards a comprehensive European international investment policy."⁶ This Communication received comments by the other EU institutions; most importantly among them were the Council Conclusions of 25 October 2010⁷ and the European Parliament's Resolution of 6 April 2011.⁸

All these documents contain important information on various aspects of future EU investment agreements to be concluded with third parties. However, they are all drafted on a level of generality that clearly falls short of containing any precise textual elements that could be used in future EU BITs and IIAs. It was thus not surprising that the attention of the 'Model BIT seekers' was soon directed towards actual negotiating fora. When the Commission negotiations with Canada on a Comprehensive Economic and Trade Agreement (CETA)

4 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, Official Journal C 306, 17 December 2007, 1.

5 Article 207(1) Consolidated version of The Treaty on the Functioning of the European Union, Official Journal C 115, 9 May 2008, 47: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." See also Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' in C. Hermann and J. P. Terhechte (eds.), *Eur. Ybk. Int'l Econ. L.* (2010) 123–151; Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How will the new EU Competence on FDI affect the emerging global regime?' (2012) 15 *J. Int'l Econ. L.* 51–84; Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011); Frank Hoffmeister and Günes Ünüvar, 'From BITs and Pieces towards European Investment Agreements' in M. Bungenberg, A. Reinisch and C. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos – Hart Publishing 2013) 57–86.

6 European Commission, *supra* note 1, p. 4.

7 Council of the EU, *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council Meeting, Luxembourg, 25 October 2010 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> (5 March 2014).

8 *European Parliament resolution of 6 April 2011 on the future European international investment policy*, (2010/2203 (INI)), Official Journal C 296 E, 2 October 2012 <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> (5 March 2014).

including an investment chapter started,⁹ it became clear that these negotiations could provide valuable insight into the course adopted by the EU in fashioning its investment agreements.

While the Commission remained successful in keeping its low-profile, bureaucratic negotiating approach confidential, the high-profile negotiating directives given to it by the Council were leaked at some stage. These Council Negotiating Directives of 12 September 2011¹⁰ concerning the negotiations with Canada, India and Singapore contain valuable information on the EU's official position with regard to a number of investment related issues. They suggest that an investment chapter should include fair and equitable treatment (FET), full protection and security, national treatment and most-favoured-nation (MFN) treatment as well as guarantees against uncompensated expropriation and probably an umbrella clause. As regards the level of detail, the instructions appear to favour the traditional European approach by adhering to a rather concise treaty text, without clarifications limiting the scope of FET and indirect expropriation as they are known from US and Canadian BITs as well as NAFTA. In fact, avoidance of 'NAFTA-contamination' was reportedly a specific wish of some Member State officials.¹¹ With regard to dispute settlement, the need for direct investor-state arbitration seemed to be unquestioned, though the precise contours were still open given the difficulty of access to ICSID (and ICSID Additional Facility) dispute settlement which appear to be the Commission's favourite venues.

Meanwhile the Canada-EU CETA negotiations have progressed to a state which allowed the Commission President and the Canadian Trade Minister to announce in mid-October 2013 that the CETA deal had been approved in principle.¹² This, of course, did not mean that the text of all chapters would have

9 On the negotiations with Canada *see* Céline Lévesque, 'The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA' in Bungenberg *et al.* (eds.), *supra* note 5, pp. 121–146.

10 Council Negotiating Directives (Canada, India and Singapore), 12 September 2011 <www.bilaterals.org/spip.php?article20272&lang=en> (5 March 2014) as well as at <www.s2b.network.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html> (5 March 2014).

11 Luke E. Peterson, 'EU Member-States Approve Negotiating Guidelines for India, Singapore and Canada Investment Protection Talks; Some European Governments Fear "NAFTA-contamination"' (2011) *IAREporter*, 23 September 2011 <www.iareporter.com/articles/20110923_2> (5 March 2014).

12 European Commission, Press Release, *EU and Canada Strike Free Trade Deal*, 18 October 2013 <trade.ec.europa.eu/doclib/press/index.cfm?id=973> (5 March 2014).

been finalized. Rather, the nitty-gritty still needs to be negotiated and whether this will be completed soon or not is uncertain.

Most recently this uncertainty was increased by parallel developments surrounding the EU-US negotiations on a Transatlantic Trade and Investment Partnership (TTIP). The beginning of the negotiations in mid-2013 were already politically overshadowed by waves of new revelations concerning US spying activities directed against EU member state governments. But towards the end of 2013, a number of press reports highly critical of investment protection and, in particular, of its core element, investor-state dispute settlement (ISDS) gained such momentum that the Commission interrupted the negotiations and announced a 'reflection period' in late January 2014.¹³ These developments certainly have repercussions also on other EU investment treaty negotiations. It implies that any speculations about the shape of future EU investment treaties that may permit glimpses of a still invisible EU Model BIT remain highly uncertain.

Nevertheless, while also other investment negotiations with Japan and China as well as a number of North African and East Asian countries are ongoing,¹⁴ the investment chapter of the Canada-EU CETA is at present the most advanced negotiating product. Although its final text still awaits publication, some preliminary versions of the investment chapter have been leaked and may provide guidance to investment scholars seeking a fuller picture of how future EU IIAs might look like.

Thus, the Draft CETA Investment Texts (supplemented by the Draft CETA Dispute Settlement) of May and November 2013¹⁵ are the crucial texts which have been relied upon by most contributors to this Special Issue in order to ascertain the more precise features of a future EU BIT/IIA. The following reflections will not attempt to recapitulate the findings of the authors. Rather, they build on them and ponder whether the expected outcome of the Canada-EU CETA investment chapter still resembles the European approach to BITs as a short treaty with standards formulated on a rather high level of generality.

13 EU Trade Commissioner de Gucht launched a public consultation on the EU's investment chapter within the EU-US Free Trade negotiations. See European Commission, Press Release, *Commission to Consult European Public on Provisions in EU-US Trade Deal on Investment and Investor-State Dispute Settlement*, 21 January 2014 <trade.ec.europa.eu/doclib/press/index.cfm?id=1015> (5 March 2014).

14 See Frank Hoffmeister and Gabriela Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT', in this Issue.

15 Draft CETA Investment Text, 31 May 2013 and 21 November 2013; Draft CETA Dispute Settlement, 15 November 2013 <www.tradejustice.ca/?page_id=2> (5 March 2014).

3 The Main Features of the Anticipated Canada-EU CETA Provisions

3.1 *Scope of Application*

One of the central issues concerning the scope of application is the question to what extent an IIA should cover all types of investments or only FDI. Further, keeping in mind the perennial debate of ICSID tribunals about the inherent notion of ‘investment’ under Article 25 of the ICSID Convention,¹⁶ it would not be surprising if IIAs included some of these limiting features.

Against this background, it is remarkable that the Draft CETA retains the broad asset-based definition comprising both portfolio and FDI¹⁷ (in spite of different views as regards internal EU powers to negotiate and conclude portfolio investment aspects)¹⁸ found in many traditional European BITs.

Specifically, and remarkably given the controversial acceptance of bondholder claims in the *Abaclat*¹⁹ and subsequent Argentinian bondholder

16 Article 25(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 UNTS 159: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” See also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (CUP 2009) 128 *et seq.*; August Reinisch, ‘From the Perennial Issue of the Notion of Investment Pursuant to Article 25 ICSID Convention and Narrow Dispute Settlement Provisions to Further Clarifications of Substantive Standards of Protection – ICSID Arbitration in 2009’ in G.Z. Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence* 2010 (OUP 2012) 839–856.

17 Article X.3 Definitions Draft CETA Investment Text, 21 November 2013, *supra* note 15.

18 See, e.g., *Lisbon Treaty Judgment*, German Constitutional Court, 2 BvE 2/08, 30 June 2009, para. 379: “The extension of the common commercial policy to “foreign direct investment” (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term “foreign direct investment” only encompasses investment which serves to obtain a controlling interest in an enterprise ... The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be included as mixed agreement.” <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html> (5 March 2014). See also Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds.), *Eur. Ybk. Int’l Econ. L., Special Issue: International Investment Law and EU Law* (Springer 2011).

19 *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

cases²⁰ as investment disputes under the ICSID Convention, the illustrative list of investments in the draft definition does not exclude loans and bonds, but rather expressly includes “bonds, debentures and other debt instruments of an enterprise.”²¹ The Draft CETA Investment Text only contains a Canadian proposal regarding debt rescheduling in a separate Annex X, aiming at excluding investor-state claims for debt restructuring claims.²²

Apparently, there will also be no exclusion of ‘speculative forms of investment’ as demanded by the EP.²³ In practice, of course, it would appear difficult to distinguish between ‘speculative’ and ‘non-speculative’ portfolio (or even direct) investment.²⁴

What is quite remarkable, however, is the fact that the introductory “chapeau” of the investment definition of the Draft CETA contains language reminiscent of the so-called *Salini* elements²⁵ which have played a major role in ICSID arbitration as a jurisdictional hurdle ensuring that only true ‘investment’ disputes and not any ordinary commercial dispute should be heard by ICSID tribunals. The draft definition of an investment contains the following slightly tautological language: “Every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, and a certain duration.”²⁶

To include such language in the definition of investment is remarkable for various reasons. First, the *Salini* criteria are jurisprudentially developed elements giving content to the undefined jurisdictional requirement of an ‘investment’ under Article 25 of the ICSID Convention.²⁷ It is widely accepted that

20 *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Tribunal constituted on 3 July 2008; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013.

21 Article X.3(c) Draft CETA Investment Text, 21 November 2013, *supra* note 15.

22 Annex X: Public Debt, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

23 See European Parliament, *supra* note 8, para. 11.

24 See August Reinisch, “The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITS and other Investment Agreements” (2013) 12 *Santa Clara J. Int’l L.* 105, 136 *et seq.*

25 See *infra* note 30.

26 Article X.3: Definitions, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

27 After *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52, investment tribunals have focused on a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State’s development. See Schreuer, Malintoppi, Reinisch and Sinclair, *supra* note 16, pp. 128 *et seq.*; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed., OUP 2012) 65 *et seq.*

this leads to a double-barrelled jurisdictional test in ICSID cases according to which claimants have to show that their activities amount to an investment under the ICSID Convention and under the definition of the applicable BIT.²⁸ Conversely, it is also generally accepted that in investment disputes arbitrated outside the ICSID framework, only the jurisdictional requirements under the applicable BIT need to be fulfilled. Nevertheless, some recent non-ICSID tribunals seem to have ‘espoused’ at least some of the *Salini* elements.²⁹ The current Draft CETA text could be regarded as a manifestation of the political will of the negotiating parties to create an additional hurdle ensuring that only a more limited number of ‘true’ investments will be protected by the investment chapter.

What is probably most interesting is the fact that the language found in the present Draft CETA text does not contain the most controversial feature of the *Salini* criteria, the “contribution to the development of the host State”.³⁰ It can

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- 28 See, e.g., *Ceskoslovenska obchodni banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 68: “A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.” <www.italaw.com/sites/default/files/case-documents/ita0144.pdf> (5 March 2014); *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, para. 112: “It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an “investment” under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention.”
- 29 See, e.g., *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 207 (“The Arbitral Tribunal therefore considers that the term “investments” under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk.”); see also *Alps Finance v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, para. 245.
- 30 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52: “The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.” The reference is to Emmanuel Gaillard, ‘Centre international pour le règlement des

only be presumed that the negotiating parties intentionally wanted to eliminate this aspect which has led to some confusion in particular by tribunals which have adopted a so-called jurisdictional approach. This approach was prominent in the annulment committee’s decision in *Mitchell v. Congo*³¹ and in the sole arbitrator’s award in *Malaysian Historical Salvors v. Malaysia*.³² Both decisions turned the characteristic elements of the *Salini* criteria into jurisdictional requirements that had to be cumulatively fulfilled with the consequence that the perceived absence of the requirement of a ‘contribution to the development of the host State’ led to the dismissal of the claims on jurisdictional grounds. The omission of the controversial ‘contribution to the development of the host State’ criteria is in line with most recent ICSID cases that have clearly discarded it.³³

But the current draft definition of an investment under the CETA also tries to incorporate other jurisprudential developments aimed at limiting the scope of an investment. The November draft contains language in square brackets purportedly excluding merely commercial claims as opposed to investment claims.³⁴

differends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales’ (1999) *JDI* 278, 292.

- 31 *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.
- 32 *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.
- 33 *See, e.g., Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 220 (“appreciat[ing] that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment....”); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 306 (“the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable owing to its subjective nature.”).
- 34 Article X.3 Draft CETA Investment Text, 21 November 2013, *supra* note 15: “For greater certainty, ‘claims to money’ does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.”

Though the precise delimitation is difficult, this general approach is in line with both ICSID and non-ICSID cases.³⁵

Another limiting approach is also evident in the draft definition of investors contained in the current CETA text. The definitional part of the CETA refers to an investor as “a natural person or an enterprise of a Party, that seeks to make, is making or has made an investment in the territory of the other Party.”³⁶ As regards natural persons, the text refers to citizenship, concerning enterprises the main criterion appears to be incorporation. With regard to the latter, the draft CETA makes clear that mere shell companies incorporated in either of the parties should not benefit from the investment protection under the agreement. This is not done by a denial of benefits clause, which is often difficult to handle in practice, but rather by a definitional clarification excluding enterprises without any “substantial business activities” in either of the parties.³⁷

3.2 Admission/Market Access

Opening up domestic markets to foreign investors is one of the main purposes of trade and investment agreements. The traditional BIT approach is to improve the legal protection for foreign investors which should induce them to invest. However, they usually do not oblige host states to admit foreign investors, thus leaving this issue to their discretion. Only gradually, US and Canadian BITs have changed course and provided for market access through expanding national treatment also to the pre-investment or establishment phase.³⁸ Another technique to open up domestic markets to foreign investors is to provide for specific market access rules in a GATS style, indicating the types and volume of investment from the other contracting party/ies that

35 See, e.g., *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 56 (“... purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention.”).

36 Article X.3: Definitions, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

37 *Ibid.* (“But ‘investor’ does not mean: a) an enterprise of a Party, if the enterprise [CAN: is owned or controlled by an investor of the other Party or of a non-Party and the enterprise] has no substantial business activities in the territory of the Party under whose law it is constituted or organized”).

38 See, e.g., Article 3(1) Canadian Model FIPA 2004 (“Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.”) <italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (5 March 2014).

should be admitted.³⁹ This approach was followed by the EC/EU in the pre-Lisbon era, when its Common Commercial Policy powers did not include an express FDI power and could arguably have been extended only to the trade-like aspects of access to foreign markets,⁴⁰ as opposed to substantive treatment. In a number of free trade agreements, the EC adopted such a GATS-inspired market access approach and made specific commitments in specific areas.⁴¹

While it was clear that the EU institutions were generally determined to continue a policy of market liberalisation,⁴² it was less clear which course to adopt for the future, whether to have separate provisions on market access or to extend national treatment to the pre-investment stage.⁴³ The draft CETA text shows that it is primarily the latter (Canadian) approach that was pursued. Its national treatment obligation extends to "establishment, acquisition (and possibly expansion) of investments."⁴⁴

In addition, the draft CETA contains a provision on market access in the form of prohibitions of specific limitations to foreign investors⁴⁵ coupled with a prohibition of performance requirements.⁴⁶

39 See on the different options also Wenhua Shan and Sheng Zhang, *supra* note 3.

40 See *supra* note 5.

41 See, e.g., the provisions on "commercial presence" of Article 65 *et seq.* Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 15 October 2008 (entry into force: provisional application: 29 December 2008), Official Journal L 289/I, 30 November 2008, 3, as well as Section C of Chapter 7 of the EU-Korea FTA, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 15 October 2009 (entry into force 1 July 2011), Official Journal L 127, 14 May 2011, 6, which provides for MFN treatment and specific market access commitments and national treatment in separate schedules. See also Dimopoulos, *supra* note 5, pp. 52–53.

42 See only European Commission, *supra* note 1, p. 5 ("... our trade policy will seek to integrate investment liberalisation and investment protection").

43 See also the discussion in Stephan Woolcock, *The EU Approach to International Investment Policy after the Lisbon Treaty*, European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Study, October 2010, EXPO/B/INTA/FWC/2009-01/Lot7/07-08-09 <[www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET\(2010\)433854_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf)> (5 March 2014), 31 *et seq.*

44 Article X.7 National Treatment, Draft CETA Investment Text, 21 November 2013, *supra* note 15; see also *infra* note 69.

45 *Ibid.*, Article X.4: Market Access.

46 *Ibid.*, Article X.5: Performance Requirements.

3.3 Substantive Treatment

The core of any IIA or BIT concluded by EU member states in the past has always been a rather similarly phrased set of substantive treatment standards: Typically, the twin obligations of fair and equitable treatment as well as full protection and security – often even contained in a single provision – and the two non-discrimination obligations of national treatment and MFN, frequently supplemented by prohibitions of arbitrary or discriminatory treatment. A further cornerstone of European BITs has always been the guarantee that investors would not be expropriated – directly or indirectly – except in the public interest, in a non-discriminatory way, according to due process and – most important in practice – under the condition that they receive adequate, prompt and effective compensation. Less uniformly contained in BITs are so-called umbrella clauses, while ‘free transfer of funds’ guarantees are regularly found in IIAs.

3.3.1 Expropriation

With regard to the formulation of the expropriation standard, apparently EU negotiators could not avoid some degree of ‘NAFTA contamination.’⁴⁷ The draft CETA expropriation provision starts out as the typical clause found in many European BITs.⁴⁸ However, it is expressly made subject to the clarifications in an annex on expropriation which basically reproduces the shared understandings already expressed in the Canadian Model BIT 2004⁴⁹ and the US Model BIT 2012.⁵⁰

This CETA understanding sets out that a finding of indirect expropriation requires a case-by-case, fact-based inquiry and provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with “distinct, reasonable investment-backed expectations,” and the character of the measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation. Finally, the understanding contains the police powers doctrine-inspired language trying to ensure that *bona fide* regulation in the public interest should not be considered expropriatory.⁵¹

47 See *supra* note 11.

48 Article X.11: Expropriation, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

49 Annex B.13(1) Canada Model BIT 2004, *supra* note 38.

50 Annex B US Model BIT 2012 <www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (5 March 2014).

51 Annex: Expropriation, Draft CETA Investment Text, 21 November 2013, *supra* note 15: “For greater certainty, except in the rare circumstance where the impact of the measure or

This is in line with the November 2013 Commission Factsheet on ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ which specifically stated “that future EU agreements will provide a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation. In particular, when the state is protecting the public interest in a non-discriminatory way, the right of the state to regulate should prevail over the economic impact of those measures on the investor.”⁵² It seems that the Commission thereby adopted not only the Canadian approach, but also followed the wishes of the European Parliament to find a “clear and fair balance between public welfare objectives and private interests” in defining indirect expropriation.⁵³

3.3.2 Fair and Equitable Treatment and Full Protection and Security

One of the more interesting features of the substantive treatment provisions in the draft CETA text is the way how the treaty negotiators attempted to define more precisely what falls short of fair and equitable treatment (FET).

The usual short FET clause stipulating that “[e]ach Party shall accord in its territory to investors and to covered investments of the other Party fair and equitable treatment”⁵⁴ is accompanied by a paragraph defining a breach of the FET obligation as a

measure or series of measures constitut[ing]:

- a. Denial of justice in criminal, civil or administrative proceedings;
- b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- c. Manifest arbitrariness;
- d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.”

52 European Commission, Fact Sheet, *Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, November 2013, 2 <trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf> (5 March 2014).

53 European Parliament, *supra* note 8, para. 19 (calling for “protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests”).

54 Article X.9(1) Draft CETA Investment Text, 21 November 2013, *supra* note 15.

- e. Abusive treatment of investors, such as coercion, duress and harassment; or
- f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 4 of this Article.⁵⁵

Obviously, the negotiators have tried to navigate between the Scylla of over-determination and the Charybdis of vagueness. At the same time this is an interesting example of the potential feedback between treaty-makers and investment tribunals. It is evident that the CETA drafters have incorporated many elements found in arbitration practice, but it is also clear that they have, presumably intentionally, not adopted all of these elements. As has been rightly stressed by Ursula Kriebaum,⁵⁶ ‘stability’ is an element usually found in attempts to define the content of FET⁵⁷ which is missing here. This could be viewed as an indication that the parties intended not to make the CETA’s FET version too ‘investor-friendly.’ It seems to underline the intention, expressed in the November 2013 Commission Fact sheet, to “reaffirm the right of the Parties to regulate to pursue legitimate public policy objectives” and to “set out precisely what elements are covered and thus prohibited” by FET in EU investment agreements.⁵⁸

Such mutual interdependence of treaty-makers and investment tribunals is also emphasized by a provision in the CETA FET clause that offers the Contracting Parties a possibility to review and clarify the specific content of FET by adding further elements.⁵⁹ This is an interesting alternative to the authoritative interpretation approach⁶⁰ pursued by Article 1131 NAFTA which has led to a number of sometimes controversial interpretations, including the one that stipulated that NAFTA’s FET does not go beyond the customary international law minimum standard.⁶¹

55 Article X.9(2) Draft CETA Investment Text, 21 November 2013, *supra* note 15.

56 Ursula Kriebaum, ‘FET & Expropriation in the Invisible EU Model BIT’, in this Issue.

57 Dolzer and Schreuer, *supra* note 27, pp. 145 *et seq.*

58 European Commission, *supra* note 1, pp. 2, 7 *et seq.*

59 Article X.9(4) Draft CETA Investment Text, 21 November 2013, *supra* note 15 (“In accordance with X [exact reference to be determined regarding the procedure], the Parties shall every X years [or regularly], or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.”) in conjunction with Article X.9(2)(f) Draft CETA Investment Text.

60 See also Christian Tams, ‘Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?’, in this Issue.

61 NAFTA Free Trade Commission, Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31 July 2001 <www.worldtradelaw.net/nafta/chap11interp.pdf>

The overall limiting tendency underlying the CETA substantive treatment provisions is also evident in the context of full protection and security (FPS). However, it is not in the sense that FPS would be limited by the customary international law minimum standard, as one might have expected given the NAFTA heritage of such an approach. As explained by Catharine Titi such an attempt was apparently made by Canada, but obviously rejected by the EU.⁶² Rather, the limiting element derives from another strand of FPS jurisprudence. While the November 2013 draft CETA article containing FPS, combined with FET, merely requires that "[e]ach Party shall accord in its territory to investors and to covered investments of the other Party [fair and equitable treatment and] full protection and security [...]", paragraph 6 of this article clarifies that "full protection and security" is limited to "physical security."⁶³ This limitation must be understood against the background of a jurisprudential divide according to which some investment tribunals have held that FPS would be limited to prevent actual physical security of investors and investments,⁶⁴ whereas others have considered that the standard would go "beyond physical security."⁶⁵

(5 March 2014) ("B. 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.").

62 Catharine Titi, 'Full Protection and Security, Arbitrary or Discriminatory Measures, and the Invisible Model BIT', in this Issue.

63 Article X.9(6) Draft CETA Investment Text, 21 November 2013, *supra* note 15 ("For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.").

64 *See, e.g., Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, para. 484 ("The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 169 ("... the absence of the word "full" or "fully" in the full protection and security provisions ... supports this view of an obligation limited to providing physical protection and related legal remedies for the Spanish Claimants and their assets").

65 *See, e.g., Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 303 ("[T]he obligation to provide full protection and security [was] wider than 'physical' protection and security because it was difficult to understand how the physical security of an intangible asset would be achieved."); *Compañía de Aguas del Aconquija*

While the clarification in the draft CETA text will ensure that FPS can be invoked only in cases concerning physical interferences with investments, it is questionable whether this will imply a significant reduction of protection for investors since most non-physical interferences often constitute violations of the FET standard.

3.3.3 Non-Discrimination

With regard to the non-discrimination standards, national treatment and MFN treatment, the draft CETA text reveals some interesting features that may be relevant for other EU IIAs as well. Specifically, the text seems to clarify some questions left open in previous EU documents. As may be recalled, the 2011 Council Negotiating Directives merely stated that the negotiations should aim to include “unqualified national treatment” and “unqualified most-favoured nation treatment,”⁶⁶ whereby it was not quite clear what the term “unqualified” was intended to mean.⁶⁷

With regard to the formulation of the national treatment clause, the latest version of the CETA negotiating text evidences a clear departure from the traditional European national treatment clauses, limited to the so-called post-establishment phase.⁶⁸ The draft CETA text extends the scope of the national treatment obligation to establishment, acquisition (and possibly expansion) of investments.⁶⁹ This clearly evidences an attempt to ensure market access/

S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.15:

If the parties to the BIT had intended to limit the obligation to “physical interferences”, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.

66 Council Negotiating Directives (Canada, India and Singapore), 12 September 2011, *supra* note 10.

67 See Reinisch *supra* note 24, p. 123.

68 See in general Freya Baetens, ‘Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law’ in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP 2010) 279–315; Andrea K. Bjorklund, ‘National Treatment’ in A. Reinisch (ed.), *Standards of Investment Protection* (OUP 2009) 29–58.

69 Article X.7 National Treatment, Draft CETA Investment Text, 21 November 2013, *supra* note 15: “1. Each Party shall accord to investors of the other Party and to covered investments,

admission obligations by adopting the Canada/US approach to extend national treatment to establishment phase.

The draft national treatment clause of the CETA also departs from the European tradition in so far as it is not fully unqualified, but rather incorporates language, triggering the non-discrimination obligation only “in like situations.” This also follows US/Canadian BIT traditions⁷⁰ and is in line with the wishes of the European Parliament.⁷¹ While useful, this addition will probably not change much, since many investment tribunals actually adopt a ‘like circumstances’ or ‘like situations’ test even in the absence of specific wording.⁷²

Much more relevant will be the text of the MFN clause of the CETA, if adopted in the latest version, expressly excluding ISDS. While the envisaged text of the MFN provision itself is rather straightforward⁷³ – though possibly also applying in the pre-investment stage⁷⁴ –, the clarification in a separate paragraph that “treatment” does “not include investor-to-state dispute settlement procedures”⁷⁵ will have important practical impact.

treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment [EU: and], acquisition [EU: of an enterprise], [CAN: expansion], conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.”

70 See, e.g., Article 3(1) Canadian Model FIPA 2004, *supra* note 38.

71 European Parliament, *supra* note 8, para. 19 (“non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate ‘in like circumstances.’”).

72 See, e.g., *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 53. See also August Reinisch, ‘National Treatment’ in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law* (C.H. Beck, Hart, Nomos, forthcoming).

73 Article X.8: Most-Favoured-Nation Treatment, Draft CETA Investment Text, 21 November 2013, *supra* note 15: “1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the establishment [EU: and], acquisition [EU: of an enterprise], [CAN: expansion], conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.”

74 In the November 2013 version of the leaked CETA text, it is indicated that the current formulation is “[s]ubject to agreement by EU on inclusion of an MFN obligation regarding establishment, acquisition, expansion of an investment.” Article X.8: Most-Favoured-Nation Treatment, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

75 Article X.8: Most-Favoured-Nation Treatment Draft CETA Investment Text, 21 November 2013, *supra* note 15 (“4. For greater certainty, the “treatment” referred to in Paragraph 1 and

This clarification is a direct response to the uncertainty which started with the *Maffezini* case⁷⁶ and was exacerbated by numerous tribunals disagreeing whether an MFN clause should permit claimants to invoke more favourable procedural, maybe even jurisdictional,⁷⁷ provisions in third country BITs or at least to overcome procedural obstacles, such as waiting periods,⁷⁸ or whether it would not permit them to do so.⁷⁹ Regardless how one stands on this issue, it is obvious that a clarification like the one in the draft CETA is welcome from the perspective of predictability and certainty and will help avoid unnecessary litigation.

Probably the most astonishing insight that the audience of the conference in Vienna learned from Frank Hoffmeister was that it was apparently intended by the negotiating parties of the CETA that MFN should only refer to *de facto* or *de iure* treatment, and was not meant to serve as a tool to ‘import’ better treatment (even substantive treatment) under other investment treaties. As explained in his written contribution to this Special Issue,⁸⁰ the underlying idea is to prevent an imbalance resulting from the fact that one party may consistently refuse to incorporate certain (substantive) standards in its IIAs which would make it impossible for investors from the other party to invoke such standards, while the reverse is not true if the other party provides for better/broader standards in some third party IIAs. This view seems to reflect a ‘trade approach’ to MFN, since in trade treaties MFN often relates to the *de facto* treatment given to products from third parties. However, MFN clauses in investment agreements regularly concern treatment obligations found in

2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements.”).

76 *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

77 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Vo79/2005, Award on Jurisdiction, 1 October 2007.

78 *See, e.g., Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011.

79 In *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 223, the Tribunal held that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.” The Tribunal in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, even denied the avoidance of waiting periods.

80 *See Hoffmeister and Alexandru, supra note 14.*

third-party treaties⁸¹ and practically all investment claims invoking MFN do so in order to import better treatment stipulated to investments in third-party treaties.

It will be interesting to see whether tribunals applying the CETA's MFN clause, as currently proposed, in the future will follow this limiting, trade-inspired reading or will rather retain the approach expressed by the *Bayindir* tribunal according to which by an ordinary MFN clause “the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries.”⁸²

3.3.4 Umbrella Clauses

The question mark which surrounded the umbrella clause in the Council's Negotiating Directives of 2010 seems to have disappeared.⁸³ The draft CETA contains an EU suggestion on an umbrella clause. The current text indicates that there is only an EU proposal, but no agreement on the inclusion of an umbrella clause in the CETA. This is not surprising given Canada's general policy not to include umbrella clauses in its IIAs.⁸⁴

The EU has proposed what may have been intended a rather limited umbrella clause, according to which “[e]ach Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor.”⁸⁵

Contrary to the usual formulation of umbrella clauses which refers to ‘any obligation,’ the EU proposal speaks of ‘any specific written obligation.’ It is not immediately evident what was intended by this special wording. Given the controversial issue whether normal umbrella clauses relate only to contractual obligations or could also refer to other obligations assumed by host states, for instance, through national legislation or unilateral undertakings,⁸⁶ it may be

81 Dolzer and Schreuer, *supra* note 27, p. 207.

82 *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 157.

83 The Council Negotiating Directives (Canada, India and Singapore), *supra* note 10, provide under “Standards of Treatment” (“f) other effective protection provisions, such as umbrella clauses?”).

84 See Céline Lévesque and Andrew Newcombe, ‘Canada’ in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 53, 60 *et seq.*

85 EU: Article X, inserted in square brackets after Article X.9: Treatment of Investors and of Covered Investments in Draft CETA Investment Text, 21 November 2013, *supra* note 15.

86 See Maria Cristina Gritón Salias, ‘Do Umbrella Causes Apply to Unilateral Undertakings?’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 490–496.

that the wording ‘any specific written obligation’ was intended to refer only to contracts and not to other commitments. However, that cannot be taken for granted.

The EU proposal for an umbrella clause is silent on the most controversial question concerning umbrella clauses in investment arbitration practice, i.e. their practical effect.⁸⁷ So far, some tribunals follow the approach of *SGS v. Pakistan* which rejected the view that “breaches of a contract ... concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically ‘elevated’ to the level of breaches of international law.”⁸⁸ Other tribunals adhere to the traditional view endorsed by *SGS v. Philippines* that an umbrella clause “makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.”⁸⁹ As recent EU member state BITs demonstrate, it is possible to clarify such uncertainties created by investment case-law.⁹⁰

87 See Christoph Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 *JWIT* 231–256; Anthony C. Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 *Arbitration International* 411–434; Thomas Wälde, ‘The “Umbrella” Clause on Investment Arbitration – A Comment on Original Intentions and Recent Cases’ (2005) 6 *JWIT* 183–236; Stanimir A. Alexandrov, ‘Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*’ (2004) 5 *JWIT* 555–578.

88 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 172. See also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 85; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 113.

89 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 128. See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 53; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May.

90 See, e.g., Article 11(1) second sentence Austrian Model BIT 2008 (“This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.”).

3.3.5 Transfer Provisions

There has always been a broad consensus that EU investment treaties should include free transfer of funds provisions.⁹¹ Thus, the current CETA draft contains an unsurprising transfer clause according to which “[e]ach Party shall permit all transfers relating to a covered investment to be made without restriction or delay and in a freely convertible currency.”⁹²

As with other transfer clauses found in BITs and IIAs, the crux of the matter is the scope of the exceptions. The November 2013 draft text contains a number of exceptions that have become more widespread in recent times,⁹³ such as provisions exempting measures relating to bankruptcy, trading in securities, criminal offences and administrative and adjudicatory proceedings.⁹⁴ In addition, the negotiating text contains an EU proposal that appears to be inspired by the financial crisis according to which temporary safeguard measures may be taken for monetary policy reasons.⁹⁵

In the past, the Commission has been rather determined to defend the EU’s capacity to impose limits on free transfer obligations for political reasons at any time and has even instituted infringement proceedings against member states whose BITs contained too broad transfer obligations.⁹⁶ These concerns

91 European Commission, *supra* note 1, 9 (“EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.”). See also Council Negotiating Directives (Canada, India and Singapore), *supra* note 10.

92 Article X.12: Transfers, Draft CETA Investment Text, 21 November 2013, *supra* note 15.

93 UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Treaty Rulemaking* (2007) 62 <unctad.org/en/docs/iteiia20065_en.pdf> (5 March 2014).

94 Article X.12(5) Transfers, Draft CETA Investment Text, 21 November 2013, *supra* note 15: “Notwithstanding paragraphs 1, 2 or 3, nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offences; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) ensuring the satisfaction of judgments in adjudicatory proceedings.”

95 Article X.12(EU 4) Transfers, Draft CETA Investment Text, 21 November 2013, *supra* note 15: “When in exceptional circumstances, capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party, safeguard measures affecting transfers may temporarily be taken by the Party concerned, provided that these measures shall be strictly necessary and shall not exceed in any case a period of six months.”

96 CJEU, Case C-205/06, *European Commission v. Austria* [2009] ECR I-1301; CJEU, Case C-249/06, *European Commission v. Kingdom of Sweden* [2009] ECR I-1335; CJEU, Case C-118/07, *European Commission v. Finland* [2009] ECR I-10889. In these cases the

stem from the fact that the EU has far-reaching powers to adopt restrictive measures under Article 66⁹⁷ and 215 TFEU⁹⁸ that may run counter to the guarantee of unhampered transfer of funds. It has been previously suggested that such an exception could resemble the security exception of the EU-Korea FTA.⁹⁹ Whether the formulation found in the November 2013 draft CETA's general exceptions clause which in an EU proposal refers to public security¹⁰⁰ will be sufficient to justify derogations from the free transfer of funds obligations remains to be seen.

D Investor-State Dispute Settlement

Investor-state dispute settlement (ISDS) has long been considered a crucial ingredient of effective investment protection. The direct access of private parties to seek remedies for violations of substantive investment treatment standards has been regarded as an important contribution to enhance the

CJEU found that even the mere possibility of a potential obstruction of the EU's regulatory power to adopt transfer restrictions by capital transfer clauses in Member State BITs was sufficient to lead to an incompatibility with EU law. See Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law' (2010) 9 *Law & Practice of International Courts & Tribunals* 409–441.

- 97 Article 66 TFEU: "Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary."
- 98 Article 215(1) TFEU: "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof."
- 99 See Hoffmeister and Ünüvar, *supra* note 5, p. 73, referring to Article 15.9 of the EU-Korea FTA, *supra* note 41, which is in turn inspired by the Article XXI GATT.
- 100 Article X. General Exceptions, Draft CETA Investment Text, 21 November 2013, *supra* note 15: "1. For purpose of the Investment Chapter: (a) a Party may adopt or enforce a measure necessary: (i) [EU: to protect public security or public morals or to maintain public order]; ... (b) provided that the measure referred to in subparagraph (a) is not: (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors [EU: where like conditions prevail], or (ii) a disguised restriction on international [CAN: trade] or investment."

effectiveness of investment protection¹⁰¹ by eliminating the need for an espousal of claims under the traditional diplomatic protection paradigm. At the same time, avoiding the political harassment factor of such espoused interstate claims is considered to lead to a general de-politicization of investment disputes.¹⁰²

In spite of the general recognition of these advantages, it was initially, i.e. after the entry into force of the Lisbon Treaty's new investment powers of the EU unclear whether the EU would strive for ISDS or rather settle for inter-state dispute settlement, along the trade law paradigm to which the Commission has become accustomed over years of GATT and WTO experience.

After an initial orientation phase, the EU institutions finally came out in favour of adopting ISDS,¹⁰³ though the European Parliament, in particular, voiced concern about ISDS.¹⁰⁴ This latter concern together with increased pressure from various NGOs, lobbying against ISDS in 2013, gained such political momentum that in early 2014 the EU Commissioner in charge of trade and investment negotiations called for a reflection period to consult the European public on investment and ISDS.¹⁰⁵

The charges against ISDS are not new and consist of a mix of serious concerns and irrational as well as partly nonsensical assumptions. As demonstrated by Christian Tams,¹⁰⁶ many arguments, currently raised against the

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

102 See already Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1 *ICSID Review-F.I.L.J.* 1.

103 See, e.g., European Commission, *supra* note 1, p. 10 ("ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others").

104 European Parliament, *supra* note 8, para. 24: "Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements."

105 See European Commission, *supra* note 13.

106 See Tams, *supra* note 60.

EU's investment negotiations, can be traced back to the notorious 2001 NY Times article, likening NAFTA panels to secret tribunals,¹⁰⁷ and fail to take into account numerous developments in investment arbitration since.

Among the standard points of criticism are the lack of transparency of the procedure, the impossibility to appeal investment decisions, the alleged pro-investor bias of tribunals, and overly broad investor rights which would lead to a chilling effect on legitimate regulation by sovereign states.¹⁰⁸

What the vociferous critics appear to overlook are the multiple developments in investment arbitration over the last decade. In 2006, the ICSID Arbitration Rules were amended with a view to more transparency, now permitting *amicus curiae* participation as well more general publication of awards.¹⁰⁹ In a similar effort, UNCITRAL adopted Rules on Transparency in Investor-State Arbitration in 2013.¹¹⁰ Though the lack of an appellate structure is typical in international dispute settlement as well as in transnational arbitration, much time and effort has been spent on considering whether some form of appeal would be feasible. While grand designs of amending the ICSID Convention have not been pursued,¹¹¹ many small steps have been taken to ensure the ultimate goal of more consistency, such as appellate mechanisms in individual IIAs and the use of joint commissions consisting of representatives of the Contracting Parties empowered to give authoritative interpretations

107 Anthony de Palma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' *New York Times*, 11 March 2001 <www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> (5 March 2014).

108 See, e.g., George Monbiot, 'This Transatlantic Trade Deal is a Full-frontal Assault on Democracy' *The Guardian*, 4 November 2013 <www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> (17 February 2014).

109 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006 <icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> (5 March 2014). See also Aurélie Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 *ICSID Review-F.I.L.J.* 427-448.

110 UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, adopted by UN GA Res. 68/109, 16 December 2013 <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (5 March 2014). See also N. Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach', in this Issue.

111 See ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, 22 October 2004; Karl P. Sauvant and Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes* (OUP 2008).

of IIAS.¹¹² The draft CETA chapter on investment is a good example of this tendency, also in so far as it clearly aims at circumscribing the content of investment standards in a more precise way in order to make the outcomes of ISDS not only more predictable, but also to limit the scope of investor rights. The detailed wording of the CETA's FET, aiming at codifying only the more restrictive elements of FET jurisprudence, is a telling example.¹¹³ Equally, the various attempts by treaty-makers in general to integrate broader interests, such as sustainable development, human rights and labour rights and the environment, into IIAS has been widespread over the last years and they also found a place in the EU's negotiations, not only, but also of CETA.¹¹⁴

It remains to be seen whether a more detached analysis of the pros and cons of ISDS will lead the EU negotiators to continue striving for effective dispute settlement mechanisms. The November 2013 draft CETA text on ISDS¹¹⁵ clearly demonstrates the mutual efforts of the negotiators to agree on a balanced and modern version of investment dispute settlement, including alternative dispute resolution mechanisms like mediation, non-disputing party participation through *amicus curiae* briefs, a standing “ISDS Committee,”¹¹⁶ tasked with interpreting the investment chapter, preventing investors from bringing multiple or frivolous claims by imposing heavy litigation cost risks, and introducing a binding code of conduct for arbitrators in order to reduce conflicts of interests.¹¹⁷

4 Conclusion

Summing up, it appears that the first EU investment chapter in a broader trade agreement, the Canada-EU CETA, will be of distinct European pedigree with a

112 See, e.g., Article 1131 North American Free Trade Agreement, signed 17 December 1992 (entry into force 1 January 1994) <www.worldtradelaw.net/fta/agreements/nafta.pdf> (5 March 2014) or Article 31 of the US Model BIT 2012, *supra* note 50. See also Tams, *supra* note 60.

113 See *supra* text at note 55.

114 See also Karsten Nowrot, ‘How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?’, in this Issue.

115 EU-Canada Comprehensive Economic and Trade Agreement, Investor-to-State Dispute Settlement Text, 15 November 2013 <www.tradejustice.ca/?page_id=2> (5 March 2014).

116 Article x-12(3) Applicable Law and Rules of Interpretation and Article x-26(3) Committee, ISDS Draft, *supra* note 115, p. 10, 18.

117 See also European Commission, *supra* note 1, p. 2, evidencing the Commission's intention to continue this course of action.

number of NAFTA- or rather 2004 US/Canada Model BIT-inspired additions as well as new features such as further details concerning the exact meaning of FET and other standards. This additional wording will probably serve as useful guidance to arbitrators in determining whether breaches of investment standards have occurred.

Whether the modifications will lead to an overall increase or decrease of investment protection and whether they will enlarge or narrow down the regulatory space of host states will ultimately depend upon the application of the agreement by individual investment tribunals, assuming that the current anti-investment law campaign does not go as far as to dismantle the entire system.

In any event, the current, fragmented, and only partly visible investment chapter of the Canada-EU CETA may not be a classical Model BIT. However, it is likely to serve as an important template also for future EU investment agreements and thus deserves close scrutiny.