Bungenberg / Reinisch

CETA Investment Law

Article-by-Article Commentary

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edited by

Marc Bungenberg
August Reinisch

2022

Published by
Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by
Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

Published in North America by Hart Publishing,
An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA
email: mail@hartpub.co.uk

ISBN 978 3 8487 6084 8 (NOMOS Print)
ISBN 978 3 7489 0213 3 (NOMOS ePDF)
ISBN 978 3 406 75347 3 (C.H.BECK)
ISBN 978 1 5099 3467 6 (HART)

First Edition 2022

Preface

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

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

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

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

Saarbrücken and Vienna, October 2021

Marc Bungenberg and *August Reinisch*

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List of Abbreviations

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
AB	Appellate Body
ACIA	ASEAN Comprehensive Investment Agreement
AcP	Archiv für die civilistische Praxis
ADR	alternative dispute resolution
AFDI	Annuaire Français de Droit International
AG	Aktiengesellschaft
AJIL	American Journal of International Law
Am. J. Comp. L.	American Journal of Comparative Law
Am. Rev. Int'l Arb.	American Review of International Arbitration
Am. U. Int'l L. Rev.	American University International Law Review
AR	Arbitration Rules
Arb.	Arbitration
Arb. Int'l	Arbitration International
ARIEL	Austrian Review of International and European Law
ARIO	Draft Articles on the Responsibility of International Organizations
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
ASA Bull.	Swiss Arbitration Association Bulletin
ASEAN	Association of South East Asian Nations
Asia Pac. L. Rev.	Asia Pacific Law Review
Austrian YB Int'l Arb.	Austrian Yearbook of International Arbitration
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
B.C. L. Rev.	Boston College Law Review
BIICL	British Institute of International and Comparative Law
BIRD	Banque internationale pour la reconstruction et le développement
BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
BLI	Business Law International
BOT	build-operate-transfer
Brazilian J. Int'l L.	Brazilian Journal of International Law
BTW	Beiträge zum Transnationalen Wirtschaftsrecht
Bus. Pol.	Business and Politics
BYIL	British Yearbook of International Law
CAFTA	United States – Dominican Republic – Central America Free Trade Agreement
Can. YBIL	Canadian Yearbook of International Law
Cap. Mark. Law J.	Capital Markets Law Journal
CARIFORUM	Caribbean Forum; Forum of the Caribbean Group of African, Caribbean and Pacific (ACP) States
CCJE	Consultative Council of European Judges
CCP	Common Commercial Policy
CETA	Canada-EU Comprehensive Economic and Trade Agreement
cf.	*confer* (compare)

List of Abbreviations

CFSP	Common Foreign and Security Policy
ch.	Chapter
Chinese J. Int'l L.	Chinese Journal of International Law
CIDS	Geneva Centre for International Dispute Settlement
CIETAC	China International Economic and Trade Arbitration Commission
CIGI	Centre for International Governance Innovation
CIRDI	Centre International pour le Règlement des Différends relatifs aux Investissements
CJ	Court of Justice
CJCCL	Canadian Journal of Comparative and Contemporary Law
CJEU	Court of Justice of the European Union
CJGG	The Chinese Journal of Global Governance
CJICL	Cambridge Journal of International and Comparative Law
CLP	Current Legal Problems
CMLR	Common Market Law Review
COFACE	Compagnie Française d'assurance pour le Commerce Extérieur
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
COMESA	Common Market for Eastern and Southern Africa
CPI	Corruption Perceptions Index
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
Croatian Arb. YB	Croatian Arbitration Yearbook
CRS	Computer reservation system
CUSMA	Canada-United States-Mexico Agreement
CYELS	Cambridge Yearbook of European Legal Studies
Dalhous. Law J.	Dalhousie Law Journal
DCF	discounted cash flow
DFC	U.S. International Development Finance Corporation
Disp. Resol. Int'l	Dispute Resolution International
DOB	denial of benefits
Doc.	Document
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
e.g.	*exempli gratia* (for example)
ECA	Economic Cooperation Agreement
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Treaty Charter
ECtHR	European Court of Human Rights
ed	edition
ed(s)	editor(s)
EDC	Export Development Canada
EEA	European Economic Area
EFILA	European Federation for Investment Law and Arbitration
EJIL	European Journal of International Law
ELTE LJ	Eötvös Loránd Universität Law Journal
EP	European Parliament

EPA	Economic Partnership Agreement
esp.	especially
et al.	*et alii* (and others)
et seq.	*et sequens* (and the following)
EU	European Union
EUP	European Union Politics
EuR	Zeitschrift Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EYIEL	European Yearbook of International Economic Law
f(f.)	and the following
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FET	Fair and equitable treatment
FIPA	Foreign Investment and Protection Agreement
FIT	Feed-in tariff
fn.	Footnote
Fordham Int'l L. J.	Fordham International Law Journal
FPS	Full Protection and Security
FTA	Free Trade Agreement
FTC	Free Trade Commission
GA	General Assembly
Ga. J. Int'l & Comp. L	Georgia Journal of International and Comparative Law
GAR	Global Arbitration Review
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
Geo. J. Int'l L.	Georgetown Journal of International Law
Harv. Negot. L. Rev.	Harvard Negotiation Law Review
i.a.	*inter alia*
i.e.	*id est* (that is)
IAMCR	International Association for Media and Communication Research
IAR	Investment Arbitration Reporter
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ibid.	*ibidem* (the same)
ICA	Investment Canada Act
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Association
ICCLR	International Company and Commercial Law Review
ICJ	International Court of Justice
ICJ Rep.	ICJ Reports
ICLQ	International and Comparative Law Quarterly
ICS	International Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Rep.	ICSID Reports
ICSID Rev.-FILJ	ICSID Review – Foreign Investment Law Journal

List of Abbreviations

id.	*idem* (the same)
IIA	International Investment Agreement
IIJL	Institute for International Law and Justice
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
Ind. J. Global Legal Stud.	Indiana Journal of Global Legal Studies
Indian J. Arb. L.	Indian Journal of Arbitration Law
infra	below
Int'l	International
Int'l Arb. L. Rev.	International Arbitration Law Review
Int'l Bus. Law.	International Business Lawyer
Int'l J.	International Journal
Int'l J. Cult. Policy	International Journal of Cultural Policy
Int'l J. Sustain. Dev.	International Journal of Sustainable Development
Int'l L. Forum	International Law Forum
Int'l Lawyer	The International Lawyer
Int'l Trade L. Regul.	International Trade Law and Regulation
INTA	International Trademark Association
IOSR-JBM	International Organisation of Scientific Research
IPA	Investment Protection Agreement
Iran-US CTR	Iran-United States Claims Tribunal
ISA	Investor-State Arbitration
ISDS	Investor-State dispute settlement
ITBLR	International Trade and Business Law Review
ITLOS	International Tribunal for the Law of the Sea
J.	Journal
J. Air L. & Com.	Journal of Air Law and Commerce
J. Disp. Resol.	Journal of Dispute Resolution
J. Ethn. Migr. Stud.	Journal of Ethnic and Migration Studies
J. Int'l Arb.	Journal of International Arbitration
J. Int'l Econ. L.	Journal of International Economic Law
J. Int'l. Disp. Settlement	Journal of International Dispute Settlement
J. Intellect. Prop. L.	Journal of International Property Law
J. Policy Analy. Manag.	Journal of Policy Analysis and Management
J. Pub. L.	Journal of Public Law
J. WTO & China	Journal of WTO and China
JDI	Journal du Droit International
JDIA	Journal of Damages in International Arbitration
JII	Joint Interpretative Instrument
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
JWIT	Journal of World Investment & Trade
JWT	Journal of World Trade
KSzW	Kölner Schrift zum Wirtschaftsrecht
L.	Law
LCIA	London Court of International Arbitration
Leiden J. Int'l L.	Leiden Journal of International Law

LIEI	Legal Issues of Economic Integration
lit.	*litera* (character)
Loy. U. Chi. L. J.	Loyola University Chicago Law Journal
LPICT	Law and Practice of International Courts and Tribunals
ltd.	Limited
m	million
MA	Market access
MAI	Multilateral Agreement on Investment
McGill L. J.	McGill Law Journal
Melb. J. Int'l L.	Melbourne Journal of International Law
Mercosur	Mercado Común del Sur
MEUFTA	Mexico – European Union Free Trade Agreement
MFN	Most Favoured Nation
MIAM	Multilateral Investment Appeals Mechanism
MIC	Multilateral Investment Court
Mich. J. Int'l L.	Michigan Journal of International Law
MIGA	Multilateral Investment Guarantee Agency
Minn. J. Int'l L.	Minnesota Journal of International Law
MIA	Multilateral Investment Agreement
MJEL	Malaysian Journal of Economic Studies
mn.	marginal number
Mod. L. Rev.	The Modern Law Review
MRO	maintenance, repair, overhaul
MST	Minimum standard of treatment
n.	note
NAFTA	North American Free Trade Agreement
NAFTA FTC	NAFTA Free Trade Commission
NDP	non-disputing party
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
NGO	non-governmental organisation
NILR	Netherlands International Law Review
No.	Number
NStZ	Neue Zeitschrift für Strafrecht
NT	National Treatment
NVwZ	Neue Zeitschrift für Verwaltungsrecht
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
NYC	New York Convention
NYIL	Netherlands Yearbook of International Law
NYU Env. L. J.	New York University Environmental Law Journal
NYU JILP	New York University Journal of International Law and Politics
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
op. cit.	*opere citato* (in the work cited)
OPIC	Overseas Private Investment Corporation
ÖZöR	Österreichische Zeitschrift für österreichisches Recht
p., pp.	page(s)
PACER	Pacific Agreement on Closer Economic Relations

List of Abbreviations

para(s).	paragraph(s)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Pepp. Disp. Resol. L. J.	Pepperdine Dispute Resolution Law Journal
PR	Performance requirements
Prel. Rem.	Preliminary remarks
Prof.	Professor
Public Adm. Rev.	Public Administration Review
QMJIP	Queen Mary Journal of Intellectual Property
Quebec J. Int'l L.	Quebec Journal of International Law
R.B.D.I.	Revue belge de droit international
RAND J. Econ.	RAND Journal of Economics
RC	Recueil des Cours
RECIEL	Review of European Community and International Environmental Law
REIO	Regional Economic Integration Organisation
Res	Resolution
Rev.	Review
Rev. Derecho del Estado	Revista Derecho del Estado
RIAA	Reports of International Arbitral Awards
RJT	Revue Juridique Thémis
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCJIL	Santa Clara Journal of International Law
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SE	State enterprise
Sec.	Section
Ser.	Series
Singap. Acad. Law J.	Singapore Academy of Law Journal
SMBD	Senior management and boards of directors
SME	small and medium-sized enterprise
SOE	State-owned enterprise
SPPP	The School of Public Policy Publications
SSDS	State-State dispute settlement
Suppl.	Supplement
supra	above
TBT	Technical Barriers to Trade
TDM	Transnational Dispute Management
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TIEA	Trade and Investment Enhancement Agreement
TPA	Trade Promotion Agreement
TPF	Third-Party-Funding
TPP	Trans-Pacific Partnership
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	EU-US Transatlantic Trade and Investment Pact

U. Kan. L. Rev.	University of Kansas Law Review
U. Toronto Fac. L. Rev.	University of Toronto Faculty of Law Review
UCILR	UC Irvine Law Review
UCLA L. Rev.	UCLA Law Review
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	General Assembly of the United Nations
Univ. Bologna L. Rev.	University of Bologna Law Review
UNRIAA	United Nations Report of International Arbitral Awards
UNTS	United Nations Treaty Service
US/USA	United States of America
USITC	United States International Trade Commission
USMCA	United States-Mexico-Canada-Agreement
v.	*versus* (against)
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WAMR	World Arbitration and Mediation Review
WJP	World Justice Project
WTO	World Trade Organisation
WTO DSU	WTO Dispute Settlement Understanding
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal
YB	Yearbook
YB Int'l Inv. L. & Pol'y	Yearbook on International Investment Law and Policy
YB. Eur. L.	Yearbook of European Law
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZRP	Zeitschrift für Rechtspolitik

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

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A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The EU and Canada Investment Policy

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

I. EU Investment Policy after the Treaty of Lisbon

1. The Question of Competences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. (New) EU Investment Policy Approaches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Canadian Investment Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Negotiation and Outcome of CETA's Investment Chapter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. The Necessity of ISDS in CETA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[140] See, Annex 30-A CETA.

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

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

I. The CETA Substantive Framework

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

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

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

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

1. The Scope of Application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Standards of Protection

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

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

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

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

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

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

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

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

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

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

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

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

[163] Article 8.9 CETA.

[164] See Article 8.28 CETA.

[165] See Article 8.31(3) CETA.

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

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

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

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

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

[168] See Article 8.6 CETA.

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

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

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

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

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

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

[174] See Article 8.7 CETA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[187] Annex 8-A CETA.

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

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

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

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

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

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

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

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

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

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

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

[193] See Article 8.10 CETA.

[194] See Article 8.10(2) CETA.

[195] Article 8.10(2) CETA.

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

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

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

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

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

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

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

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

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

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

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

[204] See Article 8.13 CETA.

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

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

4. Exemptions, Reservations and Denial of Benefits

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

5. Interim Conclusion

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

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[206] Article 8.13(1) CETA.

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

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

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

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

(b) issuing, trading or dealing in securities;

(c) criminal or penal offences;

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

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

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

1. General Considerations and Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Scope of Application and Jurisdiction of the ICS

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

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

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

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

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

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

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

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

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

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

[229] Article 8.18 para. 3 CETA.

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

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

3. Establishment of the ICS – A General Overview

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

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

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

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

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[232] See Article 8.27 CETA.

[233] See Article 8.28 CETA.

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

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

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

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

[238] See Article 8.28 CETA.

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

[240] See Article 8.30 para. 1 CETA.

[241] See Article 8.27(6) CETA.

[242] See Article 8.27(7) CETA.

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

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

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

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

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

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

[246] UNCITRAL, Rules on Transparency in Treaty-based Investor–State Arbitration (2013), available at:

https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf; Article 18, Section 3 – Commission Draft Text TTIP; Article 8.36 CETA; Article 3.46, Section 3 - EU–Vietnam IPA.

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

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

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

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

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

[252] See Article 8.26 CETA.

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

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

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

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

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

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

4. Applicable Law, Content of Awards and their Enforceability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Interim Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 8.1
Definitions

For the purposes of this Chapter:

activities carried out in the exercise of governmental authority **means activities carried out neither on a commercial basis nor in competition with one or more economic operators;**

aircraft repair and maintenance services **means activities undertaken on an aircraft or a part of an aircraft while it is withdrawn from service and do not include so-called line maintenance;**

airport operation services **means the operation or management, on a fee or contract basis, of airport infrastructure, including terminals, runways, taxiways and aprons, parking facilities, and intra-airport transportation systems. For greater certainty, airport operation services do not include the ownership of, or investment in, airports or airport lands, or any of the functions carried out by a board of directors. Airport operation services do not include air navigation services;**

attachment **means the seizure of property of a disputing party to secure or ensure the satisfaction of an award;**

computer reservation system services **means the supply of a service by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued;**

confidential or protected information **means:**

(a) confidential business information; or
(b) information which is protected against disclosure to the public;
  (i) in the case of information of the respondent, under the law of the respondent;
  (ii) in the case of other information, under a law or rules that the Tribunal determines to be applicable to the disclosure of such information;

covered investment **means, with respect to a Party, an investment:**

(a) in its territory;
(b) made in accordance with the applicable law at the time the investment is made;
(c) directly or indirectly owned or controlled by an investor of the other Party; and
(d) existing on the date of entry into force of this Agreement, or made or acquired thereafter;

disputing party **means the investor that initiates proceedings pursuant to Section F or the respondent. For the purposes of Section F and without prejudice to Article 8.14, an investor does not include a Party;**

disputing parties **means both the investor and the respondent;**

enjoin **means an order to prohibit or restrain an action;**

enterprise **means an enterprise as defined in Article 1.1 (Definitions of general application) and a branch or representative office of an enterprise;**

ground handling services **means the supply of a service on a fee or contract basis for: ground administration and supervision, including load control and communications; passenger handling; baggage handling; cargo and mail handling; ramp**

handling and aircraft services; fuel and oil handling; aircraft line maintenance, flight operations and crew administration; surface transport; or catering services. Ground handling services do not include security services or the operation or management of centralised airport infrastructure, such as baggage handling systems, de-icing facilities, fuel distribution systems, or intra-airport transport systems;

ICSID **means the International Centre for Settlement of Investment Disputes;**

ICSID Additional Facility Rules **means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;**

ICSID Convention **means the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington on 18 March 1965;**

intellectual property rights **means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights; and, if such rights are provided by a Party's law, utility model rights. The CETA Joint Committee may, by decision, add other categories of intellectual property to this definition;**

investment **means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:**

(a) an enterprise;
(b) shares, stocks and other forms of equity participation in an enterprise;
(c) bonds, debentures and other debt instruments of an enterprise;
(d) a loan to an enterprise;
(e) any other kind of interest in an enterprise;
(f) an interest arising from:
  (i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources,
  (ii) a turnkey, construction, production or revenue-sharing contract; or
  (iii) other similar contracts;
(g) intellectual property rights;
(h) other moveable property, tangible or intangible, or immovable property and related rights;
(i) claims to money or claims to performance under a contract.

For greater certainty, *claims to money* does not include:

(a) 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.
(b) the domestic financing of such contracts; or
(c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b).

Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment;

investor **means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;**

For the purposes of this definition, an *enterprise of a Party* is:

(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
(b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);

locally established enterprise **means a juridical person that is constituted or organised under the laws of the respondent and that an investor of the other Party owns or controls directly or indirectly;**

natural person **means:**

(a) in the case of Canada, a natural person who is a citizen or permanent resident of Canada; and
(b) in the case of the EU Party, a natural person having the nationality of one of the Member States of the European Union according to their respective laws, and, for Latvia, also a natural person permanently residing in the Republic of Latvia who is not a citizen of the Republic of Latvia or any other state but who is entitled, under laws and regulations of the Republic of Latvia, to receive a non-citizen's passport.

A natural person who is a citizen of Canada and has the nationality of one of the Member States of the European Union is deemed to be exclusively a natural person of the Party of his or her dominant and effective nationality.
A natural person who has the nationality of one of the Member States of the European Union or is a citizen of Canada, and is also a permanent resident of the other Party, is deemed to be exclusively a natural person of the Party of his or her nationality or citizenship, as applicable;

New York Convention **means the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June 1958;**

non-disputing Party **means Canada, if the European Union or a Member State of the European Union is the respondent, or the European Union, if Canada is the respondent;**

respondent **means Canada or, in the case of the European Union, either the Member State of the European Union or the European Union pursuant to Article 8.21;**

returns **means all amounts yielded by an investment or reinvestment, including profits, royalties and interest or other fees and payments in kind;**

selling and marketing of air transport services **means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution, but does not include the pricing of air transport services or the applicable conditions;**

third party funding **means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in**

order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute;

***Tribunal* means the tribunal established under Article 8.27;**

***UNCITRAL Arbitration Rules* means the arbitration rules of the United Nations Commission on International Trade Law; and**

***UNCITRAL Transparency Rules* means the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;**

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The definitions for the purpose of Chapter 8 are covered under this article. Individual terms are mentioned and discussed below. **1**

A. Introduction

The term 'definition' refers to 'the meaning of a term as explicitly stated in a drafted document such as a contract, a corporate by law, an ordinance, or a statute'.[1] Keeping this in mind, the definitions to the Investment Chapter (Chapter 8) of the CETA help to understand the meaning and context of these terms when they are used in the chapter. **2**

[1] Garner (ed), Black's Law Dictionary 8th ed. (2004), 1281.

3 While a number of terms used in the chapter are already covered through the general definitions for the CETA in Article 1.1, more specific investment related terms have been defined in Article 8.1 as they are relevant or applicable for this particular chapter. In one instance, the definition in Article 8.1 adds to the definition of the same term in Article 1.1 (→ mn. 128 ff.).

4 The presence of the definitions is to enhance a specific position and to help lay down and identify the correct meaning and serve as concepts throughout Chapter 8 of CETA.

5 This commentary to Article 8.1 CETA will analyse the listed terms, and it will also state where in Chapter 8 the specific term is used.

B. Spirit and Purpose

6 A number of the terms which are defined under Article 8.1 relate to the subject of general/ investment dispute resolution (*inter alia* disputing Party(ies), non-disputing Party etc.) and others which are applicable specifically for the process (*inter alia* ICSID Additional Facility Rules, New York Convention, respondent, tribunal, UNCITRAL Arbitration Rules etc.). There are however a number of terms which could be potentially relevant for other issues (*inter alia* activities carried out in the exercise of governmental authority, airport operation services, enterprise, selling and marketing of air transport service etc.). The *chapeau* of Article 8.1 however clarifies that the definitions mentioned therein are applicable for Chapter 8 only. As such, a few terms mentioned in Article 8.1 are defined again in another chapter where they are used.[2]

C. Drafting History

7 There were at least seven known Draft versions of CETA before it was finalised. The first version came into existence on 13 January 2010, second version in January 2011, third in February 2012, fourth on 15 November 2013 and the fifth version followed in the same month on 21 November. The sixth version came into existence on 4 February 2014 and the seventh version on 1 August of the same year.

8 Some definitions were present almost verbatim in the initial Drafts of the agreement as in the final version and remained unchanged. While the text of some terms was updated and evolved with later Drafts, some terms and their definitions were not found in the initial versions and only added to the agreement in the later Drafts. A few definitions underwent major revisions in each version of the agreement, inter alia key elements were added after suggestion from either Canada or the European Union. The meaning of the terms have evolved with the versions.

9 Each of the terms have their own unique drafting history and they are discussed in detail with the respective terms below.

D. Commentary

10 The definitions of the terms mentioned in Article 8.1 are discussed individually below with coverage of their drafting history, usage in the chapter and the commentary for the terms.

[2] See *inter alia,* definitions of 'aircraft repair and maintenance services', 'airport operation services' and 'computer reservation system services' in Article 9.1 where they are used for Chapter 9.

I. Activities Carried out in Exercise of Governmental Authority

The definition in the agreement is: 'Activities carried out in exercise of governmental authority means activities carried out neither on a commercial basis nor in competition with one or more economic operators'. **11**

1. Drafting History

The earliest available Draft of the CETA text which dates back to 13 January 2010 did not contain this term. *Activities carried out in exercise of governmental authority* were not defined nor mentioned in this consolidated Draft. The term made an appearance in the treaty's Draft consolidated text of January 2011 and February 2012. The text of what is now the definition of *Activities carried out in exercise of governmental authority* was present, almost verbatim, as an exception, in the definition of economic activity. The text read 'economic activity' includes any activities of an economic nature except activities carried out in the exercise of governmental authority, i.e. activities carried out neither on a commercial basis nor in competition with one or more economic operators. Activities carried out in exercise of governmental authority was included in the *Definitions* section in the Draft of 21 November 2013 where the text remained the same as in the earlier drafts. The definition remained virtually unchanged in the draft of 1 August 2014. **12**

2. Use of the Term

The term *Activities carried out in exercise of governmental authority* is solely utilised in Article 8.2(2)(b) of Chapter 8 (Investment) of CETA in the context of an activity which is outside the scope of Section B and C of the CETA. **13**

3. Commentary

As per the agreement, a Party may maintain measures with respect to the establishment or acquisition of a covered investment and continue to apply such measures to the covered investment after it has been established or acquired. But Article 8.2 CETA restricts the scope of the agreement, because measures relating to *activities carried out in exercise of governmental authority* are kept out of the purview of Section B, which states the provisions of *Establishment of investments* and Section C, which mentions the provisions related to *non-discriminatory treatment* under CETA. **14**

This definition is linked to Article 8.2(2)(b) CETA, which states that Section B (Establishment of investments) and Section C (Non-discriminatory treatment) would not be applicable to activities carried out in exercise of governmental authority. **15**

The EU Commission has confirmed that its understanding of the term 'Activities carried out in exercise of governmental authority' as included in EU FTAs originates from Article 1(3)(b) and (c) of the GATS.[3] The meaning of services supplied in the exercise of governmental authority in GATS as well in the EU FTAs is commonly in- **16**

[3] Parliamentary Questions, Question reference: E-002278/2015, 26 March 2015, Answer given by Ms Malmström on behalf of the Commission; Bischoff and Wuhler, 'The notion of investment' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 19 (22); Gould, 'Public Services' in Sinclair et al. (eds), *Making Sense of the CETA – An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement, Canadian Centre for Policy Alternatives* (2014), 35 (37).

terpreted with a very narrow meaning and is linked to core sovereign functions.[4] This means that services which are provided on a commercial basis and in competition with one or more suppliers are excluded.[5]

17 The generally accepted closed interpretation for the GATS is also carried over to the definition provided in the CETA.[6] Under this interpretation, activities such as investments in the school education sector, e.g. public schools might not be covered under the purview of exemption based on 'exercise of governmental authority' since private schools compete with public schools.[7] Already in the past, the CJEU had determined that establishing private schools does not fall into the ambit of exercise of 'official authority'.[8] This has led to a debate on whether the exemption in the CETA is wide enough for states to continue to provide services of general interest.[9]

18 As provided under Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles')[10] which are frequently used as guidelines to determine the attributability of an act to the state in investment law,[11] 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions.' The wide language of Article 4 means that irrespective of the system of division of power in a state, the exercise of legislative, executive, judicial or any other state function can be covered as an exercise of governmental authority.[12] Within the Draft Articles, the meaning of the term *governmental authority* has been frequently linked by tribunals to conduct of a state agency or private entity who are acting on behalf of a state as covered under Article 5 of the Draft Articles which states that:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

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[4] Krajewski, *Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892522; Bischoff and Wuhler, 'The notion of investment' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, 19 (22); Ministry of Employment and Investment, British Colombia, *GATS and Public Service Systems*, https://www.iatp.org/sites/default/files/GATS_and_Public_Service_Systems.htm.

[5] Parliamentary Questions, Question reference: E-002278/2015, 26 March 2015, Answer given by Ms Malmström on behalf of the Commission; Krajewski, *Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892522.

[6] Gould, 'Public Services' in Sinclair et al. (eds), *Making Sense of the CETA – An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement, Canadian Centre for Policy Alternatives* (2014), 35 (37).

[7] Schwartz and Schwartz, *Public Private Partnerships and Trade Agreements: Why open already open subnational markets?*, Paper presented at ICPP 4 Montreal, 2019, 7, available at https://www.ippapublicpolicy.org/file/paper/5cfbe605d5bbb.pdf.

[8] CJEU, Case 147/86, 15.3.1988, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1988:150, para. 9.

[9] Bischoff and Wuhler, 'The notion of investment' in Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 19 (22).

[10] ICSID, *Practice Notes for Respondents in ICSID Arbitration* (2015), p. 11; Annex to General Assembly Resolution 56/83 of 12 December 2001, UN Doc. A/RES/56/83 dated 28 January 2002.

[11] Olleson, *The Impact of the Ilc's Articles on Responsibility of States for Internationally Wrongful Acts*, BIICL (2007), 29.

[12] Commentary to Article 4, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 41.

According to the Commentary to Article 5 of the Draft Articles[13]: **19**

> The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.

The wide scope of bodies which can exercise governmental authority is further merged with the possibility of wide interpretation of the 'scope of governmental authority.' Whether an entity is performing an activity within the scope of 'governmental authority' would be determined based on the society, history and traditions of a country and is precisely determined by the internal law of the country.[14] However, there may be exceptional cases where an entity may be categorised as an organ of the state in international law even without such a designation in domestic law.[15] Whether an entity is public or private, or if assets are owned by the state is not important, but the determining factor is that the entities exert elements of governmental authority.[16] Therefore, it is crucial that a connection is established between the entities, activities performed and the exercise of governmental authority.[17] **20**

In the case of *Eureko BV v. Poland,* the arbitral tribunal observed that: **21**

> [t]he principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is, in fact, acting on the instructions of, or under the direction or control of, that State.[18]

The scope of *exercise of governmental authority* came up for consideration *inter alia* in the dispute *Saint Gobain v. Venezuela* wherein the tribunal determined that governmental authority may also be vested with non-state entities.[19] The key test in this regard is the nature of activities performed by the entities.[20] This means that an entity such as an University may have the power to exercise governmental authority but may also be acting in purely commercial capacity in certain situations such as **22**

[13] Article 5, Draft Articles on Responsibility of States for Internationally Wrongful Acts is as follows: 'Conduct of persons or entities exercising elements of governmental authority: The conduct of a person or entity which is not an organ of the State under article but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

[14] Commentary to Article 5, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 43; *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), para. 160.

[15] *Taur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), para. 313.

[16] Maxim, 'Attribution of Conduct to a State – The Subjective Element of The International Responsibility of the State For Internationally Wrongful Acts' (2012) 2 *Challenges of the Knowledge Society*, 1084 (1088).

[17] Maxim, 'Attribution of Conduct to a State – The Subjective Element of The International Responsibility of the State For Internationally Wrongful Acts' (2012) 2 *Challenges of the Knowledge Society*, 1084 (1088 f.).

[18] *Eureko BV v Republic of Poland*, Partial Award (19 August 2005), para. 132.

[19] *Saint Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum (30 December 2016), para. 460.

[20] Kovács, *Attribution in International Investment Law* (2018), Chapter 4.

while entering into a contract for securing commercial benefits, in which case it would not be an act in exercise of governmental authority.[21]

23 The acts of persons or entities that are empowered to exercise elements of governmental authority are considered as act of a state even when they exceed authority or contravene instructions.[22] However, according to the Commentary to Article 7 of the Draft Articles, such conduct cannot be attributed to the state 'where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State'. Considering that acceptance of bribes cannot be considered to be in the interest of government since it only involves benefiting an official and the bribe-giver, it cannot be considered as an act 'cloaked with governmental authority'.[23] In the *Yeager v. Iran* case, an act of an official of a state owned airline official to demand a bribe was not attributed to the state and the tribunal determined that it might be attributable to the state or the airline only if appropriate evidence was furnished that the act was expressly or tacitly approved or the airline failed to exercise appropriate control.[24]

24 This attributability of actions to the state is particularly crucial in evaluating the conduct of entities that are engaged by the government to undertake expropriation of assets.

a) Activities Seen as Exercise of Governmental Authority

25 Investor-state arbitral tribunals have determined the following activities to be an exercise of governmental authority:

26 In the *Yeager v. Iran* case, the Tribunal held the activities of a new group of armed defence force called 'Revolutionary Guards' to be attributable to the state even though they were not officially 'recognized by decree' on the date of their acts.[25]

27 In the *Hamester* case, the tribunal determined that a duty 'to regulate the marketing and export of cocoa, coffee and sheanuts; to encourage the development of all aspects of cocoa production and transformation; and to fight diseases of cocoa beans' along with the power to issue and revoke licenses and issue penalties in case the licensing conditions are violated, all fall within the exercise of governmental authority.[26]

28 The tribunal in the much-discussed *Maffezini* case also determined that activities such as 'undertaking of studies for the introduction of new industries … seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance' and 'providing subsidies and offering other inducements for the development of industries' are 'by their very nature typically governmental

[21] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 October 2012), paras. 173 and 177.

[22] Article 7, Draft Articles on State Responsibility.

[23] Greenwald, 'The Viability of Corruption Defenses in Investment Arbitration When the State Does Not Prosecute', 15 April 2015, *EJIL:Talk*, available at: https://www.ejiltalk.org/the-viability-of-corruption-defenses-in-investment-arbitration-when-the-state-does-not-prosecute/.

[24] *Kenneth P. Yeager v. The Islamic Republic of Iran*, Iran-US CTR Case No. 10199, Award No. 324-10199-1 (2 November 1987), paras. 65 f.

[25] *Kenneth P. Yeager v. The Islamic Republic of Iran*, Iran-US CTR Case No. 10199, Award No. 324-10199-1 (2 November 1987), para 44.

[26] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), paras. 190–192.

tasks, not usually carried out by private entities, and, therefore, cannot normally be considered to have a commercial nature'.[27]

In the *Flemingo Duty Free* case, the tribunal determined that a body entrusted with **29**
the power to modernise and operate airports can be held liable for exercise of its powers and is exercising governmental authority.[28] It further states that the activity of 'operation and management of an international airport is an activity which is not usually carried out by private business'.[29]

The tribunal in *UAB E "Energija"* came to the conclusion that the functions of **30**
issuance of license and determination of tariff for energy supply are activities carried out in exercise of governmental authority.[30]

An agency formed in Croatia for the purpose of 'issuing mandatory approvals **31**
for the transformation of social companies, organising and supervising the transformation of social companies, providing instructions for the implementation of the Law on the Transformation of Social Companies, and coordinating interests of all entities in Croatia related to foreign investment' was found to be exercising elements of governmental authority.[31]

An entity formed for the management of the Suez Canal was held to be performing **32**
a state activity but the entity in itself was not held to be on organ of the state.[32]

Canada has also accepted that the act of collecting customs duties is also an act **33**
carried out in exercise of governmental authority.[33]

b) Activities not Seen as Exercise of Governmental Authority

Alternatively, the following activities have been determined to be outside the scope **34**
of an act committed in exercise of governmental authority:

In the *Flughafen Zürich v. Venezuela*[34] dispute, the tribunal held that the claimant **35**
was not exercising governmental authority even though it was a company, which had Swiss Cantonal governmental shareholding, since it was not acting on behalf of, or for the benefit of the Swiss Government. The tribunal held that management and operation of an airport was not 'essentially governmental function' because it does not fall within what the Tribunal described as a State's 'core non-delegable public activities'.[35]

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[27] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para. 86.

[28] *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (12 August 2016), para. 439.

[29] *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (12 August 2016), para. 428.

[30] *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award (22 December 2017), para. 809.

[31] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018), paras. 809–811.

[32] *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), paras. 161–612.

[33] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Merits (24 May 2007), para. 77.

[34] *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19.

[35] HSF Notes, *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela: when may an entity be considered a 'governmental instrumentality'?* (15 March 2020).

36 The tribunal in the *Staur Eiendom* case also broadly came to a similar conclusion and determined that it needs to be specifically determined that an airport has to be conferred with special powers to act in governmental authority.[36]

37 The tribunal in *Kristian Almås and Geir Almås* determined that the power to lease agricultural land under a contract is not a governmental function.[37]

c) Understanding of the Meaning of the Exercise of Governmental Authority under other Agreements

38 The CJEU has considered the meaning of Article 55 of the EC Treaty (Article 62 TFEU), which deals with the exercise of 'official authority', taking a restrictive view. The Court determined that the condition of an activity to be connected with exercise of official authority is fulfilled only when the activities 'taken on their own, constitute a direct and specific connexion with the exercise of official authority'.[38] As such, activities such as providing higher education services in exchange for remuneration may be considered as an economic activity and may not benefit from the exception provided to acts under official authority.[39]

39 The Commission had stated in its filing to the WTO in 1999 that 'there are no examples in the European Court of Justice jurisprudence where the Court found that an activity would fall under the scope of Article 55 (EC Treaty)'.[40] However, activities which were found not to be in exercise of official authority include private security services,[41] services by traffic accident experts[42] and activities related to design, programming and operation of data processing systems.[43]

40 It is explained further in Clause 1(b) of the GATS Annex on Financial Services wherein it is defined further with relation to financial services and it is provided that:

> services supplied in the exercise of governmental authority' means the following:
>
> (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies
> (ii) activities forming part of a statutory system of social security or public retirement plans; and
> (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

41 Moving ahead, Paragraph 1(c) of the same Annex of the GATS is related to the linkage of this definition with competition and provides that:

> For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b) (ii) or (b) (iii) of this paragraph to be conducted

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[36] *Taur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020), para. 342.

[37] *Kristian Almås and Geir Almås v. Republic of Poland*, PCA Case No. 2015-13, Award (27 June 2016), para. 212.

[38] CJEU, Case 2/74, 21.6.1974, *Jean Reyners v Belgian State*, ECLI:EU:C:1974:68.

[39] CJEU, Case C-66/18, 6.10.2020, *European Commission v Hungary*, ECLI:EU:C:2020:792, para. 160.

[40] Joint Communication from the Parties, The European Communites-Hungary Europe Agreement, Services; The European Communities-Poland Europe Agreement, Services; and The European Communities-Slovak Republic Europe Agreement, Services, WT/REG50/2/Add.3 WT/REG51/2/Add.3 WT/REG52/2/Add.3, 19 May 1999, p. 2.

[41] CJEU, Case C-114/97, 29.10.1998, *Commission of the European Communities v. Kingdom of Spain*, ECLI:EU:C:1998:519, para. 39.

[42] CJEU, Case C-306/89, 10.12.1991, *Commission of the European Communities v. Hellenic Republic*, ECLI:EU:C:1991:463, para. 7.

[43] CJEU, Case C-3/88, 5.12.1989, *Commission of the European Communities v. Italian Republic*, ECLI:EU:C:1989:606, para. 13.

by its financial service suppliers in competition with a public entity or a financial service supplier, 'services' shall include such activities.

Definitions and explanations which are used in the Annex of the GATS may not be directly linked to the provision under Article 8.1 CETA since its provisions do not apply to the Chapter on Financial Services (Chapter Thirteen) of the CETA which is more likely to be closely connected to the GATS Annex on Financial Services. Nevertheless this definition and explanation can serve as an orientation also under Article 8.1 CETA. 42

The 'governmental authority exemption' in the GATS came up for discussion in the Appellate Body (AB) where it was indirectly indicated that the AB supports a narrow reading of the exception.[44] However, in the absence of a detailed analysis by the WTO Dispute Settlement Body (DSB), a definitive interpretation of the provision and whether it should be considered narrowly or broadly is still debatable.[45] 43

II. Aircraft Repair and Maintenance Services

The definition in the agreement is: 'Aircraft Repair and Maintenance Services means activities undertaken on an aircraft or a part of an aircraft while it is withdrawn from service and do not include so-called line maintenance'. 44

1. Drafting History

The text of what is now the definition of *Aircraft Repair and Maintenance Services* was already present in the first known consolidated draft of the CETA (i.e. of 13 January 2010) and it was defined in a manner, which resembles the final version. The text read, 'aircraft repair and maintenance services mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance'. It remained virtually unchanged in the draft of 21 November 2013, and the final Draft of 1 August 2014. Only some grammatical changes were introduced in the final text of CETA. 45

2. Use of the term

Aircraft Repair and Maintenance Services is defined and mentioned in Chapter 8 – Investment. Further it finds mention in the chapter on Cross-Border Trade in Services (Chapter 9) and is utilised in Article 9.2(2)(e) as one of the situations where protections under that Chapter are available. The term finds mention in reservations listed within two annexes to the agreement (Annex I and Annex II) under Reservation I-C-21 and Reservation II-C-17, applicable in all Provinces and Territories of Canada. 46

3. Commentary

The CJEU in Opinion 2/15 (*Singapore* Opinion) determined that the subject of Aircraft Repair and Maintenance Services falls within the ambit of the Common Commercial Policy (Article 207(1) TFEU) and the European Commission has the exclusive competence to sign international agreements on this issue.[46] 47

[44] WTO AB, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, 9 September 1997, paras. 219–220.

[45] Ministry of Employment and Investment, British Colombia, *GATS and Public Service Systems*, https://www.iatp.org/sites/default/files/GATS_and_Public_Service_Systems.htm.

[46] CJEU, Opinion 2/15, 16.5.2016, ECLI:EU:C:2017:376, paras. 64–68.

48 The definition is identical with the definition of the same phrase in the Australia-Hong Kong Free Trade Agreement.[47] This definition is also largely similar (CETA excludes the word 'such') to the definition of the phrase under the Annex on Air Transport Services of the GATS which under Paragraph 6(a) provides that: '"Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance'.

49 The Background note by the WTO Secretariat on Air Transport Services provides an insight into the scope of services covered by this clause.[48] The note states that the definition corresponds to the technical term in the industry called 'maintenance, repair and overhaul' (MRO).[49] The same document states that the market for MRO is divided into four segments: Line maintenance, upkeep of components, upkeep of engines and heavy maintenance of airframes. Out of these segments, line maintenance is not covered by the CETA Investment Chapter. The airline companies are the key players in this market.[50]

III. Airport operation services

50 The definition in the agreement is:

> Airport operation services means the operation or management, on a fee or contract basis, of airport infrastructure, including terminals, runways, taxiways and aprons, parking facilities, and intra-airport transportation systems. For greater certainty, airport operation services do not include the ownership of, or investment in, airports or airport lands, or any of the functions carried out by a board of directors. Airport operation services do not include air navigation services.

1. Drafting History

51 The earliest available Draft of CETA of 13 January 2010 did not mention or define *Airport operation services.* In the Draft of January 2011, *airport operation services* were mentioned and included in the scope of *Investment/Establishment* and in the *Cross-Border Supply of Services.*

52 The draft CETA Investment Chapter text of 21 November 2013 defined Airport Operation Services as:

> the operation and management [including the development, planning and oversight], on a fee or contract basis, of airport infrastructure, including terminals, runways, taxiways and aprons, parking facilities, and intra-airport transportation systems. For greater certainty, Airport Operation Services do not include the ownership of, or investment in, airports or airport lands, or any of the functions carried out by a board of directors. Airport Operation Services do not include Air Navigation Services.

53 The same definition in the final Draft of 1 August 2014 removed the words 'including the development, planning and oversight', from operation and management of the airport operation services. The rest of the definition remained the same.

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[47] Article 7.1, Australia-Hong Kong Free Trade Agreement, 2019.

[48] WTO, Council for Trade in Services, Air Transport Services, *Background Note by the Secretariat*, S/C/W/59, 5 November 1998.

[49] WTO, Council for Trade in Services, Air Transport Services, *Background Note by the Secretariat*, S/C/W/59, 5 November 1998, p. 2.

[50] WTO, Council for Trade in Services, Air Transport Services, *Background Note by the Secretariat*, S/C/W/59, 5 November 1998, p. 3.

2. Use of the Term

Airport operation service is defined and mentioned in Chapter 8 – Investment, where it is further used in Article 8.2(2)(a) as one of the provisions where safeguards provided under Section B (Establishment of investments) and Section C (Non-discriminatory treatment) are available for establishment or acquisition of a covered investment. **54**

It is further defined in Article 9.1 of Chapter 9 (Cross-Border Trade in Services) and is used in Article 9.2(2)(e) as one of the situations where protections under the Chapter are available. The term finds further usage within Annex I (Reservation for existing measures and liberalisation commitments) where it is: **55**

(a) Included in the Schedule of the European Union Reservations for investment and cross-border trade in services in the transport sector, and
(b) Within Reservations applicable in Poland for Investment in the transport sector.

3. Commentary

The definition of 'airport operation services' in the CETA is not seen in another trade agreement, although Section 68 of the Civil Aviation Act, 2012 of the UK and Chapter 7, Article 1 of the PACER Plus Agreement (yet to come into force) contain limited parts of the definition. Whether *airport operation services* are also covered by the GATS is not clear.[51] The CETA chapter on investment disputes will cover disputes on Airport Operations Services as an exception which can be protected under Section B – Establishment of investments (market access and performance requirements) and Section C – Non-discriminatory treatment (national treatment, most-favoured-nation treatment, senior management and board of directors) of the Agreement.[52] **56**

A number of important investor state arbitration disputes have dealt with the subject of airport operation services mostly as a part of a Build-Operate-Transfer (BOT) Contract.[53] Notable among them are *Fraport v. Philippines,*[54] *Malicorp Ltd. v. Egypt,*[55] and *Flughafen Zürich v. Venezuela.*[56] **57**

IV. Attachment

The definition in the agreement is: 'Attachment means the seizure of property of a disputing party to secure or ensure the satisfaction of an award'. **58**

1. Drafting History

The definition of the term 'attachment' was first seen in the Chapter on Investor-to-State Dispute Settlement Text in the Draft of 15 November 2013. It stated that attachment 'means the seizure of the property of a disputing party to secure or ensure **59**

[51] WTO, Council for Trade in Services, Air Transport Services, *Background Note by the Secretariat*, S/C/W/59, 5 November 1998, p. 17.

[52] Article 8.2 (2)(a) CETA.

[53] Lim et al., *International Investment Law and Arbitration: Commentary, Awards and other materials* (2018), 54.

[54] *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25.

[55] *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18.

[56] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19.

the satisfaction of an award'. The definition remained unchanged in the later drafts of 4 February 2014, 1 August 2014 and in the final text of CETA.

2. Use of the Term

60 The term *attachment* is solely defined in Chapter 8 (Investment) of the CETA. Herein, the term finds use in the provision of interim measures of protection (Article 8.34).

3. Commentary

61 The meaning of the term attachment is particularly crucial in common law in regard to immunity for foreign state assets. The meaning of the term 'enforcement' in English law merely refers to the 'adjudicative jurisdiction' of the court and a mere submission to jurisdiction of the arbitral tribunal may not amount to a waiver of immunity from attachment of the assets.[57] However, in certain common law jurisdictions, submission to arbitration in general comprises an automatic waiver of immunity from attachment.[58]

62 Article 8.34 prohibits the tribunal from issuing an order for attachment in an interim order or recommendation. This provision provides clarity and could prevent future confusion in disputes under the CETA since the ability of arbitral tribunals to order attachment through provisional measures is doubtful if there is no explicit clarification in the investment agreement or chapter.[59] Such a provision in an investment agreement – as in CETA – restricts the power of an arbitral tribunal to order attachment in interim measures even if no restrictions are present in the applicable arbitration rules since the treaty provisions are *lex specialis* on the issue.[60]

63 In any case, an order of attachment against a state through an interim order would be highly contentious and a state may be immune to interim measures of attachment due to the principle of sovereign immunity unless it has expressly waived the requirement.[61]

V. Computer Reservation System Services

64 The definition in the agreement is: 'Computer reservation system services means the supply of a service by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.'

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[57] Lim et al., *International Investment Law and Arbitration: Commentary, Awards and other materials* (2018), 475.

[58] Lim et al., *International Investment Law and Arbitration: Commentary, Awards and other materials* (2018), 465.

[59] Lim et al., *International Investment Law and Arbitration: Commentary, Awards and other materials* (2018), 191.

[60] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award – Request for Interim Measures of Protection (31 January 2004), para. 10.

[61] *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Order of the US District Court for District of Columbia (16 April 1987), para. 12; Lim et al., *International Investment Law and Arbitration: Commentary, Awards and other materials* (2018), 183.

1. Drafting History

The text of what is now the definition of *computer reservation system services* in the CETA was already present, almost verbatim, in the treaty's first known draft consolidated version of 13 January 2010. It read 'computer reservation system services mean services supplied by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.' **65**

The text remained virtually unchanged in the Drafts of 21 November 2013 and 1 August 2014 except for a grammatical change of altering the definition from plural to singular. **66**

2. Use of the Term

Computer reservation system services is defined in Chapter 8 (Investment) and Chapter 9 (Cross Border trade in services). The term is further referred to in Annex II Reservations applicable in Canada (Reservation II-C-17). **67**

In Chapter 8, it is further used in Article 8.2(2)(a) as one of the provisions where safeguards provided under Section B (Establishment of investments) and Section C (Non-discriminatory treatment) are available for establishment or acquisition of a covered investment. In Chapter 9 it is used in Article 9.2(2)(e) as one of the situations where protections under the Chapter are available. **68**

3. Commentary

A computer reservation system (CRS) is eligible for protection under Section B – Establishment of investments (market access and performance requirements) and Section C – Non-discriminatory treatment (national treatment, most-favoured-nation treatment, senior management and board of directors) during the process of establishment or acquisition of a covered investment, even though *air services, or related services in support of air services and other services supplied by means of air transport* are excluded.[62] **69**

The definition of a CRS is similar to the definition provided for the same term under Article 6(c) of the Annex on Air Transport Services for the GATS where it is a covered subject. **70**

A CRS enables the travel agencies to access airline schedules and fares, book reservations and issue tickets for the airlines.[63] CRS systems may also be used to book hotels, cars and other auxiliary services. Airlines are the major owners of CRS systems and earn revenues by providing booking facilities to the agents.[64] However, the definition does not exclude any non-airline owners from providing information about airline fares and schedules and hence they may also be able to design and operate CRS services.[65] The revenue in CRS systems *inter alia* originates from: booking fees received by the owning airline or agency from other airlines utilising the system, the share of fee from travel agents utilising the system and share from revenues generated from other services provided through the CRS.[66] **71**

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[62] Article 8.2 (2)(a) CETA.

[63] OECD, *Trade in Services: Negotiating Issues and Approaches* (2001), p. 76.

[64] Abeyratne, *Emergent Commercial Trends and Aviation Safety* (2018), Chapter 4.

[65] Abeyratne, *Aviation Trends in the New Millenium* (2001), Chapter 5.

[66] US Department of Transportation, *Study of Airline Computer Reservation Systems*, DOT-P-37-88-2, May 1998, p. 42.

72 The CRS industry has been described as an oligopoly and 'the capital costs' of creating such a system have been considered as a strong barrier to the entry of new players.[67] The European Commission has considered that CRS contribute a major share of airline reservations and it is necessary to maintain effective competition in this market which led it to enact Regulation (EC) No 80/2009 to set the guidelines in this industry.[68]

73 Disputes may arise from preference granted to CRS systems owned by companies in the home country in comparison to CRS systems from a foreign investor and a resulting uneven playing field.[69]

VI. Confidential or protected information

74 The definition in the agreement is:

> Confidential or protected information means:
>
> (a) confidential business information; or
> (b) information which is protected against disclosure to the public;
> (i) in the case of information of the respondent, under the law of the respondent;
> (ii) in the case of other information, under a law or rules that the Tribunal determines to be applicable to the disclosure of such information.

1. Drafting History

75 *Confidential or protected information* was not defined in the earlier known Drafts of CETA of the year 2010, 2011 and 2012. The Draft of 15 November 2013 described that *Confidential or protected information consists of:*

> (a) Confidential business information;
> (b) Information which is protected against being made available to the public under the Agreement;
> (c) Information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.

The definition in this draft was elaborate and descriptive, while the next Draft of 21 November 2013 defined only confidential information, briefly and did not define protected information. It stated that '**confidential information** means confidential business information and information that is privileged or otherwise protected from disclosure under the law of a Party.'

76 In the draft of 4th February 2014, the earlier definition in the 15th November 2013 draft was retained in its essence, with reorganisation of some words. It stated that *Confidential or protected information means:*

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[67] Bergman et al., 'The Economic Characteristics of Network Industries' in Vaitilingam (ed), *Europe's Network Industries: Conflicting Priorities: Telecommunications* (1998), 19 (23); Meehan, 'Airline Site-Backed study attacks Reservation Fees' (2001) 35(12) *Computer World*, 77.

[68] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89, OJ L 35/47.

[69] USITC, *The Effects of Greater Economic Integration Within the European Community on the United States*, USITC Publication 2204, July 1989, p. 8–11.

a) confidential business information;
b) information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the tribunal.

In the next Draft of 1 August 2014, the text of the definition remained the same. Though the final text of CETA retains the essence of the earlier draft but here the text has been organised more clearly and precisely. **77**

Unlike the previous drafts, the final CETA text uses the word 'or' between confidential business information and information which is protected against disclosure to the public. The use of 'or' indicates the substitutive character of both business information and the information protected against disclosure to the public for the meaning of confidential or protected information. **78**

2. Use of the Term

Confidential or protected information has only been defined and mentioned in the Investment Chapter of the CETA (Chapter 8). Confidential or protected information is included in a number of provisions of the Chapter, *inter alia*, Formal requirements (Article 8.17), Transparency of proceedings (Article 8.36), Information sharing (Article 8.37), Non-disputing Party (Article 8.38), and Consolidation (Article 8.43). **79**

3. Commentary

The definition of 'confidential or protected information' as provided in the CETA closely resembles the definition provided under the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ('UNCITRAL Rules' or 'Transparency Rules'), which are also mentioned in Article 8.36(1) as being applicable to proceedings under Section F (Resolution of investment disputes between investors and states) subject to certain modifications as prescribed in the Chapter (→ Art. 8.17 mn. 22 ff.). **80**

The determination of what is confidential business information has not been provided by the treaty or the UNCITRAL Rules and the final determination on this issue will be made by the arbitral tribunal in each particular proceeding on a case-by-case approach,[70] after considering any such designation made by the Parties.[71] Therefore, while a definition has not been provided under the treaty or the rules, definitions or the scope of confidential business information has been determined by investor-state arbitral tribunals in the past. **81**

In the *Mobil Investments Canada* case, information covered under the grounds of business confidentiality was found to include information that: **82**

> (i) describes trade secrets, or financial, commercial, scientific or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or accounting or financial records not otherwise disclosed in the public domain; and

[70] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (265).

[71] Klint, 'Article 6. Hearings' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 227 (240); Also discussed in, Parliament of the Commonwealth of Australia, *Report 188 - Investments Uruguay, ISDS UN Convention and Convention SKAO*, 1 December 2019, para. 4.17.

> (ii) if disclosed, could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates, or could interfere with contractual or other negotiations of the disputing party to which it relates.[72]

83 The *Philip Morris* tribunal provided a narrower definition which relates more closely to the circumstances of the particular case and provided the power to designate information as confidential on the basis of:

> business confidentiality, including information relating to past, present or contemplated future business activities of the Claimant; the financial affairs of the Claimant or any of its affiliates; the past, present, or contemplated future management or operational policies, procedures, or practices of the Claimant or any of its affiliates; the manufacturing, supply, or distribution process and techniques of the Claimant or any of its affiliates; the value of the Claimant or any of its affiliates or any of their respective assets; the granting of licenses or the provision of goods or services to or by the Claimant or any of its affiliates; and any other information that is proprietary or competitively sensitive and the public disclosure of which may cause competitive injury.[73]

84 Based on the available case law it can be broadly considered that trade secrets, pricing and costing information, marketing, accounting and financial records, scientific and technical information and any information, the disclosure of which could cause financial loss could be covered under the ambit of confidential business information.[74]

85 The definition contains different choices of law determining what confidential or protected information is. The scope of confidential or protected information except confidential business information has to be determined on two different parameters depending on whom the information belongs to. This is similar to Article 7.2(c) of the Transparency Rules. If the information is provided by the respondent state, it will be determined according to the laws of the respondent state while for any other information which was provided by any other Party (claimant or third Parties), the arbitral tribunal has the power to determine whether the information is/are protected under any law or rule which the tribunal determines is applicable to the Party providing the information.[75] It may be noted here that the *travaux préparatoires* to Article 7.2(c) of the Transparency Rules provide that 'information of the respondent state' refers to information introduced by the respondent state and not to information which is connected to the respondent state otherwise.[76] A similar interpretation may be taken for the provision also in the CETA.

86 For determining whether information submitted by a respondent state is eligible for protection, the tribunal has the power to interpret the laws of the state to determine whether the information can be protected but cannot choose the applicable law for evaluation of the same. In order to prevent a misuse of this provision by respondent states that invoke a legislation to protect information which would otherwise be

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[72] *Mobil Investments Canada v Canada*, ICSID Case No. ARB/15/6, Procedural Order No. 2 on Confidentiality (2 November 2015), p. 2.

[73] *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 5 (30 November 2012), para. 53.B.1.

[74] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (265).

[75] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (268).

[76] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (268).

disclosed, the arbitral tribunal has the power to conduct a good faith test to determine the purpose of any applicable law which is used to prevent disclosure of information.[77]

For other information (which does not come from the respondent), the tribunal has two duties: **87**

First, it has to determine the law or rules which will govern the release of such information and second, it has to apply the law or rules selected by it to determine whether the information would be protected from disclosure to the public. Further, the tribunals have to undertake such a test on a case-by-case basis and will also have to review whether a disclosure will be in public interest before coming to any decision.[78] **88**

In addition to the provision for confidential or protected information under the treaty, any tribunal also has to adhere to the rules governing the proceedings. The ongoing project for amendment of the ICSID Rules foresees to introduce a new definition for confidential or protected information under Rule 66 of the Proposed Amended Arbitration Rules and Rule 76 of the Proposed Amended Additional Facility Arbitration Rules.[79] These definitions could be taken into account while dealing with arbitration proceedings under the aforementioned rules and have to be harmoniously interpreted along with the provisions in the CETA. **89**

VII. Covered investment

The definition in the agreement is: **90**

> Covered investment means, with respect to a Party, an investment:
>
> (a) in its territory;
> (b) made in accordance with the applicable law at the time the investment is made;
> (c) directly or indirectly owned or controlled by an investor of the other Party; and
> (d) existing on the date of entry into force of this Agreement, or made or acquired thereafter.

1. Drafting History

The text of the definition of *covered investment* was included in the first consolidated draft of CETA. As per the Draft of 13 January 2010 'covered investment meant, with respect to a Party, an investment in its territory of an investor of the other Party on the date of entry into force of this Agreement, as well as investments made or acquired thereafter'. The definition remained the same in the drafts of January 2011 and February 2012. The text of the definition changed in the draft of 21 November 2013 and two very important types of investments, 'investments made in accordance with the applicable law at that time'; and the 'investments directly or indirectly owned or controlled by an investor of the other Party', were added to the definition of covered investment. The definition stated that **91**

[77] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (271).

[78] Ausburger, 'Article 7. Exceptions to transparency' in Euler et al. (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 249 (273).

[79] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules*, Working Paper 4, Vol. 1, February 2020, p. 66 and p. 159.

covered investment means, with respect to a Party, an investment:

a) in its territory;
b) made in accordance with the applicable law at that time;
c) directly or indirectly owned or controlled by an investor of the other Party; and
d) existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.

92 The definition remained the same in the Draft of 1 August 2014. The final text of the definition of covered investments in CETA remained the same in its essence and is written more clearly and explicitly by removing pronouns.

2. Use of the Term

93 Covered investment is mentioned in the Investment Chapter under the provisions of Scope (Article 8.2), National treatment (Article 8.6), Most-favoured-nation treatment (Article 8.7), Senior management and boards of directors (Article 8.8); Treatment of investors and of covered investments (Article 8.10), Compensation for losses (Article 8.11), Transfers (Article 8.13), Formal requirements (Article 8.17) and under the section for Resolution of investment disputes between investors and states (Section F – Scope, Article 8.18).

94 Further, covered investment is mentioned in the Chapter on Financial Services, within the provisions for investment disputes in financial services (Article 13.21) in relation to the resolution of investment disputes between investors and states previously stated under Chapter 8.

95 In Chapter 18, which deals with State enterprises, monopolies, and enterprises granted special rights or privileges, provisions for non-discriminatory treatment to covered investments are provided (Article 18.4). In the Chapter providing for exceptions, application of taxation measure to a covered investment is discussed (Chapter 28, Article 28.7).

96 Further, the Schedule of Canada provides for reservations applicable to Canada and its provinces related to limiting the number of covered investments. It is found in the reservations applicable in Canada or in individual provinces in relation to investments in particular sectors.[80]

97 Lastly, covered investments are discussed in Annex II Schedule of the European Union Reservations applicable in all Member States of the EU unless otherwise indicated, regarding the right to adopt or maintain any measure relating to air services or related services with respect to the establishment, acquisition or expansion of covered investments.

3. Commentary

98 The term 'covered investment' includes the term 'investment' which is also a defined term under the CETA. The term 'covered investment' is a recent development seen in a number of recent treaties,[81] which diverges from the traditional approach under which the term 'investment' was widely drafted and open ended.[82] Many investment treaties including CETA continue to follow this approach wherein 'investment means every kind of asset' and then a list of types of property or rights is provided.

[80] Reservation II-C-3; Reservation II-PT-1; Reservation II-PT-2,3,4,5; Reservation II-PT-6,7,8,9,10; Reservation II-PT-20,21,22,23,24,25; Reservation II-PT-60,61,62.
[81] *Inter alia* Australia-Hong Kong BIT, 2019; USMCA, 2019; CPTPP, 2018; USA-Uruguay BIT, 2005.
[82] Benson et al., *Covered Investment*, p. 4.

Many treaties, however, were not uniform in the coverage of investments and the definition. Therefore, numerous tribunals used their discretion in the interpretation of the wide definitions provided under the treaties and either sought to limit the coverage of the term[83] or even expand it,[84] thereby creating inconsistent definitions. States, however, have the right to narrow the scope of investments which are protected under a treaty by bringing about a clause which limits the broad general definition of investment.[85] **99**

Through an exercise of this power, the Contracting Parties have included the definition of covered investments which means that the parameters for the evaluation of coverage are provided within the treaty itself. As can be *prima facie* seen in the definition, it is crucial that the 'investment' first fulfils the definition for the term in CETA prior to it being considered as a 'covered investment.' **100**

For an ICSID arbitration, as per the English and Spanish language versions of the CETA, if the claim is brought by 'an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly'[86] in addition to the definition of covered investment under the CETA, a covered investment also has to be considered as an investment under the ICSID convention in what is called the double barrelled test. This is clarified in the English (and Spanish version) in Article 8.23(4), which states that a claim 'shall satisfy the requirements of Article 25(1) of the ICSID Convention.' An evaluation of what is considered as an investment under the ICSID convention is made below under the definition of 'investment' (→ mn. 194 ff.). A contrary approach is taken in the same article in the French and German language versions of CETA wherein submission of the claim under Artcle 8.23(1)(b) has been considered to be sufficient to fulfil the requirements of Article 25(1) of the ICSID Convention. **101**

The elements which have been prescribed for the decision of a 'covered investment' are evaluated as follows: **102**

a) In its Territory

The presence of a territorial limit within the definition of a covered investment is a common feature in many investment treaties.[87] Arbitral tribunals evaluate the territorial connection of an investment while making the decision of whether an investment could be covered within the treaty even when it is not explicitly stated in the definition.[88] In fact, the need for a territorial link has been described as a 'generally accepted principle' of international investment law.[89] **103**

The importance of a territorial connection is particularly significant for investments in the financial sector since portfolio investments could be bought and sold outside the territory of a host state without any direct inflow of funds into the host **104**

[83] *Joy Mining Machinery Limited v. Te Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004), para. 58; see also, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 December 2010), paras. 56–57.

[84] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), paras. 284–286; *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras. 61, 73–74.

[85] *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award (11 September 2018), para. 313.

[86] Article 8.23(1)(b) CETA.

[87] USA-Georgia BIT, 1994; AANZFTA; Canada-China BIT, 2012.

[88] Benson et al., *Covered Investment*, p. 12.

[89] *Swissbourgh Diamond Mines (Pty) Limited and others v. Kingdom of Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal (27 November 2018), para. 99.

state. Conflicting opinions prevail on their status with arbitrators disagreeing on whether in the absence of a direct link with the host state such investments could be protected.[90] In known cases, a common factor which has led tribunals to conclude that there is a territorial link with the investments is when funds in the cases were linked to the host state which could access the funds and benefit from them.[91]

105 Tribunals have also had the opportunity to discuss the importance of a link of investments to a territory in two prominent North American Free Trade Agreement ('NAFTA') disputes: *Bayview v. Mexico*[92] and *Canadian Cattlemen for Fair Trade v. United States*,[93] where the claims were rejected because of lack of investments within the territory of the host state. In *Bayview,* it was determined that the investments were located in US territory (home state) and not in the host state (Mexico) because the water distribution infrastructure (their investment) was located in Texas and the water rights which were linked to their investments were provided by the same US state.[94] In *Canadian Cattlemen,* the restriction on beef and cattle imports from farms located in Canada was not considered to be an issue covered under the treaty since they were not within the territory of the host state (USA).

b) Made in Accordance with the Applicable Law at the Time the Investment is Made

106 The requirement to comply with the applicable law is a requirement for coverage of an investment as determined by the tribunals.[95] The compatibility of an investment with the applicable law is important since tribunals have considered that investments made in breach of the domestic law can result in an investment not being protected under the treaty.[96] Tribunals have not been uniform on the requirement of compatibility with the domestic law for an investment to be covered under the definition of a treaty.[97] Instances of corruption at the time of making an investment may mean that the investment was not made in accordance with the applicable law and the tribunal may be required to evaluate such allegations while determining if it is a covered investment.[98]

107 The clause 'made in accordance with the applicable law' as provided in this definition does not provide clarity on what would exactly cover the status of an investment

[90] Covered investment according to: *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), paras. 288, 292. Not investments according to: Dissenting Opinion of Abi-Saab in *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paras. 56–57, 78, 105; Dissenting Opinion of Bernardez in *Ambiente Ufcio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), paras. 262–263.

[91] Benson et al., *Covered Investment*, 14.

[92] *Bayview Irrigation District at al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007), paras. 93–108.

[93] *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008), paras. 126–127.

[94] *Bayview Irrigation District at al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007), paras. 112-114.

[95] On this, see also, *Urbaser v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para. 558.

[96] Benson et al., *Covered Investment*, 14.

[97] Need for compatibility with the law: *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para. 101; *Grupo Francisco Hernando Contreras S.L. v. Republic of Equatorial Guinea*, ICSID Case No. ARB(AF)/12/2, Award on Jurisdiction (4 December 2015) [Spanish], paras. 231234.

[98] Miles, 'Corruption, Jurisdiction and Admissibility in International Investment Claims', 2012 3(2) *J. Int'l Disp. Settlement*, 329 (358).

and what conflict of law rules apply.[99] By going with the prima facie interpretation of this definition, 'applicable law' for CETA would require the use of Article 8.31 CETA which provides that the law governing such a decision would be the 'Agreement (*CETA*) as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties'.[100] An alternative explanation suggests that for a covered investment, in accordance with applicable law would mean that the investment is made 'in accordance with the laws of the country where they have invested'.[101] This definition of applicable law is crucial for investor-state arbitration under the CETA since the tribunals are only allowed to consider the domestic law of a Party as a matter of fact and follow the prevailing interpretation.[102] This becomes a key issue in view of the *Achmea* decision[103] and *Opinion 1/17* of the CJEU.[104]

c) Directly or Indirectly Owned or Controlled by an Investor of the Other Party

A need for a direct or indirect link through ownership or control by an investor of the other Party to an investment agreement has been held to be an essential condition for the coverage of an investment under the treaty.[105] A link has to be present between the investor and the investment made. Tribunals have however been flexible to accept jurisdiction of disputes with complex corporate structures.[106] The definition also encompasses investments in the share capital of a company incorporated in the territory of the other contracting state.[107] **108**

A lack of a clear proof about the existence of a direct or indirect relationship between an investor and the investment is a hindrance to *the rationae temporis* or *rationae personae* jurisdiction of a tribunal.[108] An absence of a link between the investment and the claimant would prevent a tribunal from accepting jurisdiction over the dispute.[109] **109**

Other than the possibility for ownership, emphasis has been placed on control over the investments. This importance placed on 'control' indicates that in many cases there would not be a requirement of transfer of capital but a shift of control takes place.[110] **110**

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[99] Bischoff and Wuhler, 'The notion of investment', in: Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 19 (31).

[100] Article 8.31(1) CETA.

[101] Bernasconi-Osterwalder, 'Reply to the European Commission's Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', *IISD Report*, June 2014, p. 3.

[102] Article 8.31(2) CETA.

[103] CJEU, Case C-284/16, 6.03.2018, *Slowakische Republik (Slovak Republic) v Achmea BV*, ECLI:EU:C:2018:158.

[104] CJEU, Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341. Also, cf. → Art. 8.31 mn. 19 ff.

[105] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction (8 December 2003), para. 63.

[106] *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction (19 September 2008), para. 52.

[107] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000), para. 68.

[108] *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/1, Award (26 September 2013), para. 186.

[109] *Peter Franz Voecklinghaus v. Czech Republic*, UNCITRAL, Final Award (19 September 2011), para. 165.

[110] Schlemmer, 'Investment, Investor, Nationality and Shareholders' in Muchlinksi et al., *The Oxford Handbook of International Investment Law* (2008), 49 (60).

In broader terms, control is considered as 'the criterion for linking a company to the State of the entity, whether natural or legal, that controls it'.[111]

111 A key part of the definition is the requirement that the investor who seeks protection must be of the 'other Party' and for this purpose, the investor must be a 'natural person' or an 'enterprise' of the other Party. A discussion on who is considered as a 'natural person' or 'enterprise of a Party' is made in the definition of the specific terms below (→ mn. 234 ff., 270 ff.).

112 In addition to the nationality requirement of an investment agreement, an ICSID tribunal also has to evaluate if the nationality requirement under the ICSID convention is fulfilled.[112]

d) Existing on the Date of Entry into Force of this Agreement, or Made or Acquired thereafter

113 The *rationae temporis* jurisdiction of a tribunal over a particular jurisdiction is determined through this provision and the 'covered investment' has to exist on the date of entry into force of the agreement 'or made or acquired' after the date of entry into force of the CETA.[113] This is particularly significant since tribunals cannot exercise jurisdiction for disputes arising out of violation of these principles or for investments which ceased to exist prior to entry into force of the CETA (→ Art. 8.18 mn. 93 ff.).[114]

114 The specific inclusion of pre-existing investments as being covered under the agreement will help in clarifying any confusion over the applicability of the treaty to such investments in the absence of an explicit declaration.[115] With the specific inclusion of the clause, all pre-existing investments are covered, signalling a favourable environment for investments in a host state.[116]

VIII. Disputing Party

115 The definition in the agreement is:

> disputing party means the investor that initiates proceedings pursuant to Section F or the respondent. For the purposes of Section F and without prejudice to Article 8.14, an investor does not include a Party;
> disputing parties means both the investor and the respondent.

1. Drafting History

116 The Draft CETA text of 13 January 2010 already contained a definition of disputing Party. The Draft stated that 'disputing party means either the respondent Party or the investor that has made a claim under Section B'. Section B referred to Settlement of Disputes between an Investor and the Host Party. The version of the definition

[111] UNCITRAL, *Réforme du règlement des différends investisseurs/Etats (ISDS)*, Academic Forum, Glossary Working Group, para. 58.

[112] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007), paras. 53–54.

[113] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (27 October 2015), para. 283.

[114] See also, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award (16 September 2003) (English Translation), para. 11.3.

[115] *Nordzucker AG v. Republic of Poland*, UNCITRAL, Partial Award (Jurisdiction) (10 December 2008), para. 113.

[116] Salacuse, *The Law of Investment Treaties* (2005), Chapter 7: Scope of Application of investment treaties.

remained the same in the Drafts of January 2011 and February 2012. The text of the definition changed in the draft of 15 November 2013, stating that '**disputing party** means either the claimant or the respondent'. The version remained the same in the draft of 4 February 2014. The text of the definition changed in the draft of 1 August 2014, this version of the definition was more explicit and in reference to the resolution of investment disputes between investors and states, under the agreement. The draft stated that '**disputing party** means either the investor that initiates proceedings pursuant to Section 6 or the respondent. For the purpose of Section 6 and without prejudice to Article X-13 (Subrogation), an investor does not include a Party'. The definition remained the same in the final text of CETA, the only change being the numbering of the applicable Section and the Article as per the final organisation of the agreement.

The term *disputing parties* was first defined in the draft of 15 November 2013, **117**
stating that 'disputing parties means both the claimant and the respondent'. The definition remained the same in the Draft of 4 February 2014. The version changed in the draft of 1 August 2014, which is also the final version of the definition in the text of CETA.

2. Use of the Term

Within Chapter 8 (Investment) of the CETA, the term *disputing party* is used in **118**
relation to recourse to mediation or its termination (Article 8.20), Third-Party-Funding (Article 8.26), constitution of the tribunal (Article 8.27), appellate tribunal (Article 8.28), ethics (Article 8.30), applicable law and interpretation (Article 8.31), interim measures of protection (Article 8.34), information sharing (Article 8.37), non-disputing Party (Article 8.38), final award (8.39), enforcement of awards (Article 8.41), and consolidation (8.43). Further, in Chapter 13, the term *disputing party* is used in investment disputes in financial services (Article 13.21).

The term *disputing parties* finds mention in Chapter 8 (Investment) in connection with consultations before referral to the investor-state dispute settlement tribunal (Article 8.19), recourse to mediation or its termination (Article 8.20), possibility for agreement on rules for the investor-state dispute settlement tribunal (Article 8.23), referral to proceedings in another forum in an ongoing dispute settlement proceeding (Article 8.24), consent for resolution of proceedings through a dispute settlement tribunal (Article 8.25), agreement on proceedings through a sole arbitrator, and fee and expenses for a tribunal (Article 8.27), challenge against a member of the tribunal (Article 8.30), dismissal of claims without legal merit (Article 8.32), discontinuance of proceedings (Article 8.35), transparency of proceedings (Article 8.36), role of non-disputing Parties (Article 8.38), distribution of costs of tribunal proceedings (Article 8.39), limitation on duration of proceedings (Article 8.39), enforcement of awards (Article 8.41), consolidation of proceedings (Article 8.43), and committee on services and investment (Article 8.44).

3. Commentary

The term *disputing party* has been included to distinguish it from a 'non-disputing **119**
party' which normally refers to one of the state Parties to the treaty that is not a respondent to the particular proceedings. As it is prima facie seen from the definition, disputing Party only covers the investor who is a Party to an investor-state dispute and a state Party to the CETA or the European Union itself, if it is a respondent in the dispute. A state Party may be an investor but in the capacity of an investor, cannot be a

disputing Party under Section F (except with subrogated rights under Article 8.14 CETA); (→ Art. 8.2 mn. 30 ff.). In this case, it would have to bring a claim under Chapter 29.

120 In case of mediation proceedings, the *disputing parties* are responsible for an agreement to have recourse to mediation and for conduct of the proceedings (See, Article 8.20 CETA below).

121 In a dispute, when both the investor and the respondent are considered together, then they are called the *disputing parties*.

IX. Enjoin

122 The definition in the agreement is: 'enjoin means an order to prohibit or restrain an action'.

1. Drafting History

123 The term 'enjoin' was first defined in the Draft of 15 November 2013, wherein it was stated that 'enjoin means an order to prohibit or restrain an action'. The definition remained the same in the later drafts of 4 February 2014, 1 August 2014 and in the final text of CETA.

2. Use of the Term

124 The term 'enjoin' is used only in Article 8.34 (Interim measures of protection) of Chapter 8 CETA.

3. Commentary

125 The term 'enjoin' has been used in a number of arbitration awards in a wide variety of contexts. In the *Dunkeld International Investment Ltd.* v. *Belize* dispute, the arbitral tribunal determined that a state's efforts to 'enjoin' arbitration proceedings are in violation of the provisions of the BIT.[117] Alternatively, in the *SGS* v. *Pakistan* dispute, the term was used against a different background and the tribunal determined that it could not 'enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory'.[118] The term was used in a similar context as *SGS* in the *Lao Holdings N.V. v. Lao* dispute.[119] In a third alternative context, the term 'enjoin' was used to refer to the limitation on the discretionary powers of the tribunal during the conduct of the proceedings under Article 17(1) of the UNCITRAL Arbitration Rules (as amended in 2010).[120]

126 In the CETA, the term 'enjoin' is used in Article 8.34 wherein it restricts the tribunal from prohibiting or restraining a measure which is under dispute before an investor-state tribunal (Article 8.34 CETA). Similar utilisation of the term is seen

[117] *Dunkeld International Investment Ltd. v. Government of Belize I*, PCA Case No. 2010-13, Award (28 June 2016), para. 336.

[118] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2 (16 October 2002), para. 36.

[119] *Lao Holdings N.V. v. Lao People's Democratic Republic I*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measure Order (30 May 2014), para. 29.

[120] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Procedural Order on Stay Application (28 February 2017), para. 47.

in a number of other investment agreements such as the USA-Uruguay BIT,[121] the CAFTA-DR,[122] and the NAFTA.[123]

Based on the utilisation of the term to restrict the powers of a tribunal regarding enjoining a measure in dispute in the arbitration proceedings, the tribunal in the *Pope & Talbot v. Canada* case refused to grant a claimant's motion for interim measures under Article 1134 NAFTA (which is similar to the provision under Article 8.34 CETA).[124] Also, pursuant to a similar provision, the tribunal in *EnCana Corporation v. the Republic of Ecuador* refused to grant an interim request against measures for recovery of incorrect tax refunds.[125] **127**

X. Enterprise

The definition in the agreement is: 'enterprise means an enterprise as defined in Article 1.1 (Definitions of general application) and a branch or representative office of an enterprise'. **128**

1. Drafting History

The definition of *enterprise* underwent major revisions over time since its appearance in the first known Draft text of the CETA of 13 January 2010. In the first draft of 13 January 2010, 'enterprise meant an enterprise as defined in Article [X.05] (Initial Provisions and General Definitions – Definitions of General Application), and a branch of any such entity'. However, further explanation of the term was missing. **129**

The version of January 2011 and February 2012 provided a detailed list of what constitutes an enterprise. It stated that 'enterprise means an entity constituted or organized under applicable law, whether or not for profit, and whether privately owned and controlled or governmentally owned and controlled, including a corporation, trust, partnership, sole proprietorship, joint venture or other association'. In the draft of 21 November 2013 and 1 August 2012, the text of the definition added some components to clearly define the term, stating that 'enterprise means any entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or controlled or governmentally owned or controlled, including any corporation, trust, partnership, joint venture, sole proprietorship or association and a branch or representative office of any such entity'. The definition stayed almost the same in the final text of CETA, wherein it stated that 'enterprise means an enterprise as defined in Article 1.1 (Definitions of general application) and a branch or representative office of an enterprise'. While tracing this linkage, as per Article 1.1 CETA, 'enterprise means an entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture or other association'. **130**

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[121] Article 28(8) USA-Uruguay BIT, 2005.

[122] Article 10.20(8) CAFTA-DR, 2004.

[123] Article 1134 NAFTA.

[124] *Pope & Talbot v. Government of Canada*, Ruling on Claimant's Motion for Interim Measures (1 January 2000).

[125] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award – Request for Interim Measures of Protection (31 January 2004).

2. Use of the Term

131 The term enterprise is mentioned several times in the CETA. It is defined in Chapter One within General Definitions and Initial Provisions. Under Chapter 8 (Investment) it is defined in Article 8.1 and further mentioned under Market Access (Article 8.4), Performance requirements (Article 8.5), Senior management and boards of directors (Article 8.8), Denial of benefits (Article 8.16), Consultations (Article 8.19), Procedural and other requirements for the submission of a claim to the Tribunal (Article 8.22), Submission of a claim to the Tribunal (Article 8.23), Final award (8.39), and Indemnification or other compensation (Article 8.40).

132 Beyond this specific definition of enterprise in Chapter 8, for the CETA a general definition of 'enterprise' has been provided under Article 1.1 CETA which is as cited above.

133 The term enterprise is mentioned in Chapter 9 (Cross-border trade in services) under Article 9.8 which is the provision on Denial of benefits. Further, the term enterprise is defined and mentioned in Chapter 10 (Temporary entry and stays of natural persons for business purposes) under the provisions for Contractual services suppliers and independent professionals (Article 10.8) and Short-term business visitors (Article 10.9).

134 The Chapter on Financial Services (Chapter 13) also mentions enterprise under the provisions of Specific exceptions (Article 13.17). In the Chapter on International maritime transport services (Chapter 14), enterprise is mentioned in the definition of *international maritime transport service suppliers* under Article 14.1.

135 Additionally, the term enterprise is defined in the Chapter on Telecommunications (Chapter 15), and mentioned under the provisions on Access to and use of public telecommunications transport networks or services (Article 15.3), Resolution of telecommunication disputes (Article 15.12), and in the Chapter on Competition Policy (Chapter 17), it is seen in the provision for Application of competition policy to enterprises (Article 17.3).

136 The term also finds mention in the Chapter on State enterprises, monopolies, and enterprises granted special rights or privileges (Chapter 18) under Article 18.3, which deals with special rights or privileges granted to state enterprises, monopolies and enterprises granted special rights or privileges.

137 In the Chapter on Trade and sustainable development (Chapter 22), the term finds mention under the provisions of Cooperation and promotion of trade supporting sustainable development (Article 22.3). Further, the term enterprise is also mentioned in the Annex 10-D under the Activities of short-term business visitors.

3. Commentary

138 The definition of an enterprise in the definitions of general application (Article 1.1 CETA) is similar to the definition prescribed in the Canadian Model FIPA, 2014[126] and the draft Multilateral Agreement on Investment.[127] The key components of the definition in Article 1.1 are the need for the entity to be constituted or organised under the applicable law, private or government ownership or control and it may fall within the categories already specified such as a corporation, trust, partnership, sole

[126] See Article 1, Canadian Model FIPA, 2014, available at https://www.italaw.com/sites/default/files/files/italaw8236.pdf.

[127] See Article II.2(i) Draft Multilateral Agreement on Investment, available at http://www.oecd.org/daf/mai/pdf/ng/ng987r1 e.pdf.

proprietorship, joint venture or other association. The entity may be for profit or non-profit (see on this also → Art. 8.2 mn. 57 and Art. 8.18 mn. 56).

The definition in Article 8.1 expands this general definition to include a branch or representative office. Inclusion of any entity is important since entities which are considered as an 'enterprise' become eligible for protection as an investment. **139**

a) Applicable Law

The law of the place of the constitution of the enterprise has been determined as the relevant law for determining the legal status of the enterprise.[128] The states are free to determine the types of enterprises and the persons who can incorporate the enterprises according to their domestic law. This approach reflects the opinion of the tribunal in *Perenco* v. *Ecuador* which held that: '[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law'.[129] **140**

b) Private or Government Ownership or Control

The possibility for private or government ownership *prima facie* means that state-owned entities are also covered within the definition of an enterprise. This is a development linked to the understanding that state-owned enterprises may in certain circumstances be working in a purely commercial capacity.[130] In those situations, a state-owned enterprise may be similar to a private business entity and can be permitted to bring about a claim under a BIT.[131] **141**

Reflecting this development of creating a distinction between the state and a state-owned enterprise and its activities, the tribunal in *Windstream* determined that the ILC draft articles make it clear that 'conduct of persons or entities such as State enterprises which are not formal organs of the State can only be attributable to the State if the person or entity in question is exercising governmental authority in the particular instance'.[132] **142**

There may, however, be situations when an entity which is not a state enterprise also performs state functions.[133] **143**

c) Whether for or not for Profit

The not-for-profit or non-governmental organisations (NGOs) may not be directly eligible for protection under investment treaties since their activities may fall short of the investment criterion.[134] These non-profit organisations may however own or **144**

[128] OECD, 'Definition of Investor and Investment in International Investment Agreements', in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), 7 (19).

[129] *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador(Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014), para. 522.

[130] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017), paras. 39–44.

[131] *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Judgment of Paris Court of Appeal (29 November 2016), paras. 17–18.

[132] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (27 September 2016), para. 233.

[133] *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), para. 160.

[134] Kube, *EU Human Rights, International Investment Law and Participation* (2019), 147.

control crucial infrastructure such as hospitals, schools, technical institutions and equipment which may be targeted by governments.[135] Recognising this problem, investment agreements such as CETA have included special provisions which would include not for profit operations and enterprises involved in such activities under the ambit of protection.[136]

d) The Type of Entity: Constituted or Organised

145 The type of entity which can be considered as an enterprise has to be recognised as a business association under the applicable law and cannot be 'mere mutually beneficial business, contractual, or culturally-rooted relations'.[137] Common forms of corporate entities which are constituted include *inter alia* limited liability companies, joint stock companies, unlimited companies, public companies, private companies, trusts etc. The form of the constituted or organised entity would be determined by the laws of the country where it is formed and may vary across countries depending on the laws of the country. While a sole proprietorship is covered under the definition of an enterprise and hence can be considered as an investor, it also has to be 'constituted' or 'organised' under the laws of the home country in some form which is legally recognised under the laws of the country.[138]

e) Inclusion of Branch or Representative Office

146 The terms 'branch or representative office' have not been defined in the CETA. In such a scenario, a reference may be made to the EU-Moldova Association Agreement and the EU-Armenia EPA. Both these agreements have defined a 'branch' in relation to trade in services, establishment and electronic commerce as:

> 'branch' of a juridical person means a place of business not having legal personality which has the appearance of permanency, such as an extension of a parent body, has a management structure and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will, if necessary, be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.[139]

147 A branch or a representative office may be particularly relevant for the services sector as can be seen from the reservations provided in the CETA wherein they are mentioned in relation to financial services.[140] Article 49 TFEU also considers that a branch or an agency is one of the modes through which companies established in a Member State may conduct their business.[141]

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[135] Kowalski, 'Recognizing an Investment: An Argument for Access to the Investor-State Dispute Settlement Mechanisms for Non-Governmental Organizations', *Penn JIL*, 16 April 2017, https://pennjil.com/recognizing-an-investment-an-argument-for-access-to-the-investor-state-dispute-settlement-mechanisms-for-non-governmental-organizations/.

[136] Other IIAs with similar provisions which include not for profit operations *inter alia* include the Colombia-UAE BIT 2017, the Singapore-Myanmar BIT 2019 and the Israel-Japan BIT 2017.

[137] *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 92.

[138] Bischoff and Wuhler, 'The notion of investment', in: Mbengue and Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (2019), 19 (33).

[139] Article 203(7), EU-Moldova Association Agreement, 2014; Article 142(h), EU-Armenia Enhanced Partnership Agreement, 2017.

[140] Reservations applicable in Italy and Hungary.

[141] CJEU, Case C-264/96, 16.7.1998, *Imperial Chemical Industries plc (ICI) and Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, ECLI:EU:C:1998:370, para. 20.

'Representative offices' are also seen as a form of permanent presence by states at least in the insurance sector.[142] This is different from branch offices which are considered as a less permanent form and are not considered eligible to acquire state-owned properties while a similar right is provided to representative offices which are listed along with forms such as limited liability companies and joint-stock companies.[143] Interestingly, while the CETA has included both branch and representative offices as enterprises and hence provided them cover under the treaty, the EU-Vietnam IPA explicitly excludes representative offices from its coverage.[144] **148**

XI. Ground handling services

The definition in the agreement is: **149**

> ground handling services means the supply of a service on a fee or contract basis for ground administration and supervision, including load control and communications; passenger handling; baggage handling; cargo and mail handling; ramp handling and aircraft services; fuel and oil handling; aircraft line maintenance, flight operations and crew administration; surface transport; or catering services. Ground handling services do not include security services or the operation or management of centralised airport infrastructures, such as baggage handling systems, de-icing facilities, fuel distribution systems, or intra-airport transport systems.

1. Drafting History

The text of the definition of ground handling services was first seen in the Draft of 21 November 2013, which stated, **150**

> Ground handling services means the provision, on a fee or contract basis, of the following services: ground administration and supervision, including load control and communications; passenger handling; baggage handling; cargo and mail handling; ramp handling and aircraft services; fuel and oil handling; aircraft line maintenance, flight operations and crew administration; surface transport; and catering services. Ground handling services do not include security services and the operation or management of centralised airport infrastructures, such as baggage handling systems, de-icing facilities, fuel distribution systems, and intra-airport transport systems.

The definition did not undergo major revisions in the subsequent versions of the text. **151**

2. Use of the Term

Ground handling services is defined in Chapter 8 (Investment) and Chapter 9 (Cross Border trade in services). The term is further referred to in Annex II Reservations applicable in Canada (Reservation I-C-21) but with reference to the definition provided in Chapter 9. In Reservation II-C-18, the term is used in reference to the definitions in both Chapter 8 and 9. **152**

In Chapter 8 where it is further used in Article 8.2(2)(a) as one of the provisions where safeguards provided under Section B (Establishment of investments) and Section C (Non-discriminatory treatment) are available for establishment or acquisition of a covered investment. In Chapter 9 it is used in Article 9.2(2)(e) as one of the situations where protections under the Chapter are available. **153**

[142] Reservations applicable in Greece (Financial Services – Insurance and insurance-related services).
[143] Reservations applicable in Hungary.
[144] Article 1.2(h)(ii), fn. 2, EU-Vietnam IPA, 2019.