Investor protection in CETA

Gold standard or missed opportunity?

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INTRODUCTION

On 29 February 2016, it was announced that a 'legal review' of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada had been completed.[1] According to its negotiators, CETA now represents the "new global standard of progressive trade agreements"; it is being touted as the "gold standard" of trade agreements.[2] The swift ratification of CETA is a "top priority" for the EU Commission and Canada, who anticipate its entry into force in 2017.

As part of its legal review, CETA's Investment Chapter was extensively modified, putatively in order to: "strengthen the provisions on governments' right to regulate; move to a permanent, transparent, and institutionalised dispute settlement tribunal; revise the process for the selection of tribunal members, who will adjudicate investor claims; set out more detailed commitments on ethics for all tribunal members; and agree to an appeal system".[3] **This paper seeks to assess to what extent CETA's "gold standard" fulfils the mandate articulated on 8 July 2015 in the Resolution of the European Parliament** (hereinafter, the *EP Resolution*) concerning the EU-US Transatlantic Trade and Investment Partnership (TTIP).[4]

Recent years have seen a growing crisis for the system of investor-state dispute settlement (ISDS), which has been typically included in over 3000 international investment agreements (IIAs) globally.[5] Prior to the recent legal review, ISDS provisions were also included in CETA. However, since the negotiations for CETA began in 2009, **major public opposition to the inclusion of ISDS** provisions both in CETA and TTIP has surged across Europe. In a public consultation held by the EU Commission in 2014 on the issue of investment protection and ISDS in TTIP, respondents expressed **overwhelming opposition** to the inclusion of ISDS.[6] Partly in response to this public outcry over ISDS, the EU Parliament articulated in the *EP Resolution* a number of concrete stipulations for reforming investment protection provisions:

(xiii) *to ensure that TTIP contains a **comprehensive chapter on investment** including provisions on both market access and investment protection, recognising that access to capital can stimulate jobs and growth; the investment chapter should aim at ensuring non-discriminatory treatment for the establishment of European and US companies in each other's territory, while taking account of the sensitive nature of some specific sectors; these should look to enhance Europe as a destination for investment, increase confidence for EU investment in the US and also **address investors' obligations and responsibilities by referring, inter alia, to the OECD principles for multinational enterprises and to the UN principles on Business and human rights as benchmarks;***

(xiv) *to ensure that **investment protection provisions are limited to post-establishment provisions** and focus on national treatment, most-favoured nation, fair and equitable treatment and protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation; **standards of protection and definitions of investor and investment should be drawn up in a precise legal manner protecting the right to regulate in the public interest, clarifying the meaning of indirect expropriation and preventing unfounded or frivolous claims; free transfer of capital should be in line with***

the EU treaty provisions and should include a prudential carve-out not limited in time in the case of financial crises;

(xv) *to* ***ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors****, and to* ***replace the ISDS system with a new system*** *for resolving disputes between investors and states which is* ***subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives…***

It is important to note that both the European-wide public consultation in 2014 and the *EP Resolution* in 2015 addressed concerns over *TTIP* – not CETA, the negotiation of which was ostensibly concluded at that time. However, in responses to the 2014 public consultation, civil society groups and NGOs consistently expressed discontent about the lack of opportunity for alterations to the equivalent provisions in CETA. Therefore, the three main areas for reform specifically identified in the *EP Resolution* – which address concerns that have long been at the centre of opposition to ISDS – apply equally to CETA. These areas are:

(I) **Right to Regulate**: that ISDS is a threat to states' ability to regulate in pursuit of legitimate public interest objectives, by according foreign investors the right to sue host states for implementing regulatory measures which adversely affect their investments, at tribunals constituted exclusively for this purpose;

(II) **Judicial Standards**: that the tribunals constituted to hear ISDS claims lack democratic legitimacy, standards of judicial independence and transparency, and are therefore not fit for purpose to adjudicate claims concerning legitimate public interest objectives;

(III) **Investor Conduct**: that evolving international standards of conduct for transnational corporate actors are as yet insufficiently developed and lack an enforceable legal basis for holding foreign investors to account for harm they cause, and that the existence of ISDS hinders progress in this area

These concerns have been widely shared and voiced by lawyers, academics, civil society groups, NGOs, and governments, across the Global North and South for over a decade.[7] From the 2000s onwards, the number of ISDS cases snowballed, and in the wake of numerous controversial decisions concerning environmental protection, mining, water services and human rights, criticism of the ISDS system has continued to grow.[8] This backlash has prompted a variety of innovative proposals for reform of both procedural and substantive aspects of international investment law, with many calling for ISDS to be abolished or replaced with a more robust, egalitarian and publically accountable judicial system, which is underpinned by principles of public international law, labour standards, human rights and environmental protection.[9] In November 2015, the EU Commission published its proposal to establish an **Investment Court System (ICS)** in the TTIP agreement, designed to address the widespread criticisms of the former ISDS system.[10] It is precisely these ICS provisions that have now been incorporated – more or less wholesale – into CETA's investment chapter, by way of the so-called "legal scrubbing" concluded in February 2016.

However, even **after the 'legal review' of CETA's investment provisions, there is little evidence that many of the widespread and legitimate concerns have been adequately addressed.** In respect of the three core areas of concern noted above, the EU's ICS proposal offers – at best – a significant innovation only with respect to the issue of **judicial standards**. Most of the relevant objectives outlined in the EU Parliament's Resolution of 8 July 2015 have been ignored or remain unfulfilled. Notable from the outset is that the CETA does not provide any comprehensive guarantee of states' **right to regulate** in pursuit of legitimate public interest objectives, and that the issue of **investor conduct** is barely mentioned. Far from constituting a "gold-standard" – as its negotiators claim – CETA's investment chapter represents a missed opportunity to implement meaningful reform into an international system of adjudication, the defects of which have long been identified.

These shortcomings are all the more alarming in light of the mandate given to the EU Commission by the European Parliament in the *EP Resolution*. In the analysis below, the requirements articulated in the *EP Resolution* are evaluated against a 'traffic light' to indicate which have been **fulfilled (green)**, which remain **uncertain (yellow)**, and which are **unfulfilled (red)** in CETA.

SUMMARY

With specific reference to the issues of investment protection, the EU Parliament's Resolution of 8 July 2015 mandated the Commission[11] to ensure reforms in CETA that would achieve the following:

A. Include standards of protection and definitions of investor/investment, which:

1. are drafted in a *precise legal manner*
2. are *limited to post-establishment provisions*
3. protect *the right to regulate in the public interest*
4. clarify *the meaning of indirect expropriation*
5. prevent *unfounded or frivolous claims*
6. allow *free transfer of capital in line with the EU treaty provisions, including a prudential carve-out not limited in time in the case of financial crises*

B. Replace ISDS with a new system that:

7. is subject to *democratic principles and scrutiny*
8. ensures *potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings*
9. includes *an appellate mechanism*
10. ensures *consistency* of judicial decisions
11. ensures the *jurisdiction of courts of the EU and of the Member States is respected*
12. ensures *private interests cannot undermine public policy objectives*
13. ensures that *foreign investors benefit from no greater rights than domestic investors*

C. Address investors' obligations and responsibilities by referring to the following benchmarks:

14. *UN Guiding Principles on Business and Human Rights*
15. *OECD Guidelines for Multinational Enterprises*

As explained in detail below, only four of the criteria set by the Resolution of the European Parliament of 8 July 2015 can be regarded as fulfilled; one is uncertain, and ten remain unfulfilled. Consequently, CETA's new chapter on investment protection cannot be considered a "gold standard". Rather, it is a missed opportunity to create a legal system that addresses these deficiencies, which have long been identified in the ISDS system.

A. STANDARDS OF PROTECTION AND DEFINITIONS

The *EP Resolution* calls for investment protection provisions to "focus on national treatment, most-favoured nation, fair and equitable treatment and protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation…"[12] These standards are those most common to international investment agreements, and their inclusion is not – per se – controversial. However, the scope of protection that these standards accord investors has, over time, been significantly extended in ISDS decision-making. The fact that investors are the only parties able to initiate claims, and that practitioners working in the highly lucrative field of ISDS may be appointed to a variety of roles (as counsel in one case or arbitrator in another), has therefore fuelled suspicions that presiding arbitrators have a vested interest in expanding the scope of these standards of investment protection by adopting a broad interpretative approach which favours investors.

The approach of the EU Commission has been to attempt to delineate more narrowly the scope of these protections, and some successes of this approach can be seen in the CETA agreement. In several respects, the CETA agreement does indeed satisfy the stipulations of the *EP Resolution*. However, the mandate provided by the *EP Resolution* itself is not particularly ambitious with regard to substantive standards of investment protection, and indeed glosses over more complex issues, for example with regard to compensation and indirect expropriation. Moreover, one of the core criticisms directed at ISDS is that arbitrators have been able to significantly expand the scope of these protections through their decision-making. As such, the efficacy of attempts to delimit such scope in CETA cannot be taken for granted without watertight reforms to judicial standards.

1. Drafted in a precise legal manner

Some of the efforts in CETA to delimit the scope of the **most favoured nation (MFN)** provisions, **fair and equitable treatment (FET) standard** and the meaning of **indirect expropriation** (see 4 below), should be welcomed. CETA's provisions are more precise than those contained in many existing IIAs. However, many of these efforts are unconvincing.

The **MFN** provision is perhaps the most favourable reform to the clarification of standards of investment protection. The provision addresses the concern that the MFN clause has previously allowed investors to invoke the provisions of a state's other international investment agreements, effectively cherry-picking the more favourable or expansive terms of investment protection. CETA expressly excludes any interpretation of the MFN treatment provision which would allow investors to invoke either the "procedures for the resolution of investment disputes between investors and states" or "substantive obligations" provided for in other international investment treaties and other trade agreements.[13] This is one of the few positive developments contained in CETA's investment chapter.

The vague **FET** standard has been regularly incorporated into IIAs without further elaboration and has therefore been subject to broad interpretation by arbitral tribunals. In CETA, breaches of the FET standard are limited to particular instances such as 'denial of justice', 'manifest arbitrariness', and 'fundamental breach of due process'.[14] But such fundamental rights are already guaranteed within the constitution and legal system of the EU. This raises the question: what then is the purpose of the FET provision? The provision further allows for extra elements of the FET standard to be adopted, upon a review of the content of the standard.[15] The structure of this provision makes clear that the review mechanism is designed to expand, rather than narrow the FET standard. But it is wholly unclear what purposes such expansion should serve. If the FET standard is expanded to include more comprehensive fundamental rights, then these should be guaranteed for all (including domestic investors and citizens) under EU law and not under an exclusive regime for foreign investors. The *EP Resolution* states clearly that **the reforms should not grant foreign investors greater rights than domestic investors – but these provisions clearly anticipate doing so.**

In interpreting the FET standard, tribunals are also directed to take into account any "specific representation" which creates "**legitimate expectations**".[16] Previous ISDS cases have demonstrated that the principle of 'legitimate expectation' leaves a very wide scope for interpretation and that states may find themselves bound by the statements of individual officials who engage with investors, or by "commitments" inferred from general laws and regulations.[17] Such concerns were specifically raised in response to the EU's 2014 public consultation on ISDS. As it stands, the provision **does not even require that representations be in writing.** As such, a host of "representations" which do not reflect the intended, democratically based policy decisions of states, may potentially be relied upon as enduring and binding commitments of states, and therefore curb host states' right to regulate.

CETA's open and asset-based **definition of 'investment'** [18] – as opposed to an enterprise-based definition or an exhaustive list of what constitutes an investment – produces the least predictable situation for host states, and enables the most expansive interpretation, which in turns expands the range of potential claims against the EU or its member states. CETA cites a list of the "characteristics" of an investment derived from the so-called *Salini* test.[19] As non-exhaustive indicators, these do not greatly limit the definition. More problematically, one of the four factors laid down in *Salini* test has been omitted: namely, "*contribution to the economic development of the host State*".[20] This omission is in opposition not only to the EU Parliament's intention that CETA foster economic development (which can be read throughout the *EP Resolution*), but also the Commission's own purported objectives.[21]

2. Limited to post-establishment provisions

This stipulation of the *EP Resolution* would appear to have been fulfilled in CETA.[22]

3. The right to regulate in the public interest

Although an improvement has been made in this respect since the 'legal review' of CETA, the concern that investment protection provisions curb states' regulatory space is **not satisfactorily addressed.**

Prior to the 'legal review', CETA contained only statements in its Preamble concerning states' 'right to regulate' with reference to a non-exhaustive list of policy objectives. These statements have been retained.[23] However, statements in Preambles are not necessarily binding; they may be merely symbolic or provide guidance as to the purpose or interpretation of the treaty.[24] Alone, they provide no guarantee that their vague references to the right to regulate will be respected in the absence of further substantive provisions. Subsequent to the 'legal review', CETA's investment chapter does now contain **two substantive articles**, which: (i) reaffirm the right to regulate to achieve "legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity"; and (ii) clarify that regulation or modification to laws which negatively affects an investment or interferes with an investor's expectations, is not alone sufficient to breach an obligation under the investment chapter.[25]

These provisions may be seen as an improvement, but they **remain problematic and may be ineffective**. In the first, the qualifying term '*necessary* to achieve' – formerly included in the EU Commission's draft ICS proposal – has been dropped. This "**nexus**" between a regulation and its objective can be critical in determining the ease with which a state might invoke the exception and proving that a measure is necessary can be overly burdensome. However, this provision now has effectively *no nexus*, and it is difficult to assess how the relationship – between a regulation and its objective – might be evaluated be a Tribunal in any future dispute. For example, read literally, the "right to regulate… *to achieve* [a stated objective]" might denote that the regulation should be proven to *in fact* achieve the objective.[26] Nor is it clear how the second clause above will operate in relation to the FET standard, which states clearly that 'legitimate expectations' may be considered a factor in determining a breach of the host state's FET obligations.

The list of indicative '**legitimate' policy objectives** might also prove insufficient. UNCTAD guidelines recommend including a more extensive (but still non-exhaustive) list of policy exceptions, such as public order, human rights, the provision of essential social services (e.g. health, education, water supply), prevention of tax evasion, protection of cultural heritage, as well as measures to ensure "compliance with laws and regulations that are not inconsistent with the treaty".[27] Furthermore, CETA does not include any guidance on how as yet unforeseen (but nonetheless legitimate) public purposes beyond those listed might be identified or invoked by states in the future. A mandatory mechanism should have been incorporated for circumstances where a state invokes a public policy exception in the course of a dispute, so that the issue is automatically referred to a joint committee. Such a committee could then "**guide the interpretation** or, alternatively, issue a **binding determination** of whether or not a measure falls within the scope of the public policy exception."[28] Currently, the Committee on Services and Investment may "recommend to the CETA Joint Committee the adoption of interpretations of this Agreement" – but only "[w]here serious concerns arise as regards matters of interpretation that may affect investment."[29] **Serious, foreseeable concerns regarding matters of interpretation that *may affect the right to regulate* seem however to be left to the determination of the Tribunal.** This is in stark contrast both to the prudential carve-out – which allows for a respondent in a dispute to request a binding determination on the validity of their defence (see 6 below) – and the FET provision – which contains a procedure for parties to request a review of the content of the FET standard (see 1 above).

The operation of the 'right to regulate' principle is further obfuscated by the caveat included in the Annex on **indirect expropriation** (see 4 below).

4. The meaning of indirect expropriation

ISDS cases in which investors claim to have been victims of "indirect expropriation" – general regulations or measures that affect the value of their investments – have been a major source of concern, in particular with regard to protecting the right to regulate. CETA's Annex on Expropriation does attempt to clarify the meaning of indirect expropriation. These innovations are however weak and risk creating further uncertainty.

Firstly, CETA imposes **vague criteria** for determining whether indirect expropriation has taken place ("*substantial deprivation*" of the "*fundamental attributes*" of property), without further defining what these criteria mean. Secondly, the list of factors relevant to the determination of whether a measure constitutes indirect expropriation is **non-exhaustive**, so that *any other factor which a Tribunal deems appropriate* may be applied in the interpretation of indirect expropriation. Thirdly, a clause designed to protect states' right to regulate to achieve "legitimate public welfare objectives" **effectively creates additional requirements for the right to regulate:** even if a measure is undertaken for a legitimate public purpose and is non-discriminatory, it may be found to be indirect expropriation if it is "so severe in light of its purpose that it appears to manifestly excessive". There is no guidance on what amounts to "severity" or "excess", or how these should be balanced with the "purpose" of a measure or its impact on an investor. No attempt is made to expressly define types of measures that categorically do *not* constitute indirect expropriation.

The Article on Expropriation also fails to provide clarification as to the meaning of indirect expropriation.[30] The Article prohibits (both direct and indirect) expropriations unless they are (i) for a public purpose, (ii) lawful, (iii) non-discriminatory, *and* (iv) accompanied by payment of **"prompt, adequate and effective compensation".** This fourth element (known as the "Hull" formula) has been subject to a complex international debate on the standard of compensation applicable to expropriations which otherwise meet the first three criteria. **Expropriation is not unlawful per se** and the provision in CETA wholly ignores alternative approaches that would have been closer to both EU standards and UNCTAD recommendations. In respect of the standard of compensation for lawful expropriation, UNCTAD suggests: 'The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation.'[31] Instead the provision in CETA effectively makes the legality of expropriation *dependent* on the Hull standard, meaning that the agreement guarantees foreign investors "prompt, adequate and effective" compensation for an expropriation (direct or indirect) even when the expropriation is otherwise lawful, non-discriminatory and for a public purpose. This potentially places foreign investors in a more favourable position than domestic investors of the EU (see 13 below).

5. Unfounded or frivolous claims

This stipulation of the *EP Resolution* would appear to have been fulfilled in CETA.[32] Though the provisions included are welcome as innovations that may improve the consistency and efficiency of decision-making under the dispute settlement procedures laid down in the agreement, their efficacy in practice will depend upon whether the reforms to ISDS in CETA prove sufficiently robust.

6. Free transfer of capital in line with the EU treaty provisions, including a prudential carve-out not limited in time in the case of financial crises

This stipulation of the *EP Resolution* would appear to have been fulfilled in CETA.[33] However, this is in striking contrast to other areas of concern that have been glossed over. Extensive provisions regarding the prudential carve-out are included in CETA's Financial Services chapter. In the event of an investment dispute, these allow for a respondent to invoke in its defence a wide-ranging exception to CETA's investment protections, and to refer the matter to the CETA Financial Services Committee,[34] whereupon either that Committee or the CETA Joint Committee may make a determination as to the validity of the defence. This determination is binding, and if the defence is deemed valid with regard to the entirety of the investors' claim, the investor's claim is deemed automatically withdrawn.

This would appear to be a significantly more thoughtful and robust approach to protecting the right to regulate for financial services than appears anywhere else in CETA's investment provisions. As such, **the prudential carve-out only highlights the significant deficit in CETA regarding other critical areas of regulation, such as environmental protection, labour or social policy.** As noted (see 3 above), CETA contains a general right to regulate which lacks any such mechanism to determine its content, scope, or its validity as a defence in a particular case, leaving any interpretation of the meaning of the right to regulate at the mercy of the new Investment Court System.

B. REPLACE ISDS WITH A NEW SYSTEM

The EU Commission's proposal for an Investment Court System (ICS) was published in November 2015. This is one of the most significant attempts to date to replace ISDS in IIA policy-making. Its inclusion in TTIP – for which it was initially designed – is still subject to on-going negotiations with the US. Nevertheless, the proposal has already been the subject of significant criticism, garnered little support from either civil society or from the business community, and has even been the subject of significant derision by ISDS practitioners.[35]

The incorporation of the ICS into CETA as a result of the 'legal review' does mark an improvement – albeit one with many limitations. In the previous CETA text, investor-state disputes were to be resolved through ad-hoc ISDS tribunals whose constitution did not deviate significantly from the provisions of the ICSID Convention. The new ICS provisions provide for the creation of a two-tier system, consisting of a Tribunal and Appellate Tribunal.

7. Democratic principles and scrutiny

In its entirety, the CETA agreement refers to "democracy" twice – in its Preamble. But the agreement's investment chapter does nothing to ensure that democratic principles will underpin the "reformed" dispute settlement process. A primary criticism of ISDS is that the failure to adequately respect the principle of the right to regulate is potentially fatal to the democratic process. CETA's investment chapter does little to reassure that this principle will be better respected under the ICS than under the former ISDS system (see 1, 3 and 4 above). As a result, **potential litigation under the ICS may still threaten attempts to regulate in the public interest, enabling the principles of investment protection to effectively trump regulations and measures adopted by the elected governments or EU institutions with a legitimate democratic mandate.**

Furthermore, the failure of the EU Commission to heed the democratic mandate given by the EU Parliament in its *Resolution* is itself a cause for a degree of concern. The *EP Resolution* expressed a clear rejection of ISDS on the basis that it provides foreign investors with the ability to leap-frog the jurisdiction of European judiciaries – including that of the Court of Justice of the European Union (CJEU) – in order to bring claims in a system which is effectively detached from the judicial institutions of the EU and its member states, their laws or constitutions. The haphazard manner in which this mandate has been addressed betrays a lack of serious concern for the need to protect and respect the democratic process.

Although a greater degree of **public scrutiny** will be enabled by incorporation of the *UNCITRAL Transparency Rules*, these rules **provide no guarantee of an appropriate level of democratic oversight** in cases which concern legitimate public policy objectives (see 3 and 6 above). The new ICS also continues to ignore a fundamental **principle of equality** before the law. No part of the agreement addresses one of the central criticisms of ISDS: that the enduring character of the system is that claims will still *only* be initiated *by* investors *against* states (see Part C below). The overwhelming public rejection of ISDS has demonstrated that a special legal regime with exclusive privileges for foreign investors profoundly offends the principles of the rule of law and democracy.

8. Potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings

Under the ICS provisions, a number of concerns remain around the **independence** of "Members" of the Tribunal and of the Appellate Tribunal, their **expertise** and potential **conflicts of interest.** Contrary to the *EP Resolution*, CETA will create a quasi-judicial institution in which cases will be overseen **not by "professional judges" – who serve exclusively and permanently in this capacity – but by "Members" of the Tribunal and of the Appellate Tribunal**. The CETA Joint Committee is mandated to appoint the Members, from which 'divisions' of three will be selected to hear cases on a "random and unpredictable" basis. These Members will be paid a retainer – to ensure their availability – and not a salary, unless the Committee decides otherwise.[36] Members may be appointed provided that they possess the "qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence" and have "demonstrated expertise" in public international law. The term "jurists of recognised competence" is sufficiently vague to encompass a very wide category of potential applicants and these **requirements for Members' appointment are inadequate** given the gravity of the cases the Tribunals will hear.

Moreover, there is currently **no agreed Code of Conduct** that would apply to Members. The Committee on Services and Investment is mandated to produce such a Code, which should address matters such as disclosure obligations, the independence and impartiality of the Members of the Tribunal, and confidentiality. But the Committee is only *obliged* to ensure that the Code is finalised no later than two years after CETA's entry into force.[37] In the meantime, only the investment chapter's 'Ethics' provisions will apply.[38] These provisions impose obligations on arbitrators to be 'independent' and to comply with the principles laid down in the *International Bar Association Guidelines on Conflicts of Interest*, which require disclosure of circumstances that are or may be perceived as conflicts of interest. Upon appointment, members must "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." These provisions do *not* prevent members from acting as counsel or as party-appointed expert or witness in any *non-investment* dispute; potential conflicts of interest that may arise from Members acting in non-investment cases are wholly ignored.

Moreover the consequences of any breach of these obligations are insufficient. Parties to a dispute may challenge the appointment of a Member of a Tribunal in a specific case on 'conflict on interest' grounds. This may lead to a disqualification of the Member from hearing that particular case, but CETA does not appear to impose any other sanctions on the Member for failing to have declared the conflict. The provisions also fail to ensure that – if the conflict of interest is confirmed and the Member disqualified – that decisions already taken by the Tribunal in that case would be annulled or even reviewed. It is also not guaranteed that such a finding will automatically lead to the removal of the Member from the Tribunal and no guarantee is provided that they might not adjudicate in further cases, even if their conduct breaches the *International Bar Association Guidelines*. The Ethics provisions state that the CETA Joint Committee 'may' remove a Member of the Tribunal, but they are not obliged to do so. Nor do these provisions bar Members who have been disqualified from reappointment.

Given the gravity of concerns about ISDS to date, these provisions would not appear to deepen the integrity of the judicial system created under CETA's investment chapter. While some 'revolving door' issues – concerning the ability of lawyers to work simultaneously as both counsel and adjudicator in multiple investment disputes – in the ISDS system appear to have been addressed, this has been done very lightly and the results are unconvincing. CETA's investment chapter also completely fails to address the very legitimate concern that any person (whether employed as an *ad-hoc arbitrator* or *member of a tribunal*) who is employed in a system of dispute settlement in which **only one class of individuals (investors) is able to initiate claims against another (states),** is liable to be influenced by the **structural inequality** of that system and inclined to ensure that a market for such claims continues to prosper. This concern **cannot be resolved** except in combination with other reforms, such as those related to the imposition of binding standards of investor conduct (see Part C below) or the mandatory referral of all cases in which a respondent state invokes a public policy exception to a joint committee of the contracting parties (see 3 above).

While the provisions do require hearings to be made public, they may be held in private in order to "protect confidential or protected information" or (under the incorporated *UNCITRAL Rules*) "where this becomes necessary for logistical reasons".[39] As these rules are newly developed, it is unclear how broadly these grounds may be invoked in future cases. The incorporated *UNCITRAL Rules* also allow for **non-disputing parties** to participate in disputes by making written submissions, meeting certain criteria.[40] But the UNCITRAL provisions are largely equivalent to those introduced under ICSID[41] in 2006, and these have to date proven wholly ineffective in enabling civil society groups and NGOs to bring environmental or human rights concerns to bear on arbitral proceedings. Such submissions have been given little weight and had little (if any) impact on tribunals' decision-making.[42] These limitations are well known and have been widely discussed, but CETA fails to improve on them in any respect.

9. Appellate mechanism

This stipulation of the *EP Resolution* has been fulfilled in CETA. The agreement does include "an" appellate mechanism in name – and therefore gets the green light. However, the operation of this mechanism remains highly questionable, in light of the fact that **none of the other requirements regarding the reform of ISDS have been met.**

10. Consistency of judicial decisions

CETA ensures consistency neither **within** the body of international investment law to which the ICS will belong, nor **between** the decisions made in this system and those of the courts of the EU. ISDS tribunals have long been criticized for adopting a largely ad-hoc and unsystematic approach to applicable law and legal principles. This has been a particular concern with regard to tribunals' interpretations of the applicability of non-investment law (such as national and international laws on environmental protection and human rights), and of principles such as the 'margin of appreciation' doctrine (which directly concerns the right to regulate).[43] CETA's dispute settlement provisions do not provide any guidance on how the arbitrators of this newly reformed process should treat the gamut of ISDS jurisprudence (numbering hundreds of awards to date), its inconsistencies and sometimes-contradictory interpretations of identical IIA provisions.

CETA is also silent on the issue of whether decisions by the Appellate Tribunal will be binding on future cases (as precedent). While some provision has been made for interpretations of CETA's investment provisions made by the Committee on Services and Investment (or the CETA Joint Committee) to be binding on Tribunals, this is only robust with regard to the provisions on prudential carve-out (see 6 above), and little care has been taken to ensure consistency with regards to determining where states' have imposed measures in pursuit of legitimate public policy objectives.

The only assured consistency is that the legal regime created in CETA is given de facto supremacy over the decisions of courts of the EU and its member states. CETA does not require investors to exhaust domestic remedies prior to initiating a claim under CETA. In determining whether domestic law is consistent with CETA, the investment provisions do instruct Tribunals to be consistent with existing interpretations given to domestic laws and to "follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party". However, in several high profile cases brought under ISDS procedures to date, investors have sought to directly challenge **judicial decisions themselves as breaches of IIA provisions**.[44] Mere deference to domestic courts or authorities on the interpretation of domestic law (which is to be treated as a "matter of fact") is not nearly sufficient, when future cases could potentially challenge the decisions of all judicial, executive, and legislative branches of democratically-elected governments, without any explicit limits on ICS Tribunals' jurisdiction.

11. Jurisdiction of courts of the EU and of the Member States is respected

As noted above, CETA does respects neither the jurisdiction of the domestic courts of EU member states, nor the exclusive jurisdiction of the CJEU on the interpretation of EU law, as **CETA does not include a requirement to exhaust domestic remedies**. This requirement might have been the most straightforward strategy to reform ISDS in this respect, but has been wholly overlooked.

CETA's investment chapter does prevent investors from bringing simultaneous or subsequent claims in other domestic or international courts or tribunals.[45] However, as the proposed ICS system would appear to privilege investors, their needs are likely to be well catered for without recourse to alternative judicial channels.

The Tribunal and Appellate Tribunal created under CETA will have jurisdiction to determine the consistency of domestic laws with the provisions of CETA, and are under no obligation to defer to the jurisdiction of courts or authorities of the EU or its member states. Tribunals must "follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party",[46] but for issues of law which are yet to be addressed by those courts or authorities, tribunals are not required to consult or refer questions to those authorities – thus jeopardising the exclusive jurisdiction of the CJEU on the interpretation of EU law. The problem this is likely to create for both the consistency of and jurisdiction over questions of EU law is already very clear: the Commission has itself attempted (unsuccessfully) to intervene in an ICSID case, which concerned Romania's discontinuation of state aid to Swedish investors.[47] Provisions on "subsidies" in CETA appear to be designed to address the specific issues that arose in that case.[48] But the scope for potential conflict between CETA's investment protection provisions and a wide range of legitimate *non-investment* policy objectives is much greater. "Covered investments" must be "made in accordance with the applicable law at that time"[49] which means that even at the jurisdictional stage of proceedings in a dispute, Tribunals will necessarily be called upon to address and decide the application and interpretation of domestic law – and not merely to treat that law as a "matter of fact".

The failure to preserve jurisdiction of courts of the EU and its member states over issues such as fundamental human rights, labour or environmental protection standards is thus still a major cause for concern.

12. Private interests cannot undermine public policy objectives

In light of the above concerns (in particular, see 1, 3, 4, 7, 8 and 11 above), there can be no guarantee that CETA fulfils this requirement. Although some credit may be given for attempts at ISDS reform – which clearly acknowledge that many of the concerns are legitimate – the provisions of CETA's investment chapter are wholly inadequate to fully ensure that the interests of private investors will not be given priority over legitimate public policy concerns in practice.

13. Foreign investors benefit from no greater rights than domestic investors

The inclusion of a set of investment protection standards in CETA and a dispute resolution procedure which caters exclusively to foreign investors – and which are not available to domestic investors – clearly violates the mandate that foreign investors should not benefit from greater rights than domestic investors.

CETA's investment provisions *do* provide procedural rights which apply *only* to foreign investors. Whether CETA's substantive rules consist of '*greater*' rights than those available to domestic investors will be ultimately determined in practice, but it is clear from the text that the level of protection for investments covered by CETA is very likely to exceed that accorded to domestic investors. For example, the incorporation of a requirement that compensation for **expropriation** be "prompt, adequate and effective" effectively excludes the possibility of reducing compensation where appropriate in cases of lawful, non-discriminatory expropriations undertaken for a public purpose (see 4 above). In its jurisprudence, the European Court of Human Rights (ECHR) has accepted that less than market value compensation may be appropriate in certain cases.[50]

The **FET standard** is another clear example of this disparity (see 1 above). As currently drafted, this standard in CETA does not currently contain any rights that foreign investors would not already enjoy under domestic laws on fundamental and constitutional rights in the EU and its member states. It is therefore first unclear why the provisions are necessary at all. But CETA contains a mechanism by which further elements of the FET standard may be adopted upon review at the request of the parties, opening the possibility for the future expansion of the FET standard.[51] So the question must be asked: **what basic rights does the EU anticipate that it might want to grant to foreign investors, which EU investors or citizens should not be also entitled to enjoy?** The Commission has – to date – been unable to answer this fundamental question.

Moreover, throughout the CETA (and TTIP) negotiations, the fundamental rationale for a judicial system exclusively for the benefit of foreign investors has never been adequately addressed. Critical questions remain concerning the logic of incorporating such a legal framework into CETA, when both Canada and the EU and its member states already possess robust legal protections for investors, enforceable in judicial systems of a high international standard. By not requiring foreign investors to first exhaust available **domestic remedies**, CETA's provisions do not even confer on domestic judiciaries the authority to examine the complaints of foreign investors in the first instance. Such a requirement need not have foreclosed investors' resort to international dispute settlement in exceptional circumstances where denial of justice has *in fact* occurred in local courts.[52] However, CETA instead reinforces the idea that domestic judiciaries are inherently incompetent or incapable of according equal treatment to foreign investors vis-à-vis domestic investors.[53] If it is believed that "access to justice" in European courts is so deficient, this should be a cue for reforming and improving standards in the legal and judicial institutions of the EU and its member states, rather than as a justification for allowing foreign investors to comprehensively bypass local jurisdiction on the mere presumption that these institutions are deficient.

C. INVESTORS' OBLIGATIONS AND RESPONSIBILITIES

The *EP Resolution* called for the reforms to ISDS to include reference to two leading frameworks in the field of international corporate social responsibility (CSR) – the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Enterprises.

Only the OECD Guidelines are referred to in CETA's preamble, which "encourages" *enterprises* to "respect internationally recognised guidelines and principles" of CSR and pursue such "best practices of responsible business conduct".[54] In CETA's investment chapter itself, the only provisions which can be construed as relating to investor's obligations and responsibilities, are:

(I) the definition of investment, requiring that investments be "*made* in accordance with the applicable law at that time";[55] and

(II) a provision excluding from recourse to the dispute settlement procedures those investments "made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process".[56]

CETA contains no reference to any obligations or responsibilities arising from the *operation* of the investor's business, *nor* to the state's duty to protect against and remedy any breaches of these obligations – as envisaged by both the UNGP and the OECD Guidelines.

Although the incorporation of investor obligations into IIAs is novel, CETA cannot be regarded as a 'progressive gold standard' while omitting any attempt to address these concerns. It is widely acknowledged in debates around the reform of ISDS, that there is a stark disparity between the voluntary or 'soft-law' character of CSR standards and the binding, enforceable nature of both IIA provisions and ISDS awards. Moreover, while investors enjoy a wide range of protections under IIAs they typically incur no obligations, thus creating both a structural imbalance in any arbitration proceedings and a lucrative market for ISDS litigation that has been heavily promoted by law firms.[57] A further concern – discussed below – is that ISDS can therefore be used to hinder legitimate attempts to remedy harmful business conduct in domestic legal systems.

In recent years, extensive proposals have been made on ways to incorporate principles of responsible business conduct into IIAs. International support for such innovations has been clearly gaining momentum – the UNGPs and the OECD Guidelines are themselves a testament to this fact. Multi-stakeholder discussions on the topic recently took place following the adoption of a UN Human Rights Council Resolution on establishing a treaty imposing international human rights legal obligations on transnational corporations.[58] At the Annual Forum of Business and Human Rights in Geneva in November 2015, some 2,300 stakeholders discussed the implementation of the UNGPs, including in relation to investment policy reform.[59]

As a result of this momentum, a raft of policy reforms has been proposed. These include guidelines produced by UNCTAD, which suggest the inclusion of sanctions-based CSR-provisions. These could include the requirement that tribunals consider an investor's compliance with domestic laws when deciding an investment dispute; the denial of treaty protection to investments operating in violation of domestic laws that reflect international legally binding obligations (e.g. labour standards or environmental conventions); or allowing states to bring counterclaims in dispute proceedings where investors have violated such laws.[60] More extensive policy options are provided for in the comprehensive proposals contained in the 2012 Model BIT designed by the Southern African Development Community.[61]

One recent innovative proposal has been to incorporate a new system of **community-investor dispute settlement (CIDS)** into the investment chapters of trade agreements: such a system could be designed to allow communities to hold foreign investors to account for damage caused through their business operations and thereby address the imbalance created by ISDS and ICS, which only allow foreign investors to initiate litigation against the host state.[62]

Such innovation was clearly mandated in the *EP Resolution*, by reference to the UNGP and the OECD Guidelines. **But the drafters of CETA have ignored this issue altogether.**

14. UN Guiding Principles on Business and Human Rights

The UNGPs are not mentioned in CETA at all. Nor can the principles which underpin the UNGPs be any way inferred by the investment provisions of CETA.

The UNGP framework is built on three pillars: (i) the state's duty to **protect** against human rights abuses of business enterprises, (ii) the corporation's responsibility to **respect** human rights, and iii) the need for victims to have access to effective **remedy**.

The UNGPs expressly acknowledge that trade and investment agreements 'affect the domestic policy space of governments' and recommend that states 'ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements'.[63] This is precisely what the mandate in the *EP Resolution* attempts to do, and CETA fails to achieve. As noted (see 3 above), CETA fails to comprehensively ensure that the principle of the **right to regulate** will be respected.

However CETA further fails to heed the principles of the UNGPs in several other important respects. The states' **duty to protect** against human rights abuses of business enterprises includes the requirement to take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication", and "to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency."[64] As noted above, CETA does not ensure that principles of fairness, equality, accountability, certainty or transparency are respected in the new ICS. Moreover, the UNGPs explicitly state that without **effective redress** for victims of the human rights abuses of business enterprises, the state duty to protect may be "rendered weak or even meaningless."[65] To ensure that these domestic judicial mechanisms are effective, the UNGPs call on states to "ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts…"[66]

However, a quasi-judicial mechanism which enables foreign investors to leapfrog domestic jurisdiction – whether it is branded ISDS or ICS – may be regarded as just such **a barrier to ensuring effective redress at the domestic level.** Although such cases are rare, it has been clearly demonstrated that where domestic courts attempt to remedy the harmful impacts of irresponsible corporate conduct, **investors can use investor-state litigation to undermine domestic legal proceedings by claiming that they breach investment protections in IIAs**. The best-known example is *Chevron v. Ecuador*.[67] In 2013, the Ecuadorian Supreme Court upheld a decision ordering the US oil company to pay $9billion to indigenous groups in compensation for contamination caused by oil-drilling in the Amazonian rainforest – one of the largest compensation awards for environmental damage in history. In response to the award, Chevron initiated an ISDS case claiming that the judgement violates provisions of the US-Ecuador Bilateral Investment Treaty. Controversially, the investment tribunal assumed jurisdiction and ordered Ecuador to block the enforcement of the domestic award.[68] This epic and controversial litigation saga is far from settled, but it is not altogether unique.[69]

Using the UNGPs as a benchmark, the incorporation of investor obligations – as mandated in the *EP Resolution* – would also mean ensuring that domestic enforcement of such obligations are guaranteed free of interference from investor-state litigation. Environmental damage on the scale of the *Chevron* case may seem unimaginable in Europe or Canada, but CETA is purported to create a new global standard, a blueprint for future trade agreements, and the ICS provisions are intended to create a springboard for discussions towards a 'multilateral investment tribunal'. **CETA cannot be regarded as a 'gold standard' while the reforms to ISDS do nothing to address this issue.**

15. OECD Guidelines for Multinational Enterprises

Only the reference to the OECD Guidelines in CETA's Preamble has any consequence for investment. It is however a weak incorporation, which merely "encourages" enterprises to heed such standards.

The OECD Guidelines themselves address the issues of corporate responsibility much less comprehensively than the UNGPs. However, like the UNGPs, the Guidelines also emphasise that states primarily "have the duty to protect human rights".[70] By addressing itself only to enterprises, the reference to the OECD Guidelines in CETA's Preamble fails to acknowledge this and precisely as with the UNGPs, the **full meaning of the Guidelines has not therefore been heeded**: CETA fails both to ensure states' right to regulate (see 3 above) and to address the potential conflict between investor-state litigation and domestic redress for damage caused by foreign investors (see 14 above).

SHORT GLOSSARY AND ABBREVIATIONS

FAIR AND EQUITABLE TREATMENT (FET) STANDARD

The FET standard is one of the IIA clauses that is at the core of today's debate on IIA reform. The standard is designed to protect foreign investors from government misconduct not captured by other standards of protection. It is also sometimes said that the FET standard may serve to foster good governance in host States. In actual practice, owing to its open-ended and largely undefined nature, the FET standard, especially as it has been drafted in traditional IIAs, has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem unfair. In fact, almost all ISDS cases to date have included an allegation of a FET breach.

There is a great deal of uncertainty concerning the precise meaning of the concept of FET, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations… As a result, the task of determining the meaning of the FET standard has been effectively left to ad hoc arbitral tribunals.

A particularly challenging issue that has arisen through arbitral practice relates to the use of the FET standard to protect investors' "legitimate expectations". Given the potentially far-reaching application of the concept of "legitimate expectations", there is a concern that the FET clause can restrict countries' ability to change investment-related policies or introduce new policies – including those for the public good – if they have a negative impact on individual foreign investors.[71]

MOST-FAVOURED-NATION (MFN) TREATMENT

MFN clauses, routinely included in traditional IIAs, aim to prevent less favourable treatment of investors from the signatory State vis-à-vis comparable investors from any third country (i.e. nationality-based discrimination). The MFN principle thereby aims to ensure a level playing field between investors of different foreign nationalities.

In actual ISDS practice, investors have relatively infrequently alleged that they have been discriminated against by virtue of the host States' more favourable application of domestic measures to investors of third states. Instead, investors have most often invoked the MFN clause to access more "investor-friendly" provisions in IIAs concluded by the host State with third countries.[72]

INDIRECT EXPROPRIATION

The expropriation provision is a key IIA element that mitigates an important risk faced by investors. Expropriation clauses do not take away States' right to expropriate property, but make the exercise of this right subject to certain conditions. Expropriation provisions usually cover both "direct" and "indirect" forms of expropriation. "Indirect expropriation" covers acts, or series of acts, whose effects are "tantamount to" or "equivalent to" a direct, formal taking. These are acts that generally involve total or near-total deprivation of an investment or destruction of its value but without a formal transfer of title to the State or outright seizure.

Investors have used provisions on indirect expropriation to challenge general non-discriminatory regulations that have had a negative effect on their investments (e.g. a ban or the imposition of restrictions on a certain economic activity on environmental or public health grounds). This raises the question of the proper borderline between expropriation (for which compensation must be paid) and legitimate public policymaking (for which no compensation is due).

Historically, IIAs have not contained any criteria for distinguishing between State action amounting to an indirect expropriation and State action of a general regulatory nature for which no compensation is due.[73]

SOURCE: *World Investment Report 2015: Reforming International Investment Governance, "Chapter IV - Reforming the International Investment Regime: An Action Menu".* UNCTAD, Geneva (2015).
Available at: http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx

ABBREVIATIONS

BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CIDS	Community-Investor Dispute Settlement
CSR	Corporate Social Responsibility
ECHR	European Court of Human Rights
EP	European Parliament
FET	Fair and Equitable Treatment
ICS	Investment Court System
ISDS	Investor-State Dispute Settlement
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreemen
MFN	Most-favoured-nation treatment
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGP	UN Guiding Principles on Business and Human Rights

ENDNOTES

1 The text, made "public exclusively for information purposes" is "the outcome of the legal review conducted by the Canadian Government and the European Commission and will be translated and thereafter subject to completion of the internal approval processes in Canada and the European Union".
See http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
A better structured version of the text is available at the homepage of the Canadian Government under http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng .
For a French version of the text see:
http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=fra .

2 Joint statement of EU Trade Commissioner, Cecilia Malmström, and the Minister of International Trade of Canada, Chrystia Freeland, 'Malmström met Minister Freeland of Canada', Brussels, 21 April 2016. Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1483

3 'Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA)', EU Commission, Monday, 29 February 2016. Available at: http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm

4 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)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN [Hereinafter, the *EP Resolution*]

5 "The universe of international investment agreements (IIAs) continues to grow. In 2015, 31 new IIAs were concluded, bringing the universe to 3,304 treaties by year-end". Source: *UNCTAD. World Investment Report 2016.* Geneva 2016. See http://www.worldinvestmentreport.org/ .

6 The consultation received nearly 150,000 replies, the vast majority of which (over 97%) rejected ISDS . See EU Commission, *Report on the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP).* Staff Working Document 13 January 2015. Available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf

7 See for example: Peterson, L.E. and Gray, K.R. (2003) Inter*national Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. International Institute for Sustainable Development* [Online]. Available from: http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; Franck, S.D. (2005) *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions.* Fordham Law Review 73 (1521); Mann, H. (2008) *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities.* International Institute for Sustainable Development [Online]. Available from: http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf; Sornarajah, M. (2010) *The International Law on Foreign Investment*. Cambridge, Cambridge University Press; Van Harten, G. (2010) Five Justifications for Investment Treaties: A Critical Discussion. *Trade Law & Development* 2 (1) pp. 19-58; Trakman, L.E. (2013) "The ICSID Under Siege", 45 Cornell Int'l L.J. 603; Lester, S. "Rethinking the International Investment Law System", Journal of World Trade 49, No. 2 (2015) 211–222

8 For example see: *Biwater v. Tanzania*, ICSID Case No. ARB/05/22; *Border Timbers v. Zimbabwe*, ICSID Case No. ARB/10/15 and ARB/10/25; *Glamis Gold v. United States of America*, NAFTA Award 8 June 2009; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1; *Methanex v. United States*, NAFTA Award 3 August 2005; *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12; *Piero Foresti et al. v. South Africa*, ICSID ARB(AF)/07/1; *Vivendi v. Argentina*, ICSID Case No. ARB/97/3. Some of these cases are discussed in Bernasconi-Osterwalder, N. and Johnson, L. (2010) *International Investment Law and Sustainable Development, Key Cases from 2000-2010.* International

Institute for Sustainable Development [Online]. Available from: http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf

9 Two of the most comprehensive guides to IIA reform have been produced by UNCTAD and the SADC. See *Investment Policy Framework for Sustainable Development (IPFSD).* United Nations Conference on Trade and Development, Geneva (2015). Available at: http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/IIA-IPFSD.aspx;
and *Model Bilateral Investment Treaty Template and Commentary*. Southern African Development Community, 2012. Available at: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

10 The EU's final "proposal for investment protection and Court System for TTIP" was published on 12 November 2015 (see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396&title=EU-finalises-proposal-for-investment-protection-and-Court-System-for-TTIP) , an earlier version was made public in September 2015 (see http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf). A first "concept paper" for the new system was presented in May 2015 (available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

11 The sections 1-6 are derived from para. 2(d)(xiv) of the *EP Resolution*; sections 7-13 from para. 2(d)(xv); and sections 14-15 from para. 2(d)(xiii).

12 *EP Resolution,* para. 2(d)(xiv)

13 CETA Article 8.7

14 CETA Article 8.10(2)

15 Such review is to be undertaken by a Committee on Services and Investment, at the request of the parties. CETA Article 8.10(3)

16 CETA Article 8.10(4)

17 For example: *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, June 11, 2012; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, May 22, 2007; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, Oct. 3, 2006; *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN3467) Final Award, July 1, 2004; *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18) Award, March 3, 2010.

18 CETA Article 8.1, 'Investment'

19 These characteristics include (i) "a certain duration", (ii) "the commitment of capital or other resources, the expectation of gain or profit," or (iii) "the assumption of risk".

20 Notably, the *Salini* tribunal added this element with reference to the Preamble of the ICSID Convention (See *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001). Some ISDS tribunals have subsequently rejected this interpretation of the Convention and so the element is not guaranteed in future interpretation of the Convention's Preamble (For example, *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, para. 364)

21 "Accessing Markets: Investment", Trade-Policy website, EU Commission. Available at: http://ec.europa.eu/trade/policy/accessing-markets/investment/ . See also the joint Canadian and European Union "Economic Impact Assessment" from 2008 (available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf) and the 2011 "Trade Sustainability Impact Assessment" commissioned by the EU Commission (available at http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf).

22 CETA Article 8.1, definition of "covered investment" and Article 8.18.1(a), providing that an investor may bring a claim only "with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment."

23 CETA Preamble: "RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity… RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories…"

24 A good example of this weakness is demonstrated in the development of the so-called *Salini* test. See footnote 20 above.

25 CETA, Article 8.9 (1) and (2). Other CETA provisions which incorporate the General Exceptions from GATT Article XX (CETA, Article 28.3(2)) expressly do not apply to the relevant sections of CETA's provisions on investment protection.

26 Rather than 'necessary', UNCTAD advises that measures which are required to be "related to", "aimed at", "directed to" or "designed to achieve" a policy objective are likely to allow for greater deference to the regulating state. *World Investment Report 2015: Reforming International Investment Governance, "Chapter IV - Reforming the International Investment Regime: An Action Menu".* UNCTAD, Geneva (2015), p.141. Available at: http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx

27 As recommended by UNCTAD, *IPFSD)* p.103 at 5.1.1.

28 UNCTAD *World Investment Report 2015,* p.141

29 CETA, Article 8.31(3)

30 CETA Article 8.12

31 See UNCTAD, IPFSD p. 45, para. 4.5

32 CETA Articles 8.32 and 8.33

33 CETA Articles 8.13, 13.16, 13.21 and Annex 13-B

34 CETA Articles 13.21(3) and (4)

35 In May 2015, the US negotiators were reported to reject the proposal months in advance of the first draft even being made public (See: "US rejects EU proposal for investment court, insists on retaining ISDS" *EurActiv*, 17 July 2015, available at: http://www.euractiv.com/sections/trade-society/us-rejects-eu-proposal-investment-court-insists%20-on-retaining-isds-314501). After its publication, one leading arbitrator – Stephen M. Schwebel – dismissed the idea as "regressive", suggesting that a permanent court would "lower the wealth of the world" (See "Arbitration Speaker: International Investment Court Would Lower Global Wealth", *Fordham Law News*, 5 November 2015, available at: http://news.law.fordham.edu/blog/2015/11/05/schwebel-international-investment-court-would-lower-global-wealth/). Most significantly perhaps, several commentators from industry and from the world of investment arbitration have raised critical concerns about the character of this new system and whether 'awards' rendered under it would qualify as such – and therefore be enforceable – under the rules of ICSID or the 'New York Arbitration Convention' (See "Escaping from Freedom? The Dilemma of An Improved ISDS Mechanism" S. Nappert. 2015 Inaugural Lecture, European Federation for Investment Law and Arbitration (EFILA), 26 November 2015, available at: https://efilablog.files.wordpress.com/2015/11/efila-annual-lecture-sophie-nappert-two-collumn_text-defa-27-11-2015.pdf; also: "Input to the Investment Protections and Dispute Settlement Provisions of the EU Commission's Draft 'Trade in Services, Investment and E- Commerce'" National Association of Manufacturers, 3 November 2015.)

36 CETA Article 8.27 paras. 7 and 15

37 CETA Article 8.44 para. 2

38 The Code of Conduct in CETA Annex 29-B does not apply to the dispute settlement provisions of the Investment Chapter.

39 UNCITRAL Transparency Rules, Article 6.3

40 Non-disputing parties must have "a significant interest in the arbitral proceedings", address a "matter within the scope of the dispute", and bring "a perspective, particular knowledge or insight that is different from that of the disputing parties" (UNCITRAL Transparency Rules, Article 4).

41 ICSID Arbitration Rules, Article 37

42 See Blackaby, N., and Richard, C. (2010) *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?* In: Waibel, M. et al (eds.) The Backlash against Investment Arbitration: Perceptions and Reality. The Netherlands, Kluwer Law International. pp. 253-274; Peterson, L.E. (2012) *Analysis: Tribunal's reading of amicus curiae tests could make life difficult for antagonistic amici - and those seeking to raise novel concerns such as human right law*. Investment Arbitration Reporter. Available from: http://www.iareporter.com/articles/20120628; Cross, C. and Schliemann Radbruch, C. (2013) *When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations.* The Law and Development Review. Available from: http://dx.doi.org/10.1515/ldr-2013-0021

43 For example, in two ICSID cases against Argentina, totally opposing approaches were taken with regard to the margin of appreciation - see *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8 and *Continental Casualty Co v. Argentina* ICSID Case No ARB/03/9. See Burke-White, W. and Von Staden, A., "The Need for Public Law Standards of Review in Investor-State Arbitrations", in Schill, S. (ed.), International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010)

44 For example, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award, June 26, 2003); *Chevron v. Ecuador* (discussed further in Part C below); and *Eli Lilly v. Canada*, NAFTA case UNCT/14/2

45 CETA Article Art. 8.22(f) and (g)

46 CETA Article 8.31(2)

47 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20). The Commission argued that if Romania pays the investors the $250 million awarded by the ICSID tribunal in December 2013, the payment would constitute state aid incompatible with EU law. See "Micula vs. (Brussels) Dracula", *Global Investment Protection*. Available at: http://www.globalinvestmentprotection.com/index.php/micula-vs-brussels-dracula/

48 CETA Article 8.9(3) and (4)

49 CETA Articles 8.1, 'Covered investment', sub-para. (b)

50 This issue is discussed in detail in *Expropriation - Series on Issues in International Investment Agreements II*. UNCTAD, Geneva. 2012. This volume cites a number of cases including European Court of Human Rights (ECtHR) decisions in which the Hull formula did not apply and *less than market value compensation was permitted* (eg. *Pincova and Pinc v. the Czech Republic,* European Court of Human Rights, Judgment, 5 November 2002, para. 53). In its jurisprudence, the ECtHR has further distinguished between "inherent illegality" (eg. an expropriation not in the public interest) and illegality which arises *only due to the non-payment of compensation*. These categories have different consequences: only the former ("inherently illegal" expropriations) results in a higher compensation standard (See *Expropriation.* UNCTAD, p.41, citing the following: *Former King of Greece v. Greece*, Article 41 Judgment, 28 November 2002, para. 78; *Yagtzilar and Others v. Greece,* Article 41 Judgment, 15 January 2004, para. 25; *Scordino v. Italy* (No. 1), Judgment, 29 March 2006, para. 255.)

51 CETA Article 8.10(3)

52 For example, following UNCTAD's recommendations, it could be specified that dispute resolution under CETA becomes available only after a given time litigating the dispute in domestic courts. See UNCTAD, *World Investment Report 2015*, p.149

53 In its 2012 ISDS Consultation document, the Commission further stated: "Despite the general solidity of developed court systems such as the US and the EU, it is possible that investors will not be given effective access to justice, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy. ISDS is therefore necessary to allow legitimate claims to be pursued." See *Public consultation on modalities for investment protection and ISDS in TTIP*, EU Commission, 2013, at "Introduction to Part B"

54 The two further references in CETA to the OECD Guidelines – in Article 22.3 on *Trade and Sustainable Development* and Article 25.4 on *Bilateral Dialogues And Cooperation* – have no bearing on the investment chapter or its provisions.

55 CETA Articles 8.1, 'Covered investment', sub-para. (b)

56 CETA Article 8.18(3)

57 See Eberhardt, P. and Olivet, C. (2012) *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Corporate Europe Observatory / Transnational Institute [Online]. Available from: http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf

58 UNCTAD, *Taking Stock of IIA Reform. IIA Issues Note* No.1, March 2016 (UNCTAD/WEB/DIAE/PCB/2016/1) Available from: http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf. pp.11-12

59 UN Human Rights Council Resolution 26/9 of 14 July 2014 (A/HRC/RES/26/9) Available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.22/Rev.1

60 UNCTAD, *IPFSD* p.58, para. 7

61 The SADC Model BIT contains extensive provisions on investor conduct, including: Compliance with Domestic Law, Environmental and Social Impact, Minimum Standards for Human Rights, Environment and Labour, and Corporate Governance Standards (Arts. 11 and 13-16). The SADC Model BIT also includes articles which attempt to remove impediments to civil actions brought against investors in their home states for harm in the host state (Art. 17: Investor Liability) and which enable states to raise an investor's breach of its obligations in ISDS proceedings as a counter-claim (Art. 19: Relation to Dispute Settlement). *Model Bilateral Investment Treaty Template and Commentary*. Southern African Development Community, 2012. Available at: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

62 See Lance Compa, "How to Make the Trans-Pacific Partnership Work for Workers and Communities", *The Nation*, 14 January 2016. Available at: http://www.thenation.com/article/how-to-make-the-trans-pacific-partnership-work-for-workers-and-communities/

63 UN Guiding Principles on Business and Human Rights (UNGPs) Principle 9. See: *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (J. Ruggie): *'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework',* UN-Doc.A/HRC/17/31. Available at: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/31&Lang=E

64 UNGPs, Principle 1, Art. 1 and Commentary

65 UNGPs, Principle 3, Art. 25 (Commentary)

66 UNGPs, Principle 3, Art. 26 (Commentary)

67 For discussion of this case, see Johnson, L. (2012) *Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority*. International Institute for Sustainable Development. Available from: http://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/#_ftn1

68 As described in Ecuador's defence, by Dr. Diego Garcia Carrion, State Attorney General, in 2012: "I ask you, the members of the Tribunal, to see this arbitration for what it really is—the Claimants' attempt to artificially transform a local lawsuit into an international controversy between a State and an investor, removing the rights of the courts of Ecuador and the local population in Lago Agrio, and objecting to or arguing elements of an investment treaty [that went into effect] five years after Texaco left our country, taking with it enormous benefits that had accrued, thanks to our oil, over the course of many years." See Diego Garcia Carrion, *Chevron Case: Ecuador's Defense on the Claimants Abuse of Process in International Investment Arbitration* (Procuraduría General del Estado, Ecuador: 2015) Available at: www.pge.gob.ec/images/publicaciones/CHEVRON_Case_Book.pdf

69 For example, Eli Lilly has also filed an ISDS claim alleging that Canadian court decisions breach NAFTA's investment protection provisions. The Canadian courts had invalidated Eli Lilly's patent rights for a drug on the grounds that the company had presented insufficient evidence of the drug's long-term benefits. *Eli Lilly v. Canada*, NAFTA case UNCT/14/2. See U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand $100 Million for Invalidation of a Patent', *Public Citizen*. March 2013. Available at: http://www.citizen.org/eli-lilly-investor-state-factsheet

70 Chapeau to Part IV. Human Rights, *OECD Guidelines for Multinational Enterprises*, 2011 Edition (OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en)

71 UNCTAD *World Investment Report 2015,* p.137

72 UNCTAD *World Investment Report 2015,* p.136

73 UNCTAD *World Investment Report 2015,* p.138-9

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