CETA and Investment: What Is It About and What Lies Beyond?

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Contents

Abstract In this concluding chapter, the authors take a critical overview of the results of the CETA investment negotiations, including but not limited to the issues raised in other Chapters of this book. Our assessment is that much of the drafting of CETA on the balance between investor rights and government policy space will create changes in form, but very limited, if any, changes in substance. The changes to the investor-state dispute settlement system are significant, but have no impact on the basic premise that gives foreign investors broad rights to sue states in international processes disconnected from other elements of domestic law and the interests of other stakeholders. These changes are of more than just form, but their impact will be constrained by the lack of real substantive change we see in the obligations on states and rights of investors. Overall, we see the protection of the investor's right to profits and property as the ongoing predominant theme, maintaining and in some

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cases furthering the basic thrusts of prior investment treaties. Significant change will have to wait for another day.

Keywords Right to regulate · Fair and equitable treatment (FET) · General exceptions · Investor rights · Investor obligations · International investment court · Right to profits · Legitimate expectations

1 Introduction

When the competence on foreign direct investment (FDI) was transferred from European Union (EU) Member States to the EU, this presented new opportunities to take a novel approach to transnational governance on investment. Unfortunately, the stock of first-generation Member State bilateral investment treaties (BITs) did not provide the European Commission with a clean slate. Some Member States were hesitant to accept the replacement of their own investment protection treaties with investment chapters in EU trade agreements containing new types of provisions. At the time of the competence transfer in 2009 there was little discussion at the national level about the impacts of investment treaties. This is arguably due to the fact that EU Member State treaties were signed with developing countries who had few investments abroad, thus creating little risk in terms of investment claims against EU countries. At that point in time EU Member States governments generally wanted to retain as much of the old-style investment protection model as possible.

In light of this context, starting negotiations with Canada early on was strategically important for the European Commission because this allowed it to experiment with the more elaborate drafting prevalent in the North American investment treaty models. In contrast to the EU, both the United States and Canada had gained experience as respondents in investment treaty claims and quickly realized that the older models left too much room for interpretation to tribunals. The beginning of the CETA negotiations coincided with a sudden growth in investment treaty claims against EU Member States, in particular under the multilateral Energy Charter Treaty, as well as under traditional bilateral investment treaties with other countries, including China. With this rise in arbitrations against EU Member States, there was a growing awareness of the risks of older treaty models. As a result, the European Commission, through its negotiations with Canada, was able to begin to introduce new language without too much opposition of EU Member States.

The rise in arbitrations and civil society engagement in the negotiating process, however, began to raise significant attention across Europe, and it became evident that even the more careful drafting introduced in Canada through the interpretative statements under the North American Free Trade Agreement (NAFTA) would not protect governments from being sued for legitimate policy measures. As a response, the Commission, sometimes dragging Canada along for the ride, developed seemingly novel drafting approaches to some of the core investment provisions discussed in this book and introduced new right to regulate clauses. These were later supplemented with a new form of dispute settlement.

The result in Chapter 8 of CETA has been called, principally by its negotiators, the new gold standard in international trade agreements. The question, of course, is whose gold is it?

The CETA Chapter on Investment, Chapter 8, is analyzed in detail in the preceding chapters. It is difficult to summarize the discussion, varied as it is, and ranging from legal theory to black-letter technical analysis. Clearly there are some very important changes in Chapter 8 compared to other versions of international investment agreements (IIAs). The introduction of a more judicialized investor-state dispute settlement system, which is an important step towards the creation of a multilateral investment court, resembles in many ways the approach taken in the 2005 model agreement proposed by the International Institute for Sustainable Development (IISD).[1] Although the CETA "only" replaces investor-state arbitration with another type of investor-state dispute settlement, this new feature is probably at the top of the list of innovative steps. The new language on fair and equitable treatment (FET) might also be defined by some, as Patrick Dumberry points out in Chapter "Fair and Equitable Treatment" of this book, as innovative. Other language is very familiar and suggests a strong desire by the negotiators to simply follow the status quo.

Our mission in this concluding chapter is not to summarize the fine chapters and analysis that precedes this chapter. Rather, we seek to take a look at the totality of the results in a more holistic way and ask two questions: What are the investment provisions of CETA about? And where does CETA fit in the future evolution of international investment agreements?

The first question very much goes back to the opening question: Whose gold is it? Phrased more accurately, the question might be understood as who is intended to get the gold—the economic benefits—as a result of the inclusion of the investment chapter in CETA?

The question is essential to understanding what CETA's investment chapter is about. Studies released during the negotiation process by both governmental and independent analysts showed rather unequivocally that the inclusion of an investment chapter in CETA will not have any significant impact on investment flows. The sustainability impact assessment (SIA) relating to CETA, issued in June 2011[2] found that, although the EU-Canada treaty might encourage investment in the negotiating parties, it would not significantly increase investment in Canada, and even less in EU.[3] Specifically on the investment chapter, the SIA found that a high-income country with strong institutions will see a low level of economic benefit, if any, that might be generated by signing of BITs. Therefore, the SIA forecasted that an investment chapter in the CETA would not create significant economic benefits for either of the negotiating parties. For Canada, such benefit would only be "minor

[1] Mann et al. (2005), pp. 126–130.

[2] European Commission, Final Report: A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, March 2011, http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147755.pdf.

[3] Ibid., pp. 355 and 360.

to notable at most"; and for EU, the benefit would be "on a much smaller scale".[4] Unsuccessful in its attempt to find that an investor-State dispute settlement (ISDS) mechanism would contribute to any economic benefit, the report was sceptical whether the mechanism would produce net sustainability benefits.[5]

This makes it clear that Chapter 8 is not necessary in order to stimulate new economic activity. So why was it included?

One answer to that question is that Canada and the EU felt they had to follow suit with other free trade agreements that include investment chapters lest they establish a precedent of excluding investment (or just ISDS) from their negotiations with other parties, especially developing countries, by excluding investment from the scope of the agreement. A variation on the theme is that if it is good for developing countries it is also good for "us" as developed countries: we should not have a double standard here.[6] This argument has a superficial logic to it, but fails to justify, in our opinion, the need for governments to take international arbitration risks, or risk limiting government policy space, for no apparent economic benefit.

If Chapter 8 was not necessary for increasing investment flows, and is expected to have few if any impacts on such flows, then the question must be addressed as to who benefits from its inclusion. Clearly, the chapter imposes no new obligations on states or investors that will actually enhance the sustainable development dimensions of investments made under the regime. There is no reason to believe, therefore, that non-investor stakeholders will benefit from the content of the Chapter. Yes, investors are expected to comply with the applicable law that is intended to support sustainable outcomes of investments in Canada and the EU, but Chapter 8 does nothing to promote the future development of that law. As Stefanie Schacherer's chapter on Investment and sustainable development shows, the impacts of the chapter on Sustainable Development will be limited to an interpretative function when applying Chapter 8.[7] But Chapter 8 does enable, consistent with other IIAs, private investors to challenge new efforts by governments to enhance sustainability outcomes. This forms part of the answer as to who is intended to benefit. The other part of the answer comes, in our view, from the market access and investment liberalization rules included in Chapter 8. These provisions establish the most aggressive set of rules limiting government participation in the economy and interferences in private investment rights, and enhancing the right to maximize profit for investors, ever seen in an investment treaty.

Our analysis will reflect on these two elements: the ongoing protection of investor rights and remedies, and the enhanced provisions on investment liberalization. Our conclusion is that CETA advances the investor interests considerably more than safeguarding government regulatory space in relation to investments to ensure more

[4] Ibid., pp. 357 and 360.

[5] Ibid., pp. 358–359.

[6] See for a full discussion of this and other related issues in Perezcano (2017) and Onwuamaegbu (2017).

[7] Schacherer (2018).

sustainable outcomes from investments. We see the changes in investor rights and government regulatory space as being more in form than function, while the limitations on government ability to regulate the development benefits of investment, including the inclusiveness of economic benefits, is being diminished. The result is an investment chapter with an enhanced set of private investor rights that identifies investors as the only beneficiaries of the system.

2 The Provisions on Investor Rights and Government Regulatory Space

Four chapters of this book are dedicated to the analysis of key investor protections: national treatment, most-favoured-nation treatment, FET and expropriation. An additional chapter focuses on the array of right to regulate provisions. Where do these take us on balance? The most likely answer, in our opinion, is not very much farther than existing IIAs go from the perspective of guaranteeing the right of governments to enact legitimate government regulations to both protect and enhance the public welfare as it relates to investments and the investment-making process. We respect the fact that reasonable minds may differ on the outcome of specific individual provisions. The analysis, as the various chapters so clearly show, is often deeply technical and this can quite easily allow for differing views on the outcomes. The problem from a state regulatory point of view is that all of the outcomes have to move together towards safeguarding the government rights to regulate, or the result will not be positive. In effect, investors, in an arbitration context, only have to win on one basis of a claim in a dispute—be it national treatment, most favour nation (MFN) treatment, FET *or* expropriation—to win an arbitration. Governments have to win on all of the national treatment, MFN, FET *and* expropriation issues raised in an arbitration or they lose the arbitration. The weakest link from a government right to regulate perspective is, therefore, the defining element.

2.1 Investor Rights Newly Drafted: More Form Than Substance

So let us consider one of the most obvious weak links, the provisions on MFN in Article 8.7.[8] Article 8.7(1) CETA begins with a broad and familiar incantation of the MFN obligation:

> Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations,

[8] For an overview of MFN provisions in various investment treaties and the evolution of case law, see Nikiema (2017). See also, Bernasconi-Osterwalder (2014), pp. 14–16.

> to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

Its breadth is comprehensive, from the birthing process of an investment in whatever form until its final dissolution or disposition. It is a full lifecycle provision in scope. This breadth may raise issues, but that is not our main concern. Rather, this concern lies in the text of Article 8.7(4):

> For greater certainty, the "treatment" referred to in paragraphs 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. Substantive 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 or maintained by a Party pursuant to those obligations.

This paragraph sets out two very different standards: the possibility of importing external dispute resolution *processes* from other treaties into a dispute under CETA is clearly barred.[9] For the substantive standards, however, there is an abject lack of clarity on what can or cannot be done. Clearly, if a specific obligation under another treaty is incorporated into domestic law, then it is covered as such by the MFN provision. Legal gymnastics to include this in Article 8.7(4) would be unnecessary. So what else is to be included? What, for example, would be made under this provision, of Canadian legislation to implement the NAFTA, which proclaims parliamentary approval of NAFTA? What about other policy statements by governments to approve or apply certain provisions?

Here, the definition of "measure" is also important. The general definition of measure in Article 1 of CETA includes a "law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party."

This incredibly broad definition of measure gives great flexibility to investors to argue what is required to enable them to bring in other treaty provisions as a basis for making an MFN argument. If a government makes a decision or incorporates a provision into an administrative policy, then it would be part of the scope of what is covered. If a parliament approves a treaty, this would seem to be covered as a procedure or decision.[10] And so on.

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[9] Claire Daigrement, in her chapter on MFN in this book, argues this is a regrettable step. We respectfully disagree, noting that allowing the use of ISDS clauses in other agreements, which are objectively more favourable to investors, would simply undo the reforms undertaken with respect to the CETA dispute settlement mechanism. See Crépet Daigrement (2018).

[10] This is exactly the case with NAFTA, for example, and other Canadian agreements. S. 10 of the North American Free Trade Implementation Act (1993) reads simply: "The Agreement is hereby approved." We have not sought to analyze possible similar legislation in other CETA covered jurisdictions, but assume the breadth of definition of "measure" would examples to a similar effect.

Why is this issue important? Essentially, if CETA enables the inclusion of older treaty provisions that have broader definitions of investor rights in a future arbitration, which has been repeatedly done in investor-state arbitrations, then the apparent effort to solidify the right to regulate in the other substantive investor rights/government obligations provisions can be easily undone.

It is worth noting here that government negotiators had many clearer choices in front of them. For one, there is Article 8.7 of CETA which makes it clear that advantages under an international tax treaty are not subject to national or MFN treatment. Following this line, they could have simply stated that no provisions in other investment treaties apply under the MFN rule. Another option would have been to say, as Canada had done in many of its treaties based on its 2004 Model BIT, that the scope of application of the MFN treatment would only cover future investment treaties.[11] Alternatively, the Canada-China model was available, to state that only treaties after a designated date will apply under the MFN rule, presumably a date after which all treaties have been updated to ensure that the intentions of the new texts are maintained.[12] All of these clear alternatives were available, but not used. This will leave the dispute settlement process to determine what the language in Article 8.7.4 means in practical terms. Given the scope of the definition of "measures", however, it clearly begs for a broad scope of interpretation, and again opens the door for prior treaty texts to be introduced into enforcement processes. Claire Daigrement appears to support this view in her MFN chapter in this book, at least in the result:

> This does not really constrain MFN treatment. In this way, MFN treatment forbids de facto discrimination, not de jure discrimination arising from differences in clauses or in formulations in investment agreements.[13]

A second potential weak link in our view is in the FET clause. The Chapter contained in the present book by Patrick Dumberry on the FET standard rightly notes there is a change in drafting style.[14] But it also rightly questions whether this is more form than function, given the language adopted in defining the primary scope of the

[11] Canada Model BIT (2004), Annex III. Exceptions from Most-Favoured-Nation Treatment: "[the MFN Treatment] shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into of this Agreement." The same language appears in Canada-Peru BIT (2006), Annex III, para. 1; Canada-Kuwait BIT (2011), Annex II, para. 1; Canada-Burkina Faso (2015), Annex III, Para. 1.

[12] Art. 8(1) of the Canada-China BIT (2012) states that the general MFN provision does not apply to "treatment accorded under any bilateral or multilateral international agreement in force prior to 1 January 1994", thus creating a cut-off date. The cut-off date in this case still included treaties based on older models and thus will limit the effect of new drafting in the Canada-China BIT. This raises a separate question about the goal of this provision, which appears to have been quite deliberately drafted to include greater investor rights through prior treaty provisions.

[13] Crépet Daigrement (2018).

[14] Dumberry (2018).

obligation is drawn from existing case law under Article 1105 of NAFTA, which has seen a wide range of interpretation.

Where we respectfully disagree with Patrick Dumberry's analysis is on the assertion that the NAFTA based tribunals have established a high threshold of severity and gravity to conclude that a state has breached the FET obligation. Our concern arises from the application of the FET standard in the *Bilcon* case primarily,[15] but also in other instances such as *Merrill and Ring v. Canada*.[16] Patrick Dumberry discusses the *Bilcon* case as a disruptive influence on NAFTA's FET jurisprudence under the heading of "legitimate expectations" in his chapter, but we see it as a broader issue of reinterpreting and broadening the substantive protections of FET, using legitimate expectations as a lever to do so.

Two features of the legitimate expectation provision in CETA are most noteworthy here. First, it does not require a written promise or commitment for the expectation to be created, any form of representation by any government official seems sufficient. In the context of permitting processes that often bring in many different government actors, there is not even a requirement that the official have the actual authority to make the representation, a factor that played out quite specifically in the *Bilcon* case in relation to the environmental impact assessment process undertaken in relation to the proposed mining quarry investment. Second, there is no requirement for an objective basis for an investor to rely on a relationship, simply a subjective assessment of the investor relying on it. These give a very broad basis for enhancing the scope of the itemized list in CETA, exactly as was done in the *Bilcon* award.

When the reasoning in *Bilcon* came together, as amply demonstrated by Patrick Dumberry, the result was one of, if not the most, extreme readings of the FET obligation under NAFTA. That the language in CETA parallels the same explanatory language in *Bilcon* that produced this result does not give much comfort for its application under CETA.[17]

2.2 Right to Regulate

As a response to concerns on governments' regulatory space, the CETA parties included a provision, Article 8.9, on "investment and regulatory measures".

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[15] *Clayton v. Canada*, NAFTA/UNCITRAL/PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

[16] *Merrill & Ring Forestry L.P. v. Canada*, NAFTA/UNCITRAL, Award, 31 March 2010.

[17] Dumberry (2018). The result in *Bilcon* was seen as so egregious that the then Conservative government of Canada, a government that did not have environmental protection as a priority issue, initiated a judicial review of the award. See *Attorney General of Canada v. Clayton et al.*, Notice of Application (16 June 2015), Toronto, T-1000-15 (FC). The judicial review is pending. Nonetheless, the negotiators did not alter the language on FET in the face of the *Bilcon* decision.

> 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories 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.
>
> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

Article 8.9 is more clearly formulated than other circular versions of right to regulate clauses used in earlier negotiating drafts of CETA and other clauses, such as Article 1114 of NAFTA, that expressly require consistency with obligations under the treaty as a condition of the right to regulate.

At the same time, Article 24.3 CETA, discussed more below, requires new environmental measures to be consistent with the obligations of the Treaty as a condition of the right to regulate.

The concern with the imprecision of the right to regulate provisions is that they then feed into equal lack of clarity in the formulations of the investor rights. The formulation of FET, for example, allows for a broad interpretation of "legitimate expectations". The right to regulate provision would not likely be read in a way broad enough to protect a state even where a regulation is legitimate and taken in good faith if it comes up against a broad notion of legitimate expectation. A "specific representation" by a government official, for example, even if not authorized to make such a representation, could well be sufficient to make a state liable despite this right to regulate clause.

Then we have other examples of expressly limited right to regulate clauses that are likely to have some influence on the interpretation of Article 8.9. Far removed from Chapter 8, in Chapter 24 on Trade and Environment, we clearly see the right to regulate for environmental purposes is well constrained by Article 24.3 on "right to regulate and levels of protection":

> The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. […].

The key words here are "in a manner consistent with multilateral environmental agreements to which it is a party and with this Agreement." This language harkens back to Article 1114 of NAFTA, an article which has never been relied on by a state party to NAFTA to defend an environmental law or decision subject to arbitration. In NAFTA, the language was only "in accordance with this Agreement". Here an extra caveat is created on the right to regulate to protect the environment that new laws and amendments to existing laws be "in a manner consistent with multilateral environmental agreements to which it is a party." The major problem here is that

multilateral environmental agreements cover a very small segment of what states routinely do to regulate for environmental protection, very small indeed. How this provision will be read in the future remains to be seen. But its placement in a Chapter that appears at first glance to be one dedicated to balancing environmental and trade and investment issues is, to say the least, an illustration of how language from NAFTA has found its way into CETA, despite twenty plus years of evidence of the futility of that language as a source of a government right to regulate to protect the environment. The broader question this raises is whether Article 8.9 will be read in a manner that is more favourable to states than its sister article on environmental issues specifically in Article 24.3.

Turning back to Art. 8.9 itself, but in light of these other provisions, it states in para. 2 that *the mere fact* of an impact of a new measure on an investment does not amount to a breach of CETA. This has been standard fare in the interpretation of investment treaty provisions since the early days of NAFTA cases. The very language here means, however, that other facts can and would create a breach of CETA's Chapter 8 when governments regulate. It just does not say what those facts are, thus simply throwing the issues back on the interpretation of the restrictions on governments contained in Chapter 8. Again, we are in a circular situation legally, albeit through different means than the words in NAFTA.

Does the CETA overall still require compliance with its obligations as a condition of the right to regulate, or does Article 8.9 provide a carve-out, or even a degree of carve-out, for such legitimate government regulations? We anticipate that, had just para. 8.9.1 been included, the provision would be read in a manner akin to an interpretative aid to turn arbitrators to a more supportive orientation to government regulations. We do not see it being read as a carve out, given it is not specific enough to easily be read this way, and given the propensity of treaty interpreters to be cautious in reading in carve outs and exclusions to a treaty text. The inclusion of para. 8.9(2), however, leaves the application of the provision much more open to conjecture. Read together, Article 8.9 does not amount to a full protection, or, as Catherine Titi concludes, an actionable right for states.[18]

The article on general exceptions also may contribute to an understanding of how broad CETA goes into protecting the right to regulate. If, for example, Article 8.9 was an actual carve out for legitimate regulatory measures, there would be no need for the application of Article 28.3, or the application of GATT Article XX General exceptions to the government obligations under Chapter 8. Yet Article 28.3 is expressly clear that it does so apply:

> Article 28.3 General exceptions
>
> 1. For the purposes of Article 30.8.5 (Termination, suspension or incorporation of other existing agreements), Chapters Two (National Treatment and Market Access for Goods), Five (Sanitary and Phytosanitary Measures), and Six (Customs and Trade Facilitation), the Protocol on rules of origin and origin procedures and

[18] See Titi (2018).

> Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX (g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.
>
> 2. For the purposes of Chapters Nine (Cross-Border Trade in Services), Ten (Temporary Entry and Stay of Natural Persons for Business Purposes), Twelve (Domestic Regulation), Thirteen (Financial Services), Fourteen (International Maritime Transport Services), Fifteen (Telecommunications), Sixteen (Electronic Commerce), and Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent
>
> the adoption or enforcement by a Party of measures necessary:
>
> (a) to protect public security or public morals or to maintain public order;
>
> (b) to protect human, animal or plant life or health; or
>
> (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
>
> (ii) the protection of the privacy of individuals in relation to the processing and
>
> dissemination of personal data and the protection of confidentiality of individual records and accounts; or
>
> (iii) safety.

While a general exception for security issues has become very common, one for other public interest reasons is not. Again, more critically, and without even entering into the interpretation issues of Article XX under the World Trade Organization (WTO) jurisprudence and its dubious applicability in a situation where investments may be subject to literally hundreds of different laws and regulations, it would not be needed if Article 8.9 were indeed intended to be a broad protection of the right to regulate.

The analysis of these and other provisions on investor rights/government obligations highlights the possibility, if not the probability, that the language changes in CETA will be more form than substance. In each instance, this seems to be a risk, at least.

2.3 Investor Obligations

The risk of the language in Chapter 8 being read more as a change in form than substance is buttressed by the overall absence of obligations on investors to buttress the expectations of governments and other stakeholders as to the conduct of investors protected by the rights under the treaty. Is there, in effect, a *quid pro quo* for the rights and remedies granted to investors? The answer seems to be no.

Besides including a provision in the preamble encouraging enterprises to respect CSR principles, virtually no reference is made to hold investors accountable. In Chapter 22 on "trade and sustainable development" there is a weak reference to the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises doing no more stating that "each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by: […] (b) encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises".[19]

This Article does not target investors, but instead targets CETA parties and calls on them to encourage the use of the voluntary CSR practices. This adds absolutely nothing to what Canada and EU Member States have already committed to in the OECD and elsewhere. It is a missed opportunity to strengthen compliance with the OECD Guidelines and strengthen accountability processes. The analysis of CETA compared to recent African directions in investment agreement negotiations by Makane Mbengue and Mohamed Negm in Chapter "An African View on the CETA Investment Chapter" of this book highlights the complete absence of investor obligations here, with one exception.[20]

This exception, which provides a positive note, and what is certainly one if CETA's most important advances, does clarify the implications of the obligation of investors to make their investments in accordance with the law of the host state. This is now imposed through a combination of the definition of investment covered in Article 8.1 and Article 8.18 on Scope of the dispute settlement process:

> *covered investment* means, with respect to a Party, an investment:
>
> (b) made in accordance with the applicable law at the time the investment is made[21];
>
> For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[22]

[19] CETA, Art. 22.3.

[20] Mbengue and Negm (2018).

[21] CETA, Art. 8.1.

[22] CETA, Art. 8.18(3).

Paragraph 3 of Article 8.13 clarifies that investments made through corruption, etc., are not made in accordance with the law of the host state and thus are not covered by the agreement. The consequence is that the investor is barred from access to investor-state dispute settlement as an enforcement mechanism. This is a first such direct expression that we are aware of in an IIA of an obligation on investors to make the investments in accordance with the relevant law, and a mechanism for enforcing it.[23] At the same time, it must be noted that the obligations only come into play when an investor brings a claim against the host state. The host state can then respond with a defense and argue that the tribunal does not have jurisdiction in those limited instances.

But this is where the considerations of investor behaviour begin and end. There are no obligations in relation to environmental performance, labour, human rights, social and economic impacts of their investments, etc. It is here that the *quid pro quo* of obligations that balance the rights of the investors is fully absent. As Makane Mbengue notes in his comparison of CETA to recent African developments, this need not be the case: obligations on investors are both possible and to many, desirable.

Given the above, does CETA mark an important advance on limiting investor rights and ensuring clear space for governments to exercise the right to regulate? In our view, this is not the case. There is no doubt that the negotiators turned their minds to these issues, which have become a flashpoint for civil society and many other observers. But the evidence of significant change in this regard is scarce.

2.4 A New Investor-State Court System

If the assessment that we reach is correct, that the changes to the investor protections and state right to regulate are more likely to be of form as compared to substance, does the shift to an Investment Court System (ICS) give reason to be more optimistic than might otherwise be the case? This is hard to know of course, but some hypotheses can be developed.

First, the ICS is a system that is designed to create more consistency in the results of ISDS cases. That much is clear. The limited number of roster members for initial hearings of disputes, the appointment of the roster members by governments which will reduce competition for arbitral influence and positioning, the appeals process

[23] There has been an ongoing debate in ISDS arbitrations whether an investment made by corruption, fraud, etc. should be disqualified from ISDS processes as a matter of jurisdiction or whether this should be one factor to be considered on the merits. By including paragraph 8.18(3) CETA makes this point very clearly, and thereby crosses the threshold to establish an obligation and a remedy for breach of that obligation. This is one of the approaches first taken in the IISD Model Agreement (Arts. 13, 22 and 32) to ensure clarity on this issue. See European Commission, Final Report: A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (n. 2), pp. 108, 114 and 118.

and the ability for governments to make submissions all should tend to support a more consistent jurisprudence and application of the CETA text.

Second, this does not in itself mean that a more balanced outcome will be the automatic result. That still depends on how those issuing interpretational rulings and awards in specific cases interpret the text itself. In the present context, given the view that the changes in the text are not as progressive towards more balanced results as many at first have suggested—even when the language may be quite novel—a great deal will depend on the personal predilections of the original roster members. Where there remains significant scope for interpretation, will that scope be used to favour more state-oriented interpretations or more investor-oriented interpretations?

This question is certainly difficult to answer at this point. We believe that if the new CETA language were to be interpreted under the current investor-state arbitration process, it is likely that interpretations would be on the investor-oriented side. Indeed, the risk of arbitrators acting as law makers instead of law interpreters is set out by a leading arbitral law specialist, Christoph Schreuer, in relation to the traditional model. In discussing new drafting of the FET obligation in several previous treaties, he writes:

> The motive behind the insistence that FET is identical with the minimum standard under customary international law is evidently to minimize its practical impact. But the effect of this insistence may well be the opposite of what is intended by those who advocate it. Dolzer has pointed out that the more likely consequence will be to accelerate the development of customary law through the practice on FET clauses in treaties.[24]

In other words, the arbitration process would continue to expand its role as a lawmaking process to maintain the growing breadth of investor rights, despite the clear intention of the treaty drafters to the contrary. But the ICS is not a traditional arbitration model. Presumably, the first members of the appeals process will face a significant burden in terms of achieving both consistency and balance, and to reverse the lawmaking tendencies or traditional arbitration approaches.

Third, while we cannot predict how balancing through interpretation will play out, the roster members and appellate members will remain bound by the text and are likely to display more fidelity to it than current arbitral tribunals that cannot be reviewed on legal grounds. If our assessment is correct in terms of the changes in the text, this may not leave as much room as expected to achieve that balance in interpretation. Certainly, the absence of obligations on investors will continue to be an issue for achieving better balance, and the lack of clarity of provisions on the right to regulate will likewise create some interpretational issues.

The result here is that it is difficult to predict in advance how the changes to CETA's text will play through the new ICS. The old adage of bad law in equals bad law out might be reapplied here in the sense of, at least, unclear law in equals

[24] Schreuer (2010), p. 131.

unclear law out. While we agree that the ICS is an important improvement over traditional arbitration models that does not mean that it will be a panacea. We cannot assume that the roster of first instance and appellate members will see their roles as addressing drafting lacuna deliberately left by the governments in one specific direction.

3 Supporting Investor Rights to Maximize Profits

A very distinct issue for understanding the results of the CETA negotiations comes from the market access provisions in Chapter 8, which are not covered in this book. CETA does this by expanding the scope of investors' unfettered market access rights, and denying host states the use of development tools and policies that could help ensure a more equitable distribution of the economic rents and of investments. Briefly, what is set out in these provisions is a vast swath of prohibitions on the governments' ability to regulate investors' access to different sectors of the economy, combined with limits on the ability of governments to maximize the contribution of an investment to economic development in the home state.

Article 8.4 establishes a broad set of restrictions on the ability of governments to regulate the numbers or sizes of foreign investments, or to require, for example, local joint venture partners. The issues raised may not be as critical from a development perspective for highly developed economies with strong domestic investment sectors, but they would be very critical for developing countries where leveraging FDI into strong domestic development opportunities is essential.

Among the prohibitions are those related to measures that would:

> (a) impose(s) limitations on:
>
> (i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test;
>
> (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
>
> (iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; 6
>
> (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or
>
> (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly

related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or

(b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.[25]

In short, these prohibitions would ban many of the most important economic development tools in developing countries, including:

- The development of state owned enterprises as national champions or mandatory joint venture partners in an investment, including in infrastructure and natural resource sectors;
- Limiting the number of investors in a given sector in order to support the development of infant industries and national champions;
- Requirements that limit maximum shareholdings by foreign investors in a company or that require minimum levels of local participation in equity ownership. This would include initiatives such as the Black Economic Empowerment process in South Africa and other states where broadening demographic participation in the economy is essential for reducing poverty and promoting a sustainable and inclusive form of economic development;
- The use of joint venture requirements for foreign investors, including when such requirements do not include state owned enterprises.

It is also impossible to predict the evolution of long-term economic policy and practice over the next several decades. By putting these provisions in place, CETA will bar all the critical economies bound by the text from reaching for the above type of economic instruments should circumstances warrant it. The need to fully foreclose such options is not self-evident from a government policy perspective. It is certainly clear that this is not a model developing countries should adopt.

In addition, Article 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, to include prohibitions on: local content requirements, whether of goods or services, for the operation of the investment; requirements to use a given percentage of the production volume within the host state for downstream economic benefits; and imposing technology transfer requirements. Article 8.5 also limiting the ability to require local research and development and worker training or worker levels to circumstances where these are accompanied by specific advantages in connections with the establishment or operation of the investment.

What this type of provision does in practical terms is limiting the economic development options of host states. Admittedly, these provisions are of less consequence in the Canada-EU context than in other contexts. But it is likely that the EU and Canada will seek to use CETA as a comprehensive precedent for applying the

[25] CETA, Art. 8.4(1).

same approach to developing countries on the basis of it being, as stated in the introduction to this chapter, the new gold standard for free trade agreements. In limiting the ability of governments to impose economic development obligations on investors, the CETA essentially protects the rights of investors not just to protect their property, but to maximize the profit levels[26] at the expense of a broader distribution of the economic rents of an investment in the host country.

The above being said, we do note that these provisions are largely excluded from the investor state dispute settlement process. This is a model first used by Canada in the Canada-China investment agreement, and it is adopted here as well. This does, at any rate, reduce the risks to states of these issues becoming a major factor in investor-state disputes, while leaving them fully subject to state-state disputes.

4 The Invisible Chapter: Domestic Regulation

The direction we see above is reinforced by the inclusion of Chapter 12, Domestic Regulation. Chapter 12 has its origins in the WTO General Agreement on Trade in Services, the GATS. Article VI of the GATS called for the development of further rules within the WTO that would limit the scope of regulations a government could apply to the entry of transborder service providers. The idea was to develop further rules to ensure a generally easy flow of transboundary services supply.

Those negotiations have never been completed, given the many differences among states, and especially developing countries. But the EU and Canada have taken the concept and now applied it not just to the transboundary provision of services, but to investment in any form of economic activity. Article 12.2 on Scope states that the domestic regulation chapter applies to, *inter alia*, to

> 1.(b) the supply of a service or pursuit of any other economic activity, through commercial presence in the territory of the other Party, including the establishment of such commercial presence;

Commercial presence is the GATS euphemism for investment into the other state party.

Moreover, the chapter applies to any form of licensing procedures or requirements. These are defined in Article 12.1 CETA:

> *licensing procedures* means administrative or procedural rules, including for the amendment or renewal of a licence, that must be adhered to in order to demonstrate compliance with licensing requirements;

[26] As noted by Schneiderman (2016), p. 39: "[…] in the case of international investment law, we are witness to a continuing preoccupation with the protection of property. It is reminiscent of vested rights doctrine and Lochnerism of the nineteenth century, coupled with a 'fanatic' and fundamental view of property rights that 'underwrites every expectation of profit."

> *licensing requirements* means substantive requirements, other than qualification requirements, that must be complied with in order to obtain, amend or renew an authorisation

These procedures and requirements, would, therefore, presumably include environmental and social impact assessments, environmental and social management plans, requirements for community development agreements in some sectors, worker training requirements where plans must be developed and approved, and multiple other possible types of requirements related to pursuing an investment. Essentially, any government approval required for an investment to operate would potentially be covered; and this for virtually all sectors of economic activity.

The substantive obligation set out in Article 12.3 CETA includes:

> 1. Each Party shall ensure that licensing requirements, qualification requirements, licensing procedures, or qualification procedures it adopts or maintains are based on criteria that preclude the competent authority from exercising its power of assessment in an arbitrary manner.
>
> 2. The criteria referred to in paragraph 1 shall be:
>
> (a) clear and transparent;
>
> (b) objective; and
>
> (c) established in advance and made publicly accessible.
>
> 3. The Parties recognise that the exercise of statutory discretion conferred on a minister with respect to a decision on the granting of an authorisation in the public interest is not inconsistent with sub-paragraph 2 (c), provided that it is exercised consistently with the object of the applicable statute and not in an arbitrary manner, and that its exercise is not otherwise inconsistent with this Agreement.
>
> […]
>
> 7. Each Party shall ensure that licensing procedures or qualification procedures it adopts or maintains are as simple as possible, and do not unduly complicate or delay the supply of a service, or the pursuit of any other economic activity.

These obligations are open-ended and unclear in terms of how they can be applied to processes like environmental and social impact assessments. Such processes can routinely take 2 to 3 or more years for very complicated projects. Would this be constrained by Chapter 12? What about areas where discretion is often left to Ministerial decision? Would criteria have to be developed to constrain all exercise of discretion to pre-set criteria?

More troubling is how Chapter 12 might be applied in relation to Chapter 8 itself, or to disputes over licensing procedures and decisions challenged under the ICS dispute settlement process. The inclusion of such a broad-based Chapter with no

specific directions on its relevance, legally, to Chapter 8, and how, for example, the FET obligation might be applied, has the potential to be very problematic. It is, at a minimum, foreseeable that investors in pursuing a dispute will argue that Chapter 8 must be interpreted in a manner consistent with the direction, if not the exact letter, of Chapter 12. This would again work to limit the scope of the right to regulate and support an expansive reading of investor rights. While Chapter 8 makes it clear that a breach of another part of the Agreement does not automatically create a breach of Chapter 8 it is difficult to foresee how the text of Chapter 12 would, at the other end of the spectrum, be seen as fully irrelevant to applying Chapter 8. Where the line falls in the middle is hard to foretell.

Moreover, the fact that Chapter 12 applies to all investment activity shows the broader intent of the CETA to create a regime for investment that is ever more favourable to foreign investors, and ever more constraining to government regulatory space. How this may play in the dispute settlement process is, again, unclear. That both the EU and Canada agreed to these provisions with virtually no public review or comment is equally remarkable.

5 Conclusion: What Lies Beyond?

Our overall understanding of the direction of investment-related measures in CETA arises from all of the above issues.

First, on preserving regulatory space for governments and constraining the rights of investors vis-à-vis government policy space, we see significant risk of the measures appearing to be more form than function. There is no doubt that in some instances, like FET, there is new language in drafting terms. But as seen in the FET instance, that same language has already led to highly problematic results in terms of protecting government regulatory space in sensitive regulatory areas, like environmental and social impact assessments. The language may be new to treaty texts, but its history in arbitration is already troubling. The same pattern seems to extend to other provisions, such as MFN.

The affirmations of the right to regulate are partly more clearly formulated than similar versions in other agreements and may safeguard the right to regulate from investment claims to some extent. Yet, it is not clear that they sufficiently reign in expansive drafting relating to the concept of "legitimate expectation" for example. The context of other provisions, such as Chapter 12 on Domestic Regulation and the role of the general exceptions also raise questions about the effectiveness, and indeed the intentions, behind the new drafting. In sum, the drafting changes made to investor rights and the government right to regulate, the changes incorporated may have been enough to mollify opposition to the agreement, but beyond that, their effectiveness remains suspect.

In addition to investment protection, CETA includes the North American practice of prohibiting performance requirements and extending national treatment obli-

gations to the pre-establishment phase of an investment. These market access elements coupled with the EU's own long-standing practice on investment liberalization have transformed CETA into an investment liberalization "powerhouse". In doing so, as we said previously, CETA has expanded the scope of investors' market access rights, and denied host states the use of development tools and policies that could help ensure a more equitable distribution of the economic rents and of investments. While this may not be as relevant to markets in the Europe and Canada when compared to developing countries, it indicates nevertheless, the overall direction of Chapter 8, and CETA more generally. This trend is also reflected in Chapter 12 on Domestic Regulation. Its interplay with Chapter 8 is entirely unclear at present.

Finally, there is a great reliance on the new ICS as a saviour for drafting vagueness and lacunae, as well as ensuring a more balanced system of rights and obligations. Whether or not these objectives will be achieved will depend in large measure on who is nominated to the tribunal roster and the Appellate Tribunal. But more importantly the dispute settlement mechanisms are not meant to be overtly legislative in nature and function. Instead, state parties should provide them with clearer language and direction and rather than rely on them to fill in the blanks. Moreover, balance will not be achieved as long as the rights and obligations set out in CETA remain one-sided.

So where does this lead to for the future development of IIAs? What lies beyond? As a starting point, CETA parties have certainly demonstrated leadership on modernizing the dispute settlement system, and reigning in some, but only some, of the risks for host state governments' policy space. However, they have not succeeded in rebalancing the rights and obligations of investors and states and designing a novel governance framework for transnational investment. This is particularly worrisome since investment provisions are incorporated in a comprehensive trade agreement, so that rebalancing and fixing issues at a later stage will be extremely difficult.

CETA is patently weak on strengthening responsible business conduct. It does not contain any provisions to hold investors accountable beyond those relating to anti-corruption and anti-fraud in the making of an investment. There are no further obligations on investors. Nor, for example, was the opportunity used to enhance mechanisms to implement the OECD Guidelines on Multinational Enterprises or other relevant principles and guidelines. For example, CETA parties could have included provisions to expand the OECD national contact point processes, allowing individuals and communities to bring complaints regarding the non-compliance with OECD Guidelines into a more transparent and effective review process.

CETA proposes to modernize and judicialize the investor-state dispute settlement system first through the ICS and later through the creation of a multilateral investment court, but it does not propose a more comprehensive framework for settling investment-related dispute. It sets out a system that is designed to serve solely the foreign investor, by replacing investor-state arbitration with an investor-state court. It will be important that future discussions around the creation of a Multilateral Investment Court result in a design that allows for the adaptation to evolving substantive law on investment. Any such mechanism should be flexible enough to cover a range of investment-related disputes, with different claimants, respondents and

interveners. The system should be aimed at finding solutions and ensuring access to justice to a range of actors, not just foreign investors. This international mechanism could be complemented through provisions that ensure access to civil justice in home state courts for victims in host states. In keeping with the absence of investor obligations beyond the corruption and fraud issues, CETA does nothing to advance these broader areas of access to justice in a foreign investment context.

For all the above reasons, we see CETA as a moment in time, where civil society and a number of EU Member States and parliamentarians pushed towards the recognition of some risks and the need to change the dispute settlement process. However, so far they have achieved only half measures of success, with most of the basic outline of a traditional agreement remaining in place. We do not see this working as a model for the future.

We are of the view that despite the apparent intention and adapting to respond to new investment tribunal decisions, the current provisions continue to be of significant risk for host states in Europe and Canada. While clearly an improvement as compared to some early Member State BITs in terms of investment protection provisions, CETA will increase the risk overall to most Member States of the EU. This is, first, because CETA introduces investor-state litigation for relationships that were previously not covered because no BIT existed, and, second, due to the drafting.

In the end, we do not see CETA as a gold standard investment chapter, nor as a model likely to be seen as worth emulating by most developing countries. At best, it may catalyze discussions on a broader notion of an international investment court. But failing this, its legacy as a "novel approach" to designing international investment governance will likely be short-lived.

CETA is, rather, designed to meet a short-term political need of the Commission and Canada to adopt their far more desired trade, intellectual property and other provisions. But in the course of the self-defining of this political need for Chapter 8, the parties have continued the trend towards greater levels of investor rights vis-à-vis other stakeholders in relation to foreign direct investment.

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