

## European Investment Policy and ISDS

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### I Introduction

Currently, the topic of investor-state dispute settlement (ISDS) and in particular the position of the European Union towards it is one of the most controversial issues with regard to the EU's external trade policy.

In late September 2014, the text of the EU–Canada Comprehensive Trade Agreement (CETA),<sup>1</sup> which includes an ISDS chapter, was finalised. However, it is very controversial and unclear whether ISDS will form part of an agreement with the United States. The negotiations on a possible investment chapter in EU-US Transatlantic Trade and Investment Partnership (TTIP) were officially suspended because of massive public and political opposition, in particular against ISDS. It is all the more important to look at the agreement with Canada and to see to what extent points of criticism that have been raised in the past are addressed in a sufficiently clear and satisfactory way.

In particular, the questions of efficiency of the procedure, predictability and consistency as well as state control over the process will be discussed.

With regard to efficiency, not only cost efficiency and speedy adjudication of claims is important but also innovative issues such as alternative dispute settlement resolution, whether in the form of mediation or conciliation, will be important. The question of predictability is closely linked to the problem of transparency and the issue of consistency will be addressed when speaking about the possibility of an appellate mechanism. Finally, the state control *problématique* is evident when looking at the very detailed language, not only of the substantive protection standards in the CETA, but also of the dispute settlement chapter. In this context, it is remarkable to see that the parties have provided for interpretation possibilities and certain limits on the level of enforcement.

The following overview will, in a very selective way, analyse a few of the provisions contained in Section 6: Investor-State Dispute Settlement of the 26 September 2014 draft of the CETA.<sup>2</sup> There is no claim to an exhaustive treatment.

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<sup>1</sup> Consolidated CETA Text, published on 26 September 2014, available at <[trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)>.

<sup>2</sup> Consolidated CETA Text (n 1).

## II The Scope of ISDS

### 1 Treaty Claims Exclusively

One important issue concerning the potentially over-reaching breadth of investor-state arbitration relates to the scope of claims that may be submitted to arbitration. Often, concern is raised that investors may use ISDS to circumvent the domestic judiciary for purely contractual claims against host states. Various International Investment Agreements (IIAs)<sup>3</sup> contain so-called umbrella or observance of observation clauses which require states to respect the obligations they entered into with regard to a specific investment.<sup>4</sup> In other words, umbrella clauses potentially bring contractual and other individual obligations within the ambit of an IIA and thus make them enforceable under its ISDS mechanism.

It is clear though that, depending on the wording of the respective treaty, a state's offer to arbitrate may also be limited. In this regard Article X.17 of the draft is fairly unambiguous.<sup>5</sup> It permits only so-called treaty claims. Hence, this provision excludes investment disputes concerning contractual issues from being litigated under the ISDS chapter of the treaty. This is evident when comparing the current formulation with broader dispute settlement clauses in other IIAs.<sup>6</sup>

In this context, it is important to note that Canada has traditionally resisted umbrella clauses and that while the 'Draft CETA Investment Text of 21 November 2013' contained an EU suggestion on an umbrella clause,<sup>7</sup> the current final draft agreement does not contain such

<sup>3</sup> See e.g. Article 10(1) last sentence of the Energy Charter Treaty (ECT) ('Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party').

<sup>4</sup> See R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012, Oxford) 166 et seq. With regard to the question whether an umbrella clause transforms the applicable law to the underlying obligation, there has been a controversial discussion; on this issue see M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Kluwer Law 2010) 180 et seq.

<sup>5</sup> Article X.17 Consolidated CETA Text (n 1) ['Without prejudice to the rights and obligations of the Parties under Chapter [XY] (Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under: Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or Section 4 (Investment Protection) of this Chapter; and where the investor claims to have suffered loss or damage as a result of the alleged breach'].

<sup>6</sup> E.g. Article 139 of the 2009 China-Peru Free Trade Agreement (FTA) which empowers the arbitral tribunal to decide on '[a]ny dispute between an investor of one Party and the other Party in connection with an investment in the territory of the other Party'. Some treaties opt for an median approach between the by providing for an exhaustive list of causes of actions covered by the ISDS mechanism and by defining the breaches listed therein, see e.g. Article 15.15 of the 2003 Singapore-United States FTA ['(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached (A) an obligation under Section B, (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach'].

<sup>7</sup> In November 2013, the Trade Justice Network leaked draft texts on the CETA; see <<http://eu-secretdeals.info/upload/2014/02/CETA-Investment-and-ISDS-Chapter-Dec-2013.pdf>>. The 'Draft CETA

a clause.<sup>8</sup> This implies that contractual disagreements and disputes can also not be brought under the protection of the CETA.

## 2 Lawful Investments

A further interesting provision dealing with limiting the scope of potential arbitration claims can be found in the same Article X.17, which provides as follows:

For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.<sup>9</sup>

What this novel provision aims at is the exclusion of claims such as those made by investors in cases like *Inceysa v. El Salvador*<sup>10</sup> and *Phoenix v. Czech Republic*, where it has been argued that the investments had been made in an unlawful way.<sup>11</sup> In those cases, the claims have been held inadmissible because they were considered to be contrary to an ‘in accordance with host state law’ clause. However, a closer analysis of, in particular, the *Inceysa* case demonstrates that such reasoning was somewhat complicated and not wholly convincing.<sup>12</sup> Moreover, the *Phoenix* award, with its enlargement of the *Salini* criteria<sup>13</sup> by an ‘in accordance with host state law’ and a bona fide requirement<sup>14</sup> has remained controversial. In this context, one should also take into

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Investment Chapter’ contained the following suggestion on page 13 ([EU: Article X Each Party shall observe any specific written obligation it has entered into with regard to an investor of the other Party or an investment of such an investor.]). This would have been in accordance with the EU Commission’s initial position on this issue, see European Commission, Directorate General for External Policies, Communication, ‘Towards a Comprehensive European International Investment Policy’ COM(2010)343 (7 July 2010) at 8.

<sup>8</sup> See C. Lévesque, A. Newcombe, ‘Canada’ in C. Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013, Oxford) 53, at 60 f. Also, NAFTA’s chapter 11 on investments does not contain such a clause.

<sup>9</sup> Article X.17 Consolidated CETA Text (n 1).

<sup>10</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Arbitral Tribunal, Case No. ARB/03/26, Award, 2 August 2006.

<sup>11</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Arbitral Tribunal, Case No. ARB/06/5, Award, 15 April 2009.

<sup>12</sup> In its scrutiny whether the investment had been made in accordance with the law of the host State, the tribunal did not restrict itself to a consideration of the law of El Salvador. Instead, it reasoned that – because treaties formed part of the law of El Salvador – the BIT with its reference to generally recognized rules and principles of international law allowed it to look at these sources in order to establish the legality or illegality of the investment. Relying on a number of general principles of law, such as *Nemo Auditur Propriam Turpitudinem Allegans*, the tribunal found, inter alia, ‘that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, “nobody can benefit from his own fraud.” *Inceysa* (n 10) para. 242.

<sup>13</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Arbitral Tribunal, Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

<sup>14</sup> *Phoenix v. Czech Republic* (n 11) para. 114 (‘1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested bona fide.’).

account Article X.3, which inter alia requires the investment, more generally, to be ‘made in accordance with the applicable law at that time’ in order to constitute a ‘covered investment’ for the purpose of the investment chapter.

The suggested clauses will therefore, make it easier for future investment tribunals to clearly dismiss cases where there is evidence that the investment was obtained fraudulently or in any other unlawful way.<sup>15</sup>

### 3 The Dismissal of ill-Founded Claims

Litigation in general and investment arbitration in particular can turn into time- and cost-intensive undertakings. In addition, concern has been voiced over an increasing number of unmeritorious and frivolous claims that still require full defence strategies on the part of respondent states. For these reasons, mechanisms to avoid the submission of unfounded claims have been introduced.<sup>16</sup>

Similarly, the draft CETA text contains Articles X.29(1)<sup>17</sup> and X.30<sup>18</sup>. These provisions entitle the respondent to file preliminary objections to a claim put forth by the claimant with a view to obtaining an early dismissal in an expedited procedure. While the former provision concerns claims ‘manifestly without legal merit’, the latter covers claims that are ‘not [...] claim[s] for which an award in favour of the claimant may be made’.<sup>19</sup> Put in other words, these provisions enable the respondent to raise objections already at a very early stage. Neither Article X.29 nor Article X.30 is totally new.

The former provision will, most likely, only be important if a claim is submitted under arbitration rules other than the ICSID Convention, since ICSID Arbitration Rule 41(5) already contains a similar provision.<sup>20</sup> In the course of its application, the wording of Article X.29 CETA

<sup>15</sup> See e.g. the facts of *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Arbitral Tribunal, Case No. ARB/03/25, Award, 16 August 2007.

<sup>16</sup> See e.g. Article 35(3)a of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entry into force 3 September 1953, which allows for the dismissal of individual applications that are ‘manifestly ill-founded’ or amount to an abuse of ‘the right of individual application’. In the context of investment arbitration, see e.g. Article 28(4) of the US-Model BIT 2012, available at <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

<sup>17</sup> Article X.29(1) Consolidated CETA Text (n 1) (‘The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. [...]’).

<sup>18</sup> Article X.30(1) Consolidated CETA Text (n 1) [‘Without prejudice to a tribunal’s authority to address other objections as a preliminary question or to a respondent’s right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article X.22 (Submission of a Claim to Arbitration) is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.’].

<sup>19</sup> Article X.29(1) Consolidated CETA Text (n 1), requires the respondent to file an objection ‘no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal,’

<sup>20</sup> ICSID Arbitration Rule 41(5) (‘Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.’).

text might arguably cause problems due to the absence of a definition of ‘manifestly’ and ‘without legal merit’. It is therefore appropriate to look at the jurisprudence on ICSID Arbitration Rule 41(5), since it also addresses claims that are ‘manifestly without legal merit’ while at the same time not providing guidance for its interpretation.<sup>21</sup> Arbitral tribunals<sup>22</sup> have so far construed the meaning of this notion on a case-by-case basis.<sup>23</sup> In *Trans-Global Petroleum v Jordan*, the tribunal stated that a claim is ‘without legal merit’ when it concerns ‘infringements of non-existent legal rights of the Claimant or non-existent legal obligations of the Respondent.’<sup>24</sup> With regard to the ‘manifestly-requirement’, the same tribunal concluded that ‘[t]he word requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high.’<sup>25</sup>

It is not apparent to what extent the second provision, Article X.30, differs from Article X.29, nor how the two provisions interrelate exactly.

In fact, the wording of Article X.30 CETA is also not wholly new and provisions in other IIAs may help to interpret it.<sup>26</sup> For instance, Article 28(4) of the 2012 US Model-BIT entitles a tribunal, in a similar manner, to dismiss a claim based on the assertion that as a matter of law, an award in favour of the claimant may not be made.<sup>27</sup> It has been remarked that this provision ‘borrows from Rule 12(b)(6) of the US Federal Rules of Civil Procedure, which permits dismissal for failure to state a claim upon which relief can be granted.’<sup>28</sup>

Taking this into consideration and looking at the wording of Article X.30 CETA, one can argue that this provision concerns claims based on factual arguments that per se are not capable of giving rise to legal claims under the treaty, e.g. the allegation that a contractual obligation

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For a more detailed analysis, see A. Diop, ‘Objection under Rule 41(5) of the ICSID Arbitration Rules’ (2010) 25 (2) ICSID Review 312–336; C. Brown, S. Puig, ‘The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules’ Sydney Law School Research Paper No. 11/33 available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1859446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859446)>.

<sup>21</sup> See above (n 17).

<sup>22</sup> So far, there have been several cases decided under ICSID Arbitration Rule 41(5): *Trans-Global Petroleum, Inc v Jordan*, ICSID Arbitral Tribunal, Case No ARB/7/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules of 12 May 2008; *Brandes Investment Partners LP v Venezuela*, ICSID Arbitral Tribunal, Case No ARB/08/3, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009; *Global Trading Resource Corporation and Globex International, Inc v Ukraine*, ICSID Arbitral Tribunal, Case No ARB/09/11, Award, 1 December 2010 and *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada*, ICSID Arbitral Tribunal, Case No ARB/10/6, Award, 10 December 2010.

<sup>23</sup> See Diop (n 20) 328.

<sup>24</sup> See *Trans-Global Petroleum v Jordan* (n 22) para. 95.

<sup>25</sup> *Ibid.*, para. 88.

<sup>26</sup> See e.g. Article 10.19 of the 2003 USA-Chile FTA ([...] a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made [...]).

<sup>27</sup> Article 28(4) 2012 US-Model-BIT (n 16) (‘Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.’).

<sup>28</sup> See J. Sharpe, L. Caplan, ‘United States’ in Brown (n 8) 835.

had been infringed.<sup>29</sup> The phrase ‘even if the facts alleged were assumed to be true’ supports this view and arguably leads to the conclusion that Article X.30 focuses on claims that concern facts genuinely not capable of falling within the ambit of the treaty’s investment chapter.

By contrast, the wording of Article X.29, in particular the term ‘legal merit’, suggests that it concerns the (manifestly wrong) application of the law to a certain factual situation that falls, from an objective and abstract point of view, under the ambit of the treaty and thus violates it. This view is further supported by Article X.29(3) which directs the tribunal to ‘assume the alleged facts to be true’ when deciding an objection under this provision. As for the relationship between these two distinct proceedings, Article X.29(2) prescribes that ‘[a]n objection may not be submitted under paragraph 1 [of this article] if the respondent has filed an objection pursuant to Article X.30 (Claims Unfounded as a Matter of Law)’. This shows that proceedings under Art X.29 are subsidiary to objections Article X.30.

With regard to ICSID Arbitration Rule 41(5), there has been a discussion whether and to what extent this rule empowers a tribunal to review the factual faults of a claim and jurisdictional objections.<sup>30</sup> It remains doubtful whether the CETA approach will provide clarification of this issue.

## 4 Alternative Dispute Resolution

The investment chapter of the CETA also contains provisions aiming at alternative dispute resolution. The overarching goal seems to be the prevention of arbitral proceedings by way of amicable settlement of disputes. In this connection, the CETA contains elaborate provisions in Article X.18 entitled ‘Consultations’<sup>31</sup> as well as Article X.19 entitled ‘Mediation’.

The requirement to resort to consultations prior to the initiation of arbitral proceedings has become a fairly common feature in IIAs.<sup>32</sup> In this connection, it is important to note that it often constitutes a pre-condition for a host state’s consent to arbitration.<sup>33</sup>

However, within arbitral practice there have been divided opinions as to whether non-compliance with an amicable settlement requirement affects a tribunal’s jurisdiction or whether this is a mere procedural formality that may be cured by actual lapse of time.<sup>34</sup> In this regard, Article X.22(1) provides:

<sup>29</sup> As described in the text above, (n 6) infringements of contractual obligation are not capable of amounting to a violation of one of the protection standards.

<sup>30</sup> See Diop (n 20) 321 et seq. See also *Trans-Global Petroleum v Jordan* (n 22) paras. 97 et seq.

<sup>31</sup> Article X.18 Consolidated CETA Text (n 1) (Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 3. [...]).

<sup>32</sup> E.g. NAFTA Articles 1118–1120 or Article 26(2) of the ECT. See C. Tams, ‘Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?’ (2014) 15 *Journal of World Investment and Trade* 603.

<sup>33</sup> See Dolzer, Schreuer (n 4) 268 et seq.

<sup>34</sup> In *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Arbitral Tribunal, Case No. ARB/08/4, at para. 194, the tribunal established that this requirement ‘constitutes a fundamental

*If a dispute has not been resolved through consultations, a claim may be submitted to arbitration under this Section by [...].*<sup>35</sup>

Moreover, the time-frame for consultations as provided for in the CETA must be followed. Article X.21(1) sub-paragraph 2 prescribes that a claim may be submitted to arbitration only if the investor

[...] allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;<sup>36</sup>

Article X.19 CETA includes a more innovative provision on alternative dispute settlement by providing for the permanent option of mediation.

In investment disputes, meditation has not been used extensively in the past.<sup>37</sup> Mediation is a means of alternative dispute resolution which, by contrast to arbitration, puts less emphasis on the strict application of the law. Its main aim is to find tailor-made solutions that are acceptable to both disputing parties. From a procedural point of view, this mechanism provides for more flexibility and informality: an impartial and independent third party neutral (the mediator) assists the parties to establish a dialogue and might also propose a feasible solution to a dispute. However, mediators are not entitled to impose binding decisions or awards upon the disputing parties.<sup>38</sup>

Currently, there is an important debate on the use of mediation in investment disputes and the International Bar Association rules on mediation of investor-state disputes are clear evidence of this trend.<sup>39</sup> With regard to investment disputes, which very often contain a long-term perspective, mediation may be a tool to enable the continuation of an investment and therefore be in the end a cost-saving and more efficient way of settling disputes than contentious arbitration. Given the fact that investment arbitration regularly concerns measures involving aspects of public interest, mediation might be a method that finds more acceptance among civil

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requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.' Other investment tribunals, however, treated 'consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.' *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Arbitral Tribunal, Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, para. 184. See also A. Reinisch, 'From Rediscovered Waiting Periods to Ever More Activist Annulment Committees – ICSID Arbitration in 2010' [2011-II] 11 *Global Community YILJ* 933.

<sup>35</sup> Article X.22(1) Consolidated CETA Text (n 1) (emphasis added).

<sup>36</sup> Article X.21(1) sub-paragraph 2 Consolidated CETA Text (n 1).

<sup>37</sup> See UNCTAD (2014). *Series on International Investment Agreements II: Investor-state dispute settlement: A sequel* at 61, available at <[http://unctad.org/en/PublicationsLibrary/diaeia2013d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf)>.

<sup>38</sup> See M. Dimsey, *The Resolution of International Investment Disputes* (Eleven International Publishing 2008) at 144 et seq.; S. Franck, 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide' (2014) 29 (1) *ICSID Review* 66–89 at 80.

<sup>39</sup> See W. von Kumberg, J. Lack, M. Leathes, 'Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29 (1) *ICSID Review* 133–141. The IBA rules are available at <[http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/State\\_Mediation/Default.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx)>.

society due to its emphasis on the consent of both disputing parties. A negative aspect of mediation is a certain lack of transparency with regard to the way a state resolves its disputes.<sup>40</sup> After all, the lack of transparency has been one of the major points of criticism among opponents of the current ISDS system.

Article X.19 CETA appears to be clearly inspired by the WTO mediation possibility, which is available during the entire process of dispute settlement in trade disputes.<sup>41</sup> If one looks at the precise wording of Article X.19 paragraph 4 CETA, which prescribes that disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator, one may wonder whether this short time-frame is realistic for the resolution of highly technical complex investment disputes.

While the contemplated time period of 60 days may in some cases indeed be too short for the prevention of arbitral proceedings, some specific elements of a dispute could be resolved by way of mediation whereas remaining issues can still be subject to arbitral proceedings. In this connection, it is also important to note that, in the context of ICSID, the partial settlement achieved under mediation can be included into a (legally binding) award pursuant to ICSID Arbitration Rule 43(2).<sup>42</sup> It remains to be seen whether investors will make use of the possibility for mediation.

## 5 Procedural and Other Requirements

Another interesting aspect of the dispute settlement chapter relating to the scope of arbitration is Article X.21 CETA which contains procedural and other requirements for the submission of a claim to arbitration. It lists, in a somewhat ‘paternalistic’ way, specific requirements a potential claimant has to fulfil before it will be allowed to raise an investment claim.

While it seems obvious that this is intended to make sure that only serious claims will be ultimately subject to arbitration, the rather (over-)specific determination contains a number of potential problems.

For instance, Article X.21(1) sub-paragraph 4, which provides that the investor does not identify measures in its claim to arbitration that were not identified in its request for consultations, may lead to protracted jurisdictional disputes on whether and to what extent the actual claim complies with this formal prerequisite.

<sup>40</sup> See Article 6(1) of Annex III Consolidated CETA Text (n 1) (‘Unless the Parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, are confidential. However, any Party may disclose to the public that mediation is taking place. The obligation of confidentiality does not extend to factual information already existing in the public domain.’).

<sup>41</sup> See Article 5(3) WTO DSU (‘Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.’).

<sup>42</sup> Article 43(2) ICSID Arbitration Rules (‘If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.’).

### III State Control over the System

One of the main points of criticisms of the opponents of the inclusion of an investment chapter to the CETA has been the allegation that investment protection may be a genuine threat to state measures serving public interest.<sup>43</sup> Against this backdrop, one of the most important trends in recent investment arbitration negotiations has been the attempt by treaty negotiators to make sure that the states parties to such treaties remain in control of the procedure. This impetus may have been fuelled by concern over activist investment tribunals that are perceived to re-interpret the original intentions of the treaty parties.

States regain control, on the one hand, by shaping the substantive protection rules in more detailed ways than before and, on the other hand, by limiting the breadth of awards.

#### 1 Substantive Limitations

With regard to the above mentioned fine-tuning of protection standards, the CETA's Article X.9 on the fair and equitable (FET) standard is particularly worth mentioning.<sup>44</sup> First of all, paragraph 2 contains a list of measures that infringe the FET standard.<sup>45</sup> This list is 'quasi-exhaustive' in the sense that it may be reviewed (and extended) by the Trade Committee only.<sup>46</sup>

Article X.27 CETA on 'applicable law and interpretation' is a further striking example of this trend.<sup>47</sup> More generally, its paragraph 2 provides that the Committee on Services and Investment may recommend to the Trade Committee the adoption of interpretations of the agreement and

<sup>43</sup> See e.g. a report of the 'Seattle to Brussels Network' entitled 'Reclaiming Public Interest in Europe's International Investment Policy – EU Investment Agreements In the Lisbon Treaty Era: A Reader available at <[http://somo.nl/publications-en/Publication\\_3558/at\\_download/fullfile](http://somo.nl/publications-en/Publication_3558/at_download/fullfile)>.

<sup>44</sup> Another example would be Annex X.11 Consolidated CETA Text (n 1) on expropriation which clearly defines the ambit of Article X.11 on expropriation with regard to measures potentially amounting to an indirect expropriation ('measures having an effect equivalent to nationalization or expropriation') in a similar manner as the US-Model BIT and its Annex B (n 16).

<sup>45</sup> Measures may violate the FET standard if they amount to a denial of justice in criminal, civil or administrative proceedings, a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings, if they constitute manifest arbitrariness, a targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief, or if they amount to an abusive treatment of investors, such as coercion, duress and harassment. Interestingly, this list does not contain the element of legal stability which has been a common feature of the FET standard under the notion of 'legitimate expectations' as interpreted by arbitral tribunals. On this issue see e.g. R. Kläßer, *Fair and Equitable Treatment' in International Investment Law* (OUP 2011) 164 et seq. After all, this might be a concession to the critics of ISDS with regard to their concern that investment protection prevents States from adopting measures serving the public interest.

<sup>46</sup> Article X.9(3) Consolidated CETA Text (n 1) ('The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.'). See also Article X.27 Consolidated CETA Text (n 1) at (n 45).

<sup>47</sup> Generally see e.g. UNCTAD, IIA Issues Note, No. 3 (December 2011), *Interpretation of IIAS: What States Can Do*, available at <[http://unctad.org/en/docs/webdiaeia2011d10\\_en.pdf](http://unctad.org/en/docs/webdiaeia2011d10_en.pdf)>.

that, of course, refers to the entire agreement, including the substantive protections. Such an interpretation, Article X.27 continues to say, shall be binding on a tribunal established under this chapter.<sup>48</sup>

From a general treaty law perspective, this builds on Article 31 Vienna Convention on the Law of Treaties (VCLT).<sup>49</sup> In the investment context, such a possibility has already been provided for in chapter eleven of the NAFTA and there indeed we have some examples of interpretations of core-substantive investment protection standards.<sup>50</sup> The most important one relates to the definition of fair and equitable treatment. In 2001, the NAFTA Free Trade Commission ‘interpreted’ that the fair and equitable treatment standard should be considered to be nothing more than the customary international law minimum standard.<sup>51</sup>

The NAFTA example has also demonstrated that such an ‘authoritative’ interpretation may be problematic when made in the course of pending proceedings.<sup>52</sup> While this may be helpful in order to clarify the intended standard of investment protection for investment tribunals, it is problematic from a due process/fair trial perspective, since it allows a host country in concert with the home country of the investor to influence the decision making of an independent investment tribunal.

<sup>48</sup> Article X.27 Consolidated CETA Text (n 1) [‘A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.’].

<sup>49</sup> In particular, Article 31 (3) Vienna Convention on the Law of Treaties, 1155 UNTS 331 [‘There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’].

<sup>50</sup> Generally, see e.g. A. Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law* 179–225.

<sup>51</sup> NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decisions of 31 July 2001, available at <<http://www.worldtradelaw.net/nafta/chap11interp.pdf>> [‘1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.’].

<sup>52</sup> See *Pope & Talbot v Canada*, UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 ILM 1347 (2002). See for a non-NAFTA case *CME Czech Republic B.V. v. The Czech Republic, Partial Award*, UNCITRAL Arbitration Award of 13 September 2001, *World Trade and Arbitration Materials* 109 (2002), para 156 (‘The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment.’).

## 2 The Breadth of Awards

Another question linked to the issue of state control and sovereignty in the context of investment protection is the question of what obligations an arbitral tribunal may impose upon the parties in an award. In particular, the public discussion on ISDS has focused on the extent to which investment tribunals can force a state to change its policies and actually to change its laws and regulations. Often, the danger of ISDS is portrayed as forcing individual states to change or actually to abstain from regulating in the public interest. Such a danger may actually materialise where tribunals order specific performance or in another way instruct states to act in a particular way. In fact, under the ICSID Convention as well as under other investment arbitration regimes, tribunals are not generally limited to awarding monetary compensation only.<sup>53</sup>

It is thus remarkable to see that in Article X.36 of the draft CETA text it is clearly laid down that a tribunal may in a final award only specify monetary damages and any applicable interest as a general principle.<sup>54</sup>

With regard to expropriation claims, it is generally accepted that a tribunal may, if it finds that an expropriation was unlawful, order restitution of property. However, in the CETA, it is also made explicit that, even in such a situation, the respondent state should have the right to choose between actually returning the property or paying fair market value compensation for it.<sup>55</sup> This is interesting because fair market value compensation has been usually treated as a requirement for the lawfulness of an expropriation under general international law.<sup>56</sup> A lawful expropriation requires the payment of compensation usually based on the fair market value anyway, whereas an unlawful (non-compensated) expropriation triggers the obligation to pay damages. In the latter case, the *Chorzów*-principle would apply: An expropriating but non-compensating state would have to eliminate all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed.<sup>57</sup> Pursuant to Article X.36, a lawful expropriation and an unlawful expropriation will arguably have the same consequence: Eventually, both conducts require the payment of the fair market value if restitution in kind is not chosen.

<sup>53</sup> The fact that Article 54(1) ICSID Convention expressly speaks of an obligation to enforce the 'pecuniary obligations' imposed by an ICSID award does not exclude the possibility of other obligations under an award such as restitution or different forms of specific performance or injunctions. See also C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2nd edn, 2009, Cambridge) 1136.

<sup>54</sup> Article X.36(1) Consolidated CETA Text (n 1) ('Where a Tribunal makes a final award against the respondent the Tribunal may award, separately or in combination, only: monetary damages and any applicable interest; [...]').

<sup>55</sup> Article X.36(2) Consolidated CETA Text (n 1) [...restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier and any applicable interest in lieu of restitution, determined in a manner consistent with Article X.11 (Expropriation):].

<sup>56</sup> See A. Reinisch, 'Legality of Expropriations' in A. Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008, Oxford) 171–204.

<sup>57</sup> *Chorzow Factory Case (Germany v. Poland)*, 1928 PCIJ (Ser. A) No. 17 (Judgment of Sept. 13, 1928).

This is clearly reminiscent of one of the old problems, discussed in various of the *Libyan oil concession* arbitrations, whether restitution of property or compensation are the appropriated remedies in cases of expropriation.<sup>58</sup> However, since restitution has been found to be the primary remedy, as already has also laid down in the ILC Articles on State Responsibility,<sup>59</sup> it is important that the CETA makes a clear statement in this regard.

Another aspect of limiting the potential breadth of what investment arbitral tribunals may award can be found in paragraph four of the same article. It provides that a tribunal may not award punitive damages.<sup>60</sup> Given that there has been some discussion as to what extent investment tribunals should be entitled to award moral damages,<sup>61</sup> it is regrettable that the dispute settlement provision of Article X.36 CETA does not clarify this issue.

A further example of the continued host state control and limitation of enforceability of investment awards can be found in Article X.39 CETA, in which it is provided that the enforcement or execution immunity provisions of states where the execution of an award is sought will be maintained. This is a provision that corresponds to Article 55 of the ICSID Convention<sup>62</sup> and according to the CETA rules will now also apply with regard to UNCITRAL or other arbitrations.

This, of course, also triggers another interesting aspect, i.e. that the current formulation of the CETA investor state dispute settlement chapter makes standard and frequent reference to the ICSID Convention. This is surprising, since it is relatively clear that the ICSID Convention without an amendment will not be available to the EU as a non-state actor on the international stage.<sup>63</sup> Given the specific background of the CETA with the EU and its Member States concluding a mixed-agreement applicable to and eventually performed mainly by its 28 Member States, the ICSID Convention could nevertheless be applicable if the respondent in a specific dispute is not the EU itself but a Member State.<sup>64</sup> Pursuant to Article X.20(4) CETA, this would be the case if ‘the measures identified in the notice [delivered to the EU requesting a determination of the respondent pursuant to paragraph 1] are exclusively measures of a Member State of the European Union [...]’. As for the personal scope, the ICSID Convention, Article 25 merely requires that the parties to a dispute (and not to the underlying IIA) are a Contracting State and a national of another Contracting State. From a Canadian perspective, this requirement

<sup>58</sup> See A. Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 502.

<sup>59</sup> Articles on Responsibility of States for internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

<sup>60</sup> Article X.36(4) Consolidated CETA Text (n 1).

<sup>61</sup> See *Desert Line Projects LLC v. Yemen*, ICSID Arbitral Tribunal, Case No. ARB/05/17, Award, 6 February 2008; *Joseph Charles Lemire v. Ukraine*, ICSID Arbitral Tribunal, Case No. ARB/06/18, Award, (March 28, 2011). See also P. Dumberry, ‘Compensation for Moral Damages in Investor-State Arbitration Disputes’ (2010) 27 (3) *Journal of International Arbitration* 247–276.

<sup>62</sup> Article 55 ICSID Convention (‘Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.’)

<sup>63</sup> Pursuant to Article 67 of the ICSID Convention, the convention is only accessible to member states of the ICRD or to any other state which is a party to the ICJ Statute. See already M. Burgstaller, ‘Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems’ (2014) 15 *Journal of World Investment and Trade* 557.

<sup>64</sup> Article X.20 Consolidated CETA Text (n 1), concerns the determination of the proper respondent.

would obviously be met.<sup>65</sup> If the proceedings under CETA Article X.20 result in a Member State being the respondent in a dispute under this agreement and if this Member State is an ICSID Contracting State,<sup>66</sup> arbitral proceedings could arguably be conducted under the ICSID rules, even though the EU is not a party.

## IV Transparency and other Procedural Issues

One of the issues that has been frequently discussed in the investment arbitration community but also within civil society is the question of sufficient transparency.<sup>67</sup> It seems that the negotiators of the draft CETA have shared the concerns raised in the course of this discussion. Article X.33 provides for the transparency of proceedings by incorporating the recently adopted UNCITRAL Transparency Rules.<sup>68</sup> Notably, this provision does not only make a reference to them but in parts extends the degree of transparency provided for by this set of rules. Paragraph two of Article X.33, for example, adds a list of further documents to be made public to the list contained in Article 3(1) of the UNCITRAL Transparency Rules. It is also worth mentioning that Article X.33(5) CETA prescribes that

[h]earings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings.

The CETA approach with regard to transparency is, at least from an EU perspective, quite revolutionary, since a vast majority of past IIAs concluded by its 28 Member States do not contain a provision requiring mandatory transparency in investor-state arbitration.<sup>69</sup> Against this background, the position of the Commission (which has taken a strong stance in support of the UNCITRAL Transparency Rules, in particular upon its adoption in 2013)<sup>70</sup> has been different to the position of many EU Member States.<sup>71</sup>

<sup>65</sup> The ICSID Convention has been into force for Canada since 1 December 2013.

<sup>66</sup> For a list of ICSID Contracting Parties and other Signatories of the ICSID Convention see <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>>.

<sup>67</sup> See on transparency in general V.V. Veeder, 'The Transparency of International Arbitration: Process and Substance' in L. Mistelis, J. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 89–102; H. Mann, 'Transparency and Consistency in International Investment Law: Can the Problem be fixed by Tinkering?' in K. Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 213; J. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in A. Bianchi and A. Peters (eds), *Transparency in International Law* (OUP 2013). See also N. Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy' (2014) 15 *Journal of World Investment and Trade* 645.

<sup>68</sup> Article X.33(1) Consolidated CETA Text (n 1) ('The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.')

<sup>69</sup> For background and more detail, see Calamita (n 67) 672.

<sup>70</sup> European Commission, Press Release, EU backs new transparency standards for investor-state dispute settlement, 11 February 2013, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=868>>.

<sup>71</sup> See Calamita (n 67) 673.

In Article X.38 CETA on the fees and expenses of the arbitrators, an attempt has been made to ensure that dispute settlement be efficient and cost sensitive. It provides that the fees and expenses of arbitrators should correspond to those under the ICSID Arbitration Rules, which are comparably low vis-à-vis those used in UNCITRAL and ad hoc arbitrations. That is relevant because it will also apply to UNCITRAL arbitrations and may therefore lead to a reduction in arbitrators' fees. Given that the costs of the tribunal are usually less than a quarter of the entire costs of international arbitration, which are mainly attributable to legal representation, it is open whether the cost saving of this particular provision will be dramatic. In this connection, it should also be noted that Articles X.22 and X.25 CETA provide for the possibility that a sole arbitrator should hear a claim. Whether this may constitute a relevant factor for the reduction of costs may also be called into question.<sup>72</sup>

With regard to cost reduction, Article X.36(5) CETA will have a more important economic impact. It stipulates that a tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. It thereby provides that there is a clear mandate to follow the loser pays principle, which is not generally adopted in investment arbitration.

Finally, the investment chapter of the CETA makes some provision for an appellate mechanism in Article X.42.<sup>73</sup> While not yet providing for such a mechanism in the agreement itself, it provides that the Committee on Services and Investment should discuss whether and, if so, under what conditions an appellate mechanism could be created under the CETA. Apart from its particular design, it should be noted that the inclusion of an appellate structure would not be compatible with the ICSID Convention, whose Article 53 unambiguously stipulates that awards 'shall not be subject to any appeal'. Thus introducing an appellate mechanism into the ICSID system would require a revision of the Convention. Against this backdrop, the creation of an appellate system merely remains an option.<sup>74</sup>

<sup>72</sup> Bischof, e.g., argues that this would only be beneficial if the sole arbitrator would categorically hear certain small claims; see J. Bischoff, 'Initial Hiccups or More? About the Efforts of the EU to find its Future Role in International Investment Law' (2014) 14 (1) Transnational Dispute Management 26–27. Similarly, Tams (n 32) at 602.

<sup>73</sup> On the discussion on the introduction of an appeals mechanisms, see e.g. D. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2006) 39 Vanderbilt J. of Transnat'l L. 51; A. Qureshi, 'An Appellate System in International Investment Arbitration?' in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1154; C. Tams, 'An Appealing Option? The Debate about an ICSID Appellate Mechanism' in G. Kraft, R. Sethe (eds), *Beiträge zum Transnationalen Wirtschaftsrecht* (Halle, 2006) and C. Tams, 'Is There A Need for an ICSID Appellate Structure?' in Hofmann, C. Tams (eds), *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Nomos, 2007); B. Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Sauvant (n 67) 231.

<sup>74</sup> See Tams (n 32) 597–598.

## V Conclusion

Looking at the specific agreements of the CETA, one can clearly discern the attempt of the treaty negotiators to limit the broad discretion given to investment arbitration tribunals in the past; states are regaining control of the process and claims should be admissible only in extreme and egregious cases.

It does appear that many of the concerns about the far or even too far-reaching powers of investment arbitrations have been adequately addressed here.

One may wonder therefore why the EU Commission, as the negotiating body responsible for the European side, was not in a position to convey this message publicly in an effective way. Instead, it remained fully silent and opened a public consultation forum when a number of criticisms were raised against the system. Whether that is now too late or not remains to be seen.