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Confronting the Investor-State Dispute Settlement Controversy

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There is growing public controversy over investor-state dispute settlement (ISDS) provisions in bilateral investment treaties. This article explores these concerns, some of which have been brought to light particularly by the German government's recent opposition to ISDS provisions in the Canada-Europe Comprehensive Economic and Trade Agreement, or CETA. This opposition puts up a possible roadblock to ratification of the CETA by the European Union.

The article suggests two ways to possibly assuage some of these concerns. One is to reduce the *ad hoc* nature of the ISDS system by institutionalizing dispute settlement panels within a given treaty such as the NAFTA or the CETA. That could at least help ensure broader public awareness of and comfort with the dispute settlement process.

The second idea explored here is to add an appellate process to ISDS awards, perhaps employing existing bodies such as the International Centre for the Settlement of Investment Disputes (ICSID). That would ensure that alleged errors in arbitration awards could be adjudicated at a second, higher level. There appears to be a glimmer of possible consideration of this by Canada and the EU, and it is another idea worth actively pursuing.

Keywords: appellate process, Canada-Europe Comprehensive Economic and Trade Agreement, dispute settlement panels, International Centre for the Settlement of Investment Disputes, investor-state dispute settlement

The Controversy

On 26 July 2014, *Suddeutsche Zeitung*, an influential German daily, reported that the German government had come out against the investor-state dispute settlement (ISDS) provisions in the proposed Canada-EU Comprehensive Trade and Economic Agreement (CETA), some say threatening the demise of the entire deal. This report was picked up instantly by the Canadian media and widely covered by national news outlets.[1]

We don't have final word on the German position. Clarifications coming out of Berlin haven't completely disavowed these reports.[2] Internal German politics could be the root of much of this, including Chancellor Merkel's need to maintain her coalition with the Social Democrats, who tend to be hostile to ISDS on ideological grounds.

Whether this poses a serious threat to final implementation of the CETA remains to be seen. Notwithstanding the fuss over the German position, EU Commission President Barroso and Prime Minister Harper jointly "released" the final text of the agreement on 26 September 2014 in Ottawa and said that now that the CETA was finalized, the treaty was being sent for approval in the Canadian and European parliaments.[3]

Whatever comes about, differing views on ISDS continue to be intense, recalling the storm of public protests in the 1990s when the OECD embarked on a quest to design a Multilateral Agreement on Investment, or MAI, with investment dispute settlement provisions.[4] There was a huge public outcry against the MAI in many countries, eventually resulting in the OECD backing away from the entire exercise. France announced in October 1998 that it could not support the agreement, effectively preventing its adoption due to the OECD's consensus procedures.

The opposition then – and continuing in various quarters today – revolves around ISDS provisions that allow outside investors to institute binding arbitration proceedings against host governments, challenging laws, regulations or other measures that are alleged to breach treaty provisions and have deleterious impacts on their investments. Critics, often left-of-centre constituents but increasingly more moderate voices, contend these provisions encourage arbitration by well-funded foreign corporations and constrain – or intimidate – host governments from implementing policy measures designed for the broader public good.

These concerns are coming up in the Trans-Pacific Partnership (TPP) negotiations, where several participating governments have indicated growing unease over these binding arbitration mechanisms. Australia is the best example. It has backed away from ISDS in its bilateral treaties as a matter of policy, stating that it will only agree to the process on a case-by-case basis.[5] The recent Australia-Japan

Economic Partnership Agreement (EPA), for example, doesn't contain investment dispute settlement mechanisms, both countries agreeing to keep the matter under review to see whether ISDS provisions are warranted in the future.[6]

Opposition to ISDS has been gaining ground in the US-EU trade talks (the Trans-Atlantic Trade and Investment Partnership, or TTIP, negotiations), notably on the European side of the Atlantic and especially in the German media. Reports are full of German and other European politicians and advocacy groups coming out strongly against ISDS, arguing that local laws and remedies available in EU countries offer sufficient legal protection for U.S. investors.[7]

In April 2014, the German junior Economy Minister announced in the Bundestag that special investment arbitration provisions were not needed in the TTIP because U.S. investors in Europe have sufficient legal protection in local courts.[8] This position gained further traction following the recent election to the European Parliament of a number of left-leaning opponents of investor-state dispute settlement.[9]

Adding to the controversy, in a major speech on 22 October 2014, EU Commission President-elect Jean-Claude Junker said, commenting on ISDS, "My Commission will not accept that the jurisdiction of courts in the EU Member States be limited by special regimes for investor-state disputes."[10]

The recently announced German position on ISDS therefore shouldn't have come as a total surprise.

In an attempt to counter growing European opposition, USTR Michael Froman, in an earlier speech on 5 May 2014, conceded the European Union already had strong legal protections for foreign investors, but argued that a US-EU trade deal should still include investor-state dispute settlement in order to set a standard for future deals with countries where rule of law is weaker.[11]

Is this controversy over ISDS legitimate? Are these concerns worth taking seriously or is this some kind of short-term political gamesmanship? The following discussion attempts to dissect these issues and pose some ideas to at least ameliorate what appears to be growing disquiet over this aspect of international trade diplomacy. The issue is not whether foreign investment protection agreements in themselves are a good thing and an important policy instrument for Canada. Indeed they are. The issue is not whether the CETA is a critically important agreement to finalize and have enter into force. Indeed it is. Rather, the purpose here is to shed some light on the concerns over the dispute settlement process in these agreements and see whether the current policies, in Canada and elsewhere, can be adjusted to accommodate some of these concerns in ways that make sense. Whether such adjustments can be undertaken at

this late stage in the CETA exercise is doubtful. However, the door should be opened to a more enlightened public discussion on these issues.

Bilateral Investment Treaties and International Development

The UN Conference on Trade and Development says there are over 2,900 bilateral investment treaties around the world, proliferating significantly in the last decade or so.[12] These treaties have various names, but all generally mean the same thing. The United States calls them bilateral investment treaties, or BITs. Canada calls them foreign investment protection agreements, or FIPAs.[13] Others simply call them international investment agreements, or IIAs.

BITs, FIPAs and IIAs are widely considered to be a positive force in promoting international stability and in aiding foreign direct investment (FDI) from wealthier economies to the developing world. They have many positive attributes, assuring stability, non-discrimination, due process and "fair and equitable treatment" of investors by foreign governments. They prohibit expropriation without prompt and adequate compensation.

One of their signal features is that they give foreign investors the right to bring binding arbitration proceedings against host governments that fail to abide by these treaty obligations. ISDS rights are preferential in that they are available to investors from outside the country but not to local – i.e., national – investors, who are subject to the restrictions of domestic laws and regulations in this respect.[14] They are also exceptional in that arbitration awards are final and binding and, save in very limited circumstances, with no rights of appeal.[15]

Canada's first bilateral investment treaty was concluded with Poland in 1990. And there are many others, some in force and some signed but not yet ratified, like Canada's FIPA with China. All of these contain ISDS provisions, with the procedures becoming more refined – i.e., more detailed and complex – over time.[16] Together with these stand-alone FIPAs, investor protection regimes have been embedded in Canada's bilateral trade agreements like the North American Free Trade Agreement. They feature prominently in the CETA as well.[17]

As noted in the 2013 *UNCTAD World Investment Report,*

> The ISDS mechanism was designed to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap and flexible process, over which disputing parties would have considerable control. Given that investor complaints relate to the conduct of sovereign States, taking these disputes out of the domestic sphere of the State

> concerned provides aggrieved investors with an important guarantee that their claims will be adjudicated in an independent and impartial manner.[18]

The concept was fundamentally sound, at least as initially conceived. However, while ISDS mechanisms are designed to ensure proper treatment of foreign investors and to aid capital flows from industrialized countries to the developing world, controversy over ISDS is now posing unexpected challenges in international trade diplomacy.

The UNCTAD report goes on to state that the actual functioning of ISDS has led to concerns in various quarters about "systemic deficiencies" in the regime. The report lists a number of areas of concern: legitimacy and transparency in the ISDS process; consistency of arbitral decisions; lack of appeal mechanisms in cases of erroneous decisions; and independence and impartiality of arbitrators.[19]

Space does not permit a full discussion of the so-called "systemic deficiencies". Rather, the following paragraphs focus on a number of substantive and procedural issues that have arisen in the CETA context, largely due to the recent German kerfuffle, and suggest some ways they can be dealt with.

Legal Uncertainties

While the legal issues in investment disputes are complex and vary from case to case, they boil down to whether the host government and its agencies have lived up to treaty obligations, the main ones typically cast in terms of guaranteeing "fair and equitable treatment" and "full protection and security" to foreign investors and their investments. Other issues concern whether a given domestic measure impacts on a foreign investment to the extent it crosses the line and is "tantamount to" expropriation.[20]

These obligations, in various formulations, are found in hundreds of IIAs around the world. The NAFTA broke new ground and was actually the first trade agreement to contain investment protection provisions. A succession of NAFTA arbitrations revealed, however, that concepts of "fair and equitable treatment" (or FET) and "full protection and security" are elastic and can be interpreted various ways, depending on the case and depending on the arbitrators that are involved.[21]

In order to try to bring some discipline to the FET concept, the three NAFTA governments issued an interpretation bulletin several years ago that said that, as the parties to the treaty, they considered the term to refer to the minimum standard of treatment accepted under customary international law.[22] While that clarification helped, it didn't resolve all of the problems because of ongoing uncertainty over what international law actually recognized as the FET standard. For many years, that

standard was considered to be expressed in the famous Neer case, decided in 1926, which stated that governmental action had to be egregious in the extreme to cross the line. The case involved the murder of a U.S. person in Mexico, and the Mixed Claims Commission appointed to decide whether Mexico owed compensation said in a well-cited passage that,

> The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[23]

Arbitrations in recent years have retrenched from Neer, recognizing that the international law standard has evolved since the early part of the 20th century. In numerous awards, both under the NAFTA and otherwise, arbitrators have held governments to account for actions that were far less egregious than expressed in the Neer decision.[24] These decisions held that governments owned a more contemporary obligation, one of ensuring fairness, due process, non-arbitrariness and transparency, even if the measures were less outrageous than the Neer standard.

This retrenchment was not universally recognized, however. In Glamis Gold v. United States, for example, a recent NAFTA tribunal dismissed claims by a Canadian company for breach of fair and equitable treatment, rejecting arguments that the standard had evolved since Neer and upholding the "egregious" and "shocking" standard as the international law norm.[25] That decision has resulted in widespread criticism in business and academic circles.

Whatever the merits of the different arguments, the debate over Neer and the correct interpretation of FET in customary international law illustrates the problem of shifting jurisprudence of ISDS tribunals, adding to the unease in some quarters over this aspect of the process.

In the CETA negotiations, Canada and the Europeans have attempted to deal with this problem by setting down more precisely the content of the FET obligation. The final text of the treaty applies the standard formulation of "fair and equitable treatment" as an over-riding treaty obligation. Article X.9 then goes on to add precision, stating that a party breaches that obligation where a measure or series of measures constitutes (a) a denial of justice in criminal, civil and administrative proceedings; (b) breach of due process, including failure of transparency in these proceedings; (c) manifest arbitrariness; (d) "targeted discrimination on manifestly wrongful grounds", such as race, gender or religion; and (e) abusive treatment of investors, such as coercion, duress and harassment.

The CETA goes on to provide other elements that further narrow down the elusive scope of FET, including reviews by Canada and the EU on the content of FET with possible interpretative recommendations.[26]

Some experts, including U.S. business groups, have criticised all of this. In examining progress in the US-EU TTIP negotiations, they argue that further defining FET will circumscribe the recourse available to investors when their economic interests have been trampled by nasty host governments.[27] This view runs up against the objective of those who want to protect the freedom of governments to legislate for the common good, even if foreign investors are directly or indirectly impacted. It illustrates the divergence in the debate on the value of ISDS in both the CETA and TTIP contexts.[28]

The purpose of this article is not to analyze the FET concept or the merits or shortcomings of the wording in the final CETA text. That exercise will unfold in due course and it is anticipated that there will be an endless flow of legal analysis on the subject. However, with the precision added to the concept of fair and equitable treatment as indicated above, it will be a major advance over the more open-ended wording in the NAFTA and in pre-existing IIAs. While only the future will tell, these ingredients should help to avoid the back-and-forth experience over the Neer doctrine and limit the debate over the state of customary international law on the required standard.

Lack of Institutional Permanency

Leaving aside the substantive issues surrounding FET, some procedural issues identified by UNCTAD have come to the fore in the controversy unleashed by the German views on ISDS. One concern referenced in the UNCTAD document is that investor-state arbitrations are *ad hoc* and inherently impermanent, with panels appointed to hear a single case, often made up of experts from distant places but who may not know much about the parties or the government involved or have a sensitivity to the context of a given dispute.

While some of that concern may be somewhat overblown, the fact is that, unlike judges on domestic courts who are part of the local community and essentially known quantities, ISDS arbitrators, frequently deciding public issues of great importance, are strangers from afar who then fade back to their own countries and their own callings when the proceedings conclude.

Under most investment protection agreements, including the NAFTA and the CETA, arbitration panels are to be composed of three members, one from each side and a third chosen by agreement or through appointment under the International

Centre for the Settlement of Investment Disputes.[29] The process isn't entirely arbitrary in this respect. There are well-known experts available for these panels under the ICSID roster, some of whom, but not all, have fine reputations as arbitrators.

However, the appointment process means that different panels with different members sit on successive disputes involving different claimants but conducted under the same treaty (like the NAFTA). Panel chairs are typically composed of persons from neutral countries who not only may be unknown in local legal circles but who also appear totally anonymous to the general public. This contributes to a degree of unease over the nature of the process.

It should be noted that use of panels composed in this way has been going on for decades and is largely a tried-and-true practice that, generally speaking, has resulted in non-biased panelists of high expertise. The broader policy concern, nonetheless, is that panels are deciding issues of great importance, both to the claimant investor and to the country whose measures are being challenged. The temporary nature of these panels can impact on perceptions of legitimacy and confidence, as UNCTAD puts it, as to whether three individuals, appointed on an ad hoc basis, can be entrusted with adjudication of investment disputes that directly involve critical public-interest measures enacted by governments.

Lack of Appeal Procedures

Another point garnering increased attention is the absence of an opportunity to appeal panel decisions. In the quest to make ISDS efficient, governments early on developed an investment dispute settlement model that is final and binding. This finality in one sense is important for both the investor and the government concerned, since the reliability and assurance of enforcement of arbitration awards is vital to the integrity of the process. But what if arbitrators err on a key legal or factual issue? As conceived at present, there is no appeal from an arbitration award.[30]

This is to be contrasted with the dispute settlement system under the World Trade Organization Agreement, which provides for appeals from panel decisions on matters of law to the WTO Appellate Body. While the WTO system and investment arbitration are different animals in that the WTO is an international organization with a permanent structure and institutional framework, the issue is nevertheless raised as to why a given trade dispute can go to appeal whereas an investment dispute, which may entail issues of equal importance, cannot.

To address this concern, the CETA provides for the establishment of a Canada-EU Committee on Services and Investment and for consultations on whether an appellate mechanism could be created. The future mandate of an appellate mechanism would be

to review panel decisions on points of law, and the text goes into some detail on the role and jurisdiction of any such mechanism.[31] However, agreement on such a body is very much in the future and fraught with many uncertainties, leaving the possibility of an appeal process in the CETA very much up in the air.

It is noteworthy that the International Centre for the Settlement of Investment Disputes – now headed by a Canadian – has also been looking at this matter. According to reports, the ICSID will be launching a new effort this year to consider changes in its procedures to improve transparency and consistency, including the possibility of adding an appellate mechanism to its structure.[32]

Moving Forward – Possible Approaches

There is no doubt that ISDS is a central element in international commercial relations and, notwithstanding the criticisms and shortcomings addressed above, remains an important tool for both investors and host countries. There is no suggestion that the almost 3,000 IIAs with investor-state arbitration provisions are somehow wrong in enshrining these mechanisms. And there is no suggestion that ISDS should, as a general proposition, be abandoned in future IIAs, either by Canada or by other industrialized states.

That being said, the controversy bubbling in the US-EU trans-Atlantic negotiations, and which recently erupted in the CETA context, has focused attention on issues that have not been given adequate public debate, certainly not in the United States or in Canada. In a sense the over-arching issue is whether ISDS as a process is indispensable in all modern trade and economic agreements. In the case of Japan and Australia, clearly it is. The German position referred to at the outset of this article is that ISDS is not needed among highly developed, industrial economies. In the TTIP and CETA debates, as well as the TPP, the subject remains under review as a hot topic.

The other points that have emerged in public discussion concern the elasticity of key ISDS obligations. One package of ideas employed in the Canada-EU negotiations is to define more precisely the content of standard terms in these treaties, notably “fair and equitable treatment” and “full protection and security”. This is a key improvement, ensuring better uniformity and consistency in arbitration awards and avoiding the situation that arose in the Glamis Gold case.

The other areas addressed above concern two main procedural areas that are critical to improving and maintaining public respect for the integrity of the ISDS system.

The first is the ad hoc nature of the system. It is not beyond the realm of the possible to remove some of these impermanent elements by institutionalizing dispute

settlement panels within a given treaty such as the NAFTA or the CETA, as two examples. A permanent tribunal, where members would be arm's length from the parties and with security of tenure, could be used to deal with all disputes under the treaty, not just investment-related cases. It is beyond the scope of this article to examine all the many details in this regard. The point here is that an institutionalised panel system, including in the CETA context, is an idea to be explored.

The second area is the lack of an appeal process, a shortcoming that is gaining increasing attention beyond legal-academic circles. It is possible to envisage an appellate process, perhaps employing existing bodies such as the ICSID. Indications are that this idea has reached some degree of maturity in the CETA negotiations. While not minimizing the challenges in this regard, the fact that there appears to be active consideration of this point in the CETA context and within the ICSID is an extraordinarily noteworthy development.

The final word is that solutions to all this are not out of reach. They will require some creative ingenuity and international consensus-building, but there are answers. At the very least, we should be actively discussing these issues and testing, even at this late stage and even with 3,200 of these investment agreements in force, whether the old paradigm, including Canada's current FIPA and CETA model, fully serves the broader public interest.

Endnotes

[1] "Canada-EU free trade deal to be rejected by Germany says report," Thomson Reuters, 26 July 2014. This was echoed by several other media outlets, including the CBC, the *Globe and Mail* and the *National Post*. See, for example, "Canada and EU may have to return to bargaining table, experts suggest," *Globe and Mail*, 28 July 2014.

[2] Following this story, the German ambassador Werner Wnendt told host Evan Solomon during an interview on CBC News Network's Power & Politics, "I think both sides want to go ahead with this agreement, it is in our mutual interest.... I am very confident we will succeed in doing so." Wnendt admits the German government has concerns about ISDS, but says negotiations are about compromise from both sides. "No it isn't [a deal breaker] — I think this is something that needs to be discussed," he added. "EU trade deal troubles denied by Canadian, German officials," CBC News, 28 July 2018: www.cbc.ca.

[3] Unusually, the text of the CETA was not actually signed by either side. A joint declaration was issued instead, approving the text. http://www.cbc.ca/news/politics/stephen-harper-confident-as-final-eu-trade-deal-released-1.2778715.

[4] The aims of the OECD initiative were to create more consistent, secure and stable investment conditions and to regulate investment in a more uniform, transparent and enforceable manner. Although the agreement was to be negotiated between the member states, the intention was to have an open agreement to which non-OECD members could accede on a negotiated basis. Picciotto, S., "Linkages in International Investment Regulations: the Anatomies of the Draft Multilateral Agreement on Investment" (1998) Vol. 19 (3) *University of Pennsylvania Journal*

of International Economic Law, pp. 731-768. A very good history of the MAI exercise, its genesis and the nature of widespread civil society opposition is found in Wikipedia under the keywords "investment arbitration".

[5] Cubitt, B. and French, T., "Potential Investor-State Dispute Settlement Provisions in Trans-Pacific Partnership Agreement – A Change in Policy for Australia" (2014). www.kluwerarbitrationblog.com

[6] "Australia-Japan Bilateral Contains Review Clause Relevant to TPP," Vol. 32 *Inside U.S. Trade*, 18 July 2014. On the other hand, reflecting a pragmatic, case-by-case approach, the 2014 Australia–South Korea free trade agreement contains ISDS provisions: https://www.dfat.gov.au/fta/kafta.

[7] There have been many comments on the ISDS controversy in the TPP and TTIP contexts. See for example, Krist, W., "ISDS: A Sticky Issue in Both TPP and TTIP," 31 July 2014, Wilson Center, Washington, D.C.: http://americastradepolicy.com/.

[8] "Germany Reverses its Support for Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership," Hogan Lovells US LLP Blog, posted 1 April 2014.

[9] "New EU Parliament Trade Chair Pushing for Scaled-Back TTIP Deal in 2015," *Inside U.S. Trade, supra.* In a July 11 telephone interview, *Bernd* Lange said he believes there is support within his Socialists & Democrats (S&D) Group and at least some European Union member states for a TTIP deal that jettisons controversial elements like investor-state dispute settlement.

[10] http://europa.eu/rapid/press-release_SPEECH-14-705_en.htm.

[11] "Froman Says ISDS Needed in TTIP to Set Standard for Other Agreements," *Inside U.S. Trade*, 5 May 2014.

[12] *World Investment Report 2013*, Geneva 2013.

[13] A full review of Canada's policy and the development of the current FIPA model is found on the DFATD web-site at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx.

[14] An excellent review of the evolution of Canada's FIPA model and the legal ingredients (and policy issues) in these treaties is contained in a soon-to-be published paper by Andrew Newcombe entitled "Canadian Investment Treaty Policy for the 21st Century," presented at a conference sponsored by Canada's Institute for Research on Public Policy, 16-17 June 2014. Newcombe's tentative conclusions are that these treaties are an important Canadian policy tool, helping to promote a coherent level of global treatment of Canadian foreign direct investment among different countries.

[15] There are, however, very narrow grounds for seeking annulment of an award for such things as corruption or manifestly exceeding the tribunal's powers under various investment treaties, such as the 1965 Convention on the Settlement of International Investment Disputes (ICSID), the ICSID Additional Facility, the UN Commission on International Trade Law (UNCITRAL) Rules and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, in practical terms, these reviews are highly exceptional and the bar for success is extremely high. The point is that there is no formal appeal mechanism available on matters of fact or law.

[16] The Canada-Poland FIPA has a fairly rudimentary ISDS regime, simply providing that if an investment dispute can't be amicably resolved, it can be referred by the investor to arbitration under the UNCITRAL rules. Starting in 1991 with the Canada-USSR investment agreement, Canada's FIPAs became progressively more robust and detailed. See: DFATD web-site, *supra.*

[17] *Canada-European Union Comprehensive Economic and Trade Agreement, Technical Summary of Final Negotiated Outcomes*, pp. 14-15. As stated in that summary, provisions on ISDS contain a whole new series of improvements over NAFTA Chapter 11, including "clear and detailed rules of procedure to promote the efficient resolution of investor-state disputes."

[18] *World Investment Report, supra*, pp. 111-112.

[19] *Ibid*., p. 112.
[20] These obligations are enshrined in Chapter 11 of the NAFTA and have been incorporated into the CETA with additional clarifications that attempt to remove some of the interpretative uncertainties in the NAFTA, such as those arising in the *Glamis Gold* case referred to below.
[21] There is a vast literature on the FET concept, far too large to attempt to list here. For a good summary of the concept and the surrounding legal and policy issues, see *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/3.
[22] NAFTA Free Trade Commission, 21 July 2001. The point was that the three governments did not intend that NAFTA panels apply a free-ranging, equitable concept of fair and equitable treatment to fit the circumstances of the case, but rather that they be restricted to the accepted international law concept of the term.
[23] *US v. Mexico* in the so-called *Neer* arbitration: (1926) 4 R.I.A.A. 60.
[24] OECD, *op cit.* See also: Laird, Ian, et al., "International Investment Law and Arbitration: 2012 in Review," in *Yearbook on International Investment Law & Policy* 2012-2013, p. 109.
[25] *Glamis Gold, Ltd. v. United States* (ICSID), Award, 8 June 2009.
[26] As well, Article X.9, paragraph 4, provides that in applying FET, a tribunal may take into account whether a host government made specific representations to an investor to induce an investment that created a "legitimate expectation" upon which the investor relied. Article X.9, paragraph 5, says that the term "full protection and security" means "physical security" of investors and covered investments.
[27] "U.S. Investment Protection Advocates Wary of Possible TTIP Outcome," *Inside U.S. Trade*, 26 June 2014. The United States has historically been reluctant to endorse a closed-list or even an illustrative-list approach, because it views that as limiting the scope of investor protections and not being as adaptable to the range of possible claims: "CETA Investment Developments Underline Persisting U.S., EU Differences," *Inside U.S. Trade*, 11 April 2014.
[28] It is worth noting that the CETA adds a number of provisions that expressly reinforce *bona fide* regulatory discretion of states on matters that are not subject to arbitration. For example, Annex X.11 under the Investment Chapter provides,

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

[29] The Centre is established by the International Convention for the Settlement of Investment Disputes under the auspices of the World Bank in Washington, DC. The Centre acts as an organizing agency in international investment arbitrations where each side consents to use the ICSID facility. According to the information available, the CETA follows the NAFTA approach and will allow the parties the option of instituting proceedings under either the UNCITRAL rules or the ICSID.
[30] The only "appeal" is the right to seek recourse to the local courts where an arbitration panel has manifestly exceeded its authority or has failed to accord the parties a fair and impartial hearing, grounds that are extremely onerous and thus seldom available.
[31] Article X:42 of the leaked text is vague in this respect, referring only to consultations on "whether, and if so, under what conditions, an appellate mechanism could be created to review, on points of law, awards rendered by tribunal under this Section…."
[32] Peterson, L. E., "Ten Years after Last Major Reforms, ICSID to Float New Amendments, Including Transparency Improvements and Possibly Appeals Process," *Investment Arbitration Reporter*, 3 July 2014: www.iareporter.com.