



Comments on Investment Protection under CETA

Nils Meyer-Ohlendorf Ecologic Institute

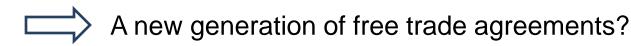




Introduction

"On investment, the agreement establishes a system that sets a new standard for investor-to-state dispute settlement procedures. We are well aware of the concerns that exist. This agreement directly addresses all the concerns that have emerged so far."

De Gucht, European Commissioner for Trade, 16 September 2014







Washington DC

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General remarks

- Canada and the EU have developed legal systems and high standards for investment protection
- International and European human rights law:
 - Discrimination
 - Access of justice
 - Expropriation

Potential to distort competition: Vattenfall can file claim, unlike RWE



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Fair and equitable treatment (FET) – Article X.9

- Each Party shall accord [...] fair and equitable treatment : Denial of justice; fundamental breach of due process, including a fundamental breach of transparency, [...] targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or breach of any further elements adopted by the Parties.
- a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied [...], but that the Party subsequently frustrated.
 - Standard wording, relatively narrow definition of FET but using vague terminology
 - Opening clause: FET could become a moving target
 - "specific representation" : vague and great practical relevance.



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Expropriation – Article X.11

- Neither Party may [...] expropriate a covered investment either directly, or indirectly [...],
 except: for a public purpose, due process; non-discriminatory, [...] compensation.
- Annex X.11 further clarification:
 - the economic impact, the duration, reasonable investment-backed expectations; and the character of the measure [...].
 - Proportionality of measure
- Standard wording, exclusion of measures "to protect legitimate public welfare objectives"; exception for "manifestly excessive measures" (opening clause?)
- CETA is a better text than the traditional BIT





Investor-State Dispute Settlement (ISDS) I

- Conflict of interests: 12 arbitrators have been involved in
 158 cases out of 263 ISCID tribunals
- International Bar Association Guidelines on Conflict of Interest in International Arbitration (IBAGCI)) included in CETA: positive
- Arbitration still possible despite formal counsel to a party



Investor-State Dispute Settlement (ISDS) II

Applicable law: CETA as interpreted in accordance with [...] international law [...] = **natural bias** towards investment protection.

Transparency:

- hearings are public in general, an important improvement
- Numerous documents must be made public
- National transparency rules prevail
- Appeal:
 - no CETA appeal system, but consultation on appellate mechanism
 - no exhaustion of local remedies



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Conclusions

- Investment Protection under CETA is not the beginning of a new era but modelled after existing treaties
- Key CETA investment rules largely the same: FET, expropriation
- Some **improvements** in ISDS
- More detailed comments on CETA forthcoming (partly funded by Atlantic Future, EU FP 7 Research Project)





Thank you for listening.

Nils Meyer-Ohlendorf

Ecologic Institute, Pfalzburger Str. 43-44, D-10717 Berlin Tel. +49 (30) 86880-0, Fax +49 (30) 86880-100

nils.meyer-ohlendorf@ecologic.eu

www.ecologic.eu