# A Uniform European Investment Policy?: The unwritten EU Model BIT

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#### **Abstract**

With the entry into force of the Lisbon Treaty the EU has acquired new competences in the area of international investment. As the world's biggest investor and recipient of foreign direct investment, the EU's investment policy will have considerable impact on the future shape of international investment law. This article analyses the expected content of EU investment agreements including the scope of application, substantive standards, and dispute settlement by scrutinizing available EU documents and existing scholarship. As a special point of reference, the recently concluded investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is considered for possible wording and structure of future EU investment agreements.

**Keywords:** European Union, model BIT, investment law, transatlantic trade and investment partnership, EU-Canada Free Trade Agreement

#### 1 Introduction

With the entry into force of the Lisbon Treaty [1] in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment. The EU is hence expressly entitled to negotiate and conclude international investment agreements (IIAs) or free trade agreements (FTAs) including chapters on investment comparable to those concluded by EU Member States individually before that. Thus, the EU's comprehensive investment competence marks the beginning of a unified EU approach toward international investment law. This will undoubtly have a considerable impact on the future shape of international investment law as the EU is the world's biggest investor and recipient of foreign direct investments. [2]

<sup>&</sup>lt;sup>19</sup> Article 207(1) TFEU provides: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." [emphasis added]; for a discussion of the precise scope of the new investment competence see e.g. Lentner, G.M. (*forthcoming* 2014). The Scope of the EU's Investment Competence after Lisbon.

<sup>&</sup>lt;sup>20</sup> According to Article 3(1) TFEU, the common commercial policy of the European Union, including foreign direct investment, is an area of exclusive EU competence.

Whereas the EU Commission clearly indicated that a Model bilateral investment agreement (BIT) will not be adopted,[3] the significance of the EU's investment policy for the world economy necessitates a more comprehensive look at the expected content of such agreements to be concluded by the EU.

Against this backdrop, this article presents and analyses what has been called the invisible or unwritten EU Model BIT.[4] The available EU documents and existing scholarship is being taken into account. As a special point of reference, the recently concluded investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[5] is considered for possible wording and structure of future EU BITs/IIAs.

Firstly, the scope of application of the EU Model BIT is addressed after which the core standards of treatment of foreign investment (expropriation, fair and equitable treatment, national and most favoured nation treatment, umbrella and transfer clauses) are examined. In conclusion, procedural issues are addressed with special emphasis on Investor-State Dispute Settlement and policy issues discussed in light of the presented analysis.

# The scope of application of the EU Model BIT

Defining the material and personal scope is one of the most important issues in international investment law. The definitions adopted in the CETA text appear to be indicative of the unwritten EU Model BIT adopting a broad definition of both terms.[6] Uncertainty regarding what kind of investors and which types of investments are being protected has led to divergent arbitral jurisprudence and heavily-criticised treaty and forum shopping.[7] For these reasons, Article X.1 of the CETA Investment Chapter seeks to narrow down the general scope of application by excluding certain industry sectors (aviation), which is, as *Bungenberg* points out, rather atypical for IIAs. It further excludes 'activities carried out in the exercise of governmental authority' from the general scope of application, [8] which is thematically misplaced. [9]

Turning to the definition of the term 'investment', the CETA investment chapter defines 'investment' as "[e]very kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources,

the expectation of gain or profit, or the assumption of risk."[10] It then provides for a demonstrative list of forms of investments typically included in BITs. This definition resembles the *Salini* criteria without including the requirement of 'contribution to the development of the host State'. [11] Thus, it is clear that the EU favours the asset-based approach with an open definition rather than adopting an exhaustive list of covered investments.

With regard to the personal scope, 'investor' is defined as "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party." [12] It is then further elaborated that the CETA text applies the dominant and effective nationality test in case of dual citizenship of natural persons, thus only providing jurisdiction on the basis of the more 'effective' nationality. Defining juridical persons, the CETA uses the country of organisation criterion, leaving the home state the discretion to define which legal persons should or should not enjoy protection. With the clear requirement demanding "substantial business activities in the territory of the Party under whose law it is constituted or organized", the CETA text ensures that treaty shopping via shell companies will not be protected under EU IIAs.[13] State-owned enterprises (SOEs) and sovereign wealth funds (SWFs) will be met with some transparency obligations to determine whether the state affiliated entity in question acted on behalf of the state making a political or economic consideration. [14]

#### Admission/Market Access

Liberalisation is a key objective of the EU's international investment policy. [15] Before gaining a comprehensive investment competence, past investment related agreements of the EC/EU were limited to admission, in which a GATS-inspired market access approach was adopted. [16]

investment power The new EU's now covers not just investment access/admission questions, but rather comprises all standards of investment protection included in IIAs or **BITs** respectively (including expropriation).[17] admission/market access is generally not regulated by BITs, [18] the draft CETA text extends – in line with the EU's liberalisation objective its national treatment obligation to establishment, acquisition and expansion of investments, [19] coupled with a negative list of sectoral reservations and exceptions.[20] It also includes a comprehensive prohibition of performance requirements.[21]

Standards of treatment in the invisible EU Model BIT

#### **Expropriation**

The expropriation provision included in the CETA text follows largely a standard wording found in various EU member state's BITs. As *Reinisch* points out however, "EU negotiators could not avoid some degree of 'NAFTA contamination,'"[22] meaning that Annex X.11 of the CETA text provides for clarification which "reproduces the shared understandings already expressed in the Canadian Model BIT 2004 and the US Model BIT 2012".[23] Accordingly, a finding of indirect expropriation requires a case-by-case, fact-based inquiry and provides a number of relevant factors, such as the economic impact of the measure, its duration, the extent to which it interferes with "distinct, reasonable investment-backed expectations," and the character of the measure or series of measures, notably their object, context and intent, in order to determine whether specific measures constitute indirect expropriation.[24] The requirement of intent was particularly criticized by *Kriebaum*, who correctly points out that this would impose an almost impossible burden of proof on the investor.[25] This should not be included in an EU Model BIT.

Furthermore a clarification is included that the right to regulate should prevail over the economic impact of state measures when they protect the public interest in a nondiscriminatory way. [26]

# Fair and Equitable Treatment

The fair and equitable treatment (FET) standard is of highest practical relevance of all protection standards. [27] In the CETA text, the content of this standard is clarified by naming the following measures that constitute a breach of FET obligations:

Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment [28]

A determination whether a measure or a series of measures constitute a breach of FET obligations should 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 in deciding to make or maintain the covered investment, but that the Party subsequently frustrated". [29]

While such clarifications of the FET standard in EU agreements is welcome, in an overall assessment *Kriebaum* notes that "by adding qualifiers to some of the FET elements the CETA norm on FET creates new uncertainties, rather than reducing them." [30]

# Non-discrimination, national treatment and MFN

The non-discrimination standards, national treatment and MFN of the CETA text, provides interesting insights for future EU IIAs. As evidenced from the CETA text, the EU Model BIT, as it stands, will most probably reflect EU Member States' BIT practice as regards national treatment and MFN clauses. [31] The exception being that, as noted above, the CETA text extends the scope of national treatment obligation to establishment, acquisition and expansion of investments to ensure coverage of market access/admission. [32]

Article X.6 on national treatment provides that:

Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

It is further clarified in paragraph 2 that this treatment means "[...] treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors." As *Tzanakopoulos* points out, while "arguably, a 'no less favouarable' treatment obligation means that the protected investor and/or their investment may be treated better than a national or a third state investor and/or their investment in like situations," this will not be of significance in practice. [33]

An important clarification is contained in Article X.7(4), which stipulates that MFN treatment does not cover investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. [34]

#### **Umbrella and Transfer Clauses**

The inclusion of an umbrella clause in future EU IIAs remains contested. This stems from the fact that EU Member States do not endorse a uniform approach in that regard. [35] While proposed in the draft text by the EU, the CETA text as it stands does not contain an umbrella clause.[36] However, according to the negotiation directive issued by the Council, the negotiations with the US regarding the TTIP, aims at its inclusion. [37] It is thus likely that the (unwritten) Model BIT will include such a clause.

In contrast to umbrella clauses, transfer provisions are included in all EU Member States BITs.[38] They grant investors the free transfer and conversion of funds related to their investments. [39] Contested remains the exact scope of exceptions to this rule. The CETA text contains a number of exceptions, such as provisions exempting measures relating to bankruptcy, insolvency, protection of the rights of creditors, trading in securities, criminal offences and administrative and adjudicatory proceedings.[40] This will satisfy the Commission's concerns to restrict the free transfer obligations when adopting restrictive measures under Articles 66 and 215 TFEU. [41]

# 3 Investor-State Dispute Settlement

Dispute Settlement fulfils a crucial function in effectively securing the substantive protections granted by International Investment Agreements. [42] It must be recalled that basically all BITs of EU Member States include ISDS,[43] and that the EU Model BIT should aim to provide for an effective investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement. [44]

CETA as well as the recently concluded EU-Singapore Free Trade Agreement, provides for investor-state dispute settlement (ISDS).[45] However, in the context of the TTIP negotiations between US and the EU, this mechanism has attracted considerable criticism. [46] Albeit included in the negotiation directive,[47] Reports point to the potential exclusion of ISDS from the TTIP.[48] It is thus submitted here that another possibility to ensure effective enforcement of investor rights modelled after the WTO's

Dispute Settlement should be considered to address the legitimate concerns of critics of the current ISDS mechanism.

#### 4.Conclusion

The conclusion of the first EU investment chapter included in the Canada-EU trade agreement provides interesting insights for the anatomy of the (unwritten) EU Model BIT. Generally speaking, it builds on existing 'best practices' of its Member States' BITs, but adds a number of important features and further details regarding the exact meaning of certain substantive standards. Herein the influence of NAFTA or the US/Canada Model BITs cannot be denied. As *Lavranos* notes, CETA as well as the Singapore FAT largely follow NAFTA and the 2012 US Model BIT. [49] The same is true with respect to the investment chapters of the FATs negotiated with Japan, US, India and China. It remains to be seen how these provisions are applied in practice by investment tribunals and whether they then actually present "[a] new start for investment and investment protection," striking "a better balance between the right of states to regulate and the need to protect investors," [51] as well as for an improved investment arbitration system in international investment law. [52]

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- [2] European Commission (2014). Trade and Investment 2014, p. 9.
- [3] See European Commission (2010). Towards a comprehensive European international investment, COM (2010)343 final, pp. 4, 6 available at <trade.ec.europa.eu/doclib/docs/2010/july/tradoc\_146307.pdf> (accessed 15 October 2014).
- [4] See the special issue of the Journal of World Investment & Trade 15 (2014).
- [5] Consolidated CETA Text of 26 September 2014 available at: <a href="http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\_152806.pdf">http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\_152806.pdf</a> (accessed 15 October 2014) [hereinafter CETA text].
- [6] See also, Hoffmeister, F. and Alexandru, G. (2014). A First Glimpse of Light on the Emerging Invisible EU Model BIT. Journal of World Investment & Trade 15, pp. 383-384.
- [7] Bungenberg, M. (2014). The Scope of Application of EU (Model) Investment Agreements. Journal of World Investment & Trade 15, p. 403.
- [8] CETA Text X.1 2.A
- [9] Cf Bungenberg, supra note 9, p. 405.
- [10] CETA Text X.3.
- [11] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.
- [12] CETA Text X.3.
- [13] See further Hoffmeister, supra note 8, p. 379; Bungenberg, supra note 9, p. 405;
- [14] Bungenberg, supra note 9, p. 413.

- [15] Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013.
- [16] Tietje, Ch. (2009). Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon. Beiträge zum transnationalen Wirtschaftsrecht 83, p. 14.
- [17] COM (2012) 335 final, 3; this assertion has been challenged particularly in connection with expropriation, see e.g. Reinisch, A. (2014). The EU on the Investment Path Quo Vadis Europe? The Future of EU BITs and other Investment Agreements. Santa Clara Journal of International Law 12(1), p. 131; Tietje, *supra* note 18, p. 14; Braun, T.R. (2010). Für einen komplementären, europäischen Investitionsschutz, in: Bungenberg *et al* (eds) Internationaler Investitionsschutz und Europarecht, p. 191; for a discussion of different interpretations see Shan, W. and Zhang, S. (2011). The Treaty of Lisbon: Half Way toward a Common Investment Policy. European Journal of International Law 21(4), p. 1061; Sven, J. and Erik, L. (2009). Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon. Beiträge zum Transnationalen Wirtschaftsrecht, p. 15.
- [18] See e.g. Dolzer, R. and Schreuer, Ch. (2012). Principles of International Investment Law, 89ff; on the other hand, a trend towards pre-establishment national treatment can be witnessed in investment agreements negotiations worldwide cf Shan, W. and Zhang, S. (2014). Market Access Provisions in the Potential EU Model BIT: Towards a "Global bit 2.0"?. Journal of World Investment & Trade 15, p. 452, with further references.
- [19] Article X.6 National Treatment CETA text.
- [20] Shan and Zhang, supra note 20, pp. 444-447.
- [21] Article X.5.
- [22] Reinisch, A. (2014). Putting the Pieces Together ... an EU Model BIT?. Journal of World Investment & Trade 15, p. 690.
- [23] Ibid 691.
- [24] Ibid.
- [25] Kriebaum, U. (2014). FET and Expropriation in the (invisible) EU Model BIT. Journal of World Investment & Trade 15, p, 465.
- [26] Reinisch, supra note 24, p. 691.
- [27] Dolzer and Schreuer, supra note 20, p. 130.
- [28] Article X.9 CETA Text.
- [29] Ibid.
- [30] Kriebaum, supra note 27, p. 482.
- [31] Cf Tzanakopoulos, A. (2014). National Treatment and MFN in the (Invisible) EU Model BIT. Journal of World Investment & Trade 15, p. 505.
- [32] See above 1.2.
- [33] Tzanakopoulos, supra note 33, p. 498.
- [34] As *Reinisch* points out, this clarification stems from uncertainty over whether an MFN clause should be able to invoke more favourable procedural, even jurisdictional provisions in a third country BIT, see Reinisch, *supra* note 24, p. 696.
- [35] See further De Luca, A. (2014). Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT. Journal of World Investment & Trade 15, p. 521.
- [36] Canada has never included an umbrella clauses in its BITs, see OECD, Working Papers on International Investment No. 2006/3, Interpretation of the Umbrella Clause in Investment Agreements, October 2006, 6.
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- [38] de Luca, supra note 37, p. 525.
- [39] ibid 526.
- [40] Article X.12 CETA text.
- [41] See Reinisch, supra note 24, p. 700.
- [42] Reinisch, supra note 19, p. 132.
- [43] Hoffmeister, supra note 8, p. 396.
- [44] Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013; see further on ISDS and the European Union e.g. Mazzini, G. (2013). The European Union and Investor-State Arbitration: A work in progress. American Review of International Arbitration 24, pp. 611-647.

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