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The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA

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ABSTRACT: The European Union's approach to ISDS is examined based on the available textual evidence in proposed or negotiated trade agreements. The evaluation focuses on three criteria: judicial independence, procedural fairness, and balance in the allocation of rights and responsibilities. Each criteria arises from concerns about the powerful and far-reaching arbitration mechanism at the core of ISDS and its role to decide the legality of sovereign conduct and allocate public funds to foreign investors. The main conclusions are that, in pursuing a massive expansion of ISDS in new trade agreements, the European Union has taken only partial steps on the issue of independence, has signalled but not carried through with steps on the issue of procedural fairness, and has not taken steps to balance investor rights with investor responsibilities or to ensure respect for the role of domestic courts.

KEYWORDS: *Foreign Investment; International Arbitration; Trade Negotiations; European Union*.

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1. INTRODUCTION

Investor-state dispute settlement (hereinafter ISDS) is an exceptionally powerful form of international adjudication that regulates and disciplines the legislatures, governments, and courts of countries for the main purpose of protecting foreign investors. Treaties that allow for ISDS claims against countries do so based on broadly-framed rights, without actionable responsibilities, for foreign investors that are enforceable in non-judicial arbitration processes. These processes are subject to limited judicial review (in a jurisdiction usually chosen by the ISDS arbitrators) or to limited non-judicial review by three arbitrators selected for each case by the World Bank President or another default appointing authority. ISDS tribunals are especially powerful because their awards and other decisions are enforceable directly against assets of the losing country located in other countries; in this respect, they are more powerful than other adjudicative forums, including domestic and international courts, that involve the review of sovereigns.[1]

To date, ISDS has been used to order public compensation mostly for very large multinational companies and very wealthy individuals in a range of regulatory areas. Compensation has been ordered by ISDS tribunals both for general and for specific decisions taken by countries' legislatures, governments, or courts.[2] The exclusive access to ISDS that is given to foreign investors, especially companies and individuals more able to finance expensive ISDS litigation, gives such investors a unique ability to influence sovereign decision-making in their favour at the expense of those with conflicting interests and no corresponding access to ISDS.

ISDS was developed in the late 1960s and 1970s for the resolution of foreign investor disputes regarding relations between developed and either developing or transition countries or, alternatively, among developing or transition countries. In contrast, ISDS has been agreed rarely among developed countries, whose judicial systems have a stronger claim than ISDS

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[1] *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 117-119 (2007).
[2] *See* GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS 52-54, 82-89 (2013).

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to attributes of public accountability, judicial independence, and procedural fairness. Since the expansion and exploding use of ISDS in the 1990s, only two contexts for ISDS have involved relations among developed countries. The first is between Canada and the United States under the North American Free Trade Agreement (hereinafter NAFTA).[3] The second, limited to the energy sector, is among Western European countries under the Energy Charter Treaty.[4] Like most of the treaties that allow for ISDS, both NAFTA and the Energy Charter were negotiated and concluded in the early or mid-1990s before the major wave of ISDS claims against countries started in the late 1990s. Yet NAFTA and the Energy Charter Treaty have generated more ISDS claims than thousands of other treaties allowing for ISDS; together, they account for about one quarter of all known ISDS claims.[5] Therefore, it is significant that governments, especially Washington and Brussels but also, for example, Ottawa and Beijing are presently pushing for a further major expansion of ISDS in the context of relations with and among developed countries. By expanding ISDS in this realm, governments will enlarge by several times the reach of ISDS tribunal power.[6]

In this paper, I examine the available textual evidence in order to assess the form of ISDS to which the European Union has given preference since entering the field of ISDS. This textual evidence comes from four proposed trade deals. The most significant is also the least evolved in negotiation: the Europe-U.S. Transatlantic Trade and Investment Partnership (hereinafter TTIP), for which a text for a TTIP investment chapter as proposed by the E.U. is publicly available.[7] For each of the other three

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[3] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 296 and 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

[4] Energy Charter Treaty (annex I of the Final Act of the European Energy Charter Conference) Dec. 17, 1994, 34 I.L.M. 373.

[5] Based on data compiled by the author, 125 (32%) of 395 known treaty-based foreign investor claims as of May 2015 were initiated under NAFTA or the Energy Charter Treaty. Of these 125, 71 were initiated under NAFTA and 54 under the Energy Charter Treaty, with 5 of the 54 initiated under both the Energy Charter and a bilateral investment treaty.

[6] *See infra* notes 93-94 and accompanying text.

[7] European Union, *Transatlantic Trade and Investment Partnership – Trade in Services, Investment and E-Commerce – Chapter II-Investment*, EU-proposed text of TTIP investment chapter, (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [hereinafter TTIP investment chapter]. See also European Commission, *Public consultation on modalities for investment protection and ISDS in TTIP*, (Mar. 27, 2014), http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf; all page number references are to the online pdf version in which the pages are not numbered [hereinafter TTIP consultation text].

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agreements, a public text of the full agreement is available although the agreements have not been finalized and each agreements is at somewhat different stages in the process toward possible ratification. They are the Canada-Europe Comprehensive Economic and Trade Agreement (hereinafter CETA),[8] the Europe-Singapore Free Trade Agreement (hereinafter Singapore FTA),[9] and the Europe-Vietnam Free Trade Agreement (hereinafter Vietnam FTA).[10]

My evaluation of the E.U. "model" of ISDS, as represented by these proposed agreements, focuses on three criteria: judicial independence, procedural fairness, and balance in the allocation of rights and responsibilities. Each criterion arises from concerns that have been expressed about the use of ISDS — and, more precisely, the powerful and far-reaching arbitration mechanism at the core of ISDS — to decide the legality of sovereign conduct and to allocate public funds to foreign investors.[11] Two of the criteria, independence and fairness, reflect elements of a judicial process as characterized especially in contexts where judicial processes are used for the final resolution of disputes about sovereign conduct.[12] The third criteria, balance, is meant to convey a modest and formal idea of equanimity in the allocation of rights and responsibilities as well as the notion of respect in international adjudication for the role of other decision-making bodies, especially domestic courts.

The main conclusions of this assessment are that, in pursuing a major expansion of ISDS, the European Union has taken partial steps on the issue of independence, signalled but not carried out steps on the issue of procedural fairness, and taken significant steps to affirm the state's right to regulate but

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[8] Comprehensive Economic and Trade Agreement, Can.-EU, Feb. 29, 2016, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf [hereinafter CETA].

[9] Free Trade Agreement, Sing.-EU, ch. 9, June 29, 2015, http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf [hereinafter Singapore FTA].

[10] Free Trade Agreement, Viet.-EU, ch. 1-7, Dec. 2, 2015, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf [hereinafter Vietnam FTA].

[11] *See* Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 23 (Stephan W. Schill ed., 2010); Van Harten, *supra* note 1, at 159-75.

[12] For an elaboration, see Gus Van Harten, *The EC and UNCTAD reform agendas: Do they ensure independence, openness, and fairness in investor-state arbitration?, in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang, Markus Krajewski eds., 2016).

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not to balance investor rights with investor responsibilities or to respect the role of domestic courts. On ISDS's lack of independence, in particular, the CETA, Vietnam FTA, and proposed TTIP investment chapter, but not the Singapore FTA, incorporate significant though incomplete improvements. On the issue of procedural fairness, the E.U.'s proposed TTIP investment chapter text incorporated steps to address the lack of procedural fairness in ISDS, but these steps were not included in any of the other three agreements, at least two of which were subject to negotiation after the TTIP investment chapter text was made public. On the issue of balance, none of the agreements address the lack of balance in the allocation of foreign investor rights and responsibilities in ISDS. Also, while the CETA has improved language on the so-called right to regulate (a euphemism in international investment law for the role of democracy, government, and judicial decision-making), all four of the agreements have codified an expansive version – compared to the U.S. approach – of the notoriously malleable foreign investor right to "fair and equitable treatment". Finally, on the issue of balance, none of the four agreements addresses ISDS' lack of respect for domestic institutions, especially domestic courts. Rather, by relieving foreign investors of any responsibility to demonstrate failings of domestic courts before bringing an ISDS claim, all of the agreements are premised on an implicit assumption that the courts in Europe and the other relevant countries fail systemically to offer justice for foreign investors. Overall, these agreements indicate that the European Union was originally prepared to accept a primarily U.S. approach to ISDS, albeit now with significant variations that emerged after the political debate about ISDS unfolded in Europe. The question remains whether such variations in the CETA, Singapore FTA, and Vietnam FTA will be maintained in the face of much stronger U.S. bargaining power in the TTIP negotiations.

2. RESPONSE TO THE LACK OF JUDICIAL INDEPENDENCE IN ISDS

To be judicially independent, ISDS would need to incorporate the conventional institutional safeguards that alleviate concerns about unacceptable judicial dependencies, especially financial and economic. That

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is, it would need to ensure that ISDS adjudicators had security of tenure and a set salary, that ISDS cases were assigned objectively to individual adjudicators such as by lottery or rotation, that outside lawyering by the adjudicators was prohibited, and that an independent judicial process was available to resolve conflict of interest claims against adjudicators. These are common features of domestic courts and other international tribunals that resolve disputes involving sovereign conduct. Historically, ISDS has not incorporated them, allowing instead for a for-profit adjudication based on an hourly or daily rate, ultimate control by executive officials over case assignments, allowance for outside legal work by ISDS arbitrators, and referral of conflict of interest claims first to other arbitrators and then to executive officials. The resulting lack of institutional independence in ISDS provides a basis for reasonable apprehension of bias that taints ISDS outcomes regardless of who they favour.[13]

In its proposals of November 2015 for an investment chapter in the TTIP, the European Union took a different approach to ISDS. This different approach was then incorporated, in large part, as part of the Vietnam FTA of December 2015 and the revised CETA of February 2016. In assessing how the E.U.'s reforms impact the issue of independence, I focus on these two agreements instead of the TTIP proposal because they are purportedly finalized texts and thus more reflective of what the European Union appears willing and able to achieve in actual negotiations with treaty partners.

Most significantly, in the revised CETA and Vietnam FTA, steps were taken to address the lack of independence in ISDS.[14] ISDS adjudicators under the CETA will be members of a roster with a reasonable degree of security of tenure. There will also be more public accountability in their initial appointment, albeit with a potentially driving role in appointment decisions given to trade officials rather than higher-level publicly-accountable decision-makers, and adjudicators will be assigned to cases through an objective process of rotation. Furthermore, adjudicators will not be permitted to work on the side as counsel in other ISDS cases although, remarkably, they are not prohibited from working on the side as ISDS arbitrators, thus

[13] *See* Van Harten, *supra* note 11.
[14] *See* CETA, *supra* note 8, art. 8.27; *see also* Vietnam FTA, *supra* note 10, art. 12 of ch. II, sec. 3.

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apparently permitting a party to an ISDS dispute to appoint a CETA ISDS roster member as an arbitrator in an ISDS dispute under another treaty and to pay him or her directly and lucratively in that other context.[15] This aspect of the revised CETA – along with its language on the required or preferred expertise of ISDS adjudicators and the potentially dominant role of trade officials in appointments to the roster[16] – suggests that a way may have been cleared for the same small group of individuals who have dominated ISDS decision-making so far, and leaned heavily toward expansive/ pro-claimant investor resolutions of contested legal issues under investment treaties[17] – to populate the CETA ISDS roster.

More fundamentally, on the criterion of independence, ISDS under CETA would still rely on an essentially for-profit model of ISDS adjudication because the adjudicators are to be paid a daily rate, making them financially interested in the frequency and duration of proceedings and thus dependent in general on deep-pocketed investors as the most likely prospective claimants to support growth of the ISDS industry. This aspect of ISDS has been ameliorated to an uncertain degree in CETA by its incorporation of a set retainer, of unknown value, for adjudicators alongside their daily rate of compensation. Even so, the remunerative set-up remains inappropriate, especially for determining such important matters as the legality of laws, regulations, policies introduced by countries and the allocation of potentially vast amounts of public money to private parties. Where only one side (foreign investors) can bring the claims that trigger the appointment and remuneration of ISDS adjudicators, the process still creates unacceptable dependencies among the adjudicators and falls short of a judicial standard.

In contrast, the Singapore FTA evidently has not been adjusted, as the CETA was, to incorporate any of the reforms related to judicial

[15] *See* CETA, *supra* note 8, art. 8.30(1); *see also* Vietnam FTA, *supra* note 10, art. 14(1) of ch. II, sec.3.
[16] *See* CETA, *supra* note 8, art. 8.27(4); *see also* Vietnam FTA, *supra* note 10, art. 12(4) of ch.II, sec. 3. In particular, each agreement limits the expertise or experience of ISDS arbitrators to the fields of public international law, international trade law, and, especially, international investment law.
[17] *See* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211 (2012); *see also* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration*, 53 OSGOODE HALL L. J. 540 (2016).

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independence.[18] Rather, the Singapore FTA still contemplates the old ISDS process – without security of tenure, set salaries, objective case assignment, and prohibitions on outside ISDS counsel work – that create reasonable suspicions of bias. Depending on the circumstances, these suspicions may operate in favour of a country, a foreign investor, or another party. To illustrate, ISDS arbitrators who lack security of tenure and seek repeat appointments are financially dependent on whoever has the power to appoint the arbitrators (where the foreign investor and sued country do not agree or do not appoint). On this issue of default appointment authority, the Singapore FTA designates an executive official, the Secretary General of the World Bank's International Centre for Settlement of Investment Disputes (ICSID),[19] as the appointing body. Yet it is inconsistent with judicial independence to allow an executive official to choose who will decide an adjudicated case in circumstances where the executive official knows who has sued whom and in what context. Allocating appointing power in this way gives an opportunity for the executive official to keep sensitive cases in safe hands in accordance with the politics of the claim.

In the Singapore FTA, the most significant step on independence is the proposed incorporation of a code of conduct for ISDS arbitrators.[20] This is a weak step due to the form of the proposed code, which would not incorporate the institutional safeguards of independence mentioned earlier. Indeed, the code would apparently not even stop ISDS arbitrators from working on the side as ISDS lawyers, which is among the more obvious contributions that a code could make. Additionally, the code would be policed by an executive official based on case-by-case complaints filed by disputing parties about alleged conflict of interest of individual arbitrators.[21] This check is inadequate in various ways. For example, it assumes that the disputing parties would be able to uncover the outside counsel work of an ISDS arbitrator, even though the existence and tribunal make-up of ISDS

[18] I refer to the June 2015 version of the Singapore FTA, *supra* note 9. The Singapore FTA investment chapter may change significantly, as did the Canada-E.U. CETA, following legal scrubbing and renegotiation.
[19] *See* Singapore FTA, *supra* note 9, art. 9.21(2).
[20] *See* Singapore FTA, *supra* note 9, annex 9-B.
[21] *See* Singapore FTA, *supra* note 9, art. 9.21(10).

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arbitrations can be kept completely secret under some treaties.[22] Unless an ISDS arbitrator under the Singapore FTA declares a potential conflict, an affected disputing party would have no way of discovering the arbitrator's role as counsel.

Unlike the CETA and Vietnam FTA, the Singapore FTA does not move towards establishing a mandatory roster of ISDS adjudicators who would be assigned to cases objectively. Instead, in the Singapore FTA, the contemplated roster does little to address ISDS' lack of independence because (a) the roster would not apply to all arbitrators appointed to each ISDS tribunal, (b) an executive official would retain the power to choose who from the roster is assigned to individual cases, and (c) the executive official would be able to appoint individuals from outside the roster if the states parties to the treaty did not agree on the roster's membership.[23] For two decades, this last loophole has helped foil a similarly weak roster in NAFTA's ISDS system.[24]

Absent the safeguards of judicial independence, ISDS outcomes are tainted regardless of other aspects of the treaty text or the personal integrity of adjudicators. In essence, the Singapore FTA, and to a lesser extent the CETA and Vietnam FTA, allow foreign investors to choose to remove adjudicative power from domestic or European courts, by bringing an ISDS claim, and reallocate it to a small group of ISDS adjudicators and executive officials, none of whom are institutionally independent in the manner of a domestic or international judge. This lack of independence remains a critical issue in the CETA and Vietnam FTA and, more completely, in the Singapore FTA.

3. RESPONSE TO THE LACK OF PROCEDURAL FAIRNESS IN ISDS

ISDS is unfair for various reasons, including its lack of judicial independence. Another key source of unfairness in ISDS is procedural. A basic principle of

[22] The problem of complete secrecy appears most acute in arbitration under the International Chamber of Commerce (ICC) arbitration rules. *See* Gus Van Harten, *A Total Lack of Transparecy,* CANADIAN LAW. (Oct. 24, 2011), http://www.canadianlawyermag.com/3912/A-total-lack-of-transparency.html.

[23] *See* Singapore FTA, *supra* note 9, art. 9.21 (2) and (4).

[24] *See* NAFTA, *supra* note 3, art. 1124(4).

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fair process in adjudication is that parties whose rights or interests are affected by the adjudication should have a right of standing in the adjudicative process, to the extent of their affected rights or interests.[25] If an affected party is denied the opportunity to seek standing, the adjudicator would not hear all sides to the dispute and may be unable to consider relevant facts and arguments. ISDS is fundamentally unfair because it does not give this right of standing to all parties affected by the adjudication of foreign investor claims. Instead, ISDS provides a right of standing only to the foreign investor(s) bringing the claim and to the respondent country, represented by its national government.[26] No one else whose rights or interests are affected by the foreign investor's claim can have standing regardless of the extent to which his or her rights or interests are affected.[27]

In its proposal for a TTIP investment chapter, released in November 2015, the European Union took a partial but significant step to address this procedurally unfair aspect of ISDS. The proposal included a right of intervention for any party with a direct interest in the proceeding, albeit limited to the option of supporting either the claimant investor's or the respondent state's position.[28] This proposal went a significant way to addressing the lack of procedural fairness in ISDS. However, it did not find its way into the Vietnam FTA of December 2015 or the revised CETA of February 2016. Thus, there was evidently awareness of the issue within the European Union and a choice made not to address the matter in subsequent agreements. In addition, the European Union has through its subsequent agreements presumably signalled to the United States that it is not firmly committed to this particular reform.

A weaker response to the problem of procedural unfairness, drawing on the U.S. approach to ISDS since the early 2000s, has been to allow ISDS

[25] *See* GUS VAN HARTEN, GERALD HECKMAN, DAVID MULLAN, JANNA PROMISLOW, ADMINISTRATIVE LAW – CASES, TEXT, AND MATERIALS 73-74 (7th ed., 2015).
[26] *See* CETA, *supra* note 8, art. X.3; Singapore FTA, *supra* note 9, art. 9.14(2)(a) (definition of "disputing parties"); Vietnam FTA, *supra* note 10, art. 2 of ch. II, sec. 3 (definition of "disputing parties").
[27] For an indication of cases in which outside parties were affected by an ISDS proceeding, see Van Harten, *supra* note 12.
[28] *See* TTIP investment ch., *supra* note 7, art. 23 ("The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party…").

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adjudicators to grant *amicus* or limited "third person" status in ISDS.[29] This step falls well short of meeting the criterion of a fair process because *amicus* representation does not require an ISDS tribunal to give standing to persons who have a direct interest in the proceeding.[30] Rather, it allows a party to participate in the proceedings in a limited way, only as authorized (if at all) by the arbitrators.[31] Conventionally, *amicus* status was used to permit parties with a useful perspective, but no legal interest, to assist the judge or other adjudicators in understanding the party's perspective. For ISDS to be fair, it would have to ensure a right of standing for all affected parties regardless of how useful the adjudicator thinks their perspective may be.[32]

On this basis, the E.U.'s model of ISDS allows adjudicators to make decisions that affect other parties — whether private actors or public entities — without hearing from them. This unfairness could be addressed, as proposed in the E.U.'s TTIP investment chapter of November 2015, by requiring public notice of ISDS claims and allowing time for other affected parties to apply for standing. In the case of the Vietnam FTA and revised CETA, the partial fix proposed by the European Union for TTIP was omitted. In all agreed texts of the European Union, therefore, ISDS is procedurally unfair.

4. RESPONSE TO THE LACK OF BALANCE IN ISDS

The discussion now turns from the process of ISDS to its overall design, focusing on the formal allocation of substantive rights and responsibilities

[29] *See* Singapore FTA, *supra* note 9, art. 3 of annex 9-G. This step also appears to have been taken in the CETA and Vietnam FTA by their incorporation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (art. 4) in CETA, *supra* note 8, art. 8.36 and 8.38(1)(b)(ii); Vietnam FTA, *supra* note 10, art. 20 of ch. II, sec. 3.
[30] *See* Patrick Wieland, *Why the Amicus Curia Institution is Ill-suited to address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*, TRADE, L. & DEV'T 334, 344-5 and 359-60 (2011); *see also* Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* THE BLACKLASH AGAINST INVESTMENT ARBITRATION 253, 259-266 (Michael Waibel et al eds., 2010).
[31] In actual arbitrations, *amicus* representation has been used rarely and with significant restrictions; *see* Wieland, *supra* note 30, at 341-4.
[32] *See* Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation,* 29 BERKELEY J INT'L 200, 208-214 (2011); *see also* ALBERTO SALAZAR, *Defragmenting International Investment Law to Protect Citizen-Consumers: The Role of Amici Curiae and Public Interest Groups* 4-8 (Osgoode Hall Law Sch., Comparative Research in Law & Political Econ., Working Paper No 6, 2013).

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and on the relationship between ISDS and domestic courts. To be balanced in a broad sense, it is suggested that ISDS must incorporate responsibilities for foreign investors that are actionable in the manner of their rights and affirm the state's right to regulate alongside the elaborate rights and protections afforded to foreign investors. This is a formalized version of the notion of balance because, with the exception of the clarity of the state's right to regulate, it does not avert to the content or extent of foreign investor rights and responsibilities.[33] To address in part this limitation of the analysis, I offer in this section a closer assessment of the foreign investor rights envisaged by the European Union in order to demonstrate their breadth and potency. The assessment reveals that some aspects of the characterization of foreign investor rights in the E.U.'s proposed or negotiated agreements are sufficiently broadly framed as to go beyond the U.S. model of ISDS.

4.1. Foreign Investor Rights, Without Responsibilities

In its conventional form, ISDS discriminates in favour of foreign investors and against anyone else who is affected by an ISDS dispute involving a foreign investor and the country against whom the investor has brought a claim. Foreign investors obtain powerful rights and protections but, as a rule, have no correspondingly actionable responsibilities to respect international standards. To make ISDS more balanced in this formal sense, states would need to allow for the use of ISDS to hold foreign investors accountable if they flout labour, environmental, consumer, or other standards in situations where domestic institutions do not offer an effective remedy.

In its approach to ISDS, the European Union has taken no steps to rebalance ISDS in this way in any of its proposed or negotiated agreements. In each agreement, foreign investors would have special access to an exceptionally powerful system of international adjudication — potentially leading to billions of dollars in public compensation — to enforce their wide-ranging rights, without responsibilities that can lead to a compensation order against the foreign investor and that are enforceable in the same process. The resulting imbalance is especially pronounced because none of

[33] For a cautious approach to the issue of foreign investor responsibilities, see PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES & THE LAW (2nd ed., 2007).

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the E.U.'s agreements require foreign investors to go to a country's courts or European courts before resorting to ISDS. That is, the agreements abandon the usual duty to exhaust local remedies, where they offer justice and are reasonably available, which applies customarily in international law and at other international courts and tribunals where individuals can bring claims against a country.[34] Building on a Western European and North American legacy of imbalanced ISDS treaties, the E.U.'s approach allows foreign investors to bring ISDS claims against a country without going to the country's courts first, regardless of whether the courts offer justice. Put differently, a foreign investor can bring an ISDS claim without any requirement that the investor explain why it would be unfair to go first to a country's courts in order to resolve its dispute. By implication, the E.U.'s approach and ISDS in general are based on the presumption that domestic courts in all countries fail systemically to offer justice to foreign investors. Similarly, these approaches operate from the premise that ISDS is independent and fair in the manner of a proper court, which it clearly is not for the reasons discussed earlier.

Why should foreign investors be relieved of the usual duty to go to domestic courts without having to show that the courts in question somehow fail to offer justice? One may worry that domestic courts could take too long or are in some other way inadequate to protect foreign investors. If that is a pressing concern, why not replace courts with arbitrators for everyone? Clearly, others — whether foreigners or a country's own nationals — may suffer as much or more than a foreign investor if courts do not offer justice. The question itself points to the radical proposition lying behind ISDS: to replace courts with a special and very powerful adjudicative system available only to foreign investors.

The issue of domestic courts also points to a larger question about the balancing of rights and responsibilities. What if domestic courts are inadequate to protect victims of foreign investors themselves? One can imagine scenarios where a person or community suffers tremendously because of a foreign investor's misconduct. Yet such actors would be limited

[34] *See, e.g.*, SILVIA D'ASCOLI & KATHRIN MARIA SCHERR, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* (European Univ. Inst., Working Paper No. 02, 2007).

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to domestic courts, with no right to initiate an international claim and receive an internationally-enforceable award of compensation. For example, in the era of ISDS, a foreign national who has been tortured by a country's officials cannot bring an international claim against the country, at least without going first to the country's courts.[35] Yet the foreign national *could* bring an ISDS claim if he or she owned assets in the state, thus qualifying as a foreign investor, albeit only to the extent that the torture affected his or her position as an asset owner. In contrast, if a foreign investor's personnel were to torture its domestic employees, with the collaboration of state officials, none of the victimized employees could bring an international claim against the company or its officers, or against the state itself, for failing to protect them, without going first to domestic courts. This illustrates the stark disparity in protection that ISDS offers to foreign investors in comparison to other victims of misconduct.

A limited starting point for recognizing foreign investor responsibilities and rebalancing ISDS would be to allow countries to bring claims against a foreign investor that has initiated an ISDS claim against the country, for the purpose of holding the foreign investor to minimum international standards of conduct. This arrangement would remain formally imbalanced because it would not give states a right, alongside foreign investors, to initiate ISDS proceedings in the first place. Also, it would not give rights to private parties who were harmed by a foreign investor and denied justice in domestic courts. Despite these limitations, there is no sign that even this step has been pursued by the European Union.

In summary, ISDS is premised on a profoundly imbalanced elevation of foreign investor rights and protections over the rights of everyone else. The European Union has endorsed this imbalance by not stipulating equivalently actionable responsibilities for foreign investors and by not incorporating a duty to exhaust local remedies before the foreign investor can bring an ISDS claim asserting its powerful rights. Moreover, as I explain

[35] *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21 (c) and 22 (4) (b), GA Res. 39/46, annex, 39 U.N. GAOR, Supp. No. 51 at 197, opened for signature Dec. 10, 1984, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987).

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below, the European Union has in key respects taken an exceptionally expansive approach to foreign investor rights.

4.2. Expansive Scope of Foreign Investor Rights and Protections

The E.U.'s approach, in the proposed TTIP and in the CETA, Singapore FTA, and Vietnam FTA, is based on broadly-framed foreign investor rights and protections. Some of the major features of this approach are outlined in this section, beginning with the breadth of the access to ISDS that is allowed for foreign investors and followed by the flexibility of the language that is used to define the core rights of foreign investors.

4.2.1. Broad Access to ISDS

The E.U.'s approach has been to define the concept of "investment" broadly, consistent with a U.S. model of ISDS. The definitions proposed for the TTIP and adopted in the CETA and FTAs are wide-ranging, giving access to ISDS to asset owners in general. The definitions are not limited, for example, to "investment" in the sense of capital committed to a risky venture with an expectation of profit or some identifiable contribution to the host country's economy.

Among the E.U.'s agreements, there are modest variations on this point. For example, the Singapore and Vietnam FTAs' definitions of investment specifically include "goodwill" and thus are broader on paper than the CETA's definition, which does not.[36] Even so, based on the record of ISDS awards, these textual differences are not as significant as they may appear because other aspects of the definition of investment have been used by arbitrators to capture broad notions of asset ownership. In particular, the CETA definition incorporates the elastic concept of "[e]very kind of asset that an investor owns or controls, directly or indirectly" and the Singapore FTA definition includes "every kind of asset which is owned, directly or indirectly, or controlled, directly or indirectly, by investors".[37]

[36] *See* Singapore FTA, *supra* note 9, art 9.1(1); Vietnam FTA, *supra* note 10, subsec. 4(p)(vi) of art. entitled "Objectives, coverage and definitions" of ch. I; *see also* CETA, *supra* note 8, art. 8.1 (definition of "investment").
[37] *See* Singapore FTA, *supra* note 9, art 9.1(1); Vietnam FTA, *supra* note 10, subsec. 4(p)(vi) of art. entitled "Objectives, coverage and definitions" of ch. I; *see also* CETA, *supra* note 8, art. 8.1 (definition of "investment").

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The E.U.'s approach is also expansive because it has expressly limited use of the so-called *Salini* criteria.[38] These criteria were adopted by early ISDS tribunals and applied subsequently to orient and limit the concept of investment in investment treaties. The European Union has adopted aspects of the criteria, but only as an optional reference point instead of a requirement for tribunals to consider.[39] To illustrate, the CETA applies only to any asset "that has the characteristics of an investment, which include 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";[40] while the Singapore FTA applies to any asset "that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration".[41] Based on this language, in the CETA, tribunals are required to consider one mandatory characteristic only — "a certain duration" — and the other three *Salini* criteria are listed merely as examples for tribunals to consider. The Singapore and Vietnam FTAs are even more flexible because they list all four of the *Salini* criteria merely as examples for tribunals to consider.[42]

Thus, the European Union has moved away from past approaches to ISDS that applied the *Salini* criteria as mandatory and cumulative elements of the concept of investment. Also, the European Union has dropped entirely one of the *Salini* criteria: the requirement that an asset, to qualify as an investment, must contribute to the development of the host country's economy. By diluting the criteria in these ways, the European Union has put aside limited constraints on the concept of investment that were developed by some ISDS tribunals. In doing so, the European Union effectively has sided

[38] *See* Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (Jul. 23, 2004), 42 I.L.M. 609, para 52. *See also* Fedax NV v Republic of Venezuela, ICSID Case No. ARB/96/3 (Jul. 11, 1997), 37 I.L.M. 1378, para 43.
[39] *See* Omar E. García-Bolívar, *Defining an ICSID Investment: Why Economic Development Should be the Core Element*, INVESTMENT TREATY NEWS (Apr. 13, 2012), http://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/.
[40] *See* CETA, *supra* note 8, art. 8.1 (definition of "investment").
[41] *See* Singapore FTA, *supra* note 9, art. 9.1(1). The Vietnam FTA's definition is essentially the same as the Singapore FTA's on this issue: *see also* Vietnam FTA, *supra* note 10, subsec. 4(p) of art. entitled "Objectives, coverage and definitions" of ch. I.
[42] *See* Singapore FTA, *supra* note 9, art. 9.1(1). The Vietnam FTA's definition is essentially the same as the Singapore FTA's on this issue: *cf.* Vietnam FTA, *supra* note 10, subsec. 4(p) of art. entitled "Objectives, coverage and definitions" of ch. I.

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with other ISDS tribunals that chose not to apply the *Salini* criteria or that treated them as guidelines instead of requirements.[43] In either case, the European Union has endorsed an approach that favours foreign investors, especially large multinationals and very wealthy individuals who are the most able to finance claims, at the expense of the regulatory domain of states. Put differently, when faced with different views among ISDS tribunals on the scope of the definition of investment, the European Union opted to codify the more investor-friendly approach.

Linked to the issue of access to ISDS, the CETA, Singapore FTA, and Vietnam FTA take modest steps to limit ISDS forum-shopping. In particular, the agreements permit an investor to bring a claim only if the investor has "substantial" or "substantive" business operations in its "home" country (i.e. in the jurisdiction of which the investor claims to be a national under the treaty).[44] This limitation on forum-shopping is modest because it does not require the investor to have its headquarters or main base of operations in the home country. Instead, ISDS claims can be brought by multinational companies or individuals with multiple nationalities so long as the company or individual has a sufficient level of business activity in the relevant jurisdiction under the treaty, even if that jurisdiction is not the primary or dominant place of business.

4.2.2. Expansive Version of Fair and Equitable Treatment

In its approach to the vague and, for states, financially risky foreign investor right to "fair and equitable treatment", the European Union appears committed to expanding the power of ISDS adjudicators. The E.U.'s codification of an expansive element, developed by ISDS arbitrators in the past, as part of the right to fair and equitable treatment goes beyond the U.S.

[43] *See* García-Bolívar, *supra* note 39.
[44] *See* CETA, *supra* note 8, art. 8.1 (definition of "enterprise of a Party"); *see also* Singapore FTA, *supra* note 9, art. 9.1(4); *see also* Vietnam FTA, *supra* note 10, subsec. 4(c) of art. entitled "Objectives, coverage and definitions" of ch. I.

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model or, for that matter, Canada's past approach.[45] It therefore seems clear that the Commission pressed for this expansive shift.

As background, the concept of fair and equitable treatment is the most widely-invoked right in treaty-based ISDS.[46] Arbitrators have been creative in giving different readings — usually expansive — to the concept.[47] In the North American approach to ISDS since the early 2000s, an effort was made to rein in ISDS arbitrators by limiting the concept to the meaning that is customarily associated with the minimum standard of treatment in international law.[48] This attempt to rein in ISDS arbitrators has had only limited success, since the 2000s, as arbitrators subsequently adopted the interpretive device of relaxing the standard of proof a foreign investor must satisfy — when arguing for an expansion of the customary international minimum standard — by relieving the investor of the usual onus to provide evidence of state practice and opinio juris in support of an evolution of customary international law.[49]

Compared to the North American effort to constrain ISDS arbitrators on this point, the European Union has taken a more expansive tack. None of the E.U.'s proposed or negotiated agreements restrict ISDS adjudicators to applying the customary international minimum standard. Instead, the E.U.'s agreements allow ISDS adjudicators to apply some of the leading expansive versions of fair and equitable treatment adopted in ISDS tribunal decisions since the late 1990s.[50] Thus, the European Union has endorsed a key feature of ISDS arbitrators' creative expansion of foreign investor rights and protections. This part of E.U.'s approach is perhaps the most important

[45] Canada's treaties providing for ISDS have followed the U.S. approach by clarifying, since the early 2000s when the issue was raised in response to early NAFTA awards, that fair and equitable treatment is limited to the meaning of the minimum standard of treatment in customary international law. That said, in some of Canada's treaties, this clarifying language is undermined by a most-favoured-nation treatment loophole. *See* Gus Van Harten, *The Canada-China FIPPA: Its Uniqueness and Non-Reciprocity*, 51 CANADIAN YEARBOOK OF INT. L. 3, 27-34 and Annex 1 (2013).
[46] *See* Van Harten, *supra* note 2, at 101-103.
[47] *See* Van Harten, *supra* note 2, at 102.
[48] *See* Free Trade Agreement, Dom. Rep.-Cent. Am.-U.S., art. 10.5(2), 19 U.S.C.S. § 4011 (LexisNexis, 2005).
[49] *See* Matthew C. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, INVESTMENT TREATY NEWS (Mar. 22, 2013), https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/
[50] *See* Van Harten, *supra* note 2, at 102.

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example of how the European Union has varied from the U.S. model and, in this case, the European Union chose a more investor-friendly, expansive direction.

The E.U.'s approach to fair and equitable treatment is also expansive because it defines that concept using a list of components.[51] The list is essentially the same in each of the E.U.'s agreements. It includes the components of denial of justice, fundamental breach of due process, manifest arbitrariness, and abusive or bad faith conduct. The CETA and Vietnam FTA add the further component of targeted discrimination on manifestly wrongful grounds. Any single component on the list can give rise to a breach of the fair and equitable treatment standard and, in turn, an order of compensation for the foreign investor.

By using this list-based approach to describe fair and equitable treatment, the E.U.'s approach might appear to limit the range of definitions that ISDS adjudicators can give to the overall right. Yet the E.U.'s agreements have a loophole; to varying degrees, they do not make it clear whether the list of the components is exhaustive.[52] For example, the CETA does not state that the right to fair and equitable treatment is breached "only" when a component on the list has been breached.[53] This lack of precision gives an opportunity for ISDS adjudicators to supplement the list by reading novel and expansive components into the right to fair and equitable treatment, as they have done frequently since ISDS claims began to explode in the late 1990s.

Perhaps most importantly, the European Union has taken an expansive approach to fair and equitable treatment by incorporating into the right a foreign investor's "legitimate expectations". The notion of legitimate expectations, as an arbitrator-created part of the right to fair and equitable treatment, is among the most novel and expansive features that arbitrators have added to ISDS. Often, they have relied on the notion of legitimate expectations to justify awards of compensation for foreign investors. In the E.U.'s agreements, the idea of legitimate expectations is incorporated in

[51] *See* CETA, *supra* note 8, art. 8.10(2); *see also* Singapore FTA, *supra* note 9, art. 9.4(2); *see also* Vietnam FTA, *supra* note 10, art. 14(2) of ch. II.
[52] *See* CETA, *supra* note 8, art. 8.10(2); *see also* Singapore FTA, *supra* note 9, art. 9.4(2) and (3); *see also* Vietnam FTA, *supra* note 10, art. 14(2) and (3) of ch. II.
[53] *See* CETA, *supra* note 8, art. 8.10(2).

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different ways. For example, the Singapore FTA is more expansive than the CETA and Vietnam FTA on this point because the Singapore FTA includes legitimate expectations as part of the list of components of fair and equitable treatment,[54] whereas the CETA and Vietnam FTA allow arbitrators to consider legitimate expectations when applying the listed components of fair and equitable treatment.[55] Even so, all of the E.U.'s agreements are more expansive than the United States' and Canada's approach because they invite ISDS adjudicators to perform a flexible analysis of the foreign investor's expectations that enhances the regulatory and financial risks of ISDS for states.

4.2.3. Other Foreign Investor Rights

Other aspects of the E.U.'s approach to foreign investor rights mostly track the U.S. model. For example, the E.U.'s proposed or negotiated agreements include foreign investor rights to full protection and security,[56] compensation for losses[57] and for expropriation,[58] and free capital transfers.[59] The agreements do not vary markedly in these respects[60] and the rights in question are typical of a U.S. model.

To illustrate further, the E.U.'s approach to the right to full protection and security follows the U.S. model by limiting the concept to the physical security of foreign investors and their investments.[61] The E.U.'s approach likewise includes a clause, consistent with the U.S. model, precluding ISDS adjudicators from finding a breach of full protection and security or fair and

[54] *See* Singapore FTA, *supra* note 9, art. 9.4(2)(e).
[55] *See* CETA, *supra* note 8, art. 8.10(4); *see also* Vietnam FTA, *supra* note 10, art. 14(6) of ch. II.
[56] *See* CETA, *supra* note 8, art. 8.10(1); *see also* Singapore FTA, *supra* note 9, art. 9.4(1); *see also* Vietnam FTA, *supra* note 10, art. 14(1) of ch. II.
[57] *See* CETA, *supra* note 8, art. 8.11; *see also* Singapore FTA, *supra* note 9, art. 9.5; *see also* Vietnam FTA, *supra* note 10, art. 15 of ch. II.
[58] *See* CETA, supra note 8, art. 8.12; *see also* Singapore FTA, *supra* note 9, art. 9.6; *see also* Vietnam FTA, supra note 10, art. 16 of ch. II.
[59] *See* CETA, *supra* note 8, art. 8.13; *see also* Singapore FTA, *supra* note 9, art. 9.7; *see also* Vietnam FTA, *supra* note 10, art. 17 of ch. II.
[60] One significant variation is that a carve-out from the right to make free capital transfers in the Singapore FTA, *supra* note 9, art. 9.7(2), appears broader than the comparable carve-out in the CETA, *supra* note 8, art. 8.13(4), and NAFTA, *supra* note 3, art. 1109(4), because, in the Singapore FTA, the carve-out includes exceptions on social security, public pensions, and taxation.
[61] *See* CETA, *supra* note 8, art. 8.11(5); *see also* Singapore FTA, *supra* note 9, art. 9.4(4); *see also* Vietnam FTA, *supra* note 10, art. 14(4) of ch. II.

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equitable treatment based on an assessment that a country has breached a provision elsewhere in the trade agreement or in another international agreement.[62] Like the approach taken in the U.S. model, these clauses constrain aspects of the adjudicative discretion in ISDS against a backdrop of expansive interpretations by ISDS arbitrators. Even so, they still carry a complex but significant risk due to the foreign investor right to most-favoured nation (hereinafter MFN) treatment.[63]

Furthermore, in the Singapore FTA and Vietnam FTA, but not the CETA, the European Union has negotiated an "umbrella clause" as part of the suite of rights for foreign investors. An umbrella clause is far-reaching because it incorporates a host country's other obligations into the foreign investor's rights at the treaty level and thus subjects those other obligations to ISDS.[64] For example, the Singapore FTA states that a country must not "frustrate or undermine" a specific and clear commitment in a contractual obligation owed to a foreign investor.[65] This version of an umbrella clause is more limited than umbrella clauses in some other treaties, but it is still potentially very expansive because it allows ISDS to be constituted as a parallel enforcement system for the state's contracts with foreign investors. This aspect of the Singapore and Vietnam FTAs also goes beyond the most commonly invoked example of the U.S. model, NAFTA, which does not have an umbrella clause, although many U.S. bilateral investment treaties include such clauses.[66] On this point, the E.U.'s approach in its FTAs demonstrates further that the European Union has accepted an expansive version of foreign investor rights.

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[62] *See* CETA, *supra* note 8, art. 8.10(6); *see also* Singapore FTA, *supra* note 9, art. 9.4(6); *see also* Vietnam FTA, *supra* note 10, art. 14(7) of ch. II.

[63] The risk is that an agreement's limiting provisions for other foreign investor rights can be undermined by the agreement's approach to (MFN) treatment. The CETA, for example, uses qualified language when it purports to preclude the importation into the CETA — using the principle of MFN treatment — of additional substantive rights of foreign investors in treaties with third states. For a more detailed explanation of the point *see* G. VAN HARTEN, *Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA* 10-11, 20, 25 (Osgoode Hall Law Sch. of York Univ., Working Paper No. 59, 2014).

[64] *See* Singapore FTA, *supra* note 9, art. 9.5(5); *see also* Vietnam FTA, *supra* note 10, art. 14(5) of ch. II.

[65] Singapore FTA, *supra* note 9, art. 9.5(5).

[66] Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 115 (2008).

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Another example of the E.U.'s willingness to accept an expanded version of foreign investor rights arises from its approach to ISDS and financial services. Compared to NAFTA, the CETA expands the role of ISDS in the agreement's chapter on financial services.[67] This expansion leads to a complex interaction between the CETA's investment and financial services chapters, a close analysis of which is beyond the scope of this paper. The key is that the CETA goes beyond the North American model, as captured by NAFTA, which extends ISDS to its chapter on financial services to a lesser degree than the CETA does.[68] As a result, the CETA expands states' obligations when regulating financial institutions by importing more foreign investor rights — including fair and equitable treatment and full protection and security — from the investment chapter into the financial services chapter.[69] In this respect, the CETA is a win for global banks at the expense of financial regulators and anyone whose interests the regulators protect.[70]

In other areas, the E.U.'s approach is not as expansive as the U.S. model. An example is the U.S.-devised prohibition on performance requirements for foreign investors. A prohibition on performance requirements typically blocks countries from requiring foreign investors to use local goods or local suppliers, or to transfer technology, as conditions for being allowed to invest in a country. The prohibition on performance requirements in NAFTA, for example, has been used successfully by U.S. companies to resist research and development requirements in Canada's offshore oil sector.[71] In the U.S. model, the prohibition on performance requirements is subject to ISDS and state-state enforcement.[72] The CETA, by comparison, has a prohibition on performance requirement that is subject to

[67] *See* CETA, *supra* note 8, art. 13.2(3) and (4).
[68] *See* NAFTA, *supra* note 3, art. 1401(2).
[69] *See* CETA, *supra* note 8, art. 13.2(3) and (4).
[70] The CETA and FTAs also have special provisions on foreign investor rights in the context of debt restructuring or a monetary crisis: *see, e.g.*, CETA, *supra* note 8, annex 8-B; *see also* Singapore FTA, *supra* note 9, artt. 9.7(3) and 17.9; *see also* Vietnam FTA, *supra* note 10, annex on Public Debt. An analysis of these provisions is beyond the scope of this paper, although they all raise the broad concern that sovereign decisions during a financial crisis would continue to be subject, to varying degrees, to review in ISDS.
[71] Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, No. ARB(AF)/07/4, ITALAW (Ont. Sup. Ct. May 22, 2012).
[72] *See, e.g.*, NAFTA, *supra* note 3, art. 1106.

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state-state enforcement only, not ISDS.[73] On this issue, the CETA resembles the substantive obligation in the U.S. model but does not allow for its enforcement in ISDS.

In addition, the CETA includes market access rights for foreign investors by including the terms "establishment", "acquisition", and "expansion" in the list of investment activities to which the treaty's national treatment obligation applies.[74] By comparison, the Singapore and Vietnam FTAs limit national treatment to post-establishment activities of foreign investors.[75] Each agreement also has extensive reservations and schedules that remove some activities from the obligation to provide no less favourable treatment to foreign investors than what is provided to domestic investors.[76] In this way, the European Union went further in its market access commitments in the CETA than in the Singapore or Vietnam FTAs. Even so, the European Union did not go as far in any of the three agreements as the U.S. model would typically go by including market access rights and subjecting them to ISDS. To illustrate, in the CETA, market access is limited to state-state dispute settlement[77] whereas in the Singapore FTA it is stated that the investment chapter applies to investments "made . . . in accordance with the applicable laws", which is a conventional device for excluding market access rights.[78]

The E.U.'s agreements, again following the U.S. model, also expressly authorize the states parties to issue interpretations of the treaty that are binding on ISDS adjudicators.[79] This mechanism is potentially useful to rein in arbitrator adventurism. That said, it has been available for over 20 years under NAFTA and has been used only twice.[80] Due to the degree of governmental mobilization and consensus that is required to implement the

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[73] *See* CETA, *supra* note 8, art. 8.5.
[74] *See* CETA, *supra* note 8, art. 8.6(1).
[75] *See* Singapore FTA, *supra* note 9, art. 9.3(1); *cf.* Vietnam FTA, *supra* note 10, art. 3(2) of ch. II.
[76] *See, e.g.,* CETA, *supra* note 8, art. 8.15; *see also* Singapore FTA, *supra* note 9, art. 9.3(2); Vietnam FTA, *supra* note 10, art. 3(3) of ch. II. A comparative analysis of these reservations and schedules is beyond the scope of this paper.
[77] *See* CETA, *supra* note 8, art. 8.4.
[78] *See* Singapore FTA, *supra* note 9, art. 9.2(1).
[79] *See* CETA, *supra* note 8, art. X.27(2); *see also* Singapore FTA, *supra* note 9, art. 9.22(3).
[80] *See* NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (Jul. 31, 2001),http://www.international.gb.ca/trade-agreements-accords-commercieux/topics domaines/disp-diff/NAFTA-Interrpr.aspx.

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mechanism, it is not an effective limit to ISDS adjudicator power. Other aspects of the CETA and FTAs also indicate, as discussed earlier, that the European Union accepts key aspects of ISDS arbitrators' past expansive interpretations of foreign investor rights, especially for the notion of legitimate expectations as part of the right to fair and equitable treatment.

4.3. Affirmation of the Right to Regulate

ISDS is imbalanced because it delivers wide-ranging and highly-enforceable foreign investor rights with corresponding responsibilities for countries. The essence of these responsibilities is the profound obligation of states to submit to ISDS adjudicator power and pay compensation as ordered by the adjudicators, where a majority of the tribunal decides the state did not, for example, treat a foreign investor fairly and equitably, live up to the investor's legitimate expectations, pay enough compensation after denying a permit or introducing a regulation, refrain from treating local investors more favourably than foreigners, or allow a foreign investor to transfer capital in or out of the country.[81] On the other hand, treaties allowing for ISDS typically lack a clear (or any) affirmation of the state's right to regulate as a counter-balance to foreign investor rights and protections. Investment treaties could affirm this right of the state effectively, alongside the state's responsibilities.[82] That is, the right could be described clearly in the treaty, without broad or ambiguous limitations, so as to limit the state's obligations as a whole concerning protection of foreign investors.[83] Yet the treaties rarely if ever do so.

As a response to this lopsided situation, the E.U.'s approach has incorporated into the CETA and Vietnam FTA a broadly worded clause that affirms the right to regulate.[84] This clause gives the ISDS adjudicators — if so inclined — an interpretive device to weigh foreign investor rights against the

[81] *See, e.g.*, CETA, *supra* note 8, art. 8.6, 8.10, 8.12, and 8.13.
[82] *See* J ANTONY VANDUZER, PENELOPE SIMONS & GRAHAM MAYEDA, INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES 287-398 (2012).
[83] *See, e.g.,* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur TS 5 and 213 UNTS 222 (entered into force Sept. 3, 1953); *see also* Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization, U.N. Conference on Trade and Employment, U.N. Doc 1948 II.D.4.1 (1948).
[84] *See* CETA, *supra* note 8, art. 8.9(1); *see also* Vietnam FTA, *supra* note 10, art. 13bis of ch. II.

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safeguarding of regulatory space for legislatures, governments and courts. Both the CETA and Vietnam FTA are worded in clearer terms than the comparably weak clause proposed by the European Union for the TTIP investment chapter.[85] Their affirmations of the right to regulate are an important improvement over the omission of the right in earlier versions of the CETA and a step toward formal balance in ISDS, even though none of the E.U.'s agreements take steps to establish actionable responsibilities for foreign investors.

In contrast, the Singapore FTA follows the usual ISDS model by not affirming the right to regulate in the investment chapter. Instead, the right is noted in aspirational preambular and other chapters of the FTA, signaling that the right is affirmed only for purposes of FTA chapters other than the investment and financial services chapters. In particular, in the Singapore FTA, the right to regulate is affirmed in the agreement's chapters on services and the environment,[86] creating an inference that the right was intentionally excluded from the FTA's separate investment and financial services chapters. The Singapore FTA thus falls well short of balancing the right to regulate, even in a formal sense, against the state's responsibilities to protect foreign investors.

Yet the European Commission has claimed that the approach to ISDS in the Singapore FTA and earlier versions of the CETA safeguards the right to regulate through a series of textual clarifications drawn mostly from the post-2000 U.S. model of ISDS.[87] For example,[88] the CETA had (and still has) moderating language for the foreign investor right to generous compensation for regulations that are viewed by the arbitrators as indirect expropriation.[89] This language supports the state's regulatory discretion as weighed against

[85] *See* TTIP investment ch., *supra* note 7, art. 2(1). *See also* G. VAN HARTEN, *Key Flaws in the European Commission's proposals for foreign investor protection in TTIP* 4-5 (Osgoode Hall Law Sch. of York Univ., Working Paper No. 16, 2016).
[86] *See* Singapore FTA, *supra* note 3, art. 8.1(2) and art. 13.2.
[87] *See, e.g.*, TTIP consultation text, *supra* note 7, at 2.
[88] The other main examples relate to the CETA and Singapore FTA's language on fair and equitable treatment, which is discussed in more detail below, and to the use of exceptions, reservations, and carve-outs. For a discussion of why the Commission's approach to these issues is problematic or misleading, from the perspective of balancing the state's right to regulate, see Gus Van Harten, *Reforming the System of International Investment Dispute Settlement, in* ALTERNATIVE VISIONS IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF M. SORNARAJAH 103 (Chin Leng ed., 2016).
[89] *See* CETA, *supra* note 8, annex 8-A; *see also* Singapore FTA, *supra* note 9, annex 9-A; *see also* Vietnam FTA, *supra* note 10, annex on expropriation.

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the state's obligation to compensate for direct or indirect expropriations, although it has major limitations.[90] For example, the moderating language does not apply to all foreign investor rights in the treaty, including the one – fair and equitable treatment – that is most frequently used by arbitrators to order public compensation for foreign investors. The E.U.'s approach also maintains interpretive power in the hands of ISDS adjudicators who have very rarely accepted principles of generalized balancing to limit foreign investor rights by reference to the right to regulate or rights of other actors.[91] If the Commission wanted to affirm the right to regulate, it would have to do so clearly for all foreign investor rights and protections and in all areas of state decision-making.

Lastly, there is a notable innovation in the CETA relating to the right to regulate. The CETA has a novel clause on arbitrators' power to order compensation for foreign investors. It is stated that, when calculating monetary damages against a country, the arbitrators shall reduce the damages to account for "any . . . repeal or modification of the measure".[92] In this way, the CETA appears to endorse expressly the incentives for states to change their decisions, in order to appease foreign investors who have brought an ISDS claim, as a means to limit the state's exposure to liability at the hands of ISDS adjudicators. Put differently, this CETA clause acknowledges and appears to be a step toward institutionalizing the dynamic of regulatory chill in ISDS.

5. CONCLUSION

The European Union has demonstrated that it is willing to accept a deeply flawed form of ISDS based on the conventional model pushed by Western European countries and the United States in their relations with developing and transition countries. That model of ISDS lacks judicial independence, procedural fairness, and formal balance in the allocation of rights and responsibilities.

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[90] *See, e.g.*, GUS VAN HARTEN, SOLD DOWN THE YANGTZE: CANADA'S LOPSIDED INVESTMENT DEAL WITH CHINA (2015).
[91] *See* Van Harten, *supra* note 2, at 89-104.
[92] CETA, *supra* note 8, art. 8.39(3).

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In the revised CETA and Vietnam FTA, but not the Singapore FTA, the European Union has taken partial but significant steps to address the lack of independence in ISDS. The European Union also moved in the proposed TTIP investment chapter to address in part the lack of fair process in ISDS, though it did not follow through with these proposed changes in the CETA or the Vietnam FTA. Furthermore, the European Union has adopted broadly-framed foreign investor rights based mostly on the U.S. model and on an especially expansive version of the frequently-invoked right to fair and equitable treatment. These broad rights are not accompanied by equivalently actionable responsibilities for foreign investors or by a requirement that foreign investors resort to domestic courts, where they offer justice, before bringing an ISDS claim. As a more positive but still limited step toward formal balance, the state's right to regulate is affirmed in the investment chapter of the CETA and the Vietnam FTA (but not the Singapore FTA).

Viewed alongside the proposed TTIP, the E.U.'s approach in these other agreements should be understood as an effort to expand massively the role of ISDS in state decision-making.[93] The pending expansion of ISDS can be illustrated approximately by considering the scope of the foreign-owned assets currently covered by ISDS. Using the U.S. economy as a proxy, for example, TTIP alone would extend ISDS coverage of foreign direct investment (FDI) by about 300%, compared to current coverage under existing U.S. treaties allowing for ISDS. That is, TTIP would cover 50 to 60% of inward and outward FDI of the United States, whereas current treaties cover 15 to 20%. Besides TTIP, other treaties pursued by the European Union or the United States — especially the CETA and Trans-Pacific Partnership – would expand ISDS to a point where it covers the great majority of FDI in the world.

Domestic investors and citizens and other foreign nationals are disadvantaged in ISDS, relative to foreign investors. They face the usual risks of democracy, regulation, and courts in the usual ways: by taking part in the

[93] These approximate figures were calculated based on existing investment treaty coverage of country-by-country inward and outward FDI flows for the U.S. in 2012 from the data provided in Organization for Economic Cooperation and Development [OECD], StatExtracts: FDI flows by partner country, http://stats.oecd.org/Index.aspx?DataSetCode=FDI_FLOW_PARTNER. The figures do not account for the possibility of forum-shopping by foreign investors which is difficult to measure and handled in different ways by arbitrators and existing treaties, but which could expand existing ISDS coverage.

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democratic process, by lobbying or protesting, by buying insurance, by bargaining for strong dispute settlement clauses in contracts with government, or by going to court. Foreign investors can still do all these things too, but with ISDS they have the added weapon of an exceptionally-powerful right to sue countries at the international level. Any proposal to grant special privileges, backed by public funds, to a group of economic actors — here, typically the largest and wealthiest in the world — calls at least for a compelling justification based on clear evidence of public benefit. The absence of this justification and evidence has been a key omission in European Union's current pursuit of a greatly expanded role for ISDS.[94]

[94] The most important agreements in this expansion would be the pending U.S.-led Trans-Pacific Partnership (TPP), the proposed TTIP, a proposed E.U.-China bilateral investment treaty, the CETA, and, for Canada, the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), which entered into force in 2014.