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Comments on Investment Protection under CETA

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Introduction

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

De Gucht, European Commissioner for Trade, 16 September 2014

⇒ A new generation of free trade agreements?

⇒ **Modell for TTIP**



General remarks

- ▶ Canada and the EU have **developed** legal systems and high standards for investment protection
- ▶ International and European **human rights law**:
 - ▶ Discrimination
 - ▶ Access of justice
 - ▶ Expropriation
 - ▶ ...
- ▶ Potential to **distort competition**: Vattenfall can file claim, unlike RWE



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

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



Expropriation – Article X.11

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



Investor-State Dispute Settlement (ISDS) I

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



Investor-State Dispute Settlement (ISDS) II

- ▶ **Applicable law:** CETA as interpreted in accordance with [...] international law
[...] = **natural bias** towards investment protection.
- ▶ **Transparency:**
 - ▶ hearings are public **in general**, an important improvement
 - ▶ Numerous documents must be made public
 - ▶ **National transparency rules** prevail
- ▶ **Appeal:**
 - ▶ **no CETA appeal system**, but consultation on appellate mechanism
 - ▶ no exhaustion of local remedies



Conclusions

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



Thank you for listening.

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