DERAINS & GHARAVI

The TTIP Debate: A Necessary Evil?

Columbia Center on Sustainable Investment

Spring 2015 International Investment Law and Policy Speaker Series
March 12, 2015

Eloïse Obadia, Partner

Question 1: Scope of the substantive investment protection provisions

- The scope of the agreement responds to a key question: *What type of investments and investors should be protected?*

  The EU's response is that investment protection should apply to those **investments and to investors that have made an investment in accordance with the laws of the country where they have invested.**

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 3

DERAINS & GHARAVI

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
"**Investment**" means every kind of asset, owned or controlled directly or indirectly by an investor of the other Party, including: a) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges; b) an enterprise, shares, stocks and other forms of equity participation in an enterprise including rights derived therefrom; c) bonds, debentures, loans, other debt instruments, including rights derived therefrom; . . .	"**Investment**" means: Every 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. Forms that an investment may take include: a) an enterprise; b) shares, stocks and other forms of equity participation in an enterprise; . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 18

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
. . . (v) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (vi) concessions pursuant to domestic law, including to search for, cultivate, extract or exploit natural resources, (vii) claims to money, or to other assets or any contractual performance having an economic value; (vii) intellectual property rights.	. . . c) bonds, debentures and other debt instruments of an enterprise; d) a loan to an enterprise; e) any other kinds of interest in an enterprise; f) an interest arising from: i. a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources, ii. a turnkey, construction, production, or revenue-sharing contract, or iii. other similar contracts; . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 18

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
	. . . g) intellectual property rights; h) any other moveable property, tangible or intangible, or immovable property and related rights; i) claims to money or claims to performance under a contract; . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 18

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
	. . . For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award. Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 18

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
Scope The provisions in this Treaty shall apply to investments made by investors of one Party in the territory of the other Party, in accordance with the applicable laws, whether made before or after the entry into force of this Treaty.	**Covered investment means, with respect to a Party, an investment:** a) in its territory; b) made in accordance with the applicable law at that time; c) directly or indirectly owned or controlled by an investor of the other Party; and d) existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 19

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
"**Investor**" means: i) a natural person having the nationality of a Party, in accordance with its applicable law; (ii) a juridical person/company or other organization organized in accordance with/under the law of a Party;	**Investor** means a Party, a natural person or an enterprise of a Party, other than a branch or representative office, that seeks to make, is making or has made an investment in the territory of the other Party. …

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 19

DERAINS & GHARAVI

Question 1: Scope of the substantive investment protection provisions

Common BIT Provisions	EU-Canada CETA Provisions
"Investor" means: i) a natural person having the nationality of a Party, in accordance with its applicable law; (ii) a juridical person/company or other organization organized in accordance with/under the law of a Party;	For the purposes of this definition an 'enterprise of a Party' is: a) an enterprise that is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party; or b) an enterprise that is constituted or organized under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under a). (*See* Consolidated CETA Text (September 2014), Art. X.3, p. 149)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 19

Question 1: Scope of the substantive investment protection provisions

- Most respondents welcome the exclusion of "mailbox companies" through the substantive business operations requirement. On the other hand, a minority of business associations consider that treaty shopping and mailbox companies – if set up in accordance with applicable law – should be allowed. Some respondents, for instance among business associations, recommend the inclusion of a denial of benefits clause instead of a reference to substantive business operations.

- With regard to the definition of investment, some respondents consider it to be too narrow, whereas others consider it too broad. In particular, trade unions called for a narrower definition (e.g., limited to FDI only). Many other participants called for the refusal of protection for portfolio and speculative investments. On the other hand, many business associations and companies proposed broad definitions of investment to include, for example, all intellectual property rights and intangible investments and to extend the protection to the pre-establishment phase of companies.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 16

Question 2: Non-Discriminatory Treatment for Investors

- Under the standards of non-discriminatory treatment of investors, a state Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (**national treatment**), as well in the same way in which it treats investors from other countries (**most-favored nation treatment**). This ensures a **level playing** field between foreign investors and local investors or investors from other countries.
- Non-discrimination obligations may apply after the foreign investor has made the investment in accordance with the applicable law (**post-establishment**), but they may also apply to the conditions of access of that investor to the market of the host country (**pre-establishment**).

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 4

Question 2: Non-Discriminatory Treatment for Investors

Common BIT Provisions	EU-Canada CETA Provisions
"Article X. Non-discrimination	**"Section 3: Non-Discriminatory Treatment** **Article X.6: National Treatment**
1. Each Party shall accord to investors of the other Party and to their investments, treatment no less favorable than the treatment it accords to its own investors and their investments with respect to the operation, management, maintenance, use, enjoyment and sale or other disposition of the investments.	1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favorable than the treatment it accords, in like situations, to its own investors and to their investments with respect to the establishment, acquisition, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. . . . (*See* Consolidated CETA Text (September 2014), Art. X.6, p. 156)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 19

Question 2: Non-Discriminatory Treatment for Investors

Common BIT Provisions	EU-Canada CETA Provisions
	Article X.7: Most-Favoured-Nation Treatment
2. Each Party shall accord to investors of the other Party and to their investments, treatment no less favorable than the treatment it accords to investors of any third country and to their investments with respect to the operation, management, maintenance, use, enjoyment and sale or other disposition of the investments.	1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favorable than the treatment it accords, in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 20

Question 2: Non-Discriminatory Treatment for Investors

Common BIT Provisions	EU-Canada CETA Provisions

. . .

4. For greater certainty, the "treatment" referred to in Paragraphs 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article , absent measures adopted by a Party pursuant to such obligations.

(*See* Consolidated CETA Text (September 2014), Art. X.7, p. 156)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 20

Question 2: Non-Discriminatory Treatment for Investors

- In this regard, some respondents consider that discrimination could be justified in certain cases. However, many business associations requested that non-discrimination provisions be kept in place. Also, referring to MFN protection, the EU's intention to avoid the importation of better ISDS procedures or substantive standards through the MFN clause is considered by many respondents not clear enough, not sufficient or excessive in the sense that it risks rendering the MFN obligation almost meaningless. There is a widespread call for greater clarity.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 16

Question 3: Fair and Equitable Treatment (FET)

- The obligation to grant foreign investors fair and equitable treatment (FET) is **one of the key investment protection standards**. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is **arbitrary**, **unfair**, **abusive**, etc.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 5

Question 3: Fair and Equitable Treatment (FET)

Common BIT Provisions	EU-Canada CETA Provisions
"Each Party shall accord investors of the other Party and their investments fair and equitable treatment." [*no further specifications*]	**Section 4: Investment Protection** **Article X.9.: Treatment of Investors and of Covered Investments** 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6. . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 22

Question 3: Fair and Equitable Treatment (FET)

Common BIT Provisions	EU-Canada CETA Provisions

. . .

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

a. Denial of justice in criminal, civil or administrative proceedings;
b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
c. Manifest arbitrariness;
d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

. . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 22

Question 3: Fair and Equitable Treatment (FET)

Common BIT Provisions	EU-Canada CETA Provisions

. . .

e. Abusive treatment of investors, such as coercion, duress and harassment; or

f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.

. . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 22

Question 3: Fair and Equitable Treatment (FET)

Common BIT Provisions	EU-Canada CETA Provisions

. . .

4. When applying the above fair and equitable treatment obligation, 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 in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

. . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 22

Question 3: Fair and Equitable Treatment (FET)

Common BIT Provisions	EU-Canada CETA Provisions

. . .

5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

. . .

(*See* Consolidated CETA Text (September 2014), Art. X.9, p. 158)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 23

Question 3: Fair and Equitable Treatment (FET)

- For most collective respondents, trade unions, and for several NGOs, the FET standards raise serious concerns either in light of certain cases or for fear that the proposed approach still allows expansive interpretations from arbitral tribunals. Several respondents (including businesses and NGOs) express concern against lowering the level of protection through a revision of the FET standards, which is viewed as providing an essential protection. The most important area of consensus appears to be that of ensuring that **FET could not be interpreted as a commitment or promise that the legal environment surrounding the investor would remain unchanged ("stabilization clause").**
- Other concerns include the possibility for the Parties to review the content of the standard during the lifetime of TTIP, whether legitimate expectations should be covered, and whether an "umbrella" clause should be included.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 17

Question 4: Expropriation

- The **right to property is a human right**, enshrined in the European Convention of Human Rights, in the European Charter of Fundamental Rights as well as in the legal tradition of EU Member States**.** This right is **crucial to investors and investments.** Indeed, the **greatest risk** that investors may incur in a foreign country is the risk of having their investment **expropriated without compensation.** This is why the guarantees against expropriation are placed at the core of any international investment agreement**.**
- **Direct expropriations**, which entail the outright seizure of a property right, do not occur often nowadays and usually do not generate controversy in arbitral practice**.** However, arbitral tribunals are confronted with a much more difficult task when it comes to assessing whether a regulatory measure of a state, which does not entail the direct transfer of the property right, might be considered **equivalent to expropriation** (indirect expropriation)**.**

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 6

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
Article X: Expropriation 1. Investments by investors of a Party in the territory of the other Party shall not be expropriated, nationalized or subjected to any measure equivalent to expropriation or nationalization, except for a purpose that is in the public interest, on a non-discriminatory basis, in accordance with due process of law and against prompt, adequate and effective compensation.	**Article X.11: Expropriation** 1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation. For greater certainty, this paragraph shall be interpreted in accordance with Annex X.11 on the clarification of expropriation.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 23

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
2. Such compensation shall amount to the fair market value of the investment immediately before the expropriation or impending expropriation became public knowledge, whichever is earlier. Compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall be paid without delay, shall be effectively realizable and fully transferable.	2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 23

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 24

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	4. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement'). (*See* Consolidated CETA Text (September 2014), Art. X.11, p. 159)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 24

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	Annex: Expropriation The Parties confirm their shared understanding that: 1. Expropriation may be either direct or indirect: a) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 24

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	. . . b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 24

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; b) the duration of the measure or series of measures by a Party;

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 24

DERAINS & GHARAVI

Question 4: Expropriation

Common BIT Provisions	EU-Canada CETA Provisions
	c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and d) the character of the measure or series of measures, notably their object, context and intent. 3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations. (*See* Consolidated CETA Text (September 2014), Annex X.11, p. 183)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 25

Question 4: Expropriation

- Most of the views expressed in this regard are related to indirect expropriation. Some respondents think that not all regulatory measures taken by States should require paying compensation, while others consider that any regulatory measure that has the same effect as an expropriation should be compensatory. This division of opinion closely resembles the debate between the "police powers" doctrine versus the "sole effects" doctrine.

- Specifically, certain respondents, including trade unions, consider that the notion of indirect expropriation should be narrowed down significantly; for instance, that it should specifically not cover lost profits. Other respondents, mainly from the business side, consider that the proposed approach would lower the protection granted to investors against the biggest risk they face abroad, in particular compared to BITs, because it allows States not to grant compensation for measures taken in certain sectors (e.g., health).

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 18

Question 5: Ensuring the Right to Regulate & Investment Protection

- In democratic societies, the **right to regulate of states is subject to principles and rules** contained in both domestic legislation and in international law. For instance, in the **European Convention on Human Rights**, the Contracting States commit themselves to guarantee a number of civil and political rights. In the EU, the **Constitutions** of the Member States, as well as EU law, ensure that the actions of the state cannot go against fundamental rights of the citizens. Hence, public regulation must be based on a legitimate purpose and be necessary in a democratic society.
- **Investment agreements reflect** this perspective. Nevertheless, wherever such agreements contain provisions that appear to be very broad or ambiguous, there is always a **risk** that the arbitral tribunals interpret them in a manner which may be perceived as a threat to the state's right to regulate. In the end, **the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply**.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 7

DERAINS & GHARAVI

Question 5: Ensuring the Right to Regulate & Investment Protection

Common BIT Provisions	EU-Canada CETA Provisions
Most BITs contain no specific provision.	**Preamble [Extract]** "**REAFFIRMING** their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions; **DETERMINED** to implement this Agreement in a manner consistent with the enhancement of the levels of labour and environmental protection and the enforcement of their labour and environmental laws and policies, building on their international commitments on labour and environment matters; . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 25

DERAINS & GHARAVI

Question 5: Ensuring the Right to Regulate & Investment Protection

Common BIT Provisions	EU-Canada CETA Provisions
	Preamble [Extract] … **RECOGNIZING** that the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; . . . (*See* Consolidated CETA Text (September 2014), Preamble, p. 6)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 25

Question 5: Ensuring the Right to Regulate & Investment Protection

- The vast majority of respondents in virtually all categories agree with the broad objective of finding an adequate balance between investment protection and the confirmation of the right to regulate in the public interest. However, some consider that the proposed approach is not sufficient, whereas others consider it too broad.

- Some respondents (mainly academics and think tanks) view the proposed approach as too weak, because the reference to the right to regulate is placed in the preamble and could be non-binding. Alternatively, trade unions see it as too narrow because the references do not apply to investment protection standards. Other respondents, such as from the business side, reject certain exceptions or limitations (e.g., on subsidies or public procurement) applicable to investment protection, or in general recommend caution against the use of such limitations.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 18

Question 6: Transparency in ISDS

- In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side.
- This **lack of openness** has given rise to **concern and confusion** with regard to the causes and potential outcomes of ISDS disputes. **Transparency is essential** to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 10

DERAINS & GHARAVI

Question 6: Transparency in ISDS

Common BIT Provisions	EU-Canada CETA Provisions
Existing investment agreements generally do not include provisions on transparency.	**Article X-33: Transparency of Proceedings** 1. The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter. 2. The request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 30

DERAINS & GHARAVI

Question 6: Transparency in ISDS

Common BIT Provisions	EU-Canada CETA Provisions
	3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules. 4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 30

DERAINS & GHARAVI

Question 6: Transparency in ISDS

Common BIT Provisions	EU-Canada CETA Provisions
	5. Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 30

DERAINS & GHARAVI

Question 6: Transparency in ISDS

Common BIT Provisions	EU-Canada CETA Provisions
	6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavor to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information. (*See* Consolidated CETA Text (September 2014), Art. X.33, p. 174)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 31

Question 6: Transparency in ISDS

- Transparency in ISDS proceedings and access to hearings is a widely-shared objective. However, there are different concerns. One group of concerns, mostly expressed by NGOs and trade unions, is that some of the exceptions to the transparency provisions to protect business confidential information could be too widely interpreted and could risk undermining the effectiveness of transparency.
- There is also concern that the tribunal could have too wide a discretion in deciding under what circumstances public hearings could be closed to the public.
- Another group of concerns stemming from business organizations and companies is that the provisions in the proposed approach on transparency go further than most national legal systems and that this could entail a risk that genuine confidential information and trade secrets could be disclosed. There is also concern that the access by the public to the hearings could politicize cases brought by companies, with the risk that this could affect the fairness of the proceedings.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 19

Question 7: Multiple Claims & Relationship to Domestic Courts

- It is often the case that protection offered in investment agreements **cannot be invoked before domestic courts** and the applicable **legal rules are different**. For example, discrimination in favor of local companies is not prohibited under US law but is prohibited in investment agreements. There are also concerns that, in some cases, domestic courts may **favor the local government** over the foreign investor e.g. denying due process rights. Governments may have **immunity from being sued**. In addition, the remedies are often different. In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. ISDS tribunals **cannot order governments to reverse measures**.
- These different possibilities raise important and complex issues. It is important to make sure that a government **does not pay more** than the correct compensation. It is also important to ensure **consistency between rulings**.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 11

Question 7: Multiple Claims & Relationship to Domestic Courts

Common BIT Provisions	EU-Canada CETA Provisions
Most investment agreements do not address the relation between ISDS and domestic courts.	**Article X-21: Procedural and Other Requirements for the Submission of a Claim to Arbitration** 1. An investor may submit a claim to arbitration under Article X-22 (Submission of a Claim to Arbitration) only if the investor: a) … b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent; . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 31

Question 7: Multiple Claims & Relationship to Domestic Courts

Common BIT Provisions	EU-Canada CETA Provisions
	c) …; d) …; e) …; f) where it has initiated a claim or proceeding, seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that: i. a final award, judgment or decision has been made; or ii. it has withdrawn any such claim or proceeding; …

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 31

Question 7: Multiple Claims & Relationship to Domestic Courts

Common BIT Provisions	EU-Canada CETA Provisions

g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

. . .

(*See* Consolidated CETA Text (September 2014), Art. X.21, p. 167)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 32

Question 7: Multiple Claims & Relationship to Domestic Courts

Common BIT Provisions	EU-Canada CETA Provisions
	Article X-23: Proceedings under different international agreements Where claims are brought both pursuant to this Section and another international agreement and: a) there is a potential for overlapping compensation; or b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, A tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award. (*See* Consolidated CETA Text (September 2014), Art. X.23, p. 169)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 33

Question 7: Multiple Claims & Relationship to Domestic Courts

- Many NGOs and citizens consider that, as a rule, domestic courts are "better placed" to address the disputes between the investors and the state. Several of these respondents directly argue for the introduction of the requirement of exhaustion of local remedies before the possibility to go to ISDS, which would become a solution of last resort.

- Conversely, nearly all large companies and business association consider that the investor should be free to choose either legal path and ISDS should not necessarily be the last resort. Some companies mention concerns of discrimination in favor of local companies, prevention of local courts from applying international treaties, and sovereign immunity for states (particularly for public acts). In general, all large companies and business associations are against the obligation to exhaust domestic remedies and fork-in-the-road provisions.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 19

Question 8: Arbitrator Ethics, Conduct and Qualifications

- There is **concern** that arbitrators on ISDS tribunals do not always act in an **independent and impartial manner**. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or **conflicts of interest**.
- Some have also expressed concerns about the **qualifications of arbitrators** and that they may not have the necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 12

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
No provisions on ethics, or a code of conduct. International arbitration rules may be relied upon and feature some provisions.	**Article X-25: Constitution of the Tribunal** . . . 1. Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator. . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 34

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	Article X-25: Constitution of the Tribunal . . . 2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, a disputing party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. The Secretary General of ICSID shall appoint the remaining arbitrators from the list established pursuant to paragraph 3 . . .

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 34

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	. . . 3. […] In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her own discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 34

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	4. Pursuant to Article X-42(2)(a), the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 15 individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party and one sub-list of individuals, who are neither nationals of Canada nor the Member States of the European Union, to act as presiding arbitrators.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 35

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	5. Arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 35

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	6. Arbitrators shall be independent of, and not be affiliated with or take instructions from any disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organization, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X-42(2)(b) (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party. (*See* Consolidated CETA Text (September 2014), Art. X.25, p. 170)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 35

Question 8: Arbitrator Ethics, Conduct and Qualifications

Common BIT Provisions	EU-Canada CETA Provisions
	Article X-42: Committee … The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties, decide to: a) establish and maintain the list of arbitrators pursuant to Article X-25(3)(Constitution of the Tribunal); b) adopt a code of conduct for arbitrators to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and that may address topics including: i. disclosure obligations; ii. the independence and impartiality of arbitrators; and iii. confidentiality. (*See* Consolidated CETA Text (September 2014), Art. X.42, p. 180)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 36

Question 8: Arbitrator Ethics, Conduct and Qualifications

- All respondents agreed on the importance of sound independence and selection procedures; however, many believe that the proposed approach will not provide sufficient guarantees or expressed doubt on their functionality. Many believe that the intrinsic characteristics of the ISDS make it impossible to regulate arbitrators' conduct. In contrast, many companies, some law firms, and even some academics expressed that the issue of conflicts of arbitrators should not be "exaggerated" and that the existing rules on the matter (e.g., IBA guidelines, ICSID rules, etc.) are sufficient.

- The expertise of arbitrators was also a topic of discussion, with NGOs arguing for a requirement of knowledge on social and/or environmental fields, and law firms and companies stressing the need for specialized and technical knowledge that is relevant to the dispute. In this regard, many respondents proposed the inclusion of grounds for disqualification for lack of the necessary qualifications (not only a lack of independence, as in the proposed approach).

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 20

Question 11: Guidance by the Parties (the EU and the US) on the Interpretation of the Agreement

- When countries negotiate an agreement, they have a **common understanding** of what they want the agreement to mean. However, there is a risk that any tribunal, including ISDS tribunals **interprets the agreement in a different way**, upsetting the balance that the countries in question had achieved in negotiations – for example, between investment protection and the right to regulate. This is the case if the agreement **leaves room for interpretation**. It is therefore necessary to have mechanisms which will allow the Parties (the EU and the US) to clarify their intentions on **how the agreement should be interpreted**.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 15

Question 11: Guidance by the Parties on the Interpretation of the Agreement

Common BIT Provisions	EU-Canada CETA Provisions
	Article X-27: Applicable Law and Interpretation 2. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a) recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date. (*See* Consolidated CETA Text (September 2014), Art. X.27, p. 172)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 41

Question 11: Guidance by the Parties on the Interpretation of the Agreement

Common BIT Provisions	EU-Canada CETA Provisions
	Article X-35: The non-disputing Party to the Agreement 1. … 2. The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement. The non-disputing Party may attend a hearing held under this Section. 3. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 2.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 42

Question 11: Guidance by the Parties on the Interpretation of the Agreement

Common BIT Provisions	EU-Canada CETA Provisions
	4. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party to the Agreement. (*See* Consolidated CETA Text (September 2014), Art. X.35, p. 175)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 42

Question 11: Guidance by the Parties on the Interpretation of the Agreement

- The large majority of respondents is not satisfied with the proposed approach to the control by the Parties on interpretation of the agreement (through binding interpretations and an intervention right for the non-disputing party), but is clearly split when it comes to the reasons for criticism.

- One part (mainly NGOs and trade unions) considers that the proposals do not give the Parties enough control over the arbitration proceedings, while the other part argues that the Parties should not intervene with the arbitration tribunals, which should remain free to decide also on issues of interpretation (mainly business associations and companies). Finally, several respondents also express doubts about the intervention right for the nondisputing party. They consider that it should be exercised with care and in good faith and be accompanied by guarantees to ensure that any submission does not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing party.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 23

Question 12: Appellate Mechanism and Consistency of Rulings

- In existing investment agreements, the **decision by an ISDS tribunal is final**. There is **no possibility** for the responding state, for example, **to appeal** to a higher instance to challenge the level of compensation or other aspects of the ISDS decision except on very limited procedural grounds.

- There are concerns that this can lead to different or even contradictory interpretations of the provisions of international investment agreements. There have been calls by stakeholders for a mechanism to **allow for appeal to increase legitimacy of the system and to ensure uniformity of interpretation**.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, March 2014, p. 16

Question 12: Appellate Mechanism and Consistency of Rulings

Common BIT Provisions	EU-Canada CETA Provisions
No provisions	**Article X.42: Committee** The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including: a) difficulties which may arise in the implementation of this chapter; b) possible improvements of this chapter, in particular in the light of experience and developments in other international fora; and,

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 43

Question 12: Appellate Mechanism and Consistency of Rulings

Common BIT Provisions	EU-Canada CETA Provisions
	c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others: i. the nature and composition of an appellate mechanism; ii. the applicable scope and standard of review;

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 43

Question 12: Appellate Mechanism and Consistency of Rulings

Common BIT Provisions	EU-Canada CETA Provisions
	iii. transparency of proceedings of an appellate mechanism; iv. the effect of decisions by an appellate mechanism; v. the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X-22 (Submission of a Claim to Arbitration); and vi. the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards. (*See* Consolidated CETA Text (September 2014), Art. X.42, p. 180)

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Annex, March 2014, p. 43

Question 12: Appellate Mechanism and Consistency of Rulings

- Opinions vary widely on this issue, neither favoring nor opposing it. Many respondents across all categories are in principle in favor of an appellate mechanism or even consider it indispensable.
- However, several of the ICC national chapters and some business associations argue in this respect that an appellate mechanism risks compromising the finality of arbitration; thus, undermining the fundamental basis of international arbitration. They also oppose an appellate mechanism arguing that there are sufficient existing mechanisms that can be used, such as the control mechanisms available under the ICSID and the New York conventions.
- Many propose an appellate mechanism with a multilateral approach (in cooperation with UNCITRAL, ICSID, and the ICC) or taking the form of an international court.

Source: *EU Public Consultation on Modalities for Investment Protection and ISDS in TTIP*, Report, January 2015, p. 24

Eloïse Obadia

DERAINS & GHARAVI PLLC

600 New Hampshire Ave. NW

Suite 640

Washington, D.C., 200037

Presentation for the Columbia Center on Sustainable Investment, Spring 2015
International Investment Law and Policy Speaker Series (March 12, 2015)