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CETA'S INVESTMENT CHAPTER: BLUEPRINT FOR A GLOBAL INVESTMENT REFORM?

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Introduction

The Canada and European Union (EU) Comprehensive Economic and Trade Agreement (CETA), belongs to this new generation of global treaties that purports to govern the world of trade as between two regional powers: The European Union and Canada. The EU is Canada's second most important trading partner after the US, and each bloc entertains a very lucrative investment relationship in the other's territory, as the total bilateral investment stocks exceeded $440 bn in 2014[1]. It is precisely this investment relation that these two economic powers have decided to enhance through chapter 8 of CETA, a chapter that has sparked difficulties until the very end of the negotiations and even beyond. Indeed, it took more than five years for negotiators to agree on a text which signature ceremony happened to be canceled out of the opposition of the leader of a Belgian regional government, Wallonia. Rescheduled three days later, the European Council President Donald Tusk and the Canadian Prime Minister Justin Trudeau finally signed the promised deal, only after a plane mechanical issue delayed the latter Prime Minister.

At the image of the signature ceremony, CETA is today a very fragile thing, legally speaking because it still has to be ratified in order to fully enter into force, and politically-speaking for the exact same reason: in the context of a wide popular opposition to international investment treaty both in Europe and in Canada, it is hard to imagine this mixed agreement succeeding through 29 signatures of national parliaments (including Canada[2]). The general public does not see the actual benefit of replacing eight bilateral investment treaties (BITs) by a unique succeeding agreement that will harmonize European investment policies with Canada

[1] "Canada, trade picture", European Commission, September 2016.
[2] "International Trade Minister introduces legislation to Parliament to implement CETA", Government of Canada, News release, October 31, 2016.

(the beginning of an end for reverse discrimination in the field of investment). It also sees the promised economic growth – of currently less than 2% both in the EU and a Canada – as an illusion that has been promised too many times. What looks more concrete to the public opinion is however a real lack of transparency and an alleged fragilization of public services and of local industries to the benefit of multinational companies.

And yet this wide opposition to investment treaties may in fact be the very reason why we need a CETA. Let us immediately end the breathtaking suspense: this paper will argue that CETA's investment chapter, in its substantive provisions, truly is a way towards an investment reform that has the potential to spread globally. Indeed, the negotiations were concluded at a time where a window of opportunity is open to influence deeply other countries' position as regard to their negotiating position with the EU. When we compare CETA and TTIP[3], the most striking difference is the one between a negotiation that works and a negotiation that does not. A success that can be explained by the necessary reforms that CETA is proposing in relation to the investment regime, and that starts with procedural change, as the very criticized and traditional Investor-State Dispute Settlement (ISDS) system is set to become an Arbitral Court System, based on the principle of transparency of proceedings and on the careful selection of independent, skilled and permanent judges to serve as arbitrator in the course of a five-years renewable mandate[4]. But this paper will focus on substantive change entailed by the negotiated treaty, and it will argue in a first part that CETA brings a long-awaited certainty in many unsettled issues of investment law; and in a second part that the treaty undoubtedly takes the stance of supporting states through much more favorable provisions than the average standard of investment treaties.

[3] Transatlantic Trade and Investment Partnership, currently being negotiated between the US and the EU.
[4] CETA, article 8-27(5).

I. Settling controversies: CETA finally brings certainty

Whether one stands better on the side of investors or on the side of states does not make a difference: he will have to admit that most of the critics addressed to the investment regime are grounded in reality. Investment arbitration tribunals have in their hands the enormous power of acting as a supreme degree of jurisdiction in the limited number of cases they are confronted to, the stakes are hence very high – beyond the billions of dollars involved – as regard to states' sovereignty. In that regard, common critics addressed to the ISDS system are that investment tribunals do not have a stable (or even logical) case-law and that a great deal of the case is settled when the third arbitrator – who chairs the investment panel and whose opinion is decisive – has been designated. Bilateral Investment Treaties (BITs) are generally drafted in general terms, allowing real possibilities for arbitrators to interpret provisions as they wish. The success of CETA negotiators is that they have learnt from the imprecisions of previous treaties and from the contentious interpretation of arbitrations, and the resulting provisions bring a great deal of clarity and of certainty that are capable of avoiding undesirable interpretations.

A – Back to basics: The definitions

Certainty starts with clear legal definition. As all investment treaties, chapter eight of the CETA starts with an article dedicated to "definitions"[5], especially of what is an investment and an investor.

In contrast with the rest of the treaty, the definition of an investment in the CETA is not

[5] CETA, article 8-1.

especially original, and it mainly respects the so-called Salini criteria[6]. CETA article 8-1 mentions the requirements of commitment of capital or other resources, a certain duration, an assumption of risk, and an "*expectation of gain or profit*", a criterion that seems to replace Salini's final and controversial one of a "*contribution to the economic development of the host state*".

Another element worth noting is the additional requirement that the investment be made "*in accordance with the applicable law at the time the investment is made*". Examples of behaviour that would have the effect of denying to an investment the protection of the treaties are "*fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process*"[7]. The presence of such a clause is not unusual, and it is inspired from prior cases that have denied jurisdiction to investments made unlawfully[8]. Its inclusion may ensure that fraudulent investment are denied legal protection, not only between Europe and Canada but beyond, as the treaty is set to inspire a wider reform.

As for the definition of investors, it seems that different kind of natural persons can claim depending on whether they are on side of Europe or on the side of Canada. Whereas Canadian investors can be either "*citizen[s] or permanent resident[s] of Canada*", the EU status of investor is only granted to nationals of EU Member States… except in the case of Latvia. Latvian permanent residents that are entitled "*to receive a non-citizen's passport*" are recognized as investors under the CETA. This legal curiosity has an historic explanation: forcibly annexed by the Soviet Union from 1940 to 1990, Latvia decided to restore the status of former Latvians that had been living elsewhere in USSR, but it did not immediately determine the status of the

[6] ICSID, Salini Costruttori S.p.A. v Kingdom of Morocco, 2001.
[7] CETA, article 8-18(3).
[8] ICSID, Phoenix Action, Ltd v The Czech Republic, 2007.

former USSR citizens that had also come to settle in Latvia during that period. The result is a unique status of "non-citizen" reserved to this limited category of individuals, who can apply at any time for naturalization.

When it comes to residentship, it is also interesting to note that the CETA addresses the hypothesis under which an investor is the citizen of a party but also the permanent resident of another. In that case, the treaty diplomatically applies the "*dominant and effective nationality*" test, borrowed from article 7 of the international Law Commission articles on Diplomatic protection (2006)[9]. This position is much in favor of an investor that has the dual nationality, and other treaties such as the ICSID Convention have instead barred jurisdiction to investors who have the nationality of the host-state[10].

As for enterprises, they can also be granted the status of investors, but the CETA actually requires them to have "*substantial business activities in the territory of that Party*". This bar to litigation is designed to deny jurisdiction to mailbox companies, subsidiary companies that are only created for the purpose of treaty shopping but that do not perform any economic activity in the country.

Definitions of terms rarely give rise to disagreements in the course of treaty negotiations since they are usually more technical than political. But it is certainly not the case of umbrella clauses, for which Canada and the European Union had to find a common ground.

[9] These articles are themselves inspired from a famous case in public international law: ICJ, Nottebohm (Liechtenstein v. Guatemala), 1955.
[10] ICSID Convention, article 25.

B – Be certain: Don't take your umbrella (clause)

A notable omission in the CETA relates to umbrella clauses, and the effect of this omission is that "contract-claims" are excluded of the scope of investment protection[11]. Indeed, article 8-18 of the Investment Chapter 8 indicates that an investor may only bring "*a claim that the other Party has breached an obligation under: (a) Section C* [non-discriminatory treatment], *with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or (b) Section D* [investment protection]*: where the investor claims to have suffered loss or damage as a result of the alleged breach*". There is no mention to the sanctity clause, that would otherwise have had the effect of transforming a contractual obligation owed by a state to an investor into an international obligation under the treaty to comply with the contract[12].

Such outcome was probably not favored by the European Commission, who affirmed on the contrary that "*they* [umbrella clauses] *have been traditionally used in Member States BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level*"[13]. In fact, it is probably Canada that was opposed to the application of such clause, at it has consistently done so in the past, for example in a derogation provision to the Energy Charter Treaty[14].

The result is a greater predictability of the rights of investors, as well of the international obligations that the EU and the states have undertaken. As contract law differs among the 28 EU Member States and the 10 Canadian provinces, it would have been a factor of uncertainty to

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[11] August Reinisch; Lukas Stifter, "European Investment Policy and ISDS", 2015 ELTE L.J. 11, 26 (2015).
[12] Gérard Cahin, "La clause de couverture (dite *umbrella clause*)", *in* Les techniques conventionnelles du droit des investissements, *RGDIP*, 2015, p. 127.
[13] "*Towards a comprehensive European international investment policy*", Communication from the Commission to the Council, (2010)343 final.
[14] OECD, International Investment Law: Understanding concepts and tracking innovations, 2008, Chapter 2, p. 104.

recognize an international cause of action to any investor who entered into a contract with public entities representing the State. Moreover, the case-law is, as often, not settled on the question of the effect of the umbrella clause, independently of how the provision is drafted. When some investment panels have argued that this clause simply permits the contract to reach the legal level of a treaty[15], others have introduced the limitation that the umbrella clause only has such effect over the contractual obligations taken in application of the State's police powers[16]. In addition to that, a second part of the case-law does not hold that the umbrella clause modifies the legal normativity of the contract, but that only the violations of the contract are risen to the status of a treaty-violation[17], and some other arbitration panels have limited this same interpretation to violations conducted by virtue of the State's police powers[18].

The exclusion of umbrella clauses is hence a victory for certainty, and it may help decrease concerns that the States' normative power is being limited by the fear of investors' anger.

By merely abstaining to draft a clause, European and Canadian negotiators have denied legal effect to *contract claims*. What is invisible in a treaty is just as important as its visible part, and jurists must beware of what is not in plain view.

C – Indirect expropriation: mind the fine print

In developed countries, most of the controversy surrounding direct expropriation has pretty much disappeared, as states usually enforce the rule of law strictly, and they would not

[15] ICSID, Nobles Venture v Romania, 2005.
[16] ICSID, El Paso International Company v Argentine, 2006.
[17] ICSID SGS v Pakistan, 2003; ICSID, SGS v Philippines, 2004; ICSID, Toto Costruzioni Generali S.p.A v The Lebanese Republic, 2009.
[18] ICSID, Sempra v Argentina, 2007; ICSID, Impregilo v Pakistan, 2005.

arbitrarily deprive someone of his investment without respecting the customary international law[19] standards that prohibit expropriation without a public purpose, respect for due process of law, non-discrimination, and payment of a "*prompt, adequate, effective compensation*" in accordance with the Hull formula[20]. European or Canadian would not expect to be subjected to a different treatment as regard to their property, and CETA protection of expropriation bears no originality, except for the part where it confers the right to a "*prompt review*" for any affected investor, by a "*judicial or other independent authority of [the] Party*".

Things really get interesting when Article 8-12(1) of the CETA casually mentions that "*for greater certainty, this paragraph shall be interpreted in accordance with Annex 8-A*" – using a drafting trick that is usually to be found in pre-formulated standard contracts between companies and consumers. This Annex is almost solely concerned with clarifying the notion of indirect investment that was otherwise only described in the article as "*measures having an effect equivalent to nationalisation or expropriation*"[21]. Such clarification is indeed welcomed, as the doctrine of indirect expropriation too has led to hesitation among investment panels as to whether emphasis should be put on the effect of the measure[22] or on the use by states of their police powers[23]. Besides, indirect expropriation has given rise to fears by states that their regulatory right may be hampered.

It is well-known that EU negotiators try to enhance the regulatory rights of states, and the European Parliament has urged for a "*clear and fair balance between public welfare objectives and private interests*" in referring to indirect expropriation[24]. This need for a proper balance

[19] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP", *Journal of International Economic Law*, April 2016, 19, 27–50.
[20] Note of Secretary of State Hull of Aug. 22, 1938, Press Releases, U.S. Dep't of State, vol. 19, No. 465.
[21] CETA, article 8-12(1).
[22] Iran-US Claims Tribunal, Tippetts v Iran, 1994.
[23] UNCITRAL, Pope & Talbot Inc. v Canada, 2000.
[24] EP Resolution of 6 April 2011 (2010/2203(INI)), para. 19.

between competing interests was first addressed by bringing, here again, more certainty in the interpretation of whether a state measure constitute indirect expropriation. The Arbitral Court will use the annex's guidelines to conduct a "*fact-based inquiry*", that does not rely on a single factor such as the economic impact of a measure – it is expressly stated that this "*sole fact (...) does not establish that an indirect expropriation has occurred*" – but several: the object, context and intent of a measure, as well as its duration and its interference with "*distinct, reasonable investment-backed expectations*". Although these factors still leave plenty of room for interpretation, the guidelines are sufficiently precise for the investors and for the Parties to know what to expect of a judgment. A second way of separating the interests of the public and those of investors was to add in the text of the treaty the guarantee of a strong legal protection in favor of "*legitimate public welfare objective*", namely health, safety, and the environment. Article 3 of Annex 8-A[25] seems to establish a presumption that a measure taken in protection of one of these interests will not constitute indirect expropriation, "*except in the rare circumstance when (...) it appears manifestly excessive*" (emphasis added).

The threshold for investors to prove that a measure is *prima facie* illegal when it relates to such wide objectives such as the protection of health, safety or the environment, is very high, and some commentators already argue that the prospect of such protection to be exported in other treaties negotiations such as the TTIP are real[26]. What appears in any event is that the EU has shown its firm commitments not only to provide more certainty to the world of investment arbitration, but also to readjust the balance between the interests of states and the interests of investors: in this battle, the CETA has largely taken the side of states.

[25] "*For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of 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*".

[26] Golnaz Abdollahi Jafari, "European Union investment policy at the crossroads: five years after Lisbon", *Bridging Europe*, 2015, Chapter 3.

II. Picking a side: CETA is on the states' side

As soon as the dependence towards investors diminishes – when states become more and more developed – the need to grant extraordinary rights to investors diminishes. In the context of extraordinary critics of the ISDS system, bilateral investment treaties have started to gain in precision and probably to narrow down investors' rights. CETA can be the little push that will concretize the trend on a global scale. That is why CETA has not been shy in expressly reaffirming the prevalence of legitimate policy objectives over investors' rights. For every attempt to correct a controversy in investor-state's arbitral case-law, CETA has settled in favor of the State, either in excluding umbrella clauses from the treaty or in adopting a very narrow definition of justiciable indirect expropriation. Perhaps this shift toward a better protection of public interests was to be expected, especially between two economically prosperous regions of the world. The only reason why investors are granted special privilege to claim at the international level through an exclusive adjudicating system is that states hope to bring capitals within their countries to finance major projects, especially in infrastructure. In places where railroads and factories are already built, the need of attracting foreign investments becomes less pregnant, and this justifies to ultimately question the need of an extensive legal protection through wide fair and equal treatment and most favored nation clauses.

A – Let's not be shy: Reaffirmation of the right to regulate

Some critics argue that the states' right to regulate is a non-issue since the rights conferred to investor do not oppose a regulation. Theoretically indeed, it is true that a state is not obliged to take into account the rights of investors when it edicts a piece a legislation… He will however have to compensate every investor present within its territory for the loss incurred. In

practice, the bar to regulation is hence situated when the norms are conceived and it takes the form of an abstention. Whether one believes that the states' right to regulate is well-established or not, it still feels better when it is written. The affirmation in the Preamble that "*this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives*" is probably to be granted the legal value of a well-intentioned and non-binding declaration. The real question is whether the consecration of regulatory measures in a binding provision comprised in the investment chapter has the potential to positively impact investment law.

"*Protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*"[27], the protected legitimate policy purposes are numerous, and it is not very clear whether the interpretation of their scope will be narrow, as in the case of an exception, or whether it will be broad. If interpreted broadly, it will be difficult for an investor to argue that a regulation does not achieve the purpose of protecting either public health, or the environment, or to benefit the consumer or cultural diversity. The question of what is covers by this notion of legitimate policy objective is essential, because it is possible to argue that the violation by a state of the protected right of an investor may only give rise to a claim under CETA if (i) a substantive provision is violated (i.e right to a fair and equal treatment, or clause of the most favoured nation); and if (ii) the relevant state's regulation does not achieve a legitimate policy purpose. This ultimate protection of the right to regulate would greatly diminish the potential for a claim against the state. What we must recognize is that this issue is "far from clear"[28].

[27] CETA, article 8-9(1).
[28] See M.L. Marceddu, "The Emerging Profile of the European IIAs", Transnational Dispute Management, Vol. 13, issue 1, March 2016.

A more straightforward protection to the right to regulate is the one that was granted in article 8-9(3) of the CETA. This provision seems to have been drafted in direct opposition to the Micula case[29], as it affirms – "*for greater certainty*" – the right for a Party "*not to issue, renew or maintain a subsidy (...) in the absence of any specific commitment under law or contract*"[30]. This shows the will for the European Union to never again put a Member State in the position of having to choose between either violating EU law (through the prohibition of state aids that are incompatible with the functioning of internal market[31]) or violating public international law[32]. Again, the right for a state to regulate prevails over the reasonable expectation of an investor that its subsidy will be maintained.

Whereas the effect of reaffirming the right of states to regulate in an operative clause is somehow uncertain, it is not the case of the fair and limited treatment clause, which scope is well-described.

B – A fair and limited treatment clause

When it comes to interpreting a clause of fair and equal treatment (FET), many arbitration tribunals are opposed. The drafters of various bilateral investment treaties have a part of responsibility in the partition of the case law, as they have themselves sustained the doubt as to whether the FET was merely referring to the minimum standard of treatment, therefore reflecting customary international law as the Neer sentence[33] has suggested; or whether a

[29] US District Court, Micula v. The Government of Romania,August 2015)
[30] CETA, article 8-9(3)(a).
[31] TFEU, article 107.
[32] In this case, ICSID Convention, article 54.
[33] UN, General Claims Commission, LFH Neer and Pauline Neer (United States) v Mexico (1926).

different name was calling for a different notion, notably the notion of legitimate expectations of the investor[34]. What appears from the reading of article 8.10 of CETA's investment chapter is that the negotiating parties no longer desire to give a blank check to the arbitrators to interpret the notion of FET, that is usually characterized in BITs as a *"treatment in accordance to international law*"[35]. Instead, the CETA has come up with a limitative list of measures that constitute a violation of a FET[36], thus constraining the future interpretation of the notion by arbitrators or by an Arbitral Court. This goal was clear since the beginning, as the European Commission expressed in September 2014 the will to come up with a "*clear, closed text that defines precisely the standard of treatment without leaving unwelcome discretion to arbitrators*"[37].

This list seems to correspond to notions encompassed in the minimum standard of treatment, as it comprises gross discrimination, manifest arbitrariness, physical coercion, or fundamental breach of due process and denial of justice. But although that was Canada's position on FET[38], the two negotiating blocs seem to have reached a common ground, as a further paragraph[39] mentions the legitimate expectation of an investor, induced by a specific representation that a Party subsequently frustrated. The inclusion of legitimate expectations in a different paragraph lets us wonder whether they merely represent an "*interpretative aid*" as Damien Nyer puts it[40], or whether they are fully encompassed in the notion of FET. Other

[34] ICSID, Saluka Investment B.V v Czech Republic, 2006.
[35] For example, see article 1105 of the NAFTA.
[36] CETA, article 8-10(2).
[37] European Commission, Note on Investment Provisions in the EU-Canada Free Trade Agreement (CETA), September 2014, page 2.
[38] It is at least what is reflected in Canada's 2004 Model BIT, article 5.
[39] CETA, article 8-10(4).
[40] Damien Nyer, "The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement", *Journal of International Arbitration*, Law International 2015, Volume 32 Issue 6) pp. 697 - 710.

commentators are more prudent, and use the term "*semi-autonomous*"[41] to describe the connection and dependence of legitimate expectations with the FET, but also the separation with the enumerative list.

Prudence was indeed the choice made by the drafters, since they have decided on the creation of a '*Committee on services and investment*'[42] that is entrusted with the task to "*review the content of the obligation to provide fair and equal treatment*". Whatever will the interpretation of the Arbitral Court on the FET provision be, such interpretation will only remain if Canada and the EU do not oppose. This safeguard of the states' interests is largely inspired from the NAFTA Free Trade Commission, that has also been used to precise the interpretation of the FET[43].

When it comes to fair and equal treatment, CETA has undertaken a good work of clarification that is likely to reduce the number of claims and that does not impair their ability to later limit the scope of the notion. As we shall see, the scope of the most favored nation clause was also limited.

C – The most favored nation becomes the most favored investor

As CETA article 8-7 explicitly mentions, a Most Favored Nation (MFN) clause requires a State party to provide investors with "*treatment no less favorable than the treatment it accords in like situations"* to investors under other investment treaties. Traditionally reserved to the area of

[41] F. Jadeau and F. Gélinas, "CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation", Transnational Dispute Management, Vol. 13, issue 1, March 2016.
[42] CETA, article 26-2(1)(b).
[43] NAFTA Free Trade Commission, 'Notes of Interpretation' (n 32).

tariff reduction under the General Agreement on Tariffs and Trade[44], this clause has then been included in BITs and it has had the effect of "*multilateralising*"[45] bilateral investments treaties through the importation of the most favorable treatment of investors present in any clause of any bilateral agreement of a country to another bilateral agreement concluded by that country. A complex network of interconnected agreement has formed, seemingly replacing the need of updating agreements through long and difficult negotiations. But this continuous "update" of agreements, always pointing in favors of investors, has given rise to fears of loss of controls by states of the rights that these agreements confer. A liberal clause conceded by a said state in the course of a difficult negotiation with a second state that has a stronger economic power – and in exchange of concessions in another clause – will end up binding this state toward the investors of all countries with whom he has negotiated an investment agreement. As a result, investors are granted rights in a way that may not match the original intent of a state, whose regulatory power is more and more constrained by the multiplication of the potentiality of claims.

By taking a resolute stance in favor of states, the CETA inevitably had to limit the MFN clause, which it did in two ways through CETA article 8-7(4), that states:

> "*For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states 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 or maintained by a Party pursuant to those obligations*".

[44] GATT (1947), art. 1.
[45] Marie-France Houde, "Most-Favoured-Nation Treatment" *in* International Investment Law, in "OECD, international investment law: A changing landscape", 2005.

First, the CETA has reduced the scope of the MFN clause as regard to substantive obligations present in BITs, in determining that it is not the treatment written in a bilateral treaty that has to be more favorable, but the application of the said treatment to an actual investor who is present in a third state. What that means is that any investor wishing to claim the right to a better treatment will have to find an investor who shares a similar situation and who enjoys a better treatment. This requirement of an actual preferable treatment is very much likely to reduce dramatically the number of claims presented against the state, as there are always differences among investors[46]: Are they both exporters? Do they have a comparable economic activity? Do they operate within the same market? etc.

The second way in which this provision limits the scope of the MFN clause is by taking out procedural treatment of the equation. It would have been a real flaw of the treaty not to exclude them, since the point of the procedural reform of the ISDS system was to come up with an arbitral court system. Any investor would have been able to argue that any treaty that contains an arbitration clause (referring for example to ICSID or UNCTAD) constitutes a more favorable treatment, but for the limit the CETA has introduced. Such controversial conceptions of the MFN clause were developed in Maffezini[47] and Siemens[48], where the compulsory delay prior to resorting to arbitration was of six months instead of eighteen. In applying the same line of reasoning to an arbitration forum, Brigitte Stern stated in her concurring and dissenting Opinion in Impregilo v. Argentina[49] that an MFN clause would result in considering the "*system that gives the choice to more fora*"[50] as the more favorable one.

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[46] Damien Nyer, "The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement", *Journal of International Arbitration*, Law International 2015, Volume 32 Issue 6) pp. 697 - 710.
[47] ICSID, Emilio Agustin Maffezini v. Spain, 2000.
[48] ICSID, Siemens c. République Argentine, 2004.
[49] ICSID, Impregilo S.p.A. v. Argentine Republic, 2011.
[50] Argument presented by Catharine Titi in "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law, Journal of International Arbitration, 2016, Volume 33 Issue 5) pp. 425 - 440.

This stop put on the constant liberalization of the investment regime through sometimes unwished multilateralisation of rights granted to investors is another successful attempt to favor states at the detriment of investors. It remains however uncertain whether other states will follow this large restriction of the MFN clause. It is even doubtful that a developing country could have negotiated a similar advantage, given that such a clause would then have run counter European or Canadian investors' interests.

Conclusion

Unlike other investment treaties, CETA proposes a strong change to the protection that is conferred to investors. But it also moves away from the detractors of free trade and of the ISDS system, and it offers an alternative that is acceptable for all sides and that will affect – if the treaty is ratified – more than 543 million people. CETA's goal to provide more certainty was born out of fair critics addressed to an investment system that needs to conduct an honest introspection of its practices. The claim that the rules should be changed in favor of states may be a quite contentious position, but this is the position that one shall take if he wants to reach out and rally the many critics of the current investment regime. To ignore the issues will only increase bitterness and hostility in a field that is already very much scorned. The European Union has understood it, partly because its new competence on foreign direct investment has been widely used to lead the discontent over democracy in the European institutions in general. In taking into account the opinion of the citizens within its own democratic union, the EU takes the stance of walking away from an adversarial relationship with Member States that has arisen in

the area of competition law, and to come back to a position of cooperation with Member States, a position that will help build a strong trade policy in relation to the rest of the world.

Beyond ratification, the greatest danger for CETA is to fail in its attempt to reform the field of investment law, and to be overflown by the growing number of voices calling for protectionism. Indeed, a failure to make the ISDS system and the substantive investment regime more acceptable to everyone may very much result in the end of international economic cooperation as we know it. The task for the small world of investment is very uneasy. It must break with the circle of unbalanced relations between developing countries and investors, and it must find a genuine common ground between investment protection and the preservation of the interests of populations – represented by states. As for the European Union, it must now offer the same kind of protection to states that it is currently negotiating agreements with, and especially to the developing countries. These countries undoubtedly need investments and investors, but not at the cost of their regulatory power and of norms that protect citizens.