Report

Evaluating the Proposed Joint Interpretation of the Comprehensive Economic and Trade Agreement (CETA)

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SUMMARY

This report analyzes the proposed interpretive guidance ("Proposed Joint Interpretation" or "draft text") on the Investment Chapter of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, which was circulated to members of the Trade Policy Committee on 19 October 2022.[1] The draft text is styled as a proposed Decision of the CETA Joint Committee, interpreting the agreement as contemplated under CETA Article 26.1.5.e.[2]

The primary focus of the draft text is the treaty's Investment Protection standards, and specifically the relationship of those standards to efforts to combat climate change. The purpose of these interpretations, though not stated explicitly, appears to be to assure member state governments and the public that the CETA's Investment Protection standards do not prevent states from regulating in the public interest, including by taking measures to mitigate and adapt to climate change.

These supposed assurances come in response to widespread concerns that investment treaties obstruct the social, economic, legal, and political transformations necessary for a greener, more sustainable future. Such concerns were expressed, most recently, in the European Parliament's resolution on the "modernization" of the Energy Charter Treaty, which observed that "an alarming number of investment claims target environmental measures," and that "various countries, including the Member States, are being sued in relation to policies on climate or the just transition."[3]

The draft text largely fails to provide assurances against these concerns. The obstacles to a green transition imposed by investment law are systemic and deeply rooted in the structure of agreements like the CETA investment chapter. In contrast, under CETA Article 26.1.5.e., the draft text is limited to offering "interpretations" of what is already in the agreement, and it can only go so far in affecting CETA's underlying balance of rights and obligations. As a result, the draft text falls back on the same techniques that have rendered previous rounds of reform largely cosmetic and ineffectual. There is, in short, nothing in this text that should be seen to mollify critics or redress legitimate concerns about the CETA or other investment treaties.

Indeed, the actual impact of the draft text on the interpretation of the CETA is likely to be minimal. In a few places, the draft text does clarify a question left open by the agreement itself, but genuine clarifications are a rarity and concern matters of relatively small importance. In most instances, the draft text's interventions do little to alter the range of possible interpretations or outcomes. These cosmetic interventions do not alter the *status quo*. In some places, the draft text introduces new and troubling layers of ambiguity with respect to efforts to address racial inequality and climate change.

These reflect systemic problems, which mostly cannot be resolved by further editing. At its core, investment law provides a special right for investors to challenge a government's laws, regulations, or administrative actions. This special right goes beyond, and is in addition to, the right to file cases in the regular court system. The special right is given only to "investors"— a special

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[1] Note for the Attention of the Trade Policy Committee (Services and Investment), Trade B3/CP/TB/ov/7326797 (Brussels 19 October 2022).

[2] See Appendix to this report.

[3] European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934(RSP).

category of persons. If successful, investors can win significant payouts, or they can leverage their claims to force governments to alter their regulatory schemes.

These features of the CETA or any other investment agreement cannot simply be interpreted away through a Decision of the Joint Committee. These systemic features can be changed only by amendment or revocation of the existing treaties.

ANALYSIS

I. CETA and the Basic Features of the Investment Treaty Regime

The international investment treaty regime, of which CETA forms a part, is a relatively new development.[4] The first bilateral treaty was signed in 1959, but the first modern investment treaty arbitration was not concluded until decades later in 1990.[5] Subsequently, "the rapid growth in the number of disputes brought to investor-state arbitration under investment treaties has transformed the investment treaty regime from an obscure field of international law to a central part of the investment regime complex."[6] Today, the investment treaty regime includes more than 3,000 treaties of varying levels of complexity, along with hundreds of arbitral decisions creating a kind of arbitral jurisprudence.[7]

A. The Investment Treaty Regime: One-Sided Protections to Investors, Enforced by Internationalized Dispute Settlement.

Investment treaties generally share four basic features.

First, investment treaties provide **freestanding rights under international law to covered investors**.[8] These rights are conceptually distinct from any rights and obligations afforded under domestic or EU law. This means that an act may be wrongful under an investment treaty even if it is lawful under a party's domestic law.[9] These freestanding rights and obligations may include:

- **Compensation for Expropriation:** Governments may not nationalize or expropriate property except under certain circumstances. Any expropriation must be accompanied by "payment of prompt, adequate, and effective compensation," which is understood to be the "fair market value" of an investment.[10] This requirement generally includes "indirect" expropriations, such as "manifestly excessive" regulations that deprive investors of the use and enjoyment of their property without a formal transfer of title.[11]

- **Full Protection and Security:** Governments are obligated to take measures to protect the "physical security" of investments, including by affording foreign investors adequate police protection.[12]

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[4] *See, e.g.*, Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INTERNATIONAL LAWYER 655 (1990).

[5] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990).

[6] JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 59 (Oxford University Press 2017).

[7] *See id.* at 2.

[8] *Id.* at 11–13.

[9] Articles on Responsibility of States for Internationally Wrongful Acts, art. 3.

[10] *E.g.*, CETA, art. 8.12.

[11] *E.g.*, CETA, art. 8.12.1 & Annex 8–A.

[12] *E.g.*, CETA, art. 8.10.

- **Most-Favored-Nation and National Treatment:** Parties to an investment treaty are obligated to refrain from discriminating against covered foreign investors in favor of domestic investors or investors from third countries.

- **Fair and Equitable Treatment ("FET"):** This phrase, although undefined in early investment treaties, has evolved into a catchall obligation to hold states liable for harm to investors caused by arbitrary legislative, administrative, or judicial decisions, discrimination, harassment, or breaches of due process.[13] This provision has been understood to protect, to some degree, investors' "legitimate expectations" about their investment.[14] Some interpretations of this obligation have been particularly expansive.[15]

Second, investment treaties generally impose **few or no corresponding obligations on investors**.[16] Most investment treaties do not impose any obligations on investors to respect labor rights and other basic human rights, to protect the environment, to avoid improper influence in domestic political processes, or anything of the sort. Some recent investment treaties have begun to include basic corporate social responsibility obligations, but even these meagre obligations are ordinarily not subject to adjudication.[17] The vast majority of investment treaties offer no means to hold multinational companies accountable for the harm caused by their activities.[18] In other words, the obligations flow only one way.

Third, investment treaties afford investors a **direct and unilateral right to international dispute settlement**. The host state consents in advance, subject to whatever conditions are in the treaty, to dispute settlement under international law. The investor can initiate this process at its own option, and generally without first resorting to domestic courts.[19] Once dispute settlement is initiated, the case can proceed to a final award even if the respondent state refuses to participate.

Fourth, the investor-state dispute settlement process is premised on **retrospective awards of compensation**. As a general matter, investors can seek only compensatory damages for the acts that harmed them. This means that investment tribunals cannot, as a rule, resolve a case by ordering

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[13] *See, e.g.*, CETA, art. 8.10.2.

[14] *See, e.g.*, CETA, art. 8.10.4.

[15] Zachary Douglas, *Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko, and Methanex*, 22 ARBITRATION INTERNATIONAL 27 (2006) (showing how some investment tribunals have imposed an interpretation of "fair and equitable treatment" that amounts to "a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain").

[16] BONNITCHA, POULSEN & WAIBEL, *supra*, at 14–15.

[17] *See, e.g.*, James Gathii & Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 113 AJIL UNBOUND 1, 1 (2019) ("When states have tried to use arbitration to challenge the misconduct of foreign investors within host states, investor-state arbitration tribunals have ignored these claims or have failed to find legal bases for *investor responsibility*.").

[18] *See, e.g.*, Martin Jarrett, Sergio Puig & Steven Ratner, *Towards Greater Investor Accountability: Indirect Actions, Direct Actions by States, and Direct Actions by Individuals*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2021).

[19] *See, e.g.*, Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUROPEAN JOURNAL OF INTERNATIONAL LAW 289, 295 (2020) (describing investment treaties as creating a "parallel legal regime, designed to function as a more effective substitute for domestic courts").

forward-looking remedies. They cannot order a state to adjust its regulatory framework to be more equitable, to reconsider an application for a license or permit, or to speed up a slow decision-making process. Instead, the only award is damages, measured by the investor's economic harm. These damages awards can in some cases be quite high.[20] And they are enforceable worldwide in much the same manner as commercial arbitral awards.

B. CETA as a Component of the Investment Treaty Regime

Each of these features is reflected in the CETA. The CETA affords covered investors fair and equitable treatment, full protection and security, protection against nationality-based discrimination, and compensation for direct and indirect takings.[21] It does not impose any significant corresponding investor obligations, nor does it provide procedural mechanisms for states to enforce investor accountability by bringing their own actions.[22] The CETA also affords a right for investors to access international dispute settlement without first going through local courts.[23] And this proceeding results in an enforceable monetary award of compensatory damages.[24]

None of the extensive reforms and clarifications in the CETA alter fundamentally this basic structure of rights and obligations. The object of the Investment Chapter remains investment protection, which is afforded to a range of possible investments. The CETA's reforms to the dispute settlement process, including the Investment Court System and the anticipation of a Multilateral Investment Court, likewise do not alter this basic structure.

In other words, investors under CETA will remain the claimants in all dispute settlement proceedings, invoking treaty-based rights and protections. And governments will be respondents in such proceedings, relying on whatever defenses are available under the treaty. As one participant in the system recently noted, these characteristics make the investment regime "very similar" to international and regional human rights systems.[25] Except that, here, the rights-bearers are not all of humanity, but a discrete class of "investors."

II. The Investment Treaty Regime's Tension with Social Welfare Regulation

For as long as it has been publicly salient, the investment treaty regime has faced concerns that it "interferes with the ability of states to regulate in the public interest by excessively constraining

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[20] *See, e.g.*, Martins Paparinskis, *Crippling Compensation in the International Law Commission and Investor-State Arbitration*, 37 ICSID REVIEW 289 (2022).

[21] *See* the provisions cited above.

[22] *See, e.g.*, Jarrett, Puig & Ratner, *supra*, at 15–16. A limited exception is that investors may not submit claims if "the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process." CETA, art. 8.18.3. The Proposed Joint Interpretation also notes that an investor's damages may be reduced by its own contributory fault. But these limited mechanisms do not provide a means for invoking investor responsibility as a general matter.

[23] *See* CETA, art. 8.22.

[24] CETA, arts. 8.39.1, 8.41.

[25] Colin M. Brown, *The Contribution of the European Union to the Rule of Law in the Field of International Investment Law Through the Creation of a Multilateral Investment Court*, 27 EUROPEAN LAW JOURNAL 96 (2022).

national policy autonomy."[26] The concern here, to be precise, is that the freestanding obligations afforded to investors are in tension with the ability of the state to adopt regulations that restrict economic activity or impact investors' revenue. Some worry that the mere threat of investor state disputes could "chill" socially valuable regulation, as governments seek to avoid confrontations with investors under investment treaties.[27] And, even if such "regulatory chill" does not yet occur systematically, investment proceedings may still unduly burden states that do undertake to regulate in the broader public interest.

A. Illustration: "Protest at the Beach," Part I

To understand how investment treaties might impact public welfare regulation, consider the following hypothetical set of facts. Suppose that a government, in a bid to boost the national economy, seeks to convert a relatively undeveloped coastal area into a premier international tourist destination. It offers inducements and incentives to foreign development companies. Attracted by these incentives, a foreign developer invests in a larger project involving a hotel, theater, and other attractions in this area. Before the project is completed, local activists argue that the area is environmentally sensitive, and that development would damage the natural environment and harm biodiversity. Following several public protests, government regulators review their earlier decision, and they agree that the projects are environmentally harmful. Permits are denied, and the area is later rezoned to exclude large-scale developments, making the land essentially worthless for developers.

The developer, if from a country that has an investment treaty with the host state, could then bring a claim for damages under the treaty. It might argue that the host government's decisions were arbitrary, inconsistent, or failed to follow proper procedures. Or it might argue that the government's inducements and incentives created "legitimate expectations," which were then undermined by the zoning change. Or it might contend that the permit denial and rezoning constituted an "act tantamount to expropriation"[28] by depriving it of the expected value of the investment. The developer would seek damages for the value of the investment, and it would likely also seek recovery of lost future profits.

This proceeding could put many states in a difficult position. The threat of a lengthy legal proceeding, followed by the possibility of a sizable damages award, might be enough to pressure some governments to settle the case. The government might then either pay the investor right away, or it might revoke the zoning measure and allow the development to go forward. If the government does choose to defend the case, it could still be facing sizable liability if it does not prevail.

B. Investment Cases and Public Interest Regulation

This tension between public welfare regulation and investor protection is to a significant degree embedded in the investment treaty regime.[29] In many cases, investors have already challenged

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[26] BONNITCHA, POULSEN & WAIBEL, *supra*, at 234 (recounting these critiques).

[27] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNATIONAL ENVIRONMENTAL LAW 229 (2018).

[28] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 111 (Aug. 30, 2000).

[29] This is discussed at length in Tienhaara, *supra*.

state regulatory measures, and have either succeeded, or have successfully delayed the implementation of regulations. These cases have included:

- **National Economic Crises:** Fifty separate cases were brought against Argentina challenging its emergency measures responding to a national economic crisis, "one of the worst political and economic crises in its history."[30] Many of these cases resulted in substantial awards in favor of the investors, or in settlement, and decisions frequently hinged on the malleable "fair and equitable treatment" standard.[31]

- **Tobacco Control:** The tobacco company Philip Morris brought proceedings against two states, alleging that plain-packaging and single-presentation requirements for cigarette packages violated investment protection obligations.[32] Although both states successfully defended these cases, the proceedings served to delay other governments' implementation of similar plain-packaging requirements.[33]

- **Renewable Energy Incentives:** In a series of cases, investors have challenged efforts by states to adjust incentive regimes for renewable energy, resulting in a series of inconsistent awards.[34]

- **Wetlands Protection:** A tribunal recently decided that the Republic of Colombia was liable to a Canadian mining company for frustrating the company's ability to operate a silver mine near sensitive high-altitude wetlands.[35] The amount of damages has yet to be determined.

- **Oil Drilling Ban:** Earlier this year, a tribunal awarded 185 million EUR in lost profit to a UK-based company, plus additional costs, in compensation for an offshore drilling ban adopted by the Italian parliament.[36]

These are only a few examples of particularly controversial cases. It bears mentioning that states have managed to prevail in several cases challenging regulatory measures, and in other cases

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[30] Federico Lavopa, *Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina*, *in* INVESTMENT TREATIES: VIEWS AND EXPERIENCES FROM DEVELOPING COUNTRIES 193 (Kinda Mohamadieh, Anna Bernardo & Lean Ka-Min eds., South Centre 2015).

[31] See, for example, *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011).

[32] *Philip Morris Brands Sarl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016); *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Liability (Dec. 17, 2015).

[33] BONNITCHA, POULSEN & WAIBEL, *supra*, at 241 (referring to delayed adoption in New Zealand).

[34] *See, e.g.*, Maximilian Schmidl, *The Renewable Energy Saga from Charanne v. Spain to the PV Investors v. Spain*, KLUWER ARBITRATION BLOG, Feb. 1, 2021, http://arbitrationblog.kluwerarbitration.com/.

[35] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Principles of Quantum (Sept. 9, 2021).

[36] Lisa Bohmer, *Analysis: Unpacking the Rockhopper v. Italy Award, Including Tribunal's Reasons for Finding that Denial of Hydrocarbons Concession Amounted to an Unlawful Expropriation, and for Awarding 190 Million EUR to Claimants*, INVESTMENT ARBITRATION REPORTER, Sept. 1, 2022, https://www.iareporter.com/.

have been found liable but have managed to pay a relatively small amount in damages.[37] Nonetheless the risk remains. As of the date of this report, investors either have brought or are threatening to bring challenges to a range of measures, including challenges to gas production by hydraulic fracturing ("fracking"),[38] the revocation of a permit to construct an oil pipeline,[39] and the refusal to grant an environmental permit for minerals exploitation,[40] among other matters.

III. 'Second-Generation' Treaties: An Attempted Response to the Critics

In response to concerns that investment law and dispute settlement would be weaponized against publicly beneficial regulations, treatymakers have sought to provide reassurances to skeptical publics. Beginning in earnest around 2004, drafters began devising so-called "second-generation" investment treaties.[41] These treaties were so called because retained the basic structures and principles of investment law as outlined above, but sought also to allay fears and "rebalance" the system of rights and responsibilities through procedural and substantive reforms.

A. CETA as a Second-Generation Investment Treaty

The CETA Investment Chapter is a premier example of a second-generation BIT. Among other things, it contains the following features[42]:

- **Right to Regulate:** The CETA reaffirms the right of each party "to regulate … to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[43] In particular, it states that the "mere fact" that an investor is damaged by a regulation does not give rise to a breach of the agreement. This provision, however, does not operate as a defense to any particular claim, and it

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37 *See, e.g.*, *William Richard Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages (Jan. 10, 2019) (finding a breach of international law in the operation of a local environmental review panel, and awarding $7 million in damages, largely arising from investors' sunk costs).

38 Press Release, Ascent Resources plc Arbitration Initiation and Revised Damages Estimate, 15 August 2022, https://polaris.brighterir.com/public/ascent_resources/news/rns_widget/story/r793ozx; Notice of Arbitration, *Lone Pine Resources Inc. v. Government of Canada*, 6 September 2013.

39 Lisa Bohmer, *15+ Billion USD Dispute Over Keystone XL Pipeline Proceeds to NAFTA Legacy Arbitration*, INVESTMENT ARBITRATION REPORTER, Nov. 22, 2021, https://www.iareporter.com/. Disclosure: the author of this report served as counsel to the respondent in an earlier case involving this pipeline.

40 Lisa Bohmer, *US Investor Threatens NAFTA Arbitration Against Mexico over Failure to Provide Environmental Permit for Mineral Exploitation Project*, INVESTMENT ARBITRATION REPORTER, Mar. 25, 2019, https://www.iareporter.com/.

41 *See, e.g.*, Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1037 (2010).

42 The CETA also includes a wide range of other substantive and procedural devices not covered here. These include clarifications to the most-favored-nation treatment obligation, procedural mechanisms for the consolidation and early dismissal of claims, an appellate mechanism for error-correction, and the possibility of a future multilateral investment court. This slate of reforms is for the most part not directly relevant to the draft interpretative guidance, and is thus outside the scope of this report.

43 CETA, art. 8.9.1.

does not preclude any investor from arguing that the circumstances of any given regulation do indeed give rise to a treaty breach.

- **Enumerating Fair and Equitable Treatment:** The CETA provides a list of what types of actions constitute a breach of the "fair and equitable treatment" principle, one of investment law's most malleable standards.[44] These include denials of justice, breaches of due process, targeted discrimination, etc. In a further attempt at clarification, each of these is modified by an adjective suggesting some degree of extremity: for example, we are told that breaches of due process must be "fundamental," discrimination must be on "manifestly" wrongful grounds, and arbitrariness also must be "manifest."[45] These terms are not defined.

- **Clarifying Regulatory Expropriations:** The CETA includes an Annex on Expropriation, which offers a series of factors for determining when an "indirect" expropriation occurs.[46] This annex deals explicitly with the possibility that public-welfare regulations can constitute expropriation, explaining that they only do so "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."[47] The possibility that a regulation might be expropriatory is not, however, foreclosed.

- **Specific Provisions Relating to the Environment:** The CETA includes provisions envisioning a positive and mutually reinforcing relationship between trade and investment, sustainable development, and protection of the environment. There are commitments to "build upon international environmental agreements to which they are party,"[48] affirmations of the right to regulate for environmental protection, and obligations to seek "high levels of environmental protection."[49] It is "inappropriate" to encourage investment by weakening environmental protection.[50] On the other hand, environmental measures that affect investment must "take into account relevant scientific and technical information and related international standards, guidelines, or recommendations," subject to the precautionary principle.[51] There is no general carve-out or exception for environmental measures in the treaty as it relates to investor protection, and instead the CETA appears to rely primarily on the above statements of the right to regulate.

[44] CETA, art. 8.10.2.

[45] CETA, art. 8.10.2.

[46] CETA, Annex 8-A.

[47] CETA, Annex 8-A.

[48] CETA art. 24.2; *see also id.* art. 25.4.

[49] CETA art. 24.3.

[50] CETA art. 24.5.

[51] CETA art. 24.8.

Taken together, these reforms are evidently designed to address the conflict between public welfare regulation and investor protection outlined above.[52] These "second-generation" reforms seek to ensure that states can continue to regulate in the public interest, provided that the regulations are non-arbitrary, rationally related to a legitimate objective, and not excessive.

B. Illustration: "Protest at the Beach," Part II

Recall the above example of a tourist development that is halted because the area is deemed environmentally sensitive. Under the CETA, it is expected that, prior to this decision, regulators collected and took into account relevant scientific information, as well as any applicable international standards and guidelines.[53] The regulators then, it is expected, will have engaged in a transparent and procedurally regular decision-making process, ultimately leading to a decision to rezone the area in a way that prevents development.[54] Prior to rendering this decision, it is expected that no government official made any "specific representation" to the developer, upon which it could have relied in pursuing the project.[55] The policy objective achieved by the decision must be "legitimate," so hopefully the environmental rationale is convincing and there is no hint that the decision was taken for politicized reasons.[56] The decision should not be tainted by "manifest" "arbitrariness," should be calculated to achieve these legitimate objectives, and should not be "manifestly excessive."[57]

Provided these conditions are met, the CETA is evidently designed to ensure that the state has a relatively strong defense against any investor claim.

IV. The Failure of the Second-Generation

The performance of second-generation BITs has been, to this point, disappointing. Although the percentage of cases filed under these newer treaties remains relatively low,[58] the tribunal decisions we have seen in such cases do not suggest anything like a paradigm shift in investment law. And, as explained in the illustration below, the reforms of the second generation are unlikely to have a significant impact on most actually existing disputes involving contested public-interest regulation.

A. Reforms 'Missing in Action'

In the words of one eminent scholar who has studied treaty reform exhaustively, these new treaties continue to produce "old outcomes" in the decisions of investment tribunals.[59] These include tribunal awards that continue to produce results and holdings consistent with the earlier investment

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[52] *See supra* Part II.B.

[53] CETA art. 24.8.

[54] CETA art. 8.10.2(b).

[55] CETA art. 8.10.4.

[56] CETA art. 8.9.1.

[57] *See* CETA arts. 8.9.1, 8.10.2(c) & Annex 8–A.

[58] *See, e.g.*, Tarald Laudal Berge, *Dispute By Design?: Legalization, Backlash, and the Drafting of International Agreements*, 64 INTERNATIONAL STUDIES QUARTERLY 919, 925 (2020).

[59] WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (Cambridge University Press 2022).

treaties, which this second generation had been expected to change. And it appears that some states and their lawyers simply are not invoking the newfound flexibilities in these treaties.

Why, then, are many innovations of the second generation "missing in action"?[60] The answer, in my experience, is not that states and their lawyers are unaware of the flexibilities these new treaties afford them.[61] Instead, it seems that these newfound "flexibilities" simply are not fit for purpose: they do not help, and in some cases even hinder, states when defending their regulatory choices in actual investment cases. This can best be shown by way of example.

B. Illustration: "Protest at the Beach," Part III

To understand how this happens, it is worth returning once more to our above example of the tourist development in an environmentally sensitive area.[62] As noted above, a permit denial and zoning regulation that prohibits development, even for environmental reasons, creates economic harm to investors and could trigger a dispute under an investment treaty. The CETA responds to this risk by affording defenses to the state, provided that the regulation was carried out in a reasonable, non-arbitrary, properly tailored, procedurally fair, and scientifically backed manner.[63] The problem is that public welfare regulation, especially on matters like climate change, is likely to be far more politically contentious than this idealized picture suggests.

First, let us consider the package of "inducements and incentives" offered to the investor. Imagine these include enthusiastic written encouragements, in emails, text messages, memos, and social media posts, from high-level officials in the local and national government. Indeed, the initial investment is celebrated with great public fanfare. Government officials and the developers collaborate to produce an extensive Environmental Impact Assessment (EIA) of the project, going beyond even what is required in domestic law. The investor makes costly adjustments to the planned project to mitigate its impact, having been assured by officials that doing so "will make sure we don't run into any obstacles later." The developer then receives an environmental permit, along with an email from the top environmental regulator saying "now nothing stands in the way" of the project.

Then the "public protests' begin among a small but vocal group of environmental activists. The activists argue that the EIA is flawed, and produce their own "Citizens' Assessment," which shows a far more damaging environmental impact. Regulators review the Citizens Assessment, but find its methodology to be flawed, and publicly stand by the original EIA. The activists bring an administrative challenge seeking to revoke the environmental permit. The challenge is rejected, with the Ministry of Environment finding that the project is "environmentally sound and compliant with all applicable laws and regulations." A court case is also quickly dismissed. The Prime Minister says at a press conference that "the courts have spoken, and we look forward to the swift completion of this project."

Then things start to shift. Despite the failed legal challenges, the protest movement continues to grow. An election shifts the coalitions in parliament toward a majority that is more concerned with

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[60] *Id.* at 6–7.

[61] This is the explanation suggested in *id.* at 8.

[62] *See supra* Part II.A.

[63] *See supra* Part III.B.

environmental protection. A TV documentary about poisoned wetlands, though unrelated to this development, galvanizes environmental activism across the region, focusing on protection of coastal areas. More citizens begin marching in the streets. They even shut down construction at the site for several days. Government ministers begin arguing in the press about the project, with some in favor and some against. One of the project's defenders argues that the environmentalists are just "out to score political points."

Eventually, officials determine that the protest movement is presenting a national social, political, and electoral issue. The Minister of the Environment asks her staff to revisit the Citizens' Assessment. In response, she receives a memo explaining that "this Ministry has never used the novel methods in the Citizens' Assessment, and they are not consistent with accepted international guidelines." With political pressure mounting and a deadline looming to approve the next phase of construction, regulators appear to be looking for more time. They ultimately deny a construction permit for the next phase of the project, citing some (seemingly small) errors and omissions in the developer's application. The developer is told to resubmit their application with the errors corrected, but the project in the meantime is delayed by several months.

From there, things begin to deteriorate. Environmental regulators issue a report about the impact of coastal development on certain wildlife habitats, and ask all developers in the area to submit further information about mitigation efforts. This report, for the first time, cites data collected in the Citizens' Assessment. The developers initially attempt to work with regulators to identify additional mitigating measures, but these efforts are met with non-committal responses and delay.

Finally, after construction has been halted for more than a year, the developers' construction permit is denied. The Notice of Denial cites a provision of the Buildings Law, which allows construction permits to be denied for reasons of safety to building occupants and those nearby. The Notice states that this provision allows permits to be denied if a project is "unsafe to the surrounding area's natural environment and wildlife." To support its findings, the Notice cites the Citizens' Assessment. The area is then rezoned to prevent further development permanently.

C. Evaluating the "Protest at the Beach"

It is far less clear how a case like the above would fare under a second-generation treaty like CETA. The investor will argue that the denial was not regulation for "legitimate public welfare objectives."[64] Instead, the investor will claim, the shifting grounds for decision, the novel interpretations of local law, and the unreasonable delay were all "manifestly arbitrary" and a "fundamental breach of due process."[65] The delay, the permit denial, and ultimate rezoning, the investor would argue, were each so severe as to be "manifestly excessive," and interfered with the "distinct, reasonable investment-backed expectations" created by regulators' earlier assurances. In fact, the investor would argue, the provisions of the CETA themselves show that this series of decisions, far from being legitimate regulation, was the kind of politically motivated regulatory behavior from which the CETA is meant to provide protection.

Should the investor be entitled to compensation in this case? The above facts may read to investors as a politically motivated, arbitrary decision. But environmental activists would likely view

[64] *See* CETA art. 8.9.

[65] *See* CETA art. 8.10.2.

the same set of facts as a hard-fought political victory. The threat of a compensation award, then, can act as a lever to undo that victory, or to prevent it from occurring in the first place.

And yet, these are the kinds of decisions that are likely to characterize the environmental and social politics of the twenty-first century.[66] Of course, sometimes it will be possible to achieve social welfare objectives through orderly, well-managed regulatory processes that include all stakeholders and proceed with full rationality. But the social and environmental politics of the twenty-first century are also sure to be marked by these sorts of struggle and division. In this context, the cobbling together of political coalitions and the mobilization of pressure on political decision-makers may not mesh well with the rational regulatory process anticipated by CETA. But this messy process is also, to borrow a phrase, what democracy looks like.

The reality of investment disputes is why the clarifications of the CETA and other second-generation treaties are doomed to fail. As long as the conflict between investor protection and social welfare regulation is portrayed as involving fully rational, well-ordered processes, then this conflict appears as though it might be resolved by carefully worded revisions to treaty language. But the reality of social welfare regulation, at least on critical issues like the environment, is far messier. And, under investment treaties, the stakes are high: a finding of liability means that a state must pay to the investor a potentially hefty damages award; there is no opportunity to go back and tweak the regulation or reconsider an application for a permit.

In other words, in the actual practice of investment treaties, policymakers simply must choose between protecting the messy political process and privileging the property rights of investors. This tension simply cannot be clarified away.

V. The Proposed Joint Interpretation: An Ineffective Rehash of the Second Generation

In this context, we should ask what, if anything, the Proposed Joint Interpretation is designed to achieve. The text presents itself as a clarifying instrument. But it should be borne in mind that the CETA, as a second-generation investment treaty, has already made multiple efforts at clarification.

The treaty itself, already much longer than earlier-generation investment treaties, employs six clarifying annexes and at least as many clarifying footnotes. These are supplemented by two decisions of the CETA Joint Committee and a Joint Interpretive Instrument adopted by the CETA parties at the time of signature. Notably, the phrase "for greater certainty" appears twenty-five times across the CETA Investment Chapter and its annexes.[67]

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[66] The following facts are entirely hypothetical. But I have written about these issues in the context of a real-life case in J. Benton Heath, *Eco Oro and the Twilight of Policy Exceptionalism*, INVESTMENT TREATY NEWS, Dec. 20, 2021, https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/. For another real-life example, see Ryan Lizza, *The President and the Pipeline*, NEW YORKER, Sept. 16, 2013, https://www.newyorker.com/magazine/2013/09/16/the-president-and-the-pipeline.

[67] *See* CETA arts. 8.1 (Definitions) (twice), 8.2 (Scope) (twice in footnotes), 8.4 (Market Access), 8.5 (Performance Requirements), 8.7 (Most-Favored Nation Treatment) (twice), 8.9 (Investment and Regulatory Measures) (three times), 8.10 (Treatment of Investors and Covered Investments) (three times), 8.12 (Expropriation) (twice), 8.18 (Scope), 8.23 (Submission of a Claim to the Tribunal), 8.30 (Ethics) (in a footnote), 8.31 (Applicable Law and Interpretation), 8.41 (Enforcement of Awards), Annex 8-A (Expropriation), Annex 8-B (Public Debt) (once in text and once in a footnote), and Annex 8-C (Exclusions from Dispute Settlement).

It is my view that the Proposed Joint Interpretation goes no further toward resolving persistent concerns about the investment treaty regime. As noted above, the conflicts between investment protection, political action, and public interest regulation are deep-rooted and systemic. The second-generation treaties attempted to "clarify" these conflicts away with annexes, footnotes, affirmations, and "for greater certainty" provisions, but these have predictably not mollified critics of the regime or even addressed the underlying substance of their critiques.

The Proposed Joint Interpretation is, in my view, doomed to suffer the same fate. It is, in the first place, limited to offering "interpretations" rather than structural amendments to the treaty (Part V.A., below). This leads to largely cosmetic adjustments, which do not impact the range of possible treaty applications and which ultimately preserve the *status quo* (Part V.B). There are only a few concrete clarifications in the text, which are of minor importance (Part V.C). And any gains in clarity are offset by the introduction of new ambiguity by this draft text (Part V.D).

A. The Proposed Joint Interpretation: Legally Binding but Limited Effect

The Proposed Joint Interpretation is fated to have only a limited effect on the understanding of rights and obligations under the CETA. Joint Interpretations rely on CETA article 26.1.5(e), which provides that the CETA Joint Committee may "adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals" in investor-state and state-to-state dispute settlement.[68] As explained further below, this ensures that interpretations will be legally binding in investor-state disputes. But it also ensures that this effect is limited to "interpretations," which as a general matter do not alter the fundamental balance of rights and obligations in the treaty itself.

The treaty's mandatory phrasing—"*shall be binding*"—makes clear that tribunals are bound by and must apply the interpretations adopted by the Joint Committee. This rule therefore is *lex specialis* with respect to committee-adopted interpretations, displacing the potentially more permissive background rule under general international law that subsequent agreements on interpretation by the treaty parties "shall be *taken into account*" by interpreters.[69] This is affirmed in the Applicable Law provisions of Chapter Eight, which state that "[a]n interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal" in investor-state disputes.[70]

The primary legal constraint on the parties' ability to act under Article 26.1.5(e) is that they may only adopt "interpretations" of the agreement. The term "interpretation" is not defined either in the CETA, and there is no single generally accepted definition of this term under international law.[71] Still, the UN International Law Commission has explained that "the starting point of interpretation is the elucidation of the meaning of the text," and that "it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain."[72] This view,

[68] CETA art. 26.1.5(e). See the Appendix to this report for the full text.

[69] Vienna Convention on the Law of Treaties, art. 31(3)(a).

[70] CETA art. 8.31.3.

[71] International law does provide generally accepted *methods* of interpretation, but this is a distinct question from defining the *act* of interpretation itself.

[72] Draft Articles on the Law of Treaties with commentaries, art. 27, cmt. 11, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II.

which presents interpretation as the elucidation of meaning and not as additive to the treaty, is a useful point of departure for understanding the Joint Committee's powers under this provision.

This point of departure is consistent with a reading of the CETA as a whole, in which "interpretation" must be distinguished from "amendment." Article 30.2 provides that amendments will enter into force only upon confirmation that parties have satisfied their own internal legal requirements for amendments, or upon a date specified by the parties.[73] The same article also provides the Joint Committee the ability to "decide to amend" the agreement's protocols and annexes, but this grant of power does not extend to the annexes to Chapter Eight on Investment.[74] The Joint Committee's power to interpret the CETA ought not be read to undermine these limits on its power to amend the agreement.

It should be noted that parties have in the past sought to challenge interpretive statements under other treaties on the ground that these were not really interpretations but *ultra vires* amendments. For example, in 2001 the parties to the North American Free Trade Agreement adopted a joint interpretation, under a similarly worded provision to CETA Article 26.1.5(e), clarifying certain investment protection obligations in that agreement.[75] Some investors challenged this declaration as an impermissible and unratified amendment of the NAFTA, but such challenges have either been rejected or treated as immaterial to the final outcome.[76] There are also strong arguments that, absent any explicit statements to this effect, investment tribunals have no authority to set aside interpretations as *ultra vires* amendments.[77] Still, the possibility remains that a tribunal could ignore a joint interpretive declaration on the ground that it does not elucidate the meaning of the treaty, but rather effectively amends its content, and is thus *ultra vires*.

The Proposed Joint Interpretation, however, should *not* be cast aside by a tribunal on these grounds, even if a tribunal were in theory authorized to do so. The proposal does not alter the underlying structure of rights and obligations in the CETA Investment Chapter, nor does it read into the chapter any obligations or flexibilities that the treaty does not otherwise contain. As described below, the proposal at best adds clarifications on small matters where the original text had been

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[73] CETA art. 30.2.1.

[74] CETA art. 30.2.2.

[75] Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, *available at* http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[76] *See, e.g.*, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 177 (Jan. 9, 2003). For tribunals criticizing the interpretation as potentially *ultra vires*, see *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL ad hoc arbitration, Award in Respect of Damages, ¶ 47 (May 31, 2002) ("[W]ere the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter."); *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL ad hoc arbitration, Award, ¶ 192 (Mar. 31, 2010) (expressing sympathy for the investor's argument that "the FTC Interpretation seems in some respect to be closer to an amendment of the treaty, than a strict interpretation").

[77] Loris Mariotti, *The Proliferation of Joint Interpretation Clauses in New International Investment Agreements*, 35 ICSID REVIEW 63, 75–76 (2020) ("Tribunals are not assigned any 'constitutional' function to review alleged *ultra vires* interpretations by States. States remain 'masters' of their treaties and tribunals are not in a position to question whether [states] have overstepped the limitations on the interpretative powers provided by international law, except perhaps in the rather remote case of interpretation conflicting with *jus cogens* norms.").

ambiguous or susceptible of multiple meanings.[78] These interventions should not be understood to effectively amend the text or to transcend the power afforded to the Joint Committee under Article 26.1.5(e).

This is both a strength of the Proposed Joint Interpretation and a severe limitation. "Interpretations" under Article 26.1.5 generally do not alter the underlying structure of rights and obligations in the CETA itself. Thus, this instrument is limited in its ability to respond to the very real tensions between investor protection and the political realities of social and environmental policymaking.[79] Because these tensions are embedded in the text of the agreement, a Joint Interpretive Declaration is a particularly unsuitable vehicle for extracting them.

B. *Proposed Joint Interpretation: A Series of Cosmetic Adjustments*

Rather than offering genuine clarifications, the Proposed Joint Interpretation mainly limits itself to cosmetic adjustments that do not offer any genuine clarification on matters of importance. I consider an interpretative instrument to offer genuine clarification where: i) it addresses an aspect of the treaty that was previously open to a range of possible applications; and ii) it meaningfully narrows that range of applications.

Most of the draft's interventions fail the second criterion. Instead, they employ a limited set of techniques to effectively restate the ambiguities and open-endedness of the original treaty text, while perhaps appearing to non-specialists as if they clarify matters. These techniques will be discussed below.

1. 'In Itself'-ing

The first of these techniques is what I refer to as *"in itself"-ing*. This is language stating that some event, "in itself," does not constitute a breach of the treaty. Thus, a violation of domestic law, for example, does not "in and of itself" breach an investment treaty.[80] But, equally, that violation may still be relevant to a claim of breach, and may still give rise to a breach under the relevant provisions of the treaty.[81]

"In itself"-ing is a common technique in investment treaty reform. The CETA Investment Chapter uses the phrase four times.[82] The Proposed Joint Interpretation adds three more: the loss of an administrative or judicial challenge is not "in itself" a denial of justice; the domestic illegality or "questionable application" of a policy or procedure is not "in itself" arbitrary; the permanence of a measure does not "in itself" mean the measure is an indirect expropriation.

[78] At worst, the draft simply expresses tautologies, confirms widely held background assumptions, or replicates or compounds ambiguities in the text. *See infra*, Part V.B. These hardly qualify as "interpretations" that do much to "elucidate" the text. But neither do they pose a concern that the Joint Committee is overstepping its bounds.

[79] These are outlined *supra*, Parts II–IV.

[80] CETA art. 8.10.7.

[81] *See id.* ("In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1 [of Article 8.10].").

[82] CETA arts. 8.3 (Relation to Other Chapters), 8.7 (Most Favoured Nation Treatment), 8.10 (Treatment of Investors and Covered Investments), 8.30 (Ethics, in a footnote).

"In itself" provisions sound nice, but they are virtually useless in actual investor-state proceedings. This is so for two reasons. First, almost no tribunal today would hold that such problems "in themselves" give rise to a treaty breach. For example, even in controversial recent decisions that appear to hinge on alleged violations of domestic law, the tribunal is careful to rest its decision on additional factors establishing a breach of international law.[83] The problem is not that tribunals are converting "mere" breaches of domestic law into breaches of investment treaties; it is that they can always find some additional factor, and hence some justification *in the treaty*, for holding a state liable when it breaches its domestic law.

Second, a clever litigant can always find an aggravating factor. Consider again the hypothetical illustrations above involving a development that is blocked for putative environmental reasons. The investor may argue that the state misapplied the domestic Buildings Law or failed to follow proper administrative procedures. But it will also contend that the general failure of the administration to follow scientific protocols, to stand by its earlier assurances, and to afford consistent treatment and prompt consideration of the investor's applications independently breached the treaty. A tribunal can then rely on these factors to justify its finding of a breach, rather than relying simply on the "mere" breach of domestic law.

2. Standard Substitution

A second technique for cosmetic reform is "standard substitution." This is where an open-ended standard, which appears to grant substantial discretion to a tribunal, is re-described using another open-ended standard, which is also open to interpretation. This allows drafters to look as if they are narrowing the terms of the treaty by using modifiers like "manifest," "fundamental," "patently," or "gross." But, while these terms may tell tribunals what words to use in rendering their judgments, they do little to constrain actual discretion.

Standard substitution has been a longstanding feature of the investment regime. The "fair and equitable treatment" standard, for example, has long been understood to be vague, open-ended, and subject to expansive interpretation. In one canonical formulation, FET was understood to prohibit "arbitrary" state decisions.[84] This raised concerns that the standard could sweep too broadly and impose wide-ranging liability depending on how it was applied.[85] Many states, then, embraced the seemingly alternative view that FET proscribed only "manifestly arbitrary" conduct.[86] CETA relies in

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[83] *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 437–440 (March 17, 2015) (finding a breach of the treaty largely based on perceived departures from domestic law, but insisting that "is not supposed to be the continuation of domestic politics and litigation by other means," and that there is a "'threshold of seriousness' that an alleged breach of equity, fairness or law must attain before constituting a breach of the international minimum standard").

[84] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004).

[85] In the United States, for example, regulations are frequently set aside as "arbitrary and capricious." *See, e.g.*, *Motor Vehicles Manufacturing Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). But, rather than imposing an enforceable right for damages against the government, these judgments often simply prevent the enforcement of the regulation until the arbitrariness is corrected, thus giving the state a chance to reform its regulatory regime. *See* 5 U.S.C. § 706(2); *see also* 5 U.S.C. § 702. If "arbitrary" conduct were treated similarly under investment law as it were under domestic administrative law, this could lead to unmanageable damages awards for relatively minor and contested procedural issues. For a comparative perspective, see GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AS PUBLIC LAW 101–108 (2007).

[86] *Glamis Gold Ltd. v. United States of America*, UNCITRAL ad hoc arbitration, Award, ¶ 22 (June 8, 2009).

three key places on this modifier, addressing "manifest arbitrariness," discrimination on "manifestly wrongful grounds," and public welfare regulations that are "manifestly excessive."[87]

This approach, while again sounding nice, clarifies nothing. There is no secret formula or hidden algorithm arbitrators can access that distinguishes "manifest" from ordinary arbitrariness. The term is seemingly supposed to signal a difference in the degree of wrongfulness.[88] But, in the context of a concrete case, there is no clear dividing line between "manifest" and "ordinary" arbitrariness. In the hypothetical above, concerning the frustrated developer, which facts suggest arbitrariness? Which of those suggest "manifest" arbitrariness?[89] There is no clear answer.

The Proposed Joint Declaration apparently recognizes this problem, but then proceeds to offer still more standards. It uses the modifiers "patently,"[90] "unreasonable,"[91] "undeniably unreasonable,"[92] "clearly,"[93] "blatant,"[94] "unfounded,"[95] and "gross."[96] It even adds a few new usages of the term "manifest."[97] The definition of manifest arbitrariness, in particular, invites us to consider whether the impugned measures are "patently not founded on reason or fact," are based on "unreasonable discretion," or are taken in "manifestly willful disregard of due process."

It might be said that these clarifications place a thumb on the scale in favor of the state, but this ignores the concrete reality of cases. The messy politics of social regulation, discussed above, is likely going to be the reality of many cases going forward.[98] In these cases, the complaining investor is likely to be able to point to a series of frustrating facts and incidents, which disrupted the investor's expectations and implicated their rights. There is little guide here for distinguishing the merely "excessive" or "unreasonable" from "manifest excess" or "patent lack of reason," other than an arbitrator's overall impressions of which party is more sympathetic.

This latest round of standard substitution, further, would appear to admit the extent of discretion that tribunals have in these cases.[99] This new round of modifiers may be designed to guide that discretion, but it preserves rather than eliminating it. The public talking points around CETA

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[87] CETA arts. 8.10.2(c), 8.10.2(d) & Annex 8–A.

[88] Though even this is not clear. *See Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 61 (Nov. 12, 2013) (using "manifest" to refer not to a question of degree, but to the "ease" with which the relevant quality or lack thereof "can be perceived").

[89] *See supra*, Part IV.B.

[90] For decisions unfounded on reason or fact, for unfounded reasons for discrimination, and for bias and prejudice.

[91] For unreasonable discretion.

[92] For disproportionate regulation amounting to expropriation, both generally and in the context of climate change.

[93] For biased judges.

[94] For miscarriages of justice.

[95] For refusal of access to courts.

[96] For misconduct offending judicial propriety.

[97] For unequal treatment before courts and for disregard of due process.

[98] *See supra*, Part IV.C.

[99] *Cf.* Brown, *supra*, at 102 (noting the "open manner" in which such treaties are written).

assert that an investor "will have to demonstrate that a public authority has breached CETA's provisions in a specific way. There'll be *no room* for tribunal members to interpret the agreement freely."[100] This preoccupation with getting the standard just right, years after the CETA's adoption, suggests that tribunals still enjoy significant freedom.

3. Stating the Obvious

A final technique is to simply state the obvious, while presenting it as a clarification of the existing regime. These clarifications usually rely on conventional wisdom, widely accepted interpretations in jurisprudence, or even logically necessary implications from the text. While appearing to resolve interpretive ambiguity around provisions, these interventions do little beyond stating what is already understood to be the case.

These include the observation that distinctions on "objective and legitimate grounds" do not amount to unlawful discrimination, that it is relevant (though not necessary) that instances of harassment were "repeated and sustained," that legitimate expectations are judged by reference to the conduct of a "prudent and informed investor," and that investors "should expect" that states will take measures to mitigate and adapt to climate change.

None of these propositions are particularly controversial, though all are presented as if they are responding to genuine ambiguities in the text. No one thinks, for example, that non-discrimination provisions should forbid distinctions on "objective and legitimate grounds"; they simply argue about what grounds are in fact legitimate.[101] Similarly, it is well-understood at a general level that "legitimate expectations" should be judged by reference to a prudent investor, but what a prudent investor would actually consider is a matter of intense dispute in cases.[102] It is similarly unlikely that anyone thinks that investors should not "expect" states to take climate mitigation and adaptation measures; rather, the question is whether measures in any given case were lawful or give rise to a duty to compensate.

As noted above, the real problems with investment law lie elsewhere, and particularly in the tension between the messy and unruly realities of politics and the orderly and stable procedures desired by investors. And none of these obvious statements resolve the thornier problems regarding, for example, *how much* disruption investors should expect as a result of climate change responses, what forms of distinction are acceptable, and so on.

C. Minor Clarifications in the Proposed Joint Interpretation

Where the draft text does adopt actual clarifications of the text, these are of relatively minor matters. As noted above, an interpretive instrument genuinely clarifies the text where it narrows the

[100] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/agreement-explained_en#investments (emphasis added).

[101] *See, e.g.*, *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, ¶¶ 167–179 (July 1, 2004) (discussing whether exporters of "flowers, mining, and seafood products" are similarly situated to oil exports, and holding that, under the circumstances of the case, they are).

[102] *See, e.g.*, *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability, and Partial Decision on Quantum, ¶ 402 (Feb. 19, 2019) (considering whether investors "were justified in relying upon the Respondent's commitment to stability as it appeared from a careful and informed reading of the Spanish regulatory measure," and deciding, in a split decision, that they were so justified).

range of possible applications. I have reviewed the instrument and concluded that the text offers a genuine clarification only rarely, and only on matters of relatively small importance. In other words, the issues that it clarifies are not likely to materially affect the outcome in many investor-state disputes arising under the CETA.

By way of illustration, the following are examples of minor clarifications:

- **Legitimate Expectations and Oral Promises:** The draft clarifies that any representations that give rise to "legitimate expectations" on the part of an investor must be "written." This is a genuine clarification from the text, which left open the possibility that such expectations may arise from oral promises only. But it is the rare case that hinges solely on oral promises, and rarer still in the era of digital communication.

- **Legitimate Expectations and Specificity:** The draft text's assurances that legitimation expectations must be "specific" does have some value after recent jurisprudence suggested that they need not be.[103] But this insistence on specificity does not resolve the bigger questions. For example, the draft text does not directly address whether such specific and unambiguous written assurances could be implied in a state's legislation or regulations. This is a curious omission given the high number of recent and pending cases in which this emerged as a major issue.[104]

- **The Fair and Equitable Treatment List:** The CETA establishes an obligation to afford investors "fair and equitable treatment," and lists five different circumstances that may breach this obligation.[105] The draft text clarifies that this list is "exhaustive," meaning that a tribunal cannot invent a sixth circumstance that breaches the text. This is a genuine clarification. But other terms in the list, such as "manifest arbitrariness," remain so malleable as to afford enough flexibility to litigants and tribunals in any conceivable dispute.

D. *Introducing Ambiguity and Litigation Risks*

On the other end of the spectrum from genuine but minor clarifications, interpretive instruments must also be careful to avoid inserting new layers of ambiguity into the text. This is a particular concern where interpretations must take into account so many already-existing clarifying annexes, interpretive declarations, and extrinsic sources like the Paris Agreement. For the most part, the Draft Joint Interpretation scores well on this metric: by limit itself mostly to cosmetic adjustments, the draft avoids any significant intervention that could introduce ambiguity. But it nonetheless does do so in at least two places, one of which is perhaps more easily remedied than the other.

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[103] *E.g.*, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration No. 2015/063, Final Arbitral Award, ¶ 650 (Feb. 15, 2018) ("The Claimant has argued that legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of, the state and that such undertakings and assurances need not be specific. … The Tribunal agrees.").

[104] Schmidl, *supra*.

[105] CETA art. 8.10.1 & 8.10.2.

1. Differential Treatment and Racial Justice

First, the text's clarification of the non-discrimination obligation introduces ambiguity around state efforts to promote equality, and particularly racial equality. The CETA prohibits "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief."[106] The Proposed Joint Interpretation nonetheless seeks to make clear that parties may grant differential treatment based on "objective and legitimate grounds, such as measures that are destined or applied to protect legitimate public welfare objectives, including … the promotion of gender equality." This creates a striking discontinuity between the "manifestly wrongful grounds" listed in the CETA itself—which include race, gender, and religious belief—and the "legitimate public welfare objectives" mentioned in the draft, which include only gender. This could be read to suggest that the parties belief efforts to achieve equality on racial or religious grounds to be inherently more suspect and subject to greater scrutiny.

This is particularly striking and troubling with respect to racial equality. In the wake of the murder of George Floyd by a police officer in 2020, "mass protests and demonstrations" erupted not just in the United States, but across Europe and much of the world, connecting with "ongoing antiracist struggles in Europe" and forming "part of a global conversation affirming the humanity of Black people across Europe, and the rest of the world."[107] This global conversation stretched far beyond police violence to embrace longstanding questions of historical and systemic injustice. As part of this global conversation, it is becoming increasingly recognized that the projects of racial and climate justice are closely linked.[108] At the same time, and problematically, investment law and arbitration may reflect a general "overarching skepticism toward measures of racial justice that do not assume the primacy of the market and do not seek to better racialized people as competitive market subjects."[109]

The Proposed Joint Interpretation, perhaps unwittingly, seems to take on board the same skepticism of state measures to achieve racial equality. By specifically mentioning one form of distinction (gender), while eliding others (race and religious belief), the interpretation may be said to suggest that the latter are deserving of stricter scrutiny or are, as a general matter, "manifestly wrongful grounds" for state policy.[110] This is, to be sure, not the only interpretation. But it is a troubling one, and one which should be corrected through subsequent instruments.

2. The Paris Agreement and Investment Law

A second layer of ambiguity concerns the text's language around the Paris Agreement and the parties' respective climate change commitments. The draft affirms that investment tribunals "shall take due consideration of the commitments of the parties under the Paris Agreement and their respective climate neutrality objectives." Further, the text states, the CETA Investment Chapter "shall be interpreted and applied by the Tribunal taking due consideration of the commitments of the Parties

[106] CETA art. 8.10.2(d).

[107] Jean Beaman, *Towards a Reading of Black Lives Matter in Europe*, 59 JOURNAL OF COMMON MARKET STUDIES 103 (2021).

[108] *See generally* OLÚF□□MI O. TÁÍWÒ, RECONSIDERING REPARATIONS (Oxford Univ. Press 2022).

[109] Ntina Tzouvala, *Invested in Whiteness: Zimbabwe, the* von Pezold *Arbitration, and the Question of Race in International Law*, 2 JOURNAL OF LAW & POLITICAL ECONOMY 226 (2022).

[110] *See* CETA art. 8.10.2(d).

under the Paris Agreement and their respective climate neutrality objectives in a way that allows the parties to pursue their respective climate change mitigation and adaptation policies."

To understand the implications of this paragraph, it is necessary to first understand that the Paris Agreement says literally not a word about investment protection. The Paris Agreement's consistency with investment law is thus a matter of interpretation, and, it turns out, contestation. The debate has given rise to diametrically opposed views, which might be referred to as the "Conflict" and "Complimentary" Views:

- **The Conflict View** begins with the position that the Paris Agreement's goals will require "economic and social transformation."[111] As a result, governments pursuing their Paris commitments will have to engage in aggressive regulation, potentially upending established rules. Because investment law obligations have long privileged stability and legitimate expectations, this gives rise to the concern that "governments that adopt aggressive decarbonization policies are likely to face adverse rulings from trade and investment tribunals. Governments will either have to be willing to suffer the consequences, including potential trade retaliation or monetary damages in investment cases, or water down their decarbonization efforts to comply with international legal rules."[112] There is thus a significant conflict between strong investor protection and states' Paris commitments.

- **The Complimentary View** is far more optimistic about the relationship between these two regimes. The system's defenders, for example, insist that "a stable legal and economic framework is important for private sector investments in the green economy."[113] Investment law provides that stability and coherence by disciplining state action. Therefore, investment law is "an active ingredient in supporting an economic system that calls sustainable development goals its own and that is not contrary to the interests of protecting the environment but, rather, is supportive of sustainable development goals."[114] While the Conflict View is, in my submission, the stronger one, the Complimentary has many adherents among prominent experts, practitioners, and scholars in the investment law system.

The Proposed Joint Interpretation's implications for climate change and investment law depend entirely on whether an adjudicator adopts the Conflict or Complimentary View, and it does not steer them in either direction. If an adjudicator is inclined to the Conflict View, then the text's injunction to take "due consideration" of Paris commitments might suggest the need to relax investment protection requirements, and to afford an additional measure of deference to the state in matters of climate regulation. But, if the adjudicator is predisposed to believe that climate goals and investor protections are mutually complimentary, then it would be counterproductive to relax those

[111] U.N. Climate Change, *The Paris Agreement*, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.

[112] Todd N. Tucker & Timothy Meyer, *Reshaping Global Trade and Investment Law for a Green New Deal*, *in* ROUTLEDGE HANDBOOK ON THE GREEN NEW DEAL (Kyla Tienhaara & Joanna Robinson eds., Routledge 2022).

[113] Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou?: Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REVIEW 29 (2018).

[114] *Id.*

protections in a climate-related case. Neither the Paris Agreement itself nor the Proposed Joint Interpretation requires adjudicators to pick either one of these paths.

In fact, investment arbitrators adhering to the Complimentary View could even turn language like this against the state. One recent case concerned the Canada-Colombia Free Trade Agreement, whose preamble included commitments to "[e]stablish a predictable commercial framework for business planning and investment" in a manner "that is consistent with environmental protection and conservation."[115] Preambles, like interpretive declarations, can be applied to interpret treaty text.[116] But the tribunal in this case suggested that this preambular language, rather than inviting extra deference for environmentally protective measures, instead counseled the opposite.[117] Indeed, the tribunal held, "neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner."[118] The state is thus, on this view, expected to uphold both values simultaneously, and not to subordinate investor protection to environmental goals.

The Proposed Joint Interpretation poses similar risks. Viewed optimistically, it would suggest an additional measure of deference for states' responses to climate change. But the language can also be viewed from the opposite perspective, to suggest that the text already provides pathways for the parties "to pursue their respective climate change mitigation and adaptation policies" without running afoul of investor protections. On this latter view, deference would not necessarily be warranted.

VI. Conclusion and Illustration: Revisiting the "Protest at the Beach"

Where does all this leave us? Let us return to the "Protest at the Beach" illustration used throughout this discussion.[119] The Proposed Joint Interpretation was evidently meant to provide some comfort that the CETA's investment provisions do not interfere with state responses to climate change and other public interest regulation. But in light of foregoing, it appears that the draft text can offer no such comfort.

Indeed, the text would raise almost as many questions as it answers in these circumstances. These include:

- **Legitimate Expectations:** Did the investor have "legitimate expectations" or "distinct, reasonable, investment-backed expectations" that the project could move forward? Could such expectations have arisen from officials' early written encouragements? What about from emails suggesting that the investor's adjustments to the project would "make sure we don't run into any obstacles later," or an official's email saying "nothing stands in the way"? Are these statements "specific" enough? Could the investor's environmental permit create such expectations? Could the

[115] Canada-Colombia FTA, prmbl., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/preamble-preambule.aspx?lang=eng.

[116] Vienna Convention on the Law of Treaties, art. 31(2).

[117] *See Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Principles of Quantum, ¶ 828 (Sept. 9, 2021).

[118] *Id.*

[119] See, in particular, *supra*, Part IV.B.

investor have expectations that the Buildings Law would not be used for environmental regulation?

- **Expropriation:** Was the final permit denial and rezoning an indirect expropriation of the investor's investment? Did those measures interfere with "written, specific, and unambiguous expectations made … by the competent authority?" Would a "prudent and informed" investor have relied on those expectations? Was the measure applied for a "legitimate public welfare objective," or to appease a vocal political group, and does it matter? Was the measure "wholly disproportionate" to those objectives? Would it be perceived as "undeniably unreasonable"?

- **Manifest Arbitrariness:** Did the permit denial and rezoning reflect "manifest arbitrariness"? Was the government's decision to embrace the environmental data Citizens' Assessment, after earlier rejecting it, "patently not founded on reason or fact"? Does the decision appear to be based on "unreasonable discretion, prejudice, or personal preference"? Is the decision to use the Buildings Law for environmental purposes "in manifestly willful disregard of due process and proper procedure"?

- **Fundamental Breach of Due Process:** Do the state's shifting reasons for its decision evince an "unjustifiable lack of transparency"?

These are just some of the issues that are likely to arise in a dispute like this, and it is unclear how they would be resolved. It is important to note that a finding for the investor in this case is exactly what many defenders of the investment law system would want. In a messy political situation like this, they would argue, investors deserve some protection against arbitrary state conduct and breaches of basic procedural norms. And, they would submit, investors deserve compensation for their harms.

It is equally important, however, to note that opponents of the investor-state dispute settlement system are not against legal protections. The courts of any host state, as a general matter, remain open to investors to challenge decisions exactly like these. Domestic courts are also equipped with a wide range of remedies and tools for dispute resolution. In some circumstances courts could award damages or restitution to an investor. But courts can also remedy procedural violations by requiring regulators to reconsider the bases for their decisions, to provide a more detailed statement of reasons and supporting evidence, or to restart a process on fairer terms. National courts thus offer a flexible set of options for resolving complicated and messy regulatory processes, which investment tribunals do not share.

Finally, it must be emphasized that the creation of a Multilateral Investment Court (MIC), as contemplated in the CETA, would not resolve the problems identified in this report.[120] Although the MIC is commonly distinguished from investor-state dispute settlement, it in fact is likely to retain all of the core characteristics identified above: a special, defined class of "investors" will be empowered to bring claims against states in international courts, and to obtain monetary damages awards for breaches of special investor-protection obligations under international law.[121] To be sure, the creation

[120] *See* CETA art. 8.29.

[121] Note how the changes outlined in Brown, *supra*, at 107–108, do not address these features.

of a salaried investment judiciary appointed by states could curb the worst excesses and overreaches of the existing fee-based, party-appointed arbitral system. But a MIC would not transform the one-sided structure of rights and obligations that characterizes the investment treaty regime and gives rise to the systemic problems discussed here.

In closing, in cases like this, the argument over international investment protection is *not* an argument over the value of due process, property rights, or the rule of law. And it is not an argument over the consistency and coherence of tribunal awards, or the independence and impartiality of tribunal members. Rather, the argument is whether some rights-holders—a discrete and defined class of "investors"—is entitled to one-sided international legal protections, enforceable through an internationalized process of dispute settlement that bypasses local courts. The foregoing illustrations should raise questions about why we have prioritized special protections for investors, rather than aggressive action to combat the most serious challenges of our time.

APPENDIX: CETA art. 26.1.5.e

Article 26.1 – CETA Joint Committee

…

5. The CETA Joint Committee may:

…

e. adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement);

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The views expressed in the foregoing report are the author's own independent expert opinion as a scholar of international investment law and policy. These views are not meant to represent the views of any of the author's former clients, nor do they constitute legal advice to any particular government, person, or party, such as a treaty party or a party to an investment dispute.

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