

**FROM SEA TO SEA:  
REGULATORY SPACE OF FEDERAL AND PROVINCIAL GOVERNMENTS  
IN CANADA UNDER CETA AND TPP INVESTMENT CHAPTERS**

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*This paper purports to assess the impact of CETA and TPP investment chapters on the regulatory space of government in Canada. As one of the most experienced developed country with investor-State arbitration (ISA), Canada joined these mega-regional negotiations with a clear understanding of the commitments it was ready to make. The end result is puzzling since the regulatory space left to the federal and provincial governments varies, sometimes in significant ways, from the Atlantic to the Pacific economic space. A comparison of CETA and TPP investment chapters will be conducted, with past Canadian treaty practice in the backdrop. Of particular importance is the extent of the right of admission granted to foreign investors and the carving out of specific sensitive policy areas. Curtailment of MFN, clarification of fair and equitable treatment (FET) and indirect expropriation are also prominent features of all new international investment agreements, and CETA and TPP address those issues often differently. Coverage of provincial measures relating to investment is a typically Canadian issue, due to constitutional reasons, and once again, the two chapters differ greatly in that regard. Various innovations in ISA are also added, compared to past Canadian treaty practice. If TPP is mostly a reproduction of US treaty practice, CETA brings new features in the international investment law landscape. Finally, the systemic issue of legal articulation between CETA, TPP and past Canadian treaties adds an unprecedented layer of complexity to the matter at hand. Given the fact that these mega-regional agreements include countries from which investments will flow into Canada, the impact of both agreements on the regulatory space of government is a pressing issue. It is argued that contradictions in the international obligations of Canada is likely to create confusion both for regulators and arbitrators, while investors might simply make the best out of it.*

CONTENTS

- I Introduction
- II Protecting the Regulatory Space of Government in Canada
  - A Limited Rights of Admission and Establishment
    - 1 New Restrictions on the Rights
    - 2 Review of Foreign Acquisition
  - B Carving Out of Sensitive Policy Areas
    - 1 Partial Exclusion of Sensitive Policy Areas
    - 2 Grandfathered Measures
  - C Curtailment of MFN Treatment

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- D Clarification of National Treatment and Indirect Expropriation
- E Restrictions on Access to Investor-State Arbitration
- III Reducing the Regulatory Space of Government in Canada
  - A Extended Coverage of Provincial and Territorial Measures
  - B The Right of Establishment and New Disciplines on Market Access
  - C Extension of Fair and Equitable Treatment?
  - D Vanishing of the Canadian Exceptions
    - 1 Cultural Exception
    - 2 General Exceptions
- IV Confusing Canadian Regulators... and Arbitrators?
  - A Competing Approaches to the Interplay between Investment Agreements
    - 1 Termination of Earlier Agreements
    - 2 Coexistence with Earlier Agreements
  - B Addressing the Confusion over Regulatory Space of Governments
    - 1 Use of MFN Clause by Foreign Investor
    - 2 Use of Denial of Benefits Clause by Government
    - 3 Impact of Investor-State Arbitration on Regulatory Space

## I INTRODUCTION

“*A mari usque ad mare*”, the motto of Canada, was chosen to symbolise the rise of a young nation extending its dominion in North America from the Atlantic Ocean to the Pacific Ocean.<sup>2</sup> Recent signature of mega-regional trade and investment agreements by Canada in the Atlantic and Pacific space adds a new dimension to this motto. The different political and economic contexts of the negotiation of these agreements is reflected in various differences in their respective legal content. On the one hand, the

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<sup>2</sup> W. Kaye Lamb, “A Mari usque ad Mare”, *The Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.ca/en/article/a-mari-usque-ad-mare/>> (last edited 14 April 2016). The motto “*A mari usque ad mare*” translates as “From Sea to Sea” and comes from Psalm 72:8: “He shall have dominion also from sea to sea, and from the river unto the ends of the earth”. In 2006, the leaders of the three northern territories of Canada officially requested that the motto be changed for “From Sea to Sea to Sea”, to reflect also the Northern border with the Arctic Ocean.

*Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union [and its Member States, [...] ], of the Other Part*<sup>3</sup> (*CETA*) is a bilateral agreement signed by Canada and the European Union (EU), binding together western developed countries. On the other hand, the *Trans-Pacific Partnership*<sup>4</sup> (*TPP*) is a multilateral agreement signed by Canada with 11 other countries: some of which are developed, some of which not; some of which belonging to the western cultural sphere, some of which not. Legal differences are particularly noticeable in the investment chapter of *CETA* and *TPP*. Given the sprawling reach of international investment law on all governmental regulatory activities, these legal variations are not inconsequential. Added to the coexistence of federal and provincial governments in Canada, the various level of liberalisation and protection of foreign investors and their investments could be even more problematic. The regulatory space of Canadian governments will vary depending on whether foreign investors come from the Atlantic or the Pacific economic space.

The concept of regulatory space is increasingly popular in the literature studying the impact of international economic law on the ability of government to adopt regulations.<sup>5</sup>

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<sup>3</sup> 29 February 2016, online: European Commission <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)> [*CETA*]. Technically, it appears that *CETA* has not been officially signed yet. The 23 equally authentic versions of the treaty have not been drawn up, apart from the final English version that was released by the European Commission on 29 February 2016. Moreover, there is still uncertainty regarding the need for the 28 EU Member States to sign *CETA* themselves, in addition to the EU, as illustrated in the use of brackets in the title of the final English version. This issue rests on the legal qualification of *CETA* under EU law, whether it is an agreement fully within the scope of EU treaty-making power, or whether it is a mixed agreement. A definitive answer to the question should be provided soon, for the similar question of the legal qualification of the EU–Singapore free trade agreement is pending before the EU Court of Justice. The question has important practical implications, since the fate of *CETA* is not likely to be the same if it needs to be ratified by the 28 Member States in addition to the EU and Canada. Approbation of the treaty by national parliaments could be longer and more arduous given the controversy over *CETA* and especially its investment chapter in the civil society in many EU Member States. *Free Trade Agreement between the European Union and the Republic of Singapore*, not yet signed, online: European Commission <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (version of 29 June 2015); European Commission, *Commission Decision of 30 October 2014 Requesting an Opinion of the Court of Justice pursuant to Article 218(11) TFEU on the Competence of the Union to Sign and Conclude a Free Trade Agreement with Singapore*, C(2014)8218/F1, online: European Commission <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-8218-EN-F1-1.PDF>.

<sup>4</sup> 4 February 2016, online: New Zealand Foreign Affairs and Trade <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/> (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam) [*TPP*].

<sup>5</sup> See generally Markus Wagner, “Regulatory Space in International Trade Law and International Investment Law” (2014–2015) 36 *U Pa J Int’l L* 1; Tania Voon, “Introduction: National Regulatory

It refers to the policy-making room of manoeuvre that government withholds under international trade and investment agreements. Regulatory space is remindful of the classic concept of “*domaine réservé*” in international law.<sup>6</sup> Basically the “reserved domain” of State is the parcel of its sovereignty that is unfettered by international legal obligations. Thus the concepts of regulatory space and of “*domaine réservé*” overlap when it comes to the ability of a State to adopt regulations in conformity with international law. The issue of regulatory space of government is particularly acute in regarding international investment agreements, when inward investment flows are entering on the territory of a State. That is particularly likely to happen in megaregional agreements concluded between Parties with developed economies like *TPP* and *CETA*. Indeed the issue of regulatory space was less salient when investment agreements were essentially designed to espouse North-South investment flows. Canada is perhaps the exception since it is Party to investment agreements with the US since 1989.<sup>7</sup>

Canada is both an importer and exporter of investment and its international investment policy is shaped to conciliate the need to protect Canadian investment abroad with that of protecting the regulatory space of government in Canada. It is also shaped by the constitutional rule giving exclusive power to Provinces to implement treaties in Canadian law when they deal with matters belonging to provincial jurisdiction.<sup>8</sup> Evolution of the case law, especially under NAFTA and US claims brought against Canada, is continuously taken into account and translated in legal innovations in the design of its

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Autonomy and the Trans-Pacific Partnership Agreement”, in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham (UK): Edward Elgar, 2013).

<sup>6</sup> See generally Pierre Bodeau-Livinec, “Le domaine réservé: persistance ou déliquescence des fonctions étatiques face à la mondialisation [The ‘domaine réservé’: Globalisation and Persistence or Deliquescence of State Functions]”, in Société française pour le droit international (ed), *L’État dans la mondialisation [The State in Globalisation]* (Paris : Pedone, 2013) 153; Robert Kolb, “Du domaine réservé: réflexions sur la théorie de la compétence nationale [‘Domaine réservé’: Reflections on the Theory of National Jurisdiction]” (2006) 110 RGDIP 597; Gaetano Arangio-Ruiz, “Le domaine réservé: l’organisation internationale et le rapport entre droit international et droit interne [The ‘domaine réservé’: International Organisation and Relationship between International Law and National Law]” (1990) 225 Recueil des cours 9.

<sup>7</sup> See generally Charles-Emmanuel Côté, “An Experienced Developed Democracy: Canada and Investor-State Arbitration”, (September 2015), abstract online: SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2658145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658145) [to be published in *CIGI Investor-State Arbitration Series*].

<sup>8</sup> *Canada (AG) v Ontario (AG)*, 1937 UKPC 6 at 5-6, [1937] AC 326.

investment agreements by Canada. When Canada entered into the negotiations of *CETA* and *TPP* it had a clear idea of the kind of commitments it was ready to make in the investment chapters. However the different dynamics of the negotiations in the Atlantic and Pacific economic spaces lead to quite different results in the investment chapters. Canada instigated the negotiation of *CETA* with the EU and its scent is obvious on the investment chapter.<sup>9</sup> By contrast, it joined the negotiations of *TPP* at a late stage, when discussions were already well ahead and its imprint on the investment chapter is nowhere to be found.<sup>10</sup> The result is that the regulatory space of government in Canada is quite different under between the two megaregional agreements.

The aim of this paper is to assess the impact of *TPP* and *CETA* investment chapters on the regulatory space of government in Canada. Past treaty practice of Canada will be the yardstick for this assessment, most notably the investment chapter in the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*<sup>11</sup> (*NAFTA*)

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<sup>9</sup> On *CETA* negotiations, see generally, Kurt Hübner, “Canada and the EU. Shaping Transatlantic Relations in the Twenty-First Century”, in Kurt Hübner (ed), *Europe, Canada and the Comprehensive and Economic Trade Agreement: Taming Globalization* (London: Routledge, 2011) 1. On *CETA* investment chapter, see August Reinisch, “The European Union and Investor-State Dispute Settlement: From Investor State Arbitration to a Permanent Investment Court”, *CIGI Investor-State Arbitration Series*, No 2 (March 2016); Damien Nyer, “The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement” (2015) 32 *J Int’l Arb* 697; Céline Lévesque, “The Challenge of ‘Marrying’ Investment Liberalisation and Protection in the Canada-EU *CETA*”, in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges* (Baden-Baden (Germany): Nomos, 2013), 121.

<sup>10</sup> On *TPP* negotiations, see generally Amokura Kawharu, “The Negotiations for a Trans-Pacific Partnership Agreement” (2012) 27 *ICSID Rev* 145; Deborah K Elms and Chin L Lim, “An Overview and Snapshot of the TPP Negotiations”, in Chin L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge (UK): Cambridge University Press, 2012) 21; Meredith Kolsky Lewis, “The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?” (2011) 34 *BC Int’l & Comp L Rev* 27. On *TPP* investment chapter, see Leon E Trakman, “The Status of Investor-State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement”, in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham (UK): Edward Elgar, 2013); Julien Chaisse, “TPP Agreement: Towards Innovations in Investment Rule-Making”, in Chin L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge (UK): Cambridge University Press, 2012) 147.

<sup>11</sup> *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2 (entry into force: 1 January 1994) [*NAFTA*].

and the model-FIPA of Canada.<sup>12</sup> Overall neither *TPP* nor *CETA* stands out as better protecting or reducing more the regulatory space of government than the other. It depends of the policy area considered. *CETA* appears to be more innovative, representing a synthesis of the preoccupations of Canada and the EU towards international investment law and ISA. *TPP* is a blueprint for US foreign legal policy in the Pacific space and elsewhere, representing an orthodox view of international investment law.<sup>13</sup>

Part II will discuss the aspects of *TPP* and *CETA* that maintain or enhance the protection of the regulatory space of government. Part III will deal with aspects of both mega-regional agreements that reduce that regulatory space. Part IV will end this paper by exploring the confusion that emerges from this comparison for regulators and arbitrators, as well as possible solution to address it.

## II PROTECTING THE REGULATORY SPACE OF GOVERNMENT IN CANADA

The protection of the regulatory space of government by *TPP* and *CETA* investment chapter is basically the same than in past treaty practice of Canada, most notably in relation to carving out of sensitive policy areas and regarding national treatment, most favoured nation (MFN) treatment and indirect expropriation. Some enhanced protection of the regulatory space is also introduced by the mega-regional agreements, especially with respect to the right of admission and the right of establishment, as well as with ISA.

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<sup>12</sup> Canada, *Agreement between Canada and [...] for the Promotion and Protection of Investments* (6 July 2012) (unpublished; on file with the author) [*Canada Model FIPA*].

<sup>13</sup> For a strong criticism of the lack of innovation in *TPP* investment chapter, see Lisa Johnson and Lisa Sachs, “The TPP’s Investment Chapter: Entrenching, rather than Reforming, a Flawed System”, *CCSI Policy Paper* (November 2015).

## A *Limited Rights of Admission and Establishment*

The right of admission of foreign investors refers to their right to make new investment in a Host State<sup>14</sup>. It is not guaranteed by international customary law, the focus of which is protection of investment already made, through the minimum standard of treatment of aliens and their property. The right of establishment refers to the conditions under which a foreign investor may operate its investment in the host State. It deals with the type of presence that is permitted for the foreign investor once admitted.<sup>15</sup> Some aspects of the right of establishment are usually dealt with by Canada through obligations relating to national treatment, MFN treatment, performance requirements or key personnel (i.e. senior management and board of directors of an enterprise). Canada usually grants both rights to foreign investors, even if it is not worded as such. The right of admission and the right of establishment are rather granted implicitly through the application of investment treaties at the pre-investment stage. Typically, the definition of investor refers to the national or an enterprise of a Party that “seeks to make” or “is making” an investment<sup>16</sup>. More explicit references are also made to “establishment” or “acquisition” of investments in the national treatment clause, MFN clause, and the performance requirements clause.<sup>17</sup> Thus Canadian investment agreements extend to the pre-investment stage, imposing disciplines at this early stage of the economic operation.

*TPP* follows the usual practice of Canada in granting implicitly the rights of admission and establishment through application at the pre-investment stage. An “investor of a Party” includes a national or an enterprise of a Party that “attempts to make” or “is making” an investment in the territory of another Party,<sup>18</sup> with the addition of explicit references to the “establishment” and “acquisition” of an investment in the definition of

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<sup>14</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 80.

<sup>15</sup> UNCTAD, *Admission and Establishment* (New York: UN, 2002) (UN Doc No UNCTAD/ITE/IIT/10 (vol II) at 12.

<sup>16</sup> *NAFTA*, *supra* note 11, art 1139 (“investor of a Party”); *Canada Model FIPA*, *supra* note 12, art 1 (“investor of a Party”).

<sup>17</sup> *NAFTA*, *ibid* art 1102, 1103, 1106; *Canada Model FIPA*, *ibid* art 4, 5, 9.

<sup>18</sup> *TPP*, *supra* note 4, art 9.1 (“investor of a Party”).

the scope of some obligations.<sup>19</sup> At first sight, *CETA* seems to follow the same approach.<sup>20</sup> It even goes a step further in the granting of the right of establishment, with Section B of the investment chapter being entitled “Establishment of investments” and the inclusion of new disciplines on market access.<sup>21</sup> Nevertheless a closer look at *CETA* shows that it introduces several new restrictions to the rights of admission and establishment. In addition, both *TPP* and *CETA* contain a clause preserving the Canadian review mechanism of foreign acquisitions. The end result is that usual regulatory space of government is preserved concerning those rights, and even extended by *CETA*.

### 1 *New Restrictions on the Rights*

Past practice of EU Member States shows that they were reluctant to grant the rights of admission and establishment to foreign investors.<sup>22</sup> This uneasiness with applying investment treaties at the pre-investment stage is reflected in *CETA* with the introduction of new restrictions.

First, fair and equitable treatment (FET), the clause on compensation for losses, the expropriation clause and freedom of transfer are all made inapplicable to the pre-investment stage.<sup>23</sup> It means that protection of foreign investors seeking to make an investment or making an investment is less extensive than that of the investors that have already made an investment. A breach of FET or of the expropriation clause could not be invoked at this stage. No similar explicit exclusion of obligations at the pre-investment stage is made in *TPP*, but they could be implicitly excluded: only the MFN clause, the national treatment clause and the performance requirements clause refer explicitly to the establishment or the acquisition of an investment.<sup>24</sup> It could reasonably and logically be

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<sup>19</sup> *Ibid* art 9.4, 9.5, 9.10 (*i.e.* the MFN clause, the national treatment clause and the performance requirements clause).

<sup>20</sup> *CETA*, *supra* note 3, art 8.1 (“investor”), 8.5 (performance requirements clause), 8.6 (national treatment), 8.7 (MFN clause).

<sup>21</sup> *Ibid* art 8.4.

<sup>22</sup> Dolzer & Schreuer, *supra* note 14 at 81.

<sup>23</sup> *CETA*, *supra* note 3, art 8.2.4 (“Section D applies only to a covered investment and to investors in respect of their covered investments.” [emphasis added]).

<sup>24</sup> *TPP*, *supra* note 4, art 9.4, 9.5, 9.10.

interpreted as meaning that only these obligations are applicable at the pre-investment stage. A similar argument could be made regarding all other investment agreements of Canada, but the issue has not been brought before an arbitral tribunal. The distinction between pre and post-investment is never clearly articulated by arbitrators. Neither is the issue of applicability of some obligations at the pre-investment stage ever discussed. In *Clayton/Bilcon v Canada*<sup>25</sup> for instance, a US investor successfully claimed compensation for the breach of FET and national treatment by the joint review panel that conducted the environmental assessment of the planned project of operating a quarry and a marine terminal in a sensitive coastal area in Nova Scotia. The question whether *Clayton/Bilcon* was a pre or post-investment case was never raised and it was assumed that FET was applicable. Under *CETA* qualification of the investment stage at which a dispute occurs is likely to be more debated.

Second, *CETA* introduces new exclusions of certain measures from the scope of the obligations applicable at the pre-investment stage.<sup>26</sup> Measures relating to air services are not covered by the obligations of the treaty at this stage, except five categories of services.<sup>27</sup> Moreover, measures relating to “activities carried out in the exercise of government authority” are also not covered at pre-investment stage.<sup>28</sup>

Third, *CETA* goes a step further in restricting the rights of admission and establishment by completely barring investor-State arbitration (ISA) at the pre-investment stage.<sup>29</sup> This innovation is significant, since only State-to-State dispute settlement will be available at this stage. Given the politicisation that it implies, it is far less likely to be used. *TPP* does not foresee such exclusion of ISA at the pre-investment stage. The exclusion in *CETA* will make the issue of qualification of the investment stage in which a dispute occurs

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<sup>25</sup> “Award on Jurisdiction and Liability” (UNCITRAL), (NAFTA Chap. 11, 17 March 2015), (Arbitrators: Bruno Simma, pres, Donald McRae and Bryan Schwartz).

<sup>26</sup> *CETA*, *supra* note 3, art 8.2.

<sup>27</sup> *Ibid* art 8.2(a). The categories of air services covered are aircraft repair and maintenance, selling and marketing of air transport services, computer reservation system, ground handling and airport operation.

<sup>28</sup> *Ibid* art 8.2(b). These activities are those carried out neither on a commercial basis nor in competition with one or more economic operators (*ibid* art 8.1 “activities carried out in the exercise of governmental authority”).

<sup>29</sup> *Ibid* art 8.2:4.

even more crucial. At the same time, *CETA* also excludes from ISA post-investment disputes concerning performance requirements.<sup>30</sup> This odd exclusion seems to partake of the view that performance requirements belong to the right of establishment rather than to the post-investment stage.<sup>31</sup> This might have been the understanding of the EU, since past treaty practice of EU Member States usually does not include a clause on performance requirements. It cannot be the understanding of Canada however. In *Mobil Investments v Canada*,<sup>32</sup> it lost a case involving the breach of the performance requirements clause at the post-investment stage. Under *CETA*, such claim will not be admissible in ISA anymore.

Even if *TPP* admits ISA at the pre-investment stage, it also introduces a new restriction by limiting damages that may be awarded to those “sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages”.<sup>33</sup> Thus the scope of damages claimable for the breach of an obligation at the pre-investment stage is more limited than at the post-investment stage. It could perhaps limit the possibility to claim loss of profit, which is normally available in reparation by compensation under general international law.<sup>34</sup> The qualification of the investment stage in which a dispute occurs will also be significant under *TPP*. This restriction is found in no other investment agreements of Canada.

## 2 *Review of Foreign Acquisition*

Canada maintains a unique mechanism of compulsory review of acquisition of Canadian enterprises by foreign investors. *Investment Canada Act*<sup>35</sup> creates two distinct review processes operating with a different set of rules. The first process subjects prospective

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<sup>30</sup> *Ibid.*

<sup>31</sup> See Dolzer & Schreuer, *supra* note 14 at 82-84.

<sup>32</sup> “Decision on Liability and on Principles of Quantum”, ICSID Case No ARB(AF)/07/4, (NAFTA Chap 11, 22 May 2012), (Arbitrators: Hans Van Houtte, pres, Merit E Janow, Philippe Sands).

<sup>33</sup> *TPP*, *supra* note 4, art 9.29:4.

<sup>34</sup> International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, art 36:2, para 27-33, in “Report of the Commission to the General Assembly on the Work of its Fifty-Third Session” (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN 2007) at 26 (UNDOC.A/CN.4/SER.A/2001/Add.1).

<sup>35</sup> RSC 1985, c 28 (1<sup>st</sup> Supp).

foreign acquisition of a Canadian enterprise to an economic test applied by the federal minister of Industry, aiming to assess whether it is of “net benefit to Canada”.<sup>36</sup> If the Minister finds that the planned acquisition does not meet this test, the foreign investor is precluded from making the investment.<sup>37</sup> The Minister may take into consideration specific undertakings submitted by the foreign investor, such as keeping a certain amount of jobs in Canada.<sup>38</sup> Only acquisition of a significant value are subjected to the review process and the threshold has been elevated in recent years, varying according to the nationality of the foreign investor, the branch in which it seeks to make an investment, or whether it is a private investor or a State-owned enterprise.<sup>39</sup> The blocking of acquisitions remains extremely rare, only two cases being reported, including the 2010 refusal of the 40 billion CDN\$ bid of Australian BHP Billiton to acquire Potash Corporation of Saskatchewan, the largest potash producer in the world.<sup>40</sup> The second review process allows the Federal Government to conduct a national security examination of all foreign acquisition of Canadian enterprises, as well as all creation of new Canadian enterprises by a foreign investor.<sup>41</sup> Again, the Federal Government may block the foreign investment for national security reasons.<sup>42</sup>

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<sup>36</sup> *Ibid* s 11, 14, 14.1, 17, 19, 21-23. The federal minister of Canadian Heritage is responsible of the review of investments in cultural sector.

<sup>37</sup> *Ibid* s 24.

<sup>38</sup> *Ibid* s 23. The previous version of the review process was successfully challenged at the GATT by the US, on the basis that some undertakings constituted performance requirements prohibited by the national treatment clause. See *Canada – Administration of the Foreign Investment Review Act (Complaint by the United States)* (1984), GATT Doc L/5504, 30th Supp BISD 140.

<sup>39</sup> Thresholds for review applicable from 24 April 2015 to 23 April 2017 are: 600 million CDN\$ (WTO Private investor); 375 million CDN\$ (WTO State-owned enterprise); 5 million \$ (Non-WTO investor and investments in cultural sector). Canada, Department of Innovation, Science and Economic Development, *Investment Canada Act. Thresholds*, online: [https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h\\_1k00050.html](https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00050.html).

<sup>40</sup> Canada, Department of Industry, *Investment Canada Act. Annual Reports 2010-2011, 2011-2012, 2012-2013* (Ottawa: Industry Canada, 2014) at 6; “BHP’s PotashCorp Bid Rejected for Now”, *CBC News* (3 November 2010), online: CBC <http://www.cbc.ca/news/business/bhp-s-potashcorp-bid-rejected-for-now-1.868381>. The other case was the refusal in 2008 of the acquisition of the space technology division of MacDonald, Dettwiler & Associates Ltd by US investor Alliant Techsystems Inc for 1.3 billion CDN\$. Canada, Department of Industry, *Investment Canada Act. Annual Reports 2009-2010* (Ottawa: Industry Canada) at 7; “Federal Government Blocks Sale of MDA Space Division”, *CBC News* (10 April 2008), online: CBC <http://www.cbc.ca/news/business/federal-government-blocks-sale-of-mds-space-division-1.703999>.

<sup>41</sup> *Investment Canada Act*, *supra* note 35, s 25.2, 25.3.

<sup>42</sup> *Ibid* s 25.4.

The *Investment Canada Act* is an important exercise by Canada of its regulatory power over foreign investments. It runs completely afoul of the rights of admission and establishment of foreign investors. Canada systematically protects its regulatory space in this regard in all its investment agreements, including *TPP* and *CETA*. It does so by grandfathering *Investment Canada Act* from the scope of obligations relating to national treatment, performance requirements and key personnel.<sup>43</sup> Canada may therefore accord preferential treatment to Canadian investors for acquisition of Canadian enterprises, despite the rights of admission and establishment of foreign investors. Conversely Canada is not allowed to tighten the mechanism, by lowering the threshold or creating a stricter test for instance. Moreover all decisions taken under *Investment Canada Act* are excluded from ISA and State-to-State dispute settlement, meaning that the operation of the review mechanism is completely shielded from claims.<sup>44</sup> Only *CETA* clarifies that State-to-State dispute settlement remains open to complaints regarding breach of the grandfather clause by amendments made to *Investment Canada Act*. This leaves open the question whether a similar complaint would be allowed under *TPP*.

## B Carving Out of Sensitive Policy Areas

A legal technique used both by *TPP* and *CETA* to protect the regulatory space of government is to allow Parties to carve out sensitive policy areas from the scope of some obligations of the investment chapters. These obligations all relate to issues not already regulated by customary international law, i.e. market access, national treatment, MFN treatment, performance requirements and key personnel. Canada is well-versed in this technique. It is employed in two different manners: a policy area may be excluded, or only existing non-conforming measures that are maintained may be grandfathered.<sup>45</sup> The

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<sup>43</sup> *TPP*, *supra* note 4, Annex I – Canada – 2 (adding MFN treatment to the exclusion); *CETA*, *supra* note 3, Annex I-C-1 (adding market access disciplines to the exclusion). See *NAFTA*, *supra* note 11, Annex I – Canada.

<sup>44</sup> *TPP*, *ibid* Annex 9-H; *CETA*, *ibid* Annex 8-C; *NAFTA*, *ibid* art 1138.2.

<sup>45</sup> In addition to this, the sector of financial services is completely excluded from the scope of all obligations of the investment chapters. *TPP*, *ibid* art 9.3.3; *CETA*, *ibid* art 8.3.1. See also *NAFTA*, *ibid* 1101:3. Taxation policy is also excluded from the scope of investor chapters in principle, with some

carving out of sensitive policy areas applies to all stages of the investment and is not limited to the pre-investment stage. The exact assessment of the regulatory power retained by Canada is not obvious since it requires a close reading of the annexes to the treaties.

## 1 *Partial Exclusion of Policy Areas*

Both *TPP* and *CETA* allow Parties to reserve the right to maintain non-conforming measures or adopt new ones in specific policy areas, through a negative list.<sup>46</sup> In addition, the areas of government procurement and State subsidies are deemed sensitive for all Parties and are excluded from the scope of some obligations directly in the text of the investment chapters.<sup>47</sup> The policy areas that Canada carved out are roughly the same under *TPP* and *CETA*, with a few additional reservations under *CETA* due to its new disciplines on market access.

A series of non-economic policy areas are carved out by Canada, in relation to aboriginal affairs<sup>48</sup>, minority affairs<sup>49</sup>, social services<sup>50</sup> and oceanfront land ownership<sup>51</sup>. New Zealand took a different approach with respect to aboriginal affairs and included instead a broader exception from all treaty obligations for the measures necessary to accord more favourable treatment to Maori.<sup>52</sup> In *Hupacasath First Nation v Canada (AG)*<sup>53</sup>, fear of encroachment with aboriginal rights by investment agreements triggered an unsuccessful

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obligations being applicable under various conditions. *TPP*, *ibid* art 29.4; *CETA*, *ibid* art 28.7. See also *NAFTA*, *ibid* art 2103.

<sup>46</sup> *TPP*, *ibid* art 9.12.2 and Annex II; *CETA*, *ibid* art 8.15.2 and Annex II. See also *NAFTA*, *ibid* art 1108:3 and Annex II. The following abbreviations are used in the footnotes below to indicate the obligations from which the policy areas are carved out: market access (MA); national treatment (NT); most-favoured nation treatment (MFN); performance requirements (PR); key personnel (KP).

<sup>47</sup> *TPP*, *ibid* art 9.12.6(a), 9.12.6(b) (NT-MFN-KP); *CETA*, *ibid* art 8.15.5(a), 8.15.5(b) (MA-NT-MFN-KP). See also *NAFTA*, *ibid* art 1108:7 (NT-MFN-KP).

<sup>48</sup> *TPP*, *ibid* Annex II – Canada – 2 (NT-MFN-PR-KP); *CETA*, *ibid* Reservation II-C-1 (MA-NT-MFN-PR-KP).

<sup>49</sup> *TPP*, *ibid* Annex II – Canada – 6 (NT-MFN-KP); *CETA*, *ibid* Reservation II-C-8 (MA-NT-MFN-KP).

<sup>50</sup> *TPP*, *ibid* Annex II – Canada – 7 (NT-MFN-KP); *CETA*, *ibid* Reservation II-C-9 (MA-NT-MFN-KP).

<sup>51</sup> *TPP*, *ibid* Annex II – Canada – 3 (NT); *CETA*, *ibid* Reservation II-C-4 (MA-NT).

<sup>52</sup> *TPP*, *ibid* art 29.6.

<sup>53</sup> 2015 FCA 4, 379 DLR (4<sup>th</sup>) 737, aff'g 2013 FC 900, 438 FTR 210; *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and the Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014 No 16 (entry into force: 1 October 2014).

challenge against ratification of the Canada-China 2012 FIPA. The argument was that ratification would be unconstitutional because the Federal government failed to consult with aboriginal peoples of Canada on the matter. The social services exclusion deals with the policy areas of public law enforcement and correctional services. Other social policy areas are also excluded, but only to the extent that non-conforming measures are adopted for a “social purpose” regarding income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

A second series of policy areas are partially carved out in the sensitive economic fields of air transportation and air services,<sup>54</sup> water transportation,<sup>55</sup> fishing,<sup>56</sup> government securities,<sup>57</sup> privatisation of State enterprises or entities<sup>58</sup> and, only in *CETA*, nationality of members of board of directors of Canadian enterprises<sup>59</sup>. The exclusion of privatisation allows the federal or provincial governments to restrict acquisition of State enterprises or entities by foreign investors. Oddly enough, this usual reservation in Canadian practice is not filed under the same annex in *CETA*: instead of being filed as a partial exclusion of a policy area, it is filed as a grandfathered measure.<sup>60</sup> Nevertheless, future non-conforming measures relating to privatisation are deemed to be existing measures by the reservation in *CETA*, meaning that it is not a grandfather clause. It is questionable whether this specification is lawful since it runs against the objective and rationale of *CETA* Article 8.15.1 and Annex I that is to limit reservations filed under it to existing measures. The protection of the regulatory space of governments relating to privatisation under *CETA* will depend on the lawfulness of this description. To be certain Canada should have followed its usual practice of using the partial carving out provision instead of trying to bend the grandfather clause.

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<sup>54</sup> *TPP*, *supra* note 4, Annex II – Canada – 9, 20, 21 (NT-MFN-PR-KP); *CETA*, *supra* note 3, Annex II-C-13, 16, 18 (MA-NT-MFN).«

<sup>55</sup> *TPP*, *ibid* Annex II – Canada – 10, 14, 15 (NT-MFN-PR-KP); *CETA*, *ibid* Annex II-C-14, 19 (MA-NT-MFN-PR-KP).

<sup>56</sup> *TPP*, *ibid* Annex II – Canada – 4 (NT-MFN); *CETA*, *ibid* Annex II-C-5 (MA-NT-MFN).

<sup>57</sup> *TPP*, *ibid* Annex II – Canada – 5 (NT); *CETA*, *ibid* Annex II-C-6 (MA-NT).

<sup>58</sup> *TPP*, *ibid* Annex II – Canada – 19 (NT-KP).

<sup>59</sup> *CETA*, *supra* note 3, Annex II-C-3 (NT-KP).

<sup>60</sup> *Ibid* Annex I-C-2 (MA-NT-KP).

The new disciplines on market access in *CETA* made it necessary for Canada to exclude additional policy areas for the first time. These partial exclusion relate to supply of social services not otherwise reserved,<sup>61</sup> drinking water services,<sup>62</sup> monopolies in air and water transportation,<sup>63</sup> collective marketing arrangements for seafood and agricultural goods,<sup>64</sup> monopoly for import of alcoholic beverages<sup>65</sup> and pipelines.<sup>66</sup> For the same reason, Canadian Provinces and territories needed to exclude partially policy areas for the first time. The 64 new provincial and territorial reservations relate to a wide array of policy areas: energy (13), gambling and betting (12), trade in alcoholic beverages (10), forest (10), fishing (10), hunting (4), land transportation services (2), recycling (1), freight transportation services (1), as well as research and experimentation development services (1).<sup>67</sup> In all these policy areas government may restrict the right of establishment of EU investors.

## 2 *Grandfathered Measures*

Existing non-conforming measures may also be protected by a grandfather clause if specifically designated in a negative list annexed to the treaty.<sup>68</sup> This legal technique is less protective of the regulatory space of government because new non-conforming measure cannot be adopted, and amendments to existing measures can only maintain or reduce the regulatory space reserved by ratchet effect. Existing measures of local governments of all Parties are grandfathered by the text of the investment chapters itself; local governments do not include federated units, designated as regional governments and

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<sup>61</sup> This partial exclusion of social services not otherwise excluded is supplemented by another reservation grandfathering existing non-conforming measures in relation to the same services. *CETA, ibid* Reservation I-C-8 (NT-MFN-PR-KP, except for existing non-conforming measures on private education services which must comply with MFN).

<sup>62</sup> *CETA, ibid* Reservation II-C-11 (MA, NT).

<sup>63</sup> *CETA, ibid* Reservation II-C-17 (MA).

<sup>64</sup> *CETA, ibid* Reservation II-C-2, 5 (MA, with NT, MFN for seafood).

<sup>65</sup> *CETA, ibid* Reservation II-C-7 (MA).

<sup>66</sup> *CETA, ibid* Reservation II-C-12 (MA).

<sup>67</sup> *CETA, ibid* Reservation II-PT-1 to 71 (some of those provincial and territorial reservations concern only cross-border trade in services). The number of provinces and territories that filed a reservation concerning investment is indicated in parenthesis for each policy area.

<sup>68</sup> *TPP, supra* note 4, art 9.12.1 and Annex I; *CETA, ibid* art 8.15.1 and Annex I.

discussed below.<sup>69</sup> Federal measures reserved by Canada concern mostly measures reserving ownership or certain economic activities to Canadians in the sensitive areas offshore oil and gas production,<sup>70</sup> uranium mining,<sup>71</sup> air and water transportation,<sup>72</sup> telecommunications,<sup>73</sup> federal corporations and cooperatives,<sup>74</sup> formerly privatised State enterprises,<sup>75</sup> agricultural land in Alberta,<sup>76</sup> licensed custom broker,<sup>77</sup> and duty free shop operator.<sup>78</sup> Again new disciplines on market access in *CETA* made it necessary for Canada to grandfather additional existing measures relating to expert examination of cultural property, extra-provincial bus services, national transportation and postal monopoly.<sup>79</sup>

Lastly existing local development policy measures in oil and gas development projects are also grandfathered.<sup>80</sup> In *Mobil Investments Canada*, Canada lost the case based on a controversial interpretation of the latter reservation by the majority of the arbitral tribunal. The issue rested on the correct interpretation of the reservation, whether less restrictive subordinate measures activated the ratchet effect of the grandfather clause or not, reducing the regulatory space of Canada accordingly.<sup>81</sup> Surprisingly no clarification of the explanatory notes of Annex I has been made in *TPP* or *CETA* in order to better protect the regulatory space of government concerning subordinate measures.

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<sup>69</sup> *TPP, ibid* art 1.3 and Annex 1-A (“regional level of government”); *CETA, ibid* art 8.15.1(iii). See below, part III.A, for a discussion on the coverage of provincial and territorial measures.

<sup>70</sup> *TPP, ibid* Annex I – Canada – 16 (NT); *CETA, ibid* Reservation I-C-15 (NT).

<sup>71</sup> *TPP, ibid* Annex I – Canada – 21 (NT); *CETA, ibid* Reservation I-C-18 (NT).

<sup>72</sup> *TPP, ibid* Annex I – Canada – 22, 26 (NT, with MFN, KP for air transportation); *CETA, ibid* Reservation I-C-20, 23 (MA, NT, with KP for air transportation).

<sup>73</sup> *TPP, ibid* Annex I – Canada – 34 (NT, KP); *CETA, ibid* Reservation I-C-9 (MA, NT, KP).

<sup>74</sup> *TPP, ibid* Annex I – Canada – 5 (NT); *CETA, ibid* Reservation I-C-3, 4 (MA, NT, KP).

<sup>75</sup> *TPP, ibid* Annex I – Canada – 8 (NT); *CETA, ibid* Reservation I-C-6 (NT).

<sup>76</sup> *TPP, ibid* Annex I – Canada – 7 (NT); *CETA, ibid* Reservation I-C-5 (NT).

<sup>77</sup> *TPP, ibid* Annex I – Canada – 11 (NT, KP); *CETA, ibid* Reservation I-C-10 (MA, NT, KP).

<sup>78</sup> *TPP, ibid* Annex I – Canada – 12 (NT); *CETA, ibid* Reservation I-C-11 (MA, NT).

<sup>79</sup> *CETA, ibid* Reservation I-C-12, 27, 28, 29 (MA, with NT for expert examiner of cultural property and extra-provincial bus services).

<sup>80</sup> *TPP, supra* note 4, Annex I – Canada – 17, 20 (NT, PR); *CETA, ibid* Reservation I-C-16, 17 (NT, PR).

<sup>81</sup> Charles-Emmanuel Côté, “II. Investissement [Investment]” (2012) 50 Can YB Int’l L 363 at 391-393.

### C *Affirmation of the Right to Regulate*

A strong affirmation of the right of the Parties to regulate on their territories to achieve legitimate policy objectives is found in *TPP* and *CETA*, but with significant differences. The right to regulate protected by *CETA* is expressed in broader terms and does not refer to the necessity for the measure to be compatible with the investment chapter.<sup>82</sup> It refers to protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. It clarifies in addition that the mere fact that a regulation affects negatively an investment or interferes with an investor's expectations does not constitute a breach of the investment chapter.<sup>83</sup> Similarly it is stated that the refusal to grant a governmental subsidy does not amount to a breach of the chapter.<sup>84</sup> It remains to be seen how this new provision will impact the application and interpretation of *CETA* but it is certainly a positive innovation for the protection of the regulatory space of government.

By contrast, the affirmation of the right to regulate in *TPP* is far less ambitious; it is self-limited by a reference with the necessity for a regulation to be "otherwise consistent" with the investment chapter.<sup>85</sup> Its language is also shier since it only refers to measures appropriate to ensure that investment activity is undertaken "in a manner sensitive to environmental, health or other regulatory objectives". *NAFTA* contains a similar circular provision and it failed to have any impact whatsoever on the interpretation of the investment chapter.<sup>86</sup> The provision in *TPP* is likely to have the same fate.

However *TPP* does contain an innovative provision affirming the right to regulate of Parties in relation to respect, preservation and promotion of traditional knowledge and traditional cultural expressions.<sup>87</sup> The right to regulate in this matter is subjected to international obligations of each Party. The legal effect of this condition is not obvious.

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<sup>82</sup> *CETA*, *supra* note 3, art 8.9.1.

<sup>83</sup> *Ibid* art 8.9.2.

<sup>84</sup> *Ibid* art 8.9.3.

<sup>85</sup> *TPP*, *supra* note 4, art 9.16.

<sup>86</sup> *NAFTA*, *supra* note 11, art 1114:1 (see also *ibid* art 1101:4).

<sup>87</sup> *TPP*, *supra* note 4, art 29.8.

On the one hand, it could be a circular clause requiring the measure to be consistent with the investment chapter of *TPP*. Since it is open-ended it could also require consistency with other relevant treaties in the field of intellectual property such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.<sup>88</sup> On the other hand, it could also refer to international instruments that impose obligations to adopt measures protecting traditional knowledge and traditional cultural expressions,<sup>89</sup> trumping the circularity of the clause and giving an external justification to the exercise of its regulatory power by a Party. Only practice will show if it is an effective provision.

#### D Curtailment of MFN Treatment

Given the sprawling reach of MFN treatment, *TPP* and *CETA* attempt to curtail its application to appropriate ends. Indeed the International Law Commission (ILC) study group on the MFN clause recently concluded that States could carefully tailor it in order to keep control on its legal effect.<sup>90</sup> Invocation of more favourable treatment accorded by other treaties is significantly restricted by a reservation barring reference to previous international agreements. *TPP* prohibits reference to treaties in force or signed prior its entry into force.<sup>91</sup> *CETA* is less restrictive since it only prohibits reference to treaties in force or signed on 1 January 1994, i.e. the date of entry into force of *NAFTA*.<sup>92</sup> Proper identification of the date of signature of *CETA* and the date of entry into force of *TPP* are thus not a purely academic questions, since they will determine whether *TPP* investors can invoke more favourable *CETA* provisions or not. Conversely *CETA* investors will be able to invoke more favourable *TPP* provisions anyways.

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<sup>88</sup> Annex 1C of the *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3 (entry into force: 1 January 1995).

<sup>89</sup> See *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, art 8(j) (entry into force: 29 December 1993); *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010, UN Reg No A-30619 (entry into force: 12 October 2014).

<sup>90</sup> International Law Commission, *Final Report. Study Group on the Most-Favoured-Nation clause*, UN Doc A/CN.4/L.852 (29 May 2015).

<sup>91</sup> *TPP*, *supra* note 4, Annex II – Canada – 13. Exceptionally, reference to future treaties is also prohibited concerning international agreements on aviation, fisheries and maritime matters.

<sup>92</sup> *CETA*, *supra* note 3, Reservation II-C-20. Again, reference to future treaties is also prohibited concerning international agreements on aviation, fisheries and maritime matters.

*CETA* offers a reduced protection of the regulatory space of government with the reference period of the MFN clause being 1 January 1994. However it contains a very interesting new clarification on the scope of the clause, providing that it cannot be used to invoke substantive obligations of other treaties.<sup>93</sup> Only concrete discrimination may be invoked, based on measures adopted pursuant to more favourable obligations in other treaties. This innovative provision should contribute significantly to the curtailment of the MFN clause in *CETA*. It is inspired by the interpretation of *NAFTA* MFN clause in *United Parcel Service of America v Canada*.<sup>94</sup>

Another provision in *TPP* and *CETA* clarifies that MFN clause cannot be used to invoke more favourable international dispute settlement provisions.<sup>95</sup> This clarification is seen in recent Canadian practice and aims to prevent reduction of the conditions put on access to ISA, as exemplified in *Maffezini v Spain*.<sup>96</sup> In this case, the foreign investor was allowed to ignore the requirement of an 18 months waiting period before bringing its claim to benefit instead of a more favourable 6 months period provided by another investment agreement. This provision means that *CETA* investors will not be able to circumvent their more limited access to ISA.<sup>97</sup>

#### E Clarification of National Treatment and Indirect Expropriation

A new clarification of national treatment is found in *TPP* concerning the key notion of “like circumstances”. A footnote clarifies that determination of like circumstances depends on the totality of the circumstances, “including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare

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<sup>93</sup> *Ibid* art 8.7.4.

<sup>94</sup> “Award on the Merits”, (UNCITRAL), para 184 (*NAFTA* Chap 11, 24 May 2007) (Arbitrators: Kenneth Keith, pres, Ronald A Cass, L Yves Fortier).

<sup>95</sup> *TPP*, *supra* note 4, art 9.5.3; *CETA*, *ibid* art 8.7.4.

<sup>96</sup> “Decision of the Tribunal on Objections to Jurisdiction”, ICSID Case No ARB/97/7, para 39 (Argentina-Spain BIT, 25 January 2000) (Arbitrators: Francisco Orrego Vicuña, pres, Thomas Buergenthal, Maurice Wolf).

<sup>97</sup> See below, part II.F, for a discussion of the restrictions on access to ISA in *TPP* and *CETA*.

objectives.”<sup>98</sup> It should restrict extensive interpretation of like circumstances and thus reduce the scope of the obligation, protecting the regulatory space of government.

Another more common clarification concerns indirect expropriation in *TPP* and *CETA*. The provision aims to restrict the scope of indirect expropriation, notably by excluding non-discriminatory regulatory actions “designed and applied to protect legitimate public welfare objectives”, except in rare circumstances.<sup>99</sup> The language of *CETA* is even stronger, limiting indirect expropriation by such regulatory actions to rare circumstances “when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.” Besides *TPP* states explicitly that the refusal to offer a governmental subsidy or grant does not constitute an expropriation<sup>100</sup>

#### F *Restriction on Access to Investor-State Arbitration*

Study of ISA is beyond the scope of this paper, but some innovative provisions in *TPP* and *CETA* do restrict access to dispute settlement for foreign investors, offering an additional layer of procedural protection for the regulatory space of government. As discussed previously, *CETA* excludes ISA at pre-investment stage, and even at post-investment stage with respect to performance requirements.<sup>101</sup> It literally means that a case like *Mobil Investment Canada* could not have been brought under *CETA*. Espousal of the claim by the EU in the State-to-State dispute settlement mechanism would be necessary, and it is not clear whether damages are available under this procedure.

A very interesting innovation is introduced by *CETA* in trying to restore the balance in ISA by increasing responsibility of foreign investors. Access to ISA is completely barred

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<sup>98</sup> *TPP*, *supra* note 4, art 9.4, n 14.

<sup>99</sup> *TPP*, *ibid* Annex 9-B; *CETA*, *supra* note 3, Annex 8-A.

<sup>100</sup> *TPP*, *ibid* art 9.8.6.

<sup>101</sup> See above, part II.A.1, for a discussion on the exclusion of arbitration at the pre-investment stage.

if the investment was made through fraudulent representation, concealment, corruption or conduct amounting to an abuse of process.<sup>102</sup>

A high profile optional exclusion of ISA is also foreseen by *TPP* concerning disputes relating to anti-tobacco policy,<sup>103</sup> in the wake of the failed challenge of Australia's plain tobacco packaging laws in *Philip Morris Asia v Australia*<sup>104</sup> and the controversy over ISA in Australia.<sup>105</sup> The provision operates like a denial of procedural benefits clause, being available to a Party even during the proceedings. This restriction on ISA means that the regulatory space of government in the anti-tobacco policy area is protected in practice insofar as the dispute is not brought under the State-to-State dispute settlement mechanism.

Some Parties went beyond the aforementioned general restrictions and added specific restrictions on access to ISA under *TPP*, but Canada did not. Significantly, Australia and New Zealand completely excluded ISA between themselves.<sup>106</sup> In contrast, ISA is already available between Canada and the US under *NAFTA* and all the investment claims that Canada faced so far were brought by US investors. Another asymmetry in *TPP* regarding ISA is the inclusion of a fork-in-the-road rule by Chile, Peru, Mexico and Vietnam, according to which the choice by a foreign investor to submit its claim to

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<sup>102</sup> *CETA*, *supra* note 3, art 8.18.3.

<sup>103</sup> *TPP*, *supra* note 4, art 29.5.

<sup>104</sup> "Notice of Arbitration", PCA Case No 2012-12 (Australia-Hong Kong BIT, 21 November 2011) (Arbitrators: Karl-Heinz Böckstiegel, pres, Gabrielle Kaufmann-Kohler and Donald M McRae); Daniel Hurst, "Australia Wins International Legal Battle with Philip Morris over Plain Packaging", *The Guardian* (18 December 2015), online: The Guardian <http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging>; Tania Voon and Andrew Mitchell, "Time to Quit? Assessing International Investment Claim against Plain Tobacco Packaging in Australia" (2011) 14 J Int'l Econ L 515. A claim against Australia's plain packaging laws is also pending at the WTO. See *Australia – Certain Measures concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complaint by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia)*, "Request for Consultations", WTO Doc No WT/DS434, 435, 441, 458 and 467/1 (2012, 2013).

<sup>105</sup> See Leon E Trakman, "Investor-State Arbitration: Evaluating Australia's Evolving Position" (2014) 15 J World Investment & Trade 152.

<sup>106</sup> *Exchange of Letters between the Government of Australia and the Government of New Zealand concerning Investor State Dispute Settlement, Trade Remedies and Transport Services*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services>.

national courts is final and bars later submission of the same claim to ISA.<sup>107</sup> The general “no U-turn” clause applies to Canada; in order to access to ISA, the foreign investor must waive all its rights to initiate or continue any proceedings before the national courts of the host State concerning the same claim.<sup>108</sup>

Many provisions in *TPP* and *CETA* aim to protect the regulatory space of government, some of them new and very innovative. At the same time, the investment chapter in both mega-regional agreements does reduce that space to other extents.

### III REDUCING THE REGULATORY SPACE OF GOVERNMENT IN CANADA

Regulatory space of government is reduced in relation to different aspects by comparison with previous treaty practice of Canada, either by *TPP*, *CETA* or both. This reduction concerns provincial and territorial measures, the right of establishment, FET and exceptions typically included in past treaty practice of Canada.

#### A *Extended Coverage of Provincial and Territorial Measures*

The traditional approach of Canada is to duck the issue of elimination of provincial and territorial obstacles to foreign investment. *NAFTA* Parties did not have time to complete liberalisation of foreign investment in their federated units at the time of closing negotiations.<sup>109</sup> It was agreed that within two years of the entry into force of *NAFTA*, each Party should file a negative list of grandfathered measures that could be maintained despite being non-conform to obligations relating to national treatment, MFN treatment, prescription requirements and key personnel.<sup>110</sup> In the meantime, *NAFTA* included a blanket grandfather clause concerning all existing non-conforming measures of federated

<sup>107</sup> *TPP*, *supra* note 4, Annex 9-J; Dolzer & Schreuer, *supra* note 14 at 216-217.

<sup>108</sup> *TPP*, *ibid* art 9.21.2(b); *CETA*, *supra* note 3, art 8.22.1(g).

<sup>109</sup> Armand de Mestral, “The North American Free Trade Agreement: A Comparative Analysis” (1998) 275 *Recueil des cours* 219 at 296-298.

<sup>110</sup> *NAFTA*, *supra* note 11, art 1108:2.

units.<sup>111</sup> Eventually, the Parties decided not to file a negative list of specific measures maintained by their federated units, and prolonged indefinitely the blanket grandfather clause.<sup>112</sup> The regulatory space of provincial and territorial government as it existed at the time of entry into force of *NAFTA* is thus protected against the application of the aforementioned provisions and all other investment agreements of Canada, including *TPP*, follow the same approach.<sup>113</sup> Like *NAFTA* did, *TPP* also includes a non-binding indicative list of existing non-conforming measures of provincial and territorial governments.<sup>114</sup> This feature does not affect their regulatory space, but enhance transparency for foreign investors and other Parties. It may also serve as a basis for future liberalisation; *TPP* envisages consultations between Parties in order to exchange information on any material impediment on foreign investment in federated units.<sup>115</sup>

*CETA* is a game changer in that for the first time, Canada agreed to provide a negative list of specific existing non-conforming measures of Provinces and Territories that are grandfathered, instead of a blanket reservation.<sup>116</sup> Foreign investment in Provinces and Territories is thus more liberalised under *CETA* than under *TPP* or any previous agreement. Nearly 200 measures are so specifically identified and reserved in *CETA*, meaning that the remaining existing measures must conform to the obligations relating to market access, national treatment, MFN treatment, prescription requirements and key personnel. The net result is that for the first time, the regulatory space of provincial and territorial governments is reduced as compared with all other investment agreement. To be sure, all significant non-conforming measures of Provinces and Territories were probably reserved, but it remains possible that other non-conforming measures were left

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<sup>111</sup> *Ibid* art 1108:1(a)(ii).

<sup>112</sup> *Exchange of Letters between the Government of Canada, the Government of the United States, and the Government of Mexico concerning Existing Non-Conforming Measures of States or Provinces*, 20 March 1996, online: NAFTA Secretariat <https://www.nafta-sec-alena.org/Portals/0/Documents/en/NAFTAreservations0001.pdf?ver=2015-11-02-140540-943> (entry into force: 20 March 1996) [*Exchange of Letters on Measures of States or Province*].

<sup>113</sup> *TPP*, *supra* note 4, art 9.12.1 and Annex I – Canada – 32. See *Canada Model FIPA*, *supra* note 12, art 17:1(a)(ii).

<sup>114</sup> *TPP*, *ibid* Annex I – Canada – 36, Appendix I-A. See *Exchange of Letters on Measures of States or Province*, *supra* note 112.

<sup>115</sup> *TPP*, *ibid* art 9.12.3.

<sup>116</sup> *CETA*, *supra* note 3, 8.15.1(iii) and Annex I. Not all 194 reservations concern investment, some dealing only with cross-border trade in services.

out, voluntarily or not. Those measures will need to be harmonised with *CETA* and any loophole in doing so might give rise to a claim against Canada.

A complete survey of all reserved provincial and territorial measures is beyond the scope of this paper. The negative list for Quebec may serve as an illustration. Measures reserved for Quebec relate to farmland and land in domain of State,<sup>117</sup> professional syndicate in supply management of some agricultural products,<sup>118</sup> preparation of canning of marine products,<sup>119</sup> classified heritage property,<sup>120</sup> funeral services,<sup>121</sup> taxi services,<sup>122</sup> bus transportation permit,<sup>123</sup> heavy vehicle and bulk trucking,<sup>124</sup> maritime transport,<sup>125</sup> cooperatives,<sup>126</sup> timber harvested in domain of State,<sup>127</sup> horse racing,<sup>128</sup> gambling and betting,<sup>129</sup> monopoly on trade in alcoholic beverage,<sup>130</sup> and production and trade in electricity.<sup>131</sup> Whether under the past approach of blanket grandfathering or *CETA* approach of filing a negative list, the regulatory space of provincial and territorial governments continues to vary from one another.

## B *The right of Establishment and New Disciplines on Market Access*

For the first in Canadian treaty practice, *CETA* adds new disciplines on market access in order to expand the protection of the right of establishment.<sup>132</sup> The new obligation deals with restrictions on the size or scale of the presence of the foreign investor in the host State, as well as with the type of legal entity through which the foreign investor may

<sup>117</sup> *CETA*, *ibid* Reservation I-PT-138 (MA, NT).

<sup>118</sup> *Ibid* I-PT-139 (NT-KP).

<sup>119</sup> *Ibid* I-PT-140 (PR).

<sup>120</sup> *Ibid* I-PT-141 (MA-NT).

<sup>121</sup> *Ibid* I-PT-142 (NT).

<sup>122</sup> *Ibid* I-PT-143 (MA-NT).

<sup>123</sup> *Ibid* I-PT-145 (MA).

<sup>124</sup> *Ibid* I-PT-146 (MA-NT-PR).

<sup>125</sup> *Ibid* I-PT-147 (MA-NT).

<sup>126</sup> *Ibid* I-PT-150 (MA-NT-PR-KP).

<sup>127</sup> *Ibid* I-PT-151 (NT-PR).

<sup>128</sup> *Ibid* I-PT-152 (NT-MA).

<sup>129</sup> *Ibid* I-PT-153 (NT-PR-KP).

<sup>130</sup> *Ibid* I-PT-154, 155, 156 (MA-NT-PR).

<sup>131</sup> *Ibid* I-PT-157, 158 (NT-PR).

<sup>132</sup> See above, part II.A, for a discussion on the rights of admission and establishment in *TPP* and *CETA*.

conduct its business.<sup>133</sup> These new disciplines on market access are meant to protect foreign investors against restrictive measures that are not dealt with by the other obligations. It reduces the regulatory space of government accordingly, although this aspect of the right of establishment is restricted in a similar fashion than the right of admission and other aspects of the right of establishment, most notably by the exclusion of ISA.<sup>134</sup> The addition of this new obligation necessitated a series of new reservations on the part of Provinces and Territories in order to carve out sensitive policy areas from its scope.<sup>135</sup>

Among the limitations on the size or scale of the presence of the foreign investor that are newly prohibited by *CETA*, a provision deals with the number of enterprises that may carry out a specific economic activity.<sup>136</sup> Could this provision be interpreted as a definitive ban on the creation of new monopolies? The obligation is deemed not to apply to measure relating to “activities carried out in the exercise of governmental authority”, but this notion is defined as “activities carried out neither on a commercial basis nor in competition with one or more economic operators.”<sup>137</sup> Both commercial State monopolies and private monopolies would thus be subjected to the new disciplines on market access. Unless a reservation has been filed to carve out a policy area or to grandfather existing monopolies, it seems that creation of new monopolies would violate the obligation.<sup>138</sup>

The reduction of the regulatory space of government is counterbalanced by a provision clarifying that certain measures are consistent with the prohibition on limitation on the size or scale of the presence of the foreign investors.<sup>139</sup> Measures deemed consistent are those relating to zoning and planning, fair competition, environmental protection,

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<sup>133</sup> *CETA*, *supra* note 3, art 8.4.1.

<sup>134</sup> *Ibid* art 8.2.4.

<sup>135</sup> *Ibid* art 8.4. See above, part II.B, for a discussion on carving out of sensitive policy areas.

<sup>136</sup> *CETA*, *ibid* art 8.4.1(a).

<sup>137</sup> *Ibid* art 8.1 (“activities carried out in the exercise of governmental authority”), 8.2.2(b).

<sup>138</sup> The chapter of *CETA* dealing with monopolies do protect the right of a Party to designate or maintain a monopoly, but without prejudice to the Parties’ right and obligations under the agreement. *Ibid* art 18.3.1. If under the investment chapter the Party would have the obligation not to designate or maintain a monopoly in a specific area, it appears that it would trump its right to do so in the chapter on monopolies.

<sup>139</sup> *Ibid* art 8.4.2.

regulations based on physical or technical constraints, and regulations requiring the presence of qualified professional in the enterprise.

### C *Extension of Fair and Equitable Treatment?*

Canadian investment agreements systematically limit FET to the minimum standard of treatment of aliens provided by international customary law.<sup>140</sup> *TPP* follows the same approach with the usual clarification that a breach of international law does not amount to a breach of FET.<sup>141</sup> New clarifications are also added, confirming the inclusion of denial of justice in FET and the requirement to provide police protection in the notion of full protection and security.<sup>142</sup> Another important new provision indicates explicitly that FET does not protect legitimate expectations of foreign investors.<sup>143</sup>

The provision on FET in *CETA* is ground-breaking for Canada and could amount to an extension of the obligation, as well as to a reduction of the regulatory space of government. For the first time in Canadian treaty practice, FET is not limited to the minimum standard of treatment of aliens of international customary law.<sup>144</sup> At the same time, *CETA* attempts to curtail FET by providing an exhaustive definition of the concept. Another innovation is the creation of an obligation to review the content of the definition of FET. In contrast with the negative language of *TPP*, *CETA* affirms that legitimate expectations of foreign investors may be taken into account in the application of FET. The usual clarification that breach of an international obligation does not amount to a breach of FET is also found, with the new clarification that a breach of domestic law does also not amount to a breach of *CETA*. At the end of the day the attempt of *CETA* to curtail FET is laudable and seems to be aimed at protecting the regulatory space of

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<sup>140</sup> *Canada Model FIPA*, *supra* note 12 art 6:2; *NAFTA*, *supra* note 11, art 1105:1; NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) at para 2:3.

<sup>141</sup> *TPP*, *supra* note 3, art 9.6.1. A standard definition of customary international law is even provided in Annex 9-A, probably to avoid any misinterpretation of the notion by arbitrators unskilled in public international law.

<sup>142</sup> *Ibid* art 9.6.2.

<sup>143</sup> *Ibid* art 9.6.3.

<sup>144</sup> *CETA*, *supra* note 3, art 8.10.

government by preventing extensive or unexpected interpretations of international customary law. At the same time, by eliminating the limitation to custom, *CETA* opens the door to importation of extensive interpretation of the self-standing FET clause. The precise effect of this clause in *CETA* is difficult to assess, but the latter argument seems more compelling, meaning that the clause would reduce rather than protect the regulatory space of government.

#### D *Vanishing of Canadian Exceptions*

Given its unique neighbouring position with the United States, as well as the weak position of French-speaking Quebec in English-speaking North America, Canada traditionally championed the cultural exception in all international forums. It has also continuously revised its investment treaty practice in light of claims brought against it and of the evolution of ISA in the world. Doing so, Canada started to import general exceptions of international trade law into its investment agreements. Both categories of exceptions have been typical of the Canadian touch on international investment law. With *TPP* and *CETA*, those Canadian exceptions are starting to vanish.

##### 1 *Cultural Exception*

The traditional stance of Canada regarding protection of Canadian cultural industries has been very strong. It usually completely excludes cultural industries from the scope of investment agreements, a policy often referred to as the cultural exemption.<sup>145</sup> All existing or new non-conforming measures are thus lawful under these agreements, leaving an unrestrained regulatory space for government in cultural policy. *CETA* and *TPP* replace this strong approach by a shier and severely amputated cultural exception.

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<sup>145</sup> *Canada Model FIPA*, *supra* note 12 art 18:7; *NAFTA*, *supra* note 11, art 2106 and Annex 2106; *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, 2 January 1988, Can TS 1989 No 3, art 2005 (entry into force: 1 January 1989; suspended 1 January 1994) [*Canada-US FTA*].

*CETA* appears to still endorse the general rationale underlining the cultural exception, affirming in its preamble the commitment of the Parties to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.<sup>146</sup> Nevertheless it replaces the blanket exemption of cultural industries by a reduced carving out of cultural industries from the scope of some obligations, relating to market access, national treatment, MFN, performance requirements and key personnel.<sup>147</sup> Symbolically, the importance of the cultural exemption is still apparent since it is provided in the text of the treaty itself, being applicable to all Parties.

The scaling down of the cultural exception is far more apparent in *TPP*.<sup>148</sup> No reference to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is to be found. The legal technique used to provide the partial cultural exception also indicates its slow dismissal: it is not included in the text of the treaty for the benefit of all Parties, but rather in the reservations filed by Canada to exclude partially sensitive policy areas from the scope of some obligations. Canada reserves its right to maintain or adopt new measures to support the creation, development or accessibility of Canadian artistic expression or content, non-conforming to obligations relating to national treatment, MFN treatment, performance requirements or key personnel.<sup>149</sup> However two specific measures are not covered by the reservation and may not be maintained or adopted anymore: discriminatory requirements on investors to make financial contributions for Canadian cultural development, and measures restricting the access to on-line foreign audio-visual content. These two liberalisation commitments seem to have been made by Canada because it recently changed its policy to that effect, meaning that no real new commitment were made in reality. But this arguments fails to take into account that the commitment is to have reduced the regulatory space of

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<sup>146</sup> 20 October 2005, 2440 UNTS 311 (entry into force: 18 March 2007).

<sup>147</sup> *CETA*, *supra* note 3, art 8.2.3. Article 28.9 in the chapter on exceptions reaffirms the cultural “exception” provided in the investment chapter, marking again the remaining symbolical attachment of the Parties for the exception.

<sup>148</sup> See generally Véronique Guèvremont, “L’exemption culturelle canadienne dans le Partenariat Transpacifique ou la destinée d’une peau de chagrin [The Canadian Cultural Exemption under the Trans-Pacific Partnership or the Story of a Disappearance” (2015) 28.1 RQDI.

<sup>149</sup> *TPP*, *supra* note 4, Annex II – Canada – 16.

government in that regard. Under *TPP*, future governments have lost the ability to re-enact such non-conforming measures.

## 2 *General Exceptions*

Canada first introduced general exceptions of international trade law in its model-FIPA in 2004.<sup>150</sup> *NAFTA* specifically excluded the investment chapter from the scope of its general exceptions.<sup>151</sup> Those exceptions allow a host State to justify a measure otherwise breaching the investment agreement, if it is necessary “to protect human, animal or plant life or health, to ensure compliance with domestic law that is not inconsistent with the agreement, or for the conservation of living or non-living exhaustible natural resources”.<sup>152</sup>

General exceptions are partly maintained in *CETA*. They are no longer applicable to all obligations of the investment agreement, but only those relating to market access, national treatment, MFN treatment, performance requirement and key personnel.<sup>153</sup> Besides the non-economic policy areas covered by the general exceptions are also different from past treaty practice of Canada: measures necessary to protect “public security or public morals or to maintain public order” are added, while measures necessary for the conservation of living or non-living exhaustible natural resources are not included. It means that a measure that breach the obligations relating to FET or to indirect expropriation may no longer be justified under *CETA*. Moreover, non-conforming measure may not be justified by environmental considerations anymore. The reduction of regulatory space of government is even greater under *TPP*. None of the

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<sup>150</sup> Charles-Emmanuel Côté “III. Investissement [Investment]” (2005) 43 Can YB Int'l L 486 at 491-492. See *General Agreement on Tariffs and Trade 1994*, Annex 1A of *Marrakesh Agreement establishing the World Trade Organization*, *supra* note 88, art XX.

<sup>151</sup> *NAFTA*, *supra* note 11, art 2101.

<sup>152</sup> *Canada Model FIPA*, *supra* note 12, art 18:1.

<sup>153</sup> *CETA*, *supra* note 3, art 28.3.2.

general exceptions are applicable to the investment chapter, Canada having come to a full circle with *NAFTA* after 20 years of legal innovation.<sup>154</sup>

The many differences in the regulatory space of government under *TPP*, *CETA*, *NAFTA* and other investment agreements of Canada are likely to be challenging for regulators and arbitrators, if not confusing.

#### IV CONFUSING CANADIAN REGULATORS... AND ARBITRATORS?

Many legal differences or contradictions have been underlined above between *TPP*, *CETA*, and other investment agreements concluded by Canada. Market access disciplines are imposed by *CETA* but not by any other treaty; FET is not limited to international customary law under *CETA*; less provincial and territorial measures are grandfathered by *CETA*; cultural industries are excluded differently in the agreements; general exceptions are available or not according to the agreement; ISA may be excluded regarding anti-tobacco policy under *TPP*, but not under any other agreement; ISA is not available at the pre-investment stage under *CETA* but may be used under all other agreements, and so on. These differences are likely to be puzzling for federal, provincial and territorial governments when trying to assess the conformity of their regulations with international investment law. How can policymaker use adequately their power if their regulatory space depends on the country of origin of a foreign investor?

Adding to the complexity, many Parties of *TPP* and *CETA* had already concluded an investment agreement with Canada. Out of a possibility of 28, seven FIPAs are in force between Canada and EU Member States: Croatia,<sup>155</sup> the Czech Republic,<sup>156</sup> Hungary,<sup>157</sup>

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<sup>154</sup> *TPP*, *supra* note 4, art 29.1.

<sup>155</sup> *Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments*, 3 February 1997, Can TS 2001 No 4 (entry into force: 30 January 2001).

<sup>156</sup> *Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments*, 6 May 2009, Can TS 2012 No 5 (entry into force: 22 January 2012).

Latvia,<sup>158</sup> Poland,<sup>159</sup> Romania<sup>160</sup> and the Slovak Republic.<sup>161</sup> As for *TPP*, out of a possibility of 11, three FTAs with investment chapters are in force between Canada and four other *TPP* Parties: Chile,<sup>162</sup> Mexico,<sup>163</sup> Peru,<sup>164</sup> and, more importantly as regards investment and ISA, the United States.<sup>165</sup>

Two competing approaches are used under *TPP* and *CETA* to deal with the interplay between overlapping agreements of Parties. As for the interplay between agreements of Parties with third parties, some tools may be used to address the confusion over the regulatory space of government.

#### A *Competing Approaches to the Interplay between Investment Agreements*

A distinction must be drawn between agreements already in force amongst Parties of *TPP* or *CETA* and agreements in force between a Party and third parties. By virtue of the principle of relative effect of treaties, based itself on the principle of sovereign equality of States, the conclusion of an investment agreement cannot have any effect on the rights

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<sup>157</sup> *Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, 3 October 1991, Can TS 1993 No 14 (entry into force: 21 November 1993).

<sup>158</sup> *Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 5 May 2009, Can TS 2011 No 27 (entry into force: 24 November 2011).

<sup>159</sup> *Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments*, 6 April 1990, Can TS 1990 No 43 (entry into force: 22 November 1990) [*Canada-Poland FIPA*].

<sup>160</sup> *Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 8 May 2009, Can TS 2011 No 26 (entry into force: 23 November 2011).

<sup>161</sup> *Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments*, 20 July 2010, Can TS 2012 No 7 (entry into force: 14 March 2012).

<sup>162</sup> *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 5 December 1996, Can TS 1997 No 50 (entry into force: 5 July 1997).

<sup>163</sup> *NAFTA*, *supra* note 11.

<sup>164</sup> *Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15 (entry into force: 1 August 2009).

<sup>165</sup> *NAFTA*, *supra* note 11. It should be added that the earlier bilateral FTA between Canada and the US is suspended, but its investment chapter did not include ISA. *Canada-US FTA*, *supra* note 147.

and obligations of third parties.<sup>166</sup> Both agreements must necessarily co-exist. The question is different regarding agreements between the same Parties or some of them. The previous agreement may be repealed by the later agreement, or both agreements may continue to co-exist side by side.

## 1 *Termination of Earlier Investment Agreements*

At international law, a treaty may be terminated explicitly by a subsequent treaty between the same parties.<sup>167</sup> It may even be terminated by a subsequent treaty relating to the same subject-matter if the Parties intended so, or if the two treaties are not capable of being applied at the same time.<sup>168</sup> However the earlier treaty may be only suspended if it was the intention of the Parties.<sup>169</sup> Implicit termination of a treaty raises difficult interpretative issues. One highly relevant precedent in the practice of Canada is the Canada-US FTA that is considered to have been suspended – but not terminated – by NAFTA.<sup>170</sup> This precedent could indicate that suspension is more likely to be intended by Parties regarding trade and investment agreements, especially if the subsequent treaty is a multilateral treaty and the earlier one is bilateral. The suspended treaty may act as a “legal insurance policy”, being able to resume its application in case the subsequent treaty is terminated or does not deliver its promises for a Party, especially if it is a multilateral treaty. This would seem to be particularly adapted to the objective of legal protection of investment agreements.

Upon its entry into force, *CETA* will terminate all earlier investment agreements between Canada and EU Member States.<sup>171</sup> The language of the treaty is very clear:

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<sup>166</sup> *Vienna Convention on the Law of Treaties*, 13 May 1969, 1155 UNTS 331, art 34 (entry into force: 27 January 1980). See Mark Eugene Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) at 467-468.

<sup>167</sup> *Vienna Convention on the Law of Treaties*, *ibid* art 54(b).

<sup>168</sup> *Ibid* art 59:1.

<sup>169</sup> *Ibid* art 59:2.

<sup>170</sup> See De Mestral, *supra* note 109 at 259.

<sup>171</sup> *CETA*, *supra* note 3, art 30.8.1 and Annex 30-A.

“The agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.”<sup>172</sup>

All seven existing FIPAs are listed in Annex 30-A.<sup>173</sup> The explicit termination provision raises two questions.

First, it seems doubtful that the EU can alone with Canada terminate earlier treaties to which it is not a Party. This would be contrary to the principle of relative effect of treaties, unless it could be argued that the EU has succeeded to its Member States regarding these agreements. Such argument would appear hardly realistic, given the fact that Member States are still subjects of international law, and in light of the transitory mechanism set into place by the EU to deal with the continuing existence of previous investment treaties of its Member States with third countries.<sup>174</sup> This mechanism seems to postulate that Member States are still the only Party bound by those agreements. This question should have a bearing on the debate over legal qualification of *CETA*, whether it falls exclusively under the EU treaty-making power or it is a mixed agreement.<sup>175</sup> Should the former vision prevail, effective termination of earlier investment agreements with Canada could be jeopardised.

Second, all earlier investment agreements contain a 15 or 20 years survival clause. Typically, these clauses provide that the protection of the treaty, including access to ISA, will continue for that period even after its termination, but only for investments or commitments to invest made before this date. *CETA* shortens this period to 3 years after

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<sup>172</sup> *Ibid* art 30.8.1.

<sup>173</sup> The investment insurance agreement between Canada and Malta is also listed in Annex 30-A. See *Exchange of Notes between the Government of Canada and the Government of the Republic of Malta concerning an Agreement relating to Foreign Investment Insurance (with Arrangement)*, 24 May 1982, Can TS 1982 No 19 (entry into force: 24 May 1982). There is also a mistake in the year of signature of the *Canada-Poland FIPA*. Annex 30-A indicates 2009 while the treaty was in reality signed in 1990. *Canada-Poland FIPA*, *supra* note 159.

<sup>174</sup> *Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, [2012] OJEU L 351/40. Cf *Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJEU L 257/121.

<sup>175</sup> See *infra* note 3 and accompanying text.

termination.<sup>176</sup> Assuming that termination of the earlier agreements is effective, can a subsequent investment agreement supersede even its survival clauses? The issue is less problematic and it is clear that the law of treaties allow Parties to do so since they remain “the masters of their own treaty”.<sup>177</sup>

*TPP* does not contain an explicit termination clause. Nevertheless, Australia chose to terminate its three existing BITs with other *TPP* Parties in side letters with Mexico,<sup>178</sup> Peru<sup>179</sup> and Viet Nam.<sup>180</sup> However it did not do so with its FTAs in force with other *TPP* Parties, even though they all include an investment chapter.

## 2 Coexistence with Earlier Investment Agreements

The interplay of an investment agreement with earlier ones still in force between the same parties, or with earlier agreements concluded with third parties, is more complex. The basic principle applicable at international law to deal with this issue is the principle of harmonization. In order to avoid conflicts of norms, the overlapping treaties should be interpreted in a manner that allow them to operate simultaneously. In the words of the International Law Commission:

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<sup>176</sup> *CETA*, *supra* note 3, art 30.8.3.

<sup>177</sup> Villiger, *supra* note 166 at 686.

<sup>178</sup> *Exchange of Letters between the Government of Australia and the Government of Mexico concerning the Termination of Investment Promotion and Protection Agreement*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-mexico-termination-of-investment-promotion-and-protection-agreement.PDF>.

<sup>179</sup> *Exchange of Letters between the Government of Australia and the Government of Peru concerning the Termination of Investment Promotion and Protection Agreement*, 29 January 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-peru-termination-of-investment-promotion-and-protection-agreement.PDF>.

<sup>180</sup> *Exchange of Letters between the Government of Australia and the Government of Viet Nam concerning the Termination of Investment Promotion and Protection Agreement*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF>.

*“The principle of harmonization. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”*<sup>181</sup>

*TPP* follows this approach and provides that it should coexist with earlier agreements concluded by the Parties, whether between themselves or with third parties.<sup>182</sup> Each Party affirms its existing rights and obligations in relation to existing international agreement. This means that all set of rules should be applicable in parallel, and that States should act in conformity with all of them at the same time, while foreign investors may avail themselves of the rules of their choice. For instance, if Canada were to elect to exclude anti-tobacco policy from ISA, American investors could still bring a claim against Canada under *NAFTA*, neutralising completely *TPP* in this respect.

## B *Addressing the Confusion over the Regulatory Space of Government*

Investment agreements may coexist between Canada and *TPP* Parties or between Canada and third parties. How should a government handle its variable regulatory space? At first, the logical answer is that it should apply discriminatory policies espousing the complex details of its respective obligations under all investment agreements. This might be the logical solution, but it is a cumbersome one implying a level of technicality that could frustrate the very purpose of policies adopted to protect public welfare objectives. At least it would ensure that Canada will not engage its responsibility for the breach of the agreements. A second, easier, solution is to simply accord a sort of *de facto* MFN treatment to all foreign investors, applying the same policy to all of them, notwithstanding their country of origin. It would mean that the smallest common denominator of regulatory space will be used in practice. That solution would favour foreign investor and will also prevent international claims against Canada. However, it

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<sup>181</sup> International Law Commission, “Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, para 4, in “Report of the Commission to the General Assembly on the Work of its Fifty-Eight Session” (UN Doc A/61/10) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, at 177 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2))).

<sup>182</sup> *TPP*, *supra* note 4, art 1.2.

would frustrate the very purpose of those carefully negotiated treaties with different partners.

From the perspective of the foreign investor, navigating through the various regulatory space of government under *TPP* and *CETA* seems to be easier. He may use the MFN clause trying to take advantage of more favourable provisions in other investment agreements. He may also set up a shell corporation in order to change its nationality and benefit directly from the protection of a more favourable investment agreement. The practical effect of ISA may also be to favour all concerned foreign investors and not only the disputing party.

Three answers to these problems of confusion over the regulatory space of government may be looked at, concerning the legal effect of MFN treatment, the possible use of the denial of benefits clause by Canada, as well as the practical impact of ISA.

#### 1 *Use of MFN Clause by Foreign Investor*

Foreign investors have a powerful tool at their disposal with the MFN clause, but it is limited in its legal effect. Both *TPP* and *CETA* allow foreign investors to invoke preferential treatment accorded to other foreign investors under future agreements.<sup>183</sup> *CETA* even allows EU investors to benefit from more favourable treatment accorded to foreign investors under earlier agreements starting from *NAFTA*. It is clear under *TPP* and *CETA* that more favourable rules of ISA cannot be invoked, like the availability of ISA at the pre-investment stage in all earlier agreements of Canada.<sup>184</sup> Could new substantive protection of regulatory space under *CETA* be circumvented by invoking broader obligations in earlier agreements? For instance, could a foreign investor prevent the application of general exceptions under *CETA* by invoking the fact that *NAFTA* does not contain such exceptions? *CETA* does include a new provision aiming to prevent

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<sup>183</sup> See above, part I.D, for a discussion on curtailment of MFN treatment in *TPP* and *CETA*.

<sup>184</sup> *Ibid.*

blanket invocation of more favourable provisions in other investment agreements.<sup>185</sup> It provides that only concrete more favourable treatment of foreign investors in application of an agreement with a third party may be invoked. This innovative provision has never been applied by arbitral tribunals, but it offers interesting promises for Canada to limit the confusion over its regulatory space. *TPP* does not include such provision and MFN treatment seems to be broader in that respect for *TPP* investors, possibly allowing them to invoke more favourable obligations in posterior agreements, if such obligations were to be accepted by Canada.

This possibility of treaty-shopping by foreign investors through the MFN clause should not be underestimated. If *NAFTA* tribunals have been reluctant to endorse the argument, it was never definitively rejected and US investors regularly invoke more favourable provisions under agreements with third countries.<sup>186</sup> In *Longyear v Canada*<sup>187</sup> a US investor was denied a provincial tax benefit on the basis of its nationality. *NAFTA* investment chapter contains a broad exclusion of taxation measures that would have probably bar any claim by the US investor. Nevertheless it invoked six FIPAs posterior to *NAFTA* in which no exclusion of taxation measures was found, allowing him to argue a breach of national treatment under *NAFTA*. The argument was never ruled on by an arbitral tribunal since the investor withdrew its claim.<sup>188</sup> His motivation for doing so is not on public record, but one may speculate whether the provincial government decided to simply give the US investor the tax benefit it wanted, fearing the consequences of an order of the arbitral tribunal to do so on the basis of the MFN clause. Should it be the case, *Longyear* would be an instance of *de facto* MFN treatment despite *NAFTA* carefully crafted obligations.

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<sup>185</sup> See *infra* note 93 and accompanying text.

<sup>186</sup> Côté, “Experienced”, *supra* note 7 at 30-31.

<sup>187</sup> “Notice of Arbitration”, (UNCITRAL), (*NAFTA* Chap 11, 20 May 2014).

<sup>188</sup> *Longyear v Canada*, “Notice of Withdrawal of Claim”, (UNCITRAL), (*NAFTA* Chap 11, 26 June 2015).

## 2 *Use of Denial of Benefits Clause by Government*

Both *TPP* and *CETA* offer also a powerful tool for governments to deal with shell corporations, with the denial of benefits clause. Canada usually includes this clause in its investment agreements. It allows Canada to deny the benefits of an investment agreement to the foreign investor that does not have substantial business activities in the territory of the other Party where it is constituted, if it is owned or controlled by an investor of a third party.<sup>189</sup> Even if the foreign investor do have substantial business activities in the territory of the other Party where it is constituted, Canada may still deny him the benefits of the investment agreement if it is owned or controlled by an investor of a third party with which the Canada does not maintain diplomatic relations or against which it applies economic sanctions.<sup>190</sup>

A more sophisticated version of the clause addresses the issue of shell corporations used by Canadian nationals that seek to use investment agreements against Canada.<sup>191</sup> The extent to which this additional provision is necessary in the light of customary international law is debatable. A basic principle of the law of State responsibility is that a State may not entail its responsibility for a breach of international law causing an injury to its own nationals.<sup>192</sup> This would only be possible if a special rule is provided to that effect. The rationale behind this principle is that only the State of Nationality of a private person may exercise diplomatic protection against the responsible State.<sup>193</sup> The contrary would be illogical since no State can invoke its own responsibility. Yet the issue at stake is whether the inclusion of ISA alters the general international law principle and allows

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<sup>189</sup> *NAFTA*, *supra* note 11, art 1113:2; *Canada Model FIPA*, *supra* note 12, art 19(b).

<sup>190</sup> *NAFTA*, *ibid* art 1113:1; *Canada Model FIPA*, *ibid* art 19(a).

<sup>191</sup> *Canada Model FIPA*, *ibid* art 19 *intro*. See also United States, *2012 US Model Bilateral Investment Treaty*, art 17:2, online: US Department of State <http://www.state.gov/documents/organization/188371.pdf>.

<sup>192</sup> See Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed (Oxford: Oxford University Press, 2008) at 400; Charles-Emmanuel Côté, *La participation des personnes privées au règlement des différends internationaux économiques: l'élargissement du droit de porter plainte à l'OMC* [Participation of Private Persons to the Settlement of International Economic Disputes: Enlarging the Right to Bring a Complaint at the WTO] (Brussels: Bruylant, 2007) at 157.

<sup>193</sup> International Law Commission, "Draft Articles on Diplomatic Protection", art 3:1, 5:3, in "Report of the Commission to the General Assembly on the Work of its Fifty-Eight Session" (UN Doc A/61/10) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, at 24 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2))).

nationals to set up a shell corporation to benefit from an investment agreement against their own State. It is highly questionable that it is the case. The explicit inclusion of this situation in a denial of benefits clause has the advantage of settling the issue. The absence of a specific provision to that effect in the *Energy Charter Treaty*<sup>194</sup> was considered fatal to the use of the clause against its own nationals by Russia in the ill-famed Yukos trilogy.<sup>195</sup> The arbitral tribunal completely ignored the possible impact of international customary law on the issue.

The denial of benefits clauses of *TPP* and *CETA* are very different. *TPP* has a much broader clause in line with recent treaty practice of Canada. It covers denial of benefits against Canadian investors using a shell corporation to bring a claim against Canada, as well as foreign investors from a third party not having substantial business activities in the Party where they are constituted.<sup>196</sup> Surprisingly enough, the clause in *CETA* does not cover these situations at all. Thus it offers no mean to Canada to block the use of shell corporations by Canadians or third party investors to take advantage of its investment chapter. The only situation that is covered by *CETA* is that of circumvention of economic sanctions by a shell corporation<sup>197</sup>, a situation that is also covered by *TPP*.<sup>198</sup>

Considering the potential importance of denial of benefits clause as a tool to protect the regulatory space of government, one would think that their conditions of application are clear and well understood. However a study of arbitral awards and practice of States in

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<sup>194</sup> 17 December 1994, 2080 UNTS 95, art 17 (entered into force 16 April 1998).

<sup>195</sup> *Hulley Enterprises Limited (Cyprus) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 226 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel) at paras 534-536, 543-545 [*Hulley Enterprises*, “Interim Award”]; *Yukos Universal Limited (Isle of Man) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 227 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel) at paras 535-537, 544-546 [*Yukos Universal*, “Interim Award”]; *Veteran Petroleum Limited (Cyprus) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 228 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel) at paras 546-548, 555-557 [*Veteran Petroleum*, “Interim Award”]. Those three awards were recently set aside by the District Court of The Hague, but for other reasons. See *Russia v Veteran Petroleum et al*, Case No C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 (20 April 2016) (The Hague District Court, the Netherlands).

<sup>196</sup> *TPP*, *supra* note 4, art 9.15.1.

<sup>197</sup> *CETA*, *supra* note 3, art 8.16.

<sup>198</sup> *TPP*, *supra* note 4, art 9.15.2.

applying the clause shows that these conditions remain quite obscure or controversial, arbitral tribunals diverging significantly in their interpretation.<sup>199</sup> Canada invoked *NAFTA* denial of benefits clause once in *St Marys VCNA v Canada*.<sup>200</sup> It did not so in its pleadings before the arbitral tribunal, but directly in its consultations with the US investor. In response, the US investor did not challenge the legality of the invocation of the clause before the arbitral tribunal, but rather before the Canadian courts.<sup>201</sup> In the end neither the courts nor the arbitral tribunal ruled on the issue since the US investor, fully owned and controlled by a Brazilian investor, accepted that it was not entitled to the benefits of *NAFTA*. Nothing in *TPP* or *CETA* answers to the question of the appropriate forum in which to invoke the clause. The rare practice of Canada shows that it could be invoked outside of formal arbitral proceedings.

The timing of the invocation of the denial of benefits clause is also problematic.<sup>202</sup> In *St Marys* the retroactive invocation of the clause in the arbitration proceedings was not questioned. In the *Yukos* trilogy, on the contrary, the issue was crucial and the arbitral tribunal considered that Russia was barred to invoke the clause after the claim was brought by the investors.<sup>203</sup> Other tribunals took the contrary view and found that the clause can be invoked after the claim by the host State.<sup>204</sup> Neither *TPP* nor *CETA* address this issue in their respective clause. *TPP* does clarify the question of timing of application of its other special denial of benefits clause, allowing optional exclusion of ISA for claims concerning anti-tobacco policies.<sup>205</sup> *TPP* explicitly allows invocation of the clause

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<sup>199</sup> Lindsay Gastrell and Paul-Jean Le Cannu, Procedural Requirements of ‘Denial of Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions” (2015) 30 ICSID Rev 78 at 94.

<sup>200</sup> “Consent Award” (UNCITRAL), (*NAFTA* Chap. 11, 12 April 2013), (Arbitrators: Michael Pryles, pres, Richard Stewart, Brigitte Stern).

<sup>201</sup> *St Marys VCNA v Canada (Minister of International Trade)* (30 March 2012), T-668-12 (Notice of Application) (FC), online: itlaw <http://www.italaw.com/sites/default/files/case-documents/ita0914.pdf>.

<sup>202</sup> Gastrell & Le Cannu, *supra* note 199 at 94-95.

<sup>203</sup> *Hulley Enterprises*, “Interim Award”, *supra* note 195 at paras 440, 455-458; *Yukos Universal*, “Interim Award”, *supra* note 195 at paras 441, 456-459; *Veteran Petroleum*, “Interim Award”, *supra* note 195 at paras 497, 512-515.

<sup>204</sup> *Guaracachi America v Bolivia*, “Award”, PCA Case No 2011-17, para 376 (Bolivia-UK BIT, 31 January 2014) (Arbitrators: José Miguel Júdece, pres, Manuel Conthe, Raúl Emilio Vinuesa) [*Guaracachi*]; *Pac Rim Cayman v El Salvador*, “Decision on Respondent’s Jurisdictional Objections”, ICSID Case No ARB/09/12, para 4.85 (CAFTA, 1 June 2012) (Arbitrators: Guido Santiago Tawil, pres, Brigitte Stern, VV Veeder) [*Pac Rim*].

<sup>205</sup> See *infra* note 103 for a discussion of *TPP* special denial of benefits clause concerning anti-tobacco policy.

even after the submission of the claim to arbitration. The impact of this specific rule of interpretation could be that without an explicit provision to this effect in the general denial of benefits clause, retroactive invocation is prohibited. But a footnote specifies that this special denial of benefits clause is without prejudice to the general one.<sup>206</sup> One may only speculate what arbitrators will make of this.

Finally the form of the invocation of the denial of benefits clause is also controversial.<sup>207</sup> An arbitral tribunal interpreting the *Energy Charter Treaty* took the view that the clause should be applied generally to all foreign investors in the same fashion, in a general declaration or in investment legislation for instance.<sup>208</sup> Tribunals interpreting other investment agreements considered instead that the clause was designed to be applied individually on a case-by-case basis.<sup>209</sup> Again, neither *TPP* nor *CETA* offer any clarification in that regard.

Incertitude surrounding the conditions of application of the denial of benefits clause of *TPP* and *CETA* is likely to contribute to the confusion over the protection of the regulatory space of government.

### 3 *Impact of Investor-State Arbitration on Regulatory Space*

ISA may also have a systemic impact on the issue of variability of regulatory space of government. Although it is designed as a dispute settlement system between a private party and a State, the practical impact of ISA often affects a broader spectrum of stakeholders. At international law, State responsibility for internationally unlawful acts entails two basic consequences: the obligation to make full reparation for the injury

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<sup>206</sup> *TPP*, *supra* note 4, art 29.5, n. 11.

<sup>207</sup> Gastrell & Le Cannu, *supra* note 199 at 95.

<sup>208</sup> *Plama Consortium v Bulgaria*, “Decision on Jurisdiction”, ICSID Case No ARB/03/24, para 157 (ECT, 8 February 2005) (Arbitrators: Carl F Salans, pres, Albert Jan van den Berg, VV Veeder).

<sup>209</sup> *Guaracachi*, *supra* note 204, para 376; *Pac Rim*, *supra* note 204, para 4.82.

caused by the internationally unlawful act, and the obligation to cease that act.<sup>210</sup> In the treaty practice of Canada, as well as in *TPP* and *CETA*, ISA is made available to offer a means to settle disputes regarding reparation of the injury caused to a foreign investor by a breach of the investment agreement that is attributable to Canada. A provision explicitly rule out any power on the part of the arbitral tribunals to order the withdrawal of the impugned measure. Arbitral tribunal may only order payment of monetary damages.<sup>211</sup> The question remains whether this provision is sufficient to alter international customary law on State responsibility and to repeal the obligation to cease the internationally unlawful act. The arbitral tribunal may not be able to order withdrawal of the measure, but the State could still be under an obligation to cease the act at international law. If it were so, an easy way to satisfy the obligation of cessation would be the withdrawal of the measure, a solution that could benefit not only to the injured foreign investor but also other ones potentially affected by the measure.

Despite this debate on the survival of the obligation to cease the internationally unlawful act under investment agreements, it appears that the same result is sometimes reached in practice with ISA. A *de facto* obligation to cease the act could derive from the operation of ISA. First, host State may agree to withdraw its measure in a settlement reached with the complaining investor.<sup>212</sup> Canada did so in at least one instance, in *Ethyl Corporation v Canada*,<sup>213</sup> where it repealed its law and paid compensation to the US investor.<sup>214</sup> Second, fear of new claims may also trigger preventive withdrawal of the measure, even after damages have been paid in compensation to the complaining investor.<sup>215</sup> The same investor may be inclined to sue again the host State, or new foreign investors suffering the same injury. Again, the practice of Canada shows that such situation may actually happen. In *Mobil Investments Canada*, Canada decided to maintain its measure after

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<sup>210</sup> « Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 34, art 28, 30-31.

<sup>211</sup> *TPP*, *supra* note 4, art 9.29.1; *CETA*, *supra* note 3, art 8.39.1; *NAFTA*, *supra* note 11, art 1135:1; *Canada Model-FIPA*, *supra* note 12, art 35:2.

<sup>212</sup> Johnson & Sach, *supra* note 13 at 15.

<sup>213</sup> “Preliminary Award on Jurisdiction” (UNCITRAL) (NAFTA Chap. 11, 24 June 1998), (Arbitrators: Karl-Heinz Böckstiegel, pres, Charles N Brower, Marc Lalonde).

<sup>214</sup> De Mestral, *supra* note 109 at 362.

<sup>215</sup> See Johnson & Sach, *supra* note 13 at 15.

having been found responsible of the injury suffered by two US investors and ordered to pay damages. It now faces two new complaints by the same US investors concerning new damages arising from the continuing application of the same measure.<sup>216</sup> Third, beyond the risk to face new complaints by foreign investors, an assessment of the risk that maintaining the measure may pose to its reputation as an investment friendly destination may lead the host State to repeal its measure.

This weakens the argument that ISA does not alter the ability of government to maintain their non-conforming measures as long they pay damages. It appears that a concrete impact of ISA can be to extend the benefits of a treaty to all foreign investors, even those not similarly protected by an investment agreement, if the host State decides to withdraw its measure. ISA can have a systemic impact on the protection of the regulatory space of governments, despite the actual space existing under investment agreements like *TPP* and *CETA*.

## BIBLIOGRAPHY

### *Treaties*

*Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments*, 3 February 1997, Can TS 2001 No 4 (entry into force: 30 January 2001).

*Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments*, 6 May 2009, Can TS 2012 No 5 (entry into force: 22 January 2012).

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<sup>216</sup> *Mobil Investments Canada v Canada*, “Request for Arbitration”, ICSID Case No ARB/15/6, (NAFTA Chap 11, 16 January 2015); *Murphy Oil Corporation v Canada*, “Notification of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven”, (NAFTA Chap 11, 16 January 2014).

*Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, 3 October 1991, Can TS 1993 No 14 (entry into force: 21 November 1993).

*Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 5 May 2009, Can TS 2011 No 27 (entry into force: 24 November 2011).

*Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and the Reciprocal Protection of Investments*, 9 September 2012, Can TS 2014 No 16 (entry into force: 1 October 2014).

*Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments*, 6 April 1990, Can TS 1990 No 43 (entry into force: 22 November 1990).

*Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 8 May 2009, Can TS 2011 No 26 (entry into force: 23 November 2011).

*Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments*, 20 July 2010, Can TS 2012 No 7 (entry into force: 14 March 2012).

*Agreement on Trade-Related Aspects of Intellectual Property Rights*, being Annex 1C of the *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3 (entry into force: 1 January 1995).

*Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union [and its Member States, [...] ], of the Other Part*, not yet signed, online: European Commission

[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) (Final version in English published on 29 February 2016).

*Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entry into force: 29 December 1993).

*Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 (entry into force: 18 March 2007).

*Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, art 17 (entry into force: 16 April 1998).

*Exchange of Notes between the Government of Canada and the Government of the Republic of Malta concerning an Agreement relating to Foreign Investment Insurance (with Arrangement)*, 24 May 1982, Can TS 1982 No 19 (entry into force: 24 May 1982).

*Exchange of Letters between the Government of Australia and the Government of Mexico concerning the Termination of Investment Promotion and Protection Agreement*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-mexico-termination-of-investment-promotion-and-protection-agreement.PDF>.

*Exchange of Letters between the Government of Australia and the Government of New Zealand concerning Investor State Dispute Settlement, Trade Remedies and Transport Services*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services>.

*Exchange of Letters between the Government of Australia and the Government of Peru concerning the Termination of Investment Promotion and Protection Agreement*, 29 January 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-peru-termination-of-investment-promotion-and-protection-agreement.PDF>.

*Exchange of Letters between the Government of Australia and the Government of Viet Nam concerning the Termination of Investment Promotion and Protection Agreement*, 4 February 2016, online: Australia, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF>.

*Exchange of Letters between the Government of Canada, the Government of the United States, and the Government of Mexico concerning Existing Non-Conforming Measures of States or Provinces*, 20 March 1996, online: NAFTA Secretariat <https://www.nafta-sec-alena.org/Portals/0/Documents/en/NAFTAreservations0001.pdf?ver=2015-11-02-140540-943>

*Free Trade Agreement between the European Union and the Republic of Singapore*, not yet signed, online: European Commission <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (version of 29 June 2015).

*Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 5 December 1996, Can TS 1997 No 50 (entry into force: 5 July 1997).

*Free Trade Agreement between Canada and the Republic of Peru*, 29 May 2008, Can TS 2009 No 15 (entry into force: 1 August 2009).

*Free Trade Agreement between the Government of Canada and the Government of the United States of America*, 2 January 1988, Can TS 1989 No 3 (entry into force: 1 January 1989; suspended 1 January 1994).

*Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010, UN Reg No A-30619 (entry into force: 12 October 2014).

*North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2 (entry into force: 1 January 1994).

*Trans-Pacific Partnership*, 4 February 2016, online: New Zealand Foreign Affairs and Trade <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/> (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam).

*Vienna Convention on the Law of Treaties*, 13 May 1969, 1155 UNTS 331 (entry into force: 27 January 1980).

### ***International Cases***

*Australia – Certain Measures concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complaint by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia)*, “Request for Consultations”, WTO Doc No WT/DS434, 435, 441, 458 and 467/1 (2012, 2013)

*Canada – Administration of the Foreign Investment Review Act (Complaint by the United States)* (1984), GATT Doc L/5504, 30th Supp BISD 140.

*Clayton/Bilcon v Canada*, “Award on Jurisdiction and Liability” (UNCITRAL), (NAFTA Chap. 11, 17 March 2015), (Arbitrators: Bruno Simma, pres, Donald McRae and Bryan Schwartz).

*Longyear v Canada*, “Notice of Withdrawal of Claim”, (UNCITRAL), (NAFTA Chap 11, 26 June 2015).

*Longyear v Canada*, “Notice of Arbitration”, (UNCITRAL), (NAFTA Chap 11, 20 May 2014).

*Hulley Enterprises Limited (Cyprus) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 226 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel).

*Maffezini v Spain*, “Decision of the Tribunal on Objections to Jurisdiction”, ICSID Case No ARB/97/7 (Argentina-Spain BIT, 25 January 2000) (Arbitrators: Francisco Orrego Vicuña, pres, Thomas Buergenthal, Maurice Wolf).

*Mobil Investments Canada v Canada*, “Decision on Liability and on Principles of Quantum”, ICSID Case No ARB(AF)/07/4, (NAFTA Chap 11, 22 May 2012), (Arbitrators: Hans Van Houtte, pres, Merit E Janow, Philippe Sands).

*Pac Rim Cayman v El Salvador*, “Decision on Respondent’s Jurisdictional Objections”, ICSID Case No ARB/09/12 (CAFTA, 1 June 2012) (Arbitrators: Guido Santiago Tawil, pres, Brigitte Stern, VV Veeder).

*Plama Consortium v Bulgaria*, “Decision on Jurisdiction”, ICSID Case No ARB/03/24, at para 157 (ECT, 8 February 2005) (Arbitrators: Carl F Salans, pres, Albert Jan van den Berg, VV Veeder).

*Philip Morris Asia v Australia*, “Notice of Arbitration”, PCA Case No 2012-12 (Australia-Hong Kong BIT, 21 November 2011) (Arbitrators: Karl-Heinz Böckstiegel, pres, Gabrielle Kaufmann-Kohler and Donald M McRae).

*St Marys VCNA v Canada*, “Consent Award” (UNCITRAL), (NAFTA Chap. 11, 12 April 2013), (Arbitrators: Michael Pryles, pres, Richard Stewart, Brigitte Stern).

*Veteran Petroleum Limited (Cyprus) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 228 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel).

*United Parcel Service of America v Canada*, “Award on the Merits”, (UNCITRAL), (NAFTA Chap 11, 24 May 2007) (Arbitrators: Kenneth Keith, pres, Ronald A Cass, L Yves Fortier).

*Yukos Universal Limited (Isle of Man) v Russia*, “Interim Award on Jurisdiction and Admissibility”, PCA Case No AA 227 (ECT, 30 November 2009) (Arbitrators: L Yves Fortier, pres, Charles Poncet, Stephen M Schwebel).

### ***International Documents***

*Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*, [2014] OJEU L 257/121.

*Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, [2012] OJEU L 351/40.

European Commission, *Commission Decision of 30 October 2014 Requesting an Opinion of the Court of Justice pursuant to Article 218(11) TFEU on the Competence of the Union to Sign and Conclude a Free Trade Agreement with Singapore*, C(2014)8218/F1, online: European Commission <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-8218-EN-F1-1.PDF>.

International Law Commission, “Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, in “Report of the Commission to the General Assembly on the Work of its Fifty-Eight Session” (UN Doc A/61/10) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, at 177 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2))).

International Law Commission, “Draft Articles on Diplomatic Protection”, in “Report of the Commission to the General Assembly on the Work of its Fifty-Eight Session” (UN Doc A/61/10) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, at 24 (UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2))).

International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, in “Report of the Commission to the General Assembly on the Work of its Fifty-Third Session” (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2007) at 26 (UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2)).

International Law Commission, *Final Report. Study Group on the Most-Favoured-Nation clause*, UN Doc A/CN.4/L.852 (29 May 2015).

NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).

UNCTAD, *Admission and Establishment* (New York: UN, 2002) (UN Doc No UNCTAD/ITE/IIT/10 (vol II)).

### ***National Legislation***

*Investment Canada Act*, RSC 1985, c 28 (1<sup>st</sup> Supp) (Canada).

### ***National Cases***

*Canada (AG) v Ontario (AG)*, 1937 UKPC 6, [1937] AC 326 (United Kingdom Privy Council).

*Hupacasath First Nation v Canada (AG)*, 2015 FCA 4, 379 DLR (4<sup>th</sup>) 737 (Federal Court of Appeal of Canada).

*Russia v Veteran Petroleum et al*, Case No C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2 and C/09/481619 / HA ZA 15-112 (20 April 2016) (The Hague District Court, the Netherlands).

### ***Government Documents***

Canada, *Agreement between Canada and [...] for the Promotion and Protection of Investments* (6 July 2012) (unpublished; on file with the author).

Canada, Department of Industry, *Investment Canada Act. Annual Reports 2010-2011, 2011-2012, 2012-2013* (Ottawa: Industry Canada, 2014).

Canada, Department of Industry, *Investment Canada Act. Annual Reports 2009-2010* (Ottawa: Industry Canada).

Canada, Department of Innovation, Science and Economic Development, *Investment Canada Act. Thresholds*, online: [https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h\\_1k00050.html](https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00050.html).

United States, *2012 US Model Bilateral Investment Treaty*, online: US Department of State <http://www.state.gov/documents/organization/188371.pdf>.

### ***Monographs***

Brownlie, Ian, *Principles of Public International Law*, 7<sup>th</sup> ed (Oxford: Oxford University Press, 2008).

Côté, Charles-Emmanuel, *La participation des personnes privées au règlement des différends internationaux économiques: l'élargissement du droit de porter plainte à l'OMC* [Participation of Private Persons to the Settlement of International Economic Disputes: Enlarging the Right to Complain at the WTO] (Brussels: Bruylant, 2007).

Dolzer, Rudolf and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008).

Villiger, Mark Eugene, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009).

*Collected Essays*

Hübner, Kurt (ed), *Europe, Canada and the Comprehensive and Economic Trade Agreement: Taming Globalization?* (London: Routledge, 2011).

Lim, Chin L, Deborah Kay Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge (UK): Cambridge University Press, 2012).

Voon, Tania (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham (UK): Edward Elgar, 2013).

*Articles and Essays*

Arangio-Ruiz, Gaetano, “Le domaine réservé: l’organisation international et le rapport entre droit international et droit interne [The ‘domaine réservé’: International Organisation and Relationship between International Law and National Law]” (1990) 225 *Recueil des cours* 9.

Bodeau-Livinec, Pierre, “Le domaine réservé: persistance ou déliquescence des fonctions étatiques face à la mondialisation [The ‘domaine réservé’: Globalisation and Persistence or Deliquescence of State Functions]”, in *Société française pour le droit international* (ed), *L’État dans la mondialisation [The State in Globalisation]* (Paris : Pedone, 2013) 153.

Chaisse, Julien, “TPP Agreement: Towards Innovations in Investment Rule-Making”, in Chin L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge (UK): Cambridge University Press, 2012) 147.

Côté, Charles-Emmanuel, “An Experienced Developed Democracy: Canada and Investor-State Arbitration”, (September 2015), abstract online: SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2658145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658145) [to be published in *CIGI Investor-State Arbitration Series*].

Côté, Charles-Emmanuel, “II. Investissement [Investment]” (2014) 52 Can YB Int’l L 387.

Côté, Charles-Emmanuel, “II. Investissement [Investment]” (2013) 52 Can YB Int’l L 397.

Côté, Charles-Emmanuel, “II. Investissement [Investment]” (2012) 50 Can YB Int’l L 363.

Côté, Charles-Emmanuel, “III. Investissement [Investment]” (2005) 43 Can YB Int’l L 486.

De Mestral, Armand, “Investor-State Arbitration between Developed Democratic Countries”, *CIGI Investor-State Arbitration Series*, No 1 (September 2015).

De Mestral, Armand, “The North American Free Trade Agreement: A Comparative Analysis” (1998) 275 Recueil des cours 219.

Elms, Deborah K and Chin L Lim, “An Overview and Snapshot of the TPP Negotiations”, in Chin L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge (UK): Cambridge University Press, 2012) 21.

Gastrell, Lindsay and Paul-Jean Le Cannu, Procedural Requirements of ‘Denial of Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions” (2015) 30 ICSID Rev 78.

Gómez-Palacio, Ignacio and Peter Muchlinsky, “Admission and Establishment”, in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 228.

Guèvremont, Véronique, “L’exemption culturelle canadienne dans le Partenariat Transpacifique ou la destinée d’une peau de chagrin [The Vanishing of the Canadian Cultural Exemption under the Trans-Pacific Partnership:” (2015) 28.1 RQDI.

Hübner, Kurt, “Canada and the EU. Shaping Transatlantic Relations in the Twenty-First Century”, in Kurt Hübner (ed), *Europe, Canada and the Comprehensive and Economic Trade Agreement: Taming Globalization* (London: Routledge, 2011) 1.

Johnson, Lisa and Lisa Sachs, “The TPP’s Investment Chapter: Entrenching, rather than Reforming, a Flawed System”, *CCSI Policy Paper* (November 2015).

Kawharu, Amokura, “The Negotiations for a Trans-Pacific Partnership Agreement” (2012) 27 ICSID Rev 145.

Kolb, Robert, “Du domaine réservé: réflexions sur la théorie de la compétence nationale [‘Domaine réservé’: Reflections on the Theory of National Jurisdiction]” (2006) 110 RGDIP 597.

Lévesque, Céline, “Les rôles et responsabilités des provinces canadiennes dans le cadre de procédures d’arbitrage entre investisseurs et États fondées sur des traités économiques [Roles and Responsibilities of Canadian Provinces in Treaty-Based Investor-State Arbitration” (2015) 28.1 RQDI.

Lévesque, Céline, “The Challenge of ‘Marrying’ Investment Liberalisation and Protection in the Canada-EU CETA”, in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges* (Baden-Baden (Germany): Nomos, 2013), 121.

Lewis, Meredith Kolsky, “The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?” (2011) 34 *BC Int’l & Comp L Rev* 27.

Nyer, Damien, “The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement” (2015) 32 *J Int’l Arb* 697.

Reinisch, August, “The European Union and Investor-State Dispute Settlement: From Investor State Arbitration to a Permanent Investment Court”, *CIGI Investor-State Arbitration Series*, No 2 (March 2016).

Trakman, Leon E, “The Status of Investor-State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement”, in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham (UK): Edward Elgar, 2013).

Voon, Tania, “Introduction: National Regulatory Autonomy and the Trans-Pacific Partnership Agreement”, in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham (UK): Edward Elgar, 2013).

Voon, Tania and Andrew Mitchell, “Time to Quit? Assessing International Investment Claim against Plain Tobacco Packaging in Australia” (2011) 14 *J Int’l Econ L* 515.

Wagner, Markus, “Regulatory Space in International Trade Law and International Investment Law” (2014-2015) 36 U Pa J Int’l L 1.

## **Medias**

“BHP’s PotashCorp Bid Rejected for Now”, *CBC News* (3 November 2010), online: CBC <http://www.cbc.ca/news/business/bhp-s-potashcorp-bid-rejected-for-now-1.868381>.

“Federal Government Blocks Sale of MDA Space Division”, *CBC News* (10 April 2008), online: CBC <http://www.cbc.ca/news/business/federal-government-blocks-sale-of-mda-space-division-1.703999>.

Hurst, Daniel, “Australia Wins International Legal Battle with Philip Morris over Plain Packaging”, *The Guardian* (18 December 2015), online: The Guardian <http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging>.