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Overview

Graham Coop is a partner in the law firm of Volterra Fietta. Graham is qualified as a barrister and solicitor in New Zealand and as a solicitor with higher rights of audience (Civil) in England and Wales. He advises and represents companies, governments and international organisations on international dispute resolution and public international law, with a particular focus on the energy, natural resources and infrastructure sectors, together with environmental, banking and defence issues. His work on contentious matters has focused on the Energy Charter Treaty, investment treaties, price revisions under long-term energy sale contracts, and maritime boundary delimitation. He has appeared as counsel, advocate and expert before a wide range of international courts and tribunals, including the International Court of Justice, ICSID, the PCA and the ICC. He is on the UK Attorney General's list of public international law practitioners.

Before joining Volterra Fietta, Graham served for seven years as General Counsel to the Energy Charter Secretariat. He led the development of the Model Agreements for Cross-Border Pipeline Projects and for Cross-Border Electricity Projects. Prior to taking up his post at the ECT, Graham worked on international dispute resolution issues as a partner in the energy and infrastructure department of the London office of a major international law firm. He has also worked as in-house counsel at a major European gas company and as head of the energy and natural resources department of the Paris office of a major international firm.

Graham is recognised globally as one of the world's leading experts on international energy law, the Energy Charter Treaty and international investment arbitration. He is an honorary member of the Investment Treaty Forum of the British Institute of International and Comparative Law. He is a member of the Editorial Committee of the International Energy Law Review and of the Journal of Energy & Natural Resources Law. He is a member of the advisory board Association of International Arbitration (Brussels). He is a Legal Expert on the Energy Charter Secretariat's Legal Advisory Task Force. He has lectured at numerous universities around Europe and is listed in the Who's Who in Public International Law.

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Gunjan Sharma is an associate at Volterra Fietta, the public international law firm. Gunjan is a New York qualified attorney who specialises in international dispute resolution, advising clients on complicated issues of public international law and counselling clients on how to protect their overseas investments. He holds a Juris-doctorate from New York University School of Law, and a Bachelor of Science in Foreign Service (International Law, Institution and Ethics) from the Walsh School of Foreign Service at Georgetown University, Washington, D.C.

Gunjan advises clients in large-scale and complex international disputes. He has represented private entities in numerous investor-state and commercial arbitrations. He has also practiced before a wide range of U.S. courts, including the United States Court of Appeals of the Second Circuit, several federal district courts, and the courts of the State of New York.

Gunjan's non-contentious experience includes providing investment and dispute resolution advice in over 300 large commercial deals, including PSCs, JOAs, EPCs, PPAs and other large construction and energy contracts. He also counsels clients on maritime and territorial disputes, and the United Nations Convention on the Law of the Sea. He routinely advises Fortune 500 and other major international companies on the protection of their foreign investments from political and regulatory risk. He also regularly guides clients during free trade negotiations, including during the negotiation of the Trans-Pacific Partnership and recent renegotiation of the North American Free Trade Agreement. Gunjan is a member of the Association of International Petroleum Negotiators.

Prior to joining Volterra Fietta, Gunjan was a senior associate in the NY office in the international litigation and arbitration group of a major global law firm. He was also a Litigation Fellow at the Innocence Project, a charitable organisation dedicated to exonerating wrongfully convicted individuals by using DNA evidence.

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Procedural Innovations to ISDS in Recent Trade and Investment Treaties

A Comparison of the USMCA and CETA

Graham Coop/Gunjan Sharma[1])

In November 2018, delegates to the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III voted to begin recommending reforms to investor-state dispute settlement ("ISDS"), a specialized form of arbitration in which countries that want to accept and encourage foreign investment agree, through treaties, to give foreign investors a private right to bring arbitrations and pursue damages for breaches of various international legal obligations.[2])

UNCITRAL Working Group III is not the only entity to suggest change should come to ISDS; some countries (such as India, Venezuela and Ecuador)[3])

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[2]) Julian Arato, *A Watershed Moment for ISDS Reform*, International Economic Law and Policy Blog (Nov. 4, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/11/a-watershed-moment-for-isds-reform.html (viewed Nov. 8, 2018); Global Arbitration Review, *UNCITRAL working group to move focus to reforms* (Nov. 5, 2018), https://globalarbitrationreview.com/article/1176487/uncitral-working-group-to-move-focus-to-reforms (viewed Nov. 8, 2018). The vote followed three sessions, held over the course of late 2017 and throughout 2018, in which the delegates considered areas where ISDS might, in their view, require reform. *Id.*

[3]) *See* Kavaljit Singh and Burghard Ilge, *India overhauls its investment treaty regime*, FT.com (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc (viewed Nov. 11, 2018); Luke Eric Peterson, *Venezuela Surprises the Netherlands With Termination Notice for BIT; Treaty Has Been Used By Many Investors to "Route" Investments Into Venezuela* (May 16, 2008), https://www.iareporter.com/articles/venezuela-surprises-the-netherlands-with-termination-notice-for-bit-treaty-has-been-used-by-many-investors-to-route-investments-into-venezuela/ (viewed Nov. 11, 2018); Ecuador terminates 16 investment treaties (May 18, 2017), https://www.tni.org/en/article/ecuador-terminates-16-investment-treaties (viewed Nov. 11, 2018).

and various political groups have also advocated reform, up to and including significantly curtailing or abolishing the system.[4]) In response, other groups have sought to maintain ISDS's protections for investors and its promise of pacific and neutral settlement of investment disputes.[5]) Reflecting this political landscape, ISDS provisions in recently negotiated treaties have tended to be more voluminous than those found in prior treaties, as states look to clarify (or perhaps even amend) the scope and form of ISDS. These more voluminous ISDS provisions tend to provide more detailed definitions of the substantive legal protections afforded to investors, permit more detailed exceptions to protections through annexes, sometimes include corresponding legal obligations on investors, and establish, in more detail than before, the procedures to be used in ISDS arbitrations.

Examples of such recently negotiated ISDS provisions abound, and it would be too compendious to describe them all in detail in this article. Instead, this article looks at a narrower field of change to ISDS, namely the procedural mechanisms for ISDS found in two treaties of profound diplomatic and economic consequence: the European Union-Canada Comprehensive Economic Trade Agreement ("CETA") and the United States-Mexico-Canada Agreement ("USMCA"), a successor to the 1994 North American Free Trade Agreement ("NAFTA"). By themselves, these treaties deserve careful study: if they finally enter in force, they will govern trade and investment relations between countries that collectively make up over half of the global GDP.[6]) Were that not enough, the procedural mechanisms found in these treaties are also reflected in numerous other agreements,[7]) and it may be reasonably expected that some of these mechanisms may find their way into other future ISDS treaties, especially those signed by the United States, European Union, Canada and Mexico.

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[4]) *See* Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70(3) Vanderbilt L. Rev. 985, 988 (2017).

[5]) *See id*. at 992–997.

[6]) *See* Global Economics Prospects, World Bank, *Highlights from Chapter 4: Potential Implications of the Trans-Pacific Partnership* (January 2016) (noting that the EU and NAFTA countries alone account for approximately half of the global GDP), http://pubdocs.worldbank.org/en/287761451945044333/Global-Economic-Prospects-January-2016-Highlights-Trans-Pacific-Partnership.pdf (viewed Oct. 31, 2018).

[7]) For example, the terms of the EU-Vietnam Free Trade Agreement and EU-Mexico Free Trade Agreement reflect many of the provisions of CETA, and some of the procedural mechanisms found in the USMCA are also found in the Comprehensive Progressive Trans-Pacific Partnership.

I. The ISDS Controversy during the Negotiation of CETA and the USMCA

It is fair to say that whether or not to include ISDS, and on what basis, was a source of debate during the negotiation of both CETA and the USMCA. In both cases, the final content of the ISDS clauses in these treaties was not decided until quite late into the negotiation process.

A. The Change from ISDS to an Investment Court during the Negotiation of CETA

1. CETA Negotiations and a new European Union Approach to ISDS

In July 2007, during the EU-Canada Summit in Berlin, EU and Canadian leaders agreed to conduct a joint study examining the costs and benefits of pursuing a closer economic partnership. Less than two years later, the EU and Canada officially announced the launch of the negotiations for a more comprehensive economic partnership.[8]) A joint EU-Canada study on this issue was then made public in October 2008. This was followed by the negotiation of CETA, which occurred in nine rounds between 2009 and 2011, followed by two more years of further discussions.[9]) An agreement in principle on CETA was reached in October 2013 and a text of the agreement was released in September 2014.[10])

During these five years of negotiations, there was little indication that ISDS would be a controversial aspect of CETA.[11]) In fact, the September 2014 draft of CETA contained an ISDS clause that gave private rights to arbitration with respect to virtually all of the treaty's investment protections.[12]) The 2014 CETA draft was intended to be close to final, with only legal review pending.

This was not to be. At around the same time that the CETA text was published, numerous EU member states, the European Parliament, European

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[8]) *See* Government of Canada, *Chronology of events and key milestones*, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng (viewed Nov. 6, 2018).

[9]) *See id.*

[10]) *See id.*

[11]) *See* David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, 49 Loyola Univ. Chic. L.J 361, 374–75 (2017), https://luc.edu/media/lucedu/law/students/publications/llj/pdfs/vol-49/issue-2/10_Gantz.pdf (viewed Nov. 7, 2018).

[12]) *See* Chapter 10 (Investment), Section 6, of the draft text of CETA (Sept. 2014), https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/CETA-Text.pdf (viewed Nov. 6, 2018).

NGOs and some civil society groups called for the European Commission to take a different approach to ISDS in its negotiations with the United States concerning the Transatlantic Trade and Investment Partnership.[13]) These criticisms were crystallized in a resolution passed by the European Parliament, which called for the European Commission to make sure that "foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors" and to

> "replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives."[14])

The pressure placed on ISDS during the TTIP negotiation process carried over to CETA. Even though a close-to-final text of CETA had been published, the drafters decided to use the legal review process the treaty was still undergoing as an opportunity to amend the treaty's ISDS clauses.[15])

Thus, even though there had been a substantially final text only awaiting legal review as early as 2014, CETA negotiations took another two years. On February 16, 2016, another final text of CETA was published. In it, Section F of Chapter 8 featured a potentially revolutionary new conception of ISDS – in lieu of arbitration tribunals appointed on a per-case basis, CETA instead sought to establish an Investment Court System ("ICS"), *i.e.*, a permanent international judicial body composed of 15 permanent members with an appellate tribunal.[16]) In short, the ad hoc process of ISDS, in which investors and states selected adjudicating tribunals on a case-by-case basis, would be replaced with a permanent international adjudicatory institute, or investment court. This article discusses ICS and its implications in further detail below.

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[13]) *See* Gantz, *supra* note 11, at 375–76.

[14]) *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* 15, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN (viewed Nov. 6, 2018).

[15]) European Commission, *Joint statement: Canada-EU Comprehensive Economic and Trade Agreement* (CETA) (Feb. 29, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm (viewed Nov. 6, 2018).

[16]) Unless otherwise stated, all references in this article to CETA refer to the February 2016 text available at the European Commission's website. *See* European Commission, *CETA Chapter by Chapter*, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (viewed Nov. 12, 2018) (hereinafter "CETA").

2. Current Status of CETA

Although the final CETA text has now been negotiated and signed, the treaty itself has not been ratified – and is unlikely to be ratified for several years.

The reason for this is an intervening decision from the Court of Justice of the European Union ("CJEU") that was rendered while CETA was being negotiated, under which CETA and its ICS provision must be affirmatively ratified not only by the EU but also by each EU member state. Article 3 of the Treaty on the Functioning of the European Union gives the Union "exclusive competence", including exclusive competence to conclude international agreements, only in the areas of customs unions, competition rules for the internal market, monetary policy for Euro-member states, the conservation of marine biological resources under the common fisheries policy and common commercial policy.[17]) In October 2014, just a month after the first 2014 draft of CETA was published, the European Commission asked the CJEU consider whether or not the ISDS provisions in the EU-Singapore Free Trade Agreement fell under the EU's exclusive competence.[18]) It was not until May 16, 2017 that the CJEU issued its opinion – and it found that the establishment of an ISDS mechanism fell outside the exclusive competence of the EU, and instead fell under the shared competence of both the EU and its member states.[19]) As the CJEU found, ISDS "removes disputes from the jurisdiction of the courts of the Member States" and "cannot, therefore, be established without the Member States' consent."[20])

The consequence of this decision was that any ISDS provision, including ICS in CETA, must be ratified not only by the EU but also by each member state separately.[21]) To date, CETA has been ratified by Canada,[22]) approved by the

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[17]) *Consolidated Version of the Treaty on the Functioning of the European Union*, art. 3, Official Journal of the European Union C 326/47 (Oct. 26, 2012), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT (viewed Nov. 12, 2018).

[18]) *See* European Commission – Press release, *Singapore: The Commission to Request a Court of Justice Opinion on the trade deal* (Oct. 30, 2014), http://europa.eu/rapid/press-release_IP-14-1235_en.htm (viewed Nov. 8, 2018).

[19]) *See* CJEU, *Opinion 2/15 of the Court* (May 16, 2017), operative part, http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN (viewed Nov. 8, 2018).

[20]) *Id.* at 292.

[21]) In some countries, such as Belgium, the ratification of CETA does not only require approval by the national legislature, but also by regional and provincial legislatures. European Parliament, Directorate-General for the Presidency Relations with National Parliaments, Legislative Dialogue Unit, National Parliaments Background Briefing (November 2016), *Procedures of Ratification of Mixed Agreements*, http://www.epgencms.europarl.europa.eu/cmsdata/upload/7ce7f104-1295-48f1-962e-51eba78d5ace/Mixed_Agreements_FINAL.pdf (viewed Nov. 16, 2018).

[22]) *See* Government of Canada, *Chronology of events and key milestones*, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng (viewed Nov. 6, 2018).

European Parliament[23]) and ratified by eleven EU member states.[24]) The ratification process is likely to undergo some hurdles, with Italy threatening not to ratify the treaty and Austria declaring that its ratification will be subject to a positive opinion by the CJEU on whether CETA's ICS provision complies with EU law.[25]) Notably, ICS has been exempted from CETA's provisional application.[26])

As a result, the final process of ratifying CETA can be expected to take several more years.

B. ISDS during the Renegotiation of NAFTA and Creation of the USMCA

The North American Free Trade Agreement ("NAFTA") was signed on December 17, 1992 and entered into force on January 1, 1994.[27]) NAFTA appears to have served its primary goal of increasing trade between its member countries: after NAFTA was signed, "U.S. trade with its NAFTA partners … more than tripled" and "increased more rapidly than trade with the rest of the world."[28]) "In 2011, trilateral trade among NAFTA partners reached the $ 1 trillion threshold"[29]) and Canada, the U.S. and Mexico remain among one another's respective largest trading partners.

But NAFTA was not without its critics. During his presidential campaign in 2009, then-candidate Barack Obama promised to renegotiate NAFTA[30]) – a promise he arguably kept by negotiating the Trans-Pacific Partnership with

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[23]) *See* European Parliament – Press release, *CETA: MEPs back EU-Canada trade agreement* (Feb. 15, 2017), http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement (viewed Nov. 8, 2018).

[24]) *See* Council of the European Union, *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017 (viewed Nov. 8, 2018).

[25]) *See* European Parliament, *Legislative Train Schedule*, http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta (viewed Nov. 8, 2018).

[26]) *See Council Decision EU 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* (Oct. 28, 2016), art 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0038 (viewed Nov. 6, 2018).

[27]) M. Angeles Villarreal & Ian F. Ferguson, Congressional Research Service, The North American Free Trade Agreement (NAFTA) 1 (May 24, 2017).

[28]) *Id.* at 11.

[29]) *Id.*

[30]) Laura Carlsen, *Obama Reaffirms Promise to Renegotiate NAFTA*, Huffington Post.com (Feb. 12, 2009), https://www.huffingtonpost.com/laura-carlsen/obama-reaffirms-promise-t_b_157316.html (viewed October 31, 2018).

twelve Pacific-rim nations, including Canada and Mexico.[31]) For his part, President Donald Trump promised to renegotiate NAFTA by "Day 200" of his administration, failing which he promised to withdraw from the treaty.[32]) After taking office, President Trump continued to promise either to renegotiate or to terminate NAFTA.[33])

President Trump's threat to withdraw from NAFTA triggered intensive negotiations between the U.S., Canadian and Mexican governments to revise the treaty's terms; these renegotiations occurred in nine rounds throughout 2017 and 2018.[34])

Chapter 11 of NAFTA contains that treaty's investment protections, including ISDS. During the NAFTA renegotiations, whether or not to retain ISDS was a highly controversial topic. A diverse set of various interest groups, including environmental groups, anti-tobacco groups, unions and even Maine state legislators, advocated scrapping ISDS altogether from a revised NAFTA.[35])

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[31]) Michael Grunwald, *The Trade Deal We Just Threw Overboard*, Politico.com (March/April 2017), https://www.politico.com/magazine/story/2017/03/trump-tpp-free-trade-deal-obama-renegotiate-nafta-214874 (viewed October 31, 2018).

[32]) *See* Tal Kopan, *Trump Transition memo: Trade reform begins Day 1*, CNN.com (Nov. 16, 2016), https://edition.cnn.com/2016/11/15/politics/donald-trump-trade-memo-transition/ (viewed Oct. 31, 2018).

[33]) Damian Paletta, *Trump considers order that would start process of withdrawing from NAFTA*, Washington Post (April 26, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/26/trump-close-to-notifying-canada-mexico-of-intent-to-withdraw-from-nafta/?utm_term=.9a39112e9565 (viewed Oct. 31, 2018); Office of the United States Trade Representative, 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program, chapter I at 4, https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf (viewed Oct. 31, 2018). For a discussion of the complicated U.S. constitutional and statutory issues governing President Trump's threat to unilaterally withdraw from NAFTA, *see* Gunjan Sharma, *Can Trump Withdraw from NAFTA Without Congress?*, Law360.com (Sept. 5, 2017), at https://www.law360.com/articles/960203 (viewed Nov. 14, 2018).

[34]) Edwin Lopez, *Timeline: How a new North American trade deal happened*, Supply chaindive.com (Oct. 2, 2018), https://www.supplychaindive.com/news/NAFTA-timeline-how-USMCA-happened/538663/ (viewed Oct. 31, 2018).

[35]) Public Citizen, *Investor-State Dispute Settlement (ISDS): Extraordinary Corporate Power in 'Trade' Deals* (C.U. "[e]liminating ISDS is a central demand for NAFTA renegotiations across the political spectrum"), https://www.citizen.org/our-work/globalization-and-trade/investor-state-system (viewed Oct. 31, 2018); AFL-CIO, *Making NAFTA Work for Working People* at 12, NAFTA Negotiations Recommendations, Docket No. USTR-2017-0006 (June 12, 2017), https://aflcio.org/sites/default/files/2017-06/NAFTA%20Negotiating%20Recommendations%20from%20AFL-CIO%20%28Witness%3DTLee%29%20Jun2017%20%28PDF%29_0.pdf (viewed Oct. 31, 2018) ("Simply put, ISDS is a separate justice system for foreign investors for which there is no legal or moral justification"); Sierra Club, *Replacing NAFTA: Eight Essential Changes to an Environmentally Destructive Deal* at 1 ("Broad corporate rights, including ISDS, must be eliminated from NAFTA to safeguard our right to democratically determine our

An equally diverse set of business, industry and other interest groups advocated retaining ISDS in its current form – or even, in some cases, strengthening or expanding it.[36])

The positions of the governments of the United States, Canada and Mexico were similarly divided. For its part, the Canadian Government took the public position that CETA would serve as a useful template for ISDS in a revised NAFTA.[37]) The Mexican government reportedly sought to preserve ISDS to encourage foreign investment in the country.[38]) The position of the United States government was not entirely uniform. The U.S. Trade Representative Ambassador Robert Lightizer, the most senior trade negotiator for the United States, openly disfavored ISDS.[39]) On the other hand, prominent and influential

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own public interest protections"), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/NAFTA%20Enviro%20Redlines%20FINAL.pdf (viewed Oct. 31, 2018); Eric Crosbie, Center for Tobacco Control, Research and Education, *Letter to Ambassador Robert Lightizer* (June 9, 2017) (describing ISDS as "a major elevation of the rights of corporations, and an important blow to national sovereignty"), https://www.regulations.gov/document?D=USTR-2017-0006-0710 (viewed Oct. 31, 2018); State of Maine, Citizen Trade Policy Commission, *Letter to Ambassador Robert Lightizer* (March 23, 2018) at 1 ("The Maine Citizen Trade Policy Commission writes to strongly support your efforts during the current renegotiation to remove Investor State Dispute Settlement (ISDS) from the North American Free Trade Agreement (NAFTA)"), https://www.maine.gov/legis/opla/CTPCLighthizerletterISDSinNAFTA.pdf (viewed Oct. 31, 2018).

[36]) American Petroleum Institute, Business Roundtable, National Association of Manufacturers, U.S. Chamber of Commerce, Letter to President Trump and Others (May 2, 2018) ("We urge you to retain strong investment protections and Investor-State Dispute Settlement (ISDS) in NAFTA"), https://www.docdroid.net/hKBnK7r/associations-nafta-letter-to-potus.pdf (viewed Oct. 31, 2018); Peter M. Robinson, *Trump aiming to make NAFTA like a football game without referees* (April 26, 2018) ("Without substantive provisions protecting investment, including investor-state dispute settlement (ISDS), it's very unlikely that the United States would gain the very tangible benefits it gets from open investment among the three NAFTA partners."), https://thehill.com/opinion/finance/385049-trump-aiming-to-make-nafta-like-a-football-game-without-refs (viewed Oct. 31, 2018); Securities Industry and Financial Markets Association (SIFMA), Letter to Ambassador Robert Lightizer (June 12, 2007) ("NAFTA should ensure that the financial sector has the same broad coverage of investor protections, and ISDS as the enforcement mechanism, as afforded to other sectors."), https://www.regulations.gov/document?D=USTR-2017-0006-0909 (viewed Oct. 31, 2018).

[37]) Adam Behsudi and Doug Palmer, *Investor dispute provision in NAFTA still at impasse ahead of Washington meeting* (February 21, 2018), https://www.politico.com/story/2018/02/21/canada-stands-firm-on-pursuing-bilateral-investor-dispute-process-with-mexico-in-nafta-356665 (viewed Oct. 31, 2018).

[38]) Nathaniel Custer et al., *Infrastructure Series: NAFTA Renegotiation – Energy Infrastructure and Investor-State Dispute*, JDSupra (May 4, 2018), https://www.jdsupra.com/legalnews/infrastructure-series-nafta-74246/ (viewed Nov. 14, 2018).

[39]) Doug Beazley, *Why the U.S. agreed to scrap NAFTA's Chapter 11*, Canadian Bar

Republican legislators, like House Ways and Means Committee Chairman Kevin Patrick Brady, supported maintaining ISDS protections[40]) – a division that led to an insightful public discussion between these two political heavyweights on the costs and benefits of ISDS that continues to be available on the internet.[41])

As a result, the NAFTA parties suggested various different approaches to ISDS throughout the NAFTA renegotiation process – as one example, one U.S. proposal would have permitted NAFTA signatories to opt into and out of their consent to ISDS at their discretion.[42]) In fact, the final content of the investment chapter and its consent to arbitration was not settled until quite late in the NAFTA renegotiation process.

Unsurprisingly, then, the final version of ISDS in the revised NAFTA – retitled the United States-Mexico-Canada Agreement, or USMCA – did not reflect the approach found in its predecessor, NAFTA. Chapter 14 of the USMCA, the treaty's investment chapter, instead reflects a pathway through the competing interests and positions that molded the U.S., Mexico and Canada's approaches to ISDS. This resulted in substantial revisions to ISDS that restricted its scope in certain respects as compared with Chapter 11 of NAFTA.

As of December 2018, the USMCA had been signed but awaited ratification by all three signatories.

II. Major Changes to the form of ISDS in CETA and the USMCA

The ISDS provisions in CETA and the USMCA contain two very different, yet highly significant, deviations from the classic form of ISDS found in other treaties. In particular: (i) CETA provides for a standing investment court; and

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Ass'n (Oct. 5, 2018), http://nationalmagazine.ca/Articles/October/Why-the-U-S-agreed-to-scrap-NAFTA-s-Chapter-11.aspx (viewed Oct. 31, 2018); Aleksandre Natchkebia, *New North-American trade deal will remove protecitons for US companies* (Oct. 22, 2018), Forex News Now, https://www.forexnewsnow.com/top-stories/north-america-trade-deal/ (viewed Oct. 31, 2018).

[40]) *See* International Economic Law and Policy Blog, *Brady-Lightizer ISDS Exchange* (March 21, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html (viewed Oct. 31, 2018).

[41]) *See* Clip of U.S. Trade Policy Agenda, *Brady-Lightizer Discussion* (March 21, 2018), https://www.c-span.org/video/?c4719932/brady-lighthizer-isds-discussion (viewed Oct. 31, 2018).

[42]) Timothy G. Nelson and Gunjan Sharma, *Digging Up the Roots: The Renegotiation of NAFTA*, 16(8) Latin Lawyer 42, 43 (2017); Katie Simpson, *U.S. wants power taken away from panel handling NAFTA disputes*, CBCNews.com (Oct. 14, 2017), http://www.cbc.ca/news/politics/canada-us-nafta-negotiation-dispute-settlement-process-1.4355537 (viewed Nov. 11, 2018).

(ii) the USMCA curtails the scope of ISDS in notable and material ways as compared to NAFTA.

A. The Investment Court System in CETA

As discussed above, Section F of Chapter 8 of CETA diverges significantly from ISDS as found in other treaties. In traditional ISDS, each dispute is heard by an arbitral tribunal that is appointed on a case-by-case basis. Although tribunals are often composed of well-known experts in the field, in theory virtually any adult in the world can serve as an arbitrator.

In contrast to that open system, CETA contemplates that investment disputes will be heard by three members of an exhaustive list of "Tribunal" members for ICS. The Tribunal is to be composed of 15 members (of whom five are EU nationals, five are Canadian nationals and five are nationals of third countries), who are appointed by the CETA Joint Committee[43]) for a period of five years, renewable once.[44]) CETA Tribunal members must "possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law."[45]) The Tribunal has a President and a Vice-President who shall be "drawn by lot" from the third-country national members of the Tribunal, and shall be "responsible for organisational issues".[46])

Each dispute is heard by three selected Tribunal members, called a "division". Each division is composed of a Canadian national, an EU national and a national of a third state.[47])

Each division's decision is subject to an appellate process heard before a specially-appointed Appellate Tribunal.[48]) The randomly-selected members of the Appellate Tribunal hear appeals from lower Tribunal decisions.[49]) Appellate review in CETA is broader than the standards for annulment set forth in

[43]) The CETA Joint Committee is the body responsible for all questions concerning trade and investment between the parties and the implementation and application of the treaty. It comprises representatives of the EU and representatives of Canada and is co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade (or by their respective designees). *See* CETA, art. 26.1.

[44]) *See* CETA, art. 8.27(2). The CETA Joint Committee also has the power to increase or reduce the number of Tribunal members by multiples of three, presumably in order to ensure the Tribunal can support its caseload. *Id.*, art. 8.27(3).

[45]) CETA, art. 8.27(4).

[46]) *Id.*, art. 8.27(8).

[47]) *Id.*, art. 8.27(6). The selection of these three members is required to be "random and unpredictable", in a process that has not yet been defined but will likely involve a system of rotating appointments or selection by lot. *Id.*, art. 8.27(7).

[48]) *Id.*, art. 8.28.

[49]) *Id.*, art. 8.28(5).

Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[50]) In particular, under CETA, awards can be appealed, and upheld, modified or reversed,[51]) based on (i) a *de novo* review of legal reasoning, *i.e.*, "errors in the application or interpretation of applicable law"; (ii) "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law"; and (iii) the grounds for annulment set forth in Articles 52(1)(a) through (e) of the ICSID Convention.[52])

Other details concerning ICS have been left to be settled at a later date. For example, Section F provides that the CETA Joint Committee "shall adopt" decisions setting out numerous fundamental provisions for the Appellate Tribunal, including the number of its members, their remuneration, the process for starting an appeal and administrative support.[53]) A specially-appointed Committee on Services and Investment also has the ability to create further binding rules for the ISDS process, including rules concerning disclosure and independence and impartiality of Tribunal members, among others.[54])

In some respects, ICS is intended to be a transitional system: the EU and Canada have also agreed to look towards establishing a multilateral investment court with an appellate system.[55])

ICS has encountered some criticism, in particular because the appointment of the Tribunal and the Appellate Tribunal is left to the sole discretion of the state parties (so that, unlike in traditional ISDS, the investor does not have a role in the appointment of the decision-makers) and because the process, including an appellate process, is likely to be longer than traditional ISDS.[56]) On the other hand, at least one EU member state, Poland, has threatened not to ratify ICS in CETA because the selection process only guarantees that an *EU* national will be a member of a division hearing a dispute involving Poland, and does not guarantee that that division member will be a *Polish* national.[57])

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[50]) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed on 18 March 1965, entered into force on 14 October 1966 ("ICSID Convention"), art. 52.

[51]) CETA, art. 8.28(2).

[52]) *Id.*

[53]) *Id.*, art. 8.28(7).

[54]) *Id.*, art. 8.44.

[55]) *Id.*, art. 8.29.

[56]) *See* S. Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation – Resolving Investor–State Disputes under Mega-regionals*, 7(3) J. Int'l Disp. Settlement 628, 643 (2016).

[57]) *See* James Shotter and Jim Brunsden, *Poland threatens to block part of EU-Canada trade deal*, Financial Times (Sept. 7, 2018), https://www.ft.com/content/9c83f060-9321-11e7-a9e6-11d2f0ebb7f0 (viewed Nov. 9, 2018).

B. The Limited Scope of ISDS in Chapter 14 of the USMCA

In NAFTA, Section B of Chapter 11 provided a general consent and submission to ISDS for broad (albeit exhaustive) categories of investments made by investors of one NAFTA country in the territory of another NAFTA country. Chapter 14 of the USMCA does not contain a similar, general submission to ISDS for breaches of all (or virtually all) of the treaty's investment protections. Instead, the right to pursue ISDS under the USMCA is limited to particular types of disputes as set forth in three Annexes to Chapter 14 – Annexes 14-C, Annex 14-D and Annex 14-E.[58])

First, Annex 14-C of the USMCA permits investors to raise certain "legacy claims", that is claims for breaches of NAFTA, under the ISDS provisions in NAFTA for a three-year period following the termination of NAFTA.[59]) As three years is also NAFTA limitation period for raising claims, Annex 14-C essentially preserves the existing right to bring NAFTA claims which arose while that treaty remained in force.[60])

Arbitration under Annex 14-C is subject to certain restrictions as well. First, the investor must have "established or acquired" its investment in a NAFTA country "between January 1, 1994 and the date of termination of NAFTA 1994."[61]) The motivation behind this clause appears to be that investors who relied on NAFTA in making their investments should be entitled to rely on its protections. The wording of the clause, however, leaves open the question of whether investors who have expanded, managed or changed their operations in a NAFTA country while NAFTA was in force would be entitled to bring a legacy claim.[62])

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[58]) *See* United-States-Mexico-Canada Agreement Text, *Subject to Legal Review*, art. 14.2(4) ("For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C …, Annex 14-D …, or Annex 14-E …"), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico (viewed Nov. 12, 1018) (hereinafter "USMCA"). This article relies on the draft text of the USMCA provided by the U.S. Trade Representative and available on its website as of November 14, 2018. This is not necessarily the final, legal text of the treaty, as it remains under "legal review" (and also because certain provisions do not appear to have been publicized).

[59]) USMCA, Annex 14-C ¶ 1. Notably, although the USMCA is plainly intended to replace NAFTA, the express terms of how and when it will replace NAFTA, and when NAFTA will terminate, have not yet been publicly disclosed. Instead, the "Transitional Provision from NAFTA 1994" in the USMCA remains blank, as of the date this article was written. *See* USMCA, art. 34.1. As a result, the exact date of NAFTA's termination remains unknown.

[60]) NAFTA, art. 1116.

[61]) USMCA, Annex 14-C ¶ 6(a).

[62]) Paragraph 6(a) of Annex 14-C also requires that the investor must have an investment "in existence on the date of entry into force of" the USMCA itself, leaving

In addition, footnote 21 in Annex 14-C states that "Mexico and the United States do not consent" to the submission of legacy claims "with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E." As such, U.S. investors in Mexico, and Mexican investors in the U.S., who have certain government contracts cannot invoke NAFTA's protections after NAFTA is terminated. Those investors must instead rely on Annex 14-E.

Second, Annex 14-D provides consent – as between the United States and Mexico only[63]) – to claims for breaches of the USMCA's national treatment clause,[64]) most-favored nation ("MFN") clause[65]) and claims for direct expropriation.[66]) The scope of the claims for breaches of the national treatment and MFN standards in the USMCA is potentially restricted as compared with the language in some prior US treaty practice.[67]) But by far the most significant

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open the question of NAFTA claims for those (admittedly a likely small number) of potential NAFTA claimants who may have seen their investments extinguished or disposed of as a result of breaches of NAFTA before the USMCA came into effect. In particular, the language of paragraph 6 does not definitively answer whether investors who currently hold potential NAFTA claims for expropriation are entitled to raise those claims once NAFTA terminates and the USMCA comes into effect. Such claimants should consider raising their claims before NAFTA terminates.

[63]) Canada is not subject to, and does not appear to have consented to anything in, Annex 14-D or Annex 14-E. As a result, except for legacy claims under Annex 14-C, Canada has not consented to ISDS under the terms of the USMCA. In effect, this means that U.S. in Canada may not have effective ISDS rights in Canada in their own names once the period for legacy claims in Annex 14-C expires; Mexican investors are likely to have ISDS rights under the Comprehensive Progressive Trans-Pacific Partnership.

[64]) August Reinisch, *National Treatment in* Building International Investment Law: The First 50 Years of ICSID 389, 389 (Meg Kinnear et al., eds., 2015) ("National treatment is one of the basic non-discrimination disciplines in international investment law. Almost all bilateral investment treaties ('BITs') and multilateral investment agreements contain national treatment provisions requiring contracting states to provide investors and investments from other contracting parties treatment no less favorable than that accorded to their own investors and investments.").

[65]) David D. Caron, *Most-Favored-Nation Treatment: Substantive Protection in* Building International Investment Law: The First 50 Years of ICSID 399, 399 (Meg Kinnear et al., eds., 2015) ("Most investment treaties contain most favored nation ('MFN') clauses. These clauses vary in their precise wording but in general state that the treatment or rights enjoyed by investors covered by a particular investment treaty shall not be less than that "accorded to investments made by investors of any third State." (citations omitted)).

[66]) USMCA, Annex 14-D, art. 3.

[67]) In particular: (1) in Annex I of the USMCA, both the United States and Mexico have reserved the right of their constituent states to maintain their existing laws and measures that may otherwise breach national treatment and MFN standards, so that, with respect to measures that exist before the USMCA comes into force, the national treatment and MFN clauses only apply to measures of the U.S. and Mexican *federal* governments, USMCA, Annex I-US-14 (reserving "[a]ll existing non-confirming

limitation found in Annex 14-D is the restriction of claims to direct – as opposed to indirect – forms of expropriation.

A direct expropriation is often described as "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, to the obvious benefit of the host State."[68]) In contrast to the forcible or acknowledged transfer of title, an indirect expropriation has been defined as "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[69]) In essence, indirect expropriation can "occur through interference by a state in the use of … property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected."[70])

Annex 14-D essentially limits claims under its terms to claims for seizures of legal title (direct expropriation) but does not permit claims for seizures that do not formally affect title (indirect expropriation). For a significant amount of time, the consistent practice of various branches of the United States government has been to call for full compensation in the event of either direct or indirect expropriations, without distinction. In the early part of the twentieth century, the United States Foreign Claims Settlement Commission, a U.S. governmental body created to evaluate claims for expropriation of U.S. citizens' property in foreign countries, routinely recognized that an expropriation could occur

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measures of all states of the United States, the District of Columbia, and Puerto Rico"); *id.*, Annex I-Mexico-49 (reserving "[a]ll existing non-conforming measures of all states of the United Mexican States"); (2) claims for breach of national treatment and MFN treatment cannot be brought by investors who are only "establish[ing] or acqui[ring] … an investment" under the treaty, but only those that have investments, USMCA, Annex 14-D, art. 3(1)(a)(i)(A); and (3) the MFN clause arguably cannot be used to import more favorable dispute resolution provisions from other treaties and/or more favorable standards of protection that do not exist in the USMCA but exist in other treaties, USMCA, Annex 14-D, footnote 22.

[68]) *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶ 103 (2000).

[69]) *Metalclad*, Award ¶ 103. The formulation of a direct and indirect expropriation in *Metalclad* has been cited by numerous other investor-state arbitrations. *See, e.g.*, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award ¶ 606 (2001); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 113 (2003); *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award ¶ 287 (2016).

[70]) OECD Working Papers on International Investment 2004/04, *'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law* 3 (Sept. 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (viewed Nov. 5, 2018).

without direct interference with legal title.[71]) The 1962 Hickenlooper Amendment and its successor, the 1994 Helms Amendment, authorize restrictions in U.S. foreign aid to countries that *either* "nationaliz[e] and expropriate[e] the property of any United States person" *or* "take any other action … which has the effect of seizing ownership or control of the property of any United States person" without compensation or a process for determining compensation.[72]) Ever since the Reagan administration began to negotiate the U.S. bilateral investment treaty program in the 1980s, the United States has sought to require arbitration and compensation of claims arising out of both direct and indirect expropriations.[73]) The 2012 Model U.S. BIT continued to recognize both direct and indirect expropriations, and require arbitration for both,[74]) as did NAFTA's Chapter 11.[75])

In some ways, the USMCA continues this prior practice: Article 14.8 of the treaty and Annex 14-B[76]) recognize the international obligation to compensate investors in the event of either direct or indirect expropriations. What is different in Annex 14-D of the USMCA is that U.S. and Mexican investors are

[71]) G.C. Christie, *What Constitutes a Taking of Property under International Law?*, 38 Brit. Y.B. Int'l L. 307, 307–315 (1962).

[72]) *See* 22 U.S.C. § 2370a (2018).

[73]) *See* Secretary George P. Shultz, Message from the President of the United States Transmitting the Treaty between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol Signed at Washington, December 6, 1983, Senate Treaty Doc. 99-15, 3–4 (1986) ("[The model BIT] provides that any direct or indirect taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general standards of treatment discussed above. The BIT's definition of 'expropriation' is broad and flexible; essentially 'any measure' regardless of form, which has the effect of depriving an investor of his management, control or economic value in a project can constitute expropriation requiring compensation equal to the 'fair market value'"), https://2001-2009.state.gov/documents/organization/43585.pdf (viewed Nov. 11, 2018).

[74]) United States Trade Representative, 2012 U.S. Model Bilateral Investment Treaty, art. 6, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (viewed Nov. 12, 2018).

[75]) NAFTA, art. 1110.

[76]) Annex 14-B of the USMCA defines and provides guidance on what constitutes a direct expropriation and what constitutes an indirect expropriation for the purposes of the USMCA. The content of Annex 14-B mirrors, in substantial part, prior versions of the same Annex found in the 2012 Model US BIT and the Trans-Pacific Partnership; the criteria for establishing if an indirect expropriation in Annex 14-B has often been compared to the test for establishing a regulatory taking under the Fifth Amendment of the U.S. Constitution as articulated by the U.S. Supreme Court in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978). *See, e.g.*, Anthony B. Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test*, 30 N.W. J. Int'l L. & Bus. 339 (2010).

now denied a private treaty remedy for indirect expropriations, whereas they retain that remedy for a direct expropriation. This arguably presages a distinction in the U.S. government's priorities between direct and indirect expropriation. On the other hand, it is also possible that the distinction between direct and indirect expropriations in Annex 14-D may become an outlier in U.S. treaty practice given the *sui generis* nature of the NAFTA renegotiations. To date, the U.S. government does not appear to have taken a firm position on this question.

Third, Annex 14-E provides consent – again, only as between the United States and Mexico – for investment disputes related to investors who have certain types of contracts with those governments. In this respect, Annex 14-E only covers investors that have "covered government contracts", which are defined as bilaterally executed contracts between an investor (or its local subsidiary) and the national government of the U.S. or Mexico, so long as those contracts "grants rights … in a covered sector."[77]) The sectors covered by Annex 14-E are (i) oil and gas,[78]) (ii) supply of power generation services; (iii) supply of telecommunications services "to the public on behalf of" the United States or Mexico; (iv) supply of transportation services "to the public on behalf of" the United States or Mexico; and (v) "the ownership or management or roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government".[79])

Investors who have such contracts are entitled to bring claims for breach of any of the USMCA's substantive investment protections, under the ISDS procedures set forth in Annex 14-D, within three years of when they knew or should have known of the claim's existence.[80]) However, certain requirements for bringing arbitrations under Annex 14-D – including a requirement to bring claims initially to domestic courts (discussed below) – are not required for arbitrations under Annex 14-E.[81])

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[77]) *See* USMCA, Annex 14-E ¶ 6(a); *see also id.* ¶ 6(e). Footnote 33 of Annex 14-E confirms that unilateral acts of administrative or judicial authorities, such as unilaterally granted licenses and permits, and administrative or judicial consent decrees, cannot constitute a covered government contract.

[78]) Historically, the oil and gas industry in the country was the exclusive purview of Mexican state-owned entities and NAFTA formally denied its investment protection to U.S. and Canadian oil and gas investors in Mexico (of which there were very few) – at least until the liberalization of the oil and gas sector in Mexico which has occurred in the last few years. A discussion of the NAFTA's current protections to oil and gas investors in Mexico is beyond the scope of this article.

[79]) USMCA, Annex 14-E ¶ 6(b).

[80]) *Id.* ¶ 4.

[81]) *Id.* ¶ 4 & footnote 31.

III. Procedural Mechanisms in ISDS under CETA and the USMCA

In addition to a new form of ISDS in each treaty, CETA and the USMCA (in particular, its Annex 14-D[82]) also require numerous mandatory procedural mechanisms in investment arbitration. As this article will show, many of these mandatory mechanisms are similar in CETA and the USMCA – and many are different. A review of these procedural mechanisms may perhaps provide guidance on the future form of ISDS in other treaties.[83])

A. The Role of Domestic courts

According to some commentators, ISDS represents an undesirable abrogation of the role of the domestic judiciary in resolving investment disputes.[84]) For other commentators, the ability to seek neutral adjudication of an investment dispute outside the potentially partial review of local courts is a benefit of ISDS.[85])

CETA and the USMCA take very different positions with respect to the role of local courts in ISDS.

CETA's approach places domestic courts and ICS on equal but separate planes. In Article 8.22(1)(f) of CETA, a pre-condition to an investor's claim is that the investor must "withdraw[] or discontinue[] any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim."[86]) This is roughly equivalent to the terms of the 1994 NAFTA, which similarly required investors pursuing ISDS to waive the "right to initiate or continue" domestic proceedings "or other dispute settlement procedures" with respect to the measures alleged to be a breach.[87]) The introduction of this clause in both instances was likely directed towards avoiding duplicative and parallel proceedings and the risk of double compensation.

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[82]) Annex 14-C borrows the procedures for ISDS set forth in NAFTA. Annex 14-E borrows the procedures in Annex 14-D, with certain exceptions explained above.

[83]) What follows is not a compendious overview of all of the intricacies of ISDS in CETA and the USMCA. Instead, this article highlights only certain procedural mechanisms that the authors consider may be of greatest interest to the reader.

[84]) ISDS Platform, Friends of the Earth Australia, *Why we must ban secret corporate courts from trade deals*, https://isds.bilaterals.org/?why-we-must-ban-secret-corporate (viewed Nov. 8, 2018).

[85]) Stephan Schill, *The Virtues of Investor-State Arbitration*, EJIL: Talk! (Nov. 19, 2013), https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/ (viewed Nov. 8, 2018).

[86]) CETA, art. 8.22(1)(f).

[87]) NAFTA, art. 1121(2)(b).

In contrast, the USMCA gives a primary initial role to local courts that is somewhat jealous of their role as neutral adjudicators of investment disputes. In this respect, although the USMCA contains waiver language similar to that of CETA and NAFTA, the effect of that waiver is substantially modified by an additional requirement placed on arbitrations under Annex 14-D. Specifically, Annex 14-D requires that, in order to use ISDS, the investor must first have pursued relief before the administrative tribunals or competent courts of the host state "with respect to the measures alleged to constitute a breach" of the USMCA, and that either a "final decision from a court of last resort" has been obtained or "30 months have elapsed from the date the [domestic] proceeding … was initiated."[88])

Although it is not necessarily common, some investment treaties have previously "require[d] that a claim be submitted to local remedies before it may be submitted to arbitration, but do not require that those remedies be exhausted."[89]) The most litigated and well-known examples are found in some of the bilateral investment treaties signed by Argentina and Uruguay.[90]) These clauses are said to be intended to give an investor "'a feel' for whether the judges are independent and impartial, and whether it is worth continuing the domestic proceedings."[91]) They also give host state's courts and administrative agencies a chance to correct any breaches of their laws.[92]) The purpose of these clauses is essentially to maintain, to a degree, the function and role of domestic judicial and quasi-judicial bodies in the resolution of investment disputes.[93])

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[88]) *Id.* When read in conjunction with the four-year statute of limitations, this thirty-month period effectively gives investors an eighteen month period (from the thirtieth month after a dispute arises to the forty-eighth month) to bring an investor-state arbitration.

[89]) Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy and Interpretation 482 (Oxford University Press 2010).

[90]) *See, e.g.*, Netherlands-Argentina BIT, art. 10; Switzerland-Uruguay BIT, art. 10.

[91]) United Nations Conference on Trade and Development, *Investor-State Dispute Settlement: A Sequel* 83 (2014), http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (viewed Nov. 5, 2018).

[92]) Note that Annex 14-D makes clear that the requirement to submit the dispute to local courts cannot be avoided unless such a submission was "obviously futile", USMCA, Annex 14-D, footnote 24, a potentially higher barrier than the concepts of futility and waiver adopted by some investment tribunals in the past.

[93]) The USMCA's requirement to initially submit an investment dispute to local courts must also be read in tandem with Annex 14-D, Appendix 3, which provides that an U.S. investor can waive its right to claim a breach of Chapter 14 of the USMCA in ISDS if it, or its local Mexican subsidiary, "has alleged [a] breach of an obligation under [Chapter 14 of the USMCA], as distinguished from breach of other obligations under Mexican law, in proceedings before a court or administrative tribunal in Mexico." USMCA, Annex 14-D, Appendix 3. This fork-in-the-road clause waives ISDS rights if claims for breach of the treaty are raised in domestic Meixcan courts or tribunals (because, in Mexico, international treaty rights may be immediately enforceable in local proceedings). The result is that a U.S. investor seeking to make a USMCA claim

B. Addressing Parallel Proceedings through Consolidation and Other Means

Commentators have also expressed a concern about ISDS that, in certain conditions, multiple investors who are affiliated with each other can bring separate ISDS arbitrations, sometimes under different treaties, that seek recovery for the same underlying harm to the same investment.[94])

The first way that both CETA and USMCA Annex 14-D address this purported concern is by providing a means for consolidation – that is, a means under which related claims brought in different arbitrations *under the terms of the treaty only* can be heard by a newly constituted tribunal. Both treaties provide essentially the same process and standard for consolidation: consolidation may occur where a party requests it and can demonstrate to a newly formed tribunal that the "two or more claims that have been submitted to arbitration … have a question of law or fact in common, *and* arise out of the same circumstances."[95]) The use of the conjunctive "and" establishes that it is not sufficient that the separate claims have issues of law or fact in common; they must also arise out of the same underlying factual circumstances.[96])

Importantly, however, the consolidation clause in both treaties only applies when claims are raised under the treaty itself (i.e., consolidation can only occur between two arbitrations brought under CETA for CETA's consolidation clause; and two arbitrations brought under the USMCA for the USMCA's consolidation clause). Consolidation does not extend to arbitrations brought under separate treaties.[97])

In this respect, CETA also addresses the possibility of arbitrations arising under different treaties. Article 8.24 provides that "[w]here a claim is brought pursuant to this Section and another international agreement" and there is either "a potential for overlapping compensation" or "the other international claim could have significant impact on the resolution of the claim brought" pursuant to CETA, the CETA tribunal is required to either "stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award."[98]) In other

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under Annex 14-D or Annex 14-E must carefully navigate and control its initial pleadings before Mexican courts or tribunals, lest it inadvertently trigger this provision.

[94]) *See* Katia Yannaca-Small, *Parallel Proceedings*, *in* The Oxford Handbook of International Investment law 1008, 1008–09 (Peter Muchlinkski, Federico Ortino & Christoph Schreuer, eds., Oxford University Press 2008).

[95]) USMCA, Annex 14-D, art.12(1)(6); *accord* CETA, Article 8.43(8).

[96]) A difference between the consolidation clauses in both treaties is that, in CETA, the newly constituted tribunal is selected from the members of the Tribunal constituted to hear disputes under ICS; whereas in the USMCA, the parties and, failing that, the Secretary-General of ICSID, selects the new tribunal.

[97]) *See* USMCA, Annex 14-D, art. 12(1); *accord* CETA, Article 8.43(1).

[98]) CETA, art. 8.24.

words, the tribunal is required to take into account the possibility of parallel proceedings, but is given flexibility in how to do so. The USMCA contains no similar clause.

Furthermore, as discussed above, both the USMCA and CETA require investors pursuing ISDS under those treaties' terms to waive the right to "initiate or continue" other proceedings with respect to the measures alleged to be a breach of the treaty, including, potentially, other ISDS proceedings.[99])

Finally, as discussed above in footnote 93, in the USMCA, U.S. investors in Mexico must choose whether to raise their claims of breaches of the treaty to Mexican courts or through ISDS.

C. Ethics and Challenges to Arbitrators

One of the concerns expressed about ISDS is that, because arbitrators often are acting or have acted as counsel, or are often appointed to panels involving similar issues of law and fact, there is the potential for issue and/or ethical conflicts.[100]) There are also concerns that the standards for determining whether ISDS arbitrators suffer from a conflict are somewhat undefined.[101])

In order to address these concerns, both CETA and the USMCA mandate that tribunal members must comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, as well as certain other ethical rules set forth in the treaty or later compiled by the treaty signatories or their representatives.[102]) In effect, these treaties take what was previously "soft law" – the nonbinding guidelines promulgated by the International Bar Association – and mandate their application as a requirement of the treaty.

Furthermore, both the CETA and the USMCA also define the entity that must hear challenges to the appointment of tribunal members. In CETA's case, such challenges are to be submitted to the President of the International Court of Justice.[103]) In the USMCA, challenges are brought to the Secretary-General of ICSID, a specialist body for investor-state arbitration based in the World Bank, under the procedure set forth in the UNCITRAL Rules.[104])

These clauses diverge from the process for challenging arbitrators in Article 58 of the ICSID Convention, a convention that establishes ICSID and

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[99]) CETA, art. 8.22(1)(f); USMCA, Annex 14-D, art. 5(1)(e).

[100]) Anthea Roberts and Zeineb Bouraoui, *UNICTRAL and ISDS Reforms: Concerns about Arbitral Appointments, Incentives and Legitimacy*, EJIL: Talk! (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/ (viewed Nov. 12, 2018).

[101]) *Id.*

[102]) CETA, art. 8.30(1); USMCA, Annex 14-D, art. 6(5).

[103]) CETA, art. 8.30(2).

[104]) USMCA, Annex 14-D, art. 6.

governs how arbitrations before ICSID are conducted.[105]) Under Article 58, proposals to disqualify arbitrators are heard by the other members of the tribunal or, if they are split or other members are unavailable to hear the disqualification proposal, by the President of the World Bank.[106]) Under CETA and the USMCA, however, even where the investor elects to have ICSID and its arbitration rules govern its claims,[107]) challenges to tribunal members are heard by the treaty's appointed authority – *not* other tribunal members. In any event, it is not unusual for challenges to be heard by designated authorities, and both the President of the International Court of Justice[108]) and the Secretary-General of ICSID[109]) can hear challenges to arbitrators.

D. Preserving the Regulatory Discretion of the Host State

Another stated concern about ISDS is that it interferes with the state's right to enact regulations in the public interest.[110]) In response, defenders of ISDS note that its scope is limited to awards of damages for aggrieved investors under established standards of investment protection and ISDS tribunals do not have the power to prevent states from passing regulatory measures.[111])

CETA and the USMCA address the concern that ISDS will interfere with the state's regulatory discretion in different ways.

In CETA, a tribunal's jurisdiction is limited in two ways. First, the tribunal cannot "decide claims that fall outside the scope of" Article 8.18, *i.e.*, it can only determine whether or not a party has "breached an obligation" under the investment chapter.[112]) Furthermore, CETA also provides that:

> "The Tribunal shall not have jurisdiction to determine the legality of the measure, alleged to constitute a breach of this Agreement, under the

[105]) ICSID Convention, art. 58.

[106]) *Id*.

[107]) CETA, art. 8.23(2); USMCA, Annex 14-D, art. 3(3).

[108]) *See, e.g.*, *CC/Devas Mauritius Ltd. et. al. v. Republic of India*, Decision on Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013) (ICJ President determining challenge in proceeding under Mauritius-India BIT); *CC/Devas Mauritius Ltd. et. al. v. Republic of India*, Award on Jurisdiction and Merits ¶ 28 (July 25, 2016) (same).

[109]) *See* International Centre for Settlement of Investment Disputes, World Bank, *Deciding Challenges*, https://icsid.worldbank.org/en/Pages/services/Deciding-Challenges.aspx (viewed Nov. 9, 2018).

[110]) *See* Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70(3) Vanderbilt L. Rev. 985, 991 (2017).

[111]) *See id*.; European Policy Information Center, *Investor-State Dispute Settlement: Myths and Reality*, https://www.civismo.org/files/informes/2014/EPICENTER-Briefing-ISDS-20th-November-2014%20%281%29.pdf (viewed Nov. 12, 2018).

[112]) CETA, art. 8.18(1).

> domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party."[113])

Some commentators have pointed out that these clauses, especially the second, may be difficult to interpret in practice. For example, in many instances, an investor may claim that a particular measure applied to its investment constituted an egregious breach of local law – and, accordingly, the measure's application was also a violation of a legal requirement set forth in a treaty (such as the fair and equitable treatment standard). For at least one commentator, it is unclear how a tribunal could determine the first part of that claim if, in fact, it cannot "determine the legality of the measure … under … domestic law".[114])

In all events, the apparent aim of these provisions is to make clear that a CETA tribunal should not stray from determining the claim before it – a claim for breach of the treaty itself.

In the USMCA, the same underlying concern is reflected in Article 13(7) of Annex 14-D, which provides that "[a]n award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case."[115]) This clause also appears directed towards making sure that the investment dispute does not seek to abrogate or curtail the state's right to regulate in the general interest.[116])

E. Bifurcation of Proceedings and Avoiding Expensive Arbitrations over Unmeritorious Claims

Another concern about ISDS is the argument that it forces states to incur the time and expense of defending against patently unmeritorious claims.[117]) The converse position is that there is no evidence that ISDS is given to un-

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[113]) CETA, art. 8.31(2).

[114]) Jarrod Hepburn, *CETA's New Domestic Law Clause*, EJIL: Talk! (March 17, 2016), https://www.ejiltalk.org/cetas-new-domestic-law-clause/ (viewed Nov. 9, 2018).

[115]) USMCA, Annex 14-D, art. 13(7).

[116]) Other provisions in the substantive protections set forth in Chapter 14 of the USMCA also recognize a state's right to regulate in the public interest, including a provision that provides that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objections, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances." USMCA, Annex 14-B ¶ 3(b).

[117]) Anthea Roberts and Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL: Talk!

meritorious claims and the growth of ISDS actually reflects the growth of foreign direct investment since the end of the Cold War generally.[118])

In April 2006, concerns about the time and expense of addressing unmeritorious claims before ICSID tribunals led to the enactment of Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings.[119]) Rule 41(5) provided that a party could seek dismissal of a claim within thirty days of the constitution of an ICSID tribunal if the party could establish that the "claim is manifestly without legal merit".[120]) The procedure contemplated by Article 41(5) is an "accelerated" procedure intended to permit dismissal of the case even before "the tribunal has had an opportunity to examine matters of jurisdiction and competence."[121]) Of course, under the reasoning set forth by various ISDS tribunals, a party could also seek to have a claim dismissed on the grounds of a failure to state a *prima facie* cause of action even without such express provisions.[122])

Both CETA and the USMCA expand and codify the terms of Rule 41(5) and apply its underlying concept to ISDS under their provisions. Specifically, both CETA and the USMCA permit a respondent to submit (i) an objection that "a claim is manifestly without legal merit";[123]) and (ii) an objection that "a claim, or any part thereof, … is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true."[124])

The latter objection has been expressly provided for in other U.S. investment treaties, such as the Central American-Dominican Republic-U.S. Free Trade Agreement.[125]) According to one commentator, the objection that a claim is "not a claim for which an award in favour of the claimant may be made" is intended to replicate a procedure for the preliminary disposition of litigations, well known to U.S. litigators in both state and federal courts, called

(June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/ (viewed Nov. 12, 2018).

[118]) European Policy Information Center, *Investor-State Dispute Settlement: Myths and Reality*, https://www.civismo.org/files/informes/2014/EPICENTER-Briefing-ISDS-20th-November-2014%20%281%29.pdf (viewed Nov. 12, 2018).

[119]) *See* Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* 542 (Cambridge University Press, 2d. ed. 2009) ("The idea behind this provision is to efficiently dispose of cases that are manifestly without merit").

[120]) The ICSID Rules of Procedure for Arbitration Proceedings, Article 41(5). The ICSID Rules of Procedure for Arbitration Proceedings are available at https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf.

[121]) Schreuer, *The ICSID Convention: A Commentary*, *supra* note 119, at 543.

[122]) *See, e.g.*, Audley Sheppard, *The Prima-Facie Jurisdictional Threshold in* The Oxford Handbook of International Investment Law 933 (Peter Muchlinkski, Federico Ortino & Christoph Schreuer, eds., Oxford University Press 2008).

[123]) CETA, art. 8.32(1); USMCA, Annex 14-D, art. 7(4).

[124]) CETA, art. 8.33(1); USMCA, Annex 14-D, art. 7(4).

[125]) Sheppard, *supra* note 122, at 957.

a "motion to dismiss".[126]) Under U.S. litigation practice, the court will hypothetically accept the factual allegations of the plaintiff's initial pleading as true, and thereafter determine whether the plaintiff's allegations, if true, would satisfy the legal elements for the causes of action for which the plaintiff has sought a remedy.[127]) If the plaintiff's own allegations cannot sustain its causes of action, the case may be dismissed. While it is unclear if the drafters of CETA and the USMCA intended to adopt all the intricacies of U.S. motion to dismiss practice into ISDS, that form of U.S. motion practice may well inform the conduct of ISDS under CETA and the USMCA moving forward.

Both CETA and the USMCA also provide for the expedited and/or preliminary review of these two types of objections, albeit on different terms.[128])

In CETA, these two types of objections must be addressed separately. Objections that "a claim is manifestly without merit" will be heard on an expedited basis if presented within thirty days of the date of the constitution of the tribunal,[129]) and only if no objection has been made that a claim "is not a claim for which an award in favour of the claimant may be made."[130]) An objection that a claim "is not a claim for which an award in favour of the claimant may be made" under CETA must also be determined on a preliminary basis, *i.e.*, in a separate phase of proceedings (and not joined with the merits).[131]) A CETA tribunal may also decline to hear an objection that a claim "is not a claim for which an award in favour of the claimant may be made" if an objection that "a claim is manifestly without merit" has already been made, presumably only until the latter objection has been resolved.[132])

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[126]) *Id.* at 958–59. Pertinent examples of this practice are: Rule 12(b)(6) of the U.S. Federal Rules of Civil Procedure (which governs civil lawsuits in U.S. federal district courts), a rule that permits dismissal for "failure to state a claim upon which relief can be granted"; and Rule 3211(7) of the New York Civil Practice Law and Rules (governing civil lawsuits in New York state trial courts), a rule that permits dismissal if "the pleading fails to state a cause of action." To the author's knowledge, virtually every trial court of general jurisdiction in the United States, whether state or federal, routinely uses this type of motion practice as a means of controlling docket size.

[127]) There are sometimes some deviations in this practice, again which are well-known to U.S litigators. For example, courts may often dismiss causes of action based on unimpeachable documentary evidence, such as undisputed terms of a contract, a pre-existing judgment or a settlement agreement. *See, e.g.*, N.Y. Civil Practice Law and Rules 3211(1) (permitting dismissal for "a defense founded upon documentary evidence"). Different and heightened pleading standards may also apply to different types of actions, such as actions under U.S. securities laws and actions based on fraud. And the pleading standard required by federal and state courts also varies based on the particular interpretation of the rules of civil procedure by the relevant appellate courts.

[128]) CETA, art. 8.33(1); USMCA, Annex 14-D, art. 7(4).

[129]) CETA, art. 8.32(5).

[130]) *Id.*, art. 8.32(2).

[131]) *Id.*, art. 8.33(1).

[132]) *Id.*, art. 8.33(3).

In contrast, under the USMCA, both objections will be considered on an expedited basis if they are presented within forty-five days of the date of the constitution of the tribunal.[133]) Either or both types of objection must be determined as a preliminary question – that is, in a separate, initial phase of the arbitration – provided they are presented by the time the respondent's counter-memorial is due (or a response to an amendment of the claim is due).[134])

Finally, the USMCA also mandates that any objection to the tribunal's jurisdiction and competence must be heard as a preliminary question, in an initial phase, if brought within forty-five days of the date of the constitution of the tribunal.[135]) This suggests that a diligent respondent state can require bifurcation of proceedings so long as it can articulate objections to jurisdiction and competence based on its initial review of the request for arbitration or notice of dispute. At the same time, it is often the case that objections to jurisdiction do not become apparent or discoverable until after the claimant has submitted its initial memorial.

In both CETA and the USMCA, tribunals still retain the discretion to order bifurcation of their proceedings with respect to all other objections to jurisdiction and competence.

F. Other Procedural Mechanisms of Note

Finally, CETA and the USMCA contain some other procedural mechanisms that may be of interest to the reader:

- *Transparency and amicus curiae submissions*: Both CETA and the USMCA require ISDS proceedings to be conducted in public and transparently (with certain limitations) and permit third parties who may be affected by the process to seek to file submissions setting forth their views.[136])
- *Binding state interpretations*: Both CETA and the USMCA contain provisions that allow committees appointed by the signatory states to issue binding interpretations of the substantive content of the treaty, which must then be followed by tribunals.[137])
- *Review of awards*: The USMCA permits an arbitrating party to require that the tribunal issue a proposed decision or award sixty days before

[133]) USMCA, Annex 14-D, art. 7(5).
[134]) *Id.*, Annex 14-D, art. 7(4).
[135]) *Id.*, Annex 14-D, art. 7(5).
[136]) CETA, art. 8.36; USMCA, Annex 14-D, art. 8.
[137]) CETA, art. 8.31; USMCA, art. 30.2.

a final award is issued, and allows the parties forty-five days to provide comments on that proposed decision.[138])

- *Allocation of costs*: CETA adopts a loser-pays system, in which the prevailing party is presumptively entitled to recover all of its fees and costs in the arbitration;[139]) while the USMCA provides that the tribunal may allocate costs and fees as it sees fit.[140])

IV. Concluding Remarks

As can be seen, CETA and the USMCA have taken very different approaches to the ultimate form of ISDS. In CETA, concerns about the legal stability and consistency of ISDS have resulted in a permanent court system, with an appellate tribunal that is empowered to review legal issues essentially *de novo*. In contrast, in the USMCA, concerns about the expansive use of ISDS to question regulatory measures have resulted in a curtailment of its scope. Both treaties, however, make use of similar procedural mechanisms in an attempt to address some commentators' concerns about ISDS. It remains to be seen whether other treaties will adopt one or the other form of ISDS and these procedural mechanisms.

[138]) USMCA, Annex 14-D, art. 7(12).
[139]) CETA, art. 8.39(5).
[140]) USMCA, Annex 14-D, art. 13(4).