

# The 'Spaghetti Bowl' of IIAs



# The Typical Standards in IIAs

## **'Absolute' Standards:**

- Fair and equitable treatment (FET)
- Free Transfer Clauses (protecting the entry and exit of capital)
- Umbrella Clauses
- Customary IL Protections (protections recognized under customary international law such as full protection and security (FPS), the international minimum standard (including bans on denials of justice), and the Hull Rule awarding compensation upon expropriations)

## **'Relative' Standards:**

- National and Most Favored Nation (MFN) treatment
- Ban on 'arbitrary' or 'discriminatory' treatment
- Umbrella clauses

## **Enforcement:**

- Investor-State Dispute Settlement (ISDS)

## Variations on NT/MFN

- **Treatment “in similar circumstances”**
- **Treatment “in like cases”**
- **Treatment “no less favorable”**
- **To what protected activities?**
- **As floor or ceiling?**

“Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investors of any third country, whichever is the most favourable.”

- Turkey-Turkmenistan BIT

# Article 8.7 CETA

(1) Each Party shall accord to an investor of the other Party ... treatment it accords **in like situations**, to investors of a third country . . .

( 4) For greater certainty, the “treatment” referred to in paragraph 1 . . . does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreement. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment,” and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

# Distinct US FET Clauses

- (1) “Investment shall be accorded FET . . . **and**, in no case be accorded treatment required by international law” (e.g., US-Arg BIT)
- (2) “treatment in accordance with CIL, **including** FET . . .” (NAFTA)
- (3) (2) above plus clarification that FET means the international min. standard and does not require treatment above that standard;” FET “**includes**” denial of justice (US Model BITs of 2004 and 2012)
- (4) (3) above but FET deleted from remaining ISDS (USMCA)

# EU-Canada FTA (CETA)(also TPP-II)

Art. 8.10 (2) A Party breaches the obligation of fair and equitable treatment . . . if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties [under a provision that authorizes the state parties to develop interpretative recommendations that can be adopted by the CETA Joint Committee for decision].

( 4) When applying . . . FET, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

# Select Variations on FPS

- “full protection and security”
- “full and complete protection and security”
- “full and constant protection and security”
- “most constant protection and security”
- “full protection under the Treaty”
- “full legal security and protection”
- “adequate protection and security”
- “‘full protection and security’ . . . requires each Party to provide the level of police protection required under customary international law”
- “continuous protection and security, i.e., excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof”

# The Legitimacy Deficits of ISDS

## Rule of Law Gaps

1. Scope for forum shopping/parallel proceedings
2. Absence of total transparency for documents, awards, oral proceedings, third party funding
3. Fragmentation of the law
4. Absence of stronger rules on ethics and conflicts of interest
5. Lack of access for third parties/amici

## Democratic Deficits

1. Overly broad interpretation of investor rights
2. Overly narrow views of host states' "policy space"
3. Failure to address MNC responsibilities
4. Narrow deference to democratic choices

## Risks to Sovereign Equality

1. Failures to address LDCs' needs for assistance
2. Needs for limits on costs and awards
3. Need for more diverse arbitrators

# Modernizing IIAs: UNCTAD's Reform Agenda

Figure 7. Overview of phase 2 IIA reform options



Source: ©UNCTAD.

# The Complexification of Reform: UNCITRAL Working Group III

- Original mandate: consistency of awards, arbitrators and decision-makers, and addressing cost/duration of proceedings
- Current agenda includes: third party funding, mediation/conciliation; exhaustion of local remedies, appellate mechanism; shareholder claims; treaty parties' interpretations; frivolous claims; third party participation; counterclaims; code of conduct; selection/appointment of arbitrators; advisory center . . . .

# The EU's Multinational Investment Court

**First Instance Court/Appellate Tribunal would solve all of the following concerns:**

- **Inconsistency/fragmentation**
- **Problem of multiple proceedings**
- **Lack of correction**
- **Lack of Arbitral independence**
- **Insufficient Transparency**
- **Lack of diversity of arbitrators**
- **Problems with arbitral appointments**
- **Cost/duration**