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INVESTMENT LAW AND THE EUROPEAN UNION: A REPLY TO CATHARINE TITI

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1. Introduction

Reasonable people might disagree whether the EU is likely to make a significant and commendable contribution to international investment law. Catharine Titi makes a powerful and in many ways persuasive argument in support of this likelihood. This reply will be limited to two issues where the materials put forward could also lend support to a different, if not necessarily better, reading. I will first consider the appropriateness of evaluating developments in international investment law through the analytical perspective of balance between (originally excessive) investor protection and (gradual recognition of) the right to regulate.¹ It will be suggested that the apparent consensus on the meaning of 'balancing' may sometimes obfuscate certain less obvious issues at play. Secondly, the contribution of the recent EU practice will be briefly examined,² finding it less interesting and innovative than one might have expected.

2. The Fog of Balancing

International investment law represents a balance between the competing interest of investors to protection from unfair treatment and the interest of the host State to exercise its regulatory powers.³ That is not an unusual proposition about international law. One could describe many regimes of international law as balancing competing

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¹ See also C. Titi, *The Right to Regulate in International Investment Law* (2014).

² See also Titi, 'Le "droit de réglementer" et les nouveaux accords de l'Union européenne sur l'investissement', 39 *Journal du droit international* (2015) 64.

³ Lowe, 'Regulation or Epropriation', 55 *CLP* (2002) 447, at 450.

interests of different kinds.⁴ But taking an uncontroversial general description and loading it too heavily with legal or systemic significance may lead the inquiry into a bank of fog. One example of what I have in mind in relation to investment law is ‘depoliticisation’: a concept that (at its best) means everything for everybody, with little independent analytical value,⁵ but may also be significantly misleading, suggesting with persuasive force that certain positive rules have (not) been created, or that certain legal solutions would (not) fit the existing regime.⁶ Another example is ‘regulatory chill’: a perspective that takes complex inquiries about content of rules and compliance with rules and conflates them into a single question, presented from an entirely odd angle. In a similar vein, there are two reasons to be cautious about focusing on changes in treaty language to identify the (re)balancing of interests in investment law: first, it may miss or simplify important elements in international investment law; secondly, it may leave aside systemic assumptions that have to be taken into account if the balance is to be properly calibrated. I will address these concerns in turn.

A. What is Being Balanced

I would not want to overstate my first concern. I am not suggesting that there is nothing of interest to be gained from an examination of changes in investment treaty practice.⁷ But there are four qualifications, none of them particularly original or controversial, that have to be made to an argument that an examination of changes in treaty language can demonstrate changes in international law. The first qualification is a technical one. Identification of the meaning of treaty rules by reference to their textual expression may provide a glimpse of the ordinary meaning of terms, but would fall short of the full inquiry mandated by principles of treaty interpretation expressed in the Vienna Convention on the Law of Treaties: calibrating ordinary meaning by context, object and

⁴ E.g. international humanitarian law, Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *Virginia JIL* (2010) 795; O’Connell, ‘Historical Development and Legal Basis’, in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2013), at 1, 36-8, or law of the sea, *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, UNCLOS Annex VII Case, Award, 18 March 2015, at paras. 219, 309.

⁵ Paporinkis, ‘The Limits of Depoliticisation in Contemporary Investor-State Arbitration’, 3 *ESIL Proceedings* (2010) 271.

⁶ *Corn Products International, Inc. v. Mexico*, ICSID AF Case No. ARB/(AF)/04/1, Decision on Responsibility, 15 Jan. 2008, Separate Opinion of Arbitrator Lowenfeld, 18 Aug. 2009, at para. 1; *Ecuador v. US*, UNCITRAL Arbitration, Expert Opinion of Professor Reisman, 24 Apr. 2012, at paras. 24-5, 37, 54; *id.*, Expert Opinion of Professor Tomuschat, 24 Apr. 2012, at para. 32.

⁷ Alvarez, ‘The Evolving BIT’ in I.A. Laird and T.J. Weiler (eds), *Investment Treaty Arbitration and International Law* (2010), at 1.

purpose, and other available materials, particularly by the background practice from other treaties and cases that informs ordinariness or speciality of particular expressions. The second qualification is that any interpreter, whether operating in an arbitral or a less formalised setting, will have to examine a variety of different rules – on jurisdiction, admissibility, scope and content of obligations, exceptions in primary rules, and applicable secondary rules – to determine the existence of responsibility or the success of a particular claim. A rule-by-rule comparison may miss the overall systemic effect of individual changes, e.g. the knock-on effect that changes to rules on jurisdiction, admissibility, or exceptions will have on the manner of issues that substantive obligations address. The third qualification is that not all rules bearing upon the meaning of the treaty and substantive and procedural consequences of its breach will be set out in the treaty itself. Interpretation of investment treaties may require drawing upon customary law on the issue⁸ or taking into account rules of other regimes of international law like international human rights law⁹ or international health law.¹⁰ Rules of State responsibility have sometimes been attributed interpretative significance¹¹ and would, of course, apply as secondary rules.¹² Tribunals may also be capable of drawing upon uncodified inherent powers to conduct proceedings.¹³

Finally, the common woe of negotiators, namely to be misunderstood by adjudicators and legal writers,¹⁴ is particularly likely in investment law. Jurisdictional clauses are broad, adjudicators decentralised, and the application of rules to particular facts, rather than the more abstract exercise of interpretation, will often be of decisive importance in the formulation of treaty rules and their application in arbitral decisions.¹⁵

⁸ *Saluka Investments BV (Czech Republic) v. Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, at paras. 254-62.

⁹ *Rompotrol Group v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, at paras. 168-72.

¹⁰ *Philip Morris Brand Sàrl (Switzerland) and others v. Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, 17 Feb. 2015, at paras. 23-4.

¹¹ *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 Nov. 2014, at para. 316.

¹² *Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. AA 227, Final Award, 18 Jul. 2014, at paras. 1594-606, 1650-92, 1763-9.

¹³ Brown, 'Inherent Powers in International Adjudication' in C. Romano *et al.* (eds), *The Oxford Handbook of International Adjudication* (2013), at 828.

¹⁴ Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?', 65 *AJIL* (1971) 358.

¹⁵ Consolidated CETA Text (26 September 2014), available at: trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, Art. X.9(2), (4), Annex X.11(2); Draft EU-Singapore FTA (October 2014), available at: trade.ec.europa.eu/doclib/html/152844.htm, Art. 9.4(2), (5), Annex 9-A(2); *Saluka*, *supra* note 8, at paras. 266-75, 310-456, 464-96; *Rompotrol*, *supra* note 9, at paras. 270-80; *Yukos*, *supra* note 12, at paras. 1575-84; *British Caribbean Bank Limited (Turks & Caicos) v. Belize*, PCA Case No. 2010-18, Award, 19 Dec. 2014, at paras. 233-47, 279-84; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 Dec. 2014, at paras. 209-88; *Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, at paras. 446-604.

Overall, in many instances the contentious issues will turn on the usual lawyerly techniques of identification of applicable law, interpretation, solution of conflicts, and application of law to facts (more often than not, within or with an eye to formalised dispute settlement, or in response to it), which may eventually strike – or undo – the balance.¹⁶ Careful *ex ante* attention to precise textual expression of particular clauses is, of course, an important element of this exercise. But to focus on that exclusively runs the danger of missing something important, just as telling the story of the European human rights law solely by comparing the language of the European Convention of Human Rights with its Protocols would.

B. What Is Not Being Balanced

My second broader concern relates to the conceptual aspects of the perspective of balancing. The strongest version of the criticism would be that balancing is not a freestanding and normatively neutral concept, and cannot be unreflectively taken as a given and merely applied.¹⁷ The intermediate criticism would call for greater clarity for what precisely is meant by balancing.¹⁸ I will not pursue these points here and assume that it is defensible to evaluate investment law from the perspective of balancing the interests of investors and States. I will merely draw attention to two perhaps slightly less obvious aspects of investment law that could have bearing on such an inquiry.

The first relates to the scope of investment law: the all-important question of what the ‘investment’, protected by this regime of international law, is. The annulment committee in the *Caratube v. Kazakhstan* case recently noted that ‘[a] number of tribunals have reached the conclusion that the existence of an investment requires some inherent characteristics. ... it is commonly accepted that contribution and risk assumption form part of the core elements which characterize an investment’.¹⁹ Indeed, a number of

¹⁶ Mills, ‘The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration’ in Z. Douglas, J. Pauwelyn, and J. Viñuales (eds), *The Foundations of International Investment Law* (2014), at 437.

¹⁷ Cf regarding compliance, Kingsbury, ‘The Concept of Compliance as a Function of Competing Functions of International Law’, 19 *Michigan JIL* (1998) 345.

¹⁸ ‘Balancing’ may apply to interests (whether of particular disputing parties or genus of parties), rights, values, policies, interpretative materials, tensions between obligations, regimes, or systems, balancing mandated by particular primary or secondary rules, or balancing of evidence. See a recent inter-State award, in which ‘balance’ was used to describe interests underpinning particular rules, *Chagos*, *supra* note 4, at paras. 219, 309, process of interpretation, *id.*, at para. 502, application of primary obligations to particular facts, *id.*, at paras. 528, 531, 534-5, 540, and the system of dispute settlement, *id.*, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, at para. 45.

¹⁹ *Caratube International Oil Company v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, 21 Feb. 2014, at para. 235.

important awards delineate the scope of the regime so as to exclude even significant economic activities if they are of insufficient economic contribution or duration, or are subject to no other risk than purely commercial.²⁰ There may be scope for reasonable disagreement on whether this approach is reflective of *jurisprudence constante* in ICSID arbitration or investment arbitration more generally.²¹ But that disagreement is irrelevant for evaluating the EU practice, which explicitly delineates the scope of protection and consent to arbitration by incorporating the ‘characteristics of an investment’ into the *chapeau* of the definition of ‘investment’.²² Investments of insufficient duration, contribution, and risk will not be ‘investments’ that fall under the protective ambit of the EU treaties.

The second observation relates to teleology and structure. The story told by most investment treaties in their preambles weaves together three strands: importance of legal protection provided, its relationship with the flows of capital, and the overall effect on the host State’s development.²³ I would not want to overstate my point. There are differences in emphasis and formulation, and there are other strands present. Reciprocity appears explicitly through the deepening of economic relations, and implicitly through home States’ interest in the protection of their nationals. Indeed, reasonable people disagree on whether the teleology makes sense, will deliver on its promises, and is overall worth-while.²⁴ Still, the *lex lata* does seem to view the existence of protection under international law as closely interlinked with the investor’s decision to make or retain an investment. Consequently, in a structural sense, (at least parts of) investment protection treaties may be better conceived of as pledges made by host States to influence or reward investors’ decisions.²⁵ Taking these points together, investment treaties (are intended to) nudge or be nudged by particular decisions that inject investments so deeply into the legal and economic system of the host State as to necessarily subject them to significant risks going beyond the merely commercial. This dynamic has to be taken into account

²⁰ *KT Asia v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 Oct. 2013, at paras. 188-223; *Nova Scotia Incorporated (Canada) v. Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, 30 Apr. 2014, at paras. 90-7, 105-13; *Poštová Banka, AS and Istrokapital SE v. Greece*, Award, 9 Apr. 2015, at paras. 360-71.

²¹ Legum, ‘Of Definitions and Disregard: An Editorial’, 30 *ICSID Rev* (2015) 281.

²² CETA, *supra* note 15, Art. X.3; EU-Singapore FTA, *supra* note 15, Art. 9.1.

²³ Texts of the most recent treaties provided by UNCTAD illustrate my point, available at: investmentpolicyhub.unctad.org/IIA/MostRecentTreaties.

²⁴ Poulsen, Bonnitcha, and Yackee, ‘Transatlantic Investment Treaty Protection’ (12 March 2015); Baetens, ‘Transatlantic Investment Treaty Protection – A Response to Poulsen, Bonnitcha and Yackee’ (12 March 2015), available at: www.ceps.eu/publications.

²⁵ Cf. Brimlayer, ‘From ‘Contract’ to ‘Pledge’: The Structure of International Human Rights Agreements’, 77 *BYBIL* (2006) 163.

when evaluating the balance struck, and an otherwise impeccable analysis of what treaties say may miss something important if it does not.²⁶

3. Brave New Europe

In the investment treaty practice of post-2000 (investment law, as it were, *after* arbitration), States participating in the system have adopted two approaches: first, remained perfectly happy to continue in the usual manner (e.g. the traditional home States in Western Europe);²⁷ secondly, finessed sources and content of obligations, added layers of substantive and procedural exceptions, and advanced transparency (Canada and the US).²⁸ The first few months of 2015 have delivered two new approaches: India has reshaped the teleology of investment law around the right to regulate, setting out *prima facie* narrow substantive and procedural guarantees, interlinked with investors' obligations;²⁹ and Brazil has departed from the investor-State paradigm by concluding treaties that provide for inter-State dispute settlement only.³⁰ Considered against this background, does the EU practice provide an innovative and coherent contribution worthy of its own separate chapter in the story of development of investment law?

A. New Europe

Titi's highly competent discussion of the developments in the EU practice leads her to conclude that 'it is probable that we stand at the threshold of a yet newer generation of international investment treaties, and one set to change the face of international investment law as we know it'. That may very well be so, but glimpses of the aesthetically

²⁶ As Vaughan Lowe puts it, 'it makes no sense to criticize a BIT for being an unbalanced instrument favouring investors at the expense of host States, if one looks only at the provisions of the BIT. ... to criticize a BIT on the ground that it only gives rights to investors is like criticizing a screwdriver for only being useful for attaching screws', Lowe, 'Book Review of *Commentaries on Selected Model Investment Treaties / edited by Chester Brown. ISBN 978-0-10-964519-0, £180.00*', 30 *ICSID Rev* (2015) 275, at 276.

²⁷ 2003 Italy Model BIT; 2004 Netherlands Model BIT; 2006 France Model BIT; 2008 Germany Model BIT; 2008 UK Model BIT. Treaties and Model Treaties referred to in this and the following footnote are available at: investmentpolicyhub.unctad.org/IIA.

²⁸ 2004 DR-CAFTA; 2004 Canada Model BIT; 2004 US Model BIT; 2012 US Model BIT. The 2007 Norway's attempt at a Model BIT could provide a European counterpart.

²⁹ 2015 India Model BIT, available at: http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp.

³⁰ 2015 Brazil-Mozambique BIT, available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR;

2015 Brazil-Angola BIT, available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280.

enhanced future have been rather well disguised so far, and the existing practice shows a somewhat uneasy mixture of things new and old. Three examples taken from the section on substantive obligations should illustrate my point.

First, the definition of expropriation in EU treaties follows the US-Canada approach (that in its own turn borrows from a 1978 US Supreme Court judgment).³¹ Why? Would it not make more sense for the EU to search for inspiration closer to home than 1970s Washington DC? It could have drawn upon European human rights law,³² itself of an equally respectable vintage³³ and elaborated in quite a few international judgments dealing with (issues comparable to) investment protection.³⁴ Secondly, the definition of most-favoured-nation treatment in the CETA explains that substantive obligations in other treaties are not ‘treatment’, unless particular measures are adopted pursuant to them.³⁵ Why? The proposition that obligations in other treaties do constitute ‘treatment’ seems to be reflective of consensus in investment arbitration.³⁶ What is the reason for such a sharp departure from a generally accepted reading of the clause, seemingly expressed in the form of an interpretation of the ordinary meaning, rather than an exception? Thirdly, the definition of fair and equitable treatment has been supplemented by an explanation of what conduct can constitute its breach.³⁷ The idea of elaborating fair and equitable treatment in this manner is an interesting one (even if the pedigree and implications of some elements may be more obvious than others). But the effort to ensure greater predictability may be undercut by significant differences already present within the EU practice: ‘targeted discrimination’ in the CETA but not the Singapore FTA; a rule on

³¹ *Penn Central Transportation Company and others v. New York City* (1978) 438 US 104, at 123-8; 2012 US Model BIT Annex B; CETA, *supra* note 15, Annex X.11(2); EU-Singapore FTA, *supra* note 15, Annex 9-A(2).

³² Cf 2007 Norway Model BIT Art. 6.

³³ Case 44/79 *Hauer* [1979] ECR 3727, at paras. 17-30; App. Nos 7151/75 and 7152/75, *Sporrong and Lönnroth v. Sweden* ECHR Series A 52.

³⁴ See just in the Grand Chamber of the ECtHR in the last three years: App. No 54522/00, *Kotov v. Russia* [GC] Judgment 3 Apr. 2012; App. No 38433/09, *Centro Europa 7 SRL and Di Stefano v. Italy* [GC] ECHR Rep 2012; App. No 71243/01, *Vistiņš and Perepjolkins v. Latvia* [GC] ECHR Judgement 25 Oct. 2012; App. No 60642/08, *Ališić and others v. Bosnia and Herzegovina and others* [GC] ECHR Rep 2014. The US-Canada definition appears to have been applied in one case so far, *Railroad Development Corporation (RDC) v Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, at paras. 79-152.

³⁵ CETA, *supra* note 15, Art. X.7(4).

³⁶ *White Industries v. India*, UNCITRAL Case, Final Award, 30 Nov. 2011, at para. 11.2. Most States do not even raise this particular point, *MTD Equity Sdn. Bhd. and other v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, at para. 64; *Rumeli Telekom and other v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 Jul. 2008, at para. 575; *EDF International SA and others v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, at paras. 921-37; *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013, at para. 396; *Apotex Holdings Inc. and other v. US*, ICSID Case No. ARB(AF)/12/1, Award, 25 Aug. 2014, at paras. 9.66-71; *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL Case, Final Award, 15 Dec. 2014, at paras. 540-555.

³⁷ CETA, *supra* note 15, Art. X.9(2), (4); EU-Singapore FTA, *supra* note 15, Art. 9.4(2), (5).

contractual breaches in the FTA but not in the CETA; and ‘legitimate expectations’ expressed as part of the obligation in the FTA but only something to be taken into account in application in the CETA. Overall, the EU practice is not without innovative ideas, but could benefit from closer attention to both the fine print and overall consistency.

B. Brave Europe

Thinking about the EU from behind a veil of ignorance, one could imagine a number of possible innovative futures for its investment law (some of which may be more likely than others in legal, political, and policy terms). The EU could nudge investment protection law towards a ‘Uruguay moment’, centralising and institutionalising its dispute settlement, in some ways similarly to multilateral trade. At the other end of the spectrum, it could move towards (for lack of a better word) a ‘Campbellian moment’, entirely or substantially dismantling mixed adjudication to return to the traditional inter-State regime.³⁸ Or a generalist international lawyer’s perspective could be adopted, taking a step back to reflect upon the function that international law and dispute settlement could be expected to fulfil within this legal regime.³⁹ Such an examination could possibly lead to modest conclusions about the role of this manner of adjudication, suggesting instead a focus on greater involvement of Parties (e.g., internalisation of investment law in bureaucratic decision-making and inter-Party consultations, lack-of-agreement-by-Parties precondition to claims, expectation of non-disputing Parties’ submissions, and a broad approach to permissibility of inter-Party arbitration). And there are smaller tweaks that could have significant systemic importance, e.g. elaborating the meaning of particular terms or concepts in a manner that non-parties could adopt or take into account in some legally relevant form.⁴⁰ When the veil of ignorance is dropped, there is little that one could point to in the existing EU practice that could have such an impact as the US practice has had, or the recent Indian and Brazilian practice may have.

³⁸ See SADC Case 2/2007, *Mike Campbell (Ltd) and Others v. Zimbabwe* [2008] SADCT 2, which led to the dismantlement of the individual-State aspects of the SADC Tribunal, de Wet, ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’, 28 *ICSID Rev* (2013) 45.

³⁹ H. Lauterpacht, *The Function of Law in the International Community* (2011); Lowe, ‘The Function of Litigation in International Society’, 61 *ICLQ* (2012) 209; G. Hernández, *The International Court of Justice and the Judicial Function* (2014).

⁴⁰ 2015 Mauritius Convention on Transparency, available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html; Lowe, *id.*, at 216-9.

Titi is right that the EU has moved beyond the models of traditional home States of Western Europe. But the more important point may be that the *sui generis* elements of European constitutional and political order have not yet translated into qualitatively new contributions to international investment policy.⁴¹ Indeed, the lack of major surprises may be the most surprising aspect of the story so far. Whatever new faces may be lurking around the corner,⁴² the black letter of the existing EU practice is an update of the US practice of the last decade, better on some points than others – not that there’s anything wrong with that.

⁴¹ Rules on apportionment of financial responsibility between the EU and Member States may be an exception, in any event related to secondary rules of responsibility and (tertiary) rules of dispute settlement rather than primary rules of investment protection, Dimopoulos, ‘The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities’, 51 *CMLR* (2014) 1671.

⁴² European Commission, ‘Concept Paper: Investment in TTIP and beyond – the path for reform’ (5 May 2015) available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.