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European Commission Publishes Non-Paper of Model Clauses for Member States' Bilateral Investment Agreements with Third Countries

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In October 2023, the European Commission published a [Non-Paper of Annotations to Model Clauses for Negotiation or Re-negotiation of Member States' Bilateral Investment Treaties \("BITs"\) with Third Countries](#) ("Model Clauses") ("Non-Paper"). Non-papers are informal documents usually put forward in closed negotiations with EU institutions. The views in this Non-Paper do not necessarily communicate an official position. The Model Clauses may reflect a broader investment protection approach of the Commission and promote best practices for Member States, but they are not an official EU Model BIT. They are suggested for inclusion by Member States in BITs with third countries, to ensure wider compliance with EU policy.

In this post, we provide observations on the Non-Paper. The Model Clauses provide for investment protection within an EU framework. In their Preamble, they identify that where a BIT is concluded with a candidate or potential candidate State to the EU, the BIT must terminate when the (potential) candidate accedes to the EU. This is in line with the [CJEU's ruling in Achmea](#) (C-284/16), deciding that investor-State arbitration under intra-EU BITs is incompatible with EU law.

What Is Covered in Their Scope?

The definition of "*investor*" requires legal persons to engage in "*substantive business operations*" in a host State. This would exclude shell or mailbox companies and treaty shopping practices.

A 'legality requirement' is included where investments must be in accordance with a host State's laws.

The definition of "*investment*" adopts the '*Salini* criteria' of duration, commitment of capital or other resources, and the assumption of risk or expectation of gain or profit. It contains a non-exhaustive list and includes clarification (*inter alia*) that "*claims to money*" do not include claims arising purely from commercial transactions for the sale of goods or services. Orders or judgments arising from judicial or administrative actions or arbitral awards are not an investment. The Model Clauses protect investments only during the *post*-establishment phase.

On Substantive Protections

The Model Clauses address a number of current issues as explained below.

Right to Regulate and Non-Stabilisation

The Model Clauses include an Article on a host State's right to regulate for legitimate policy objectives, including public health, social services, public education, safety, the environment (including climate change), public morals, social or consumer protection, privacy, and data protection, and the promotion and protection of cultural diversity.

A 'non-stabilisation clause' is contained in paragraph 2 of the Article, which states that a BIT is not interpreted as a host State's commitment that it will not change the legal and regulatory environment which may affect an investor's expectation of profits.

National-Treatment (NT) and Most-Favoured-Nation (MFN) Treatment

The Model Clauses cover NT and MFN treatment. The Commission proposes that these standards do not apply to "public procurement" and "subsidies or grants [...] including government-supported loans, guarantees and insurance." Further, a host State is not required to extend benefits arising from double taxation treaties with third countries to investors.

MFN treatment is clarified not to extend to dispute settlement procedures contained in third country BITs, which is often discussed in cases including *Maffezini v. Spain*, where an Argentinian investor relied on a more favourable dispute settlement clause in the Chile-Spain BIT.

Fair-and-Equitable-Treatment (FET)

The Commission proposes to define a breach of FET to include denial of justice, lack of due process, arbitrariness, targeted discrimination, and abusive treatment. Investors' 'legitimate expectations' are a consideration when assessing FET in the context of the earlier-defined circumstances. Legitimate expectations require the making of specific representations to an investor to induce investment and that this representation was relied on in the making or maintaining of the investment.

Full-Protection-and-Security (FPS)

The Model Clauses clarify that FPS covers only "physical" integrity of investors and investments against interference. This seeks to distinguish other forms of protection and security (e.g., 'legal' security) and to avoid an overlap with protections under FET.

Protection Against Unlawful Expropriation

The protection against unlawful expropriation incorporates common requirements, including that expropriation must be for a public purpose, not lack in due process, be non-discriminatory, and on payment of prompt, adequate, and effective compensation ('Hull Formula').

Similar to newer Model BITs, the expropriation provision is interpreted in accordance with an Annex on Expropriation. Expropriation may be direct or indirect. The Annex also confirms that

non-discriminatory measures with a legitimate policy objective do not constitute an expropriation. They include measures for public health, social services, public education, safety, environment (including climate change), public morals, social or consumer protection privacy and data protection, and protection of cultural diversity. Only in “*rare circumstances*“, when the impact of a measure is so severe in light of its purpose or manifestly excessive, may it not be classed as such.

Observance-of-Undertakings

The Model Clauses include an ‘umbrella clause’. This clause only applies where a host State has used its sovereign powers to breach a written commitment. A host State’s exercise of powers of any ordinary commercial actor (e.g., non-payment of invoices, delay, or non-delivery of goods or services) may not constitute a breach of this Article.

Legal and Regulatory Transparency

The Model Clauses propose an Article on transparency, which requires publishing laws and regulations of general application that may affect investors. This includes measures aimed at environmental protection or labour conditions.

General-Exceptions

A general-exceptions clause is included and modelled after Article XIV of the GATS. Where a measure is not applied arbitrarily or discriminatorily, a host State may adopt measures to protect public security, human, animal or plant life or health, to prevent deception, and fraudulent practices and to protect privacy and safety of persons. The Commission notes that this provision was influenced by the [CJEU’s opinion on CETA](#), which recognised the importance of general exceptions in EU agreements and their impact on the autonomy of the EU legal order.

Denial-of-Benefits

The Model Clauses allow a host State to deny benefits under a BIT where it adopts measures to maintain international peace and security, including protection of human rights, which prohibit transactions with investors or investments or to avoid circumvention of such measures. In particular, the Commission identifies that EU sanctions may provide for restrictive measures and enable the freezing of funds and resources. The provision permits denial of benefits without prior publicity or additional formality in exercising that right – as is discussed in investor-State dispute settlement (“ISDS”) cases.

A Focus on Corporate Social Responsibility and Responsible Business Conduct

In line with EU commitments, the Model Clauses provide for sustainable development. They propose that Parties recognise the importance of investor due diligence in considering adverse impacts on the environment and labour conditions, in operations, supply chains, and other business relationships. Parties shall promote investor uptake of corporate social responsibility or responsible business practices.

There are no direct obligations on investors. The Model Clauses reaffirm a State’s endorsement and support for relevant instruments, including the [UN Global Compact](#), the [UN Guiding](#)

Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises.

Environment and Climate Change Remain Relevant

The Model Clauses also address the environment and climate change. Host States are free to determine domestic environmental protection as appropriate. The provision states that autonomy should be consistent with the State's commitments to international standards and agreements on environmental protection. Host States should not weaken levels of protection in environmental laws to encourage investment. They should not waive or derogate from environmental laws to encourage investment. Parties should implement multilateral environmental agreements that they ratified.

The Model Clauses also recognise the need to take action to combat climate change and its impacts, consistent with the [UN Framework Convention on Climate Change](#) and the purpose and goals of the [Paris Agreement](#).

Investor-State Dispute Settlement

ISDS-related provisions mentioning arbitration are also included. However, no specific venue or applicable arbitration rules are referenced. This could reflect recognition that Member States may need flexibility when negotiating ISDS under BITs with third countries which may oppose the EU's current approach to this issue.

Scope of a "Dispute"

The Model Clauses define the scope of application of the ISDS mechanism as a "*dispute*" arising from an alleged breach of investment protection standards under the BIT, which allegedly caused loss or damage to the investor or its locally established enterprise.

Multilateral Dispute Settlement Mechanism

The Model Clauses reference pursuing the establishment of a standing multilateral investment court with an appellate mechanism. They prescribe, upon entry into force between the Parties of an international agreement providing for such a court, any common rules in a BIT on ISDS by international arbitration would cease to apply. This reflects the EU's position towards investor-State arbitration. This has been the subject of on-going negotiations of the EU in the [Working Group III of UNCITRAL on ISDS Reform](#).

Applicable Law and Rules of Interpretation

The Model Clauses propose that tribunals interpret a BIT in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law as applicable between the Parties. Domestic law, which includes EU law, is excluded from the applicable law. The Model Clauses propose that tribunals have no jurisdiction over the legality of a measure under

domestic law. They clarify that tribunals should treat domestic law issues as matters of fact and follow the prevailing interpretation given to it by host State courts.

Multiple Proceedings

The Model Clauses address parallel claims. They contain an Article on multiple proceedings, aimed against double recovery. The Article requires tribunals to dismiss claims where a claim was already submitted to a domestic or international court or other tribunal concerning the same treatment as that alleged to breach the BIT. This may not apply to interim injunctive or declaratory relief.

Claims Manifestly Without Legal Merit

The Model Clauses provide for the early dismissal of claims that are manifestly without legal merit. Objections must be filed within 30 days of establishment of a tribunal or 30 days after becoming aware of the relevant facts. This is similar (save on timing) to [Article 41 of the 2022 ICSID Arbitration Rules](#).

Code of Conduct for Members of Tribunals

Finally, the Model Clauses propose provisions on “*Ethics*“, together with an Annex on the “*Code of Conduct for Members of Tribunals and Mediators*“. Codes of conduct have been included in Annex 29-B of the CETA, save for a number of exceptions. In particular, the Annex considers the independence and impartiality of arbitrators and assistants. It also contains obligations around confidentiality and disclosure and provides for rules on former tribunal members.

Conclusion

The European Commission’s Model Clauses take on a number of current discussions in international investment law. In particular, the Model Clauses seek to ensure that investment protection in BITs of Member States with third countries are consistent and harmonised with EU law and policy.

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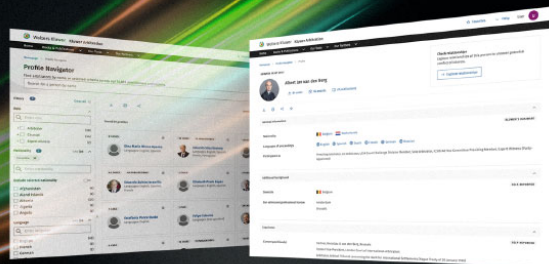
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