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The EU has recently concluded a number of ambitious Free Trade Agreements (FTAs) that inter alia include the right to make establishments. Based on the agreements concluded with Korea, Singapore and Canada, it is examined to what extent these agreements secure a free movement of companies that is comparable with the free movement of companies that has been achieved within the EU. It becomes clear that the rules on freedom of establishment in Article 49 and 54 TFEU in many respects have been the model for the rules inserted in the FTAs. Nevertheless, it is concluded that the free movement secured by the FTAs is likely to be less advanced than in EU law. This conclusion is based on a number of reasons; that the scope of establishments covered by the FTAs is likely to be interpreted more restrictively, that the rights granted to companies under the FTAs are more limited and finally that private enforcement of the FTAs will be far more difficult than is the case under EU law.

1. Introduction

The freedom of establishment in Article 49 and 54 TFEU ensures that companies formed in the EU Member States may exercise free movement within the internal market. They are granted the right to set up branches and subsidiaries, and conditionally granted the right to perform a cross-border merger and a cross-border convergence. In the last couple of years the EU has entered into a number of Free Trade Agreements (FTAs) which are more ambitious than previous FTAs and which include the right to perform establishments. This development raises the question to what extent the new FTAs guarantee the free movement of companies and more specifically to what extent this right of establishment is comparable with the freedom of establishment under Articles 49 and 54 TFEU.

The reason for the new more far-reaching FTA is that the EU with the Lisbon Treaty was granted a wider competence to enter into trade agreements with third countries.[1] As a consequence hereof, the Commission formulated a new strategy, focusing on entering into more ambitious bilateral trade agreements with strategically important trading partners – a so-called 'new generation of FTAs'.[2] The first of this new

[1] According to Article 207(1) TFEU, the common commercial policy now includes rules on 'direct foreign investments', which cover rules on establishments. For an analysis of the consequences of the treaty amendment see Nikos Lavranos, *New Developments in the Interaction between International Investment Law and EU Law*, The Law & Practice of International Courts and Tribunals 2010, pp. 409-44.

[2] See COM(2006) 567. The strategy has later been confirmed, see COM(2010) 612 and recently the speech by Commissioner Malmströms entitled: *The Commission's Future Trade Strategy*, 23 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153265.pdf.

generation of FTAs was entered into with South Korea in 2010 (EU-Korea FTA).[3] Subsequently, agreements have been concluded with inter alia Singapore (EU-Singapore FTA) and Canada (Comprehensive Trade and Economic Agreement – CETA).[4] Furthermore, other agreements are being negotiated with India, Japan and the USA. Especially the agreement with the USA – the Transatlantic Trade and Investment Partnership (TTIP) – has been the course of much debate.

This new generation of FTAs already concluded includes rules on establishment, and it is likely that such rules will also be included in the coming agreements. The agreements are not similar in all aspects, which is a logical consequence of the fact that they are negotiated bilaterally. Based on the FTAs recently concluded, and with an eye to the rules which the Commission has proposed for the TTIP,[5] it is, however, possible to outline the main elements in the rules ensuring the free movement of companies.

The relevant rules focus on establishments and investments. It differs whether these rules are found in the same chapter or in different chapters.[6] The rules on establishment and investments both apply to what would be termed 'establishments in the EU' and supplement each other. Whereas the rules on establishment focus on barriers to entry, the rules on investments focus on barriers which occur after the establishment has been made.[7] The focus of this article is on the rules ensuring the companies the right to move to other states on a permanent basis. The FTAs also include rules on the provision of services and free movement of goods, but these rights will not give the companies the right to move more permanently and will therefore not be dealt with here.

The structure for the following is that firstly it will be analyzed which companies benefit from the right to perform establishments and investments. Then it will be analyzed what constitutes an establishment

[3] The agreement is published in OJ 2011 L 127/6. For an account of the background and implications of the agreement see Der-Chin Horng, *Reshaping the EU's FTA Policy in the Globalizing Economy: The Case of the EU-Korea FTA*, Journal of World Trade 2012, pp. 301-326.

[4] The two FTAs with Canada and Singapore are available on the Commission's webpage, see http://ec.europa.eu/trade/policy/in-focus/ceta/ and http://trade.ec.europa.eu/doclib/press/index.cfm?id=961. They still need to be ratified and are thus not yet in force. The Commission has decided to request an opinion of the EU Court of Justice on the competence to sign and ratify the agreement with Singapore, and the ratification will have to wait for this opinion, see press release IP/14/1235 dated 30 October 2014. In addition to these FTAs the EU has concluded a number of association agreements and the Deep and Comprehensive Free Trade Area with Ukraine in 2014, see OJ 2014 L 161/1. These agreements are adopted as part of the Neighbourhood Policy programme and pursue a number of other purposes than trade liberalization. Because of these special features these agreements will not be included in the following comparison.

[5] The Commission has published drafts for different chapters for the TTIP on its webpages, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230. In the following there will be references to the draft chapters on 'Trade in Services, Investment and e-commerce' and this will be referred to as the 'TTIP draft'. The second draft was published at the end of July 2015. It goes without saying that the chapters are likely to undergo changes once it has been negotiated with the USA.

[6] In the EU-Korea FTA the rules on establishment are in Chapter 7, section A, whereas there are no rules on investor protection (there are, however, in Chapter 8 some rules on payments and capital movements). In the EU-Singapore FTA the rules on establishments are in Chapter 8, section C, and the rules on investor protection are in Chapter 9. In the FTA with Canada (CETA) both the rules on establishments and investor protection are found in Chapter 10 on 'Investment'.

[7] In comparison the freedom of establishment and the free movement of capital cover both barriers to entry and restrictions which occur afterwards.

or an investment (section 3), and finally the rights granted to companies performing an establishment will be examined (section 4). The latter includes not only an examination of the rights given, and exceptions hereto, but also a brief discussion of how companies may expect to exercise their rights under the much debated Investor-State Dispute Settlement (ISDS) adopted as part of some of the agreements.

So far only the agreement with Korea is in force and at the time of writing there are no awards interpreting the agreement.[8] Later it may be expected that the agreements will be interpreted by arbitration tribunals formed in accordance with the agreements. As explained in section 4.4 the agreements are not likely to have direct effect in the EU, and consequently national courts in the EU may not apply the agreements.[9] Given that national courts in EU Member States will not handle cases and that arbitration tribunals will not be allowed to submit preliminary questions under Article 267 TFEU,[10] it is unlikely that the Court of Justice of the European Union (CJEU) will be asked to interpret the agreements. Thus, even if there are similarities between EU law and the FTAs, there is no guarantee that the FTAs will be interpreted as the EU rules have been interpreted by the CJEU. It is more likely that the arbitrators will follow the interpretations given by previous arbitration awards on similar provisions in investment treaties or FTAs. If there are no such previous awards, the arbitrators are according to Article 31 of the Vienna Convention on the Law of Treaties likely to rely on interpreting the ordinary meaning of the terms of the agreement in their context and in the light of its objective and purpose.[11]

2. Which companies benefit from the FTA?

Both natural and juridical persons benefit from the FTAs. In the agreements there is a definition of what constitutes a juridical person. This covers '…any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.'[12] This very broad definition of a juridical person has many similarities with the definition of companies benefitting from the freedom of establishment according to Article 54 TFEU, which covers all companies

[8] On the developments under the agreement see the latest annual report by the Commission, COM(2015) 139.

[9] However, national courts may want to interpret national law (and EU law) consistent with the agreement and thus indirectly apply the agreements. Also, since these agreements are mixed agreement, national courts may have jurisdiction over some aspects of the agreement and can use these directly if national law allows direct effect of international agreements.

[10] On the implication of this see also Markus Burgstaller, *Investor-State Arbitration in EU International Investment Agreements with Third States*, Legal Issues of Economic Integration 2012, pp. 207-222, arguing that Article 267 should be changed to allow for such preliminary questions from tribunals formed under the EU FTAs. If tribunals were allowed to ask preliminary questions, they would be able to ask the Court about the interpretation in situations in which the FTA clearly intends to be interpreted parallel to EU law. The CJEU would be inclined to answer such request, see Case C-28/95, *A. Leur-Bloem*.

[11] On the interpretation of investment treaties see Rudolf Dolzer and Christoph Schreuer: *Principles of International Investment Law*, OUP, 2nd Edition, 2012, pp. 28-30.

[12] This definition is cited from EU-Korea FTA, Article 7.2(e). A similar definition is found in EU-Singapore FTA, Article 8.2(b) and in the TTIP draft, Chapter 1, Article 1-1(3)(b). In CETA the term 'enterprise' is used, but the definition is similar, see Chapter 10, Article X.3.

'…constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'. It is even more generous than Article 54 TFEU as it also includes legal entities that do not work for profit. Non-profit-making entities are expressly excluded from Article 54. However, on close examination there may not be a difference. For there to be an establishment under the FTAs there need to be some economic activities, see below section 3, and therefore a non-profit entity would have to have commercial activities to benefit from the agreements. Similarly, Article 54 covers entities which may not be organized for profit, but which have economic activities.[13]

To be able to benefit from an agreement the company must have a link to one of the contracting states. In the agreement with Korea and Singapore it is required that the juridical person is '…set up in accordance with the laws of one of the Member States of the European Union or of [Korea/Singapore], and having its registered office, central administration or principal place of business within the territory of [the EU or Korea/Singapore]'.[14]

Under Article 54 TFEU a company is also required to have a link to the EU in that it should be formed according to the laws of one of the Member States and have its 'registered office, central administration or principal place of business within the Union.' The wording in the FTAs with Singapore and Korea is an exact copy of the TFEU. However, there is one difference since in both FTAs there is a footnote defining the term 'central administration' as the 'head office where ultimately decision-making takes place'. The term 'central administration' in Article 54 is not defined in EU law and the CJEU has not had a chance to define it. Nevertheless, the definition given in the two FTAs does not seem to be far from how one would expect the same term in Article 54 to be interpreted.[15]

The FTAs with Korea and Singapore (and the TTIP draft) add that if a juridical person only has its registered office or central administration in the territory of one of the parties, the company shall not benefit from the FTA 'unless it engages in substantive business operations' in one of the parties. Interestingly there is a footnote attached to this according to which the EU will understand the concept 'substantive business operations' as equivalent to the concept 'effective and continuous link' which is 'enshrined in Article 54'. Article 54 does not mention this requirement, but it was decided very early by the Member States that to avoid that letterbox companies with no real link to the Community should benefit from the freedom of establishment it should be required of these companies to have an effective and contin-

[13] Thus in Case 196/87, *Steymann,* a religious community may benefit from free movement as it had commercial activities. This could indicate that a non-profit organization having commercial activities could benefit, see also Jürgen Schwartze (Hrsg.): *EU-Kommentar*, Momos, 2. Auf., 2009, pp. 685-686, but more skeptical Stefano Lombardo, *Some Reflections on Freedom of Establishment of Non-profit Entities in the European Union*, European Business Organization Law Review, 2013, pp. 225-263, as he argues that the main criterion is whether the entity is under a 'distribution constraint' and not so much the character of the entity's activity. He does, however, criticize this state of affairs (mener du ikke 'state of affairs' med 's' = situation/tilstand/forhold? Uden 's' betyder det 'statsanliggende'.) and argues that entities that perform economic activities should benefit from the freedom of establishment even if they are non-profit entities.

[14] See EU-Korea FTA, Article 7.2(f) and EU-Singapore, Article 8.2(c).

[15] See also Jürgen Schwartze (Hrsg.): *EU-Kommentar*, Momos, 2. Auf., 2009, p. 687, and Stefan Grundmann: *European Company Law*, intersentia, 2nd Edition, 2012, p. 135.

uous link to the economy of one of the Member States.[16] Even though the requirement has been accepted by the CJEU, the Court has not had the chance to interpret the requirement.[17] Therefore even though it is a part of EU law, it is hardly a well-defined concept.

The fact that the requirement of an 'effective and continuous link' originally was introduced to avoid the use of letterbox companies is interesting as it is also one of the reasons for including the requirement in the FTAs. The Commission has explained that it hopes to avoid that letterbox companies benefit from the access to the ISDS mechanism that the FTAs provide.[18] Given that there is no definition or neither 'substantive business operations' nor 'effective and continuous links' it may, however, be questioned how effective the requirement is.[19] One of the most difficult tasks in drafting rules to prevent the use of letterbox companies is to make sufficiently concise definitions.[20] It may, however, be that the risk of being denied access to the ISDS may have a preventive effect, and in this case a more 'fluffy' definition may do the job.

The definition of companies benefitting from CETA and the TTIP (according to the draft) differs slightly from the definition explained above.[21] Under these definitions it is required that the juridical person or enterprise is constituted or organized under the laws of one of the parties and has substantial business activities in the territory of that Party. Given that there is also a requirement of substantive business operation under the FTA with Singapore and Korea, see above, the only difference is that it is not required that the companies should have their registered office, central administration or principal place of business in one of the parties to the agreements. If a company is formed in the EU (or Canada/US) and has substantial business activities there, it is likely to have at least its registered office there, and therefore the omission of this requirement will hardly make a difference in practice. Another difference is that CETA does not include a footnote stating that the requirement of substantial business activities should be equivalent to 'effective and continuous link', but the Commission hopes to include such a footnote in the TTIP. Finally, it seems that under this definition the company must have substantial business activities in the state in which it is formed (or in an EU company just somewhere in the EU). This requirement of business activities is more specific as the FTAs with Korea and Singapore are satisfied as long as there are some business activities somewhere within the contracting parties, and not necessarily in the state of incorporation.

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[16] See the Council's *General Programme for the abolition of restrictions on freedom of establishment*, Title 1: Beneficiaries, OJ 1962 L 36/62. On the background to this requirement see Uwe Eyles: *Das Niederlassungsrecht der Kapitalgesellschaften in der Europäischen Gemeinschaft*, Nomos, 1990, pp. 87-90, and Eric Stein: Harmonization of European Company Law, Bobbs-Merrill, 1971, pp. 33-34.

[17] See Case C-208/00, *Überseering,* para. 75.

[18] See *Concept Paper; Investment in TTIP and beyond – the path for reform*, published by the Commission on http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[19] The effectiveness has also been questioned in the public hearing held by the Commission on the ISDS in the TTIP, see the report dated 15 January 2015, SWD(2015) 2, p. 16. The requirement of an 'effective or continuous link' is not the only way of preventing or limiting the use of letterbox companies, see the account by Fai De Swart, *The Use of Mailbox Companies in International Investment Protection*, European Company Law, 2015, pp. 19-25.

[20] See Karsten Engsig Sørensen, *The fight against letterbox companies in the internal market*, Common Market Law Review, 2015, pp. 85-118.

[21] See the TTIP draft, Chapter 1, Article 1-1(3)(c) and CETA, Chapter 10, Article X.3.

If a company has the link to the EU or to the other contracting states as required above, it does not seem to matter who is in control of or owns the company. Consequently, it does not matter that the company is owned or controlled by third country nationals.[22] There is an exception found in CETA according to which a Party may deny benefits to a company if it is owned or controlled by an investor from a non-Party state against which the denying Party has imposed measures relating to the maintenance of international peace and security.[23] It seems that even if a company is owned or controlled by persons of the state in which the company is establishing itself, the company may benefit from the FTA, e.g. if EU citizens use a Singapore company to establish themselves in the EU, they may rely on the EU-Singapore FTA.[24] Also here the FTA aligns with Article 54 as the nationality of the shareholders (and management) does not influence the company's status as a beneficiary of the freedom of establishment.[25]

The FTAs have special allowances for certain conduit companies, but the extent of this allowance differs. According to Article 7.2 of the EU-Korea FTA a company that is controlled or owned by a natural person or a juridical person from either the EU or Korea may benefit from the rules on establishment. In the agreement there is a definition of when a company is owned or controlled. That is the case when a person or company owns or is the beneficial owner of more than 50 % of the equity interest of the company. A company is controlled when a person or company has the power to name the majority of directors or otherwise legally direct its actions.[26] The latter seems to refer to the situation where company law allows for control contract, as is the case in for instance Germany. Thus disregarding where the company is formed (e.g. including a company formed in third countries) and disregarding whether it has any link to the EU or Korea, a company controlled by persons that are nationals of Korea or a EU Member State or a company formed in one of these states (and having a link to it, see above) will benefit from the rules on establishment in the EU-Korea FTA. This allows for making investments in the other party through conduit companies situated in third countries even though these companies do not have any business activities anywhere. It is not clear why this provision is inserted – and an establishment conducted through a company situated in a non-EU Member State would not benefit from the freedom of establishment in the TFEU[27] – but is does seem to make it easier to make tax planning.[28]

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[22] Where an agreement – as here – provides for incorporation as the main connecting criterion, tribunals are not inclined to look at the nationality of the owner when deciding whether a company belongs to a party, see for instance the interim award dated in PCA Case No. AA226, *Hully Enterprises Limited (Cyprus) v. Russian Federation*, paras. 411-417. See also Anil Yilmaz, *Corporate Personality in ICSID arbitration*, International Arbitration Law Review, 2012, pp. 172-185 and Rudolf Dolzer and Christoph Schreuer: *Principles of International Investment Law*, OUP, 2nd Edition, 2012, p. 48.

[23] See CETA, Chapter 10, Article X.15.

[24] There are thus cases where the tribunal has found that if there is no indication of the contrary, such companies may benefit from an agreement, see Jeswald W. Salacuse: *The Law of Investment Treaties*, OUP, 2010, pp. 189-190.

[25] See the Council's *General Programme for the abolition of restrictions on freedom of establishment*, Title 1: Beneficiaries, OJ 1962 L 36/62. If such requirements are used by the Member States, it is likely to infringe Article 49, see also Case C-211/89, *Factortame II*, para. 30. See also Case C-212/97, *Centros*, where a UK company owned by a Danish couple residing in Denmark was allowed to invoke the freedom of establishment when setting up a branch in Denmark.

[26] See Article 7.2(f).

[27] See Case C-157/05, *Holböck* and Case C-524/04, *Thin Cap.*

In the EU-Singapore FTA there is a regulation very similar to that in the EU-Korea FTA, apart from the fact that the conduit company needs to have 'substantive business operations' in either the EU or Singapore.[29] Thus conduit companies may be formed in third countries but need to have business activities in one of the parties. This raises the interesting question whether the fact that the conduit company conducts activities through a subsidiary situated in the EU or in Singapore qualifies for 'substantive business operations' or whether it needs to conduct activities on its own to qualify. In CETA there is also a provision for conduit companies as it includes an enterprise that is '…constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under a)' (e.g. by an enterprise that would itself be able to benefit from CETA).[30] For such conduit companies it is not required that they have 'substantial business activities' in the EU or Canada. It is, however, still a requirement that such companies are formed in either the EU or in Canada and are controlled by a person or company from the same party. Since it does not allow for companies formed in third countries, the potential for tax planning is much more limited.

A company as defined will not only benefit from the rights granted to establishments, but it would also enjoy the rights granted to investors in the FTAs.[31] There are several tribunals which have allowed investors who only indirectly own or control the investment to invoke the special investor protection rights.[32] These cases would thus allow for companies which have used conduit companies (even in third countries) to invoke the special investor protection rights.

With the exception of certain conduit companies as explained above, companies formed in third countries will not be able to rely on the FTAs. This is also the case under Article 54 where only companies formed in one of the Member States can rely on the freedom of establishment.[33] However, in some of the FTAs special rules are made for shipping companies.[34]

Thus in conclusion, the definition of companies benefitting from the FTAs is formulated in a manner very much resembling Article 54 TFEU. This is especially true regarding the FTA with Korea and Singapore, but in substance it is also the case as to CETA. They fact that the wording is so close to Article 54 indicates that it has been the intention of the EU to align the FTAs with Article 54. Even when different wording is used, the EU has made clear their intention to apply it the same way Article 54 is applied. The fact that the EU intends a similar interpretation does not necessarily mean that the tribunals will opt for one, since the intention of both parties should be taken into consideration when interpreting an agreement.

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[28] It may also be that the conduit company has been inserted to make it less likely that the ultimate owner has to reveal his or hers identity or to make is less likely that the ultimate owner is made liable being a result of piercing of the corporate veil.

[29] See EU-Singapore FTA, Article 8.2(c). There is also a definition of 'controlled' and 'owned' similar to that in the EU-Korea FTA.

[30] See CETA, Chapter 10, Article X.3.

[31] The special rights granted to investors are outlined below in section 4.3.

[32] On this case law see Jeswald W. Salacuse: *The Law of Investment Treaties*, OUP, 2010, pp. 184-186.

[33] Or formed under EU law, which is now possible with inter alia the SE company.

[34] See EU-Korea FTA, Article 7.2(g) and the TTIP draft, Article 1-1(3)(d). There are, however, some additional requirements for these 'foreign' shipping companies which ensure their link to the contracting parties.

3. What constitutes an establishment or investment?

In the agreements with Korea and Singapore the definition of an establishment is as follows:

'i) the constitution, acquisition or maintenance of a juridical person; or

ii) the creation or maintenance of a branch or representative office within the territory of a Party for the purpose of performing an economic activity.' [35]

The TTIP draft proposed by the Commission has a very similar definition.[36] CETA, on the other hand, does not include a definition on establishments. Instead it regulates 'investments' which also cover establishments, see below.[37]

According to the definition, the cited establishments can take the form of setting up a company, branch or representative. On the outset, this seems very similar to the definition of establishment in Article 49 since it can take the form of a subsidiary, branch or agency.

The FTAs contain a number of clarifications. The term 'juridical person' is as explained in the section above defined in the FTAs in a way that comprises most corporate forms. It does not use the term 'subsidiary' as does Article 49 TFEU. This term is used in EU law since an establishment requires the acquisition of control over a company.[38] This raises the question whether the definition of establishments covers a minority shareholding that does not convey control. By using the term to 'constitute' or 'acquire' a company it may be implied that control is necessary. However, there is a footnote attached to the definition in both the agreement with Singapore and Korea stating: 'The terms "constitution" and "acquisition" of a juridical person shall be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links.' This footnote may indicate that a controlling shareholding is not required as long as the shareholding is acquired with the intention of prolonged holding. Thus some minority shareholding may be covered, but not portfolio holdings.

In the FTA with Korea and Singapore there is a definition of 'branch of a juridical person' specifying that it is a place of business that is not having distinct legal personality, but is an extension of a parent body.[39] This corresponds to how a branch is perceived in EU law. The agreement with Korea furthermore specifies that a branch '… has the appearance of permanency, such as the extension of a parent body,

[35] EU-Korea FTA, Article 7.9(a) and EU-Singapore FTA, Article 8.8(d). In the latter agreement the following is added to the last part of the definition '…including, but not limited to, supplying services'. This addition does not seem to add anything new, but is most likely just added to make it clear that establishment is not reserved to companies providing services, such as is the case under the GATS.

[36] See the TTIP draft, Chapter 1, Article 1-1(3)(g).

[37] CETA, Chapter 10, Section 2, thus has the title: 'Establishment of Investments' and several provisions in CETA use the expression 'establishment'.

[38] See inter alia Case C-251/98, *Baars*, para. 22, and Case C-436/00, *X and Y*, para. 67. A minority shareholding would not be protected by Article 49, but may benefit from the free movement of capital in Article 63 TFEU.

[39] See EU-Korea FTA, Article 7.9(e) and EU-Singapore FTA, Article 8.8(a).

has a management and is materially equipped to negotiate business with third parties…'.[40] The term 'branch' is not defined in EU law, but the CJEU has set some minimum requirements to what constitute an establishment. In Case C-221/89 *Factortame II*, the Court held that an establishment '…involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.'[41] The minimum requirements formulated by the Court include not only a requirement of a fixed location but also a requirement of some level of staff and equipment.[42] Thus, the definition given in the EU-Korea FTA seems to be very close to the minimum requirements required under EU law.

Both for setting up companies, branches or representation offices it is a requirement that it is done for the '…purpose of performing an economic activity.' The agreements with Korea and Singapore has a definition of what constitutes 'economic activities', as it includes any activity of an economic nature except activities carried out in the exercise of governmental authority.[43] Very similar requirements are found in EU law. Thus the CJEU has made it clear that there will only be an establishment protected by Article 49 if the intention of a genuine economic activity exists.[44] Also Article 51 excludes activities which are connected, even occasionally, with the exercise of official authority. Thus again, on the face of it the FTA and EU law seem very much alike, but it is far from given that the exception for public authority and the requirement of an economic activity will be interpreted in a similar way.

In EU law, the concept of establishment has been extended by the CJEU to include many other activities than setting up subsidiaries and branches. Thus the Court has found that the fact that a company moves its real seat to another Member State is an establishment protected by Article 49.[45] The same is the case if a company is involved in a cross-border merger or a cross-border conversion.[46] According to the CJEU the right of establishment covers '…company transformation operations, [that] respond to the needs for cooperation and consolidation between companies established in different Member States.'[47] This raises the interesting question whether the FTAs allow for a similar broad interpretation of the concept of establishment.

Looking first at the transfer of real seat, it should be noted that the definition of a juridical person in the agreement with Singapore and Korea only requires that the company is formed in one of the parties to the FTA and has its registered office, central administration *or* principle place of business in the EU or Korea/Singapore. Thus the provision does not seem to require that the company has its real seat in the state in which it is incorporated, and consequently that seat could be elsewhere. However, the definition does require that the company is 'set up in accordance with the law' of either an EU Member State or Korea/Singapore. If one of the states of incorporation would require that the real seat is situated in that state, it seems that the agreement respects this – just like it is the case in the EU according to the

[40] See EU-Korea FTA, Article 7.9(e).
[41] See para. 20. This has been repeated several times including Case C-246/89, *Commission* v *United Kingdom*, para. 21; and Case C-196/04, *Cadbury Schweppes*, para. 54.
[42] Case C-196/04, *Cadbury Schweppes*, para. 67.
[43] See EU-Korea FTA, Article 7.9(c) and EU-Singapore FTA, Article 8.8(b).
[44] See Case C-196/04, *Cadbury Schweppes*, para. 66.
[45] Case 81/87, *Daily Mail*.
[46] Case C-411/03, *SEVIC System AG* and Case C-378/10, *VALE*.
[47] Case C-411/03, *SEVIC System AG*, para. 19.

judgement in Case 81/87, *Daily Mail*. If, however, the state of incorporation does allow the company to move its real seat, it raises the question whether the FTA requires that the state of establishment accepts that the company has moved its real seat. According to the CJEU this is required under EU law, but it is less clear whether the same is the case under the FTA. It depends on whether such a duty can be inferred in the rights granted under the FTAs, see below section 4.1.

As for cross-border merger and conversions it is less clear whether the definition of establishment covers these types of corporate transaction. In principle, a merger and conversion can be said to include the 'constitution' or 'acquisition' of a company, but this would be stretching the normal interpretation of these concepts. Even though the CJEU did find that there was reason for such an interpretation in EU law, it is not given that a similar expansive interpretation would be applicable to the FTAs. Therefore, most likely these types of corporate transformations are not covered.

In CETA there is no definition of an establishment and instead it is investments that are protected. In the agreement with Singapore the rules on establishment are supplemented by rules protecting investment. It is the intention of the Commission that such rules will also be inserted in the TTIP. The rules on investments intend to protect the same companies as defined above in section 2.[48] An investment is defined as '…every kind of asset which is owned, directly or indirectly or controlled, directly or indirectly by investors of one Party in the territory of the other Party, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration.'[49] This general definition is supplemented by a number of examples of different kinds of investment. For instance, the investment may take the form of an enterprise, including a branch, share, stocks and other equity participation. Thus it is clear that the term 'investment' also covers establishments. But it is a broader concept and also includes transactions that would not be covered by the freedom of establishment in the EU. For instance, all investment in shares, including minority shares would be covered.[50] But also loans and certain contractual setups such as turnkey, construction, concession and management contracts are covered.

Again, it should be considered whether this definition of investment will include free movement of companies through transfer of seat or cross-border mergers and conversion. A company that transfers its real seat would be setting up a branch and thus this transaction would seem to be covered by the definition of an investment. In CETA and the TTIP draft it is also a requirement that the company is legally formed in a Member State, and thus also in this agreement it would be possible for the state of incorporation to require that the real seat is in that state. Looking at the situation in the state to which the real seat is transferred, the definition of juridical persons benefitting from CETA (and the TTIP draft) does not give any indication of the location of the companies' registered office or central administration.

[48] In the EU-Singapore FTA the rules on investments are in Chapter 9 and here there is a definition of juridical persons which corresponds to the one found in Chapter 8 on 'Services, Establishment and Electronic commerce'.

[49] This is cited from the EU-Singapore FTA, Article 9.1, but an almost similar definition is found in CETA, Chapter 10, Article X.1.

[50] There are several cases where minority shareholders are given investor protection, see Rudolf Dolzer and Christoph Schreuer: *Principles of International Investment Law*, 2nd Edition, OUP, 2012, p. 58. It must, however, be a condition that the requirement of a 'certain duration' is fulfilled, see the definition in the main text above.

But as mentioned above, it is a requirement that the company has business activities in the state of incorporation (or for companies formed in the EU, somewhere in the EU). This may give the state of establishment the right to deny granting rights to companies that do not have any activity in the state of incorporation, but otherwise there does not seem to be anything to prevent a company from transferring its real seat. The very broad definition of investments may also cover investments in the form of a cross-border merger or conversion, but again it would most likely be stretching the wording.

4. Which rights are granted to companies?

4.1. Prohibiting discrimination

The FTAs require national treatment of establishments and investors. More specifically this requires that those companies and persons from the other party that conduct an establishment or investment must be given a treatment no less favourable than the state accords to its own like establishments and investors.[51] A less favourable treatment is given if the conditions of competition are in favour of establishments or investments of the Party compared to like establishments or investors of the other Party.[52]

A few additional guidelines for the application of the requirement of national treatment are found in the agreements. There is a footnote in the FTAs with Singapore and Korea specifying that in the case an activity is being conducted through a branch or a representative office, national treatment should be extended to the branch or office but need not be extended to other parts of the entrepreneur located outside the territory where the economic activity is being performed.[53] This specification is hardly surprising as the aim primarily is to give protection to the activities that are part of the establishment. Furthermore, some of the agreements have provisions making it clear that the contracting states may not require senior management or the board of directors to have a particular nationality.[54]

The requirement of national treatment is also a well-known part of EU law. In EU law is has been used frequently to set aside not only direct discrimination based on nationality but also covers discrimination based on other criteria but with the same effect. The FTA requirement of national discrimination may also include a prohibition on some sort of covert (or de facto) discrimination,[55] but there is no guarantee that it will be given the same extensive interpretation as in EU law.

The requirement of national treatment is likely to affect the free movement of companies, as there are many situations where the setting up of branches or subsidiaries may be subject to discrimination. It is less clear how the national treatment requirements will affect other types of free movement, such as the movement of the real seat, cross-border merger and conversions. As mentioned above, it is not

[51] See EU-Korea FTA, Article 7.12, CETA, Chapter 10, Article X.6, and EU-Singapore FTA, Articles 8.11 (for establishments) and 9.3 (for investments). Similar provisions are suggested by the Commission in its TTIP draft, Chapter II, Article 5.
[52] See EU-Singapore, Article 8.11(3) and EU-Korea, Article 7.12(3).
[53] See the footnote to EU-Singapore FTA, Article 8.8(c) and EU-Korea FTA, Article 7.9(b).
[54] See CETA, Chapter 10, Article X.8 and TTIP-draft, Chapter II. Article 2-5.
[55] See Rudolf Dolzer and Christoph Schreuer: *Principles of International Investment Law*, 2nd Edition, OUP, 2012, p. 201.

clear that the FTAs cover establishment in these forms, but given that this is the case, it is not clear to what extent the requirement of national treatment would ensure these types of free movement. Firstly, the way the requirement of national treatment is worded it is clearly focusing on the situation in the state of establishment, and will most likely not give any rights against the state from which the company origins. Thus, unlike the situation in EU law, the right to make an establishment does not include any right of exit, and therefore the state of incorporation would be free to prevent the transfer of the real seat, cross-border mergers or conversion.[56] In the state of establishment, on the other hand, discrimination is not allowed.

Looking at the situation in the state of establishment it should be considered how far the requirement of national treatment secures the free movement of companies. In the case of mergers and conversions the CJEU has held that it would be discrimination of foreign companies if cross-border mergers and conversions are not possible, when internal mergers and internal conversions between different corporate forms are possible.[57] The CJEU may have termed this discrimination,[58] but it is far from clear that a tribunal would find that the differentiation between national and cross-border corporate transformations is infringing the national treatment requirement. Furthermore, it is not clear whether the enforcement of the real seat requirement in the state of establishment is discriminatory. If the state of establishment is applying a real seat requirement for both domestic and foreign companies (for instance by applying the real seat theory as the conflict of laws rule), it depends on how one looks at the requirement. It may either be seen as a requirement that companies which perform business and have their real seat in a state need to be incorporated in that state, and thus the requirement is discriminatory. Or it may be seen as a requirement that companies – domestic and foreign – are subject to the legislation in the state in which they have their real seat, and thus the requirement may not be discriminatory. The Court was not clear in Case C-208/00, *Überseering*, since it was both referring to the first feature making it discriminatory in para. 79, and calling the requirement a restriction in para. 82.[59] But if the state to which the real seat is moved does not impose any real seat requirements on its own companies, it is obvious that imposing requirements for the position of the real seat against companies formed in a contracting state will be an infringement of the requirements of national treatment. Since in recent years more and more Member States in the EU have adopted the incorporation theory, it will be difficult for these Member States to enforce a real seat requirement. Thus when the TTIP is concluded, we may expect to see more

[56] The freedom of establishment according to Article 49, on the other hand, does prohibit some restrictions imposed by the Member State of origin, see Case 81/87, *Daily Mail*. The same case, however, established that the Member State in which a company is incorporated may impose restrictions on a company's ability to transfer its real seat out of that state, due to the fact that companies are creatures of national law.

[57] See Case C-411/03, *SEVIC System AG*, paras 22-23, and Case C-378/10, *VALE*, para. 36.

[58] Actually, the Court is not clear since it points out that the different treatment of cross-border and domestic transactions amounts to a 'restriction', see the paragraphs referred to in the previous footnote.

[59] Before the Case 81/87, *Daily Mail*, was decided there was a similar debate whether the real seat theory was discriminatory, as the freedom of establishment at that time was primarily a ban on discrimination (this was before the *Gebhard* case expanded the freedom).

Delaware corporation used for doing business in the EU – and we may experience a real Delaware effect![60]

In the agreement with Korea and in CETA there are also rules on Most Favoured Nation Treatment (MFN treatment).[61] MFN treatment is normally much less important than national treatment. If you receive national treatment, you are likely to get the best treatment possible, as it is only seldom that investors from third states are given a better treatment than domestic investors. This is also the reason why MFN treatment has played a very limited role in the EU.[62] The requirement of MFN treatment is not likely to play a larger role for the free movement of companies. In the unlikely event that the EU or one of the other contracting states grants companies in third states the right to perform cross-border merger, conversions or similar transactions, this right will also have to be extended to the parties to the FTAs where MNF treatment is granted.[63]

4.2. Beyond discrimination

With the judgment in Case C-55/94, *Gebhard*, the CJEU made it clear that the freedom of establishment also prohibits certain non-discriminatory restrictions to free movement. This broader prohibition has proven very important in the EU.[64] In the FTAs, however, only few inroads beyond discrimination are made.

First, there are provisions on market access.[65] Despite the promising title these provisions only cover some very specific barriers to access such as limitations on the number of establishment, or the requirement of an economic needs test to do establishments, and a maximum percentage limit on foreign shareholding in companies. Additionally, measures that require the use of specific types of legal entity or joint ventures are prohibited. The same is the case for limitation on the number of persons that may be employed in the establishment. This provision refers to the number of locally employed persons as the FTA does not secure the right to bring your own employees to the establishment. In the agreement with Korea and Singapore there are some provisions that allow for the temporary placement of key per-

[60] The Delaware effect as the consequence of regulatory competition has been discussed intensively in the EU, but more as a phenomenon inspired by the US and never as a scenario where the state of Delaware actually becomes the preferred place of incorporation for EU business.
[61] See EU-Korea FTA, Article 7.14 and CETA, Chapter 10, Article X.7.
[62] One of the few cases addressing the issue of MFN treatment is Case C-376/03, *D.* v *Inspecteur van de Belastingdienst*. See also Karsten Engsig Sørensen, *The Most-Favoured-Nation Principle in the EU*, Legal Issues of Economic Integration 2007, pp. 315-347.
[63] An area where the requirement for MFN treatment could have impact is when FTAs grant investors the right to start arbitration against the state, e.g. ISDS, see below. The rules on ISDS are, however, expressly excepted from the rules on MFN treatment, see footnote 21 to EU-Korea FTA, Article 7.14 and CETA, Article X.7(4).
[64] For an account of how the ban on restriction has been used by the CJEU see for instance Catherine Barnard: The Substantive Law of the EU, OUP, 4th Edition, 2013, pp. 309-311.
[65] See EU-Korea FTA, Article 7.11, CETA, Chapter 10, Article X.4, and EU-Singapore FTA, Article 8.10. A similar provision is proposed in the TTIP draft, Chapter II, Article 2-2.

sonal and trainee, but apart from that the free movement of persons is not protected.[66] Thus it is clear that the FTAs are very reluctant to allow for free movement of persons, which is true for most free trade agreements including the WTO agreements.[67] These provisions are important but by their nature limited to the specific form of regulated barriers. A similar list of prohibited market access barriers exists in the Service Directive (Directive 2006/123/EC), Articles 14-15.

Second, in CETA there is a provision on 'Performance Requirements' that prohibits certain requirements relating to how the activities of the establishment are performed, for instance requirements to use local products or requirements to export a given percentage of goods produced.[68] It is debatable to what extend these rules go beyond discrimination.

Third, in the chapter on investment protection there are provisions that indicate a protection beyond discrimination. Given that these concern investments, the focus is on restrictions which occur after the establishment/investment has been made. As mentioned, such rules are part of CETA and the EU-Singapore FTA (and most likely the coming TTIP)[69] but not the EU-Korea FTA. The main feature of the regulation in the two existing agreements is rules ensuring 'fair and equitable treatment and full protection and security', rules on expropriation and capital transfer: [70]

- The requirement of 'fair and equitable treatment and full protection and security' covers two standards of protection. This latter requirement of 'full protection and security' refers to the duty to ensure that investors are not harmed physically.[71] The requirement of 'fair and equitable treatment' does potentially secure investors a more far-reaching protection. The requirement is well-known from Investment Treaties, and has been invoked in many cases.[72] That, however, does not mean that it is a well-established standard, and in theory it

[66] See EU-Korea FTA, Article 7.18, and EU-Singapore FTA, Article 8.14. Similar provisions are proposed in the TTIP draft, Chapter IV.

[67] See for instance the overview of areas covered in EU and US FTA in Henrik Horn, Petros C. Mavroidis and André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, The World Economy 2010, pp. 1565-1588.

[68] CETA, Chapter 10, Article X.5. Provisions on 'Performance requirements' are usual for agreements entered into by Canada and the USA, see M. Sornarajah: *The International Law of Foreign Investment*, CAP, 2010, pp. 205-206. Therefore, it is likely that there will be such a provision in the final text of the TTIP, and so far the Commission seems to have accepted this as it is part of their latest draft, see Chapter II, Articles 2-6.

[69] Rules on investor protection was thus proposed by the Commission in their first draft for a chapter on investment. In the revised draft published 31 July 2015 however the Commission have left out the rules on investor protection. There is still however a heading for the topic and the comment: "In view of the on-going reflection on investment protection, the EU proposal does not include provisions in this area, but only a placeholder." The reason for this change will be clear from the discussion in section 4.4 below.

[70] Additionally, in both agreements there are rules on 'Compensation of Losses' dealing with losses due to war, revolution, etc., see CETA, Chapter 10, Article X.10, and EU-Singapore FTA, Article 9.5.

[71] There has been awards where the provision was interpreted as covering certain non-physical violations of investors, see M. Sornarajah: *The International Law of Foreign Investment*, CAP, 2010, pp. 359-60, and Jeswald W. Salacuse: *The Law of Investment Treaties*, OUP, 2010, pp. 210-217. To avoid such an expansive interpretation a footnote to CETA, Chapter 10, Article X.9(1) and EU-Singapore FTA, Article 9.4(4) clarifies that this provision '…refers to the Party's obligations relating to physical security…'.

[72] Jf. Jeswald W. Salacuse: The Law of Investment Treaties, OUP, 2010, s. 218.

is disputed how broad a protection the provision provides.[73] Some guidelines to its interpretation are given in the FTAs: According to the EU-Singapore FTA, Article 9.4(2), to comply with the requirement of 'fair and equitable treatment' a Party may not adopt measures that constitute: '(a) Denial of justice in criminal, civil and administrative proceedings; (b) A fundamental breach of due process; (c) Manifestly arbitrary conduct; (d) Harassment, coercion, abuse of power or similar bad faith conduct; or (e) A breach of the legitimate expectation of an investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the investor'. An almost similarly worded provision is found in CETA.[74]

- The agreement also has a protection against direct or indirect expropriation.[75] If there is an expropriation, it is required that these should serve a 'public purpose' and furthermore should be conducted under 'due process of law' and in a non-discriminatory manner. Finally, it is required that there should be the payment of '…prompt, adequate and effective compensation'. One of the trickiest issues here is what constitutes indirect expropriation, and to clarify this annexes have been added to the agreements.[76] It is here specified that indirect expropriation occurs where a measure or series of measures have an effect equivalent to direct expropriation, meaning that it substantially deprives the investor of the fundamental attributes of property, including the right to use, enjoy and dispose of it. The assessment of whether this is the case should take into account the economic impact of the measure, the reasonable expectation the investor may have and the character of the measure, including its objective.[77] Finally, it is made clear that measures designed to protect legitimate public welfare objectives such as health, environment etc. are only expropriation when they appear manifestly excessive or discriminatory. This last addition seems to be included in an attempt to ensure that the rules on indirect expropriation are not too broadly applied.[78]
- Lastly, both agreements have rules on payment and capital transfers related to the investment. This may be transfer of contributions of capital to the investment, or transfer from the investment such as transfer of dividends, interest, proceeds from sale etc. The provisions prohibit any restrictions (or delays) on such transfers, but make reservation for equitable and non-discriminatory restrictions in laws relating to *inter alia* bankruptcy, dealing in securities, criminal offences etc.[79]

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[73] See Jeswald W. Salacuse: The Law of Investment Treaties, OUP, 2010, pp. 222-228, and Katia Yannaca-Small in August Reinisch (ed.): *Standards of Investor Protection*, OUP, 2008, pp. 111-130.

[74] See CETA, Chapter 10, Article X.9(2) and (4).

[75] CETA, Chapter 10, Article X.11, and EU-Singapore FTA, Article 9.6. Similar provision is suggested in the TTIP draft, Article 14.

[76] See CETA, Annex X.11 and EU-Singapore FTA. Annex 9-A.

[77] The annexes are slightly differently phrased. In CETA it is also spelled out that regard should be had to the duration of the measure. In the EU-Singapore FTA there are some additional remarks about expropriation of land and restriction to intellectual property rights, see Annexes 9-B and 9-C.

[78] See Commission's *Concept Paper: Investment in TTIP and beyond – the path for reform*, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[79] CETA, Chapter 10, Article X, and EU-Singapore FTA, Article 9.7. There are also rules on capital transfer in the EU-Korea FTA.

These rights granted to investors are difficult to compare to the review of non-discriminatory restrictions which take place under EU law. The most obvious comparison with EU law is the rights related to capital transfers as a very similar protection is granted to transfers under the freedom of establishment and/or the free movement of capital under Article 63 TFEU. In EU law there is also a protection against expropriation in Article 17 of the Charter. The requirement of 'fair and equitable treatment and full protection and security' may in part overlap with the protection given under Article 49 TFEU, but the restrictions which are normally tested under Article 49 TFEU seldom have to do with denial of justice or any other abuse on the part of a Member State. Also, if a Member State fails to give physical protection that may infringe the free movement rights, but this is only the issue in few cases.[80] Therefore it is very difficult to compare the two setups.

In the EU, harmonization has played an important role to ensure free movement of companies. Such harmonisation cannot be expected as a consequence of the new FTAs. In the agreements with Korea and Canada there are the expression of an intention of reviewing the legal framework for investment, but this intention seems rather vague and non-binding.[81] The Commission plans to aim for a more committing agreement with the USA on regulatory cooperation, but this will hardly end with a programme for harmonizing company law issues.[82]

4.3. Exceptions

There are a number of exceptions to the rules protecting establishments and investments. First, some sectors are excluded, including the weapon industry, audiovisual services and certain transport services.[83] Also financial services are subject to special rules in the agreements. It is noteworthy that the FTAs do not rely on positive commitments from the parties before the right of establishment is granted to a specific sector. This was the system used in older FTAs and in the GATS and it often resulted in a very slow evolvement of the right of establishment.

There are a number of general exceptions due to general societal concern such as public health, public security etc.[84] Additionally, there is an exception for taxation which may have an important impact on

[80] See Case C-265/95, *Commission v France,* where France failed to protect the free movement of imported goods from physical harm.
[81] See EU-Korea FTA, Article 7.16, and CETA, Chapter 26.
[82] Most likely the regulatory cooporation will focus on liberalizing trade in goods and services. See the document entitled: *Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation*, 6 May 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf and Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, Journal of International Economic Law, 2015, pp. 1-16.
[83] See EU-Korea FTA, Article 7.10, CETA, Chapter 10, Article. X.1, and EU-Singapore FTA, Article 8.9.
[84] See EU-Korea FTA, Article 7.50 and Articles 15.8-5.9, CETA, Chapter 32, Articles X.02-X.05, and EU-Singapore FTA, Article 8.62 and Articles 17.9-17-10.

the free movement of companies.[85] It specifies, *inter alia*, that the agreement shall not be construed to prevent the Parties from distinguishing in their tax legislation between taxpayers who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested. Furthermore, it is specified that the agreements shall not prevent the adoption of any measure aimed at preventing the avoidance or evasion of taxes. Given the huge number of cases where the CJEU has set aside Member States' tax rules, this exception may potentially be very important. In the EU a very similar exception for taxation is found in TFEU Article 65, but the CJEU has limited the application of the exception through a very narrow interpretation.[86] It seems less likely that the exception in the FTAs will be given a similar narrow interpretation.

Apart from these general exceptions there are annexes to the agreements listing more specific reservations. In these annexes there are some reservations taken by the EU on behalf of all Member States in addition to the reservations taken by each Member State individually. The reservations are very different in nature, but several of these have to do with special requirements for setting up branches.[87]

4.4. Enforcement

FTAs normally allow for enforcement via State-to-State arbitration, but may not necessarily allow private parties to enforce the agreements. In recent years, the Commission has tried to limit the direct effect of the FTAs that they enter into, and consequently individuals and companies may not be able to enforce the FTAs through the courts of the Member States.[88] This is also the case with CETA and the EU-Singapore FTA.[89]

Nevertheless, the FTA with Singapore and Canada does allow for private enforcement through the Investor-State Dispute Settlement (ISDS). These agreements allow some of the special investor protection rights outlined above to be enforced through the ISDS. This possibility has proven to be one of the most controversial elements of the new FTAs, since there is a fear that this opportunity for private enforcement may be misused. Most recently, the debate has focused on the inclusion of the ISDS in the TTIP. It is not possible here to go into detail with all elements of this dispute settlement system, nor its implications, and only a few features of this discussion will be mentioned.

[85] See EU-Korea FTA, Article 15.7, CETA, Chapter 32, Article X.06, and EU-Singapore FTA, Article 17.6.
[86] See Case C-35/98, *Verkooijen.*
[87] In the EU there is only a full harmonization of the rules applicable to branches of companies from other Member States, and consequently, Member States may impose additional requirements for branches of companies from third countries, see the Eleventh Company Law Directive (Directive 89/666/EEC).
[88] See Aliki Semertzi, *The Preclusion of Direct Effect in the recently concluded EU Free Trade Agreements*, Common Market Law Review 2014, pp. 1125-1158. It remains to be seen how the CJEU will react to these attempts to limit the direct effect of the agreements.
[89] In both CETA, Chapter 33, Article 14.16, and EU-Singapore FTA, Article 17.15, there is a general reservation that the agreement does not have direct effect. Normally, there will also be a reservation in the Council's decision to ratify the agreement, but as yet such a decision has not been adopted as the ratification is still pending.

It has been discussed whether it is necessary to have this kind of investor protection in an agreement between states such as the EU and the USA. Originally, ISDS rules were developed to ensure a possibility to enforce agreements against states without a reliable judicial system, and this is hardly the case with the EU and the USA.[90] The Commission, however, maintains that ISDS rules even in an EU-US context will make investments more attractive. This has, however, been questioned.[91] Another argument for including ISDS rules in the agreement is that this may work as a model for other FTAs where ISDS is needed to ensure an appropriate investor protection.[92]

Another point of criticism raised is that ISDS may unduly favour foreign investors over domestic investors. Whereas both groups of investors may use the domestic courts and laws in the state of establishment to protect their investment, it is only foreign investors who are given the possibility to enforce the special investor protection rights in the FTAs through arbitration.[93] This kind of imbalance is also present in EU law where a cross-border element is required to invoke the free movement rights. However, in relation to the FTAs the imbalance may be even greater as it may allow shareholders to collect compensation for harm done to the local company without that compensation benefitting others who may have claims on the local company. The right to start arbitration is normally granted to the foreign investor, and not necessarily to the local company that is the result of an establishment. The agreements may make allowances for treating such a local company as a foreign investor.[94] Looking at the FTA with Singapore and CETA they, however, do not seem to allow the local company to start proceedings. Instead, it is made clear that an investor may make claims on behalf of the company he or she owns or controls.[95] What is not clear is whether compensation given will be paid to the investor or to the local company. Only in the latter case will the compensation benefit all creditors in the local company. Cases on investor protection in other investment treaties show that tribunals may not always make a clear distinction between claims of the company and of the investors and as a consequence, a wide range of problems may occur.[96]

[90] As the agreement is not likely to have direct effect in the EU private enforcement through the national courts of the EU, Member States would have to rely on national law or EU law.

[91] Many of those responding to the public consultation about including ISDS in the TTIP felt that ISDS was unnecessary, see the Commission's report on the results of the consultation SWD(2015) 3, p. 14. A similar position was taken by the European Economic and Social Committee, see the opinion on *Investor protection and investor to state dispute settlement in EU trade and investment agreement with third countries*, 19 May 2015, REX/411, paras 1.15 and 5.8.

[92] See also Reinhard Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, Journal of World Trade 2015, pp. 199-210, arguing that the USA and the EU should 'lead by example'.

[93] See Gus Van Harten, *A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA*, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595189.

[94] See Rudolf Dolzer and Christoph Schreuer: *Principles of International Investment Law*, 2nd Edition, OUP, 2012, pp. 50-52.

[95] See EU-Singapore FTA, Article 9.14(2)(b) and CETA, Chapter 33, Article X.18.

[96] For an account of these problems see David Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency*, OECD Working Papers on International Investment, No. 2013/3, the same author, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/2 and Eda Cosar Demirkol, *Admissibility of Claims for*

The point which has raised by far the most criticism is that the possibility of investors suing states may prevent the latter from enacting legislation. In the debate opponents of the ISDS have often referred to different cases where companies have sued states because they felt that new legislation infringed their rights as investors.[97] A key point seems to be that the requirement of 'fair and equitable treatment' and the protection against indirect expropriation may be given an expansive interpretation by the tribunals which may restrict states' ability to regulate.[98] The Commission has tried to counter this criticism by taking several different measures.[99] *First*, in the agreement with Singapore and in CETA there has been an attempt to make the investor protection more concise, and at the same time make it clear that they do not hamper the regulatory power of the Parties.[100] However, not everyone is convinced that this suffices to ensure the necessary freedom to regulate. At the same time the business community is starting to fear that the investor protection becomes too weak.[101] *Second*, the Commission proposes measures to prevent abusive practices. Thus according to the Commission, the new FTAs prevent that investors may use letterbox companies set up in one of the contracting states for the purpose of benefitting from the agreements. As discussed in section 2 this is done by inserting the requirement of an 'effective and continuous link' to the economy of one of the parties to the agreement. Whether this is effective is debatable. Next in CETA a provision has been introduced which denies the right to arbitrate when the investment is 'made through fraudulent representation, concealment, corruption, or conduct amounting to an abuse of process'.[102] *Third*, the Commission makes suggestions to how tribunals are established and proposed the introduction of an appeal body. But the criticism continues, and lately both the European Economic and Social Committee and the European Parliament have called for an alternative to ISDS in the TTIP.[103] In the draft for a TTIP-chapter on investment published at the end July 2015 – and thus after the call for an alternative - the Commission has left out the rules on investment protection "in view of the on-going reflection on investment protection". Thus, it seems that the Commission is taking stock and is considering alternatives.

Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration, ICSID Review 2015, pp. 391-413.

[97] See for further details Gus Van Harten, *A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA*, available at SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595189, Marika Armanovica and Roberto Bendini, *Civil society's concerns about the Transatlantic Trade and Investment Partnership*, report prepared for DG Expo dated October 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516037.

[98] See the concern expressed in the consultation conducted by the Commission SWD(2015) 3, pp. 17-18.

[99] See the Commission's *Concept Paper: Investment in TTIP and beyond – the path for reform*, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[100] See the Commission's *Concept Paper*, note above, p. 6.

[101] See the result of the Commissions consultation, SWD(2015) 3, p. 15.

[102] See CETA, Chapter 10, Article X.17(2).

[103] The Opinion of the European Economic and Social Committee, REX/411 dated 19 May 2015, para. 1.18, and the Parliament's Resolution dated 8 July 2015 (2014/2228(INI)), para. (d)(XV).

5. Concluding remarks

The new FTAs concluded by the EU allow for the free movement of companies to a higher degree than what has previously been seen. The regulation of establishment and investments in the new FTAs in several respects mirrors the rules on establishment found in Article 49 and 54 TFEU. Nevertheless, the rules will hardly be able to secure the same amount of free movement rights as companies have in the EU. *First*, it seems unlikely that the tribunals that ultimately will interpret the agreement will interpret the freedom of establishment in the same way as done by the CJEU to include cross-border mergers and conversions. *Second*, the rights granted under the agreements are more limited than those granted under EU law, as the requirement of national treatment may be expected to be interpreted more restrictive than the prohibition of discrimination in the EU, and there is no general test for restrictions. Also, there are more exceptions – both general and specific – in the FTAs and they may be expected to be given a wider impact than exceptions are given in EU law. *Third*, the agreements will not have direct effect, and even though we do not know the final fate of ISDS in the TTIP, it is clear that private enforcement will be more difficult under the FTAs than in EU law.