

Annex 1: Legal analysis of CETA's Investment Court System (ICS)

Currently Canada has 7 Bilateral Investment Treaties (BITs) with EU Member States: Croatia; Czech Republic; Hungary; Latvia; Poland; Romania; Slovakia¹. To date four cases have been brought forward each in different countries - Romania, Slovakia, Czech Republic and Croatia. In two cases, Czech Republic and Croatia, the courts found in favour of the state in issues related to breaches of shareholder agreement and alleged mistreatment of investment in a joint venture. Both the Slovakian and Romanian case are pending decision and are linked to permit approval for mining rights².

Topic	Summary of provisions	Analysis
Chapter EIGHT - Investment		
Section A - Definition and scope		
Article 8.1 - Definitions No revisions made in the Article	<ul style="list-style-type: none"> ● Section sets out the legal binding definition of key words and concepts used in the chapter. 	<ul style="list-style-type: none"> ● Limits suits by 'shell-companies', it does not prohibit corporate restructuring for the benefit of bringing an investment claim.
Section B - Establishment of investments		
Article 8.4 - Market Access No revisions made in the Article	Point a) of this article contains prohibitions regarding imposing several limitations, eg on (i) establishment of an investor of the other	<ul style="list-style-type: none"> ● Extensive market access commitments. ● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual

¹ UNCATD Investment Policy Hub. Canada. (Visited 08/06/2016) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/35>

² UNCATD Investment Policy Hub. Investment Dispute Settlement Navigator Canada. (Visited 08/06/2016) <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=1>

	<p>party, such as limiting the number of enterprises that may carry out a specific economic activity and</p> <p>(ii) a numerical quota or economic needs test.</p> <p>Point b) prohibits requirements on incorporation such as a specific type of legal entity or joint venture.</p> <p>Next, this article lists exceptions to the abovementioned prohibitions. Exceptions include:</p> <p>a) zoning and land use regulations, and</p> <p>d) the imposition of a moratorium or ban to ensure the conservation of natural resources and the environment.</p>	<p>Member States' reservations.</p>
<p>Article 8.5 - Performance requirements</p> <p>No revisions made in the Article</p>	<ul style="list-style-type: none"> Prohibits the imposition of performance requirement on investors, such as to export a given percentage of their production or to transfer technologies. Prohibition relates to establishment (para.1) or receipt of subsidies or other advantage (para.2). The following paras. list exceptions. 	<ul style="list-style-type: none"> Performance requirements are already prohibited by the WTO's TRIMS agreement. Art. 8.5(1)(a)-(e) are following the TRIMS. However, (f) and (g) are going beyond TRIMS, which is more restrictive than necessary. Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States' reservations.
<p>Section C - Non-discrimination treatment</p>		
<p>Article 8.6 - National Treatment</p>	<ul style="list-style-type: none"> Obligations to provide National 	<ul style="list-style-type: none"> Needs to be read in conjunction with Annexes I

<p>No revisions made in the Article</p>	<p>Treatment (NT)</p> <ul style="list-style-type: none"> ● Prohibition to market access and relative establishment rights incorporation ● Host has obligation to prospective investors before investment is made. 	<p>and II of the CETA Agreement to check individual Member States’ reservations.</p> <ul style="list-style-type: none"> ● Provisions limit the ability of host state to regulate investment pro entry stage. ● As such investors with poor environmental, consumer protection, labour rights or public health records could not be blocked.
<p>Article 8.7 - Most-favoured-nation treatment</p> <p>Limited revisions made in the Article</p>	<ul style="list-style-type: none"> ● Obligations to provide Most-favoured-nation treatment (MFN) ● Prohibition to market access and relative establishment rights incorporation ● Host have obligation to prospective investors before investment is made - limits ability to regulate at pre-entry stage. 	<ul style="list-style-type: none"> ● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States’ reservations.
<p>Article 8.8 - Senior management and boards of directors</p> <p>No revisions made in the Article</p>	<ul style="list-style-type: none"> ● Prohibition to impose nationality requirements on senior management and boards of directors. 	<ul style="list-style-type: none"> ● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States’ reservations.
<p>Section D - Investment protection</p>		
<p>Article 8.9 - Investment and regulatory measures</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> ● Reaffirmation of the right to regulate to achieve legitimate public policy objectives (such as public health, safety, the environment, public morals, social or consumer protection or cultural diversity). ● Clarification that regulations in the public 	<ul style="list-style-type: none"> ● The article is a novum in international investment law and its inclusion is to be welcomed. It should be borne in mind that the parties, by their definition as sovereign entities, possess the right to regulate. The inclusion of such an article is therefore to clarify the balance between sovereignty and the

	<p>interest that negatively affect an investment or expectations of profits are not a breach. Further paragraphs clarify the relation of subsidies with this chapter.</p>	<p>duty to compensate for some infringements and to lessen the scope for these infringements. In contrast to Art. 2.1 in the TTIP proposal, this article contains no necessity test (a need for a regulation to be necessary to protect . . .), which is commendable.</p> <ul style="list-style-type: none"> • However, it must be noted that this clause does not secure the right to regulate as wordings designed to exclude public interest measures from the scope of investment protection do not necessarily prevent investors from suing and arbitrators are not likely to discard a case due to such an exception clause. • A carve-out to protect public policy measures could be formulated as follows: <i>"Any measure or action undertaken by a Party that aims or has the effect of contributing to a public interest, such as environmental protection including measures or actions combating climate change, social protection, consumer protection, and public health protection, does not constitute a breach of the provisions of this Chapter."</i>
<p>Article 8.10 - Treatment of investors and covered investment</p> <p>Limited revisions made in the Article</p>	<ul style="list-style-type: none"> • Defines the standard of and accords fair and equitable treatment (FET) to investors and investments. • Contains a list of what would constitute a breach of FET ((2)(a)-(f)) and a review mechanism (3). 	<ul style="list-style-type: none"> • Hybrid approach to establish breach of FET - there is a list of behaviours constituting a breach of FET which is complemented with a flexibility mechanism allowing parties to discuss FET obligations. • Known as the 'catch-all' provision that in the past

	<ul style="list-style-type: none"> • Adds criterion about frustration of an investor's legitimate expectation (4) and clarifications concerning breaches of provisions in the CETA agreement (6) or domestic law (7). 	<p>has been most used by investors when launching cases and has been interpreted in an inconsistent and far-reaching manner.</p> <ul style="list-style-type: none"> • Article 8.10 seeks to address this problem by listing the type of conduct that constitutes a breach of 'fair and equitable treatment'. • Article 8.10, however, falls short of a real improvement for three reasons.: <ul style="list-style-type: none"> - Firstly, the text does not make explicit that the list is exhaustive, for instance by adding the word 'only' (thus stating 'A Party only breaches the obligation'). The CETA Joint Committee on a proposal by the Committee on Services and Investment, may, moreover, decide to expand the scope of the standard (see for a criticism on the powers of the CETA Joint Committee point 12 and 8). - Secondly, the list of measures constituting a breach of fair and equitable treatment merely codify already existing practice under investment law, and do not constitute a significant limitation of the standard. - Thirdly, article 8.10 actually codifies frustration of legitimate expectations of an investor as a breach of the standard. As one of the most far reaching interpretations of fair and equitable treatment, codifying legitimate expectations is not a limitation of the standard, but an expansion of it.
<p>Article 8.12 - Expropriation Limited revisions made in the</p>	<ul style="list-style-type: none"> • Prohibits a party from directly or indirectly nationalising and covered investment and lists the circumstances and conditions 	<ul style="list-style-type: none"> • The article is a copy of the TTIP ICS Article 5 text and can also be found in other existing Bilateral Investment Agreements (BITs).

Article	<p>under which it may do so ((1)(a)-(d)). Limits the compensation to be paid to the fair market value (2) plus interest (3).</p> <ul style="list-style-type: none"> • Accords a right to review to an investor (4) and clarifies issues related to intellectual property. • Annex 8-A provides definitions of direct or indirect expropriation and further clarifications. 	<ul style="list-style-type: none"> • The article and annex are modest improvement and provide increased legal certainty. In its determination of an indirect expropriation, a tribunal is required to carry out a case-by-case and fact-based inquiry (Annex 8-A (2)). • While the definition of indirect expropriation offers a shield against some investor challenges of regulatory measures, the carve-out only applies to non-discriminatory measures that protect 'legitimate' public welfare objectives and to measures that do not 'appear manifestly excessive'. Clearly more preferable language would be to exempt all measures that aim or contribute to the public interest, such as environmental, social, health, or consumer protection. As such both the CETA and TTIP ICS fail to sufficiently ensure coherence between trade and the values of EU trade policy including public health, environmental and consumer rights. • The calculation of compensation should also take into account if the investment is considered to have potentially negative economic and societal costs from the date of requisitioning or destruction until the date of actual payment.
Section E - Reservation and exceptions		
Article 8.15 - Reservations and exceptions		<ul style="list-style-type: none"> • Selected substantive commitments do not apply to those existing non-conforming measures that are

<p>No revisions made in the Article</p>		<p>listed in the schedules.</p> <ul style="list-style-type: none"> • State are not allowed to maintain pre-existing laws, regulations and other measures that are not in conformity with the commitments in the investment chapter unless stated in the schedule.
<p>Section F - Resolution of investment disputes between investors and states</p>		
<p>Article 8.22 - Procedural and other requirements for the submission of a claim to the Tribunal</p> <p>Limited revisions made in the Article</p>	<ul style="list-style-type: none"> • Lists the conditions which an investor needs to fulfill to file a claim ((1)-(3)) and that could constitute reasons for the tribunal to refuse jurisdiction (4). Most notably withdrawal of other proceedings and waiver to initiate proceedings over the same matter in other fora (“no u-turn”). • Covers what happens if requirements or other procedural or jurisdictional elements are not fulfilled. 	<ul style="list-style-type: none"> • After renegotiation under the disguise of ‘legal scrubbing’: investor no longer required to prove that an award/judgment/decision was rendered by another forum (court or tribunal under domestic law or BIT). • What remains is a requirement to withdraw existing procedures in a domestic court or under a BIT (1(f)) and to waive the right to initiate a claim in these fora with respect to the same measure (1(g)). The main improvement in relation to the previous CETA text is that this fork-in-the-road clause is not limited to claims for damages, but applies to all actions in courts concerning the same measure. • However, the waiver in (1)(g) expires if the tribunal does not accept the claim based on list of conditions or any other procedural or jurisdictional grounds (5(a)) or if it dismisses the claim as manifestly without legal merit (Art. 8.32) or unfounded as a matter of law (Art. 8.33). The investor could thus go back to national courts or

		<p>use a BIT.</p> <ul style="list-style-type: none"> • Moreover, the respondent (Canada or the EU) has to request that the tribunal declines jurisdiction (4). The burden of proof that the investor has withdrawn or waived its right to initiate is thus on the respondent. In our opinion, the Tribunal itself should examine these requirements on its own motion, and not upon the request of the respondent.
<p>Article 8.24 - Proceedings under another international agreement</p> <p>Technical revisions made in the Article</p>	<ul style="list-style-type: none"> • Covers overlaps with claims brought under other international agreements. 	<ul style="list-style-type: none"> • Relation to Art. 8.22. • Helps to catch cases where a claim is brought pursuant to this section and another international agreement (BIT), but for another measure (if it was concerning the same measure, it would have to be withdrawn or waived, see Art. 8.22(f)-(g): overlapping compensation or other impacts would be taken into account by staying proceedings or in the decision, order or award. • However, following Art. 8.39(2)(d), the award shall not affect the right a person - other than the person which has provided a waiver pursuant to Article 8.22 - may have in monetary damages or property awarded under a Party's law.
<p>Article 8.26 - Third Party funding</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> • Requires full disclosure of third party funding to the Tribunal, at the time of the submission claim 	<ul style="list-style-type: none"> • The article does not prohibit third party funding, thus allowing for companies to 'invest' in ICS cases and as a result claim part of the potential award as a return on their investment.

<p>Article 8.27- Constitution of the Tribunal</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> ● Tribunals shall be constituted on the basis of a permanent roster of fifteen arbitrators. These fifteen individuals shall be appointed by the CETA Joint Committee. The roster will be made up of five EU nationals, five Canadian nationals, and five from third party nationals. Random case allocation. ● Members of tribunal shall have qualification of respective country to be appointed as judicial office, or jurist. ● Members of the tribunal shall be paid monthly retainer fee, decided by the Joint Committee. ● The ICSID Secretariat will act as Secretariat for the Tribunal as in the ICS proposal. It will manage the account where the fees of the parties will be sent. 	<ul style="list-style-type: none"> ● The establishment of a permanent roster appointed by the Parties is a step in the right direction in securing independence of the arbitrators. However, some concerns over independence remain: ● Tribunal Members are not fully financially independent. They receive a retainer fee, but are still paid for the amount of work they carry out, creating a financial incentive to hear cases in a one-sided system (only investors may bring cases). Moreover, Tribunal Members may still work as ISDS arbitrators in other cases brought under the old system; ● There are insufficient guarantees that the arbitrators will be able to properly assess domestic law as the system favours the selection of arbitrators that are ‘experts’ in international investment law. ● CETA does not require arbitrators to meet the requirements for judicial office. CETA also does not require arbitrators to have expertise in the field of domestic social, environmental or other public law. Considering the controversy over the system and the failure to recognise the value of such law in the past, it is appropriate that this is made an explicit requirement in EU trade agreements even if domestic law is not formally part of the applicable law (as arbitrators will still assess domestic law);
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<p>Article 8.28 - Appellate Tribunal</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> • The functioning of the tribunal, the appointment and the remuneration of members are not determined in the final CETA text but will be defined at a later stage by the CETA Joint Committee • Appellate Tribunal may confirm, modify or reverse any decision based on error of application or interpretation / error of facts / presentation of new facts. • The Appellate Tribunal will be made up of three appointed members. • There will be a possibility for the committee on investment and services to review the functioning of this appellate body and make recommendations to the joint committee 	<ul style="list-style-type: none"> • <i>See above under 'Article 8.27- Constitution of the Tribunal'</i>
<p>Article 8.29 - Establishment of a multilateral investment tribunal and appellate</p>	<ul style="list-style-type: none"> • Article 8.29 provides that CETA Joint Committee can decide that a potential future multilateral investment mechanism 	

<p>mechanism</p> <p><i>NEW Article</i></p>	<p>replaces the ICS system under CETA.</p>	
<p>Article 8.30 - Ethics</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> ● Requires member of Tribunal to be independent, and not government affiliated (though may receive remuneration from government). ● May not participate in dispute that would create direct or indirect conflict of interest. ● Must comply with International Bar Association Guidelines on Conflicts of Interest in International Arbitration. ● Any conflicts of interest must be raised to the President of the International Court of Justice. 	<ul style="list-style-type: none"> ● This article is a copy of Article 11 in TTIP ICS
<p>Article 8.31 - Applicable law and interpretation</p> <p><i>NEW Article</i></p>	<ul style="list-style-type: none"> ● This article is based on article 13 in section 3, subsection 5, of the Commission ICS proposal in TTIP; ● The text seeks to make the Investment Court System compatible with the EU Treaties, by taking into account the powers of the EU courts granted in the Treaties. In particular, the text seeks to obscure the powers of the arbitration tribunals to consider questions of EU law, a core competence of EU courts, and to obscure the effects this would have on the 	<ul style="list-style-type: none"> ● Article 8.31 seeks to accommodate one of the key constitutional flaws of ISDS under EU law: its incompatibility with the Treaties. Article 8.31 seeks to preserve the powers of the European Court of Justice and the autonomy of the EU legal system by limiting the powers of the Tribunals in relation to domestic law. However, these precautions are not sufficient to take into account the fundamental concerns regarding the compatibility of the agreement with the EU Treaties. ● To respect the powers of the courts of the Member States and the ECJ under the Treaties, the system

	EU legal order.	would require (i) exhaustion of domestic remedies and (ii) prior involvement of the European Court of Justice over questions of EU law.
<p>Article 8.32 - Claims manifestly without legal merit</p> <p>Technical revisions made in the Article</p>	<ul style="list-style-type: none"> Establishes rights for respondent to file an objection to a claim that is manifestly without legal merit. The respondent must specify the grounds for the objection. The tribunal will hear the parties and issue a decision stating the grounds for its reasoning. 	<ul style="list-style-type: none"> Establishes a “fast-track” procedure, after the establishment of a tribunal, to quickly check a claim on its legal merits and dismiss it if the tribunal so decides. Important to filter “frivolous claims” - however entirely dependent on the interpretation of the tribunal and the quality of the objection, because “the Tribunal shall assume the alleged facts to be true” (5). Cannot be used if an objection was filed under Art. 8.33. Relation to Art. 8.22(5)(c): the investor would still be able to go to a domestic court or tribunal via a BIT.
<p>Article 8.33 - Claims unfounded as a matter of law</p> <p>Technical revisions made in the Article</p>	<ul style="list-style-type: none"> Establishes a right for the respondent to file an objection claiming that the claim has no legal merit and “is not a claim for which an award in favour of the claimant may be made under this section, even if the facts alleged were assumed to be true.” Similar procedure as in Art. 8.32. 	<ul style="list-style-type: none"> Used as another filter to dismiss unlawful cases. Based on a similar provision in TTIP ICS Art. 17. Relation to Art. 8.22(5)(c): the investor would still be able to go to a domestic court or tribunal via a BIT.
<p>Article 8.36 - Transparency of proceedings</p>	<ul style="list-style-type: none"> States that hearings should be open to the public. 	<ul style="list-style-type: none"> Includes the provision of art 18 of the TTIP ICS proposal

<p>Technical revisions made in the Article</p>	<ul style="list-style-type: none"> ● Provides protection against disclosure of confidential information or protected information, if deemed necessary. ● Confidentiality is defined according to each party's law. 	
<p>Article 8.39 - Final award</p> <p>Limited revisions made in the Article</p>		<ul style="list-style-type: none"> ● This is based on the TTIP ICS article 28 ('Provisional Award') ● The main difference between the TTIP and the CETA award system that the TTIP ICS is about 'provisional' award and there are rules - including an appeal mechanism - regulating it which have the potential of early compensation for the claimant. In the current CETA ICS, such an opportunity does not exist. ● Costs include monetary damage and interests, limited to the damage suffered by the investor and depending on the Tribunal's decision, other reasonable costs, including legal representation and assistance. ● If only parts of the claim have been successful, the costs shall be adjusted proportionately. ● This maintains the financial chilling impact of ICS as the unsuccessful disputing party shall bear the costs (which might be the state), legal costs are included and adjustment is foreseen in case of partial win.

<p>Article 8.44 - Committee on Services and Investment</p> <p>Substantial revisions made in the Article</p>	<ul style="list-style-type: none">• Defines the code of conduct for the members of the tribunal• The committee can recommend to the joint committee the adoption of interpretations of this agreement• The committee can recommend the adoption of any further elements of the FET obligation	<ul style="list-style-type: none">• The composition of this committee, which will have a major influence on the system, is not defined in the text.
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