



## Investment provisions in the EU-Canada free trade agreement (CETA)

CETA confirms all the innovations of the EU's new approach on investment and its dispute settlement mechanism thus meeting the high expectations of citizens and industry for a fairer, more transparent and institutionalised system of settling investment disputes. It introduces important innovations in this field, ensuring a high level of protection for investors while fully preserving the right of governments to regulate and pursue legitimate public policy objectives such as the protection of health, safety, or the environment.

CETA represents a significant break with the past, at two different levels:

1. It includes an explicit reference to the **right of governments to regulate** in the public interest and clearer and more **precise** investment protection **standards**, i.e. the rules, as set out in CETA, removing ambiguities that made these standards open to abuses or excessive interpretations;
2. It creates of an independent **investment court system**, consisting of a permanent tribunal and an appeal tribunal competent to review decisions of the tribunal, where dispute settlement proceedings will be conducted in a **transparent and impartial** manner.

## 1. RIGHT TO REGULATE AND PRECISE INVESTMENT PROTECTION STANDARDS

- CETA makes clear from the outset that the EU and Canada preserve their **right to regulate** and to achieve legitimate policy objectives, such as public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity. This is a clear instruction to the tribunal for the interpretation of the investment provisions.

It is also explicitly foreseen that Governments can change their laws, including in a way that affects investors' expectations of profit and that the application of EU's state aid law does not constitute a breach of investment protection standards.

*Relevant CETA provisions: Article 8.9 Investment and regulatory measures*

- CETA introduces a **precise and specific standard of treatment** of investors and investment. Unlike other agreements, the standard of "fair and equitable treatment" in CETA is a clear, closed text which defines precisely the standard of treatment, without leaving unwelcome discretion to the Members of the Tribunal. Both the EU and Canada have to agree to review the standard for it to be revisited.

Thus, a breach of the fair and equitable treatment obligation can only arise when there is:

- ✓ Denial of justice in criminal, civil or administrative proceedings;
- ✓ A fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- ✓ Manifest arbitrariness;
- ✓ Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- ✓ Abusive treatment of investors, such as coercion, duress and harassment.

The concept of "legitimate expectations" is limited to situations where a specific promise or representation was made by the State.

*Relevant CETA provisions: Article 8.10 Treatment of investors and covered Investments*

- CETA **makes clear what constitutes "indirect expropriation"**. For the first time in an EU agreement, detailed language has been agreed upon to clarify what constitutes indirect expropriation in order to avoid claims against legitimate public policy measures:
  - ✓ Legitimate public policy measures taken to protect health, safety or the environment do not constitute indirect expropriation. Only measures which are manifestly excessive in light of their objective (a rare occurrence) might amount to indirect expropriation.
  - ✓ Indirect expropriation can only occur when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of its investment;
  - ✓ A detailed case-by-case analysis is introduced to determine whether an indirect expropriation has taken place. The sole fact that a measure increases costs for investors cannot give rise in itself to a finding of expropriation;

The issuance of compulsory licenses in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation.

Relevant CETA provisions: [\*Annex 8.12 : Expropriation and Annex 8-A\*](#)

- CETA **does not protect so-called "shell" or "mailbox" companies**. To be qualified as an investor, it is necessary to have real business operations in the territory of one of the Parties.

Relevant CETA provisions: [\*Article 8.1: Definitions\*](#)

- CETA **does not allow** investors to "import" and **use in the dispute settlement procedures the substantive provisions from other agreements** (e.g. from Treaties of EU Member States) that they consider are more advantageous to their interests.

Relevant CETA provisions: [\*Article 8.7: Most-Favoured-Nation Treatment\*](#)

- **Only specific concerns can be brought to investment dispute settlement**. Only claims relating to non-discriminatory treatment (Section C of the CETA investment chapter) and investment protection (Section D) can be submitted to investment dispute settlement under CETA. Other provisions of the CETA cannot. In particular, refusal to admit a foreign investor, even if possibly in violation of CETA commitments can only be challenged by the EU and Canada and not by the investors.

Relevant CETA provisions: [\*Article 8.18 Scope\*](#)

## 2. EFFECTIVE, FAIR AND TRANSPARENT INVESTMENT DISPUTE RESOLUTION SYSTEM

### ✓ **Scope**

Investment dispute settlement under CETA is **strictly limited to breaches of the few investment protection provisions which enshrine fundamental principles** such as non-discrimination, expropriation only for a public purpose and against adequate compensation and fair and equitable treatment (see explanations above) and which has caused damage to a specific investor. But a claim cannot be brought to investment dispute settlement simply because an action has an impact on investors' profits. Also it cannot be used by an investor to claim a breach of another part of the CETA agreement. For example, it cannot be used to obtain market access by investors. This is an important clarification.

Relevant CETA provisions: [Article 8.18 Scope](#)

### ✓ **Permanent investment Tribunal and an Appellate Tribunal**

- CETA **creates a permanent investment Tribunal and an Appellate Tribunal**. Contrary to the traditional investment dispute settlement approach, the Tribunal will be composed of fifteen members nominated by the Union and Canada and not by arbitrators nominated by the investor and the defending state. The tribunal will hear cases in divisions of three members appointed via a randomised procedure. The Appellate Tribunal will review decisions of the Tribunal. CETA clearly defines the grounds for reviewing awards of the Tribunal. The Members of the Tribunal and Appellate Tribunal will have the same qualifications as for the International Court of Justice and will have to be beyond reproach in terms of ethics. The Union and Canada will adopt a decision setting out the practical details, already identified in CETA.

In addition, CETA contains a firm commitment that the Union and Canada will join efforts with other interested parties for the **creation of an international multilateral investment court**.

Relevant CETA provisions: [Article 8.27 - Constitution of the Tribunal](#); [Article 8.28 - Appellate Tribunal](#) and [Article 8.29 - Establishment of a multilateral investment tribunal and appellate mechanism](#)

- CETA sets **new and clearer rules on the conduct** of investment dispute settlement proceedings.

### ✓ **Ethical rules for the Members of the Tribunal**

CETA establishes **strict rules of ethical behaviour for the Members of the Tribunal** which guarantee their full independence and impartiality. Situations where a Member of the Tribunal can act as a counsel or an expert in pending or new investment disputes are prohibited. Further, CETA has a binding code of conduct for the Members of the Tribunal. The code is based on the ethical rules of the International Bar Association, subject to further revision. It prevents conflicts of interest. In case a Member of the Tribunal is found not to comply with the code, he/she will be replaced. That decision is taken by an independent outside party - the President of the International Court of Justice and not by the remaining Members of the division of the Tribunal hearing the case as is often the case in existing agreements.

Relevant CETA provisions: [Article 8.30 Ethics](#)

### ✓ **Conduct of proceedings**

CETA introduces **full transparency in investment dispute settlement proceedings**: all documents (submissions by the parties, decisions of the tribunal) will be publicly available on an United Nations website which the EU will finance. All hearings will be open to the public. Interested parties (NGO's, trade unions) will be able to make submissions. This will be binding and cannot be waived by the tribunal or the parties to a dispute. As is also the practice in national/local courts in the European Union and Canada, information can potentially be withheld in case of business secrets and information considered confidential under the national laws of the responding state. These instances are clearly defined. There are 3,000 agreements with investment dispute settlement provisions in existence. Only the ones to which the United States and Canada are Party have comparably far reaching transparency arrangements. In all the other existing agreements, there is no such access to documents of a proceeding or access by the public to hearings.

Relevant CETA provisions: [Article 8.36 - Transparency of proceedings applying the UNCITRAL rules on transparency](#)

#### – **Prohibition of parallel proceedings**

CETA prohibits parallel proceedings: **investors cannot seek remedies in domestic courts (or other international tribunals) and before the CETA investment tribunal at the same time.** The aim is to avoid double compensation and divergent verdicts. Most of the 3,000 existing agreements have no such mechanisms.

Relevant CETA provisions: [Article 8.22 - Procedural and other Requirements for the Submission of a Claim to the Tribunal](#); [Article 8.24 - Proceedings under another international agreement](#)

- **No to fraudulent or manipulative claims**

CETA has rules **preventing fraudulent or manipulative claims**. For example, the making of an investment or business re-organisation for the purpose of bringing a case (as is alleged Philip Morris has done to bring its case against Australia) is explicitly prohibited. Only EU agreements contain such provisions (see for another example EU-Vietnam FTA).

Relevant CETA provision: *Article 8.18.3 - Scope*

- **No repeal of the measure**

CETA clearly states that awards rendered by the Tribunal under CETA **cannot lead to the repeal of a measure** in the Union, a Member State or Canada; the most which can be required of a country is compensation and this only to the level of the losses actually suffered. It is not possible under CETA to impose punitive fines, as may be possible under domestic laws. This is an important clarification, not present in most of the 3,000 existing agreements.

Relevant CETA provision: *Article 8.39 paragraphs 1, 3 and 4 - Final Award*

- **No repeal of the measure**

CETA also introduces **statutory limits** (3 years, extended if a domestic court proceeding is pursued) for bringing a claim. Again of the 3,000 agreements with investment dispute settlement provisions in existence, only the ones to which the United States and Canada are party to have such arrangements.

Relevant CETA provision: *Article 8.19.6 – Consultations*

- **In line with principles of international law**

CETA clarifies that in adjudicating upon the consistency of a claim, the tribunal shall apply the agreement **in accordance with the principles of international law**. With respect to domestic law, CETA confirms that EU or Member States law will be examined only as a matter of fact (for instance, to determine whether the property rights allegedly expropriated actually exist under the law of the country where the property is) and that determining whether a measure under domestic law is legal remains the monopoly of the EU and its Members States competent authorities, or of Canada.

Relevant CETA provision: *Article 8.31.1 - Applicable law and interpretation*

### – **Fast-track rejection of unfounded claims**

CETA has a **fast track system for rejecting unfounded or frivolous claims**. Frivolous claims can be thrown out in a matter of weeks. These are innovative provisions, broader in scope of application and in functioning than any existing comparable systems, except for the ones existing under other EU agreements (see EU-Vietnam FTA).

Relevant CETA provisions: Articles 8.32 - Claims manifestly without legal merit and Article 8.33 - Claims unfounded as a Matter of Law

### – **The losing party pays the costs**

This is important because under all existing agreements there are no clear rules, with the result that often even if a government successfully defends itself it still bears all of its costs.

Relevant CETA provision: Article 8.39 paragraph 5 - Final Award

### – **Mediation for amicable solution**

CETA contains specific provisions on mediation to encourage an amicable solution. It also introduces changes intended for the SMEs: the possibility of having the consultations via videoconference, the possibility of a sole Member of the Tribunal to hear the case when both parties agree and the possibility for the parties to the agreement to adopt possible ceilings for costs of claims brought by SMEs.

Relevant CETA provisions: Article 8.20 - Mediation; Article 8.19.3, Article 8.23.5 - Submission of a Claim to the Tribunal, Article 8.39.6 - Final award

### – **Control by the Parties as regards interpretation of the agreement**

As an additional safeguard, CETA makes clear that the EU and Canada have the right to adopt binding interpretations and to make **submissions when they are not defendants**. The reason for this is to permit the Parties to control and influence the interpretation of the agreement. The ability to adopt binding interpretations is a safety valve in the event of errors by the tribunals (the likelihood of which is in any event greatly reduced by the clear drafting of the relevant investment protection standards).

Relevant CETA provisions: Article 8.31.3 - Applicable Law and Interpretation; Article 8.38 - Non-disputing Party

