European Commission

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

How is the right to regulate protected in the investment chapter?

The EU and Canada have agreed to bring very significant clarifications to the key substantive provisions, which are also the most often invoked by investors when bringing claims under the investor-to-state dispute settlement system. In concrete terms, this means that arbitrators will now have strict and detailed guidance when these provisions are invoked by an investor.

1. Reaffirming the right to regulate

The CETA reaffirms the right of the EU and Canada to regulate to pursue legitimate public policy objectives such as the protection of health, safety, or the environment.

2. Precise definition of Fair and Equitable treatment

For the first time ever, the CETA agreement provides for a **precise definition of "Fair and Equitable treatment".** This will avoid too wide interpretations and provide clear guidelines to tribunals.

Under the agreement, a breach of the fair and equitable treatment obligation arises in the following cases:

- Denial of justice in criminal, civil or administrative proceedings;
- 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.

In addition, a breach of legitimate expectations is limited to situations where the investment took place only because of a promise made by the State that was subsequently not honoured.

3. **Detailed language on indirect expropriation**

For the first time in EU agreements, CETA contains detailed language on what constitutes indirect expropriation:

   a. Clarifying that indirect expropriation can only occur where there is **substantial deprivation** of the attributes of property;

   b. Providing for a detailed step-by-step analysis to determine whether an indirect expropriation has taken place and clarifying that the sole fact that a measure increases costs for investors **does not give rise in itself to a finding of expropriation**;

   c. Providing that **legitimate public policy measures taken to protect health, safety or the environment do not constitute indirect expropriation**, except in the rare cases where they are manifestly excessive in light of their objective.

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

5. The agreement also makes clear that obligation to provide 'full protection and security' **does not cover protection against changes of laws and regulations**.

6. The **definition of investment** covers only assets that possess the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, and a certain duration;

7. **Shell companies are not protected**. To be qualified as an "investor", it is necessary to have substantive business operations in the territory of one of the Parties;

8. As in other EU Free Trade Agreements, the agreement permits the adoption and enforcement of **prudential measures**;

Investor state dispute settlement in CETA: main achievements

The investor-state dispute settlement system agreed with Canada in CETA establishes the most progressive system of investor-state dispute settlement yet agreed in any agreement. It has a number of key features designed to

ensure that the system is effective and efficient, whilst providing important procedural safeguards which will improve the control of the parties of the interpretation of the agreement and ensure that frivolous cases are discouraged or swiftly dismissed. These key features include:

1. **Prohibitions on seeking remedies in domestic courts and through ISDS** at the same time, whilst encouraging the use of domestic court;
2. Increased certainty for states through the setting of time periods after which a claim cannot be made (in principle 3 years);
3. increased consistency and strengthened **protection against possible conflicts of arbitrators** through the need for agreement on the arbitrators, failing which the arbitrator will be chosen from a list (rosters) of arbitrators, jointly decided by the European Union and Canada (this is a first in an ISDS mechanism);
4. Introduction of a **binding Code of Conduct** for arbitrators – again a first in an ISDS mechanism;
5. Exceptionally **strong protections against frivolous claims** - stronger than in any existing ISDS mechanism. 2 systems which permit frivolous claims to be rejected very quickly – one where the case is manifestly unfounded, the other where the tribunal, even if facts are assumed to be correct, cannot rule in favour of the investor;
6. strong protection **against unfounded claims** – the losing party bears the costs and so takes the risk if it takes a chance on bringing a claim (the current system is unclear on costs, meaning that sometimes even if entirely successful in its defence, the govt. still bears the costs). Again, this is a first in an ISDS mechanism;
7. **Full transparency** – all documents will be public, all hearings open, interested parties (NGO's) can make submissions. This is the first agreement applying in substance the new United Nations rules on transparency in ISDS (UNCITRAL);
8. A **possible appellate mechanism**: The first EU agreement which provides for the possibility to establish an appellate mechanism (the US has included such provisions in all of its agreements since 2004.).
9. **Encouragement of alternative dispute resolution** – explicit provisions for mediation for investment disputes – again a first in an ISDS mechanism;
10. Absolute clarity that a state cannot be forced to repeal a measure;
11. Effective mechanisms for the Parties to the agreement (the EU and Canada) to issue **binding interpretations** on what they originally meant

in the agreement and to take part in arbitrations on questions of interpretation;

12. Action against spiralling costs through effective limits to the costs of the arbitration – also a first in an ISDS mechanism;
13. ISDS only applies to alleged breaches of the investment protection standards and does not apply to market access.

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For more information:

EU and Canada strike free trade deal – Press release, 18 October 2013

On EU trade relations with Canada

On the Transatlantic Trade and Investment Partnership (TTIP)

On EU investment policy