Investment Court System (ICS) and investment protection

Why do we need investment protection clauses in an agreement with Canada?

EU Trade Agreements include **commitments to improve market access to investments,** which provide an important advantage to EU companies accessing third country markets. Investment protection provisions are a logical complement of the liberalisation provisions. Together, investment liberalisation and protection ensure a business friendly environment and provide a stable legal framework that encourages investment flows between the EU and third countries.

The ICS provisions included in CETA represent a new EU approach to investment-related disputes, as the adjudication of future investment disputes under EU agreements should have a higher level of **transparency** and **consistency,** where the independence and impartiality of adjudicators is guaranteed. The ICS provisions in CETA will only enter into force when all EU Member States have ratified CETA.

Right to regulate by local governments

Article 8.9 of CETA stipulates that the Parties fully preserve their **right to regulate for public policy purposes**, such as to protect public health, safety, the environment or public morals, social or consumer norms or to promote and protect cultural diversity. These objectives are just examples and it is important to understand that this is an open-ended list that will cover **all public policy objectives**. CETA's preservation of the right to regulate by governments is also reaffirmed in point 2 of the Joint Interpretative Instrument (JII) adopted by the EU and its Member States and Canada at the time of CETA's signature. The JII explicitly confirms that, "CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity". The JII constitutes a document of reference that will have to be made use of if any issue arises in the implementation of CETA regarding the interpretation of its terms; to this effect, **the JII has legal force and a binding character**, as has been confirmed by the Council Legal Service.

Article 8.9 also ensures that investment protection provisions may not be interpreted as a commitment from governments that their legal frameworks will remain unchanged. This clarifies that the fact that a measure may negatively affect an investment or affect an investor's expectations of profits is not sufficient to say that the measure is inconsistent with the agreement. Furthermore, CETA's Article 8.12 clarifies that an investor is not allowed to seek compensation as long as a public policy measure is non-discriminatory. The right to regulate covers **all levels of public authorities**: EU, national, regional and local authorities across the EU.

CETA's provisions on investment protection are narrowly formulated in Article 8.10. In practice, they ensure that investors are protected only in cases of breaches of fair and

equitable treatment, which covers clear situations such as denial of justice, fundamental breach of due process, targeted discrimination and abusive treatment.

No regulatory chill

Granting the right to investors to submit disputes in front of an investment tribunal does not represent an obstacle to a government's right to regulate in the public interest. In fact, the possibility for investors to lodge such investment claims has existed in the EU for more than 40 years through over 1400 bilateral investment treaties concluded by Member States. This has not held the EU or its Member States back from developing some of **the world's most far reaching policies on consumer, social, environment and health protection**, at times directly at odds with the interest of business operators – e.g. policies to ban cigarettes advertising or bans on smoking in all public spaces.

This is also true for measures adopted by public authorities to protect **public housing**.

Article 8.9 of CETA protects the right of governments to regulate for public policy interests, the JII further affirms "the right of governments, at all levels, to provide and support the provision of services that they consider public services" and emphasises that "CETA does not prevent governments from defining and regulating the provision of these services in the public interest. CETA will not require governments to privatise any service nor prevent governments from expanding the range of services they supply to the public".

In addition, CETA's Article 24 sets **ambitious rules on environmental protection**, notably with regard to the respect of key Multilateral Environmental Agreements, including in particular the **Paris Agreement**. Article 24.3 in particular recognises the right of each Party to establish its own levels of environmental protection and to regulate accordingly. The EU and Canada have both pledged to **reach carbon neutrality by 2050**, which will impact both Parties' energy transition strategies. In no way should CETA's provisions on investment protection be seen as an obstacle to the EU and Canada's efforts in fighting climate change and achieving green goals: the EU has already adopted binding legislation as part of its climate and energy strategy 2030 and is ready to launch new legislative initiatives in the framework of the EU Green Deal.

Access by civil society to ICS proceedings and binding interpretations

CETA's Article 8.36 allows interested parties (such as **NGOs and other civil society organisations**) to intervene in investment dispute settlement proceedings and make submissions to the Tribunals. It introduces **full and mandatory transparency** of proceedings before the Investment Court System, which means that all documents (submissions by the disputing parties, decisions of the Tribunal and Appeal Tribunal) will be made publicly available and hearings will be open to the public. Information enabling civil society organisations to participate will be publicly available well ahead of time in line with the UNCITRAL Transparency Rules. The Commission will proactively promote the publication of case-related information in all cases in which the EU acts as a respondent and will cooperate with Member States that act as respondents to ensure timely publication of relevant information also in such cases.

CETA's Articles 8.31.3 and 8.44.3(a) also foresee the possibility for the Joint Committee (the highest decision-making body in CETA, where the EU is represented by the European Commissioner responsible for Trade and Canada by the Minister for International Trade) to

issue interpretations of CETA's investment provisions, which are **binding** on the Tribunal in charge of solving disputes in the field of investment.

Trade and sustainable development

Robust and legally binding provisions

CETA contains an **ambitious and comprehensive set of disciplines** on trade and sustainable development, trade and labour standards and trade and environmental protection. Importantly, **these disciplines are not soft law**: these provisions are legally binding and CETA includes a dedicated and binding dispute settlement mechanism for the enforcement of the Sustainable Development chapters. The procedure is **time bound, transparent and inclusive,** and involves governments, external experts, civil society, and other independent bodies such as the ILO. The list of dedicated panellists appointed to deal with disputes in this field was established by the EU and Canada already in 2018, shortly after CETA's provisional entry into force.

In terms of **concrete deliverables** concerning this chapter, the first CETA Joint Committee adopted in September 2018 **three Recommendations** which set the stage for further work on the following topics: (i) joint work on **climate action** measures and the implementation of the Paris Agreement within the CETA context, in line with commitments taken in the JII; (ii) joint work to better understand how trade agreements can contribute to **gender equality**; and (iii) encouragement for **small and medium-sized enterprises** to use the opportunities offered by CETA. The three Recommendations have been implemented through a number of actions (conferences, workshops, seminars, establishment of contact points) and have benefited from the engagement of civil society at multiple levels. They set the framework for future work between the EU and Canada on promoting sustainable development objectives through CETA.

Strengthening monitoring and enforcement

As a result of the broad debate in the EU on Trade and Sustainable Development in 2017/2018, the Commission proposed the **15-points Action Plan** in February 2018 to further enhance the effectiveness and implementation of the Trade and Sustainable Development chapters. Almost two years down the road, we are starting to see **important and concrete results** of this enhanced approach. For instance, in **Vietnam** these efforts have led to concrete outcomes in the run-up to approval of the EU-Vietnam trade agreement: in June 2019, it announced the ratification of ILO Convention No 98 and presented a calendar for the ratification of two other outstanding conventions. In November 2019, the National Assembly approved a new Labour Code.

In addition, the Commission has adopted a **more assertive stance** on enforcement using all the tools at our disposal, when necessary. In December 2018, the EU requested government consultations over the lack of implementation by **South Korea** of key Trade and Sustainable Development commitments. In December 2019, a panel of experts was established. Following a civil society complaint on Trade and Sustainable Development issues, we engaged closely with **Peru** and in December 2018 reached a bilateral understanding to address the identified shortcomings. We are now closely monitoring the advances made by Peru.

The Commission is reinforcing its capabilities to address the correct implementation and the enforcement of rules agreed in the EU's trade agreements with third countries through the appointment of the **Chief Trade Enforcement Officer** (CTEO) within DG TRADE. As indicated by Commission President Von der Leyen, the CTEO will have amongst his or her responsibilities the task to ensure that parties with whom the EU has signed an agreement live up to the standards of the agreement. In the context of the future tasks that will be assigned to the CTEO, the Commission will be able to streamline and enhance its ability to enforce trade agreements. Dealing with any potential breaches of Trade and Sustainable Development chapters will be at the core of the CTEO's mandate.

Early review

With regard to CETA, the EU and Canada indicated their intentions to review the **implementation and enforcement of Trade and Sustainable Development chapters** already in the JII and initiated the exercise as soon as the Agreement came into force provisionally on 21 September 2017. The respective approaches to the exercise were also publicly discussed with interested stakeholders during the **Civil Society Forum** organised in Ottawa in November 2019. An initial assessment by the Commission of the implementation of these chapters shows that no information has been brought to the attention of the parties on possible non-compliance with such provisions. However, it is still early days in the implementation of CETA and **more time is needed** to fully evaluate the implementation by the EU and Canada of CETA's Trade and Sustainable Development chapters. CETA is a progressive Agreement and the ambition of the Commission is to keep it up to speed with policy developments taking place at wider level.

More broadly, the Commission will remain highly attentive to the effectiveness of the implementation and enforcement of the TSD chapter. The first next step is the appointment of the CTEO. In addition, the Commission has committed to undertake a review of the 15-point TSD implementation action plan within five years following its adoption in 2018.

Food safety and quality standards

Track and trace systems in Canada concerning notably hormones and GMOs

CETA leaves unchanged the rights and obligations of the EU and Canada under the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures and therefore does not affect European or Canadian SPS rules. This means that **all products imported into the EU need to comply with EU rules and regulations.**

Consequently, based on Directive 96/22/EC, **the use of substances having a hormonal action for growth promotion is forbidden** in the production of farm animals and in the import of meat and meat products from animals treated with such growth promotors. This prohibition applies to Member States and to **all meat imports** from third countries, including Canada. Third countries authorised to export meat to the EU that allow the use of growth promotors for domestic use are obliged to have segregated production systems in place to ensure the absence of forbidden substances for meats exported to the EU. These systems have to be supervised in accordance with provisions laid down in EU legislation.

The EU also has very **clear rules on the commercialisation of GMOs** and CETA cannot change or undermine these rules. Products containing GMOs can only be placed on the EU market with an authorisation at EU level. Concerned companies have to request an authorisation and demonstrate the absence of risk for the consumer and the environment. In addition, the applicant needs to provide an analytical method capable of detecting and quantifying the GMO as well as a reference material. The European Union Reference Laboratory (EURL) validates the method and makes it available to the laboratories in the Member States. Once a GMO is authorised in the EU, EU **obligatory labelling** as foreseen in EU legislation applies regardless of the labelling provisions applied in non-EU countries. With regard to animal products that have been genetically modified, the European Food Safety Authority has published guidance on what information should be submitted if a request for authorising a GM-animal or derived products would be made by an applicant. Currently, **no GM-animal or derived product is commercialised in the EU** and, no such authorisation request for GM-animals or derived products has been introduced in the EU.

The validated detection methods and the certified reference materials allow for the detection of authorised GMOs **at very low levels**: for GMOs authorised for food and food use, the validated detection methods allow to verify presence at the 0.9% labelling threshold foreseen in the EU GMO legislation. For GMOs destined for feed use for which the authorisation is pending, the official laboratories are in a position to carry out the analysis at the level of 0.1%. For non-authorised GMOs, official laboratories apply the even stricter zero-tolerance: any presence of a non-EU authorised GMO is non-compliant and results in removal of the batch of food/feed from the market. To reiterate, this procedure applies for any third-country product, irrespective of whether a free trade agreement is in place or not.

Quality of controls

To ensure that meat imports from third countries meet European food safety standards, the Commission and Member States have put in place a control system, which includes the following elements:

- Imports into the EU from third countries must be accompanied by a **veterinary certificate** (for animal products) issued by the competent authority of the exporting country. The reliability of the third-party certification to comply with the EU import requirements must be recognised by the Commission, in accordance with the requirements set out in the applicable EU legislation;
- Member States carry out **regular official controls** to verify that imported products meet EU requirements;
- In addition to controls carried out at the border by Member States on third country imports, the Commission also regularly carries out **inspections in third countries** to check compliance with EU import rules;
- Furthermore, meat products can only enter the EU via border inspection posts, where they are subject to veterinary checks, the nature of which is defined by EU rules, meat products that are not meeting EU requirements are refused at the border. Any detection of a banned substance is notified via the **EU Food safety alert system** (Rapid Alert System for Food and Feed - RASFF) to ensure rapid corrective measures to protect the European consumer. Moreover, food safety authorities in the Member States also carry out regular checks on their own territory to ensure that the food

products sold in their domestic market comply with relevant safety requirements. Any identified problem is immediately notified to the Commission; the other European auditors also consider RASSF alerts to determine their monitoring and audit programme based on the risks identified.

Regular audits to ensure the respect of EU standards for foods safety are carried out in Canada. The Commission bases the schedule of these audits on the register of established risks. The audits are conducted on the basis of objective criteria and in consultation with food safety/health authorities in EU Member States. Member States are part of the EU teams that conduct food safety audits and the follow-up actions thereof, such as the review of actions points. Their participation ensures a specific and complementary expertise to EU auditors and goes beyond an observer.

All EU food safety audit reports are made public. In case of non-compliance, EU auditors seek to ensure that all follow-up is proportional to the risk identified due to noncompliance. The most recent EU audit that took place in Canada (9 September 2019 to 20 September 2019) related to the evaluation of the control systems in place governing the production of bovine and pig meat intended for export to the European Union. The audit report is being finalised.

Level playing field in agriculture

Different standards in the EU and in Canada

Under the WTO Agreement on Sanitary and Phytosanitary (SPS) measures, each Member has the right to set its own level of protection under the conditions set in this Agreement. This right to regulate on the levels of protection is fully respected under CETA. As a consequence, **SPS standards can be different in different countries as long as they respect the conditions of the WTO SPS agreement** i.e. are necessary to protect human, animal or plant health and based on scientific grounds.

This means that Canada may have different **maximum residue levels (MRLs) of pesticides and antimicrobials** than those laid down in EU legislation and the other way around.

The EU rules on MRLs are determined solely by the EU and in full respect of the applicable EU legislative process, with involvement of the European Commission, the European Parliament and Council upon a scientific based opinion by the European Food and Safety Agency (EFSA). Regulation (EC) No 396/2005 regulates MRLs for pesticides.

In some cases, the EU MRLs are stricter i.e. lower than the Canadian ones, and in some other cases the **Canadian MRLs are stricter**.

For instance, for several **important antimicrobials/pesticides**, Canada maintains lower maximum residue levels (MRLs) than those laid down in the EU. This means that the import conditions are stricter for these products, for example in the case of EU exports of lemons and grapefruit. For antimicrobials, substances such as doxycycline, spectinomycin, marbofloxacin that are used in the porcine species have an MRL set in the EU. However these substances are not authorised by Canada for porcine species. Similarly, for several important pesticides, Canada maintains lower maximum residue levels than those laid down in the EU. This means

that the Canadian import conditions are stricter for these pesticide/product combinations. In the case of potatoes, Canada has set stricter MRLs for following pesticides: Boscalid, dimethomorph, Ethoprophos, Imidacloprid. Similarly in the case of potatoes, several substances with an EU-MRL are not registered in Canada e.g.: Flufenacetat and Quizalofop-P.

Animal welfare

Animal welfare provisions included in EU legislation are not watered-down by CETA. For example, EU animal welfare legislation regarding slaughter also applies to imports, and meat imported from third countries must be accompanied with an attestation certifying that requirements at least equivalent to those of the EU have been met. Compliance or equivalency with legislation is determined following on-the-spot verifications made by the Commission.

There are no agreed trade rules on animal welfare in the international field, therefore the Commission to **enhance animal welfare** both through our bilateral relations and through further development and improved implementation of international standards developed by the World Organisation for Animal Health (OIE). **CETA does include provisions on cooperation on animal welfare**: in Article 21.4, the Parties have agreed to "exchange information, expertise and experiences in the field of animal welfare in order to promote collaboration on animal welfare between the Parties".

This discussion now forms part of CETA's **Regulatory Cooperation Forum**. The issue of animal welfare has been identified as one of the first topics of discussion of the Regulatory Cooperation Forum, following the public consultation to identify priorities for further work. The first meeting of the Forum, in December 2018, specifically identified the issue of long distance animal transportation, which has already resulted in a tangible outcome. Canada recently announced an update of its Animal Transport Regulations, which will include stricter transportation requirements. These new rules come into force on 20 February 2020. The overall objective is that animals are suitably fed, hydrated and rested when they are transported. Canada's legislation also covers **humane treatment of food animals at the slaughter establishment** under the Safe Food for Canadians Regulations (SFCR), which came into force on 15 January 2019.

Trade agreements are indeed a tool to improve convergence, but we should not lose sight of the multilateral work, such as in the World Organisation for Animal Health (OIE). Here Canada and the EU are cooperating on the ongoing work of international animal welfare standards, and CETA provides an impetus to this reinforced co-operation.

Tools at the disposal of the Commission in case of unfair competition or unforeseen import surges

Access to the EU market of particularly sensitive agricultural products is not fully liberalised in EU trade agreements, including CETA. Sensitive agricultural products are protected as follows:

i. Trade in some products such as **poultry and eggs** has not been liberalised.
ii. Other sensitive products like beef and pork are protected by **tariff rate quotas**; beyond the quotas EU tariffs protect these products.
iii. **An entry price system on fruits and vegetables** protects seasonal produce in the EU.

iv. Furthermore, the EU retains the ability to use all the **safeguard instruments** necessary to fully protect sensitive agricultural products in the Union in accordance with the EU's WTO commitments.

The Commission has pledged to monitor closely developments in trade in sensitive agricultural products with Canada. It does so through a number of EU market observatories. In case of imbalance in the market of an agricultural product in any sector, the Commission has committed to take at the earliest opportunity, and in any event **within five working days**, the necessary measures within the framework of existing EU regulations with a view to restore market equilibrium.