Joint analysis of CETA's Investment Court System (ICS)

Prioritising Private Investment over Public Interest

This analysis is based on the revised Investment Protection Chapter of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, published 29th February 2016.

The new CETA Investment Chapter contains some improvements compared to the previous version: the introduction of an article on the right to regulate; clearer ethics rules; more transparency provisions. Nevertheless, it falls short of addressing some core concerns relating to the protection of public health; animal and plant life and health; the environment; consumers' and labour rights. It may create a 'fright to regulate' as the actual 'right to regulate' in the public interest is not sufficiently guaranteed and protected.

The following analysis highlights key concerns that have not been addressed in the revised CETA investment chapter, meaning that CETA falls short of safeguarding democracy and the rule of law both in Europe and Canada. See Annex 1 for a technical and detailed legal assessment.

ICS in CETA: The Good, the Bad, the Ugly

The Good:

- Recognition of the flaws of Investor to State Dispute Settlement (ISDS)
- Increased transparency in the proceedings

The Bad:

- One-sided system which allows investor claims only, based on broadly defined investor rights
- The right to regulate is not sufficiently protected
- No requirement to exhaust domestic legal remedies
- Negative effects of awards and "loser pays" on small Member States

The Ugly:

- Lack of independence of Tribunal members not fully addressed
- Insufficient public scrutiny and accountability of the CETA Joint Committee
- Lack of justification for such a contentious mechanism between Parties with developed legal systems based on the rule of law
- No legal certainty over compatibility of Investment Court System (ICS) with the EU Treaties

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Key concerns

1. Definition of Investment (Art. 8.1)

The definition is very broad, covering "every kind of asset" under direct and indirect control of an investor. Moreover, it is retroactive and would cover investments made before the entry into force of CETA. The chapter attempts to limit treaty shopping and abuses by mailbox investors, but defining the key concept of "substantial business activity" is left open to interpretation by tribunals. An exhaustive list of covered investments, an enterprise-based definition and thresholds could have ensured that only selected types of investment were protected under the agreement.

2. Establishment of Investment (Arts. 8.4 - 5)

CETA grants extensive market access, which may prohibit a wide range of measures that regulate the entry or treatment of foreign investors. The full extent of liberalisation depends on the market access carve-outs (measures or future measures reserved in Annexes I and II). However, it still risks binding the EU or Member States to longstanding commitments in areas they did not intend to cover. This is due to the negative list approach, which the EU used for the first time in CETA and which still looks very patchy. A further risk is that some of these commitments are subject to investment arbitration. The prohibition of performance requirements in Art. 8.5 is another weakness because it goes beyond obligations at WTO level. Local content or technology transfer requirements can be legitimate policy tools.

3. Non-discriminatory Treatment (Arts. 8.6 - 8)

The articles create obligations to grant national treatment and most-favoured nation (MFN) treatment to each other's investors. The outcome of this is that the EU and Member States have, de facto, undertaken commitments to prospective investors even before the investment is made.

4. Right to Regulate (Preamble and Art. 8.9)

These newly included provisions intend to strengthen the right to regulate. The right to regulate can be understood as defining the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. However, Art. 8.9 (1) merely 'reaffirms' this already existing balance. The following paragraph offers some improvement, but it cannot properly be construed as a carve-out for decision-making in the public interest. The formulation of this article is declarative and not legally enforceable. It is merely a guideline for arbitrators. Contrary to public statements by the parties, these provisions therefore fail to effectively limit claims that challenge public policy measures. To protect the right to regulate, the parties should have introduced a carve-out or a binding principle to guide interpretation, see Annex.

5. Investment Protection and Fair and Equitable Treatment (Art. 8.10)

This article accords Fair and Equitable Treatment (FET) to investors and investments, which has become the centrepiece of most modern investor claims. Known as "catch-all" provision, it has allowed investors to challenge public policy measures through arbitration. Art. 8.10 seeks to address this problem by listing the types of conduct that constitute a breach of the FET standard. However, it falls short of a real improvement for three reasons:

- The list is a mere codification of already existing practice under investment law, and does not significantly limit the standard.
- The article codifies the 'frustration' of 'legitimate expectations' of an investor as a breach of the standard. As one of the most far reaching interpretations of FET, codifying legitimate expectations is not a limitation of the standard, but an expansion of it.
- The list of breaches is not exhaustive, and can be amended by the CETA Joint Committee, which would expand the scope of the standard (please see point 13 and Annex).

6. Expropriation (Art. 8.12 and Annex 8-A)

While the definition of indirect expropriation (in Annex 8-A) offers a shield against general investor challenges concerning 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'. An acceptable solution would have been to exempt all measures that aim at or contribute to public interest, but as it stands, the text fails to ensure full protection of public health, the environment and consumer rights. Furthermore, the calculation of compensation should take into account whether the investment produced negative economic and societal costs from the date of requisitioning or destruction until the date of actual payment.

7. Relationship with Domestic Courts (Arts. 8.22 - 24, Arts. 8.32 - 33)

The revised chapter does not require the exhaustion of domestic remedies, but permits investors to choose between going to national (or international) courts or the investment arbitration mechanism under CETA. The exhaustion of local/domestic remedies is an important rule of international law, which has become common practice in international investment law. It can officially be demanded as a requirement for consent under the ICSID Convention (Art. 26). CETA therefore goes against a standing practice in international law and perpetuates the privileged status of foreign investors under international investment law. Furthermore, both Canada and the EU have advanced legal systems, based on the rule of law, which guarantee adequate judicial protection for foreign investors and there is no evidence of systematic discrimination of foreign investors in either jurisdiction.

8. Independence and Selection of Tribunal Members (Arts. 8.27, 8.28 & 8.30)

The revised chapter seeks to address one of the core criticisms of ISDS - the lack of independence and bias towards investors of ISDS arbitrators - by modifying the selection process of CETA tribunal members. Tribunal members will be randomly selected from a roster of 15 individuals, appointed by the CETA Joint Committee. While the selection process is a step in the right direction, CETA still

does not guarantee sufficient independence because (please see Annex for an elaboration of the points below):

- Tribunal members are (still) not financially independent and remain incentivized.
- The selection process of the roster of Tribunal Members is opaque and lacks concrete rules on appointments or scrutiny thereof.
- This system opens the interpretation of complex, sovereign public policy decisions up to tribunal members who will evaluate them from a narrow trade/investment perspective with insufficient knowledge of domestic law or expertise in public policy fields.

9. Appellate Mechanism (Art. 8.28)

While the introduction of an appellate mechanism is to be welcomed, the ad-hoc tribunal merits some criticism. Neither its overall functioning and procedures, appointment of members or their remuneration are defined in the final CETA text. The mechanism is heralded for increasing the legitimacy of the system, yet these fundamental elements are to be defined by the CETA Joint Committee (see also point 13). One of the core features of ICS is thus still pending, enabling it to escape any democratic scrutiny and risking to produce a technocratic court, driven by policy justice rather than public justice.

10. Transparency (Art. 8.36) and Intervention by Third Parties

The chapter contains considerable improvements on transparency. It is based on, and goes further than the UN Commission on International Trade Law (UNCITRAL) transparency rules. Hearings, exhibits and submissions would be made available to the public, which is a novelty, and civil society stakeholders can make *amicus curiae* submissions. However, there are no deadlines for the publication of awards, and redactions of confidential information will have to be monitored by civil society to make sure they are not going too far. Unlike the TTIP ICS proposal, CETA does not offer possibilities for third-party intervention. This is a regrettable choice. Rights and mechanisms for third-party intervention are vital, for example for local population, who are directly affected in cases relating to environmental permits for mining or infrastructure projects.

11. Final Award (Art. 8.39)

The article attempts, but fails to effectively prevent a potential regulatory chill effect, resulting from fear of having to pay high compensation to foreign investors. On the one hand, it excludes the award of punitive damages and limits damages to monetary damages and restitution of property at market value. On the other hand, it fails to clarify that 'the loss suffered by the investor', which will have to be compensated, does not include expected profits. This is relevant in light of claims brought in relation to investor's legitimate expectations (see above). As it stands, investors would be able to sue governments for great sums covering years of expected profits. Moreover, while the "loser pays" principle may in principle deter (frivolous) claims, it might also impose a heavy burden on smaller Member States, considering that proceedings can last 24 months or longer. If, as the chapter claims, frivolous and unlawful claims are already being filtered by the respective articles, this principle is an inadequate choice.

12. Sunset Clauses in CETA (Arts. 30.8 (4) and 30.9 (2) CETA)

Sunset clauses are a controversial mechanism to prolong the applicability of investment agreements so that investors can still bring a claim, even after countries have terminated the agreement. The sunset clause in CETA Art. 30.9 (2) is set for 20 years, which is long in international comparison and longer than the 15 years used in most Member State BITs with Canada. This undermines democratic processes as, particularly in Europe, decisions to terminate international agreements are usually based on internal democratic decision-making. Moreover, CETA contains a sunset clause for provisional application, which is entirely unprecedented (Art. 30.8 (4)). If provisional application was terminated and the agreement does not enter into force, investors could benefit from the chapter for another three years. This means that foreign investors could potentially sue governments under CETA, even if national parliaments reject the deal.

13. The CETA Joint Committee (Art. 26.1)

The CETA Joint Committee has several important powers, but there are no rules which determine how the Committee can be publically held accountable for its decisions, nor are there any clear rules on its composition, decision-making, and transparency. Art. 26.1 establishes the Committee which *"shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees"*, but further elements of its composition are unclear. It not only appoints the roster of Tribunal members, but it can also adopt definitions of the 'fair and equitable treatment' standard and adopt interpretations of provisions in the investment chapter that will be binding on tribunals, even while a case is ongoing. These factors contribute to making ICS unpredictable and potential prey to influences seeking to undermine public interest decision-making processes. The powers of the CETA Joint Committee are problematic because it can change features of the agreement without democratic oversight or accountability and undermine the power of courts to interpret EU law.

14. Compatibility with EU Law (Art. 8.31 and others)

Art. 8.31 seeks to accommodate one of the key constitutional flaws of ISDS under EU law: its incompatibility with the Treaties. The article seeks to preserve the powers of the European Court of Justice (ECJ) 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 would require (i) exhaustion of domestic remedies and (ii) prior involvement of the ECJ over questions of EU law.

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; Slovakia[1]. 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 rights[2].

Topic	**Summary of provisions**	**Analysis**
Chapter EIGHT - Investment		
Section A - Definition and scope		
Article 8.1 - Definitions No revisions made in the Article	• Section sets out the legal binding definition of key words and concepts used in the chapter.	• 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	• 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

	party, such as limiting the number of enterprises that may carry out a specific economic activity and (ii) a numerical quota or economic needs test. Point b) prohibits requirements on incorporation such as a specific type of legal entity or joint venture. Next, this article lists exceptions to the abovementioned prohibitions. Exceptions include: a) zoning and land use regulations, and d) the imposition of a moratorium or ban to ensure the conservation of natural resources and the environment.	Member States' reservations.
Article 8.5 - Performance requirements No revisions made in the Article	● 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.	● 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.
Section C - Non-discrimination treatment		
Article 8.6 - National Treatment	● Obligations to provide National	● Needs to be read in conjunction with Annexes I

No revisions made in the Article	Treatment (NT) ● Prohibition to market access and relative establishment rights incorporation ● Host has obligation to prospective investors before investment is made.	and II of the CETA Agreement to check individual Member States" reservations. ● 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.
Article 8.7 - Most-favoured-nation treatment Limited revisions made in the Article	● 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.	● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States' reservations.
Article 8.8 - Senior management and boards of directors No revisions made in the Article	● Prohibition to impose nationality requirements on senior management and boards of directors.	● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States' reservations.
Section D - Investment protection		
Article 8.9 - Investment and regulatory measures *NEW Article*	● 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	● 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

	interest that negatively affect an investment or expectations of profits are not a breach. Further paragraphs clarify the relation of subsidies with this chapter.	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. ● 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: *"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."*
Article 8.10 - Treatment of investors and covered investment Limited revisions made in the Article	● 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).	● 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

	● 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).	has been most used by investors when launching cases and has been interpreted in an inconsistent and far-reaching manner. ● 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.: - 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.
Article 8.12 - Expropriation Limited revisions made in the	● Prohibits a party from directly or indirectly nationalising and covered investment and lists the circumstances and conditions	● 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	under which it may do so ((1)(a)-(d)). Limits the compensation to be paid to the fair market value (2) plus interest (3). ● 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.	● 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		● Selected substantive commitments do not apply to those existing non-conforming measures that are

No revisions made in the Article		listed in the schedules. ● 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.
Section F - Resolution of investment disputes between investors and states		
Article 8.22 - Procedural and other requirements for the submission of a claim to the Tribunal Limited revisions made in the Article	● 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.	● 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

		use a BIT. ● 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.
Article 8.24 - Proceedings under another international agreement Technical revisions made in the Article	● Covers overlaps with claims brought under other international agreements.	● 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.
Article 8.26 - Third Party funding *NEW Article*	● Requires full disclosure of third party funding to the Tribunal, at the time of the submission claim	● 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.

Article 8.27- Constitution of the Tribunal *NEW Article*	• 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.	• 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);

		• The selection process of the roster of Tribunal Members is opaque. The CETA Joint Committee appoints these individuals, but there are no clear rules on how this appointment process will take place or how it can be scrutinized by the public or their democratically elected representatives. There is therefore a risk that government officials will appoint Members without any public scrutiny.
Article 8.28 - Appellate Tribunal *NEW Article*	• 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	• *See above under 'Article 8.27- Constitution of the Tribunal'*
Article 8.29 - Establishment of a multilateral investment tribunal and appellate	• Article 8.29 provides that CETA Joint Committee can decide that a potential future multilateral investment mechanism	

mechanism *NEW Article*	replaces the ICS system under CETA.	
Article 8.30 - Ethics *NEW Article*	● 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.	● This article is a copy of Article 11 in TTIP ICS
Article 8.31 - Applicable law and interpretation *NEW Article*	● 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	● 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.
Article 8.32 - Claims manifestly without legal merit Technical revisions made in the Article	• 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.	• 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.
Article 8.33 - Claims unfounded as a matter of law Technical revisions made in the Article	• 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.	• 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.
Article 8.36 - Transparency of proceedings	• States that hearings should be open to the public.	• Includes the provision of art 18 of the TTIP ICS proposal

Technical revisions made in the Article	● Provides protection against disclosure of confidential information or protected information, if deemed necessary. ● Confidentiality is defined according to each party's law.	
Article 8.39 - Final award Limited revisions made in the Article		● 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.

Article 8.44 - Committee on Services and Investment Substantial revisions made in the Article	• 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	• The composition of this committee, which will have a major influence on the system, is not defined in the text.