An SIA analysis of the Investment Chapter in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)

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A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada

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An SIA analysis of the <u>Investment Chapter</u> in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)

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7.3. INVESTMENT[1]

Overall Summary:

Regulatory and institutional reforms encouraged by CETA may remove certain barriers in Canada to EU investment; however, as the negotiations remain ongoing, this assessment is based on a set of assumptions. Removal of barriers could create certain net economic benefits. It would likely create some positive, and potentially negative, social impacts. It would likely have mixed environmental impacts.

Regarding investor-state dispute settlement (ISDS) specifically, the conflicting costs and benefits of such a mechanism make it doubtful that its inclusion in CETA would create a net/overall (economic, social and environmental) sustainability benefit for the EU and/or Canada. There is no solid evidence to suggest that ISDS will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism, just as state-state dispute settlement is also an enforcement mechanism. And the policy space reductions caused by ISDS allowances in CETA, while less significant than foreseen by some parties, would be enough to cast doubt on its contribution to net sustainability benefits. As such, the study's assessment suggests that a well-crafted state-state dispute settlement mechanism might be a more appropriate enforcement mechanism in CETA than ISDS.

Economic assessment summary:

The impact of CETA as a whole specifically on investment, as well as the impact of the Investment Chapter specifically on trade and intangible business linkages, could contribute to some increase in GDP growth in Canada and the EU.

More specifically, the impact of CETA as a whole on investment in Canada and the EU will likely be positive, and could be 'notable,' although in the opinion of the study would likely be less than 'significant.' For Canada, investment liberalisation in CETA is expected to reinforce existing trends in bilateral investment, with the majority of flows directed towards the financial, energy and mining sectors. More specifically, if included in the negotiations, removal of restrictions in such sub-sectors as telecom; transportation services, including water and transportation services; fisheries; finance; and mining/uranium may positively impact the level of bilateral investment in such areas. Investment in the EU would likely follow the positive trend predicted for Canada, but on a smaller scale. This is due to the relatively larger size of the EU economy compared to Canada and given Canada is currently more restricted to FDI than the EU at large.

The Investment Chapter in CETA could encourage economic benefits in Canada in terms of trade-related effects and intangible linkages, although the significance of these will likely be minor to notable at most. The Investment Chapter in CETA would provide benefits to multinational

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[1] **Introductory notes:** "Investment" herein follows the definition used in NAFTA – specifically, all types of financial investments, shareholding, secured debts and typical forms of FDI. The below assessment delineates between portfolio investments and FDI where appropriate. Unlike the other cross-cutting issue sections herein, this section considers both the US and Mexico alongside the assessment for the EU and Canada, in recognition of the linkages between CETA and NAFTA, and the EU-Mexico FTA and CETA. Although the analysis focuses on investment arising out of an "Investment" chapter in CETA, particularly in reference to investor-state provisions, it also considers investment effects from CETA as a whole. This investment section, (as well as the analysis of investment-related indicators within the individual sectoral analyses), is partially informed by the FDI gravity modelling results found in Annex 3.

companies in particular in terms of fostering intangible business relationships, which may have economic benefits, and stimulating the flows of capital and differentiated goods.

However, the role of ISDS, which may be included in the Investment Chapter in CETA, as a contributor to the aforementioned economic benefits is unclear as there does not appear to be readily available empirical evidence on the matter. On one hand, simply to the extent that it serves as an enforcement mechanism, the inclusion of ISDS in CETA may contribute to some economic benefits, and the economic risks it brings are unlikely to be as significant as some stakeholders suggest. On the other hand, it is uncertain that the aforementioned economic benefits from ISDS would be maximised in a sustainable way, and the fact remains that ISDS does usually create at least some minimal economic costs to government.

The Investment Chapter in CETA will create requirements that on one hand will likely have positive economic effects, while on the other hand may also create effects that constitute a reduction in economic policy space.

Social assessment summary

There will likely be some positive, and potentially some negative, social impacts from investment encouraged under CETA as whole. Increased investment under CETA might be channelled into creating jobs in Canada and the EU that score higher on quality and decency of work indicators, although it may also create some degree of worker displacement and wage inequality. Either way, these impacts would likely be relatively limited. The impacts related to CETA-encouraged investment flows would not be attributable solely to the Investment Chapter but to the combined impacts of a number of provisions in CETA, for example those relating to other cross-cutting issues described herein, those liberalising restrictions in services (inclusive of those not related directly to investment), and those creating tariff reductions.

The policy space reductions caused by ISDS allowances in CETA would likely be less significant than foreseen by some, but still enough to cast doubt as to if they would contribute to net/overall social sustainability in Canada and the EU. (This said, it should be kept in mind that the state legally maintains the right to regulate in the face of an ISDS mechanism, although it may have to pay compensation in ISDS cases and feel dissuaded from regulating for fear of ISDS cases; and it is important to stress that a reduction in "policy space" as used in this assessment exclusively refers to the ability of governments to make policies that have clear social [as well as economic and environmental] benefits.) This assessment is based upon consideration of several arguments: the questionable utility of using ISDS as currently operating rather than domestic courts in Canada and the EU; precedent of ISDS creating some regulatory chill; risk of unrecorded regulatory chill from ISDS; lack of information on ISDS case rulings; and risk created by a 'third country incorporation' provision in ISDS in CETA. This brings into question the efficacy of ISDS in contributing to protection of investors' rights premised on objectives of preventing capital flight and enhancing investment with the end goal of contributing to the "the well-being of society." Likewise, it is doubtful that including ISDS in CETA would create a net/overall social sustainability benefit for the EU and/or Canada.

Environmental assessment summary

As mentioned in the Industrial Products section, increased FDI in the oil sands and mining sectors could lead to increased environmental impacts since these sectors are environmentally intensive. Given the relative concentration of FDI inflows in these sectors in Canada, a marginal increase in investment inflows driven by CETA and higher oil and mineral prices could lead to an increase in production capacity that would in turn lead to impacts on capital stocks, use of bio-diverse areas, *water use and contamination, toxic contaminants and effluents, and air pollution and GHG emissions. This said, although the gravity modelling for this report provides some indication that investment could increase, it is unclear how much CETA would increase investment in the oil sands and mining sectors, and if investment does not particularly increase then the directly related environmental impacts therein would clearly be lessened.*

On the other hand, increased investment under CETA might have some positive environmental impacts. In particular, some investment might gravitate towards green technology, producing positive impacts in Canada and the EU.

This analysis errs on the side of caution by assuming that, while not meeting the threshold of 'significant,' ISDS in NAFTA, as well as some EU BITs, may very well have created some magnitude of reductions in environmental policy space relevant to this SIA, and thus ISDS in CETA may have some negative environmental impacts on the EU and Canada. It is therefore doubtful that including ISDS in CETA would create a net/overall environmental sustainability benefit for the EU and/or Canada.

7.3.1. EU, Canada, USA and Mexico

BASELINE

FDI and portfolio flows

Canada

Canadian direct investment abroad has rapidly expanded in the past 30 years, and Canadian firms now own more foreign operations in terms of dollar value than foreign companies own in Canada.[2] Outward stocks of FDI stood at $522,069 million in 2009, representing an increase of 66% since 2000.[3] Of this stock, the EU was the second largest destination for Canadian outward investment with 25.1% of the total, representing an increase of 4.1 percentage points from 2000 figures. In 2009, the total stocks of investment in Canada amounted to $483,472 million.

In terms of sectoral investment, the largest recipients of outward Canadian FDI are the finance and insurance industry (50.3% of all outward FDI stocks) and the energy and metallic minerals industry (23.3%). The average annual FDI inflow from 1994-2009 from the Canada to the EU was $CAD 8,189.[4]

The average annual FDI inflow from 1994-2009 from the US to Canada was $CAD 12,337, and the average annual FDI inflow during the same period from the EU to Canada was $CAD 8,813.[5] The EU serves as the second largest source of inward FDI in Canada, contributing 29.8% of the total stocks in 2009. Herein, the UK is the single largest contributor, holding 11.6% of the total stock of foreign investment in Canada, followed by the Netherlands (8.5%), France (3.3%), Germany (2.5%) and Luxembourg (1.8%). Overall, these countries respectively represent the 2nd, 3rd, 5th, 7th and 9th largest sources of investment into Canada in 2009. In terms of sectoral investment, inward FDI is primarily directed towards Canada's energy and metallic minerals industry (36.2%) and finance and insurance industry (19.8%). Within the former, the EU, led by

[2] Institute for Research on Public Policy. "Dispelling Myths about Canadian Foreign Direct Investment." Canada.
[3] Statistics Canada
[4] Constructed average from Statistics Canada data
[5] Ibid

the UK, holds 35.2% of all inward FDI in the sector, while in the latter the EU holds 34.8% of all inward FDI.[6]

At the end of 2007, the market value of Canadian portfolio investment abroad totalled $714,734.7 million consisting of $564,138.4 million in stocks and $150,596.4 million in debt instruments. Herein, the EU served as the second largest destination of Canadian portfolio investment with holdings of $201,318.6 million. Within the EU, the largest destinations were the UK (33.4% of all EU holdings), France (14.8%), Germany (15.1%) and the Netherlands (7.4%).[7]

EU

In 2009, outward investment from the EU totalled $366,727 million, with the main outflows originating from Luxembourg,[8] the UK and France. The largest destinations for outward FDI in 2006 were the US, Canada and Switzerland. Inward investment totalled $309,557 million, with the aforementioned countries also serving as the main sources of investment.

In terms of portfolio investment, Euro area holdings of foreign securities totalled EUR 3.8 trillion at the end of 2008, with holdings of US securities at 33% of the total and offshore financial centres 12%.[9]

US and Mexico

The US is the world's largest recipient of FDI. More than $325.3 billion in FDI flowed into the US in 2008, which is a 37 percent increase from 2007.[10] The $2.3 trillion stock of FDI in the US at the end of 2008 is the equivalent of approximately 16 percent of US GDP.[11] Canada is the largest source of inward investment with inflows of $25, 813 million in 2009 followed by France with $24,046 million and Germany with $16,210 million. In total, financial inflows from the EU were $83,725 million. The US also has the world's largest outward investments. Outward flows totalled more than $3.2 trillion in 2009.[12] In 2009, the largest recipients of US FDI were the Netherlands ($471,567 million), the UK ($471,384 million) and Canada ($259,792 million). In total, outflows to the EU were more than $1,976 billion.[13]

FDI in Mexico for 2009 was $11.6 billion, down 51% from the previous year. The US was the largest foreign investor in Mexico, accounting for 49.8% ($5.8 billion FDI from the US) of reported FDI. The economic slowdown in the US in 2008 and 2009 has caused a significant decline in this figure. The Mexican Government estimate of FDI for 2010 is $15 billion to $20 billion.[14]

Regulatory and institutional framework

Canada and EU

International investment agreements ("IIAs") serve as the legal basis for international investment cooperation. There are several types of IIAs. These include Bilateral Investment

[6] Statistics Canada
[7] Statistics Canada
[8] The role of Luxembourg in investment is primarily explained by its role in financial intermediation
[9] European Central Bank
[10] US Dept. Of Commerce – Bureau of Economic Analysis
[11] CIA World Factbook
[12] CIA World Factbook
[13] US Dept. Of Commerce – Bureau of Economic Analysis
[14] US Department of State

Treaties (BITs)/Foreign Investment Promotion and Protection Agreements (FIPAs); double taxation treaties (DTTs); hybrid bilateral trade and investment agreements like CETA, often called preferential free trade and investment agreements (PTIAs); regional trade and investment agreements, some of which may be PTIAs, like NAFTA; regional economic integration agreements; and other multilateral agreements involving foreign investment, for example, sectoral investment agreements like the Energy Charter Treaty. According to UNCTAD, as of 2005 there were over 2,400 BITs, 2,600 DDTs, and many PTIAs, regional economic integration agreements, and other multilateral agreements involving foreign investment worldwide.[15]

The investment environment in Canada and the EU (including EU MS) is governed by a variety of domestic and international rules. Certain EU MS have particularly well developed domestic regulatory and institutional environments for FDI and portfolio flows. Both Canada and the EU, as members of the WTO, are bound by WTO agreements including GATS and the Agreement on Trade Related Investment Matters (TRIMS).

Canada and the EU have a number of trade and economic agreements with foreign countries, many of which include provisions on investment. A listing of these agreements for can be found in the Tables 72 and 73 in the "Third Countries" section below.

Additionally, Canada and the EU each have a range of investment-specific agreements with other nations. Canada's FIPAs with third countries are listed in a Table 74 in the "Third Countries" analysis below.[16] EU MS have concluded 1,200 BITs with other countries.[17] BITs typically include provisions defining standards of treatment, protection from expropriation, the right to freely transfer capital, prohibitions on certain performance requirements, and investor-state dispute settlement.[18] Under Article 207(1) of the Treaty on the Functioning of the European Union (TFEU), the new name of the EU Treaty as written under the Treaty of Lisbon, FDI now falls within the scope of EU commercial policy. The EU now has the exclusive competence to abolish barriers to foreign direct investment, whereas previously Member State BITs protected EU investors (market access was already an EU competence).

Canada and EU MS have undertaken a number of measures to facilitate investment among one another specifically. Canada has FIPAs with 6 EU MS: the Czech Republic, Hungary, Latvia, Poland, Romania, and Slovakia. Canada and EU MS have made commitments through the OECD to one another to mutually facilitate investment, including via the OECD Code for Liberalisation of Capital Markets and Code for the Liberalisation of Invisible Operations and the Guidelines for Multinational Enterprises. These commitments do not include investment protection provisions,

[15] UNCTAD (2005). "Investor-State Disputes Arising From Investment Treaties: A Review." UNCTAD Series on International Investment Policies for Development. New York and Geneva. http://www.unctad.org/en/docs/iteiit20054_en.pdf

[16] Canadian FIPAs contain the following major components: 1. Definitions; 2. Treatment of Investments - General and Specific Obligations; 3. Protection of investments - Expropriation, Compensation, and Transfers; 4. Subrogation (this is an insurance term, used for situations where the insurer has the rights of its insured after it makes an insurance payment) 5. Dispute Settlement Mechanisms; 6. Entry Into Force; 7. Exceptions and Special Provisions. More on the structure of FIPAs can be found at URL: http://www.bilaterals.org/spip.php?article497

[17] EC (2010). "Memorandum 10/303: Q&A: Commission launches comprehensive European international investment policy." 7 July 2010.

[18] Gallagher, Kevin P (2010), "Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements." G-24 Discussion Paper Series, UNCTAD.

such as expropriation and investor-to-state dispute settlement. The OECD National Treatment Instrument is a non-binding agreement. The 2008 Joint Study suggests that no Canadian provinces and territories have arrangements with EU MS on Canadian Direct Investment Abroad (CDIA) outside of the informal mechanisms set up by Ontario. Regional businesses and commerce groups importantly facilitate commerce and trade between the EU and Canada.[19]

Canada, EU, US and Mexico

The US has a particularly well developed investment environment, and Mexico has an investment environment that has seen marked improvement and transformation over the last few decades. The US has one of the most developed systems for FDI and portfolio flows in the world. Mexico has a well-established environment for investment with the US and Canada under NAFTA, and with the EU under the EU-Mexico FTA which entered into force in 2000. More than 18,000 companies with US investment have operations in Mexico, and the US accounts for more than 40% of all FDI there.[20] However, Mexico opted out of making commitments for investment in its energy sector under NAFTA, which has ultimately hurt Mexico.[21]

As mentioned, the important investment relationship between Canada, the US and Mexico is governed by NAFTA. Box 33 below summarises certain key provisions in Chapter 11 of NAFTA, which deals specifically with investment.

Box 33: Select provisions in Chapter 11 of NAFTA

- Article 1102 of NAFTA requires national treatment in investments between NAFTA countries. Sub-article 2 (Article 1102:2) applies to investors and investments in "like circumstances," which may allow for difference in interpretation when considering the applicability of different sized companies and/or investments in different sectors. (Note: As stipulated by Article 1108, Article 1102 does not apply to government procurement; subsidies or grants; nor does it apply to measures that relate to aboriginal affairs, minority affairs or social services such as health, child care and social welfare.)
- Article 1103 of NAFTA requires all concessions in investment be extended to investors from the US and Mexico in what is known as a most favoured nation (MFN) clause. Sub-article 2 (Article 1103:2), like Article 1102:2, applies to investors and investments in "like circumstances," which may allow for difference in interpretation when considering the applicability of different sized companies and/or investments in different sectors. (Note: As stipulated by Article 1108, Article 1103 does not apply to government procurement, subsidies or grants.)
- Article 1105 of NAFTA requires members to observe minimum standards within "international law."
- Article 1106 on NAFTA prohibits performance requirements in terms of export quantity

[19] 2008 Joint Study
[20] US Department of State http://www.state.gov/r/pa/ei/bgn/35749.htm
[21] Hufbauer, G.C. and J.J. Schott. (2005)

requirements, domestic content, and technology transfer, among other requirements.

- Article 1110 of NAFTA states that "No Party may…take a measure tantamount to nationalization or expropriation of such an investment…" except under certain circumstances.[22]

Certain provisions herein have been used as the basis for private investors to sue the state over claims that the government limited their investment opportunities/their rights have been violated under the agreement. These are so called "investor-state" provisions, which form the basis for what is called investor-state dispute settlement (ISDS). Article 1102, 1105 and 1110 have been frequently used in this regard.

The application of Chapter 11 is limited by sectoral, reciprocal and investment review reservations listed in Annexes 1, 2 and 3 of NAFTA.[23]

NAFTA allows companies of any nationality incorporated in a NAFTA country to bring a Chapter 11 case.[24]

ANALYSIS

ECONOMIC ASSESSMENT

INDICATOR: Impact on institutional and regulatory environment for investment (focus on FDI)

Canada and EU

FDI restrictions and liberalisation

The OECD has compiled an FDI Restrictiveness Index which is useful at a basic level to assess the investment climate in Canada and the EU (and the US and Mexico). The index uses 4 categories of restrictions against investment, i.e. equity restrictions, screening and prior approval requirements, restrictions on key foreign personnel/directors, and an "other restrictions" category.[25] It calculates scores for several sectors and weights the sector scores (using FDI/trade

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[22] Article 1110 of NAFTA states: "*No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the general principles of treatment provided in Article 1105; and (d) upon payment of compensation in accordance with paragraphs 2 to 6.*"

[23] For example, Canada carried over 48 sectoral reservations from CUFSTA under Chapter 11 of NAFTA (Hufbauer, G.C. and J.J. Schott (2005), pg 202)

[24] See Dumberry, P. (2001). "The NAFTA Investment Dispute Settlement Mechanism: A Review of the Latest Case Law: Journal of World Investments." 151-95; and Hufbauer, G.C. and J.J Schott (2005), pg 206 footnote 22

[25] The OECD defines the 2010 index components as follows: (1) foreign equity limits (no foreign equity allowed, foreign equity allowed to be less than 50% of total equity, foreign equity is allowed to be greater than 50% but less than 100% of total equity); (2) screening and prior approval (approval required for new FDI/acquisitions of less than USD 100million or if corresponding to less than a 50% of total equity, approval required for new FDI/acquisitions above USD 100 million or if corresponding to over a 50% of total equity, notification with discretionary element); (3) restrictions on key foreign personnel/directors (foreign key personnel not permitted, economic needs test for employment of foreign key personnel, time bound limit on employment of foreign key personnel, nationality/residence requirements for board of directors – majority must be nationals, at least one must be a

weights)[26] to create an overall country score. The index is not without its flaws, including that it does not take into account important determinates of investment including barriers posed by state-owned enterprises and semi-private government enterprises or special government rights,[27] or stringency of enforcement and application of rules. Still, the 2010 Index has made some revisions to past methodologies,[28] and is useful in providing a basic understanding of the dynamics of the institutional and regulatory investment environments in Canada and the EU (and the US and Mexico).

Table 63: OECD 2010 FDI restrictive index for EU(24)* (0 = most open, 1 = most closed)

Country	Equity restrictions	Screening and prior approval requirements	Restrictions on key foreign personnel/directors	Other restrictions	Total FDI index
Austria	0.058	0.009	0	0.009	0.076
Belgium	0.014	0	0	0.002	0.016
Czech Rep.	0.049	0	0	0.006	0.055
Denmark	0.063	0	0	0.001	0.063
Estonia	0.052	0	0	0.046	0.098
Finland	0.019	0	0	0.021	0.04
France	0.038	0	0.001	0.014	0.053
Germany	0.02	0	0	0.004	0.025
Greece	0.032	0.002	0.002	0.024	0.059
Ireland	0.035	0	0	0.024	0.059
Italy	0.069	0	0	0.004	0.073
Hungary	0.065	0	0	0.001	0.066
Latvia	0.051	0	0	0.034	0.085
Lithuania	0.036	0	0	0.014	0.05
Luxembourg	0.003	0	0	0	0.004
Netherlands	0.003	0	0	0.001	0.004
Poland	0.058	0	0	0.053	0.111
Portugal	0.003	0	0	0.003	0.006
Romania	0.008	0	0	0	0.008
Slovak Rep.	0.049	0	0	0	0.049
Slovenia	0.011	0	0	0	0.012
Spain	0.019	0	0	0	0.019
Sweden	0.028	0.027	0	0.001	0.057

national); (4) "other restrictions" (establishment of branches not allowed/local incorporation required; reciprocity requirement; restrictions on profit/capital repatriation; access to local finance; acquisition of land for business purposes; land ownership not permitted but leases possible)

[26] See Golub (2003) for explanation of weighting methodology

[27] Mandel-Campbell. A. (2008)

[28] For example, the 2010 methodology expands upon previous coverage for sectors and re-weights certain components.

UK	0.036	0	0	0.022	0.059
EU (24) Average	**0.034**	**0.002**	**0.000**	**0.012**	**0.048**

*OECD 2010 FDI Restrictiveness Index does not provide data for Malta, Cypress, and Bulgaria
Source: Data compiled from: Kalinova, B., A. Palerm and S. Thomsen (2010)

As can be seen in the above table (although not accounting for Malta, Bulgaria or Cypress given lack of data), the EU overall has a relatively low FDI restrictiveness index of 0.048 out of 1. Members with the highest investment restrictiveness include Poland and Estonia. Members with the least restrictive index include the Netherlands and Luxembourg.

Table 64: OECD 2010 FDI restrictive index for Canada, EU (24)*, US and Mexico (0 = most open, 1 = most closed)

Country	Equity restrictions	Screening	Key Personnel	Operational Restrictions	Total FDI Index
Canada	0.067	0.082	0.000	0.005	0.153
EU (24)*	0.034	0.002	0.000	0.012	0.048
US	0.100	0.000	0.008	0.008	0.116
Mexico	0.131	0.095	0.000	0.037	0.264

*OECD 2010 FDI Restrictiveness Index does not provide data for Malta, Cypress, and Bulgaria
Source: Data compiled from: Kalinova, B., A. Palerm and S. Thomsen (2010)

As can be seen in the above Table 64, Canada has a more restrictive investment environment than the US or EU24, although less restrictive than Mexico. As is evidenced in Table 64, Canada's most significant restrictions to FDI are in the media and fishing sectors. It is least restrictive in the agricultural and forestry as well as real estate sector. Still, the full impact of this restrictiveness on the grand scheme of investment flows should be contextualised, as the Canadian Competition Panel among others have noted Canada does attract noteworthy amounts of FDI. Indeed, as a proportion of GDP its stock of inbound FDI is relatively high among developed countries.[29] Canada experienced a significant change in its OECD FDI restrictiveness in the last 4 years, as in 2006 its FDI restrictiveness index score was about 0.359[30] making its 2010 score of 0.153 roughly 53% lower, although it is unclear how much of this is due to a reduction in restrictiveness or a result of changes to the OECD restrictiveness index methodology between 2006 and 2010.[31]

[29] Competition Review Panel. *Compete to Win*. Ottawa: Government of Canada. 2008.
[30] Data from: Blanka Kalinova, Angel Palerm and Stephen Thomsen (2010), "OECD's FDI Restrictiveness Index: 2010 Update", *OECD Working Papers on International Investment, No. 2010/3*, OECD Investment Division, www.oecd.org/daf/investment
[31] See Ibid at pg 7 which makes a note on comparing 2006 vs. 2010 FDI restrictiveness indexes

Table 65: Canada's 2010 OECD FDI Restrictiveness Index by sector[32] (0= most open, 1 = most closed)

Sector	Canada's FDI restrictiveness index
Agri. & For.	0
Fishing	0.6
Mining	0.15
Manuf.	0.1
Electricity	0.1
Construction	0.1
Distribution	0.1
Hotels & res.	0.1
Transport	0.267
Media	0.7
Telecom	0.35
Financial Serv.	0.067
Business Serv.	0.1
Real Estate	0
Total FDI Index	**0.153**

Source: Kalinova, B., A. Palerm and S. Thomsen (2010)

Table 66: Canada's 2006 OECD FDI Restrictiveness Index by sector (0= most open, 1 = most closed)

Sector	Canada's FDI restrictiveness index
Business service (total)	**0.175**
Legal	0.200
Accounting	0.200
Architecture	0.150
Engineering	0.150
Telecoms (total)	**0.525**
Fixed	0.525
Mobile	0.525

[32] The OECD offers the following further description of what some of the sectors herein include: Business services (legal services, accounting and audit, architectural services, and engineering services); other finance (including securities and commodities brokerage, fund management, custodial services, etc.); telecommunications (fixed telecoms, mobile telecoms); media (radio and TV broadcasting, other [newspapers, etc.]); transport (land, maritime, air); electricity (general distribution); food and other manufacturing (including textiles, wood, paper and publishing, other manufacturing); mining and quarrying (including oil exploration and drilling)
Notes: (1) The score for Financial Services has been calculated on the basis of a National Treatment instrument. Canada's position under the Codes of Liberalisation in the area of financial services is discussed in the July 2009 Report by the Investment Committee to the OECD Council (www.oecd.org/daf/investment/instruments).
(2) The scores for Fishing, Maritime Transport, Media and Telecoms have been calculated on the basis of Canada's list of exceptions under the National Treatment instrument. The corresponding sectoral reservations under the Capital Movements Code are under review by Canada.

Construction	**0.150**
Distribution	**0.150**
Finance (total)	**0.219**
Insurance	0.200
Banking	0.225
Hotels & Restaurants	**0.150**
Transport	**0.413**
Air	0.675
Maritime	0.300
Road	0.250
Electricity	**0.350**
Manufacturing	**0.150**
Total FDI Index	**0.228**

Source: Koyama, T. and S. Golub (2006)

CETA may not reduce any current investment barriers in the EU to a significant degree given the EU's already comparatively low level of investment restrictiveness. The impact of this reality on FDI flows is discussed under the "FDI and portfolio flows…" indicator(s) below. This is not to deny that CETA may encourage some reductions on investment barriers in EU MS with higher investment restrictiveness.[33]

Regulatory and institutional reforms encouraged by CETA may remove certain barriers in Canada to EU investment; however, without further details of the agreement it is difficult to tell exactly what barriers may be removed. Also, without further details, it is difficult to tell if these barriers will be removed specifically because of the CETA negotiation process or were in the process of being liberalised anyway.

It is also worth noting that CETA may affect restrictions in the inter-provincial investment in Canada. Requirements on administrative processing of paperwork that must be completed and submitted to agencies at different levels of government acts as an impediment to investment. Lack of harmonisation can also lead to delays in zoning, licensing and permit requirements. CETA may prioritise reduction of at least some of these internal barriers to investment in Canada, which are of concern to EU companies operating in Canada as well as to domestic Canadian companies.

Enforcement provisions in investment and trade & investment agreements

Logic behind using investor-state provisions in investment and trade & investment agreements

Investor-state provisions are included in investment (e.g. BITs) and trade & investment agreements (like NAFTA) as the basis for ISDS, i.e. for private investors to sue the state in international arbitration over claims that the government limited their investment opportunities/their rights have been violated under the agreement. They deal with disputes over property rights and other treatment of investments. A brief overview of commonly invoked

[33] Note that although Poland has a more restrictive FDI environment than Estonia according to the OECD index, Poland has signed an FIPA with Canada, implying that its FDI restrictiveness with Canada would be comparatively lower than it is with the RoW under the OECD index.

investor-state clauses from NAFTA, found in Chapter 11 of that agreement, can be found in Box 33 of the baseline section. The remainder of this analysis considers investor-state provisions in CETA that would likely be worded in a broadly similar manner to those in NAFTA Chapter 11.

It is important to note that investor-state provisions are not unique to NAFTA or (if included) to CETA; however, while EU MS have many BITs with investor-state provisions the EC has not included investor-state provisions in an EU-wide trade & investment agreement with third countries. CETA would be a first in this regard.[34] Such provisions are very common in IIAs signed all over the world over the past decade or so, and it is now more unusual to have such an agreement without their inclusion.[35] Cases are often heard by the World Bank's ICSID; the Permanent Court of Arbitration, according to UNCITRAL rules; or the International Court of Arbitration in Paris, an arm of the International Chamber of Commerce. As noted by UNCTAD, the UN agency dealing specifically with trade, the increase in investor-state disputes usually arises as increased international investment flows lead to more occasions for such disputes, and more occasions for disputes taken together with more IIAs are likely to lead to more cases. Also, with increased numbers of investment agreements in place, more investor-state disputes are likely to be within the realm of ISDS. Another reason for the increase may be the increased complexity of recent IIAs and other regulatory hurdles in their actual implementation. Additionally, as investors hear about successful claims, more investors may be encouraged to use the mechanism.[36]

Advocates of ISDS, and BITs at large, argue that these provide added security to investors, which ultimately creates economic benefits for society. Specifically, as ISDS is undisputedly intended as a core mechanism for protecting investors' rights, it intuitively should also contribute to the wider stated objectives of its advocates in protecting such rights, i.e. preventing capital flight and maintaining investment, "enhancing"/increasing investment, and through these actions contributing to the "the well-being of society."[37] For example, advocates say investor-state dispute settlement prevents capital flight in the event of a problem with investment. Also, there is a related rationale for including investor-state provisions in an agreement like CETA because "Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others."[38]

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[34] Sinclair, S. (April 2010), pg 15

[35] A database of BITs can be found at UNCTAD's website here: http://www.unctadxi.org/templates/docsearch____779.aspx

[36] UNCTAD (2005)

[37] Trade negotiators from the European Commission, February 2011 suggest investor state provisions may increase investment (consultations with EC trade negotiations, February 2011). The EC finds in EC (2010c) "Memorandum..." page 1 that *"Investors are not the only beneficiaries of investment agreements. Investment, being an important driver for economic and social development, equally benefits all stakeholders. Thus, protection of investors' rights is not an aim in itself, but serves a wider objective: to enhance investment and contribute to the well-being of society."* In another publication the EC finds that "*Investor-state dispute settlement, which forms a key part of the inheritance that the Union receives from Member State BITs, is important as an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment.*" (EC (2010d). "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a comprehensive European international investment policy." COM 343 final. 7.7. 2010, pgs 9-10)

[38] Ibid, confirmed by consultations with DG Trade investment and service negotiators, March 2011. Also, aforementioned consultations specifically suggest that EU and/or Canadian investment might be diverted to a country like China if not protected by ISDS in CETA. And it was inferred that this investment loss could be compounded if China were to sign an agreement with ISDS with Canada, for example, if CETA did not include ISDS. In response, it must first be recognised a wide variety of pull factors unrelated to any push factors in CETA exist in China which make

The implications of these objectives for CETA are discussed further in the "FDI and portfolio flows…" indicator section, below.

Investor-state allowances vs. domestic law and domestic adjudication

As with any binding commitment, investor-state provisions require enforcement mechanisms since without a mechanism of enforcement investment commitments have relatively little meaning. However, some suggest that tribunals, at least as currently operating, are not necessarily the most appropriate institutional settings in which to hear investment-specific cases. Gus Van Harten of Osgoode Hall Law School suggests tribunals are "fragmented and non-hierarchical adjudicative structure of investor-state arbitration." He suggests that investor-state tribunals have in the past "been more likely to base damages awards on violations of the standard of fair and equitable treatment, in particular, than expropriation provisions in investment treaties." Further, he says "…governments are not acting responsibly to the public purse if they assume, when passing a measure, that future tribunals will favour a state-friendly as opposed to an investor-state interpretation." [39] Also, some draw attention to the apparent inability to challenge cases heard under ICSID rules.[40] These concerns extend to ISDS under CETA, as it appears to be on track to use the same method of tribunal arbitration. Others may disagree with the aforementioned assessment, finding that international tribunals provide an environment to hear cases that is in fact less bias than domestic courts in certain countries. And some sources emphasis that the ICSID Convention, for example, does not override domestic laws relating to sovereign immunity from the awards process, and arbitration decisions can be annulled or revised on review.[41]

More specifically, the utility of ISDS between developed countries in particular can be questioned, for example between the EU and Canada under CETA, given the strength of their existing institutional environments. Herein, a commonly held viewpoint from some opponents of investor-state provisions in agreements between countries like the US and Canada, i.e. those developed countries in NAFTA, is that investors from countries with well developed legal systems for hearing disputes will "abuse" such provisions in an effort to challenge government regulation.[42] As a note, when involving developing countries, investor-state arbitration is also not without its flaws, and in fact may be sometimes disproportionately burdensome on these countries,[43] although, at least theoretically, on the other hand these countries might benefit

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it a highly attractive market to EU and Canadian investment. (And Canada's resource endowements in particular, not the prospect of ISDS, make Canada attractive to Chinese investors.) Second, while China has more recently included certain ISDS provisions in investment agreements, for example in its latest BIT with Germany, no recorded ISDS case has ever been brought against China to date. It is likely that this trend is explained in that foreign businesses might feel they would jeopardise their operations in China if bringing an ISDS case, and in fact one reason for ISDS being allowed in recent Chinese investment agreements is likely the flexibility in the scope of what is committed and the fact that such allowances could practically be more so to protect Chinese interests abroad than vice versa (see Prud'homme, Dan (2011) "Recent ISDS trends in investment agreements with China." Working Paper.)

[39] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011

[40] Allen & Overy LLP (2010). "Investment Treaty Arbitration: Protecting and Promoting Foreign Investments." http://www.allenovery.com/AOWeb/binaries/51290.pdf

[41] EIU (2010). "Evaluating a potential US-China bilateral investment treaty." EIU report for the US-China Economic and Security Review Commission. EIU, London. http://www.uscc.gov/researchpapers/2010/EIU_Report_on_US-China_BIT--FINAL_14_April_2010.pdf

[42] See Public Citizen. http://www.citizen.org/Page.aspx?pid=2309

[43] On one hand, the relationship between developed and developing countries in particular might best be protected by such arbitration given the often underdeveloped nature the dispute settlement institutions within developing countries. For example, a number of studies discuss the utility of ISDS where investors are concerned about the

more from ISDS if they in fact bring investor security that exists comparatively more in developed countries.

Box 34: treatment of firms from third countries under certain ISDS provisions

NAFTA allows companies of any nationality incorporated in a NAFTA country to bring a Chapter 11 case (hereafter sometimes referred to as the 'third country incorporation provision').

As a note, the application of this provision may be somewhat limited by provisions included in NAFTA to protect against "treaty shopping," a situation where investors search for home countries that have treaties with host countries where investments will be made. The potential for such treaty shopping was recognised in the drafting of Chapter 11 of NAFTA, which includes a provision allowing a party to deny the benefits of the agreement to investors that have no "substantial business activities" in their putative home country.[44]

Without further details of CETA it is unclear how the agreement might address the aforementioned issues. The implications of including the third country incorporation provision in CETA are discussed further in the "Cost of ISDS…" and "Policy space" indicators sections, below.

Certain government officials consulted have pointed out that NAFTA Chapter 11 cases brought under NAFTA tribunals could instead be brought to domestic courts under domestic law (regardless of the existence of NAFTA), and this would also apply to CETA.[45] This point is further analysed below.

NAFTA allows a wider breadth of recourse than in domestic law in allowing a private foreign individual to challenge a foreign government, for example in certain circumstances depending on the related commitments in terms of MFN, national treatment, minimum standards of treatment, monopolies and state enterprises, performance requirements, requirements on senior management and board of directors, among others. These provisions deal with treatment of companies along a relatively specific set of commitments.

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strength of domestic reforms implemented in countries with higher perceived risk and/or corruption, i.e. usually certain developing countries (for example, see Vandevelde, K. (1998). "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties". Columbia Journal of Transnational Law). On the other hand, it is interesting to note that the NAFTA experience suggests that there is no clear evidence of more ISDS being initiated against developing countries than developed countries, as 28 cases were brought against Canada whereas only 17 cases were brought against Mexico (a developing and emerging country as defined by the IMF, although a member of the OECD). This said, trends in NAFTA alone cannot be extrapolated to assessing the ISDS relationship between all developed countries and developing countries, and further analysis is warranted in this area.
Monetary payouts, combined with the clear concerns raised by UN panels over the impacts of investor-state provisions on developing countries in particular -- among others see UNCTAD (2007) and other groups, for example, Osogoode Law School (2010) – suggest a need for improved arbitration of investor-state cases or dramatic changes in the system, for example moving towards contract-based approaches to ensure investment rather than IIAs. To take an example from NAFTA even, Mexico has been compelled to pay over $187 million in damages under NAFTA (data from Sinclair (October 2010)). This is the highest amount of damages paid by any NAFTA country, and clearly has higher monetary burden on the Mexican government than it would on the US or Canada given its comparatively smaller budget.

[44] Article 1113.2. For further discussion on this issue see UNCTAD (2005)

[45] Consultations with trade negotiators from the European Commission, February 2011

Moreover, NAFTA provisions related to "expropriation" go beyond domestic law on the same subject (also called "takings law"). Domestic law in NAFTA countries requires compensation for direct expropriation, which under a simplified definition is when the government takes over property rights. In NAFTA, for example, provisions allowing protection of expropriation are worded in a rather unique way: allowing protection against acts "tantamount to expropriation" and wider indirect expropriation. These provisions have been applied more liberally than US domestic takings law in terms of "diminution of value," "conceptual severance," "police power" and the "ripeness rule." [46] The US takings law is known to be more complex than Canadian takings law. As such, a CETA with investor-state provisions for expropriation similarly worded to NAFTA would inferably open the door to more ambitious interpretations and usages than allowed under domestic takings laws in Canada.

Other investment enforcement mechanisms outside ISDS

The standard enforcement mechanism outside ISDS to protect investors' rights in a trade/trade & investment agreement, and also intended to meet the same end objectives of ISDS as previously listed, is state-state dispute settlement. In state-state dispute settlement, disputes go through state representatives and tariffs are allowed to be raised or agreement concessions or obligations suspended as punitive measures.

Drawing on other conclusions in this assessment, it is the opinion of this study that a well-crafted state-state dispute settlement mechanism might be a more appropriate enforcement mechanism than ISDS in CETA. First, given state-state dispute settlement does not bring with it the same sustainability concerns as ISDS (as described in the economic, social and environmental assessments hereto), it would have fewer negative impacts if included instead of ISDS in CETA. Second, (as described in the economic, social and environmental assessments hereto), while advocated by a variety of business groups, there is no strong evidence to suggest ISDS brings with it more/maximises net benefits (economic, social or environmental) than state-state dispute settlement. Herein, it should be noted, however, that it would seem that there is at least some risk that if not carefully awarded, remedies (raised tariffs or suspension of agreement concessions or obligations) in state-state dispute settlement might have some negative impacts, including impacts on industries indirectly related to the investment disputes

[46] Herein "diminution of value" refers to the level of loss required to constitute expropriation; whereas the *Metalclad Corp v. United Mexican States* case (hereafter "*Metalclad*") shows that NAFTA required "significant" impairment of the investment value, not the stricter destruction of nearly the entire value as required in US takings law. "Conceptual severance" refers to splitting the value of takings into components of space, time and function to determine the value of takings; while this concept is not typically allowed in domestic US law when determining the value of a land taking, rulings from *Metalclad, Pope & Talbot vs. Canada* (hereafter "*Pope & Talbot*")*,* and *S.D. Myers Inc. vs. Canada* (hereafter "*S.D. Myers*") by NAFTA tribunals applied this concept. "Police power" refers to the unintentional loss of property or other economic disadvantage from ordinary, non-discriminatory state actions like regulation and taxation; whereas some suggest *Metalclad* makes a comparatively limiting judgment on the breadth of police power allowed under Chapter 11 when compared to domestic US law. The "ripeness rule" under US law finds that one must exhaust state procedures for remedy before filing a case with federal court; however, sources suggest that in *Metalclad* the ripeness rule was not required (although as a note, consultations are required before formal litigation in the NAFTA tribunal). Sources: Text of NAFTA Chapter 11, US eminent domain law, and related jurisprudence – for example, e.g. *Metalclad*, *Pope & Talbot*, and *S.D. Myers* decisions at www.naftalaw.org. Also, among secondary sources see: Shenkman, E. (2002) "Could principles of Fifth Amendment takings jurisprudence be helpful in analyzing regulatory expropriation claims under international law?" *New York University Environmental Law Journal* 11(1): 174-197; Porterfield, M. C. (2004) "International expropriations rules and federalism." *Stanford Environmental Law Journal* 23(3): 4-90; and Been, V. and J. C. Beauvais. (2003). "The global Fifth Amendment? NAFTA's investment protections and the misguided quest for an international 'regulatory takings' doctrine." *New York University Law Review* 78 (1): 30-143.)

at hand. Also, there would inevitably be concerns among businesses over the effectiveness and efficiency of such a mechanism when compared to ISDS. As such, both caution and tact need to be exercised in using state-state dispute settlement.

By way of context, while there has been a trend in new generation trade agreements to include ISDS, there are prominent recent examples of trade & investment agreements between developed countries which exclude ISDS.[47] For example, the US-Australia FTA, signed in 2004 and entered into force on 1 January 2005, does not include ISDS given opposition to including such a mechanism in a trade agreement with developed countries with robust institutions. That agreement, however, includes a provision to allow reconsideration of the FTA's enforcement mechanism if warranted. Given this precedent and recent policy statements, it would not be surprising if the Australian government seeks to keep ISDS out of the Australia-Japan FTA, negotiations on which started in 2007.[48] The recent EU-Korea FTA (like other EU-wide FTAs to date), signed in 2009 does not include ISDS.

US and Mexico

If CETA removes certain barriers in Canada to EU investment – directly or indirectly – it could directly or indirectly remove barriers to US and Mexican FDI into Canada. This is due to the Chapter 11 MFN and national treatment provisions under NAFTA that would extend to investors in "like" circumstances under CETA.

There is also an automatic extension of liberalisation afforded under NAFTA in what is known as the "ratchet" mechanism. The mechanism is invoked in instances of "autonomous" liberalisation, i.e. liberalisation that is considered unilateral, and applies to areas listed in Annex I of NAFTA although it does not apply to areas listed in Annex II (exclusions) of NAFTA.[49]

There remain some questions about the applicability of the NAFTA ratchet mechanism in relation to CETA. Consultations with trade negotiators suggest that CETA in unlikely *per se* to trigger the ratchet mechanism given Canada "generally liberalises on an autonomous basis." [50] While there could be a chance that CETA would encourage the use of Chapter 11 by the US and Mexico in situations where it otherwise would not have been used, i.e. if CETA were not implemented, these chances appear to be relatively limited.

Specifically, there is evidence that negotiations in CETA in particular could liberalise a number of services listed in NAFTA Annex II, Schedule of Canada, and while not fully clear what regulatory implications this would have for the US and Mexico they appear to be limited. CETA may

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[47] "Developed" herein used in-line with the IMF categorisation

[48] One update from the Australian authorities finds "We will continue consultations with Australian stakeholders on the merits of including investor-state dispute settlement (ISDS) in an FTA with another developed country." (Australia-Japan Free Trade Agreement: Newsletter Update 2. http://dfat.gov.au/fta/ajfta/newsletter_update/update_2.html); whereas recent policy statements clearly indicate the Gillard government does not intend to use ISDS in trade agreements, at least those with developing countries: "In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries." (Australian Government Department of Foreign Affairs and Trade (2011). "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity." http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state)

[49] Consultations with trade negotiators from the European Commission, February 2011

[50] Consultations with DG Trade services trade and investment negotiator in February 2011

liberalise sectors also listed in some form in NAFTA Annex II, Schedule of Canada, such as certain air transportation services, water transportation services, government finance, and telecom services. For example, within Annex II of NAFTA, CPC 752 Telecom Services, CPC 7549 – "Other Telecommunications Services Not Elsewhere Classified (limited to telecommunications transport networks and services)" is listed as having reservations in terms of national treatment, MFN, and senior management and boards of directors. Notably, NAFTA Annex IV, Schedule of Canada also sets reservations for "telecommunications transport networks and telecommunications transport services."[51] In addition, the aforementioned liberalisation does not seem to constitute "autonomous" liberalisation, since available evidence suggests it would result at least partly as a result of CETA negotiations. This suggests that if CETA were to liberalise CPC 7549, such liberalisation would not automatically extend to the US and Mexico under the NAFTA ratchet. However, further details of CETA would be required to specifically analyse all types of telecom services and government finance and the related reservations in NAFTA Annex II, compared to what is being asked for in CETA in order to determine the application of the NAFTA ratchet and/or if the US and Mexico would have recourse under investor-state provisions if not extended similar treatment. A similar assessment could be performed for air transportation services and water transportation services, although these sectors would not seem to extend to the US and Mexico even if liberalised for the EU under CETA, given stipulations in Annex IV of NAFTA.

INDICATOR: FDI and portfolio flows (from CETA as a whole), FDI and portfolio flows (from Investment Chapter in CETA alone, trade flows (from Investment Chapter in CETA alone), FDI and portfolio flows (from ISDS alone), trade flows (from ISDS alone)

Canada

The following section will analyse the potential economic impacts of (1) CETA as a whole on investment, (2) an Investment Chapter in CETA, and (3) the role of ISDS, within the Investment Chapter, as a contributor to the aforementioned impacts. The analysis will draw heavily upon trends in investment and trade patterns resulting from BITs/FIPAs and hybrid trade and investment agreements like NAFTA.

FDI flows caused by relevant trade agreements and implications for CETA as a whole

It is generally recognised that investment liberalisation when combined with certain other policies encourages investment and growth.[52] For example, there is a general consensus that

[51] NAFTA Annex IV, Schedule of Canada reads: "*Canada takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement. For international agreements in force or signed after the date of entry into force of this Agreement, Canada takes an exception to Article 1103 for treatment accorded under those agreements involving: (a) aviation; (b) fisheries; (c) maritime matters, including salvage; or (d) telecommunications transport networks and telecommunications transport services (this exception does not apply to measures covered by Chapter Thirteen (Telecommunications)*)." It is notable that the aforementioned reservation (d) does not appear to include all telecommunication services that might be liberalised under CETA.

[52] For example, among others see: Kirkpatrick, C., C. George and S. S. Scrieciu (2004). "Implications of Trade and Investment Liberalisation for Sustainable Development: Review of Literature." Impact Assessment Research Centre at Institution of Development Policy and Management, University of Manchester. 19 May 2004.

NAFTA clearly increased FDI in Mexico. [53] These analyses, however, may not be as relevant to CETA, as they typically involve developed countries' interactions with developing countries.

Generally, to the extent that a trade and investment agreement like CETA removes barriers to FDI it may increase FDI flows. Specifically, gravity modelling performed in this study generally supports the argument that removal of restrictions may positively impact the level of bilateral investment in such areas. See Annex 3 for further details of these results.

The impacts of NAFTA on US-Canada investments provide a useful indicator of the possible impacts of CETA on EU-Canada investment. There is evidence that NAFTA as a whole contributed to some increased investment between the two countries in certain sectors, for example in the automotive sector;[54] however, it is unclear as to how much the specific impact of the Investment Chapter of NAFTA contributed to the aforementioned investment flows. Moreover, Hufbauer and Schott (2005) suggest that overall (i.e. inclusive of all provisions in the agreements) "the CUSFTA and NAFTA did little to enhance the already mature direct investment relationship between Canada and the United States."[55] As such, while NAFTA in its entirety has encouraged certain investment between Canada and the US, evidence suggests its contribution to overall investment increases between the two countries has not been particularly significant.

The impact of CETA on investment in Canada will likely be larger than the relatively insignificant impacts from CUSFTA and NAFTA. The impacts will be more significant than those between Canada and the US under NAFTA because the EU is not as integrated with Canada as the US was pre-CUSFTA and pre-NAFTA.

On the other end of the spectrum, CETA will likely have a less significant impact on investment than those predicted for trade agreements between developed and developing countries. This is because there is not the same potential for investment growth present in the CETA relationship as there would be between Canada, or the EU, and certain developing nations. In a related vein, the impact of CETA will be more limited than would be found in an agreement involving developing nations given the advanced nature of the institutions and high incomes in the EU and Canada, whereas higher income countries in many cases attract less capital flows than those with lower incomes (refer to the gravity modelling in Annex 3 for related statistical correlations herein). As such, quantitative estimates in studies of agreements between developed and developing countries, for example in the EU-Andean SIA on the EU-Andean FTA,[56] or among developing countries,[57] do not provide particularly relevant estimates that can be extended to the EU-Canada CETA context.

Some studies might be used to gauge the specific impact of CETA on encouraging investment, an exercise requested by the Contracting Authority, although the studies producing quantitative results should be extending to the CETA context with great caution. For example, IBM (2008),

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[53] Among others see Hornbeck, J.F. "NAFTA at Ten: Lessons from Recent Studies." *CRS Report for Congress*. 13 February 2004; and Dee, P. and J. Gali (2003) "The Trade and Investment Effects of Preferential Trading Arrangements", NBER working paper 10160.

[54] Hufbauer, G.C. and J.J. Schott. (2005), Chapter 6, discusses the growth of the automotive industry (including via investment and other means) as a result of NAFTA.

[55] Ibid, pg 36

[56] See DEVELOPMENT Solutions et. al. (2009).

[57] Among other quantitative projections on increased investment resulting from FTAs with developing countries see Jaumotte, Florence (2004). "Foreign Direct Investment and Regional Trade Agreements: The Market Size." IMF Working Paper: WP/04/206. http://www.imf.org/external/pubs/ft/wp/2004/wp04206.pdf

predicts an increase of investment resulting from the EU-Korea FTA given that the FTA is a "deep FTA" and that cross-border investment between the EU and Korea would increase and third countries will also invest in Korea to benefit from improved market access. Based on these basic assumptions, the study then assumes a lower bound rise in FDI equivalent to 30% of the EU investment in Korea (slightly below $1 billion/year) and an upper bound 60% rise in FDI (equivalent to an annual increase of FDI slightly below $2 billion), for the purpose of inputting these assumptions into econometrics predicting according rises in GDP from the FTA over a eight year period. [58] It is beyond the scope of this SIA to assess in detail how these specific estimates might apply to CETA; however, it is quite clear that the aforementioned assumptions are just that, and while perhaps a general metric there is little reason to believe they can be used as a reliable proxy for investment increases under CETA.

By way of another comparison, a variety of studies that reach qualitative conclusions on investment encouraged by the trade agreement between the US and Australia should provide useful to generally gauging the amount of investment CETA may stimulate. This FTA is likely the best comparison to CETA available considering general similarities of the US with the EU, and Australia with Canada. Monash (2001) predicts that the FTA would not only encourage US investors to invest in Australia but also may additional encourage them to use Australia as a base for operations in the Asia-Pacific region, and generally emphasises the 'head-turning' impact of generating increased interest in investing in Australia.[59] USITC (2004) finds that "*The markets in both the United States and Australia are substantially open to foreign direct investment under current policies. Therefore, according to several U.S. industry representatives, the U.S.-Australia FTA is <u>not expected to have a significant impact</u> on the level of U.S. direct investment in Australia, or the level of Australian direct investment in the United States*." (emphasis added) [60] It is notable that Stoler (2009) finds that in fact several years after the FTA was in force, US investment in Australia dropped for a number of years, and Australian investment in the US surprisingly grew to exceed American investment in Australia, although also notes that a longer period of time would need to be considered before tying such trends to the US-Australia FTA.[61]

Given the aforementioned findings, it seems reasonable to assume that CETA, like the US-Australia FTA, might encourage investment in Canada and the EU to the extent envisaged by the aforementioned studies. In other words, it could encourage investment, but not significantly increase investment. This also at least leaves open the possibility that such an increase could be closer to a 'minor' rather than 'significant' magnitude.

While the US-Australia FTA is the best proxy available to evaluate investment under CETA, by way of additional analysis, there is reason to believe that investment realised under CETA could be at least slightly more significant than that under that agreement. It should be noted that Australia is significantly less restricted to FDI from the RoW than Canada in sub-sectors like

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[58] IBM Belgium et al. (2008). "Trade Sustainability Impact Assessment of the EU-Korea FTA: Final Report – (Phase 3)" http://www.eu-korea-sia.org/uploads/filedir/Docs/Front%20Page%20T/EU%20Korea%20FTA%20SIA%20Phase%203%20Final%20Report.pdf

[59] Monash (2001). "An Australia-USA Free Trade Agreement: Issues and Implications." Report for DFAT, APEC Study Centre, Monash University. http://www.dfat.gov.au/publications/aus_us_fta_mon/aus_us_fta_mon.pdf

[60] USITC (2004). US-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects." USITC Publication 3697. Pg 104. http://www.usitc.gov/publications/docs/pubs/2104f/pub3697.pdf

[61] Stoler, Andrew (2009). "Economic Impact of the AUSFTA." Institute for International Trade. Paper for Fulbright Symposium, Canberra, Australia.

fishing and telecom, which put some upward pressure on Canada's *overall* FDI restrictiveness – whereas Australia's overall OECD FDI Restrictiveness index was 0.270 in 2003 vs. Canada's 0.352, and Australia's 2010 index was 0.138 vs. Canada's .153 (and the EU24's was 0.048). As such, CETA may encourage investment in Canada in these sub-sectors more so than the US-Australia FTA would encourage investment in such sectors in Australia. The effects of reducing investment barriers in creating economic benefits in Canada will likely be magnified by other provisions of CETA, particularly if these provisions are ambitious – for example those on government procurement, IPR, labour mobility, competition policy, and free circulation of goods (as well as those provisions typically found in FTAs in terms of trade facilitation, all provisions liberalising restrictions in services, and tariff reductions). These provisions may act along with other provisions of CETA to encourage investment flows, particularly in sectors where EU-Canada economic activity occurs as a result of global and regional value chains, investment and sales by foreign affiliates, and flows of people and technologies.[62] For these reasons, it is the opinion of the study that CETA might encourage 'notable' investment, and this might be somewhat greater than the investment realised under the US-Australia FTA.

In summary, it is the opinion of the study that CETA might encourage 'notable' investment, but it is less likely that it will be 'significant.' The metrics herein are defined in the methodology of this SIA, and are supported by relevant economic literature.

Impact of BITs on investment flows and trade, and implications for an Investment Chapter in CETA

Certain studies suggest BITs themselves are not significant determinants of investment flows, and emphasise other factors are more significant determinants of investment flows. For example, Hallward-Driemeier (2003) and Rose-Ackermann (2005) use empirical analysis to find BITs are not significant determinants of investment flows.[63] UNCTAD (2003) finds that "BITS play a minor role in influencing global FDI flows" and in another part of the report says "the policy framework [of BITs] is at best enabling, having by itself little or no effect on FDI flows."[64] However, it should be highlighted that the same study does suggest that provisions in BITs do provide an "enabling" function for IIAs to ensure investors certain security in their investments after they decide to invest in a country.[65] Specifically, factors that encourage FDI may include reduction of numerous NTBs restricting investment, and pull factors such as market size, infrastructure, human capital, and certain tax rules/incentives,[66] among other elements.

In contrast, other studies find a positive correlation between the *number* of BITs signed and the foreign investment received by a country. Importantly, these findings do not suggest that

[62] Goldfarb, D and L. Theriault (2010). "Canada's 'Missing' Trade With the European Union." The Conference Board of Canada

[63] Hallward-Driemeier, M. (2003). "Do Bilateral Investment Treaties attract FDI?" http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf; Rose-Ackermann (2005). "Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties." Yale University.

[64] See UNCTAD (2003). *World Investment Report 2003*, pgs 89 and 91 respectively

[65] For example, see UNCTAD (2003). *World Investment Report 2003.* For a comparison of the conflicting economic theories on foreign investment see Sornarajah, M. (2004) "The International Law on Foreign Investment." 2nd edition, Cambridge.

[66] However, it should be noted that Blonigen and Davis (2000) suggest that tax treaties specifically can discourage FDI as they can be used to reduce tax evasion and not only make it easier to avoid double taxation. Source: Blonigen, B. and R. Davis. 2000. "The Effects of Bilateral Tax Treaties on U.S. FDI Activity." NBER Working Paper 7929. Cambridge: National Bureau of Economic Research.

signing a BIT in itself increases investment, although do somewhat support the economic utility in signing BITs.[67] Still, even while establishing correlation of investment flows with the number of BITs signed, a number of other explanatory variables outside the BITs themselves would appear to be at work contributing to such increases in investment.

Other studies critique Hallward-Driemeier (2003) directly, noting that the study does not fully consider the international integration that BITs in fact do foster. They suggest a country may benefit from a BIT if the treaty allows them to enhance international connections, like those related to expansion of trade or to increase value added in products. Swenson (2008)[68] follows this line of thought, and focuses on BIT's effect on trade rather than just investment, analysing trade flows from 1975 to 2000. The study's results suggest that investment treaties improve capital goods and differentiated goods, particularly for multinational companies. One reason used to explain why past studies did not find BITs to be statistically significant facilitators of commerce is that expanded activity via foreign presence of multinational firms does not necessarily imply that the host country will see high value foreign investments given the firms' main investments may take an intangible form rather than one in fixed assets. The study also suggests, although not supported with specific evidence, that this may increase multinational technology transfer and finds "if BITs encourage high value trade, their presence may bring the benefits such as enhanced rates of country growth that are hoped for by signatory countries."[69]

Although the literature is mixed on the precise economic benefits of BITs as trade and investment enhancing agents, what is clear in the studies that find BITs/the signing of more BITs to be trade and/or investment enhancing is that the level of any benefit is much less when involving a high income country with strong institutions. Specifically, the effects of BITs are far more significant when involving low income countries than when involving high income countries. Swenson (2008) makes this point. Blonigen and Wang (2005),[70] Subramanian and Wei (2007),[71] and Wheeler and Mody (1992),[72] while not all analysing BITs specifically, emphasise that the magnitude of trade and investment differs notably when measuring the effects of international trade and investment agreements by grouping countries with different levels of development. Nunn (2007)[73] and Levchenko (2006)[74] find that investment protections are

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[67] Egger, P. and M. Pfaffermayr. (2004) "The impact of bilateral investment treaties on foreign direct investment" *Journal of Comparative Economics*, 32(4):788-804. Egger, Peter and Valeria Merlo. (2007) "BITs and FDI Dynamics." *World Economy;* Salacuse, J. and N. Sullivan. (2004) "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal*: 46(1); Neumayer, E. and L. Spess (2005). "Do Bilateral Investment Treaties Increase Foreign Direct Investment?" *World Development*, 33(10): 1567-1585. Note: Egger and Pfaffermayr (2004) look at OECD investment, while Salacuse and Sullivan (2004) and Neumayer and Spess (2004) use larger sets of countries.

[68] Swenson, D. (2008). "Bilateral Investment Treaties and International Integration." University of California Department of Economics. Working Paper.

[69] Ibid at Pg 14

[70] Blonigen, B. A. and M. Wang. (2005) "The Inappropriate Pooling of Wealthy and Poor Countries in Empirical FDI Studies", in T. Moran, E. Graham and M. Blomstrom (eds.) "Does Foreign Direct Investment Promote Development? Washington D.C.: Institute for International Economics, 221-243.

[71] Subramanian, A. and SJ Wei. (2007) "The WTO Promotes Trade, Strongly but Unevenly," *Journal of International Economics*, 72(1):151-175.

[72] Wheeler, D. and A. Mody. (1992) "International Investment Location Decisions: The Case of US Firms." *Journal of International Economics*, 33:57-76.

[73] Nunn, Nathan. (2007) "'Relationship-Specificity, Incomplete Contracts and the Pattern of Trade.'' *Quarterly Journal of Economics*, Vol. 122, No. 2.

[74] Levchenko, A. (2006) "Institutional Quality and International Trade." *Review of Economic Studies*.

associated with an increase in the quality of trade, and that these impacts are most prominent in countries with weaker institutions and infrastructure needed to facilitate trade. As mentioned, the gravity modelling in Annex 3 of this study further lends support to the concept that capital generally moves from higher income countries to lower income countries.

The above findings in their entirety do not provide a strong consensus that signing a BIT by itself will either prevent capital flight or enhance/increase investment, although there are certainly elements of evidence that indicate that under certain circumstances they could increase trade and commerce more generally. Specifically, BITs do appear to have economic benefits in that they provide benefits to multinational companies; foster forms of intangible business relationships, which may have economic benefits; stimulate the flows of trade in terms of capital and differentiated goods in countries with lower incomes; and in the sense that the signing of more BITs is positively associated with FDI flows (although a number of other explanatory variables outside the BITs themselves would appear to be at work contributing to such increases in investment). It is noteworthy herein that the studies that most strongly tout the benefits of signing a single BIT suggest the effects will be felt more in areas that *are not* measured in conventional investment statistics. Given these findings, an Investment Chapter in CETA by itself will appear to have a positive impact in terms of encouraging trade, and less evidence suggests it might encourage investment as commonly measured.

This said, there is good reason to believe that the economic benefits created by an Investment Chapter in CETA would be less than significant, i.e. on a level of minor to notable but less than significant. This conclusion is reasonable given the mixed evidence as to the magnitude of economic benefits from BITs, none of which suggest that they lead to *significant* increases in trade, intangible linkages, or investment specifically, and many of which specifically suggest they in fact do not lead to significant increases in investment. The conclusion is also based on the fact that the trade, commerce and investment institutions in the EU and Canada are among the best in the world and citizens of Canada and EU MS enjoy some of the highest per capita incomes in the world – which, according to the literature, would mean they would see relatively less benefits from an agreement like CETA than if the agreement were to involve a developing nation(s) with lower per capita incomes. This likely also explains why all of the 6 FIPAs Canada has signed with EU countries are with relatively less developed countries as opposed to with its most important investment partner in Europe – the UK.[75]

Box 35: FDI vs. portfolio flows

FDI vs. portfolio flows

Further research and analysis is needed to distinguish the specific impacts of an Investment Chapter in CETA on FDI vs. portfolio flows. There are distinctions in decision-making behind portfolio investments compared to FDI. Generally, the aforementioned impacts regarding investment flows specifically apply to FDI given its relative importance in the economic studies

[75] It would be useful to analyse what additional areas of liberalisation might be afforded by CETA investment provisions vs. existing EU BITs and Canada FIPAs. For example, compared to the bilateral Canada-Poland FIPA/BIT, or through the Canadian and EU accession to the OECD Code on for Liberalisation of Capital Markets. This comparison would also be helpful in determining the specific impact of ISDS under CETA. Unfortunately, given the lack of details of CETA among other limitations, it is beyond the scope of this SIA to perform such an exercise.

reviewed. Still, extending the economic logic exhibited in the gravity modelling in this report, portfolio flows will likely be encouraged through CETA to the degree that barriers currently inhibiting flows are removed, although the significance of this is uncertain. This would facilitate capital flows to firms that rely on portfolio investment, for example the finance industry. As with FDI, however, the impact of CETA in this regard would be lessened given the advanced nature of the institutions currently in Canada.

Impact of BITs on FDI flows and trade, and implications for ISDS provisions in particular

The role of ISDS in *particular* as a contributor to the aforementioned economic benefits of an Investment Chapter in CETA is unclear, as there does not appear to be readily available empirical evidence on the matter. Care should be taken not to confuse causality between the increased investment that CETA could foster by reducing barriers to investment in Canada via an Investment Chapter as a whole and the impacts of investor-state provisions in CETA in particular.

In the absence of such results, one could make three different assumptions as to the role of ISDS in contributing to these benefits. These assumptions would be that ISDS is an enabler in the economic benefits that are created by BITs, as it is clearly a core pillar of enforcement in such agreements; ISDS does not contribute to these overall benefits; or that the allowance of ISDS in BITs actually reduces the level of economic benefits otherwise created by BITs.

The first of these assumptions is the most intuitive and provides some support for the idea that ISDS allowances in CETA would contribute to the overall economic benefits attributed to an Investment Chapter in CETA. Given the findings of Swenson (2008) that BITs provide economic benefits to multinational companies, it appears reasonable to suggest that many multinational companies at least are aware of the security provided by ISDS. However, given the lack of available surveys suggesting otherwise, it seems reasonable to suggest that most SMEs would not consider ISDS as providing "security" to their investments as the economic benefits of ISDS appear to be most significantly realised by MNCs and given the general trend among SMEs in lacking resources for large scale legal action like the type typically involved in ISDS cases. Still, there are examples of individual investors or families of investors bringing Chapter 11 cases against Canada, for example. Also, as discussed in the "Impact on institutional and regulatory environment for investment" indicator hereto, ISDS most certainly serves a role in the functioning, and thus as some kind of contributor to the economic benefits realised from BITs, which are tantamount to an Investment Chapter in CETA. To be sure, without an enforcement mechanism there is no reason to believe that an Investment Chapter in CETA would stimulate the same positive economic impacts as predicted earlier in this analysis.

However, even the aforementioned assumption does not convincingly support the conclusion that ISDS as currently structured maximises sustainable economic benefits. First, and again, the assumption cannot be made with full confidence and would need to be subject to empirical testing. Second, an important distinction should be drawn between ISDS as a general enforcement mechanism, just as state-state dispute settlement is an enforcement mechanism, vs. investor-state provisions in particular.

The question then becomes what is the ideal structure for an investment enforcement mechanism in maximising what is referred to hereafter as 'sustainable economic benefits.' As discussed under the "Impact on institutional and regulatory environment for investment" indicator, opponents of ISDS have not only expressed criticism over the existence of investor-state provisions but many appear more critical of the compounded effect such provisions have when implemented by existing tribunals in terms of lack of transparency, fairness and other issues. This suggests that the ISDS mechanisms as currently functioning are not ideal in the sense that they deserve to be improved in order to more clearly create sustainable economic benefits. In analysing the economic benefits of ISDS one would have to consider how much of a magnifying effect investor-state provisions will have in contributing to the economic benefits from an Investment Chapter. Further, even if ISDS is an enabler within the Investment Chapter of CETA in creating economic benefits, what additional benefits might be realised if ISDS provisions in CETA operated in a different, arguably improved/less partial, manner than ISDS at present? And how would this compare to the state-state dispute settlement mechanism, as mentioned in the "Impact on institutional and regulatory environment for investment" indicator? Moreover, do the monetary benefits from ISDS outweigh the potential negative economic costs as mentioned under the "Economic costs and benefits of ISDS" indicator below?

Note: Even if it was found that ISDS as currently structured in CETA is ideal and would contribute to maximise the economic benefits realised from an Investment Chapter and CETA as a whole, several questions must be answered before concluding that ISDS provisions in CETA will produce *net* sustainability benefits.[76]

Conclusion

The impact of CETA as a whole on investment in Canada will likely be positive, may be 'notable,' but is expected to be less than 'significant.' More specifically, CETA will likely positively impact investment in certain sectors in particular. Investment liberalisation in CETA is likely to reinforce existing trends in bilateral investment, with the majority of flows expected to be directed towards the financial, energy and mining sectors. If on the table, removal of restrictions in such sectors as telecom; transportation services, including water and transportation services; fisheries; finance; and mining/uranium sub-sectors may positively impact the level of bilateral investment in such areas. While consultations with the Contracting Authority suggest that CETA negotiations would not actively seek liberalisation of the media content sector in Canada, and thus it was not looked at in-depth in this SIA,[77] it should importantly be noted that stakeholders, for example the Canadian Media Production Association (CMPA), have expressed concern that liberalisation of telecoms could in-turn lead to pushes to liberalise certain cultural industries.[78] For more specific information on CETA's impact on investment in certain sectors refer to the sectoral assessment sections of this SIA.

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[76] In particular, it would need to be carefully considered if the monetary benefits discussed therein would outweigh the potential negative economic, social and environmental impacts mentioned in both the "Economic costs and benefits of ISDS" and economic, social, and environmental "policy space" indicators hereto. It is unclear if ISDS as currently structured in CETA would create any such net benefits, and there is reason to be concerned that it would result in net losses.

[77] Consultations with the Contracting Authority at the Project Steering Committee Meeting in September 2010. As a note, if CETA were to liberalise the media sector in Canada, which has the highest level of restrictiveness of any sector in Canada, this would encourage investment in this sector.

[78] Feedback from the CMPA, finds that "The CMPA is therefore of the view that any move to significantly liberalize the FDI rules in telecommunications, as contemplated by the CETA, would inevitably lead to comparable liberalization of FDI rules for broadcasting and broadcasting distribution – irrespective of the fact that the EU professes that it is currently not seeking liberalization of FDI rules as they apply to Canada's cultural industries." (submission to study team by Norm Bolen, CMPA, 11 April 2011)

The Investment Chapter in CETA in particular could encourage economic benefits in Canada although the significance of these will likely be minor to notable at most. An Investment Chapter in CETA could provide benefits to multinational companies and foster forms of intangible business relationships, which may have economic benefits; and stimulate the flows of capital and differentiated goods. Evidence is much weaker that it will specifically increase FDI flows. It is unclear if an ISDS mechanism as currently structured within an Investment Chapter would in itself create net economic benefits, although there is doubt that the mechanism as operating is maximising sustainable economic benefits, let alone maximising such benefits in a way state-state dispute settlement in CETA could not.

EU

Investment in the EU under CETA would likely follow the positive trend predicted for Canada, but on a smaller scale. This is due to the relatively larger size of the EU economy compared to Canada, which makes a percentage increase in Canadian investment in the EU less significant in the EU than the impact in Canada of same increase in EU investment in Canada. Also, given Canada is currently more restricted to FDI than the EU at large (see “Quality of institutional and regulatory environment” indicator above), reduction of investment barriers in CETA will likely encourage new investment in Canada more so than in the EU. CETA is likely to reinforce existing trends in Canada-EU bilateral investment. This assessment is generally supported by the FDI gravity modelling performed for this report (see Annex 3).

With regards to ISDS in CETA in particular, given limitations in research and analysis on the subject, it is not possible to decompose the economic impacts such provisions may have on the EU. On one hand, as mentioned in the Canada section, it seems intuitive that ISDS allowances in CETA would contribute to the overall economic benefits attributed to an Investment Chapter in CETA and CETA overall. However, again, this assumption cannot be made with full confidence and would need to be subject to empirical testing.

Several questions must be answered before concluding that ISDS as currently structured in CETA will produce net sustainability benefits. In the absence of such research and analysis it is unclear if an ISDS mechanism as currently structured within an Investment Chapter would in itself create net economic benefits. And even if it can be generally ascertained that ISDS provisions in CETA would contribute to the overall economic benefits realised from an Investment Chapter in CETA and CETA as a whole, it is doubtful whether the mechanism is operating in maximising sustainable economic benefits.

US and Mexico

CETA would have a minor or perhaps lesser impact on investment into the US and Mexico, and may encourage investment from these countries in Canada. Chapter 11 of NAFTA automatically extends MFN and national treatment status to the US and Mexico in “like” circumstances that may occur under CETA, and thus the US and Mexico in certain cases would be granted the same opportunities to invest in Canada that the EU would enjoy under CETA. However, the legalities herein are nuanced, and thus there may not be many benefits from CETA realised under this mechanism as a result (see the “Quality of institutional and regulatory environment for FDI” indicator for more information herein). Of course the US and Mexico would not be granted the same opportunities Canada would gain to invest in the EU, although it should be considered that Mexico recently signed an FTA with the EU, which would likely make this mostly a non-issue for Mexico.

To the degree that EU or Canadian investment is diverted from the US and/or Mexico as a result of CETA, this would clearly negatively impact investment flows to these countries. In the US in particular, some have warned that the combined effect of the EU signing trade agreements with Canada and Korea could undermine US trade policy, investment inclusive, which has failed thus far to move forward with certain trade agreements, like the one with Korea.[79] The degree of this diversion is uncertain.

INDICATOR: GDP

It is a well documented phenomenon that investment liberalisation when combined with trade and certain other policies encourages GDP growth.[80] CGE modelling results from studies conducted on trade agreements between developed countries such as the US and Australia, EU and Korea, and Japan and Australia,[81] and between developed and developing countries like the EU-ASEAN FTA[82] suggest a strong growth in GDP from increases in trade and FDI, particularly in the long-run. Long-run capital mobility is partially responsible for this suggested growth. This body of quantitative evidence also suggests that the overall positive effects in the various sectors tend to accrue more towards services given the predominance of FDI flows to that sector.

Some studies might be used to gauge the specific impact of CETA on encouraging investment and related impacts on GDP, an exercise requested by the Contracting Authority, although the studies producing quantitative results should be extending to the CETA context with great caution. As mentioned in the "FDI and portfolio flows…" indicator, IBM (2008), assumes a lower bound rise in FDI equivalent to 30% of the EU investment in Korea (slightly below $1 billion/year) and an upper bound 60% rise in FDI (equivalent to an annual increase of FDI slightly below $2 billion) for the purpose of inputting these assumptions into econometrics predicting according rises in GDP from the FTA over an eight year period. The study then finds a "rather significant macroeconomic impact" on Korea, with an average annual real GDP growth rate over the eight year period tested (2008-2015) that is 0.2% higher than in the lower bound scenario without the increased investment and almost 0.4% higher than in the upper bound scenario without the increased investment.[83] While it is beyond the scope of this SIA to assess in detail how these specific estimates might apply to CETA, it is quite clear that the aforementioned assumptions are just that, and while perhaps a general metric there is little reason to believe they can be used as a reliable proxy for investment and related GDP increases under CETA.

More generally, however, given the findings in the "FDI and portfolio flows…" indicator, it is reasonable to suggest the impact of CETA as a whole on investment in Canada will likely be positive, could be of a notable magnitude, and thus this could contribute to some increases in GDP growth in Canada and the EU. Certain increases in efficiencies of investment under CETA

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[79] Cooper, William H. et al. (2011) "The EU-South Korea Free Trade Agreement and Its Implications for the United States." CRS Report for Congress. 7-5700.

[80] For example, among others see: Kirkpatrick, C. et al (2004)

[81] Centre for International Economics (2005)

[82] Institute for International Development and Economics (2009). *Trade Sustainability Impact Assessment for FTA between EU and ASEAN.* March 2009.

[83] IBM Belgium et al. (2008). "Trade Sustainability Impact Assessment of the EU-Korea FTA: Final Report – (Phase 3)" http://www.eu-korea-sia.org/uploads/filedir/Docs/Front%20Page%20T/EU%20Korea%20FTA%20SIA%20Phase%203%20Final%20Report.pdf

could have a multiplier effect in positively impacting GDP. This conclusion is further supported by the fact that an important amount of the EU-Canada economic relationship, for example the Canada-UK economic relationship, is based on investment and more intangible connections.

The Investment Chapter in CETA in particular could encourage economic benefits of a minor to notable magnitude, yet this chapter by itself would likely result in negligible increases in GDP growth. An Investment Chapter in CETA could encourage a number of economic benefits in Canada which are not necessarily investment-related effects, although as mentioned in the "FDI and portfolio flows…" indicator the significance of these benefits will likely be minor to notable at most. Given the high level of development of both economies it is unlikely that this will lead to measurable increases in GDP growth in percentage terms. As such, ISDS allowances within an Investment Chapter in CETA would not have a measurable positive effect on GDP in either Canada or the EU.

INDICATOR: Economic costs and benefits of ISDS

Canada

Canadian stakeholders have expressed concern that investor-state provisions in CETA would lead to ISDS cases with significant costs in terms of damages and legal fees, as well as a significant number of such cases. The following analysis assesses these concerns of stakeholders using Canada's experiences under NAFTA as a tool of comparison. Specifically, this section (1) assesses the significance of the monetary damages and legal fees borne by NAFTA signatories vs. the objectives of ISDS in terms of monetary benefits, and (2) assesses the trends in terms of number of ISDS cases over the last 16 years post-implementation of NAFTA, and determines if including ISDS in CETA would create similar trends.

Costs of NAFTA ISDS in terms of damages and legal fees

While CETA provisions modelled off on NAFTA Chapter 11 would indeed likely cost Canada directly paid-out damages on successful cases, the significance of these payments deserves further analysis. For example, from 1994 to early 2011 there were only 4 cases against Canada under Chapter 11 that resulted in monetary settlements.[84] One case filed in 1997 by the Ethyl Corporation, a US chemical company suing over a ban on import and inter-provincial trade of the gasoline-additive MMT, resulted in $US 13 million in damages. A 1998 case involving S.D. Myers Inc., a US waste disposal company suing over a temporary ban of toxic PCB wastes, resulted in payment of $US 5 million (plus interest). And the third case, also filed in 1998, involving Pope & Talbot Inc., a US lumber company that challenged Canada's export quota system, resulted in a payment of $CAN 915,000.[85] In August 2010, the Canadian government agreed to pay $CAN 130 million to Abitibi Bowater Inc. in an out-of-court settlement over measures taken by the local government of Newfoundland and Labrador to return to the timber and water usage rights held by the company to the state and expropriate certain assets and lands associated with the company's usage rights. [86] This single case is particularly significant

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[84] Review of cases as listed in Sinclair (Oct. 2010). The Trammel Crow Co. case, filed in 2001, resulted in an out-of-court settlement that did not involve payment of damages
[85] Review of cases as listed in Sinclair (Oct. 2010)
[86] All figures taken from review of cases as listed in Ibid

from a monetary standpoint as it constitutes approximately 83% of all investor-state damages (as valued in $CAN) awarded during the 16 years in which NAFTA has been in force.[87]

The aforementioned four cases are out of a total of 28 cases filed under Chapter 11 against Canada from 1994-2010, and out of a total of 64 cases formally brought by NAFTA countries against one another during that time.

The importance of the payments under these four cases is debatable. These cases account for a miniscule percentage of the $CAD billions in average annual trade flows among Canada and its NAFTA partners. As another illustration, on one hand it might be more relevant to compare the damages paid under Chapter 11 cases to money that could be spent on environmental protection programs, given these four cases deal with environmental issues in some manner; however, this could be a skewed comparison given the uncertainty of ISDS as a contributor to economic benefits (see "FDI and portfolio flows…" indicator) and given that, depending on a number of factors, a dollar increase in government spending may have a higher or in fact lower than 1:1 cost-to-sustainability-benefits ratio.

As an alternative comparison, Table 67 not only considers average bilateral FDI flows among NAFTA countries but also NAFTA's contribution, in percentage terms, to FDI flow from the US (the source of all the winning investor-state cases) to Canada. It shows that NAFTA investor-state provisions have produced relatively little economic costs as a percentage of bilateral FDI flows from the US to Canada over the last 16 years.

Table 67: $ Costs of US Chapter 11 cases against Canada vs. avg. annual bilateral FDI inflows from US (millions of $CAD)

Total Chapter 11 damages paid by Canada since NAFTA implemented/yr*	Avg. annual FDI inflow from US to Canada	Damages as % of FDI inflow from US
$10.5 (yearly avg.)	$12,337	0.0%

*From $CAD 157 in Sinclair (Oct. 2010), unclear from source if this amount also includes any awards of legal costs (see note 3, pg 22 Sinclair (Oct. 2010)). Sources: Damage amounts from Sinclair (October 2010), FDI statistics from Statistics Canada. FDI avgs. from 1994-2009 (data for 2010 unavailable)

The legal fees Canada has incurred defending against these specific cases and in defending all other cases (i.e. those that are still pending or did not result in the award of damages to the complainant) should additionally be considered. It has been suggested that the cost of administering a NAFTA arbitration panel usually falls between $500,000 to $1 million or more, and the losing party typically pays the costs of the arbitration itself; additionally, governments "routinely incur costs of several million dollars or more" when defending themselves in NAFTA cases.[88] One might question these numbers, for example, using cost estimates of the Canadian *Tembec Inc. vs. the US* case, which sources report resulted in the costs of the proceedings (which appears to be all of the costs) of only $271,000 to be paid to the US government. Still, some sources suggest that the legal defence costs of ISDS could be particularly extreme, citing

[87] Author's calculations using figure of $CAD 157 million mentioned in Ibid (which appears to incorporate at least some interest rate and exchange rate calculations).
[88] Sinclair (Oct. 2010), pg 24

examples where EU MS have had to pay $USD 10-15 million in defending themselves under bilateral investment treaties.[89] Other sources suggest that any ISDS costs should be contextualised by comparing the costs of domestic legal fees for a case of expropriation vs. legal fees incurred in the ISDS tribunal.[90] Tribunals decide how to divide legal costs among parties to disputes. Table 68 considers how the costs of defending an investor-state case *combined* with the damages that may be paid out upon losing such a case compare to FDI flows. It also considers the economic benefits of ISDS in NAFTA vs. costs in terms of impacts on policy space.

Table68: **Cost-to-benefit in Canada of NAFTA ISDS (money figures in millions of $CAD)**

ISDS damages paid by Canada since NAFTA implemented PLUS avg. legal costs of defending all cases/yr*	Avg. annual FDI inflow from US to Canada	Damages PLUS legal costs as % of avg. annual FDI inflow from US	Economic benefits for Canada from ISDS in NAFTA	Costs to Canada from ISDS in CETA in terms of impacts on policy space***
$29/yr avg.	$12,337	0.2%	May have/continue to contribute to some overall trends in NAFTA to: Increase in trade, and relationships stimulating output and VA *= Uncertain. And even if contributed to the aforementioned benefits, overall benefit has been less than significant*****	Potential costs from ↓ policy space as relevant to the SIA *= Uncertain. Likely less than significant but could be minor to notable*

* Uses $CAD 157 in Sinclair (Oct. 2010) as amount of damages, unclear from source if this amount also includes any awards of legal costs (see note 3, pg 22 Sinclair, S (Oct. 2010)). Uses the extreme upper bound of $CAD 10 million as the cost of every one of the 28 investor-state cases brought against Canada since 1994 (this is extreme given the average costs are likely far less and given that if the defendant is successful they often are at least partially compensated for their costs). Herein, costs of successful cases only would be $CAD 197 million. **Finding from Hufbauer and Schott (2005) *** Economic, social and environmental "policy space" as relevant to this SIA and as further analysed under the policy space indicators hereto. FDI avgs. from 1994-2009 (data for 2010 unavailable). Sources: Damage amounts from Sinclair (Oct. 2010), FDI statistics from Statistics Canada

Drawing from Table 68, even when adding in an extreme upper bound for legal costs, the aforementioned conclusion remains the same, i.e. that NAFTA ISDS has produced relatively little costs when compared to US-Canada investment flows since the implementation of NAFTA. However, and importantly, NAFTA ISDS also has not produced a relatively

[89] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011
[90] Consultations with DG Trade services trade and investment negotiator in February 2011

significant/quantifiable monetary benefit. There are also policy space implications of such ISDS, which are discussed further in the "Policy space" indicator(s) hereto.

It is worth noting that there has been some discussion in Canada over who will pay the damages of NAFTA Chapter 11, which could have implications for individual provinces' budgets. The issue here is over if or to what extent the federal government of Canada should be responsible for paying the damages of Chapter 11 against the actions of local governments. Most recently, after the Abitibi Bowater settlement the Canadian Prime Minister is reported as saying "I have indicated that in future, should provincial actions cause significant legal obligations for the government of Canada, the government of Canada will create a mechanism so that it can reclaim monies lost through international trade processes."[91] It is unclear how this mechanism might work, although if provinces are made responsible for paying damages this would put a new source of pressure on their budgets.

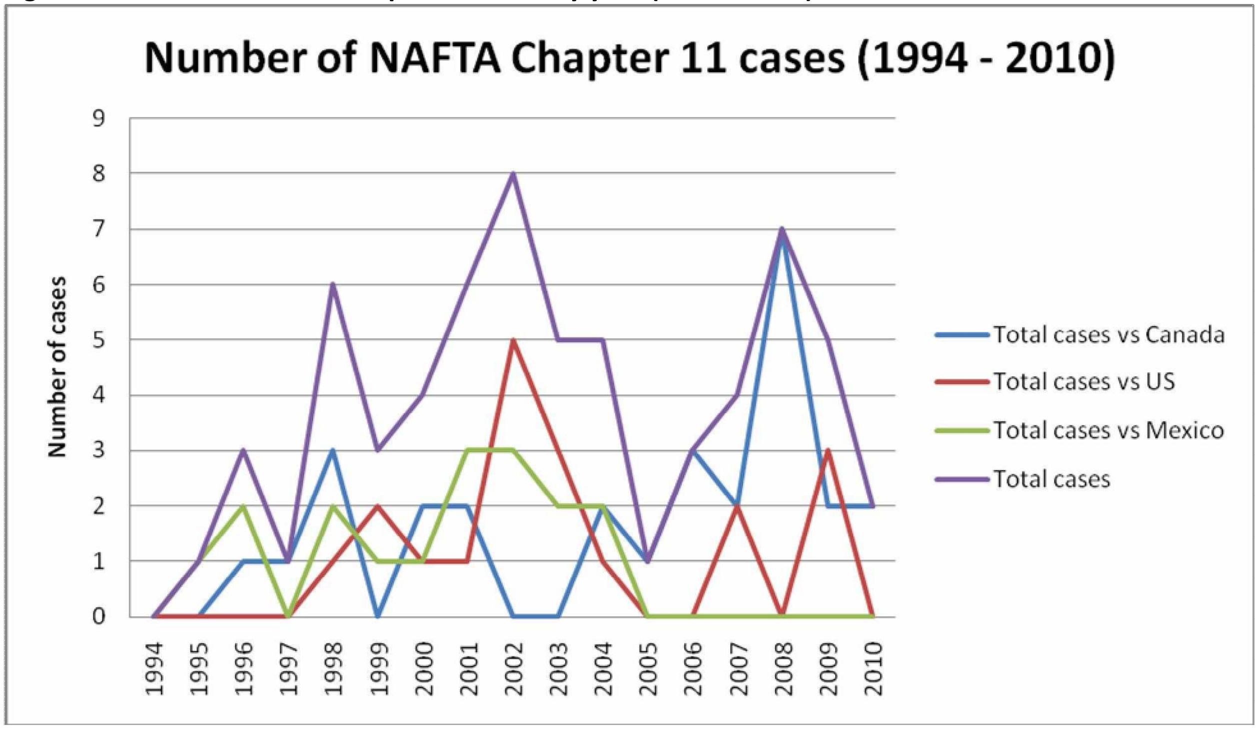
Number of ISDS cases under NAFTA

As mentioned, there have been 64 Chapter 11 cases formally filed from 1994- 2010. US investors brought 43 cases (27 cases against Canada and 16 against Mexico), Canadian investors brought 18 cases (17 against the US and 1 against Mexico), and Mexican investors brought 3 cases (2 against the US and 1 against Canada).

There does not appear to be a clear trend in the overall number of Chapter 11 cases brought over the last 16 years. Figure 7 below illustrates this point. However, one could cautiously point out a few trends. First, there is a trend in recent years towards not bringing cases against Mexico. There does appear to be somewhat of an increased trend in bringing cases against Canada (brought by US investors). There does not seem to be a particularly identifiable trend in cases brought by Canadian investors.

[91] *The Globe and Mail*, August 27, 2010, page B3

Figure 7: Number of NAFTA Chapter 11 cases by year (1994 – 2010)



Sources: Cases tallied from Sinclair (Oct. 2010)

Despite these findings, it is worth noting that at the international level the frequency of ISDS cases have risen dramatically since 1994. As mentioned previously, UNCTAD suggests that the increase in investor-state disputes has arisen as increased international investment flows and more IIAs lead to more occasions for such disputes and related cases. Also, with increased numbers of investment agreements in place, more investor-state disputes are likely to be within the realm of ISDS. Another reason for the increase may be the increased complexity of recent IIAs and other regulatory hurdles in their correct implementation. Additionally, as investors hear about successful claims, more investors may be encouraged to use the mechanism.[92]

The four successful Chapter 11 cases brought against Canada to date are out of a total of 28 cases filed under Chapter 11 against Canada from 1994-2010, although only 13 cases appear to have been completed[93] and some sources suggest that only 8 cases in fact have led to a publicly confirmed final result in arbitration.[94] These figures suggest that 14% of NAFTA investor-state cases against Canada have resulted in awarding of damages to date. Although, when calculating this as a percentage of decided cases, depending on the number one uses for decided cases this means either 31% or 50% of cases have resulted in awarding of damages. It is worth noting that Canada has defended against the highest number of investor-state cases under NAFTA.[95]

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[92] UNCTAD (2005)

[93] Review of cases as listed in Sinclair (Oct. 2010)

[94] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011

[95] Specifically, 9 more than the US and 11 more than Mexico (or 9 depending on if one considers the "*Halcehtte*" and "*Scott Ashton Blair*" arbitrations as listed in Sinclair (2010) that according to that same source never commenced). Since no notice of arbitration was even provided for these 2 cases they are ignored throughout this analysis. The US had 19 cases filed against it and Mexico had 17 cases filed against it from 1994 – Oct. 1, 2010. Source: Review of cases in Sinclair (Oct. 2010)

As a further note, there does not appear to be a particularly significant trend in terms of the industries in which Chapter 11 cases have been brought against Canada, as these 28 cases include a wide array of industries: chemicals; recreation (outfitting/hunting); water disposal; water transport; lumber, paper and forestry; mining; fishing; oil and gas; courier services; real estate; media; dairy; healthcare; construction; pharmaceuticals; and on energy-related taxation policies.

Conclusions:

This analysis puts into perspective the direct monetary cost of the damages awarded and trends in terms of number of cases brought under Chapter 11 under NAFTA 16 years after implementation. The costs are not as significant as some stakeholders suggest but at the same time have not produced a significant quantifiable net monetary benefit. There has not been a clear trend in the overall number of Chapter 11 cases. This understanding is useful when considering the potential impacts of ISDS in CETA.

Damages and number of ISDS cases under CETA

Consultations with EC trade negotiators suggest that the fact that CETA is unlikely to liberalise the Canadian market much beyond what is afforded to the US and Mexico under NAFTA should serve to reduce the significance of damages and legal fees and the number of cases brought under CETA's ISDS mechanism.[96]

Allowing ISDS in CETA will clearly open a new avenue for EU investors to sue Canadians, as the EU is not a party to NAFTA (although technically EU firms seemingly have had some chance to utilise ISDS under NAFTA given its 'third country incorporation' provision). Further, judging both from consultations with EC trade negotiators and stakeholders, CETA would at least provide certain types of liberalisation not currently afforded to the US and Mexico in NAFTA. These advances may be in the mining (uranium), transportation services, fisheries, and finance sub-sectors. As discussed in the "FDI and portfolio flows…" indicators, these advancements will likely create some economic benefits, however minor. At the same time, however, these advances clearly increase the probability that investor-state cases would be initiated against Canada.

Herein, the level of litigiousness of EU investors would be one determinant of the frequency and monetary costs Canada would incur as a result of including ISDS in CETA. For the sake of analysis, assuming the EU is as generally as litigious as the US, and if the same basic liberalisation is afforded to the EU as afforded to the US under NAFTA, this would imply that Canada could expect to be on the defensive for the same number of cases and pay damages and legal fees roughly around the same as incurred under NAFTA to date. Specifically, taking from the upper bound estimates in Box 36, this would mean that from 2012 to 2028 (assuming CETA goes into effect in 2012), Canada might expect around 43 CETA ISDS cases from the EU, the successful of which might cost $197 million in combined damages and legal costs. Overall, Canada might expect ISDS in CETA to cost it around $CAD 437 total in the 16 years post-implementation of CETA, which averages to $CAD27.3 million per year. Taking from the numbers in Box 36 in section on the EU below, Canada might expect an average initial claim to be around $USD 564 million. Canada might even expect more significant numbers herein given CETA will liberalise some areas more so than NAFTA, although at the same time the impacts of this 'additional' liberalisation could be just as well offset by lesser liberalisation in other areas

[96] Consultations with DG Trade services trade and investment negotiator in February 2011

than that afforded to the US and Mexico under NAFA. The aforementioned figures are obviously only rough estimates, meant to provide a general idea of the number of cases and level of damages and legal fees Canada might expect under ISDS in CETA and can be adjusted in level of magnitude from there given a number of considerations. As mentioned in the below section for the EU, the frequency with which intra-EU ISDS cases have been brought and the sizeable claims in those cases indicate that it is not unreasonable to compare the level of litigiousness in the EU with that in the US.

Box 36: Can an investor from any country sue Canada under CETA?

NAFTA allows for companies of any nationality incorporated in a NAFTA country to bring a Chapter 11 case. For example, this implies that an EU company incorporated in Canada can already bring a case against Canada under Chapter 11. This allowance does not appear, at least judging from the names of the complainant's in Chapter 11 cases, to have been used thus far. This could be for any number of reasons, most likely of which is that investors are unaware this mechanism exists.

Still, including this allowance in CETA creates a sizeable risk of investor-state litigation against Canada. While on one hand the existence of this allowance would seem to imply that the impact of CETA should be relatively limited, given investors from EU nations (or other third countries) already incorporated Canada, the US or Mexico could technically have already brought cases against such countries under NAFTA. Still, it is clear that if CETA were to include a similar mechanism it at very least would be opening up a significant channel for litigation. Moreover, if by including the mechanism in CETA this were to heighten awareness that the same mechanism existed in NAFTA, litigation could increase under both NAFTA and CETA rules.

Table 69: $ Potential costs-to-benefits to Canada of including ISDS in CETA ($CAD)

Potential damages PLUS legal costs* from cases against Canada under CETA ISDS/yr	Potential number of cases against Canada under CETA ISDS/yr	Avg. annual FDI inflow from EU to Canada**	Damages PLUS legal costs as % of avg. annual FDI inflow from EU	Economic benefits for Canada from ISDS in CETA++	Costs to Canada from ISDS in CETA in terms of impacts on policy space**
$27.3 million/yr avg.*	2.7/yr avg.	$8,813 million	0.3%	May lead to: Increase in trade and otherwise foster relationships stimulating output and VA – lack of maximisation of sustainable economic benefits in ISDS as structured =	Potential costs from ↓ policy space = *Uncertain. Likely less than significant but could be minor to notable*

				Uncertain. Likely less than significant	

*Uses the extreme upper bound of $CAD 10 million as the cost of defending every one of the 28 Chapter 11 investor-state cases brought against Canada since 1994 (this is extreme given the average costs are likely far less and given that if the defendant is successful they often are at least partially compensated for their costs). FDI avgs. from 1994-2009 (data for 2010 unavailable). ++ Based on analysis in the "FDI and portfolio flows…" indicator hereto. **Policy space as defined and discussed in the "Policy space" indicator hereto. Sources: NAFTA damage amounts from Sinclair (Oct. 2010), Statistics Canada, and sources cited in aforementioned indicators

In conclusion, as shown in Table 69 above, while including ISDS in CETA indeed *may* create some economic benefits it is uncertain that they would be maximised in a sustainable way. (Moreover, it is unclear that ISDS would create a net/overall sustainability benefit for Canada.) A careful judgement is required in determining if the threat in terms of number and monetary costs of including ISDS in CETA would outweigh the economic benefits. On one hand, there is a risk for Canada in including ISDS in CETA. On the other hand, when put into a proper context, the monetary costs of defending against ISDS cases brought by the EU through CETA will not be as significant as certain stakeholders suggest nor will they have a significant impact on investment flows. This latter point is reinforced by consultations with Gary Hufbauer of the Institute of International Economics in Washington D.C. who suggests that "Given the maturity of both Canada and the EU in investment matters, I would subscribe to the view that the investment provisions [in CETA] are more like an insurance policy against rare but damaging events. And because the adverse events are rare, the impact on investment flows will be quite small."[97] A more detailed understanding of the dynamics herein can be ascertained by reading through the "Policy space" and "FDI and portfolio flows…" indicators.

EU

As mentioned in the "Impact on institutional and regulatory environment…" indicator section, it is unclear if the experiences of developing countries are a useful proxy for assessing the implications on the EU of ISDS under CETA. The EU only contains five "emerging and developing countries" as defined by the IMF (Romania, Latvia, Bulgaria, Poland and Lithuania). Canada has already signed FIPAs with three of these countries (Latvia, Poland, and Romania) (and the remainder of its EU MS FIPAs are with some of the less wealthy countries in the EU, i.e. the Czech Republic, Hungary and Slovakia) and thus ISDS in CETA is not a particularly new instrument in dealing with these specific countries. Moreover, the vast majority of EU states are developed, some with some of the highest levels of economic development in the world. As such, a consideration of ISDS experiences in or otherwise involving developing countries is foregone in this analysis.

There are some incentives in CETA ISDS that could lead to cases being brought against the EU, and thus result in damages paid by the EU. Given Canada to date has not signed a comprehensive agreement like NAFTA with provisions allowing all Canadian investors to sue EU governments, although it does have FIPAs with 6 EU countries, CETA will allow Canadian and certain other investors a wider mandate to sue the EU over the policies of its MS.

The significance of ISDS under current EU BITs in terms of cost and number of investor-state cases should be contextualised by a number of factors. First, it must be considered that the EU

[97] Consultations with Gary Hufbauer, Institute for International Economics, February 2011

has 1,200 BITs already in place, so investor-state provisions are not new to MS. At the same time, there remain concerns from different groups over the regulatory structure of BITs as they have been instituted in the EU, suggesting that in fact this experience has not been entirely positive. Under Article 207(1) of the TFEU, FDI now falls within the scope of EU commercial policy. The EU now has the exclusive competence to abolish barriers to foreign direct investment, whereas previously Member State BITs protected EU investors (market access was already an EU competence). Recently, the EC has discouraged individual MS from signing BITs in favour of an EU-wide approach to signing investment agreements.

Other information regarding current EU BITs in terms of cost and number of investor-state cases deserves consideration. There have been numerous relevant cases of intra-EU ISDS disputes, some of which have led to sizeable damages paid by governments. For example, the *Vattenfall vs. Germany* case, named after the Swedish state-owned power company, was settled with the German government in 2010. Although the awards in this case seem to be kept secret, given the sizeable sum of the original claim of €1.4 billion plus interest, it could be possible that a substantial sum was paid in this case. It should be noted that this case refers to intra-EU ISDS rather than ISDS with non-EU countries.

Importantly, ISDS in CETA would bind the EU in its entirety in a way it has never before committed in any ISDS mechanism. These obligations would put an increased burden on the EC, particularly when becoming responsible for defending against investor-state cases brought against any number of the governments within MS in the EU.

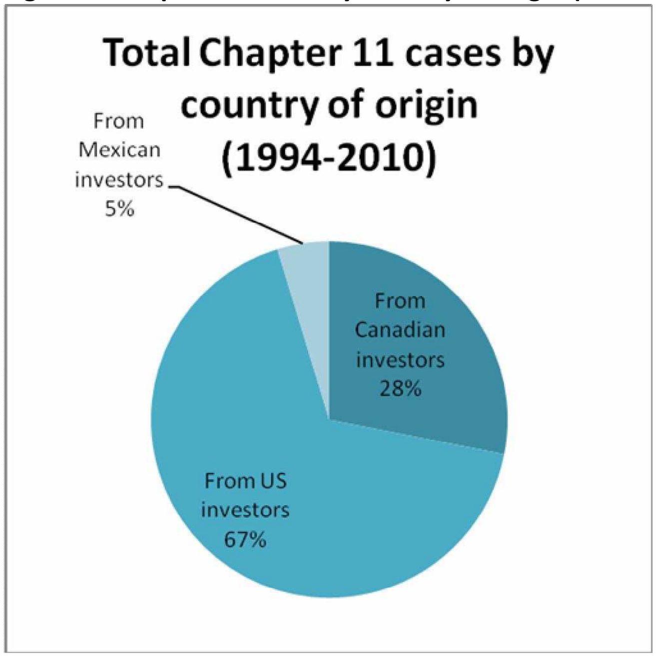
Who is more litigious in Chapter 11 disputes, the US or Canada?

Some stakeholders have pointed to the commonly circulated notion that US is the most litigious country on earth to infer that the number of cases and size of the claims brought under ISDS in CETA would inevitably be less than those brought under NAFTA, as the US would not be a signatory to CETA. While it may be the case that the US is particularly litigious at large, this assertion and its extension to CETA deserves further analysis.

Number of Chapter 11 cases (1994-2010):

The below Figure 8, which measures the total number of NAFTA Chapter 11 cases by country of origin since implementation of NAFTA, supports the aforementioned assertion. 67% of Chapter 11 cases have been brought by US investors, while only 28% of cases have been brought by Canadian investors and 5% by Mexican investors.

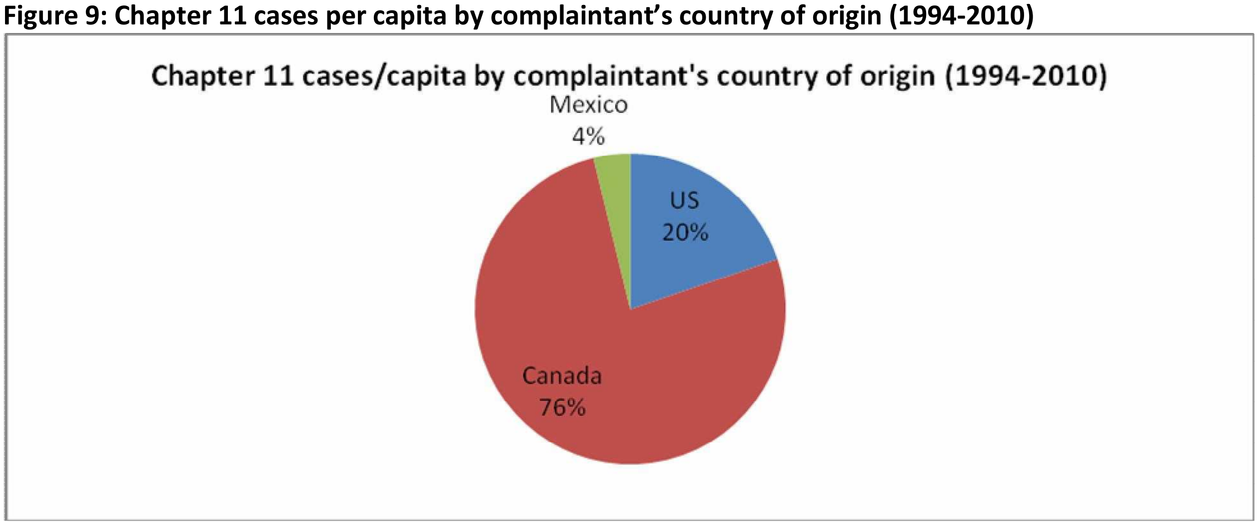
Figure 8: Chapter 11 cases by country of origin (1994 – 2010)



Source: Cases tallied from Sinclair (Oct. 2010)

However, when considered on a per capita basis, Canada in fact is more litigous in Chapter 11 cases than the US. Per capita, a Canadian investor is 3.9 times more likely to bring a Chapter 11 case than a US investor. And a Canadian investor is 20.1 times more likely to bring a Chapter 11 case than a Mexican investor.[98]

Figure 9: Chapter 11 cases per capita by complaintant's country of origin (1994-2010)



Sources: Cases tallied from Sinclair (Oct. 2010), population statistics from CIA Factbook 2011

[98] For simplicity, this assumes roughly the same number of investors per capita in the US, Canada and Mexico.

Average claims in Chapter 11 cases (1994-2010):

In addition to having a higher propensity to bring Chapter 11 cases, Canadian investors are also more likely to bring higher value claims than US investors, although not higher than Mexican investors. Canadian Chapter 11 claims are on average 2.5 times higher than US claims. And in fact Mexico has the highest average claims record out of any NAFTA country; however, this result is heavily skewed given the 2009 *CANCAR* case brought by Mexican investors requests "$2 billion annually" (considered for this exercise simply as $2 billion), given information is only available for this and one other Mexican claim brought to date (*Signa SA*), and given Mexico has only brought three Chapter 11 cases since 1994.

Table 70: Average claim (millions $USD) in Chapter 11 cases by complainant's country of origin (1994-2010)

Complainant's country of origin	Avg. Chapter 11 claim
Mexico	$1025*
Canada	$979
US	$387

Notes: Does not include damages awarded to complainants for legal fees. Claims listed in $CAD in Sinclair (Oct. 2010) considered 1:1 with $USD. *2009 *CANCAR* case brought by Mexican investors requests "2billion annually," although for the purposes of this exercise only $2billion used. *Grand River Enterprises Six Nations Ltd* (2003) claim of "between $310 and $664 million" thus avg. cost of $487 used. No amounts available for 2009 Cemex case brought by Mexican investors. US claims exclude *Peter Pesic* case and *Georgia Basin Holdings* (as well as *Scott Ashton Blair* and *Halchette*, which apparently involve US investors vs. Mexico), as no data is available on these cases. Source: data compiled from Sinclair (Oct. 2010)

By a different comparison, Canadians do not bring claims that are as high on average; however, they still remain higher than those brought by the US. Specifically, among Chapter 11 cases brought either by Canadian investors vs. the US or US investors vs. Canada, the claims of Canadian investors are on average 1.8 times higher than those brought by US investors.

Table 71: Average claim (millions $USD) in Chapter 11 cases brought either by Canadian investors vs. US or US investors vs. Canada (1994-2010)

Complainant's country of origin	Avg. Chapter 11 claim
Canada	$1030
US	$564

Notes: Does not include damages awarded to complainants for legal fees. Claims listed in $CAD in Sinclair (Oct. 2010) considered 1:1 with $USD. *Grand River Enterprises Six Nations Ltd* (2003) claim of "between $310 and $664 million" thus avg. cost of $487 used. US claims exclude *Peter Pesic* case and *Georgia Basin Holdings*, as no data available on these cases. Source: data compiled from Sinclair (Oct. 2010)

In conclusion, the assertion that the impacts of ISDS in CETA would inevitably be less serious than under NAFTA because the US would not be a signatory to CETA is seriously misleading. In fact, when analysing the data, a Canadian investor is 3.9 times more likely to bring a Chapter 11 case than a US investor and on average brings Chapter 11 claims that are 2.5 times higher than US claims. However, it should also be noted that it does not appear that Canada (or Mexico) has won a Chapter 11 case that has resulted in the defendant paying damages, although in some cases they have split the costs of the case with the defendant. Nonetheless, these finding have obvious implications for CETA, specifically that the EU should be more wary about Canada bringing more investor-state cases than perhaps otherwise assumed.

There are other issues of concern with ISDS under NAFTA, which could also apply in CETA, that appear to be overlooked. As mentioned, NAFTA allows for companies of any nationality incorporated in a NAFTA country to bring a Chapter 11 case, and if CETA were to include this same allowance it would create a sizeable risk of litigation against EU. For example, a US company incorporated in the EU could in theory bring an investor-state case against the EU under CETA ISDS. Given the fact that the US is perceived as one of the most litigious country in the world, this possibility brings sizeable risk. Moreover, if by including the mechanism in CETA this were to heighten awareness that the same mechanism existed in NAFTA, litigation could increase under NAFTA and CETA rules.

Given these findings, as with Canada, a careful balancing act is required in determining if the threat in terms of number and monetary costs of including ISDS in CETA would outweigh the economic benefits. The table below provides a cost-to-benefit comparison of including ISDS in CETA.

Table 72: $ Potential costs-to-benefits to the EU of including ISDS in CETA (millions of $CAD)

Potential damages PLUS legal costs* from cases against the EU under CETA ISDS/yr	Potential number of cases against EU under CETA ISDS/yr	Avg. annual FDI inflow from Canada to EU**	Damages PLUS legal costs as % of avg. annual FDI inflow from Canada	Economic benefits for the EU from ISDS in CETA++	Costs to the EU from ISDS in CETA in terms of impacts on policy space**
$10.6/yr avg.*	1.1/yr avg.	$8,189	0.1%	Increase in trade and otherwise foster relationships stimulating output and VA – lack of maximisation of sustainable economic benefits in ISDS as structured = *Uncertain. Likely less than significant*	Potential costs from ↓ policy space = *Uncertain. Likely less than significant but could be minor to notable*

*Uses the extreme upper bound of $CAD 10 million as the cost of defending every one of the 17 Chapter 11 investor-state cases brought by Canada since 1994 (this is extreme given the average costs are likely far less and given that if the defendant is successful they often are at least partially compensated for their costs) . FDI avgs. from 1994-2009 (data for 2010 unavailable). ++ Based analysis in the "FDI and portfolio flows…" indicator hereto. **Policy space as defined and discussed in the "policy space" indicators hereto. Sources: NAFTA damages from Scott Sinclair (Oct. 2010), Statistics Canada, and sources cited in aforementioned indicators

In conclusion, as shown in Table 72 above, while including ISDS in CETA indeed may create some economic benefits it is uncertain that they would be maximised in a sustainable way. (Moreover, it is unclear that ISDS would create a net/overall sustainability benefit for the EU.) On one hand, there is a risk for Canada in including ISDS in CETA. On the other hand, when put into a proper context, the monetary costs of defending against ISDS cases brought by the EU through CETA will not be as significant as certain stakeholders suggest nor will they have a significant impact on investment flows. A more detailed understanding of the dynamics herein can be ascertained by reading through the "Policy space" and "FDI and portfolio flows…" indicators.

US and Mexico

Investor-state provisions in CETA are unlikely to have a significant impact on costs borne by, or the number of cases against, either the US or Mexican government. While CETA could theoretically increase the damages awarded by the Canadian government to US and Mexican companies under NAFTA investor-state provisions given the usage of the ratchet mechanism, as discussed in the "Impact on institutional environment" indictor hereto, these situations could be limited. Given these factors, it seems unlikely that the damages from any such litigation would be particularly significant.

INDICATOR: Impacts on economic policy space

Canada, EU, US and Mexico

BASELINE & ANALYSIS

An Investment Chapter in CETA clearly would create reductions in regulatory flexibility in the EU and Canada. These reductions would first be caused by liberalising certain sectors. They would be caused by preventing foreign governments from denying national treatment and MFN to investors. They would be caused by other requirements that are standard in most trade agreements, for example requirements for a minimum standard of treatment, restrictions on expropriation, and prohibitions on performance requirements, among other requirements depending upon the agreement. CETA may also institute investor-state arbitration to enforce these requirements. While all these examples indeed constitute a reduction in regulatory flexibility, as explained in the methodology section, the "policy space" indictor in this SIA is exclusively used to measure reductions in the ability of governments to make policies that have clear economic, social or environmental benefits.

Some of the aforementioned reductions in regulatory flexibility will contribute to the economic benefits discussed under previous indictors in this section, however others may also constitute a reduction in economic policy space as it is used in this SIA. However, further analysis would be needed in this area in order to create a fuller assessment of these impacts. Particularly when considering the extent to which ISDS in CETA might be more liberal than domestic takings laws in Canada and the EU in its definition of expropriation, this might have some negative implications on economic policy space in the EU and Canada (refer to the "Impact on institutional and regulatory environment." indicator for more on this issue). As mentioned in the "…social policy space" indicator in the Social Assessment below, ISDS in CETA may reduce economic policy space by putting some limits on otherwise useful capital controls. Regulatory reductions on performance requirements may create some risk of reducing economic policy space of the type assessed in this SIA, although, again, without a more thorough assessment herein, which is outside the scope of this SIA, this is unclear (the discussion on offsets in the

Government Procurement section in this SIA sheds light onto some questions that may need to be answered before making a fuller assessment herein).

There are few if any impacts expected on economic policy space in the US and Mexico.

SOCIAL ASSESSMENT

INDICATOR: Impacts on social policy space (and spill-over effects on other types of policy space)

Canada

Canadian stakeholders have expressed concern that ISDS under CETA would lead to reductions in Canadian policy space. The main concerns of stakeholders are that investor-state provisions and their application in ISDS under CETA would threaten policy space by creating regulatory chill, reversal and/or undermining of public policies already in practice, and make it difficult to reverse failed privatisations. There are also concerns that CETA's potential liberalisation of current investment policy and laws will limit policy space. While one could consider the impacts ISDS has had on developing countries in assessing the impacts ISDS in general could have on Canada, there are many obvious institutional, regulatory and other differences between developing countries and Canada and the EU at large. As such, the following analysis assesses the aforementioned stakeholder concerns using a more robust and directly relevant comparison – Canada's experiences under NAFTA. As explained in the methodology section, the "policy space" indictor in this SIA is only used to measure reductions in the ability of governments to make policies that have clear economic, social or environmental benefits.

Regulatory chill and other reductions of policy space

Stakeholders have expressed concerns that ISDS under CETA will lead to "regulatory chill" or other forms of reduced policy space that will have negative impacts on public welfare. Regulatory chill as defined in this analysis is a situation where the government does not enact new 'socially desirable' laws and regulations – i.e. those to improve areas like human rights (including human health, safety, and education) and environmental protection – in fear that foreign investors may seek compensation under certain legal agreements, like a trade agreement, and/or doing so could lead to capital flight.[99] The analysis uses this definition as opposed to a wider definition of regulatory chill given analysis based on a wider definition would stray from an SIA analysis. Some scholars suggest there are generally three types of regulatory chill or reduced policy space: (1) proposed regulatory measures may be abandoned or modified before they are introduced in the legislative or other rule-making process, (2) proposed measures may be abandoned or modified after they are introduced but before they are adopted, and (3) measures may be abandoned or modified after they are adopted.[100]

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[99] For definitions of "regulatory chill," among other sources see: Cotula, L. (2008). "Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses." *Journal of World Energy Law & Business. Oxford Journals*. June 2008. 1(2): 158-179.; and Neumayer, E. (2001) "Greening trade and investment: environmental protection without protectionism." Earthscan Publications, London.

[100] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011

It is difficult to comprehensively analyse the extent of regulatory chill caused by a trade agreement. Among other reasons, a case does not necessarily have to be brought in order to cause a wave of regulatory chill, as the mere existence of investor-state provisions in a trade agreement can cause regulatory chill. This said, turning to NAFTA, while it will never be known if certain measures in Canada were not enacted in the past because of a chilling effect, it seems reasonable that if the chilling effect was significant enough, given Canada's solid institutions and communication mechanisms, as well as an informed population, then government, academics, or other stakeholders would have pointed to the most significant and solid examples of regulatory chill. Still, and again, there is some uncertainty in this assumption.

Box 37: Reductions in Canadian policy space caused by Chapter 11: A questionnaire

In an effort to add some more clarity to this situation, a questionnaire was distributed in mid February 2011 to the Attorney General's offices in all Canadian provinces and territories, as well as to the office at the national level, to assess the impacts of regulatory chill and other forms of reduced policy space in Canada caused by NAFTA Chapter 11 and the predicted impact under CETA ISDS. The results from one questionnaire, ultimately answered not by the Attorney General's office but the Ministry of Economic Development and Trade in Ontario, indicated that NAFTA has had a "Non-existent or negligible" impact in terms of regulatory chill and did not create any other limits on policymaking and/or policy implementation in Ontario. Also, the same results suggest that investor-state provisions if included in CETA will likely have a "Non-existent or negligible" impact on policymaking in Ontario. This feedback downplays the importance of certain examples of regulatory chill in Ontario cited by some scholars.[101] Results from the questionnaire sent to New Brunswick provide no rankings on NAFTA's or CETA's impact on policy space given the stated sensitive nature of the NB Attorney General office's involvement in the CETA negotiations. Feedback from the questionnaire sent to Alberta only suggests that the province takes a range of issues into account when making regulations, including Canada's international trade obligations. No other responses were received.

Below is a broad and brief overview of NAFTA investor-state challenges that have been claimed will or actually have led to regulatory chill or otherwise reduce policy space in Canada. This is followed by a summary analysis of what these examples mean for CETA.

Effect on public services/would-be public services

Auto insurance: Perhaps the most clear-cut example of regulatory chill directly resulting from NATA investor-state provisions is where New Brunswick abandoned a public auto insurance proposal after threat of a Chapter 11 lawsuit. Sources suggest that Ontario also backed away from an automobile insurance plan given the precedent in the New Brunswick case.[102] It should be noted that regulation of auto insurance may not conventionally be thought of as part of 'socially desirable' regulation and thus the extent to which these instances are considered regulatory chill under the definition used in this SIA is debatable.

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[101] For example, see: Kukucha, C. (2008). *The Provinces and Canadian Foreign Trade Policy*. UBC Press, Vancouver. 2008.

[102] Ibid

Postal services: In 2005, concerns were expressed over the UPS Chapter 11 case challenging the cross-subsidation of the Canadian Postal Service within the Canadian postal market, which was seen by some stakeholders to threaten the monopoly and undermine state regulation in the sector.[103] However, the case was subsequently dismissed.

Health: British Columbia requested a clear definition of what social services were committed in Annex II (exclusions) of NAFTA, and were assured that "public education, public training, health and child care" were included in provisions related to cross-border investment and services.[104] In other words, none of these services fall under the full purview of the NAFTA investor-state mechanism. Also for context, there are provisions in NAFTA Chapter 11 to allow companies to operate services for public health and education without fear of being sued.[105] Also, as stipulated by NAFTA Article 1108, Article 1102 does not apply to measures that relate to social services such as healthcare (or childcare and social welfare).

On healthcare specifically, particularly private healthcare, as distinguished from wider 'health-related' measures which are mentioned below, no successful investor-state case has been brought against Canada since NAFTA has been enacted. The most recent case on healthcare in Canada, *Centurion Health Corporation vs. Canada* which disputed that the Canada Health Act had limited investment opportunities in Canada by monopolising the healthcare market, was dismissed on procedural grounds in August 2010.

Nonetheless, concern exists about the regulatory chill investor-state provisions/ISDS in NAFTA may create on health-related regulations. While not solely related to health issues, the Government of Canada abandoned a regulation in December 2001 to prohibit the display of "light" and "mild" descriptors on tobacco packing after Phillip Morris International protested the ban.[106] Salazar (2010) suggests that recent NAFTA tribunal decisions confirm that "…a non-discriminatory regulation that may affect foreign investors' property rights, but advances a public purpose may not constitute expropriation." [107] In other words, in practice leeway exists in policymaking for public purposes under the investor-state provisions in NAFTA Chapter 11, particularly Article 1110. However, the same analysis goes on to suggest there are still significant uncertainties in Chapter 11 which may cause regulatory chill, particularly in areas related to Canada's pro-healthy eating policies.[108]

Also, as further discussed below, there have been a notable number of environmental cases brought under Chapter 11, some of which also touch somewhat upon the issue of public health. For example, there is the aforementioned *S.D. Myers Inc.* case where a US waste disposal company sued and won over a temporary ban of toxic PCB wastes. There is also the aforementioned *1997 Ethyl Corporation* dispute, where the Canadian government settled out of

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[103] Public Citizen (2005). "NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005." February 2005. http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf

[104] Kukucha, C. (2010). "Provincial Pitfalls: Provinces and the Canada-EU Trade Negotiations." University of Lethbridge. URL: http://www.cpsa-acsp.ca/papers-2010/Kukucha.pdf

[105] NAFTA Chapter 11, Article 1101, sub-article *4. "Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."* (emphasis added)

[106] Pavey, B. and T. Williams (2003). "The North American Free Trade Agreement: Chapter 11." Parliamentary Research Branch, Library or Parliament of Canada. 26 February 2003.

[107] Salazar, A. V. (2010). "NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law." *Arizona Journal of International and Comparative Law*, 27 (1): 32

[108] Ibid

court with the Ethyl Corporation over Canada's ban on the import and inter-provincial trade of the gasoline additive MMT, a suspected neurotoxin. There is the ongoing case, filed in August 2008, in which *Dow Agro Sciences* alleges the 2006 Quebec ban on the use of pesticides for cosmetic lawn care was imposed without a scientific basis or opportunity for the company to prove the pesticides are safe, and that the ban is tantamount to expropriation.

Education: No investor-state cases regarding education have been brought against Canada to date.[109] Readily available evidence does not suggest NAFTA has created significant regulatory chill on measures promoting education.

Environment

There have been a number of environmental cases brought under Chapter 11 of NAFTA. In fact, as of a decade after NAFTA was in force, over ¼ of all investor-state disputes involved environmentally-related concerns.[110] The aforementioned *S.D. Myers Inc*. and *Ethyl Corporation* cases involved environmental issues. While not only related to environmental issues, some observers raise environmental concerns over the August 2010 *Abitibi Bowater Inc.* out-of-court settlement over measures taken by the local government of Newfoundland and Labrador to return to the state timber and water usage rights held by the company and expropriate certain assets and lands associated with the company's usage rights.[111] Among other issues, the case concerns the role of Abitibi Bowater, who was in bankruptcy, in paying to clean up the environmental pollution it left at several former properties. These cases are of great concern to a variety of stakeholders who are worried they will erode protection of plant, animal and human safety.[112]

There are a number of ongoing NAFTA investor-state cases that involve environmental issues and have raised concerns that they might reduce policy space to the detriment of the environment. For example, Bilcon Corporation is suing the Canadian government under NAFTA Chapter 11 for over $188 million for rejecting a development project in White Point Quarry, which lies along a coastal area near the Bay of Fundy biosphere reserve.

Capital controls

Recent studies have expressed concern over the restrictions investor-state provisions can put on a government's flexibility to institute capital controls. [113] The proper usage of capital controls has wide-ranging implications in terms of maintaining the macroeconomic health of an economy, which in turn has implications on controlling inflation, curtailing wage inequality, among other social issues.

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[109] Review of cases as listed in Sinclair (Oct. 2010)
[110] Hufbauer and Schott (2005)
[111] Sinclair (Oct. 2010) at pg 25 suggests "*…the Abitibi Bowater settlement entails an open-ended, excessive conception of property rights that goes well beyond reasonable protections and domestic legal norms…Whenever natural resource concessions are revised or revoked, however legitimate the government's reasons, investors can now be expected to invoke NAFTA's Chapter 11*."
[112] Among others, see The Council of Canadians. "NAFTA's Chapter 11 investor-state dispute process: New challenges to Canadian environmental and health policy call NAFTA into question."
[113] Gallagher, K. (2010)

Box: 38 Frequency of cases citing the expropriation provision and breadth of expropriation protections

It is important to note that not all investor-state brought against Canada under NAFTA to date were based on the particularly controversial expropriation clause, although 79% were. For example, while the expropriation aspect of NAFTA cases often receives the most publicity, 6 cases out of the 28 NAFTA cases brought to date – *United Parcel Service of America Inc.* (2000); *Trammel Crow Co*. (2001); *Peter Pesic* (2005); *Mobil Investments Canada, Inc. & Murphy Oil Corporation* (2007); *Bilcon Inc.* (2008); and *Centurion Health Corporation* (2008) – 21%, do not invoke the expropriation provision in Chapter 11.[114] Half of these cases were already mentioned in this "Policy space" indicator as being of concern to stakeholders, and the *Mobil* case, which has not been mentioned thus far, is also of concern to some. Of these cases the *Bilcon* and *Mobil* cases are still under review and the others have ended without known damages.

The frequency of the usage of expropriation clauses, when considered alongside the principle that the allowances for cases on expropriation under NAFTA are wider than those under domestic Canadian law, produces a stronger force to reduce policy space. Still, there is not persuasive evidence that this will necessarily result in reductions of policy space considered relevant to this SIA. The significance of the expropriation flexibility in particular is uncertain given the relatively limited NAFTA jurisprudence on the issue. On one hand, one could suggest the limited jurisprudence on the subject allows for the possibility that this allowance is a relatively minor issue; however, many cases in NAFTA are still undecided (i.e. 15 or 20 depending on one what information one consults as to the state of such cases). Also, there does not seem to be much utility, let alone equity, in allowing foreign investors to bring cases regarding expropriation in way not allowed to domestic investors.

Given the lack of clear implications of these issues under NAFTA precedent, there is not enough evidence to suggest that under CETA they will have clear impacts on policy space that will be of significance. Still, they are cause for concern.

In addition to the aforementioned examples, which focus largely on regulatory chill concerns, certain sources infer that allowing ISDS like that in NAFTA in an agreement could actually lead to reversal and/or undermining of public policies currently in practice and this would have negative impacts on public welfare.[115] For example, stakeholders suggest some NAFTA cases have indeed undermined currently in force domestic and international laws.[116] Without a rigorous legal analysis it is not possible to fully assess the extent of these claims.

[114] Review of cases in Sinclair (Oct. 2010)
[115] Public Citizen (2005)
[116] For example, respectively referencing the *S.D. Meyers* (1998) and *Pope & Talbot* (1998) cases under NAFTA Chapter 11 against Canada, Public Citizen (2005) finds "…the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the U.S.-Canadian Softwood Lumber Agreement, were both successfully challenged using NAFTA investor-state system and damages were awarded in both cases."

Difficulty in reversing ‘failed’ privatisations

As discussed in the government procurement section, investor-state provisions in CETA could conceivably discourage private services (including those that were formerly public and then made private) from being made public. Stakeholders have expressed particular concern that failed privatisations might not easily be remedied by making such services public for fear of investor-state litigation. Examples are cited where investor-state provisions have made reversing failed privatisations costly.[117]

However, these trends should be put into context. To the extent these concerns arise from the protection against expropriation allowed in CETA, domestic takings laws require compensation for typical forms of expropriation anyway (as discussed in the “Impact on the institutional and regulatory environment…” indicator). In other words, a lawsuit on expropriation issues could be brought, and can already be brought, in domestic courts *without* CETA investor-state provisions, with some rather rare exceptions as discussed in the “Impact on the institutional and regulatory environment…” indicator and again mentioned in the above Box 38. Also, it should be recognised that the government retains the right to act in what it considers the public interest, for example in nationalising failed private services, although if it loses an investor-state case it may have to pay compensation.

Regarding the latter example on nationalising failed privately delivered services, the below Box 39 briefly considers if investor-state provisions in CETA could make it more difficult to nationalise certain services, and includes a mention of water delivery and management services which were not covered in NAFTA in the same way stakeholders suggest they may be in CETA. It should be stressed that the impact of nationalisation, privatisation, and the difficulties that implementing either one has on the actual end quality of public services, which is a major focus of privatisations in addition to controlling the costs to government of otherwise providing such services, deserves an analysis of its own which is outside the scope of this SIA.

Box 39: Will investor-state provisions in CETA make it more difficult to nationalise certain services?

Certain provisions in CETA on services and investment may compound the indirect, long-term trends towards forms of privatisation of certain services that are not currently as competitive as they would be with CETA as mentioned in the “Quality of goods and services” indicator in the Government Procurement section; however, it is unclear to exactly what extent this will make it more difficult to reverse failed privatisations in Canada or the EU. Stakeholders warn that CETA will in part push privatisation through a ban equity caps, performance requirements and certain other services-related provisions that will ultimately be locked in law and protected with a dispute resolution system, including via investor-state provisions.

Indeed, certain services could be subject to investor-state cases under CETA; however they must first meet some criteria (again, assuming the functioning of the Investment Chapter in CETA will be structured similar to NAFTA). For example, they should not be directly related to government

[117] See examples in, among others: Sinclair (Oct. 2010)

procurement. They should be actually committed in CETA and legally susceptible to investor-state provisions (i.e. they are not excluded by sectoral, [118] reciprocal and investment review reservations). To single out the expropriation clause within investor-state provisions, the government would actually have to want to nationalise/further nationalise a service that is private in some form (for a discussion on forms of nationalisation and privatisation see the box on privatisation in the "Quality of goods and services" indicator in the Government Procurement section). Lastly, and obviously, an investor-state case would actually also have to be brought.

Herein, how and why an investor-state case could challenge a nationalisation plan requires further analysis. The investor obviously needs to meet the legal requirements for bringing a case against a nationalisation. But also, the rationales behind investors bringing a case and the approaches/forms of nationalisation the government attempts to institute also requires further consideration. Specifically, what form of nationalisation is sought and what state of privatisation the target service provider is in will be a factor in determining if cases are even considered in the first place.

Additionally, and as alluded to under this indicator, it is unclear to what degree the threat of a case, or even a formally lodged case, with or without a win, would cause regulatory chill or other regulatory pressures that would complicate or actually prevent a nationalisation plan. And without this certainly there is uncertainty in how difficult it would be to actually nationalise certain services.

As such, the aforementioned limitations combined with the analysis on NAFTA precedent (i.e. only on the results of cases brought to date) suggest that it will not necessarily be as difficult to nationalise certain services under CETA as certain stakeholders seem to suggest. However, this certainly does not mean it will be easy, nor in certain cases without investor-state challenges which will cost money and may indeed derail such efforts. Also, this conclusion is based on evidence of the results of past NAFTA cases and many cases are still pending. Further, even if governments do not attempt to nationalise 'failed privatisations' this should not necessarily detract from certain stakeholders' views that privatisations may result in certain negative impacts.

This issue warrants further study. For example, privatisation of water services, which were not covered in NAFTA in the same way stakeholders suggest they may be in CETA, has been recorded to have mixed impacts depending on the circumstances.[119] In fact, there is a notable amount of literature pointing out the significant negative impacts that can result from privatisation.

Liberalising current investment policy and laws

In addition to the impacts on the regulatory system caused by potential investor-state provisions in CETA, stakeholders have different views on CETA's overall impact (not only limited to ISDS) in terms of liberalising and binding liberalisation of certain Canadian laws. Some stakeholders are concerned that CETA may directly liberalise and bind liberalisation of Canada's investment requirements and this would in turn limit Canadian policy space. For example,

[118] Note: Canada carried over 48 sectoral reservations from CUFSTA under Chapter 11 of NAFTA (Hufbauer and Schott (2005), pg 202.)

[119] Among others see: Gleick et al. (2002)

Canada may reduce the equity cap on foreign investment in the telecom industry as a result of CETA. On the other hand, other stakeholders suggest more competition resulting from telecom liberalisation in particular is better for Canadian consumers as they pay notably more for their telecommunication services than do consumers in the EU.

At a surface level, this obviously would limit the government's flexibility in economic policymaking as previous investment restrictions would no longer be allowable; however this in itself does not indicate it would reduce the type of 'policy space' that is relevant to this SIA. An in-depth assessment of all of Canada's investment rules that may be liberalised within CETA, their utility in policymaking, and an assessment of related results would be needed to fully assess positive and negative consequences herein.

Conclusion

The full effects in terms of regulatory chill from undecided NAFTA investor-state cases has yet to be assessed, and thus it is difficult to use these examples in a way that might specifically predict the impacts of similar provisions in CETA – nonetheless, some conclusions can be made. Although certainly creating some limitation on policy space there does not appear to be sufficient evidence to suggest investor-state claims under NAFTA to date have significantly undermined Canada's domestic rules for health/safety or education*,* nor substantially inhibited Canada's ability to propose and implement essential environmental regulations (see Environmental Assessment below). Consultations to date with Canadian government regulators, albeit limited to Ontario (other government consultations did not produce direct answers), support this. And for context, there are provisions in NAFTA (and the GATT) that stipulate the agreement should not prevent enactment of certain justifiable measures to protect human, animal or plant life or health,[120] which may have contributed somewhat indirectly to this outcome.

This assessment is based on imperfect information and there is some information that suggests that NAFTA has created what could be defined as regulatory chill and other reductions in policy space. Clear examples of regulatory chill as defined by some include abandonment of an auto insurance plan in New Brunswick and Ontario, as well as abandoning a plan on packaging on cigarettes. Although 3 of the 4 successful Chapter 11 cases against Canada involved regulatory inflexibility that should not be blamed solely on NAFTA but also on unrelated difficulties in domestic policymaking, they also could have somewhat reduced policy space via challenging bans on MMT, export quotas on lumber, and a temporary ban of toxic PCB wastes. Some continue to predict dire consequences for provincial and local regulatory authorities as a result of NAFTA ISDS, pointing to the 4th successful Chapter 11 case, *Abitibi Bowater*, and pending cases including the *Dow Agrosciences* and *Bilcon* case, among others. Further, there could be other forms of regulatory chill that have resulted from ISDS in NAFTA, although their regulatory significance is unclear, which compound the level of significance of such instances.

It is important to again stress that a reduction in policy space as it is sometimes defined by stakeholders is not necessarily negative, and thus it is essential to fully consider in detail the actual significance of the aforementioned initiatives as impacting the policy space indicator as defined in this SIA. While considering this, some, for example Public Citizen (2005), go to

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[120] See footnotes on related point in "Quality of goods and services" indicator and baseline for the Environmental Assessment in Government Procurement section.

extremes in criticising ISDS in NAFTA specifically. Others, while less extreme still find that available evidence from NAFTA suggests that ISDS may "lead to reductions in policy space and that those reductions are significant in light of the risk of large awards and the general cost to the public of failures or omissions to regulate in areas of public health and environmental protection and the delivery of public services. In the absence of further study, it is not possible to rule out this troubling outcome."[121] This analysis disagrees with these levels of wariness over ISDS in NAFTA, and thus ISDS in CETA, for the reasons mentioned below, although also as mentioned below agrees with a need for wariness of ISDS in CETA (and NAFTA).

The available evidence does not convincingly suggest that investor-state provision in NAFTA to date have created *significant* reductions of the type of policy space relevant to this SIA. To be sure, this conclusion is reached using a reasonable threshold for burden of proof (minding the obvious dangers of thresholds that are too low or high), i.e. following the same approach to what constitutes a "significant" impact as described in the methodology of this SIA. It considers the details of the examples provided in the above section, including via a review of tribunal rulings.[122] As such, many of the extreme concerns over Chapter 11 seem misleadingly overstated, a conclusion also reached by prominent experts on the impacts of NAFTA.[123] Many of these concerns often continue to be based more on a scenario of 'what if' in terms of past and future impacts rather than the available evidence from 16 years of precedent, sometimes draw upon the questionably relevant experiences of developing countries, and appear to undervalue the nuanced sustainability implications of ISDS discussed in other indicators hereto.

Nonetheless, this analysis errs on the side of caution by concluding ISDS in NAFTA likely has created and will continue to create some reductions in policy space, i.e. policy space as relevant to this SIA, in Canada which may have negative impacts on social sustainability. This conclusion has implications for CETA.

The policy reductions caused by ISDS allowances under CETA would likely be less significant than foreseen by some observers, but not necessarily insignificant and could indeed have negative impacts on social policy space. They might be on the magnitude of minor to notable. As stated, this opinion was reached after a careful weighing of relevant available evidence and erring on

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[121] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011

[122] Primary sources on all cases: http://www.naftalaw.org/disputes_canada.htm. For information on the 4 cases in particular:

(1) For *S.D. Myers Inc. vs. Canada* (partial award, Nov. 2000) main opinion http://www.naftalaw.org/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf, separate concurring opinion at http://www.naftalaw.org/Disputes/Canada/SDMyers/SDMyersMeritsAwardOpinion.pdf

(2) The final decision on *Ethyl Corporation vs. Canada* was kept secret although there are 1998 opinions available on place of arbitration, jurisdiction, and confidentiality: http://www.naftalaw.org/disputes_canada_ethyl.htm

(3) For *Pope & Talbot Inc. vs. Canada* (final award on merits, April 2001) http://www.naftalaw.org/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf)

(4) The final decision on *Abitibi Bowater vs. Canada* appears to be kept secret per request of one or both of the parties. No notice of confidentiality appears to be available. Information on notice of intent and arbitration at http://www.naftalaw.org/disputes_canada_abitibi.htm. Limited information is available on the final ruling, although some is available at sources such as Sinclair (Oct. 2010), and Best, C. (2010). "The Federal Government Settles AbitibiBowater's NAFTA Claim." The Court.ca, August 27, 2010.

[123] This same general conclusion was made by Hufbauer and Schott (2005) at pg 249, although not necessarily for all the same reasons provided herein and it should be note that their book was also published before the 2010 *Abitibi Bowater* decision. Additionally, in consultations with Gary Hufbauer, Institute for International Economics, February 2011, he warns of overemphasising the value of discriminatory practices meant to upkeep an often abstract concept of policy space, citing that these are dimensions of policy space (as it is often vaguely defined) that trade and investment agreements like CETA seek to limit.

the side of caution for following reasons: (1) the seeming lack of utility in using investor-state arbitration panels between the EU and Canada, who have some of the most advanced legal systems in the world combined with the shortcomings of ISDS tribunals as currently operating; (2) the potential pressure that the number of investor-state cases and costs in terms of damages and legal fees may have had and continue to create in terms of regulatory chill; (3) the likelihood of the existence of unrecorded regulatory chill and other impacts reducing policy space that may have some negative impacts; (4) given there is some indication that ISDS cases under NAFTA and EU BITs have lead to reductions in policy space, and this is only part of the picture as Chapter 11 legal opinions are publicly available for only 50% of NAFTA Chapter 11 cases against Canada ending in payment of damages and limited information is also available on EU ISDS cases; and (5) given that including a provision allowing companies of any nationality incorporated in a CETA country to bring an investor-state case would compound these concerns.

Taken individually, and especially when taken together, these issues provide a solid reason for concern that ISDS in CETA may reduce SIA-relevant social policy space in Canada. And as such, it is doubtful that including ISDS in CETA would create a net/overall social sustainability benefit for Canada.

EU

It is clear that the EC has been meeting some difficulties recently in ensuring that its policy objectives are met with regards to BITs. The EC has stated "EU investment policy has to be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, health and safety at work, consumer protection, cultural diversity, development policy and competition policy."[124] Yet there remain concerns from different groups over the regulatory structure of BITs as they have been instituted in the EU, suggesting that in fact this experience has not been entirely positive. Under Article 207(1) of the TFEU, FDI now falls within the scope of EU commercial policy. The EU now has the exclusive competence to abolish barriers to foreign direct investment, whereas previously Member State BITs protected EU investors (market access was already an EU competence). Recently, the EC has discouraged individual MS from signing BITs in favour of an EU-wide approach to signing investment agreements.

The significance of ISDS under current EU BITs in terms of threats to policy space as defined in this SIA should be contextualised by a number of factors. On one hand, it must be considered that the EU has 1,200 BITs already in place, so investor-state provisions are not new to MS. On the other hand, many of these BITs are between certain MS and third countries that are developing and are not particularly litigious. There have been at least 35 known cases already brought against EU states, although as there is little publicly available information on many of these cases it is difficult to measure the policy impacts therein.

Although the aforementioned findings provide general uncertainty as to the impacts of ISDS on EU policy space, when taken together with details of trends in ISDS against MS that are available, they provide a real concern that ISDS will reduce policy space in the EU. In recent years there has been concern over the application of intra-EU BITs in particular. For example, the EC has expressed concerns over a number of cases, for example in the *Eureko v. Slovakia* arbitration, *Eastern Sugar v. Czech Republic*, *AES v. Hungary*, and *Electrabel v. Hungary cases*.

[124] EC (2010). "Memorandum: Q&A…"

Some conclude concerns over these cases may reflect that intra-EU BITs serve as "a source of inequality between EU citizens as well as a hindrance to the harmonized development of EC law."[125] The *Vattenfall* claim, named after the state-owned Swedish power company, involves a decision by the Hamburg city council in Germany and has generated a notable amount of press attention.[126] Some note that the *Vattenfall* case concerns a range of health, climate change and conservation concerns, and will likely raise concerns over regulatory chill among local decision makers in Germany.[127] While it is still not fully clear to what extent these trends should be extrapolated to EU-wide BITs with a foreign nation like Canada, they do provide relevant experiences that are cause for at least some concern.

The aforementioned potential reductions in policy space in the EU resulting from current ISDS will likely be compounded in CETA given that current investment agreements do not bind the EU in its entirety as would investor-state provisions in CETA. Since the EU as a whole has not included investor-state provisions in its EU-wide trade and investment agreements it will take some time for the EU to adjust to investor-sate cases arising from CETA. Although Canada already has FIPAs with 6 EU countries, CETA will provide Canadian (and certain other investors if the 'third countries incorporation' provision is included in CETA) a wider mandate to sue the EU's oversight institution over the policies of its individual MS. These obligations would put an increased burden on the EC by becoming responsible for defending against investor-state cases brought against any number of the governments within MS in the EU.

In conclusion, the EU could experience limits on policy space from investor-state provisions in CETA that will have negative impacts on social sustainability. These limits could be on the magnitude of minor to notable. The rationale herein follows the same rationale in the Canada section, i.e. is based upon consideration of the (1) questionable utility of using ISDS as currently operating rather than domestic courts in the EU, (2) precedent of ISDS creating some regulatory chill, (3) risk of unrecorded regulatory chill from ISDS, (4) lack of information on ISDS case rulings, and (5) risk created by a 'third country incorporation' provision in ISDS in CETA. While the significance of ISDS cases under CETA may not be of the magnitude as that experienced under NAFTA to date, it is reasonable to suggest that CETA will likewise produce reductions of policy space. Further, at a minimum, it appears that CETA would reduce policy space in a way that would burden an EC that is at present struggling to steer the ISDS tendencies of its MS onto the right track. And this risk would be compounded by the propensity of Canada to bring investor-state cases, which counter to conventional belief is in fact noteworthy when dealing with a developed competitor like the EU (see "Cost of investor-state provisions…" indicator).

Taken individually, and especially when taken together, these issues provide a solid reason for concern that ISDS in CETA may reduce SIA-relevant social policy space in the EU. And as such, it is doubtful that including ISDS in CETA would create a net/overall social sustainability benefit for the EU.

[125] Von Krause, C. (2010). "The European Commission's Opposition to Intra-EU BITs and Its Impact on Investment Arbitration." Kluwer Law International. http://kluwer.practicesource.com/blog/2010/the-european-commission%e2%80%99s-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/

[126] Bryant, C. (2009). "Germany faces action over power plant." *Financial Times*. April 2, 2009.

[127] Consultations with Gus Van Harten, Osgoode Hall Law School, York University, February 2011

US and Mexico

Investment provisions in CETA are not likely to have notable effects on policy space in the US and Mexico. This said, it is not fully clear if the inclusion of a 'third country incorporation' provision in CETA might impact policy space in the US or Mexico.

INDICATOR: Inequality in wages, displacement of workers, decency and quality of work, knock-on effects in innovation

BASELINE & ANALYSIS

Canada, EU, US and Mexico

The overall social impacts of an Investment Chapter in CETA fundamentally depend on its implications for policy space and economic growth. For analysis on related impacts on policy space see the "Policy space" indicator above.

The specific effects of an Investment Chapter in CETA on employment and wage inequality are mixed. Theoretically, when combined with other provisions of CETA, investment provisions in CETA could encourage some labour market frictions with employment shifts among sectors and wage inequality among workers.[128] However, trade and investment effects together would create this effect, and an Investment Chapter in CETA would likely have little impact on its own. The extent of shifts depends on the level of liberalisation in CETA. These negative effects could be at least somewhat offset by the positive effects mentioned below.

There may be some positive impacts from investment encouraged under CETA; however, these impacts would most likely be realised when combining the impacts the Investment Chapter in CETA might have on stimulating investment with the number of other provisions in CETA, for example, those on labour mobility, free circulation of goods, competition policy, IPR, government procurement, trade facilitation, provisions liberalising restrictions in services (inclusive of those indirectly related to investment), and tariff reductions. Investment may be channelled into certain industries that benefit human health (and the environment), for example green technology. Investment also would likely be channelled into job creation overall, some of which may simply make-up for job loss in other areas but nonetheless could be concentrated in industries that have higher scores on certain decency of quality work indicators.

For more on the social impacts caused by CETA-encouraged investment refer to the sectoral analyses in this report.

[128] For example, for discussion of related impacts from NAFTA see Hornbeck (2004).

ENVIRONMENTAL ASSESSMENT

INDICATOR: Biodiversity, water usage and contamination, toxic contaminants and effluents, air pollution and GHG emissions

BASELINE & ANALYSIS

Mining

Energy is the fastest growing sector for investment in Canada, with $87 billion in 2006, up from $30 billion in the late 90s. In 2006 it represented 20% of total inward FDI. The reason for this can be seen in the rising cost of oil and the dramatic growth in oil sands production in Alberta. Mining is also a fast rising target for investment, totalling 8.7% of inward FDI in 2006. Growth in mining and oil and gas extraction decreased in 2009, after successive years of growth. The average of the five-year growth rate was 15.2%. Oil and gas extraction rose 2.7% in 2008 to reach $78.8 billion, representing 14.4% of all industries. Mining's growth rate decreased to 0.6% in 2009, representing $25.4 billion. The stock invested by the UK in mining and energy dropped $4.4 billion.[129]

As mentioned in the Industrial Products section, if CETA increased FDI in the oil sands and mining sectors this could lead to increased environmental impacts since these sectors are environmentally intensive. Given the relative concentration of FDI inflows in these sectors in Canada, a marginal increase in investment inflows driven by CETA and higher oil and mineral prices could lead to an increase in production capacity that would in turn lead to impacts on capital stocks, use of bio diverse areas, water use and contamination, toxic contaminants and effluents, and air pollution and GHG emissions. This said, although the gravity modelling for this report provides some indication that investment could increase, it is unclear how much CETA would increase investment in the oil sands and mining sectors.

A full analysis of these potential impacts is available in the "Industrial Products" section.

Other sub-sectors

According to FDI gravity modelling performed for the study, increased investment might gravitate more towards sectors like transportation services and fisheries if barriers in these relatively protected sectors are reduced under CETA. Increased investment in the maritime transportation services could somewhat neutralise some polluting effects realised in other transportation services, for example via land transport. Increased investment in the fisheries sector could put some further stress on fish stocks, although feedback from stakeholders suggests Canada in particular has a strong record on sustainable fishing and is committed to maintaining such a record under CETA.[130]

Further details on these impacts can be found in the environmental assessments per the individual sub-sectors.

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[129] Government of Canada Statistics (2010). http://www.international.gc.ca/economist-economiste/performance/state-point/state_2010_point/2010_6.aspx?lang=eng
[130] Feedback from Patrick McGuiness, Fisheries Council of Canada, 1 April 2011

INDICATOR: Environmental policy space, institutional and regulatory environment

BASELINE & ANALYSIS

Depending on its provisions, and as mentioned, CETA could also impact indicators such as environmental policy space and institutional and regulatory environments. Under NAFTA, the introduction of investor-state provisions to protect investment led to widely publicised investor-state disputes. As mentioned in the "Policy space" indicator in the Social Assessment section, as of a decade after NAFTA was in force over ¼ of all investor-state disputes involved environmentally-related concerns.[131] The broad interpretation of NAFTA's investor-state provisions, combined with a panel process that was perceived as lacking transparency, as well as concerns about the lack of independence, public accountability, fairness, and participation of such processes led to much criticism from both public servants and civil society, and continues to receive criticism. Some argued, and some continue to argue, that NAFTA's Chapter 11 provisions on investment create a regulatory chill that prevents the introduction of new environmental regulations.

The available evidence does not convincingly suggest that investor-state provisions in NAFTA to date have created *significant* reductions of the type of environmental policy space relevant to this SIA. Both the EU and Canada have concluded numerous bilateral and regional investment agreements in the past 16 or so years after NAFTA, and their regulatory frameworks have proven adaptable and robust enough to prevent a significant decrease in policy space and an erosion of their environmental regulatory frameworks.[132] Furthermore, the chilling effect on the introduction of new domestic regulations subsequent to NAFTA does not appear to be significant after 16 or so years as provinces and federal government have continued introducing environmental regulations. For these reasons, unless CETA would introduce provisions that move away from current EU or Canadian practice, it will likely not have significant environmental policy impacts.

This said, this analysis still errs on the side of caution by concluding, while not meeting the threshold of 'significant,' ISDS in NAFTA, as well as EU BITs, may very well have created and will continue to create some magnitude of reductions in environmental policy space relevant to this SIA, and thus ISDS in CETA may have some negative environmental impacts on the EU and Canada. In other words, the environmental policy reductions caused by ISDS allowances under CETA would likely be less significant than foreseen by some, but not necessarily insignificant. The rationale for this conclusion is based on the findings under this indicator as well as the rationale in the "Policy space" indicator in the Social Assessment. The potential for specific investor-state challenges to stall legitimate regulatory action is real and as such should be closely monitored. For instance, the impacts of the recent *Abitibi Bowater* case and ongoing investor-state cases related to the environment should be monitored closely to the extent they

[131] Hufbauer and Schott (2005)

[132] Among other sources describing the impact of investor-state provisions in NAFTA on the environment see Gaines, S. E. (2006). "Environmental Policy Implications of Investor-State Arbitration." Third North American Symposium on Assessing the Environmental Effects of Trade, Montreal, 30 November – 1 December 05. CEC. February 2006. For example, pg 36 of that report finds: "What was surprising, even in retrospect, is that such a high proportion of the early Chapter 11 arbitrations concerned environmental measures. This high proportion led to reasonable concerns among environmental policy makers and advocates that Chapter 11 could have a broad constraining effect on governments considering new environmental restrictions on economic activity. This reasonable concern, however, has become exaggerated through claims of casual or partly-informed commentators, sometimes based on erroneous information about the nature of the compensation claims being made, the factual background, or the legal grounds on which compensation was paid or awarded..."

may show gradual erosion of environmental protections. As a note, some stakeholders have expressed concerns on the potential impact of investor-state provisions on the future ability of Canada to curtail greenhouse gas emissions in the Alberta oil sands.[133]

Taken individually, and especially when taken together, these issues provide a solid reason for concern that ISDS in CETA may reduce SIA-relevant environmental policy space in the EU. And as such, it is doubtful that including ISDS in CETA would create a net/overall environmental sustainability benefit for the EU and/or Canada.

For further analysis on CETA's impact on policy space, which is not limited to environmental policy space, see the "Policy space" indicator in the social assessment section.

7.3.2. OTHER THIRD COUNTRIES

BASELINE

The EU and Canada have a number of key trade and economic agreements with foreign countries. Additionally, it appears that Canada has concluded or is still working on 35 FIPAs with other countries. These FIPAs are listed below. EU MS collectively have 1,200 BITs with foreign countries, and thus are too extensive to list in this section.

Table 73: Multilateral trade and economic agreements and negotiations for the EU and Canada

Type of Agreement	EU	Canada
FTA		North American Free Trade Agreement (1994): US and Mexico
		European FTA (2009): Iceland, Liechtenstein, Norway and Switzerland
FTA Negotiations	Colombia and Peru	Andean Community Countries: Bolivia, Colombia, Ecuador and Peru
	GCC	Caribbean Community: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago
	Central America	Central America: El Salvador, Guatemala, Honduras and Nicaragua
	ASEAN[134]	Free Trade Area of the Americas:

[133] Shrybman, S. (Nov. 2010). "Potential Impacts of the Proposed Canada-European Union Comprehensive Economic and Trade Agreement (CETA) on the Pace and Character of Oil Sands Development: A Legal opinion." Council of Canadians, et al. November 2010.

		34 democratic governments in the Americas
	MERCOSUR[135]	
Economic Partnership Agreement	CARIFORUM states (2008): Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, Trinidad and Tobago	
EPAs under negotiation	EAC: Burundi, Kenya, Rwanda, Tanzania, Uganda	
	ESA: Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe	
	Pacific: Papua New Guinea, Fiji	
	SADC: Botswana, Lesotho, Namibia, Mozambique, Swaziland	
Trade and Investment Cooperation Agreement		MERCOSUR (1998)
		Andean Community (1999)

Source: adapted directly from chart compiled in EU-Canada SIA Inception Report (2010)

Table 74: Bilateral trade and economic agreements and negotiations for the EU and Canada

Type of Agreement	EU	Canada
FTA	Faroe Islands (1997)	Israel FTA (1997)
	Norway (1973)	Chile FTA (1997)
	Iceland (1973)	Costa Rica FTA (2002)
	Switzerland (1973)	Colombia FTA (2008)
	Croatia (2005)	Peru FTA (2009)
	Albania (2006)	Jordan FTA (2009)
	Montenegro (2008)	
	Bosnia and Herzegovina (2008)	
	The former Yugoslav Republic (2004)	
	Serbia (2010)	
	Chile (2002)	
	Mexico (1997)	
FTA Negotiations	Ukraine	Ukraine
	Morocco	Morocco
	Korea	Korea
	Egypt	Dominican Republic
	India	India
	Singapore	Singapore

134 March 2009 the Joint Committee agreed to "take a pause" in the regional negotiations
135 Negotiations on hold between 2004 and 2009 but restarted in 2010

	Israel	
	Jordan	
	Lebanon	
	Libya	
	Occupied Palestinian Territory	
	Syria	
	Tunisia	
Customs Union	Andorra (1991)	
	Turkey (1996)	
	San Marino (1992)	
Association Agreement	Algeria (2005)	Palestinian Authority (1999)
	Egypt (2004)	
	Israel (2000)	
	Jordan (2002)	
	Lebanon (2002)	
	Morocco (2000)	
	Palestinian Authority (1997)	
	Syria (1978)	
	Tunisia (1998)	
	Chile (2005)	
Trade, Development and Co-operation Agreement	South Africa (2000)	South Africa (1998)
Trade and Economic Cooperation Agreement		Australia (1995)
Interim Economic Partnership Agreement	Ivory Coast (2009)	
	Cameroon (2009)	
Economic Partnership Agreement Negotiations	Ghana	
Trade and Cooperation Agreement Negotiations	China	
	Iran	
	Iraq	
	Russia	
Other Negotiations	Kazakhstan (Agreement on trade in certain steel products)	
	Vietnam (trade in textile and clothing products)	

Source: adapted directly from chart compiled in EU-Canada SIA Inception Report (2010)

Table 75: Canadian Foreign Investment Promotion and Protection Agreements (FIPAs)

Partner Country for Canadian FIPAs	In force date/status
Bahrain	Negotiations concluded
Tunisia	Pending
Tanzania	Pending
Indonesia	Pending
Madagascar	Negotiations concluded
Vietnam	Pending
Mongolia	Pending

India	Pending
China	Pending
Jordan	14 Dec 2009
Kuwait	Pending
Peru	20 June 2007
Croatia	30 January 2001
Costa Rica	29 September 1999
Lebanon	19 June 1999
Uruguay	2 June 1999
El Salvador	Signed 31 May 1999
Armenia	29 March 1999
Thailand	24 September 1998
Panama	13 February 1998
Venezuela	28 January 1998
Egypt	3 November 1997
Ecuador	6 June 1997
Romania	11 February 1997
Barbados	17 January 1997
Philippines	13 November 1996
Trinidad and Tobago	8 July 1996
South Africa	27 November 1995
Latvia	27 July 1995
Ukraine	24 July 1995
Hungary	21 November 1993
Argentina	29 April 1993
Czech and Slovak Federal Republic	9 March 1992
USSR	27 June 1991
Poland	22 November 1009

Source: adapted directly from DFIAT "Negotiations and Agreements"[136]

ANALYSIS

CETA-inspired investment reforms in Canada in particular (given its higher restrictiveness to investment than the EU as measured by the OECD FDI Restrictiveness Index) may also have minor spill-over effects, making Canada more attractive to FDI from a variety of third (non-EU MS) countries. This might occur if the reforms do not provide access solely to EU firms and go beyond investment provisions in Canada's FIPAs and other investment-related agreements. Although the effects tied to an Investment Chapter in CETA alone will likely be less than

[136] DFIAT. "Negotiations and Agreements." http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx

significant, when combined with other provisions of CETA – for example those on labour mobility, free circulation of goods, competition policy, and trade facilitation – these effects may be more significant.