### ANNEX 1

#### A GUIDE TO CETA’S MOST DANGEROUS CORPORATE RIGHTS

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<th>TRADE SPEAK: WHAT’S WRITTEN IN CETA[^62]</th>
<th>TRANSLATION: WHY IT IS DANGEROUS[^63]</th>
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<td><strong>Definition of investment:</strong> « 'Investment' means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment [...]. » Then follows a long, non-exhaustive list of « forms that an investment may take », ranging from shares over debt instruments to intellectual property rights. (Chapter 8, Article 1)</td>
<td>The definition of « investment » is very important because it determines which foreign capital is protected. A broad – and open-ended – definition such as in CETA not only covers actual enterprises in the host state, but a vast universe ranging from the value of a trademark, alleged promises made by a state controlled entity or government authority in a secret contract to sovereign debt. This exposes states to unpredictable legal risks.</td>
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<td><strong>Definition of investor:</strong> « Investor means a Party, a natural person or an enterprise of a Party [...] that seeks to make, is making or has made an investment in the territory of the other Party ». An « enterprise of a Party » must either have « substantial business activities in the territory of that Party » or « be directly or indirectly owned or controlled » by a natural person of or an enterprise with substantial business activity in that Party (Chapter 8, Article 1)</td>
<td>The definition of « investor » is important because it determines who is protected. While much will depend on the arbitrators’ interpretation of « substantial business activities », CETA does prevent blatant treaty abuse through mailbox companies (such as a Canadian firm suing Canada via a shell construction in the Netherlands). But this will not prevent the thousands of US- and EU-owned corporations with subsidiaries in Canada to sue EU governments via CETA and vice versa (see page 9). That an investor is also protected if he/she only indirectly owns or controls the investment further opens the gate to treaty shopping.</td>
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<td><strong>National treatment:</strong> “Each party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory” (Chapter 8, Article 6)</td>
<td>Foreign investors have to be treated at least as favourably as domestic ones. This has been interpreted as a prohibition of any measure that de facto disadvantages foreigners – even if not on purpose. For example, a Canadian ban on the export of a toxic waste (applying to all investors and in line with an international environmental treaty) was found to favour Canadian firms because they could continue their business while a US competitor could not ship the waste to the US to treat it there (see page 5)</td>
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<td><strong>Fair and equitable treatment (FET):</strong> “Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment (...).” Then follows a list of examples which would constitute a breach of this obligation: “denial of justice”, “fundamental breach of due process”, “manifest arbitrariness,” “targeted discrimination” and “abusive treatment of investors.” (Chapter 8, Article 10)</td>
<td>This potentially catch-all clause is the most dangerous for taxpayers and regulators: it is used most often and successfully by investors when attacking public interest measures. The inclusion of “manifest arbitrariness” as one of the criteria that investors can invoke as a breach of this clause in CETA leaves the door wide open for investors to sue and for arbitrators to interpret it to their discretion. When studying what investors have argued in emblematic public interest cases, we found that it is not uncommon for companies to argue that the measures sanctioned by the State were “arbitrary”[^64]. In three-quarters of cases won by US investors, tribunals found an FET violation[^65].</td>
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### TRADE SPEAK: WHAT'S WRITTEN IN CETA

**Protection of investors’ legitimate expectations:**

“When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated” (Chapter 8, Article 10)

**Expropriation:**

“A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (…), except: a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) on payment of prompt, adequate and effective compensation” (Chapter 8, Article 12)

“For greater certainty, except in rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.” (Chapter 8, Annex 8-A)

**Most-Favoured-Nation (MFN) Treatment:**

“Each party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.”

CETA clarifies that this “does not include" ISDS provisions in other deals and that “substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment” […] absent measures adopted by a Party pursuant to such obligations.” (Chapter 8, Article 7)

### TRANSLATION: WHY IT IS DANGEROUS

**Tribunals have already interpreted the FET concept as protecting investors’ “legitimate expectations” - even if the term is not part of existing treaties such as NAFTA. They have also considered it as creating a right to a stable regulatory context – binding governments to not alter laws, regulations or other measures, even in light of new knowledge or democratic choices. In the Quebec case where community opposition led to a moratorium on fracking, Lone Pine argues that the "revocation" of its gas exploration permits violated its "legitimate expectation of a stable business and legal environment." CETA goes into the direction of codifying such expansive interpretations of FET, widening the concept’s scope and giving investors a powerful weapon to fight tighter rules. It is especially troubling that CETA does not define what type of “specific representation” by a state would create a “legitimate expectation”.**

**CETA creates various new institutions that can change the substance of the treaty in the future. This can cut both ways. There is growing concern that this might lead in the long run to an even wider codification of the scope of FET.**

**Arbitrators have used MFN provisions like a "magic wand" that allows investors in ISDS proceedings to "import" more favourable rights from other treaties signed by the host state. This multiplies the risks of successful attacks against public policy. CETA’s MFN wording somewhat addresses this cherry-picking, but remains open to interpretation by arbitrators and it is ambiguous. In particular, why does CETA not clearly bar the "import" of substantive obligations from other agreements? It does so only in the absence of "measures […] pursuant to such obligations" in other treaties and the term “measure” is defined extremely broadly in CETA.”**
How CETA’s investor protection rules could result in a boom of investor claims against Canada and the EU.

1. Consent to arbitration: Claims may be submitted under the usual investor-state arbitration rules such as the ICSID convention and the UNCITRAL rules. There is no requirement to first exhaust local remedies.

2. The tribunal deciding the cases: Investor claims will be decided by a “tribunal” of three chosen from a pool of 15 “members” appointed by the CETA Joint Committee. They will receive a “monthly retainer fee” to be determined by the Committee, but will otherwise be paid according to the “Administrative and Financial Regulations of the ICSID Convention.”

3. Final award: When a tribunal finds that a state violated CETA’s investor rights, it “may only award, separately or in combination: (a) monetary damages and any applicable interest; (b) restitution of property.” Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided.

4. Article 21 of CETA’s chapter on financial services allows for investor-state disputes with regard to financial services when “an investor claims that a Party has breached Articles 8.10 (Investment - Treatment of investors and of covered investments), 8.11 (Investment - Compensation for losses), 8.12 (Investment - Expropriation), 8.13 (Investment - Transfers), 8.16 (Investment - Denial of benefits), 13.3 (Financial Services – National treatment), or 13.4 (Financial Services – Most-favoured-nation treatment)” or “in which Article 13.16.1 [on prudential carve-outs in the financial sector] has been invoked.”

5. Free transfer of capital: “Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay...” Then follows a list of examples of types of transfers, including profits, interest and payments made under a contract.

6. Survival clause: “In the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date.”

This is where the EU in effect says: our courts are not good enough for foreign investors. Unlike domestic firms and ordinary people, foreign investors will have the exclusive right to bypass domestic legal systems and sue the EU and its member states directly at international tribunals, which will judge whether policies are right or wrong and can order vast sums of taxpayer money to be paid as compensation.

Damages awards can amount to serious raids on public budgets, and can be enforced by seizing state property in many other countries around the world.

One of the highest known awards to date, US$ 50 billion, was made against Russia. In 2003, the Czech Republic had to pay a media corporaUS$354 million – the equivalent of the country’s national health budget at the time. Tribunals often order compensation for expected future profits, like in a case against Libya which had to pay US$900 million for “lost profits” from “real and certain lost opportunities” of a tourism project, even though the investor had only invested US$5 million and construction never started.

Under CETA, foreign investors have more rights to challenge financial regulations than under previous treaties like NAFTA. This threatens to hamstring regulations charged with protecting consumers and financial stability in an emergency. Under NAFTA, investor lawsuits in the financial sector were mostly limited to a bank’s [still wide-ranging] rights to transfer funds freely and be protected from expropriation. CETA expands their rights to include highly elastic concepts such as fair and equitable treatment. Canada’s financial services negotiators themselves warned that this would “create a chilling effect that will have negative consequences for the overall economy of the country.”

This provision would allow the investor to withdraw all investment-related monies, reducing the ability of countries to deal with out- and inflows of capital, balance of payment and other macroeconomic crises. This is a de facto ban on capital controls. While Article 28.4 allows for quite limited temporary safeguard measures with regard to capital movements and payments and Article 28.5 permits some restrictions in case of serious balance of payments and external financial difficulties. These exceptions are far too restrictive to regulate cross border capital flows in the public interest.

Even if CETA is terminated, investors could still bring claims for 20 more years for investments made before the termination. This “zombie clause” allows the corporate super rights to live on after the rest of CETA is dead.