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Moving Beyond CETA: Investment Provisions for a Canada-UK PTA in a Post-Brexit World

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Executive Summary

Objective
Determine what provisions are likely to be included in the Investment Chapter of a Canada-UK Preferential Trade Agreement, assuming the UK proceeds with Brexit.

Methods
We examined the political and contextual factors that could help inform a post-Brexit Investment Chapter for both parties, as well as examined past agreements signed by the Parties. CETA was used as the baseline, given that it is currently the status quo between the Parties. CUSMA and CPTPP were also looked at as primary examples of recent agreements signed by Canada, though additional agreements and academic research were also used.

Conclusions
Several contextual factors and Party objectives primarily informed our approach to determining what types of provisions to include. For context, we considered: 1) the dual purpose of international investment law and the expansion using investment chapters in larger preferential trade agreements; 2) Brexit as a catalyst event; and 3) Canada's and the UK's experience in negotiating and implementing investment agreements. For Party objectives, we considered: 1) Canada and the UK's shared objectives of transitioning CETA, retaining the right to regulate and increasing investment; 2) the UK's objective to establish an independent investment policy and develop a precedential treaty for future investment negotiations; and 3) Canada's objective to further diversify its trade relationships while advancing its inclusive trade agenda.

Many provisions will remain largely similar to those found in CETA, though there is also room to expand beyond that baseline. Changes could include expanding labour and environmental standards as seen in CUSMA, including a gender chapter as seen in Canada-Israel, including provisions that provide for investment facilitation and investor obligations, and expanding on the prohibitions on performance requirements as seen in CUSMA and CPTPP.

Dispute resolution is one area that is currently under intense focus on the international stage, with many agreements moving away from traditional investor-state dispute settlement (ISDS). The UK has repeatedly mentioned concerns regarding ISDS, and may not want ISDS in the agreement at all. Given that both Canada and the UK have well established legal systems with respect for the rule of law, providing no ISDS and leaving protection of investor rights to the domestic courts (similar to CUSMA) is likely an appropriate option. In the alternative, a heavily reformed version of ISDS that limits what matters investors may bring claims under (similar to CETA) is also be an appropriate option. In any event, traditional ISDS is unlikely.

Overall, while there should be little difficulty in Canada and the UK coming to agreement on an investment chapter, it still represents an opportunity to push the boundaries on the "gold standard" that was set during the CETA negotiations.

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1 Abbreviations and Definitions

BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CUSMA	Canada-US-Mexico Agreement
CIL	Customary International Law
EU	European Union
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
Parties	Canada and the United Kingdom
PTA	Preferential Trade Agreement
SSDS	State-to-State Dispute Settlement
TRIMS	The Agreement on Trade-Related Investment Measures
TRIPs	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	The United Kingdom of Great Britain and Northern Ireland

2 Introduction

The purpose of this paper is to predict the provisions that will likely be included in an Investment Chapter of a potential Preferential Trade Agreement (PTA) between Canada and the United Kingdom (UK) following the UK's exit from the European Union (EU). When the UK exits the EU, then Canada and the UK will likely agree to a PTA. To predict the provisions which will likely be included in a Canada-UK PTA, the authors examined contextual factors and party objectives related to both Canada and the UK that will likely influence both Parties during negotiations. We then applied those factors to international investment law to predict the likely content and wording of specific provisions.

In predicting the likely content of provisions in a potential Canada-UK PTA, we relied on previous treaties as precedents and focused specifically on recent trade agreements entered into by Canada. We gave particular weight to three recent agreements: the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU,[1] the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[2] and the Canada-US-Mexico Agreement (CUSMA).[3] Because both Canada and the UK are parties to CETA, it will likely serve as a template for a Canada-UK PTA generally and for an Investment Chapter specifically.

We predict that a future Canada-UK PTA will likely strongly resemble CETA. However, we also predict that Canada and UK will include innovative provisions which include new

[1] Comprehensive Economic and Trade Agreement between Canada and the European Union, 30 October 2016 (not yet in force), online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng [CETA].
[2] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018 (entered into force 30 December 2018), online: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng [CPTPP].
[3] Canada-United States-Mexico Agreement, 30 November 2018 (not yet in force), online: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng [CUSMA].

obligations or expand on the provisions from CETA. We developed these provisions based on the distinctive characteristics of both Parties and their established investment relationship. Based on our predictions, we drafted an Investment Chapter and other provisions related to investment that will likely be included in a Canada-UK PTA.

3 The Factors that Will Likely Influence Canada-UK Investment Chapter Negotiations

To predict the likely content of a potential Canada-UK Investment Chapter, we examined the context in which the two States will negotiate. We also considered the objectives of both Canada and the UK in negotiating an investment agreement. Based on our examination of the context and objectives of each party, we extracted three contextual and three objective factors. These six factors will likely influence both Parties during negotiations and determine the ultimate content of a Canada-UK Investment Chapter.

3.1 Contextual Factors Influencing Canada-UK Investment Chapter Negotiations

Three contextual factors will likely influence the content of a Canada-UK Investment Chapter. First, the different models of international investment agreements (IIAs) and the dual purposes underlining IIAs. Second, the shadow and fallout of the 2016 Brexit referendum and the process by which the UK will likely leave the EU. Third, the differences between the Parties' historical experience with IIAs, particularly how both Parties have developed and implemented these agreements and their experience with Investor-State Dispute Settlement (ISDS). These three

contextual factors will likely inform how the Parties will develop their future investment relationship.

3.1.1 The Models and Dual Purposes of International Investments Agreements

There are several possible models for IIAs, and these models provide the contextual background for negotiating an IIA. The term "International Investment Agreements" refers to a wide range of different instruments, including Bilateral Investment Treaties (BITs) and Investment Chapters within larger PTAs, often called Free Trade Agreements (FTAs). BITs are agreements between two States with a focus on their investment relationship specifically. On the other hand, PTAs are agreements between two or more States which focus on their economic relationship as a whole, including both trade and investment. For the most part, the provisions contained in both are similar. These provisions include non discrimination provisions, which protect foreign investors from worse treatment than domestic investors (National Treatment) or investors from third parties (Most Favoured Nation), as well as provisions concerning the State's confiscation of an investor's property (Expropriation) and provisions setting out a State's commitment to "treat investments 'fairly' or 'justly'" (Fair and Equitable Treatment).[4] Many IIAs also include an arbitration system that allows investors to enforce their rights against States—ISDS. However, BITs may address additional issues which investment chapters do not. This is because, in PTAs, the parties can address these issues elsewhere—for example, in a standalone chapter—because they impact the entire PTA and not just the investment relationship.[5] These issues include, for example, environmental or labour standards.

[4] Krista Nadakavukaren Schefer, *International Investment Law,* 2nd ed (Cheltenham: Edward Elgar Publishing, 2016) at 377.
[5] *Ibid* at 1.

The biggest difference between BITs and PTAs is that PTAs address the larger economic relationship between the parties. Such agreements can lead to deeper foreign investment as a by-product of the trading relationship. This is because PTAs provide preferential market access to firms by lowering specific tariffs exclusively for the parties involved. Preferential market access reduces import/export cost, which encourages firms from one party to diversify their production to another party's territory where inputs and final products can be more cost-effectively produced.[6] As a result, firms, regardless of their nationality, invest in the most cost-effective territory.[7] Additionally, the wider subject matter at play in PTAs broadens the parties' negotiating scope. For example, during CUSMA negotiations to replace the North American Free Trade Agreement (NAFTA), Canada negotiated to retain State-to-State Dispute Settlement (SSDS), which affected the entire PTA, in exchange for removing ISDS from the Investment Chapter.[8]

IIAs have two main purposes. First, for the "Home State" of investors seeking to invest abroad, the purpose is to protect their investors from the actions of states where their investors are likely to invest.[9] Second, for the "Host State," where foreign investors invest, the purpose of IIAs is to increase investment inflow into the territory by attracting foreign investors, often by guaranteeing them investment protections.[10] Today, states, including Canada and the UK, generally focus on finding a balance between these dual purposes—but that was not always the case.

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[6] Sonal S Pandya, "Political Economy of Foreign Direct Investment: Globalized Production in the Twenty-First Century" (2016) 19 Ann Rev Poli Sci 455 at 457.
[7] Leonardo Baccini and Andreas Dür, "Investment Discrimination and the Proliferation of Preferential Trade Agreements" (2015) 59:4 J Conflict Resolution 617 at 621, 638.
[8] Scott Sinclair, "Saving NAFTA Chapter 19: Was it worth it?" (23 October 2018) Canadian Centre for Policy Alternatives, at 18, online report: https://www.policyalternatives.ca/publications/reports/saving-nafta-chapter-19.
[9] Schefer, *supra* note 4 at 2.
[10] Johannes Kniess, "Must We Protect Foreign Investors?" (2018) 5:2 Moral Philosophy and Politics 205 at 209.

Historically, developed countries used IIAs to protect their own nationals' foreign investments in developing countries. Investors from developed countries perceived developing countries, particularly newly independent states, as politically and economically unstable and unpredictable.[11] Accordingly, developed countries used IIAs to guarantee their investors protections that "went largely beyond" the protections provided by the developing countries' laws—these protections primarily benefitted developed countries' investors because developing countries' nationals were unlikely to make reciprocal foreign investments.[12] As a result, many IIAs asymmetrically benefitted developed countries at the expense of developing countries.[13] While this asymmetry is changing, it is still evident in treaties today. For example, Canada has, in the last four years, signed BITs with Senegal, Mali, and the Ivory Coast.[14] While there has been Canadian investment in all three states, statistics indicate that there has been no reciprocal investment in Canada.[15]

The emergence of many developing countries as capital-exporting states has highlighted the asymmetry of IIAs and, in particular, how ISDS benefits investors at the expense of Host States.[16] Furthermore, while investors argue that strong protections are necessary for IIAs to encourage future investments, the OECD has recently concluded that there is no empirical

[11] Frank J Garcia et al, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18:4 J Intl Econ L 861 at 866.
[12] *Ibid* at 866, 870.
[13] *Ibid* at 870.
[14] Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, 27 November 2014 (entered into force 5 August 2016) [Canada-Senegal]; Agreement Between Canada and Mali for the Promotion and Protection of Investments, 28 November 2014 (entered into force 8 June 2016) [Canada-Mali]; Agreement Between the Government of Canada and the Republic of Côte d'Ivoire for the Promotion and Protection of Investment, 30 November 2014 (entered into force 14 December 2015) [Canada-Côte d'Ivoire].
[15] Global Affairs Canada, "Foreign Direct Investment Statistics – Outward and Inward Stocks" (April 2018), online: https://www.international.gc.ca/economist-economiste/statistics-statistiques/outward_inward-actifs_passif.aspx?lang=eng.
[16] Garcia et al, *supra* note 11 at 870.

evidence that IIAs increase foreign investment in Host States.[17] As a result, the balance that IIAs aim to achieve between investor protection and states' right to regulate is in flux. Thus, while the dual purposes of IIAs will likely inform Canadian and UK negotiators, both Parties are also actively consulting investors and the public to inform their future investment policy.[18] Both Parties indicate that the consultations' purpose is to better represent their State's interest in future negotiations.[19]

The evolving contemporary reality of IIAs will influence Canada and the UK as they negotiate a PTA. In addition, the features of IIAs will play a role in contextualizing the negotiations and their outcome. Both Parties are likely to seek an agreement that includes provisions which speak to the dual purpose of IIAs: increasing investment flows and providing investor protection, as they currently have a reciprocal investment relationship.[20] In addition, as Canada and the UK were both involved in the negotiations of CETA, considered by some to be a gold standard among PTAs, it is likely that they will negotiate a PTA rather than simply a BIT in order to establish an economic relationship, similar to, if not deeper than, that which was negotiated under CETA.

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[17] Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence" (Paris: OECD Publishing, 2018) OECD Working Papers on International Investment 2018/01, at 30, online http://dx.doi.org/10.1787/e5f85c3d-en.

[18] Global Affairs Canada, "Free Trade Agreements (FTA) Consultations", online: https://www.international.gc.ca/trade-agreements-accords-commerciaux/consultations/fta-ale.aspx?lang=eng; Department for International Trade (UK), "Consultation Hub", online: https://consultations.trade.gov.uk/.

[19] Global Affairs Canada, "Free Trade Agreements (FTA) Consultations", *supra* note 18; Department for International Trade (UK), "Consultation Hub", *supra* note 18.

[20] Lorenzo Cotula & Lise Johnson, "Beyond Trade Deals: Charting a Post-Brexit Course for UK Investment Treaties" (December 2016) IIED Briefing: Columbia Center on Sustainable Investment, at 1, online: http://pubs.iied.org/17388IIED; Global Affairs Canada, "Foreign Direct Investment Statistics – Outward and Inward Stocks", *supra* note 15.

3.1.2 Brexit's Impact on a Canada-UK Investment Chapter

As a result of the UK's forthcoming "Brexit" from the EU, Canada and the UK have stated that they intend to negotiate a PTA, which would include an investment chapter. Once the UK leaves the EU, CETA will no longer provisionally apply between Canada and the UK and a transitional agreement will take its place, while a more permanent PTA is negotiated. The content of the Canada-UK PTA (including an investment chapter) will depend upon whether there is a "Hard Brexit", wherein the UK leaves the EU entirely, or a "Soft Brexit," where the UK enters a customs union with the EU.

The UK's decision to leave the EU was based on a referendum held on June 23, 2016, where 52% of citizens voted to leave the EU.[21] The UK subsequently invoked Article 50(2) of the Treaty for the Functioning of the European Union[22] on March 29, 2017, which started the process of negotiating the UK's exit from the EU. In accordance with Article 50, the UK was slated to officially exit the EU on March 29, 2019.[23] However, the UK has yet to exit the EU or finalize the terms of a withdrawal agreement. We do not attempt to speculate on when or how the UK will leave the EU.

3.1.2.1 The UK Has Prioritized Transitioning its Existing Trade Agreements

At present, the Canada-UK economic relationship is based on the provisional application of CETA (excluding the Investment Chapter, as its validity under EU law is currently being

[21] Lorand Bartels & Armand de Mestral, "Trade relations between Canada and the UK in the event of Brexit" (2 December 2018) Strategic Knowledge Report SSHRC-ESRC, at 2, online: https://www.mcgill.ca/jean-monnet-chair/research-brexit.
[22] Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008 OJC 115/47, art 50(2) (entered into force 1 December 2009) [TFEU].
[23] Trade Commissioner Service (Canada), "Brexit – Summary information for Canadian companies", (15 April 2019) online: https://www.tradecommissioner.gc.ca/trade_commissioners-delegues_commerciaux/country-pays/united-kingdom-royaume-uni/information-brexit-renseignements.aspx?lang=eng.

challenged at the European Court of Justice[24]) and other agreements which only "apply to the UK by virtue of its status as an EU Member State."[25] As a result, the UK Government are in the process of negotiating transitional agreements with several countries in order to maintain their economic relationships following their exit from the EU and until such time as they are able to negotiate independent PTAs to replace the UK's EU-based agreements.[26] Canada and the UK have already begun such technical discussions concerning a proper transitional agreement.[27]

The UK will likely model its transitional agreement with Canada on its other existing transitional agreements. For example, the UK's transitional agreement with Iceland and Norway "incorporate[s] by reference relevant provisions" from the European Economic Area (EEA) Agreement and the EU's bilateral trade agreements with both countries with only "a few necessary modifications."[28] According to the UK's report to Parliament on the transitional agreements, there are three main "advantages" to this approach: first, it allows the future PTA freedom to adapt to the "various possible outcomes of the UK's ongoing negotiations with the EU;" second, it sends "a clear message" of the Parties' intention to maintain the trade and investment relationship; third, it "provides a clear legal text, making rights and obligations unambiguous where they had by necessity changed."[29] Based on these advantages and a recent UK press release confirming this position, the UK and Canada will likely follow a similar model and replicate the relevant CETA

[24] "CJEU Advocate General Finds ICS in Line with EU Law, Final Court Ruling Pending", *Investment Treaty News* (23 April 2019), online: https://www.iisd.org/itn/2019/04/23/cjeu-advocate-general-finds-ics-in-line-with-eu-law-final-court-ruling-pending.
[25] Bartels & de Mestral, *supra* note 21 at 3.
[26] UK Government, "Policy Papers and Consultations", online: https://www.gov.uk/search/advanced?group=policy_and_engagement&topic=%2Fbusiness-and-industry%2Ftrade-and-investment
[27] Bartels & de Mestral, *supra* note 21 at 9.
[28] Department for International Trade (UK), "Continuing the United Kingdom's trade relationship with Iceland and the Kingdom of Norway" (12 April 2019), at para 22, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795335/100419_OFF-SEN_EEA_PR.pdf.
[29] *Ibid*.

provisions in a transitional agreement in order to maintain the current economic relationship and establish a flexible foundation on which to negotiate a new PTA.[30]

3.1.2.2 The Future Canada-UK Relationship Depends on the Future EU-UK Relationship

For the purpose of this paper, we assume that the UK will leave the EU without finalizing its future trade relationship with the EU. Once the UK officially leaves the EU, it will regain its authority to conclude investment and trade agreements with third parties, including Canada.[31] The nature of those agreements will depend on the UK's future relationship with the EU. For the purpose of this paper and our contextual analysis, we assume a "Hard Brexit." A Hard Brexit would occur if the UK was to exit the EU, both the Single Market and Customs Union, in favour of defining its future economic relationship with the EU through a PTA.[32] In a Hard Brexit scenario, Canada and the UK would negotiate a PTA as two independent states.

More recently, a second scenario has been floated as a potential exit strategy, that of the UK joining a customs union with the EU. At a high-level, a customs union with the EU would allow goods to be transported between the UK and the EU without "checks or customs imposed" but would require any goods coming into the customs union from a non-member state be subject to a jointly agreed upon tariff.[33] This would likely subject the UK to many of the European Single Market's rules and restrict the UK's ability to negotiate trade agreements with other states, including Canada.[34] That said, the UK could negotiate a customs union similar to that of the

[30] Department for International Trade (UK), "Exporting to Canada After EU Exit If There's No Deal" (26 April 2019), online: https://www.gov.uk/guidance/exporting-to-canada-after-eu-exit.
[31] Trade Commissioner Service (Canada), "Brexit – Summary information for Canadian companies", *supra* note 23.
[32] Economic & Social Research Council, "What is hard Brexit?", *The UK in a Changing Europe*, online: https://ukandeu.ac.uk/fact-figures/what-is-hard-brexit/.
[33] BBC, "Brexit: What Is the Customs Union?" (17 November 2018), online: https://www.bbc.com/news/av/uk-46195799/brexit-what-is-the-customs-union at 00h:00m:20s.
[34] *Ibid*; "A step in the right direction; The Brexit Negotiations", *The Economist* (April 6, 2019) at 12.

European Free Trade Association ("EFTA"), whose Member States include Iceland, Liechtenstein, Norway and Switzerland. Members of the EFTA retain the ability to negotiate PTAs while also participating in the Internal Market by creating "common rules and equal conditions of competition."[35] In either scenario, while the UK's ability to negotiate a PTA with Canada would be curtailed by its shared Customs Union rules and tariffs, there may be a place for a BIT or IIA between the Parties. For example, like the EFTA's specific exclusion of competency over agriculture and fisheries policies from their EEA Agreement with the EU, the UK could negotiate similar competency exclusions such as an exclusion for investment policy specifically.[36]

Until the UK leaves the EU and begins negotiations, it will not be possible to determine with any certainty how the UK-EU negotiations will impact the Canada-UK Investment Chapter. Nor do we attempt to. This paper's contextual analysis and resulting predictions on the content of the Investment Chapter in a Canada-UK Agreement assumes a Hard Brexit. Or, at the least, a situation in which the UK will have the authority to negotiate an investment agreement with Canada after Brexit.

3.1.3 Canada and the UK Have Extensive History Negotiating Investment Agreements

Both Canada and the UK have experience negotiating IIAs. These past experiences will likely contextualize the Parties' negotiating positions. The Parties' negotiating history will likely inform the Investment Chapter's content and provide valuable insight into each Party's perspective going into negotiations.

[35] Thorginnur Omarsson, "Frequently asked questions on EFTA, the EEA, EFTA membership and Brexit", *About EFTA*, online: https://www.efta.int/About-EFTA/Frequently-asked-questions-EFTA-EEA-EFTA-membership-and-Brexit-328676.
[36] *Ibid*.

3.1.3.1 Canada Has Experience Negotiating and also Defending Investment Agreements

Canadian investment policy is constantly evolving based on Canada's experience with IIAs: both because of Canada's negotiating experience and its experience as a respondent in ISDS claims. Canada has actively negotiated BITs and investment chapters in PTAs for over 50 years.[37] Following NAFTA negotiations, Canada developed its most sophisticated BITs, known as FIPAs (Foreign Investment Promotion and Protection Agreements).[38] Canada's model FIPA serves as a "template for Canada in discussion with investment partners."[39] The template serves as a starting point in negotiations but Canada anticipates that not all agreements will reflect the model—or each other.

Recently, Canada has shown significant flexibility in negotiations and has not rigidly followed its model FIPA. For example, in CETA, Canada agreed to substantially depart from its model ISDS provisions by removing *ad hoc* tribunals and instead establishing a permanent tribunal that includes an appellate mechanism.[40] One reason for Canada's willingness to deviate from the model FIPA is that that the Canadian Government likely views the model as outdated, since the last time it was formally updated was 2004 (although some amendments have been made since

[37] Charles-Emmanuel Côté, "An Experienced, Developed Democracy: Canada and Investor-State Arbitration" (2016) Centre for International Governance Innovation (CIGI) Investor-State Arbitration Series Paper No 7 at 3, online: https://www.cigionline.org/publications/experienced-developed-democracy-canada-and-investor-state-arbitration.
[38] *Ibid*.
[39] Céline Lévesque & Andrew Newcombe, "Canada", in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 53 at 58.
[40] CETA, arts 8.27—8.28.

then).[41] Just last year, the Canadian Government began consulting the public on its model FIPA and will likely release an updated version in the near future.[42]

Canada and the UK will likely adopt a PTA rather than a BIT. So, while Canada's model FIPA will inform its negotiations with the UK, the final product will likely be an investment chapter within a broader PTA. As one scholar points out, FIPAs are mostly targeted at developing countries, whereas Canada has exhibited a preference for negotiating PTAs with developed countries based on their ability to better manage the entire economic relationship between the Parties.[43] Furthermore, as the UK prepares to leave the EU, it will likely seek to conclude a PTA with Canada to replace CETA. And because many of Canada's recent PTAs have been negotiated with developed countries and have all contained investment chapters, most notably, CETA, it is likely that Canada would also seek to negotiate a PTA including an investment chapter.[44]

Another factor in the evolution of Canadian investment policy is Canada's experience with investment agreements in practice: specifically, how tribunals interpret and apply these agreements in investor-state disputes. According to one scholar, Canada is "the developed democracy most experienced as respondent in investment disputes."[45] As such, Canada's experience with ISDS is informative; especially because much of Canada's experience in ISDS has been with developed countries.

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[41] "The Evolving BIT: A Commentary on Canada's Model Agreement", (26 June 2013) International Institute for Sustainable Development, online: https://www.iisd.org/itn/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/; Global Affairs Canada, "Public consultation: Canada's foreign investment promotion and protection agreements" (24 August 2018), online: https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/index.aspx?lang=eng.

[42] Côté, *supra* note 37 at 3; Global Affairs Canada, "Minister Carr Launches Public Consultation on Foreign Investment Promotion and Protection Agreement" (14 August 2018), online: https://www.canada.ca/en/global-affairs/news/2018/08/minister-carr-launches-public-consultation-on-foreign-investment-promotion-and-protection-agreements.html.

[43] Côté, *supra* note 37 at 4.

[44] Examples of this include CETA, CUSMA, CPTPP, Free Trade Agreement between Canada and the Republic of Korea, 22 September 2014 (entered into force 1 January 2015) [Canada-Korea FTA].

[45] Côté, *supra* note 37 at 3.

But Canada's experience with ISDS may be more positive than it appears. As of January 2018, Canada had acted as the respondent under NAFTA Chapter 11 a total of "41 times…more than either Mexico or the U.S" with a record of nine wins and eight loses, spending over CAD$314 million on Chapter 11 cases between damages, settlements, and legal fees.[46] But for the same time period, the value of US investment in Canada amounts to CAD$404 billion. Canada's legal fees amount to a cost of 0.0007%.[47] Contextually, while Canada has been forced to defend many ISDS actions, the benefits of its investment agreements could outweigh the costs of ISDS.

Canada's ISDS experience also highlights the difficult balancing act involved in determining dispute resolution mechanisms in investment treaties. IIAs balance competing concerns for both investor rights and state sovereignty. All eight of Canada's losses under Chapter 11 concerned "public policy issues or regulatory matters".[48] *Bilcon v Canada* is only one example illustrating the discretion that NAFTA tribunals have to "second-guess the legitimacy of non-discriminatory government actions".[49] The Tribunal in *Bilcon* found that Canada had breached its fair and equitable treatment obligation under Article 1105 of NAFTA, as it had "frustrated a US company's 'legitimate expectations' that an environmental assessment of the company's proposed quarry would not consider "community core values."[50]

It is perhaps due to Canada experience with NAFTA Chapter 11, that Canada agreed to abandon an ISDS mechanism in CUSMA.[51] However, some form of ISDS has been included in

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[46] Sinclair, "Canada's Track Record Under NAFTA Chapter 11" (16 January 2018) Canadian Centre for Policy Alternatives at 4, online report: https://www.policyalternatives.ca/nafta2018.
[47] Côté, *supra* note 37 at 3; Global Affairs Canada, "Foreign Direct Investment Statistics – Outward and Inward Stocks", *supra* note 15.
[48] Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 5.
[49] *Ibid* at 7; *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) [*Bilcon*].
[50] Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 7.
[51] CUSMA; Meredith Lilly, "A Canadian Perspective on the Future of North America's Economic Relationship" in *The Future of North America's Economic Relationship* (2019) Centre for International Governance Innovation Special Report 15 at 16, online:

Canada's other recent PTAs with developed countries. Under CETA, Canada avoided traditional ISDS by opting for a more court-like system.[52] Yet in CPTPP, it agreed to a more traditional *ad hoc* ISDS process.[53] Contextually, Canada's recent experience with ISDS—both as a respondent and in negotiating PTAs—will likely inform whether Canada will agree to include ISDS in an investment Chapter with the UK. And, if the Parties do include ISDS, this experience will likely influence what form it will take.

As highlighted, Canada's recent experiences with investment agreements show that Canada takes a flexible approach to negotiations. While starting from its model FIPA, Canada recognizes that not all investment agreements are the same—although they retain similar core elements. In addition, Canada's robust experience with ISDS has likely contributed to its more flexible approach in adopting or not adopting ISDS. Despite acting frequently as the respondent in ISDS, Canada may conclude that there are economic benefits in continuing to include the provision in future investment agreements.

3.1.3.2 Previous UK Investment Agreements Have Mostly Been with Developing Countries

A Canada-UK Investment Chapter would likely be the beginning of a new era in the UK's investment policy and treaty-making. Since concluding its first investment treaty in 1975, the UK independently negotiated investment "agreements with over 100 countries," most recently with Colombia in 2010.[54] However, in 2009 the UK transferred their power to conclude IIAs to the EU.[55] While the UK retained the ability to negotiate with third countries, the EU held exclusive

https://www.cigionline.org/sites/default/files/documents/North%20American%20Forum%20Special%20Report_1.pdf.

[52] CETA, arts 8.27—8.28.
[53] CPTPP, ch 9, s B.
[54] Cotula & Johnson, *supra* note 20 at 1.
[55] TFEU, arts 3(1), 207.

competency to "legislate and adopt legally binding" investment agreements unless it delegated such competency to a member state.[56] As such, the UK has not independently concluded IIAs with third countries since 2010. But, as part of the EU, it has been involved in investment treaty negotiations, including negotiating CETA.[57] After the UK exits the EU, the competency to conclude investment agreements will return to the UK, which will then be able to develop a new investment policy.

The UK's post-Brexit investment policy will likely be substantially different from its pre-2010 investment policy—especially as it pertains to developed countries like Canada. In developing a new policy, the UK will likely depart from the BITs it negotiated before relinquishing competency for treaty negotiations to the EU.[58] All of the UK's independently negotiated BITs were concluded with developing countries. Thus, while some provisions may be relevant, these BITs are poorly suited to informing the UK's investment relationship with a developed country.[59]

However, the UK is not completely devoid of experience with respect to IIA negotiations with developed countries. As an EU Member State, the UK has participated in negotiating and signing 67 treaties which include investment provisions.[60] Most importantly, the UK participated in negotiating CETA. This experience will likely inform the UK's negotiating goals and will also give them insight into Canada's negotiating interests.

At present, the UK Parliament is developing a post-Brexit investment policy. In May 2018, the International Trade Committee commenced an inquiry into how the Government should approach the negotiation of BITs and free trade agreements "that liberalise and protect foreign

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[56] *Ibid*, art 2(1).
[57] Cotula and Johnson, *supra* note 20 at 1.
[58] David Collins, "The UK Should Include ISDS in its Post-Brexit International Investment Agreements," (2017) 14:3 Manchester J Intl Econ L 301 at 304.
[59] UNCTAD, "United Kingdom Bilateral Investment Treaties (BITs)" Investment Policy Hub, online: https://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu.
[60] Collins, *supra* note 58.

investment."[61] According to Committee Chair Angus Brendan McNeil, MP, the committee's focus is to develop an investment policy that "maintain[s] a healthy flow of investment into—and out of—the UK".[62] The Committee has sought both expert and stakeholder submissions on a variety of topics, including on the sorts of investment provision which the UK should seek to include in future trade and investment agreements.[63]

Additionally, the UK's post-Brexit policy will likely be informed by their experience with ISDS. According to UNCTAD's Investment Policy Hub, UK investors have used ISDS 78 times as complainants, but the UK has only been the respondent once.[64] As the complainant, UK investors have sought to enforce their investor protections under various BITs. However, the UK Government has only had to defend their actions on one occasion.[65] As such, the UK's ISDS experience is lopsided: they have extensive experience as a Home State but not as a Host State. This experiential deficiency was identified in a report from the UK's House of Lords' European Union Committee, entitled The Transatlantic Trade and Investment Partnership ("TTIP Report").[66] In that report, the House of Lords sought the opinion of experts to improve the UK's understanding and inform their perspective on ISDS. Interestingly, one expert referred specifically to Canada's experience when discussing the use of ISDS between two developed countries.[67] As such, it is likely that while the UK will have a positive impression of ISDS from its perspective as a Home

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[61] House of Commons (UK), "UK Investment Policy Inquiry Launched" (2 May 2018) Commons Select Committee, online: https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/news-parliament-2017/uks-investment-policy-launch-17-19/.
[62] *Ibid*.
[63] *Ibid*.
[64] UNCTAD, "United Kingdom: Investment Dispute Settlement Navigator", Investment Policy Hub, online: https://investmentpolicyhub.unctad.org/ISDS/CountryCases/221?partyRole=1 .
[65] UNCTAD, "Ashok Shancheti v United Kingdom", Investment Policy Hub, online https://investmentpolicyhubold.unctad.org/ISDS/Details/234.
[66] House of Lords European Union Committee, "The Transatlantic Trade and Investment Partnership" (13 May 2014), 14th Report of Session 2013-14, online: http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc54c03415b014c049e935801d2.do.
[67] *Ibid* at paras 156, 161.

State, the UK also has an experiential deficiency in defending actions as a Host State. This lack of experience will inform the UK's negotiating position and the UK will likely seek to improve its understanding of the challenges facing Host States.

3.1.4 Summary of the Three Contextual Factors

In short, Canada and the UK will not be negotiating from scratch. Several contextual factors have shaped the negotiating position of both Parties. These factors include, first, their desire to balance the dual purposes of international investment law through a PTA which captures their full economic relationship; second, Brexit's impact on the Canada-UK economic relationship; and third, both Parties' negotiating history of IIAs and practical experience with ISDS. These contextual factors will inform how the Parties negotiate. The context surrounding the negotiations will also inform the Party's objectives, which we analyze in the next Section.

3.2 Objective Factors Influencing Negotiations

In addition to contextual factors, in order to predict which provisions the Parties will likely include in the Investment Chapter, we also considered the objectives of both Canada and the UK in further developing their investment relationship. We identified three objective-based factors that will likely influence the outcome of negotiations: shared objectives and individual objectives for both Canada and the UK. First, Canada and the UK have a number of shared objectives, including a preference for respecting state sovereignty; second, the UK's negotiating position will be influenced by its goal of developing an independent trade policy; and third, Canada's objectives include diversifying its trade and investment relationship and advancing its inclusive trade agenda.

3.2.1 The Parties Share Many Objectives

The Parties' shared objectives are a factor which will likely inform their negotiating position. Canada and the UK have long worked together on the international stage. As noted by Dr. Fox, the Canadian and UK relationship extends beyond their historical membership in the Commonwealth and includes membership in international organizations such as NATO, the G7 and the G20.[68] As such, it seems only natural that after Brexit the UK would establish a bilateral treaty with Canada to solidify their economic relationship. The shared history and close relationship between Canada and the UK will likely result in a shared perspective on many of the issues under negotiation. In particular, the Parties share the goals of transitioning CETA, protecting sovereignty and regulatory freedom, and protecting investors.

3.2.1.1 Both Parties Intend to Adopt Strong Investment Ties by Transitioning CETA

While Canada and the UK are likely to use CETA as a starting point for Investment Chapter negotiations (and for the PTA generally), Canada will likely be cautious about substantially altering CETA provisions in a way that would jeopardize its ratification by EU Member States. Both Canada and the UK have publicly highlighted the importance of CETA and their desire to establish a stronger economic relationship following Brexit. In July 2018, Global Affairs Canada (GAC), released a statement reassuring Canadians that following Brexit, the Government would "work with the [UK] to ensure [they are taking] full advantage of [their] particular bilateral trade relationship."[69] Similarly, in December 2018, a UK Department for International Trade press

[68] Bartels & de Mestral, *supra* note 21 at 8 *citing* House of Commons (UK), Hansard, 57th Parl, Volume 643 (26 June 2018), online: https://hansard.parliament.uk/Commons/2018-06-26/debates/A43EC00E-687B-4B0D-A845-98A16973004D/DraftEU-CanadaTradeAgreementOrder#division-12037.
[69] Bartels & de Mestral, *supra* note 21 at 10 *citing* Global Affairs Canada, "Canada's Continued Trade Relationship with the United Kingdom Post-Brexit" (2018) C Gaz I 2931.

release heralded CETA's early success and indicated that both the Canadian and UK Prime Ministers were focused on establishing a bilateral deal to allow for smooth transition of the economic relationship following Brexit, when CETA will no longer apply.[70]

As previously mentioned, it is likely that CETA provisions will form the basis for the Canada-UK transitional agreement which will come into effect immediately following the UK's exit from the EU and until such time as a new Canada-UK PTA can be negotiated.[71] It is also the case that both Parties are keen to transition CETA into a future Canada-UK PTA. According to the Secretary of State for International Trade, Liam Fox, MP, the UK believes that CETA is a "most advanced and ambitious" PTA that has "room for improvement in the future."[72] As both Canada and the UK view CETA as a template for their PTA negotiations, it is likely that the CETA Investment Chapter will be the foundation for their Investment Chapter negotiations.[73] Additionally, since both Canada and the UK were involved in CETA negotiations, they have the advantage of mutually agreeing to certain pre-existing sections, allowing both Parties to focus on negotiating specific issues.[74]

In addition, both Canada and the UK must be alive to the reality that, because CETA has yet to be ratified by the EU, any substantial changes to the CETA provisions may dissuade EU Member States from ratifying CETA as it is. Canada must be cautious not to depart so drastically from CETA as to discourage EU Member States from ratifying the Agreement. Though CETA

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[70] Department for International Trade (UK), Press Release, "UK trade with Canada up 14% since new free trade agreement introduced" (10 December 2018), online: https://www.gov.uk/government/news/uk-trade-with-canada-up-14-since-new-free-trade-agreement-introduced.
[71] Department for International Trade (UK), "Exporting to Canada After EU Exit If There's No Deal", *supra* note 30.
[72] See House of Commons (UK), Hansard, 57th Parl, Volume 643 (26 June 2018), online: https://hansard.parliament.uk/Commons/2018-06-26/debates/A43EC00E-687B-4B0D-A845-98A16973004D/DraftEU-CanadaTradeAgreementOrder?highlight=canada#contribution-E5E06E80-7979-4E40-B238-F2B1F0D37A3F.
[73] Bartels & de Mestral, *supra* note 21 at 21.
[74] *Ibid*.

was signed in 2017, the European Commission's view of CETA as a 'mixed agreement' requires "signature and ratification by all the EU Member States"[75] At present, ratification is still uncertain as there is significant opposition to the agreement from "both civil society groups and political opponents."[76] As previously mentioned, Belgium has challenged CETA's investment chapter at the European Court of Justice. As such, Canada must be cautious to balance any desire to "improve" CETA with their goal of eventually bringing CETA fully into force through ratification. And the UK should be prepared to accept certain provisions from CETA which Canada views as essential to ensuring CETA's ratification by EU Member States.

In sum, it is likely that Canada and the UK will look to CETA as a starting point for their Investment Chapter. Many of the provisions are likely to remain substantially the same but others, as we discuss below, are likely to altered in a way that both increases investor protection and increases the inflow of investment to both jurisdictions. During negotiations, both Parties should be cautious not to substantially alter CETA provisions, such as ISDS, in a way that would endanger Canada's ability to ratify CETA with the EU Member States, who may feel that the UK is getting a better agreement than them.

3.2.1.2 Both Parties Seek to Protect their Sovereignty and Regulatory Freedom

Canada and the UK have been adamant that any investment agreement would need to acknowledge each state's sovereignty and regulatory freedom. In a 2017 White Paper, titled *The United Kingdom's Exit From and New Partnership with the European Union*, the UK Government articulated that parliamentary sovereignty must be essential to Britain's new trade and investment

[75] Ian Laird & Flip Petillion, "Comprehensive Economic and Trade Agreement, ISDS and the Belgian Veto: A Warning of Failure for Future Trade Agreements with the EU?" (2017) 12:4 Global Trade and Customs J 167 at 171.
[76] *Ibid* at 174.

relationships.[77] The UK Government emphasized that "[a]ny arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximize legal certainty, including for businesses, consumers, workers and other citizens."[78]

Professor Mavluda Sattorova warns that the UK's Post-Brexit international investment policy will likely be influenced by the public perception that investment agreements require governments to commit to protections which allow investors to subvert parliamentary sovereignty by dictating regulatory action.[79] This perceived loss of sovereignty would run counter to one of the UK government's key principles informing their departure from the EU: that Brexit must allow the UK government to "take back control" of their own laws.[80] As such, retaining sovereignty and the ability to freely regulate will likely be an important goal in the UK's negotiating strategy.

Canada likely also shares the UK's concerns over parliamentary sovereignty and regulatory freedom. According to Dan Ciuriak, Canada's new inclusive trade agenda aims to protect the government's ability to regulate in the public interest.[81] One way that Canada has enhanced its regulatory freedom is by agreeing to opt-out of the ISDS provision of CUSMA.[82] Critics of ISDS argue that investors can rely on ISDS to undermine governments' ability to regulate in the public

[77] UK Government, "The United Kingdom's Exit From and New Partnership with the European Union" (February 2017) Report to Parliament Cm9417, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.
[78] *Ibid* at 15.
[79] Mavluda Sattorova, "UK Foreign Investment Protection Policy Post-Brexit" in Michael Dougan, ed *The UK After Brexit: Legal and Policy Challenges* (Cambridge: Intersentia, 2017) 267 at 277.
[80] UK Government, "The United Kingdom's exit from and new partnership with the European Union" *supra* note 77 at 5.
[81] Dan Ciuriak, "Canada's Progressive Trade Agenda: NAFTA and Beyond" (14 January 2018) CD Howe Institute Commentary No 516 at 4, online: https://www.cdhowe.org/public-policy-research/canada's-progressive-trade-agenda-nafta-and-beyond.
[82] See CUSMA, art 14.2(4); Under CUSMA, Annex 14-D only applies to Mexico-US Investment Disputes; Hugo Perezcano Díaz, "Trade in North America: A Mexican Perspective on the Future of North America's Economic Relationship" (11 February 2019) Centre for International Governance Innovation (CIGI) Special Report 7 at 11, online: https://www.cigionline.org/publications/future-north-americas-economic-relationship-nafta-new-canada-united-states-mexico.

interest. Under NAFTA's Investment Chapter, Canada has paid $220 million to US investors who challenged government measures.[83] Critics point to cases like *Bilcon*, where the tribunal awarded American investors significant damages at Canada's expense when Canada attempted to bar the investment on public interest grounds.[84] Critics also argue that ISDS leads to regulatory chill, which can "inhibit or discourage legitimate public policy or regulation."[85] As such, Canada's decision to opt-out of ISDS under CUSMA could be seen as a move towards protecting Canadian sovereignty.

3.2.1.3 Both Parties Will Likely Agree that an Investment Chapter Should Protect Investors

Importantly, both Parties must balance their desire for regulatory freedom with their investors' interests. The investment chapters of agreements like CETA provide confidence and substantive protection for investors.[86] According to the TTIP Report, the UK viewed an investment agreement as a positive protection for investors from the inconsistency of state law across the United States.[87] The UK would likely have similar concerns about inconsistencies between provincial laws in Canada.

The UK would likely not only be concerned about inconsistency between provincial laws, but also the fact that the federal government cannot force the provinces to comply with Canada's international obligations. To combat this concern during the CETA negotiations, the EU required

[83] Angella MacEwen, "Welcome Movement on Progressive Trade Agenda in USMCA" (12 October 2018) Policy Options: Institute for Research on Public Policy, online: http://policyoptions.irpp.org/magazines/october-2018/welcome-movement-on-progressive-trade-agenda-in-usmca/; UNCTAD, "Canada – as respondent State", Investment Policy Hub, online: https://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=2; Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 1.
[84] See *Bilcon*, *supra* note 49.
[85] Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 9.
[86] House of Lords European Union Committee, "The Transatlantic Trade and Investment Partnership", *supra* note 66 at para 160.
[87] *Ibid*.

that the provinces be meaningfully involved in the negotiations.[88] According to Patricia Goff, involving the provinces in developing PTAs recognizes that these agreements have evolved to require some level of regulatory harmonization.[89] While the federal government has the power to exclusively commit Canada to international agreements, the reality is that PTAs may create obligations in areas of provincial legislative competence. But under PTAs, any provincial infringement of treaties provisions is the responsibility of the Canadian government.[90] PTAs protect investors by ensuring investors have recourse, regardless of the level of government responsible for the breach. Therefore, as a way to alleviate the UK's concern with provincial inconsistencies, they may require that the Canadian provinces be involved in negotiations of the Canada-UK Investment Chapter.

3.2.1.4 Balancing the Right to Regulate with Investor Protection

Both Parties will likely agree that the need for investor protection is limited by their desire to protect their sovereign right to regulate. The lack of an investment agreement prior to CETA did not keep Canadian investors out of the UK or vice versa. For example, there are nearly "700 UK firms currently operating in Canada, and around 750 Canadian firms operating in the UK."[91] Because of this existing relationship, there is room to adopt less restrictive investor protection provisions in order to maintain the Parties' right to regulate, which is a major concern for both Parties.

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[88] Patricia Goff, "Canadian Trade Negotiations In An Era of Deep Integration" (February 2016) CIGI Papers No 88 at 5, online: https://www.cigionline.org/sites/default/files/cigi_paper_no.88_web_0.pdf.
[89] *Ibid*.
[90] *Ibid* at 6; Côté, *supra* note 37 at 27.
[91] Department for International Trade (UK), "Britain's commitment to Canada's future" (13 April 2018), online: https://www.gov.uk/government/speeches/britains-commitment-to-canadas-future.

Furthermore, the extent to which investment treaties are necessary to provide confidence for foreign investors is exaggerated. According to Dr. Poulsen's testimony in the TTIP Report, there was no evidence to suggest that UK or US investors were investing less due to a lack of an investment agreement.[92] In addition, Dr. Poulsen argued that including an investment chapter in the TTIP would cause more political disruption during negotiations than it would be worth. If investors are going to invest anyway, the Parties could spend significant resources disagreeing over which protections to include with limited potential benefit.[93]

Similarly, as both Canada and the UK are developed countries with "strong rule-of-law tradition[s]", the investor protection provided by ISDS could be unnecessary or even harmful.[94] The UK has a legal regime which, "both in terms of substantive content and implementation by local courts, is among the best…at protecting the property rights of both domestic and foreign investors."[95] While the Canadian system does not protect property to the same extent as investment agreements, it does provide remedies for constitutional and administrative claims.[96] In Canada, foreign investors may not be entitled to the damages they would receive under ISDS.[97] Under Canadian law, there is "a lack of constitutional protection for property rights, as well as the non-applicability of equality and anti-discrimination safeguards to corporations under section 15 of the *[Canadian] Charter [of Rights and Freedoms]*."[98] While there are fewer grounds on which foreign investors may bring claims, and while damages may not always be available, investors can benefit

[92] House of Lords European Union Committee, "The Transatlantic Trade and Investment Partnership", *supra* note 66 at para 165.
[93] *Ibid*.
[94] Lauge Poulsen, Jonathan Bonitcha & Jason Yackee, "Transatlantic Investment Treaty Protection" (2015) Ideas Working Paper Series from RePEc CEPS Special Report No 102 at 18.
[95] *Ibid* at 20.
[96] Armand de Mestral & Robin Morgan, "Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?", in Armand de Mestral, ed, *Second thoughts: investor-state arbitration between developed democracies* (Waterloo: Centre for International Governance Innovation, 2017) at 178.
[97] *Ibid* at 177.
[98] *Ibid*.

from administrative law remedies.[99] Though this may not be as lucrative for foreign investors, it does provide a reasonable avenue for investors to claim state action in Canadian domestic courts.

3.2.1.5 Their Shared Perspective Will Inform the Parties' Negotiating Positions

In negotiating a Canada-UK Agreement, the parties' share common perspectives on key issues. This shared perspective will likely influence the content of the Investment Chapter. The Parties share the goal of transitioning CETA and forging close economic ties in the aftermath of Brexit. Both parties also share the view that the Investment Chapter should not undermine their sovereignty nor their freedom to regulate. But both parties are also committed to protecting investors. Where state sovereignty and investor protection collide, the parties will likely prefer to respect state sovereignty at the expense of investors.

3.2.2 Furthering the UK's Objective to Develop an Independent Investment Policy

In anticipation of Brexit, the UK is crafting an independent investment policy that reflects its new global position. A Canada-UK PTA would demonstrate to other states that the UK is "open for business." It would also serve as a template for the UK's future investment agreements, such as a potential agreement with the United States. Thus, developing and implementing a new independent investment policy is an important objective for the UK in these negotiations.

3.2.2.1 The UK Has Not Had an Independent Investment Policy Since 2009

Establishing an independent investment policy will provide the UK with a framework from which to negotiate investment agreements with countries around the world, including Canada. The

[99] *Ibid* at 178.

UK needs to develop an investment policy that reflects the new reality of its exit from the EU. Since the UK signed the Lisbon Treaty in 2009, competency to "legislate and adopt legally binding" investment agreements with other states has belonged exclusively to the EU.[100] While the UK could negotiate and consult third parties, it could not conclude investment treaties without permission from the EU. As such, one of the key principles of the UK Government's plan for "fulfilling the democratic will of the people" after Brexit is to "secur[e] new trade agreements with other countries."[101] In addition, the UK plans to be an international "champion of free trade"[102] by using its "economic and diplomatic influence to remove barriers, open up new markets, and spread prosperity to every corner of the globe."[103]

3.2.2.2 A Canada-UK PTA Would Demonstrate that the UK is "Open for Business"

By successfully negotiating a Canada-UK PTA, the UK would hope to signal to cautious investors that the UK's economy will not suffer as a result of its exit from the EU's internal market. Through this, Canada would demonstrate that it has confidence in the UK as an investment destination. The Canada-UK economic relationship is a significant one.[104] For example, there is significant foreign direct investment that flows between Canada and the UK. In 2017, the UK's foreign direct investment into Canada was CAN$47.4 billion, the fifth largest source of investment from any one country, while Canada's foreign direct investment into the UK was CAN$102.6 billion, the second largest destination for Canadian investors.[105] While this economic relationship

[100] TFEU, arts 3(1), 2, 207; Stefanie Schacherer, "Can EU Member States Still Negotiate BITs with Third Countries?", *IISD Investment Treaty News* (10 August 2016), online: https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/#_edn2.
[101] UK Government, "The United Kingdom's exit from and new partnership with the European Union" *supra* note 77 at 6.
[102] *Ibid* at 51.
[103] Department for International Trade (UK), "Britain's commitment to Canada's future", *supra* note 91.
[104] *Ibid*.
[105] Global Affairs Canada, "Foreign Direct Investment Statistics – Outward and Inward Stocks", *supra* note 15.

is bound to continue once the UK exits the EU, fear of instability could cause future investment to decrease. The Parties will likely hope that agreeing to a PTA will combat this fear and signal to Canadian and other foreign investors that the UK remains a safe place to invest.

Currently, investors are preparing for EU divestment from the UK, and vice versa.[106] With free movement, several UK and non-UK companies have developed complex supply chains that enter and leave the UK multiple times.[107] According to one study, as a direct result of the Brexit referendum in 2016, approximately 63% of EU supply chain managers planned to remove UK suppliers from their supply chains and 40% of UK supply chain managers planned to remove EU suppliers from their supply chains.[108] This is a problematic figure as "intermediaries account for a majority of the UK's trade in goods and services with the EU."[109] How the UK remains connected with the EU's internal market will likely be a concern for Canadian investors. As CETA was concluded while the UK was still part of the Internal Market, Canadian investors contemplating UK investments are likely to proceed with caution, focusing on whether the UK will be able to retain much of its access to the Internal Market following its exit.

The integration of the UK and EU markets is a major concern for investors. The UK's post-Brexit relationship with the EU will likely influence future Canadian investments in the UK. The EU market is fives time the size of the UK domestic market.[110] If the UK leaves the EU without an agreement on regulatory and customs co-operation, Canadian investors in the UK with

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[106] David Henig, "Sweden, UK and the EU: Managing post-Brexit Relations and Defining a new Agenda for European Competitiveness," (2019) European Centre for International Political Economy: Policy Brief No 1/2019 at 2, online: https://ecipe.org/publications/sweden-uk-eu-managing-post-brexit-relations/.
[107] Nigel Driffield & Michail Karoglou, "Brexit and Foreign Investment in the UK" (2019) 182:2 J Royal Statistical Society 559.
[108] Jonathan Perraton & Marta R M Spreafico, "Paying Our Way in the World? Visible and Invisible Dangers of Brexit" (2019) 24:2 New Poli Econ 272 at 280.
[109] *Ibid*.
[110] Daniel Schwanen, "Canadian interest and possibilities in avoiding a "hard Brexit" (Part One)" (30 October 2018) CD Howe Institute: Intelligence Memos, online: https://www.cdhowe.org/intelligence-memos/daniel-schwanen-canadian-interest-and-possibilities-avoiding-%E2%80%9Chard-brexit%E2%80%9D-part.

EU clients may decide to shift current and future investment from the UK to the EU to take advantage of the larger market.[111] Some international businesses have already begun this shift: for example, Sony Corp recently moved their EU headquarters from the UK to the Netherlands.[112] As such, while signing an investment agreement with Canada could signal to others states that Canadian investors are confident that the UK is open for business, it is important to caution that an investment agreement alone will not guarantee a deeper investment relationship with Canadians.

3.2.2.3 A Canada-UK PTA Would Provide a Template for US-UK Negotiations

It is very likely that UK negotiators will view a Canada-UK investment agreement as a precedent for their forthcoming negotiations with the US. The UK and the US are each other's largest source of foreign investment, jointly supporting approximately two million jobs.[113] And the US and UK have both demonstrated their interest in negotiating a post-Brexit trade and investment agreement.[114] In addition, a Canada-UK PTA transitioning CETA would provide a template for UK negotiations with countries other than the US as well.

In late February 2019, the US Trade Representative and the President released their "specific negotiating objectives" for a US-UK free trade agreement. With respect to investment, the US' objective is to ensure US investors in the UK receive "rights consistent with U.S. legal

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[111] Economist Intelligence Unit, "Country Report: United Kingdom", (London: The Economist Intelligence Unit, 2019 at 2 (accessed 29 March 2019).
[112] Joe Mayes, "The Brexit Bill: Here's the Damage So Far", *BNN Bloomberg* (31 January 2019), online: https://www.bnnbloomberg.ca/the-brexit-bill-here-s-the-damage-so-far-1.1206263.
[113] House of Lords European Union Committee, "The Transatlantic Trade and Investment Partnership", *supra* note 66 at para 7.
[114] Peter Sands et al, "On the Rebound: Prospects for a US-UK Free Trade Agreement" (2018) King's College London M-RCBG Working Paper Series No 89, online: https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/USUK%20FTA%20516%20FINAL.pdf.

principles and practice" and to provide UK investors in the US with no "greater substantive rights than domestic investors" receive.[115] Furthermore, the US aimed to negotiate provisions to "reduce or eliminate barriers to U.S. investment in all sectors in the UK."[116] While the UK has yet to release its international investment policy, it is likely that they will use a Canada-UK investment agreement to set parameters for a future negotiation with the US, especially because Canada and the US share similar regulatory approaches.[117]

3.2.3 Canada's Objectives are Investment Diversification and Inclusive Trade Innovations

Going into negotiations with the UK, Canadian negotiators will likely focus on two important objectives. First, and most importantly, Canadian negotiators will likely intend to maintain and increase their trade and investment with the UK in an effort to diversify Canada's international trade and investment relationships. Second, Canadian negotiators will likely seek to include innovations to CETA that reflect Canada's inclusive trade agenda.

3.2.3.1 Diversifying Trade and Investment is a Canadian Priority

Trade diversification has become a priority in recent years due to the large percentage of investment between Canada and the US.[118] The CUSMA negotiations illustrate Canada's overreliance on trade with the US. Carlton University Professor Meredith Lilly has speculated that the US leveraged this overreliance to extract numerous concessions during the CUSMA

[115] Office of the United States Trade Representative & Executive Office of the President, "United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives" (2019) at 7, online: https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf.
[116] *Ibid*.
[117] Bartels & de Mestral, *supra* note 21 at 22.
[118] Global Affairs Canada, "Foreign Direct investment Statistics – Outward and Inward Stocks", *supra* note 15.

negotiations.[119] In light of this overreliance on the US, the current Canadian Government has adopted the objective of diversifying Canada's trading relationship beyond the US. To achieve this objective, the Canadian Government established the Ministry of International Trade Diversification.

In Prime Minister Justin Trudeau's mandate letter to the Minister of International Trade Diversification, he remarks that the "goals" of the minister will be to "increase and diversify trade and attract job-creating investment to Canada."[120] According to the letter, the Minister's Trade Diversification Strategy,

> should include transparent performance measures to ensure [the Government is] focused on increasing and diversifying trade for the benefit of the middle class,…maximiz[e] Invest in Canada to position Canada as a top destination for global investment and promote our economic brand…[while making] Canada the most attractive destination for global investment and to remove unnecessary barriers to inbound investment.[121]

In recent years, Canada has also undertaken several steps to diversify its investment sources, by concluding agreements such as CETA and CPTPP. Given the UK's position as one of Canada's primary foreign investment destinations, Canadian negotiators will likely view the UK as an ideal market for establishing further investment ties in order to diversify Canadian trade and investment.

3.2.3.2 Inclusive Trade Goals Will Likely Influence the Content of a Canada-UK PTA

Canadian negotiators will likely continue to push for innovations with respect to the traditional models of investment agreements. The Canadian approach to investment agreements has been to increase the detail in both substantive and procedural provisions, leading to longer,

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[119] Lilly, *supra* note 51 at 17.
[120] The Right Honourable Justin Trudeau, "Minister of International Trade Diversification Mandate Letter" (28 August 2018), online: https://pm.gc.ca/eng/minister-international-trade-diversification-mandate-letter-august-28-2018.
[121] *Ibid*.

more complex agreements.[122] In part, these innovations to the traditional models of investment agreements have been led by the Canadian Government's implementation of an inclusive trade agenda.

Canada's inclusive (formerly "progressive") trade agenda aims to preserve "the open trading system, but also the ability to deliver domestic policy goals" by including both "substantive and procedural elements" to correct any distributional impacts from trade and investment while "safeguarding" the Government's ability to regulate in the public interest.[123] According to Dan Ciuriak, the inclusive trade agenda is Canada's response to " anti-globalization populism" and "the concentration of trade gains at the top of the income scale."[124] Canada has sought to advance its inclusive trade agenda in recent PTA negotiations.

Canada's inclusive trade agenda has played an important role in its recent PTA negotiations. This role is evidenced by the "rebranding" of the Comprehensive and *Progressive* Agreement for Trans-Pacific Partnership and the delay of trade negotiations with China due, in part, to that country's human rights record.[125] And CETA also highlights the "importance of promoting investment based on principles of sustainable development, and increasing economic cooperation based on equality and mutual benefit."[126] Even in CUSMA, Canada managed to secure a variety of inclusive provisions, such as an exception for state measures ensuring investment activities are sensitive to environmental, health, safety and other regulatory objectives.[127] Given

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[122] Andrea K Bjorkland, Yarik Kryvoi & Jean-Michel Marcoux "Investment Promotion and Protection in the Canada-UK Trade Relationship" (18 November 2018) SSHRC-ESRC Knowledge Synthesis Grants Understanding the Future of Canada-UK Trade Relationships at 2, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312617.
[123] Ciuriak, *supra* note 81 at 2, 4.
[124] *Ibid* at 2.
[125] *Ibid* at 3.
[126] Michael Kosch & Rebecca Olscher, "Canada" in Calvin S Goldman, ed, *Foreign Investment Regulation Review,* 6th ed (London: Law Business Research Ltd, 2018) 33 at 46.
[127] CUSMA, arts 14.16, 32.5, 24.32, 23.17(8); MacEwen, *supra* note 83.

its recent importance in Canada's trade negotiations, the inclusive trade agenda will likely form an important part of Canada's negotiating objectives with the UK.

3.3 The Negotiating Context and Party Objectives Are Important Factors in Predicting the Investment Chapter's Content

In order to properly assess which provisions are likely to be included in a Canada-UK Investment Chapter, we considered both the context in which the negotiations will take place as well as the shared and individual objectives for both Canada and the UK in concluding such an agreement. These contextual factors and Party objectives will inform this paper's assessment as to which provisions are likely to be included in a Canada-UK Investment Chapter.

Contextually, it is important to keep in mind the dual purpose of international investment law, which is to provide investor protections as well as to increase the inflow of investments domestically. Furthermore, without Brexit, these negotiations would not be possible. It is therefore important to consider the aftermath of the Brexit referendum and what Brexit means for the Canada-UK investment relationship. Finally, both Canada and the UK have negotiated investment agreements in the past and both Parties' experience with these agreements will likely characterize how they understand investment agreements.

Also, Canada and the UK both have shared and individual objectives for negotiations of the Investment Chapter. Jointly, Canada and the UK are likely to seek to maintain the majority of their provisions under CETA in order to maintain their investment relationship. Additionally, both Parties seek to maintain their sovereign right to regulate, though both Parties will likely also desire to maintain the existing level of investor protections in CETA. For the UK specifically, their objective is likely to establish an independent investment policy that reflects their new position

within the global economy. Additionally, the UK is likely to want to develop an investment agreement with Canada that can be used as a precedent for future negotiations, for example with the US. For Canada, the focus will likely be on further diversifying international trade away from the US as well as advancing their inclusive trade agenda, which addresses the broader impact of trade beyond economic concerns.

Having identified the contextual factors and Party objectives, and analyzed their likely impact on negotiations, we now proceed to apply these factors to predict the likely investment-related provisions within a Canada-UK PTA.

4 Predicted Investment-Related Provisions within a Canada-UK PTA

In this section, we analyze common provisions of investment treaties and discuss how the Parties' context and objectives will affect the negotiation of these provisions. At the end of each section, we predict the content of each provision based on the factors identified above. Based on these predictions, we created a draft Investment Chapter and related provisions. These draft provisions are reproduced in the appendices.

4.1.1 The Basic Requirements for Investor and State Liability

CETA, CUSMA, and CPTPP all state that their investment chapters apply to a covered investment made by an eligible investor in the territory of a party.[128] Investors benefit from treaty protection provided they meet the definition of investor, their investment meets the definition of

[128] CETA, art 8.2; CUSMA, art 14.2; CPTPP, art 9.2.

investment, and the investment is within the territory of the party. Where these requirements are met, investors can rely on treaty provisions to protect them from state measures.

While it is important to determine when investors or investments benefit from treaty protections, it is also important to determine when states are liable. States are responsible for state measures which violate treaty provisions. Under Customary International Law (CIL), states are responsible for the actions of all their organs, which include provincial or territorial governments.[129] Thus, Canadian provincial governments, for example, can incur liability for Canada. Because state responsibility is CIL, state responsibility for provincial actions applies unless a treaty specifically rejects it.

Because states are liable for the actions of subnational governments, whether the parties specifically address liability in the agreement is likely not a point of negotiating tension. Although CETA, CUSMA, and CPTPP differ in how they address state liability, none reject state responsibility for provincial actions. In CUSMA and CPTPP, the scope provision specifies that actions of a state party include actions of any central, regional, or local government or a person exercising authority delegated to it by a government entity.[130] CETA does not define the level of government in the scope provision but differentiates between local, regional, and central government in, for example, the Reservations and Exceptions provision.[131] In the interest of transitioning CETA, the parties will likely agree to import the language of CETA rather than adding in language from CUSMA or CPTPP.

[129] Rudolf Dozer & Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press, 2012) at 216—219.
[130] CUSMA, art 14.2; CPTPP, art 9.2.
[131] CETA, art 8.15.

4.1.2 Definition of "Investment"

The definition of "investment" determines what types of investment are—and are not—covered by the Investment Chapter. Only investments which meet the definition of "investment" can benefit from the treaty provisions. The definition may be either inclusive or exclusive and open or closed depending on the goals of the parties. Whether the definition is broader or more restrictive determines the breadth of treaty protection.[132]

CETA, CPTPP, and CUSMA employ similar definitions of "investment."[133] The definition is broad and precedes a non-exhaustive list of examples of investments. The definition in CETA begins

> **Investment** means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: …[134]

In CETA, CPTPP and CUSMA, "investment" is also defined broadly as "every kind of asset."[135] Asset-based definitions are broad because they grant investors protection not only for businesses they operate in the host country but also for property the investors own in that country (e.g., shares or physical property).[136]

The three Agreements require investments to have the "characteristics of an investment." These characteristics include commitment of capital, expectation of profit, and assumption of risk. The CETA differs from CUSMA and CPTPP in that it adds "duration" in the inclusive definition

[132] Schefer, *supra* note 4 at 71.
[133] CETA, art 8.1; CUSMA, art 14.1; CPTPP, art 9.1.
[134] CETA, art 8.1 "investment."
[135] *Ibid*; CUSMA art 14.1; CPTPP art 9.1.
[136] UNCTAD, *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II*, (New York, Geneva: United Nations, 2011) at 24.

of the characteristics of an investment. While CUSMA and CPTPP do not explicitly include it, duration is a common requirement for investments.[137]

The three Agreements then provide inclusive lists of examples that meet the definition of investment. Each agreement lists "an enterprise" as a possible investment. The meaning of "an enterprise" is defined in the general definitions Chapter of each Agreement. This definition is substantially the same across the CPTPP, CUSMA, and CETA. For example, in CETA,

> **enterprise** means an entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture or other association.[138]

The effect of an enterprise-based definition is to broadly include all types of business ventures. Because the three Agreements define investments as assets that an investor owns or controls, "directly or indirectly," the Agreements do not limit investments to direct investments alone. Including indirect investment extends treaty protection to indirect owners, such as shareholders in a holding a company which owns a company that owns an underlying investment. The risk of this extension is that third-party or Host State individuals or corporations may be able to benefit from treaty protections to which they are not entitled.[139] In CETA, this risk is addressed by limiting the definition of investor.[140]

After the non-exhaustive list of examples, the three Agreements each specifically exclude certain assets from the definition of investment. The CPTPP excludes orders and judgments. CETA and CUSMA also exclude orders and judgments but also exclude commercial contracts and the financing thereof. While Canada's 2004 Model FPIA similarly excluded commercial contracts, the

[137] Schefer, *supra* note 4 at 90.
[138] CETA, art 1.1 "enterprise;" see also CPTPP, art 1.1; CUSMA, art 1.1.
[139] UNCTAD, *Scope and Definition, supra* note 136 at 66.
[140] See, *infra*, subsection 4.1.3.

UK's 2008 Model BIT includes "any performance under contract."[141] Including commercial contracts can lead to the definition of investment becoming "overly broad."[142] Furthermore, tribunals have come to conflicting conclusions about whether commercial contracts have the characteristics of investment (and thus meet the definition).[143] Excluding commercial contracts removes doubt about whether simple contracts meet the definition, including the characteristics, of an investment.

4.1.2.1 Definition of "Covered Investments"

The three agreements also define "covered investment." CUSMA and CPTPP limit investments to those made in the "territory of a party" by an "investor of another party."[144] For example, an investment in the territory of Canada by a British investor would be a covered investment. CUSMA and CPTPP also limit the treaty temporally: they limit the scope of the agreement to investments that were existing or were made after the treaty entered into force.[145]

CETA expands on these limitations, adding a requirement that investments comply with applicable law. CETA also more clearly requires that investors of another party (and not some third party) own or control the investment directly or indirectly. The CETA definition reads

> **Covered investment** means, with respect to a Party, an investment:
> a. in its *territory*;
> b. *made in accordance with the applicable law* at the time the investment is made;
> c. directly or indirectly *owned or controlled* by an investor of the other Party; and
> d. existing on the date of *entry into force* of this Agreement, or made or acquired thereafter[146]

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[141] Model Text [Draft] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of _____, (2008) art 1 "investment", online: https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2847 [UK Model BIT 2008].
[142] UNCTAD, *Scope and Definition, supra* note 136 at 31.
[143] *Ibid* at 24.
[144] CUSMA, art 14.1 "covered investment;" CPTPP, art 9.1.
[145] *Ibid*.
[146] CETA, art 8.1 "covered investment" [*emphasis added*].

The legal requirement imposes an obligation on investors to meet applicable domestic laws in order to qualify for treaty protection. The legal requirement aims to "induce foreign investors to ensure that all local laws and regulations are satisfied in the course of establishing an investment."[147] As a result, the CETA parties gain more control over the admission of investments. The treaty denies protection to investments which fail to meet any of the four requirements ("a" through "d" above) of the CETA definition. And the ownership requirement addresses the risk of non-party investors benefiting from treaty protections, which is also addressed under the definition of investor.[148]

4.1.2.2 Prediction: The Parties Will Likely Adopt the CETA Definition of Investment

Both Canada and the UK are likely to adopt the definitions of "investment" and "covered investment" from CETA. This is consistent with the parties' shared goal of transitioning CETA.

On the one hand, because the CETA definition is still very broad, it achieves the UK's goal of demonstrating to investors that it is open for business. And both parties have demonstrated an interest in protecting investors, which this relatively broad definition achieves. And while excluding commercial contracts may limit the scope of the treaty, it provides certainty to investors about what types of investments are covered.

On the other hand, both parties prioritize protecting their sovereignty. As such, they will likely adopt the CETA definition of "covered investments." The CETA definition automatically denies benefits to investments which fail to meet the four basic criteria of the definition. By requiring investments to comply with applicable law, the parties can ensure that only investments

[147] UNCTAD, *Scope and Definition, supra* note 136 at 38.
[148] See, *infra*, subsection 4.1.3.

which meet the domestic rules can benefit from protection. This preserves both parties' sovereign right to regulate.

4.1.3 Definition of Investor

Defining "investor" serves a similar purpose as defining "investment." Only investors who meet the definition of "investor of a party" may benefit from treaty protections for their eligible investments. The definition of "investor" depends on the definition of "investment." In CETA, an investor is "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."[149] Investors seeking to benefit from treaty protection must ensure that their venture meets the definition of "investment" as well as ensuring they qualify as investors.

An investor can be a Party, (for example, one of the contracting states); a national of a party (a private citizen of a Party); or an enterprise of a Party (any entity that meets the definition of "enterprise.") In essence, an enterprise is any entity, such as a corporation, which can benefit from treaty protection.[150] An enterprise need not have legal personality: it could be an informal association. The definition of enterprise is broad. This broad definition gives treaty protection to a expansive category of loosely defined investors who make eligible investments. The CPTPP, CUSMA, and CETA share almost identical definitions. The definition of investor is particularly important for determining (1) the nationality of dual citizens and (2) nationality of enterprises. Addressing these issues determines whether a person or enterprise meets the definition of "investor of a party" and can, therefore, benefit from treaty protection.

[149] CETA, art 14.1 "investor;" The definitions are substantially similar in CUSMA (art 14.1) and CPTPP (art 9.1).
[150] CETA, art 1.1 "enterprise."

4.1.3.1 Nationality of Individual Investors (Dual Citizens)

In a Canada-UK PTA, the definition of "investor" should establish criteria for determining the dominant nationality of an investor when an investor is a national of both countries. Canada and the UK have a shared history, and many Canadians are also British citizens and vice versa. Determining which party an investor belongs to is important because, particularly in a bilateral agreement, it determines whether the investor can benefit from treaty protection.

An investor may be a "natural person" of a party. CETA defines a "natural person" as a citizen of one of the parties.[151] And in the case of dual citizens, CETA determines the nationality of a natural person by their "dominant and effective nationality."[152] Similarly, CUSMA determines nationality by "dominant and effective citizenship."[153] Canada has also adopted the "dominant and effective" nationality requirement to determine nationality in its recent BITs. In the 2018 Canada-Moldova BIT, Canada adopted the same "dominant and effective" language and in the 2016 Canada-Hong Kong BIT, Canada adopted similar language that listed factors to determine an investor's "predominant link."[154]

4.1.3.2 Nationality of Enterprises (Denial of Benefits Provisions)

As with determining nationality of individuals, a Canada-UK PTA should include rules to determine the nationality of corporations. Nationality rules for corporations achieve two goals. First, they serve the goal of determining nationality of individuals in determining to which party

[151] CETA, art 8.1, "natural person."
[152] *Ibid*.
[153] CUSMA, art 14.1 "investor of a party."
[154] Agreement Between the Government of Canada and the Government of The Republic of Moldova for the Promotion and Protection of Investments, 12 June 2018 (not in force) art 1 [Canada-Moldova]; Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, 10 February 2016 (entered into force 6 September 2016) art 1 [Canada-Hong Kong].

the investor belongs. This is important because many companies have established operations in both countries as well as third countries. Second, they also help to determine whether an enterprise has the nationality of one of the parties to the treaty or of a third party. Excluding enterprises which are actually nationals of third-party states prevents "treaty shopping," where enterprises from third parties attempt to qualify for treaty protection.[155] For example, a Mexican corporation might incorporate in Canada in an attempt to benefit from the Canada-UK PTA.

Under the definition of "investor," CETA defines nationality for an enterprise as

1. (a) an enterprise that is constituted or organised *under the laws of that Party* and has *substantial business activities* in the *territory* of that Party; or
2. (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a *natural person of that Party* or by an enterprise mentioned under paragraph (a).[156]

The definition excludes "letterbox" companies from treaty protection, which are corporations incorporated within a jurisdiction but that have no presence other than, for example, a post office box. They lack physical property, employees, or other ties to the jurisdiction.[157]

CUSMA and CPTPP, by contrast, allow any enterprise that meets the general definition of "enterprise."[158] Under CUSMA and CPTPP, enterprises need only meet the requirement of organization "under applicable law." However, under the Denial of Benefits (DOB) provisions in CUSMA and CPTPP, parties can choose to exclude enterprises that do not meet additional criteria of substantial business activities and ownership by a natural person of the party, similar to CETA.[159]

[155] UNCTAD, *Scope and Definition*, *supra* note 136 at 92.
[156] CETA, art 8.1 "investor of a party" [*Emphasis added*].
[157] UNCTAD, *Scope and Definition*, *supra* note 136 at 93.
[158] CUSMA, art 1.1 "enterprise;" CPTPP art 1.1.
[159] CPTPP, art 9.15; CUSMA, art 14.14.

The difference between CETA, on the one hand, and CUSMA and CPTPP on the other is that CETA includes the nationality requirements for corporate investors in the definition of "investor," while CUSMA and CPTPP include nationality requirements in the DOB provision. CETA is automatic; CUSMA and CPTPP are discretionary. By including nationality requirements in the definitions section, CETA effectively prohibits all enterprises which fail to meet the criteria in the definition. Conversely, CUSMA and CPTPP merely give parties a choice—they can choose to deny benefits if an investor fails to meet the criteria.

Investment tribunal jurisprudence demonstrates that discretionary DOB provisions are weaker than automatic DOB provisions.[160] For example, tribunals have held that discretionary provisions can only be applied prospectively and not retrospectively;[161] parties may also need to provide notice to investors which they intend to exclude.[162] Furthermore, tribunals have inconsistently interpreted discretionary DOB provisions.[163] Because discretionary DOB provisions are weaker and create uncertainty, UNCTAD recommends that parties adopt automatic DOB provisions.[164] Like the provisions in CETA, automatic provisions include all requirements for investors to qualify for treaty protection as part of the definition of investor—states need not take any action to deny benefits to investors that fail to meet the definition.

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[160] UNCTAD, *Scope and Definition*, *supra* note 136 at 94.
[161] *Ibid* at 98.
[162] NAFTA art 1113 explicitly required notice; while CUSMA and CPTPP do not require notice, a tribunal could read notice requirements into those agreements. See North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992 (entered into force 1 January 1994), art 1113 [NAFTA].
[163] Carmen Nuñez-Lagos & Javier García Olmedo, "The Invocation of 'Denial of Benefits Clauses': When and How? (17 February 2014), *Kluwer Arbitration Blog*, online: http://arbitrationblog.kluwerarbitration.com/2014/02/17/the-invocation-of-denial-of-benefits-clauses-when-and-how-2/; see *Guaracachi v Bolivia*, PCA Case No 2011-17, Award, (31 January 2014); *Plama v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005).
[164] UNCTAD, *Scope and Definition*, *supra* note 136 at 99.

All three Agreements include DOB provisions.[165] But while CUSMA and CPTPP list nationality requirements for enterprises in their DOB provisions, CETA does not. All three Agreements also allow states to deny benefits to investors if they are owned or controlled by a non-party investor and the party adopts measures against that third party.[166] For example, if Canada adopted sanctions against Russia and a Russian company owned a British investor in Canada, Canada could deny the benefits of the Canada-UK PTA to that Russian investor. None of the three Agreements require states to meet requirements such as providing notice to the investor.

4.1.3.3 Prediction: Investor Definitions Will Likely Follow CETA

Given the overlap of business between Canada and the UK, it is likely that the Parties will agree to define rules for determining the nationality of dual citizens using language substantially similar to CETA and CUSMA. The definition of "natural person" provides a template which addresses these concerns. Canada and the UK are also likely to define the nationality of enterprises.

Canada and the UK will likely agree to retain the stronger automatic DOB provision from CETA rather than adopting the discretionary DOB provision from CUSMA and CPTPP. The parties will likely agree to follow CETA because automatic DOB provisions create more certainty for states and investors than discretionary provisions like those in CUSMA and CPTPP. Defining enterprise nationality automatically denies benefits to investors which do not meet these requirements. As a result, nationality requirements can help to ensure that only corporate investors from the Parties benefit from the treaty.

There is no evidence to suggest that the Parties would favour "lowering the bar" from CETA by including discretionary DOB provisions. While the Parties, and the UK in particular,

[165] CPTPP, art 9.15; CETA, art 8.16; CUSMA, art 14.14.
[166] *Ibid*.

want to encourage investment, they likely want to encourage legitimate investment. Adopting discretionary DOB provisions could embroil the Parties in disputes with enterprises that lack substantial business activities in either Party's territory. Thus, even considering that the Parties would like to promote investment, it does not follow that they would undertake the risks associated with discretionary DOB provisions.

4.2 Admission and Establishment

Admission and establishment provisions determine whether investors have a right to establish investments and whether states have a right to refuse investments. There are two models to admission provisions: either the provisions grant states a unilateral right to refuse to admit a foreign investor or the provisions require states to make a qualified commitment to admit investors.

Canada has typically accorded foreign investors a right to establish an investment in Canada. For example, in Canada's 2004 Model FIPA, the National Treatment provision extends national treatment protection to the "establishment, acquisition, [or] expansion" of investments.[167] But the right is qualified because Canada reserves the right to refuse investment. Under the *Investment Canada Act,* the Government can review and potentially deny proposed investments if the proposed investment meets certain criteria.[168]

Canada will require that a Canada-UK PTA exclude Investment Canada review from dispute settlement. CETA, CPTPP, and CUSMA all include specific provisions which address Investment Canada review. Annex 8-C of CETA excludes Investment Canada review from dispute settlement

[167] Agreement Between Canada and _____ for the Promotion and Protection of Investments (2004) art 3, online: https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2820 [Canada Model FIPA 2004].
[168] RSC 1985, c 28 (1st Supp).

(both ISDS and SSDS).[169] Similarly, CUSMA Article 32.12 excludes Investment Canada review from dispute settlement.[170]

4.2.1 Market Access

Article 8.4 of CETA prohibits states from imposing certain restrictions on investors' market access. CETA's market access provision broke new ground among PTAs. While some previous PTAs included market access provisions, CETA is unique among PTAs because it is drawn from the language of GATS Article XVI, [171] which prohibits specific types of measures that would inhibit an investor's admission and establishment rights.[172] GATS Article XVI and CETA Article 8.4 prohibit measures which set quantitative ceilings on, for example, the number of companies that may operate in a certain sector.[173]

The CETA Market Access provision provides assurances to investors by restricting how states can prohibit investors from entering the Host State market. But the CETA provision balances market access assurances for investors with state control over market access. According to UNCTAD, "this model is useful where States do not wish to liberalize across the board but wish to follow controlled and industry-specific liberalization."[174] The Market Access Article recognizes that, notwithstanding the market access rights provided, states have the right to introduce certain measures that could reduce market access. For example, while states would be prohibited under 8.4(1)(b) from requiring an enterprise to adopt a specific legal structure (such as a corporation or

[169] CETA, annex 8-C.
[170] CUSMA, art 32.12.
[171] GATS, art XVI [*GATS*].
[172] Wenhua Shan & Sheng Zhang, "Market Access Provisions in the Potential EU Model BIT: Towards a 'Global BIT 2.0'?" (2014) 15 J World Investment & Trade 422 at 437—38.
[173] CETA, art 8.4; Martín Molineuvo, *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (2011: Kluwer Law International) at 90.
[174] UNCTAD, *Admission and Establishment: UNCTAD Series on Issues in International Investment Agreements*, (New York, Geneva: United Nations, 2002) at 21.

joint venture), 8.4(2)(c) specifically permits states to adopt measures restricting the concentration of ownership of enterprises to promote fair competition.[175]

CETA provides investors with a greater right of establishment than CUSMA or CPTPP because it includes rights to establishment under both National Treatment and MFN as well as under Market Access. Including both market access and establishment rights gives investors an enhanced right of establishment compared with Investment Agreements that lack a market access provision.[176] And CETA goes further than GATS because it does not limit market access to investment in services only—it applies market access to all investments.

4.2.2 Prediction: The Parties Will Likely Include a Market Access Article

The UK will likely seek to include the Market Access provisions from CETA to encourage investors and demonstrate that the UK is "open for business." And the UK is committed to maintaining and expanding high levels of market access both into and out of the UK after Brexit.[177] Similarly, Canada will likely agree to adopt a Market Access provision for its trade-liberalizing benefit. Addressing market access both protects Canada's right to prohibit certain investments and also accords with Canada's goal of liberalizing, diversifying, and expanding trade. Market access has the potential to encourage investors—for both parties—by providing certainty about when states can and cannot adopt measures which could impact investors.

[175] CETA, art 8.4(1)(b), 8.4(2)(c).
[176] Molineuvo, *supra* 173 at 92.
[177] Department for Exiting the European Union, "Policy paper: The United Kingdom's Exit From, and New Partnership with, the European Union" (15 May 2017) s 8.15.

4.3 Treatment of Investors Provisions – Fair and Equitable Treatment

Treatment of Investors[178] provisions set standards that bar a broad range of adverse treatment of investors and commits parties to providing a certain level of protection to investors. There are often two parts to Treatment of Investors provisions. The first is Fair and Equitable Treatment (FET), which will be the main focus of this section. Generally, FET obligates parties not to frustrate investors' legitimate expectations, deal with them in bad faith, or willfully neglect their interests.[179] FET is broad in scope and varies in substantial ways from agreement to agreement[180] and in how it is interpreted from one decision to another.[181] The second part is Full Protection and Security which is a general commitment to protect a foreign investor from physical harm. It will likely be mentioned in an agreement between Canada and the UK but is not subject to significant variation between agreements, therefore, it will not be discussed further in this paper. The remainder of this section will be concerned with FET provisions.

4.3.1 There are Three Different Kinds of Fair and Equitable Treatment Provisions

There are three broad categories of FET provisions:

(1) A non-limited autonomous provision not tied to the minimum standard of treatment under CIL that does not specifically define FET. This is the most volatile and likely to be subject

[178] Section title in CETA, art 8.10. In CUSMA, art 14.6 it is called the Minimum Standard of Treatment.
[179] *Alex Genin et al v Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001).
[180] CUSMA, art 14.6; CETA, art 8.10; Canada Model FIPA 2004, *supra* note 167, art 5; UK Model BIT 2008, *supra* note 141, art 2; NAFTA, art 1105.
[181] *SD Myers v Canada,* UNCITRAL (NAFTA), First Partial Award (13 November 2000) [*SD Myers*]; *Pope and Talbot v Canada*, UNCITRAL (NAFTA), Award in Respect of Costs (26 November 2002) [*Pope and Talbot*].

to different interpretations by arbitrators (found in the UK-Sierra Leone BIT[182] and the UK-Serbia BIT[183]). The use of this type of FET provision has declined in recent years.[184]

(2) A provision which explicitly ties FET to the CIL minimum standard of treatment (CUSMA, Canada's 2004 Model FIPA, CPTPP).[185] This is likely more restrictive than an autonomous FET provision. However, it can also be subject to different interpretations by arbitrators and some tribunals have held that the standard of protection under CIL has increased and the distinction between this standard and the autonomous standard is not clear or agreed.[186]

(3) A list of specific state actions that violate FET included in the provision.[187] This list can be an inclusive list[188] or it can be exclusive.[189] There can be another provision that allows for the parties to adopt more elements to the list.[190] This theoretically improves predictability of the provision and restricts the scope of FET to the extent that the parties want.

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[182] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments, 13 January 2000 (entered into force 20 November 2001) art 2 [UK-Sierra Leone].
[183] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, with Exchange of Notes, 6 November 2002 (entered into force 3 April 2007) art 2 [UK-Serbia].
[184] UNCTAD, Investment Policy Hub, online: https://investmentpolicyhubold.unctad.org/#iiaInnerMenu. There have been far more qualified FET provisions in the past 5 years than unqualified ones. And far more in the past 5 years than in any time period before.
[185] CUSMA, art 14.6; Canada Model FIPA 2004, *supra* note 167, art 5; CPTPP, art 9.6.
[186] *Mondev v United States of America*, NAFTA Arbitration, ICSID Case No ARB(AF)/99/2, Final Award (11 October 2002); *Gold Reserve v Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014); *Merrill and Ring Forestry v Canada*, ICSID Case No UNCT/07/1, Award (31 March 2010).
[187] CETA, art 8.10; Model Text for the Indian Bilateral Investment Treaty, Bilateral Investment Treaty Between the Government of the Republic of India and the Government of ____ (2015), online: https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560.
[188] Agreement For the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, 10 November 2009 (not entered into force) [Columbia-India BIT].
[189] CETA, art 8.10(2).
[190] CETA, art 8.10(3).

4.3.2 The Parties Will Likely Use but Modify the CETA FET Provision

The Parties will likely not use a non-limited autonomous FET provision. This type of provision is unpredictable in application, may lead to unexpected liability and, as a result, is likely more restrictive of the sovereign right to regulate. The CETA provision's benefit is that it offers significant investor protection. But the benefit likely does not outweigh the uncertainty that comes with an FET provision and the potential it has for discouraging state action that may be interpreted as breaching the provision.

The UK has stated that they are interested in attracting investment, encouraging outgoing investment, and adopting measures that protect parliamentary sovereignty.[191] The mandate of the Department for International Trade includes maximizing wealth creation through the support of outward foreign direct investment.[192] Therefore, the UK will likely want to take a balanced approach to the FET provision. A balanced approach would provide protection for outward investment but still give the UK space to make policy without incurring liability in relation to Canadian investors.

Although past practice demonstrates that Canada favours a restrictive CIL standard for the FET provision (as seen in CUSMA, CPTPP, Canada's model FIPA, and the agreed interpretation of FET under NAFTA[193]), they have also shown, in the CETA, that they are flexible negotiators and are willing to adopt an FET provision that is autonomous but specifically defined. Such a provision more clearly delineates the limits on state sovereignty and it also indicates a commitment to protecting investor interests in well-defined circumstances. Therefore, since retaining

[191] UK Government, "The United Kingdom's exit from and new partnership with the European Union" *supra* note 77 at 13, 55.
[192] UK Government, "The United Kingdom's exit from and new partnership with the European Union" *supra* note 77 at 13, 55.
[193] NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) s B.

investment is a concern for the UK, the FET provision will likely be similar to or even the same as the CETA provision. Because the CUSMA FET provision is tied to, and in effect limited by, the CIL rules, the UK may worry that it is not protective enough of investors and not sufficiently certain. Furthermore, Canada has incurred liability under NAFTA's FET provision even after the parties adopted the CIL interpretation.[194] Therefore, Canada may see a well-defined autonomous FET provision as superior to one tied to CIL.

As noted, the UK has expressed approval of CETA's FET provision. However, Canada may feel that they are in a position to negotiate a better provision for their interests than when negotiating with all of Europe. One area that Canada would likely seek to improve is legitimate expectations of investors. CETA states that the breach of legitimate expectations of investors, which were formed based on a specific representation made by the Host State, can be considered when assessing whether the FET standard was breached. In *Bilcon*, Canada was found liable to investors under an FET provision when the tribunal found it violated the investors' legitimate expectations. As such, Canada will likely seek to remove legitimate expectations from the scope of FET.

A precedent for removing legitimate expectations from FET could be drawn from CUSMA or CPTPP. Both have essentially similar provisions that approach legitimate expectations wholly negatively, stating that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[195] Compared to this, CETA is more permissive because it specifically includes legitimate expectations of the investor as a

[194] *Bilcon*, *supra* note 49.
[195] CUSMA, art 14.6.

consideration, albeit in a limited way because it requires the legitimate expectations to be based on a specific representation by or on behalf of the state.[196]

4.3.3 Prediction: CETA FET Modified to Exclude Legitimate Expectations

CETA is an excellent model for an FET provision in the Investment Chapter. Both Parties have expressed approval of the CETA provision and it balances their objectives. For the UK, this is protecting and enhancing parliamentary sovereignty as well as promoting inbound and outbound investment. For Canada, this provision offers an important protection to investors but if it is well defined it will not be interpreted too broadly. Especially if legitimate expectations are restricted. A well-defined FET standard clearly delineates the extent to which policy making ability is limited while still offering clear and predictable protection to investors. If any change were made to the CETA provision, then it would be to the legitimate expectations portion. Because of losses in NAFTA dispute settlement and based the treatment of legitimate expectation in CPTPP and CUSMA, Canada will likely prefer to remove legitimate expectations as a sufficient ground to claim FET.

4.4 Expropriation

Parties to investment treaties typically agree to allow expropriation if specific criteria are met when the expropriation occurs. This includes prompt, adequate, and effective payment for the investment that is expropriated; the expropriation being for a public purpose; the expropriation being made under the dues process of law and in a non-discriminatory manner.[197] Expropriation provisions are a significant concern for foreign investors because they eliminate the ability of states

[196] CETA, art 8.10.
[197] CETA, art 8.12.

to arbitrarily expropriate an investment and ensure that if a state does expropriate then the investor is immediately compensated a fair amount. There are two types of expropriation: direct and indirect. The meaning of direct expropriation is uncontroversial: it occurs when the Host State's government acquires the investment for itself. Indirect expropriation occurs when the government does not directly acquire the investment but takes actions that have the same effect as direct expropriation. This sometimes turns solely on whether the investor has been substantially deprived of the benefit of the investment.[198] However, sometimes the public policy of the government measure is considered. The benefit of the measure for the public is weighed against the adverse effects the measure has on the investor.[199] Because of the uncertainty, more recent treaties have endeavored to define indirect expropriation. Both CETA and CUSMA attach Annexes which describe more precisely what indirect expropriation is and specifically list the objectives of the government for the tribunal to take into account.[200]

Based on the recent history of agreements formed by Canada and the UK's commitment to promoting sovereignty, the parties will likely want to adopt an expropriation provision that clearly defines indirect expropriation. Following CETA and CUSMA, parties can do this by referring to an Annex which defines indirect expropriation. However, there are some differences between the expropriation Annexes in CUSMA and CETA. Notably, CUSMA explicitly and negatively states that expropriation cannot be found unless property rights of the investors are affected.[201] CETA states this positively, saying that indirect expropriation occurs when the act "substantially deprives the investor of the fundamental attributes of property in its investment."[202] Since the provision

[198] *Metalclad v Mexico*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) at para 104.
[199] *Tecmed. v Mexico*, ICSID Case No ARB (AF)/00/2, Award, (29 May 2003) at paras 118—19.
[200] CETA, art 8.12, annex 8-A; CUSMA, art 14.8, annex 14-B.
[201] CUSMA, annex 14-B(1).
[202] CETA, annex 8-A(1).

does not explicitly forbid a claim in which no property rights are affected, it may be more permissive than the CUSMA provision. However, in multiple cases tribunals have found that property rights must be interfered with to find liability.[203] Therefore, there may be little difference between these provisions in practice. However, given the fact that the UK has stated it is specifically interested in promoting investment, the negative framing of the principle in CUSMA may be seen as too restrictive on investors.

4.4.1 Prediction: No Change to Expropriation

Besides the difference mentioned above, the expropriation provisions and their accompanying annexes in the CETA and CUSMA are substantially similar and likely will be adopted in a Canada-UK PTA. The greater definition of indirect expropriation and the explicit inclusion of government objectives as a consideration are likely to be seen as beneficial provisions by both parties and will be included in the Investment Chapter.

4.5 Most Favoured Nation

The most favoured nation (MFN) provision forbids less favourable treatment of an investor covered by the agreement than that given by a host state to an investor of a another state in like circumstances. That is, if favourable treatment is given to investors from a third party, the investor covered by the agreement should receive no less favourable treatment and can make a claim under the MFN provision if they do not receive it.[204]

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[203] *Mamidoil v Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) at paras 566—67; *Compañia del Desarrollo de Santa Elena v Costa Rica*, ICSID Case No ARB/96/1, Final Award (17 February 2000) at para 76; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) at paras 245—48 [*El Paso*].
[204] Canada Model FIPA 2004, *supra* note 167, art 4.

4.5.1 Canada and the UK Will Likely Limit the Scope of MFN to Avoid Importing External Treaty Provisions

The main concern associated with the MFN provision is it being used to claim rights from treaties that the host state has with 3rd party states. In some cases, tribunals have allowed the investor to rely on provisions that are in a treaty between the host state and a third party but are not in the treaty between their home state and the host state by relying on the MFN provision. For example, In *Bayindir v Pakistan*, the tribunal allowed the investor to import the FET provision from another treaty so that the investor could rely on it even though FET was not provided for in the treaty under which the investor was claiming on the basis that if it did not, investors protected under the other treaty would receive more favourable treatment.[205]

The CETA addressed this concern by restricting the scope of MFN. Under the CETA, MFN cannot be used to import dispute settlement procedures from other agreements. Furthermore, substantive provisions from other agreements do not apply, in and of themselves, through the MFN provision of CETA.[206] Therefore, the MFN provision of CETA likely only applies to the actions a government takes with respect to two investors from different home states that have investment agreements with the host state where the investors are protected by similar provisions. For example, if Canada restricted exclusively American investors from transferring Canadian profits to the US then, under NAFTA, an American investor could claim under both the transfer of funds provision of NAFTA and the MFN provision. With respect to the MFN claim, an American investor could rely on the fact that investors from 3rd parties that have agreements with Canada are not subject to the same restrictions.

[205] *Bayindir v Pakistan*, ICSID Case No Arb/03/29, Award (14 November 2005) para 157.
[206] CETA, art 8.7.

Another option would be to not include an MFN agreement at all. There are 37 investment agreements (out of 2571 listed on the UNCTAD IIA Mapping Project) that have no MFN provision.[207] This is certainly an option if both countries are adverse to the risk presented by the MFN provision. However, given Canada's history of signing agreements with an MFN clause and the UK's commitment to promoting investment both within the UK and abroad, it seems more likely that the countries will commit to some kind of MFN provision.

4.5.2 Prediction: No Change to MFN from CETA

Both countries will likely want to include an MFN provision because both countries want to improve outward investment flow by protecting their investors overseas and Canada has universally included an MFN provision in its agreements. The MFN provision will probably be the same as CETA, which restricts the scope of MFN by not allowing it to be used to import provisions from investment agreements with third parties. By restricting the scope of what MFN can apply to, both countries can add predictability to what they may be held liable for and this in turn could strengthen parliamentary sovereignty.

4.6 National Treatment

The National Treatment provision guarantees that investors will face no less favourable treatment than citizens of the host state. These provisions sometimes state that the investor and the citizen must be in like circumstances[208] although sometimes this statement is not included.[209]

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[207] UNCTAD, *supra* note 184.
[208] CETA, art 8.6; Agreement Between Canada and Mongolia for the Promotion and Protection of Investment, 8 September 2016 (entered into force 24 February 2017) [Canada-Mongolia]; Canada-Hong Kong; Canada Model FIPA 2004, *supra* note 167.
[209] Agreement Between the Macedonian Government and the Government of the Kingdom of Denmark for the Promotion and Reciprocal Protection of Investments, 8 May 2015 (entered into force 30 June 2016), art 3 [North

4.6.1 The National Treatment Provision of CETA, CPTPP, and the Canadian Model FIPA Will Likely Be Used

Canada is very consistent its National Treatment provisions. The National Treatment provisions in the CETA, CPTPP, and the Canada Model FIPA are all essentially the same. They state that investors will not be treated less favourably than local investors in like circumstances. They also include a provision that guarantees foreign investors the best level of treatment offered in any of the provinces of Canada. That is, if any one province treats its investors better than the other provinces and Canada, then that is the standard at which international investors should be treated.[210]

The National Treatments provision in NAFTA and the CUSMA add slightly more detail to the scope of the provision. In NAFTA, the parties clarified that they cannot require that a certain portion of shares of an investment belong to a citizen of the host state (except for nominal qualifying shares for directors) nor can they require an investor to sell its investment because of the investor's nationality.[211] The CUSMA defines "like circumstances" in greater detail. It states that like circumstances will depend on the totality of circumstances including whether the state's policy distinguishes between investors based on legitimate welfare objectives.[212] A provision that defines "like circumstances" in this way seems more narrow and so less restrictive on governments but in practice tribunals have found that a lack of a legitimate regulatory purpose is necessary to make out a claim of discrimination. In *Total SA v Argentina*, the tribunal stated that the

Macedonia-Denmark]; Agreement Between the Portuguese Republic and the United Arab Emirates on the Reciprocal Promotion and Protection of Investments, 19 November 2011 (entered into force 4 July 2012), art 4 [Portugal-UAE].

[210] CETA, art 8.6; CPTPP, art 9.4; Canada Model FIPA 2004, *supra* note 167 art 3.

[211] NAFTA, art 1102.

[212] USMCA, art 14.4.

complainant must have been treated worse without any justification from the government.[213] In *SD Meyers*, the tribunal stated that environmental protection is a legitimate policy and distinctions between investors that are the result of environmental protection policy are not discriminatory.[214] In *Olin Holdings v Libya*, the tribunal cites *Total SA v Argentina* and agrees that the test is whether there is differential treatment that is not justified.[215] Despite the fact this line of cases suggests the provision in CUSMA is redundant, there is no harm in including it and the image it presents aligns with the goals of Canada and the UK.

4.6.2 Prediction: The Parties will Likely Adopt the CUSMA National Treatment Provision

Both parties will likely include a National Treatment provision. The provision in the CUSMA is expands on CETA because it allows states to differentiate between investors for legitimate regulatory purposes. This aligns with the UK's goal of protecting parliamentary sovereignty. It is questionable whether the CUSMA provision would have any practical effect because of how arbitrators have interpreted the national treatment provisions under other agreements but there is no downside to specifically allowing for legitimate regulatory distinctions and it may be beneficial in assuring that arbitrators will interpret the provision consistently.

4.7 Transfer of Funds

Both Canada and the UK would likely agree to include a "Transfer of Funds" article in their Investment Chapter, as they have included one in all their previous investment agreements. Such an article outlines the host State's commitment to allow an investor to convert and repatriate

[213] *Total v Argentina*, ICSID Case No ARB/04/1, Decision of Liability (27 December 2010) at para 344.
[214] *SD Meyers v Canada*, *supra* note 181 at para 250.
[215] *Olin Holdings v Libya*, ICSID Case No 20355/MCP, Final Award (25 May 2018) at para 203.

proceeds and profits related to their investment.[216] Including a Transfer of Funds article recognizes that an investor has committed certain "resources to the host State's economy" but that they are not required to do so indefinitely and thus protect the investor's right in the future to repatriate their investment.[217] In turn, a Transfer of Funds article can play an important role in encouraging investment inflow into the host State and providing protections for individual investors, two of the previously identified likely objectives of both Parties.

4.7.1 Two Key Issues: Scope and Limitations on the Investor's Ability to Transfer

A Transfer of Funds article addresses two key issues for investors and Host States: what is the transferability of an investor's funds and what restrictions or exceptions may a State place on the investor's right to transfer?

4.7.1.1 Scope of the Investor's Ability to Transfer

Transfer of Funds articles establish the scope of an investor's ability to transfer funds by detailing the types of transfer which are allowed "to be made without restrictions or delay" and when the protections may apply.[218]

Prospectively, a Transfer of Funds article's protections are limited to those who are deemed "investors" and funds which are deemed "investments" under the Investment Chapter.[219] This is reinforced within the article itself, as the investor's ability to transfer funds is predicated on there

[216] Sean Hagan, "Chapter 9: Transfer of Funds", in United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues*, Volume I (New York and Geneva: United Nations, 2004) 257, online: https://unctad.org/en/Docs/iteiit200410_en.pdf.
[217] Hanno Wehland, "The Transfer of Investments and Rights of Investors under International Investment Agreements – Some Unresolved Issues" (2014) 30:3 Arb Intl 565 at 565—66.
[218] CETA, Art 8.13(1).
[219] Hagan, *supra* note 216 at 258.

being "a link or connection between the investment and the funds sought to be transferred" by the investor.[220]

Within the article, there is often a list describing what types of funds are covered by the article. This list often includes such funds as the initial investment, "profits, dividends, interest, capital gains…and other fees…from the covered investment," "proceeds from the sale or liquidation…of the covered investment", as well as the payment of adjudicatory orders.[221]

An investor's protections for the transfer of the funds as described above are likely applicable both where investor is transferring in or transferring out of a Host State, unless otherwise specified.[222] Transferring in refers to such transfers made in order to provide the initial investment into the host State. Transferring out refers to transfers made out of the host state by the investor, such as the repatriation of proceeds from their investment, "including profits and the proceeds of any sale or transfer."[223]

In addition, Transfer of Funds articles often provide additional protections. One such protection is a commitment by both Parties home States not to interfere with their investors' decisions as to whether or not to transfer funds in and out of the host State.[224] Another protection allows investors who makes a transfer in accordance with the article to do so in their preferred currency.[225]

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[220] Abba Kolo, "Transfer of Funds: The Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 345 at 356.
[221] CETA, art 8.13(1).
[222] Hagan, *supra* note 216 at 258.
[223] *Ibid* at 257.
[224] CETA, art 8.13(2).
[225] Hagan, *supra* note 216 at 259.

4.7.1.2 Limitations on the Investor's Ability to Transfer

Transfer of Funds articles often contain a provision providing for a *prima facie* assumption "transfers relating to covered investments regardless of the purpose or nature" will be unrestricted.[226] Allowing for unrestricted transfers encourages, promotes and protects long-term investment between the Parties, supporting both Canada and UK's objective to increase investment inflow and protect their investors.[227] This is because an unrestricted right to transfer assures investors will be able to "reap the benefits [of their] investment through dividend payments, paying for goods and services, servicing of debts, or fulfilling other financial obligations that would enhance the value of the investment."[228]

However, the right of unrestricted transfer is often qualified by including certain exceptions. These exceptions protect both the Host State and the Home State's right to regulate, allowing them to address important macro-economic problems and protect their ability to regulate their domestic financial system as desired.[229] For example, the host State may wish to restrict the investor's right to transfer in certain areas of domestic law, such as bankruptcy, securities, and criminal or penal offences.[230] Often, there is qualifying language added that any restrictions placed on transfers must be "equitable and non-discriminatory" in order to provide investors with a sufficient level of protection from a host State's arbitrary actions.[231]

[226] Kolo, *supra* note 220 at 355.
[227] *Ibid*.
[228] *Ibid* at 356.
[229] Hagan, supra note 216 at 277.
[230] CETA, art 8.13(a)—(c).
[231] CETA, art 8.13(3).

4.7.2 Canada and UK Investment Agreements Have Historically Included Transfer of Funds Provisions

An important indication that Canada and the UK would likely include a Transfer of Funds article in their Investment Chapter comes from the fact that they have included such an article when concluding previous BITs and investment chapters. Upon reviewing each of Canada's and the UK's last six investment agreements (three BITs and three preferential investment agreements each), all 11 contained a Transfer of Funds article (including CETA).[232] These previous articles all deal with similar subject matter, providing investors with a right to transfer certain funds that is qualified in various ways to provide for the Parties' right to regulate.[233] From this fact, it can likely be inferred that Canada and the UK would likely agree to include a Transfer of Funds article within their Investment Chapter.

4.7.3 Prediction: The Transfer of Funds Article Will Likely Follow CETA

Canada and the UK are likely to include a Transfer of Funds article in their Investment Chapter that is substantially similar to one found in CETA under Article 8.13. As both Parties have indicated that CETA shall be the template of their PTA, it would be unlikely that the Transfer of

[232] Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part, 15 October 2018 (not in force) art 2.7 [EU-Singapore]; Comprehensive and Enhanced Partnership Agreement Between the European Union and the European Atomic Energy Community and their Member States, of the One Party, and the Republic of Armenia, of the Other Party, 24 November 2017 (not in force) ch 6 [EU-Armenia]; CETA, art 8.13; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, 17 March 2010 (entered into force 10 October 2014) art 5 [UK-Colombia]; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, 12 May 2016 (entered into force 25 July 2007) art 8 [UK-Mexico]; UK-Serbia, art 6; Canada-Mongolia, art 11; Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea, 27 May 2015 (entered into force 27 March 2017) art 11[Canada-Guinea]; Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, 20 April 2015 (entered into force 11 October 2017) art 11[Canada-Burkina Faso]; CUSMA, art 14.9; CPTPP, art 9.9;

[233] *Ibid*.

Funds article would provide reduced protections than those which are already included.[234] Furthermore, Canada's preference to maintain a similar level of protection in future Transfer of Funds articles is signalled by the substantial similarity between CETA Article 8.13 and the Transfer of Funds articles included in CUSMA and CPTPP.[235] As such, the Canada-UK Investment Chapter's Transfer of Funds article will likely mirror CETA Article 8.13, unless the UK expresses a preference for non-traditional provisions which substantially increase protections.

4.8 Performance Requirements

Performance requirements are used by host countries to put obligations on investors to achieve a variety of economic and non-economic goals.[236] Examples of performance requirements include transferring technology to the country, using local products or services, and funding research and development locally.[237] Some performance requirements are prohibited by the Agreement on Trade-Related Investment Measures (TRIMs), but otherwise countries may use them unless a treaty between them prohibits them.[238] They are generally seen as beneficial for developing countries to help build certain industries, improve standards or living, or achieve some other goal, but also have received criticism for creating inefficiencies in investment.[239]

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[234] Bartels & de Mestral, *supra* note 21 at 8 *citing* House of Commons (UK), Hansard, *supra* note 68; Bartels & de Mestral, *supra* note 21 at 10 *citing* Global Affairs Canada, "Canada's Continued Trade Relationship with the United Kingdom Post-Brexit", *supra* note 69.
[235] CUSMA, art 14.9; CPTPP, art 9.9.
[236] UNCTAD, *FDI Policies for Development: National and International Perspectives* (Geneva: United Nations Pub, 2003) at 88.
[237] Suzy H Nikièma, "Performance Requirements in Investment Treaties" (2014) International Institute for Sustainable Development Best Practice Series at 2—3, online: https://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf.
[238] UNCTAD, *supra* note 236 at 90.
[239] Nikièma, *supra* note 237 at 3, 6.

Canada historically has imposed prohibitions on performance requirements in its investment treaties unlike most other countries,[240] with similar prohibitions found in the CETA, CPTPP, and CUSMA.[241] In the recent Canada-China agreement, the parties only prohibited performance requirements under TRIMs to which they were already bound as WTO members. Incorporating TRIMs in their investment treaty, however. allows those requirements to be subject to ISDS under the treaty.[242] The UK, on the other hand, does not have prohibitions on performance requirements within their model BIT, though their model BIT is generally seen as outdated as it pre-dates the current climate that led to Brexit.[243] Investment agreements made by the EU after the Treaty of Lisbon have been inconsistent in their inclusion of prohibitions on performance requirements, with them being found for example in CETA and EU-Vietnam, but not in EU-Singapore or EU-Japan.[244]

CPTPP and CUSMA differ from CETA to some extent. For example, both contain provisions prohibiting a requirement to use technology of the State Party.[245] They also include some additional exceptions, such as measures that are: 1) "necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement"; 2) "necessary to protect human, animal or plant life or health"; or 3) "related to the conservation of living or non-living exhaustible natural resources".[246] These set of exceptions may not be applied in an arbitrary or

[240] *Ibid* at 9.
[241] CETA, art 8.5; CPTPP, art 9.10; CUSMA, art 14.10.
[242] Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, 9 September 2012 (entered into force 1 October 2014) art 9 [Canada-China].
[243] United Kingdom Model BIT 2008, *supra* note 141.
[244] CETA, art 8.5; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part, 27 June 2018 (not in force) art 8.8 [EU-Vietnam]; EU-Singapore; Agreement between the European Union and Japan for an Economic Partnership, 17 July 2018 (entered into force 1 February 2019) [EU-Japan].
[245] CUSMA, art 14.10(1)(h); CPTPP, art 9.10(1)(h).
[246] CUSMA, art 14.10(3)(c); CPTPP, art 9.10(3)(d).

unjustifiable manner, or constitute a disguised restriction on international trade or investment, but may otherwise act as exceptions.[247] CPTPP in particular states that these measures include environmental measures.[248] These types of exceptions provide more policy space for the parties to operate in, and would likely be appealing to the UK as well as Canada's inclusive trade agenda.

4.8.1 Prediction: The Parties Will Likely Follow CPTPP

Based on the inclusion of prohibitions on performance requirements in CETA, CPTPP, and CUSMA, as well as Canada's historical use of these provisions and the fact that they are found in Canada's Model BIT, Canada's stance on these provisions appears quite clear. On the other hand, there is no clear indication based on public statements, government reports, or recent practice from the UK to suggest their stance one way or the other. However, given both parties interest in protecting public policy space, and Canada's inclusive trade agenda, the Parties will likely favour a section on prohibitions of performance requirements that includes some exceptions (with a specific reference to the environment) such as those seen in CPTPP.

4.9 Umbrella Clauses

Umbrella clauses incorporate obligations of host states to investors which are not set out in the treaty into the treaty. For example, umbrella clauses can bring contractual obligations of states (which are excluded under the definition of investment) into the scope of the treaty.[249] Including umbrella clauses expands the scope of treaty protection for investors by allowing them to rely on obligations which are not captured by the treaty. Even though the contract would not normally

[247] *Ibid.*
[248] *Ibid.*
[249] Schefer, *supra* note 4 at 504.

qualify as an investment, the umbrella clause extends state liability and expands the scope of treaty protection. The historical rationale for umbrella clauses is for capital exporting states to "increase protection of their investors by elevation of contracts between investors and host states to the level of international obligation."[250]

Umbrella clauses are unpredictable. According to Fecak, "the interpretation and application of umbrella clauses in investment treaty arbitrations has been alarmingly inconsistent and has spurred deep controversies."[251] Some tribunals have interpreted umbrella clauses broadly while others have interpreted them narrowly, refusing to grant treaty protection to contracts in the absence of clear intention of the parties.[252] In addition, umbrella clauses can create uncertainty regarding the choice of forum for disputes and even the parties involved.[253]

Neither the CETA nor CUSMA include an umbrella clause.[254] The previous Canadian model FIPA also did not include an umbrella clause. The CPTPP only includes a limited umbrella clause: investors can bring dispute settlement actions resulting from breaches of investment agreements.[255] Investment agreements are contracts between a state party and an investor or investment.[256] Investors can rely on these agreements, which are essentially contracts, in bringing dispute settlement actions. The UK Model BIT, however, included a general umbrella clause.[257]

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[250] Tom Fecak, *International Investment Agreements and EU Law* (Kluwer Law International, 2016) at 41.
[251] *Ibid*.
[252] *Ibid*; *SGS Société Générale de Surveillance v Pakistan,* ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003); *El Paso*, *supra* note 203.
[253] Fecak, *supra* note 250 at 42.
[254] CUSMA, annex 14-E "Mexico-United States Investment Disputes".
[255] CPTPP, art 9.19(1)(a)(i)(C).
[256] CETA, art 9.1 "investment agreement".
[257] UK Model BIT 2008, *supra* note 141, art 2(2).

4.9.1 Prediction: Canada and the UK Will Likely Not Include an Umbrella Clause

It is unlikely that the proposed Canada-UK Investment Chapter will include an umbrella clause. The primary purpose of umbrella clauses is to extend treaty protection, particularly dispute settlement, to obligations which are not normally covered by the treaty. However, umbrella clauses are contentious and unpredictable. Furthermore, if the proposed Canada-UK Investment Chapter does not include ISDS, the clause would have no benefit because its purpose is to expand the scope of ISDS.

4.10 Exclusions and Exceptions

States often agree to exclude certain government measures from investment agreements or PTAs. These exclusions determine the scope of treaty protection and protect states' right to regulate in certain policy areas without incurring liability.[258] Because they release states from liability, states can rely on exceptions as defences against liability. States may exclude measures from all or part of the agreement and may also choose to allow only exclusions necessary to achieve certain policy objectives (for example, protecting the environment). Exclusions may be general or target specific sectors or policy areas. CETA, CUSMA, and CPTPP, provide exclusions within their investment chapters and general exclusions that apply to the PTA more broadly. There are three main types of exclusions: security exclusions, specific exclusions including existing or future measure exclusions, and general exceptions.

[258] Andrew Newcombe & Lluís Paradell, "Defences and Exceptions" in *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 484.

4.10.1 Security Exceptions

Security exceptions allow states to exclude measures from treaty protection if those measures are necessary to protect the state's essential security interests. Security provisions are broad and likely self-judging, meaning that states determine for themselves whether measures are necessary to protect their security interests.[259] These exceptions are self-judging because a state can adopt a security measure "that it considers necessary to protect its essential security interests."[260]

A WTO Panel recently held that the security exceptions under GATT Article XXI are "not totally 'self-judging.'"[261] However, the Panel also held that the party invoking Article XXI has broad discretion to determine whether "it considers" the measure necessary to protect its essential security interests, provided the measure is connected to an identified international emergency.[262] Even if national security exceptions in PTAs are not totally self-judging, they never-the-less provide significant protection for states' regulatory freedom in relation to national security.[263]

CUSMA and CPTPP follow the US 2004 Model BIT's broad national security exclusion, which exempts any measures which the state itself "considers necessary … for the protection of its own essential security interests."[264] The broad, self-judging language of these provisions is similar to GATT Article XXI. However, the scope of GATT Article XXI is more limited than the scope of national security exceptions in CUSMA and CPTPP because it is limited to certain types of measures.[265] The GATT limits security exceptions to measures related to fissionable materials,

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[259] *Ibid* at 492.
[260] CETA, art 28.6; GATT, art XXI.
[261] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (adopted 5 April 2019) at para 7.102; GATT, art XXI(b).
[262] *Ibid* at para 7.145.
[263] Newcombe & Paradell, *supra* note 258 at 492.
[264] *Ibid* at 489; CUSMA, art 32.2; CPTPP, art 29.2.
[265] GATT, art XXI(b)(ii); see CETA, art 28.6.

the arms trade, or measures taken in times of war.[266] CUSMA and CPTPP do not restrict security exceptions in this way.

4.10.1.1 Prediction Canada and the UK Will likely Agree to Include Security Exceptions

Canada's recent practice has been to include national security exemptions in its PTAs.[267] CETA for example includes a security exception that is almost identical to GATT Article XXI,[268] which is consistent with Canada's Model FIPA.[269] The security exceptions in CETA, CUSMA, and CPTPP all apply to the entire PTA, including the Investment Chapters. Given that national security exclusions protect sovereignty and freedom to regulate, both Canada and the UK are likely to adopt a national security exception that applies to the entire PTA and that uses language at least as strong as CETA.

4.10.2 Specific Exclusions

States can agree to exclude specific sectors or measures from the application of all or part of the PTA or investment agreement. Under the Investment Chapters in CETA, CPTPP, and CUSMA, the parties agreed to exclude both specific industries and types of measures. In those agreements, the parties also agreed to exclude specific sectors and measures from the scope of the entire PTA.

[266] GATT, art XXI(b).
[267] Newcombe & Paradell, *supra* note 258 at 489.
[268] CETA, art 28.6.
[269] Canada Model FIPA 2004, *supra* note 167, art 10.4.

4.10.2.1 Specific Exclusions from Investment Chapters: Exceptions and Reservations

In each of CETA, CPTPP, and CUSMA, the parties included an "Exceptions and Reservations" of "Non-Conforming Measures" provision within each agreement's Investment Chapter.[270] These provisions exclude specific measures from the application of all or part of the Investment Chapters. For example, CETA excludes measures specified in the annexes from application of any of Articles 8.4 to 8.8 (Market Access, MFN, National Treatment, and Boards of Directors). These provisions exclude specified existing and future measures in certain policy areas set out in annexes.[271] They also exclude any measures relating to specified sectors (also set out in annexes), to government procurement, or subsidies. Government procurement and subsidies are not, however, excluded from performance requirements (CETA Article 8.5).

In determining exclusions from the application of CETA, both the federal and provincial and territorial governments specified the sectors to be excluded and the types of provisions to be excluded. The Federal Government excludes, for example, existing measures such as the *Investment Canada Act* under Annex I.[272] Under Annex II, the Government excludes specific sectors from future measures. For example, it excludes Aboriginal Affairs from each of Articles 8.4 through 8.8; it also excludes Financial Services but only from Articles 8.6 and 8.7.[273]

4.10.2.2 Specific Exclusions from the Scope of the Investment Chapter

The parties can also agree to specifically exclude sectors from application of the entire Investment Chapter. In CETA, the parties agreed to exclude air services and related industries (e.g., aircraft repair) as well as specific actions carried about in the exercise of governmental

[270] CETA, art 8.15; CUSMA, art 14.12; CPTPP, art 9.12.
[271] CETA, annexs I-II.
[272] *Supra* note 168.
[273] CETA, arts 8.4—8.8.

authority.[274] CETA also excluded audio-visual services for the EU and cultural industries for Canada.[275] CUSMA and CPTPP do not exclude specific sectors from the application of their Investment Chapters, though these agreements do exclude sectors from the PTA more generally. Canada will likely seek to exclude cultural industries from the application of the proposed investment chapter in much the same way as it excluded cultural industries from the application of the investment chapter in CETA.

Parties can also exclude measures more broadly by excluding specific types of measures or measures relating to specified sectors from all or part of the PTA. In each of CETA, CUSMA, and CPTPP, the Parties exclude some types of tax measures from the application of the PTA. Tax exclusions are similar to national security measures, although they are not self-judging. The Parties to a Canada-UK PTA will likely also exclude tax measures.

Specific exclusions give parties a complete defence to treaty liability when they implement measures which violate the treaty's provisions. While exclusions offer States a defence against liability, they must demonstrate that the measures at issue fall within the scope of the exclusion.[276] For example, Canada successfully relied on specific exclusions defences in *UPS v Canada,* where they relied on the cultural industries and government procurement exceptions.[277] Given Canada's success with specific exclusions in the past, Canada is likely to seek to include specific exclusions in future investment agreements.

[274] CETA, art 8.2(2).
[275] CETA, art 8.2(3).
[276] Newcombe & Paradell, *supra* note 258 at 488.
[277] *United Parcel Services v Canada*, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) at 136, 170, 172.

4.10.2.3 Canada and the UK Will Likely Include Specific Exclusions Similar to CETA

The "Exceptions and Reservations" provisions in CETA, CPTPP, and CUSMA are substantially similar. CETA differs in one important way, which is that it permits exclusions from the Market Access provision and allows parties to derogate from specific provisions if the measures at issue would comply with the TRIPS Agreement.[278] The parties will likely not deviate from CETA, especially because a Canada-UK PTA will likely also include a Market Access Provision.

A Canada-UK PTA will likely include specific exclusions similar to CETA. Given the efficacy of specific exclusions, Canada will likely seek to include specific exclusions like those in CETA. In addition, the UK will likely seek to include exclusions because they grant states regulatory freedom. For the purposes of this paper, we assume that Canada will seek to exclude the same subjects as CETA. But predicting which sectors the UK will seek to exclude, however, is more difficult—particularly considering the absence of a recent UK investment Agreement which could act as a precedent. As such, we do not include the annexes in our draft provisions.

4.10.3 General Exceptions

General exceptions exclude government measures in identified policy areas from treaty application. These provisions are usually modelled on, or simply incorporate by reference, GATT Article XX or GATS Article XIV.[279] Under the GATT and GATS, general exclusions allow states

[278] Agreement on Trade-Related Aspects of International Property Rights, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 299 (entered into force 15 April 1994) [TRIPS].
[279] General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 187 (entered into force 15 April 1994) [GATT 1994]; General Agreement on Trade and Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 190 (entered into force 15 April 1994) [GATS].

adopt measures which do not comply with other treaty provisions. In this way, they protect states' right to regulate and provide states with potential defences to liability under the agreements.

While most investment agreements do not include general exceptions provisions, Canada habitually includes these provisions in its investment agreements.[280] The Canadian Model FIPA includes language analogous to GATT Article XX, allowing state parties to implement measures necessary to protect, for example, human, animal, or plant life or health.[281] General exception provisions are also more common in PTAs, and are found in all of CETA, CPTPP, and CUSMA. However, of the three, only CETA applies general exceptions to its Investment Chapter—general exceptions do not apply to the investment chapters in CPTPP or CUSMA.

CETA incorporates GATT Article XX by reference for Articles 8.4 through 8.8 of the Investment Chapter.[282] CETA then imports most of the content of GATS Article XIV in relation to the same articles in the Investment Chapter. Other countries also apply general exceptions to investment chapters in PTAs: for example, the Japan-Singapore Economic Partnership Agreement (2002) incorporates the language of GATT Article XX and applies it to investments and investors.[283] And, similar to CETA, the China-New Zealand PTA incorporates both GATT Article XX and GATS Article XIV in relation to investments.[284]

The effect of general exceptions on investment agreements is unclear. There are two possible interpretations. First, general exceptions are intended to grant states additional regulatory freedom. Following WTO jurisprudence, states should be able to rely on general exceptions as

[280] Newcombe & Paradell, *supra* note 258 at 500; Canada Model FIPA 2004, *supra* note 167, art 10.
[281] Canadian Model FIPA 2004, *supra* note 167, art 10.
[282] CETA, arts 28.3(1), 8.4—8.8.
[283] Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, 13 January 2002 (entered into force 30 November 2002) [Japan-Singapore]; Newcombe & Paradell, *supra* note 258 at 501—02.
[284] Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China, 7 April 2008 (entered into force 1 October 2008) [China-New Zealand]; Newcombe & Paradell, *supra* note 258 at 502.

defences against liability to investors under the treaty.[285] But, the second interpretation is that general exceptions actually limit states' regulatory freedom by explicitly identifying when states can derogate from treaty provisions with the result that flexibility in applying the substantive investor protection standards in the treaty is limited.[286]

Much of the lack of clarity about the effect of general exceptions provisions depends on whether these provisions apply to expropriation or the minimum standard of treatment. This is because investment treaty provisions inherently balance the rights to regulate with investor protections.[287] General exceptions provisions, which ought to militate in favour of the right to regulate, are thus either superfluous or actually restrictive because they oust the balancing inherent in these investment provisions in favour of the specific protection of the general exception provisions. For example, in *Bear Creek v Peru*, the tribunal interpreted general exceptions restrictively.[288]

In *Bear Creek*, Canadian investor Bear Creek brought an action against Peru under the Canada-Peru FTA.[289] Peru denied Bear Creek's application to develop a Silver mine, which Bear Creek disputed as an indirect expropriation which violated the FTA. Peru attempted to rely on the doctrine of police powers, which is a CIL defence which allows states to adopt measures which would violate treaty terms when those measures are necessary to protect public safety. The tribunal rejected Peru's defence because, while the Canada-Peru FTA explicitly stated available exceptions, police powers was not listed as an exception.[290] This restrictive approach demonstrates

[285] Newcombe & Paradell, *supra* note 258 at 503.
[286] *Ibid*. See *Bear Creek Mining Corporation v Peru* (Award) ICSID Case No ARB/14/21 (30 November 2017).
[287] Newcombe & Paradell, *supra* note 258 at 503.
[288] *Bear Creek Mining Corporation v Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) [*Bear Creek*].
[289] Canada-Peru Free Trade Agreement, 29 May 2008 (entered into force 1 August 2009).
[290] *Bear Creek*, *supra* note 288 at para 473.

the risk of including general exceptions: if interpreted exhaustively, exceptions provisions prevent states from relying on non-treaty defences.

Andrew Newcombe criticizes general exceptions provisions in investment agreements for precisely this reason: they lead to uncertainty and can actually undermine their goal of enhancing states' right to regulate.[291] As a result, Newcombe recommends that investment agreements should not include general exclusions.[292] CETA addresses this issue by not applying the general exceptions provisions to expropriation (Article 8.12) and the minimum standard of treatment (Article 8.10). Thus, CETA mitigates the lack of clarity in these provisions.

4.10.3.1 Prediction: Canada and the UK Will Likely Include General Exceptions Similar to CETA

General exceptions are designed to reinforce states' right to regulate. Exclusions grants states regulatory freedom in specified policy areas, allowing states to adopt measures which impact investors in ways that would otherwise violate the terms of investment agreements. But these provisions sometimes have the opposite effect: interpreted restrictively, as in *Bear Creek*, exclusions can limit states' freedom to regulate to only those exceptions specified in the treaty. To prevent tribunals from applying restrictive interpretations, agreements like CETA do not apply general exceptions to certain state obligations in investment agreements.

Canada and the UK share the goal of protecting their regulatory freedom. As such, they will likely agree to include general exceptions provisions which preserve their right to regulate. In order to address the risks of general exceptions, the Parties will likely follow CETA because it mitigates the potential for general exceptions to undermine states' right to regulate in relation to

[291] Andrew Newcombe, "The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?" in *Improving International Investment Agreements*, Armand de Mestral & Céline Lévesque, eds (2012, London: Routledge) 267 at 268.
[292] *Ibid* at 282.

expropriation and FET. If tribunals interpret the CETA general exceptions consistent with WTO jurisprudence, general exclusions sections modelled on CETA would enhance the Parties' freedom to regulate. As a result, the parties are likely to agree to include general exclusions similar to CETA.

4.10.4 Regulatory Freedom Provisions in Investment Chapters

Regulatory Freedom Provisions, sometimes called Interpretative Guides, are similar to general exceptions in that they recognize states' right to regulate in respect of legitimate policy areas. The CPTPP, CUSMA, and CETA include regulatory freedom provisions with hortatory language recognizing states to regulate.[293] However, beyond providing interpretive assistance, these provisions do grant states a defence from treaty liability. The CPTPP and CUSMA include similar provisions which recognize the parties' rights to adopt measures "that it considers appropriate" to ensure investments are "sensitive to environmental, health, safety, or other regulatory objectives."[294] The policy areas are an open list, which permits states to regulate for any "regulatory objectives" that "it considers appropriate." However, these measures must be "otherwise consistent with this chapter."[295] The provision thus fails to operate as an exception because, while it recognizes states right to regulate, it subjects that right to the provisions of the Chapter.[296] In essence, it only reinforces what the Chapter already provides.

While still essentially hortatory, CETA goes somewhat further in recognizing states' right to regulate than CUSMA or CPTPP. CETA incorporates similar language which affirms the parties' rights to regulate in respect of "legitimate policy objectives, *such as* the protection of

[293] CETA, art 8.9; CUSMA, art 14.16; CPTPP, art 9.16.
[294] CUSMA, art 14.16; CPTPP, art 9.16.
[295] CUSMA, art 14.16; CPTPP, art 9.16.
[296] Newcombe & Paradell, *supra* note 258 at 509.

public health, safety, the environment or public morals, social or consumer protection or the promotion or protection of cultural diversity."[297] These other objectives are not defined, making the provision non-exhaustive. The provision in CETA has some "teeth" because it exempts certain measures from application of the Investment Protection Section (Section D) of CETA: the provision states that

> The mere fact that a party regulates, including through a modification of its laws, in a manner which negatively affects an investment or interferes with investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this section.[298]

CETA also includes additional language which excludes violations of investor's expectations and states' decision to withdraw subsidies.

4.10.4.1 Canada and the UK Will Likely Include Regulatory Freedom Provisions Similar to CETA

Article 8.9 of CETA, the Interpretative Guide Provision likely recognizes and protects states' rights to regulate more than similar provisions in CUSMA and CPTPP. As such, Canada and the UK are likely to adopt the text of Article 8.9 of CETA. While still essentially hortatory, Article 8.9 recognizes states' right to regulate. Canada will likely accept this provision as a sufficient recognition of their right to regulate, especially when combined with a general exclusions section elsewhere in a Canada-UK PTA.

[297] CETA, art 8.9(1) [*emphasis added*].
[298] CETA, art 8.9(2).

4.11 Dispute Resolution

How disputes are resolved under investment treaties is contentious. There has been increasing criticism of the traditional Investor-State Dispute Settlement (ISDS) approach, though no clear consensus alternative has emerged.[299] Methods that may be used to resolve disputes include: 1) Traditional ISDS; 2) domestic courts; 3) state-to-state dispute settlement (SSDS); and 4) reformed ISDS.

4.11.1 Traditional ISDS is Unlikely to Be Included in a Canada-UK PTA

Traditional ISDS includes some form of investor-state arbitration (ISA), typically with arbitrators appointed by the investor and the state on an *ad hoc* basis for a particular dispute.[300] However, ISDS has come under increasing criticism for a variety of reasons, including its lack of transparency (both in terms of decision-making and the appointment of arbitrators), lack of arbitrator independence (arbitrators often act is counsel or experts in other ISDS proceedings), its ability to interfere with domestic public policy, and the two-tier system it creates by providing remedies not available to domestic investors.[301] There have also been inconsistencies in the substantive decisions made under ISDS, and , no appellate mechanism in place, there has been no way to ensure the uniform interpretation of provisions.[302] Despite the increased criticism, ISDS provisions overall are quite prevalent, with only 130 out of 2571 IIAs not having some form of ISDS in them, according to the UNCTAD IIA Mapping Project.[303]

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[299] UNCTAD, "Reforming investment dispute settlement: a stocktaking", (2019) IIA Issues Note: International Investment Agreements Issue 1, online: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf.
[300] UNCTAD, *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II* (New York, Geneva: United Nations, 2013) at 13.
[301] Bjorklund, Kryvoi & Marcoux, *supra* note 122 at 7.
[302] "Consistency, efficiency and transparency in investment treaty arbitration" (2018) International Bar Association at 3, online: https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569.
[303] UNCTAD, *supra* note 184.

The UK, for example, has traditionally used ISDS in its agreements, with 106 bilateral agreements signed prior to the Treaty of Lisbon all including some form of ISDS.[304] While the UK government has not made any definitive statements regarding which type of dispute settlement mechanism they would prefer going forward, there is some evidence to suggest they would prefer to avoid ISDS. The UK issued a White Paper on their upcoming planned departure from the EU. In the White Paper, it was stated that "Any arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximise legal certainty…".[305] Several years earlier, during negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP), the UK House of Commons Committee on Business, Innovation, and Skills specifically mentioned ISDS as a mechanism they were not convinced should be included; they instead believed domestic courts in both the US and EU provided adequate protection, and ISDS should only be used if that was demonstrated to be inaccurate.[306]

The UK, as previously mentioned, has also been very rarely challenged through ISDS, and so an argument could be made that concerns regarding ISDS are overstated. However, Canada is a developed nation with sophisticated investors who would be investing much more in the UK than what occurs under their more traditional investment agreements with developing nations, and so there would be more potential for legal challenges in a Canada-UK PTA. Regardless, it is an active political issue in the UK, and no clear stance has been taken by the government on the subject.

Canada's approach to ISDS has varied in recent investment agreements, and it is in the process of updating its model BIT which has not been updated since 2004.[307] A Senate Report

[304] Collins, *supra* note 58 at 3.
[305] Department for Exiting the European Union, *supra* note 177, s 2.10.
[306] House of Commons (UK), Business, Innovation and Skills Committee, *Transatlantic Trade and Investment Partnership* (25 March 2015) at para 54—55, online: https://publications.parliament.uk/pa/cm201415/cmselect/cmbis/804/804.pdf.
[307] Canada Model FIPA 2004, *supra* note 167.

from 2017 provided no clear consensus on how to proceed with dispute resolution, outlined concerns arguments raised in committee both for and against ISDS, and suggested the government should clarify their stance on the issue.[308] In the CUSMA, ISDS was removed from the agreement between Canada-US and Canada-Mexico (though Canada-Mexico may still use the ISDS mechanism found in CPTPP, as both are signatories to that agreement). The Canadian Minister of Foreign Affairs, Chrystia Freeland, made the following comments after finalizing negotiations on the CUSMA:

> The investor-state-dispute resolution system that has allowed companies to sue the Canadian government is also gone between Canada and the United States. Known as ISDS, it has cost Canadian taxpayers more than $300 million in penalties and legal fees. ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment, for example.[309]

Based on this statement, it would appear that Canada would prefer to avoid ISDS in future agreements. However, they also recently agreed to ISDS provisions in CPTPP, suggesting they have some flexibility regarding what type of dispute resolution process they are willing to use.[310]

However, given that both the UK and Canada are developed countries with very similar and well-respected legal systems, and both countries have to some degree expressed their frustration with the *status quo* ISDS, it is reasonable to infer that traditional ISDS is likely not appropriate for a modern Canada-UK PTA. The downside is that investors prefer the inclusion of ISDS, as it is the most accessible venue for enforcing treaty obligations.

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[308] Senate (Canada), Standing Committee on Foreign Affairs and International Trade, *Free Trade Agreements: A Tool for Economic Prosperity* (February 2017) at 33, online: https://sencanada.ca/content/sen/committee/421/AEFA/reports/FreeTradeReport_e.pdf.

[309] Prime Minister's Office, News Release "Prime Minister Trudeau and Minister Freeland speaking notes for the United States-Mexico-Canada Agreement press conference" (1 October 2018), online: https://pm.gc.ca/eng/news/2018/10/01/prime-minister-trudeau-and-minister-freeland-speaking-notes-united-states-mexico.

[310] Government of Canada, News Release "What does CPTPP mean for investment?" (21 February 2018), online: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/investment-investissement.aspx?lang=eng.

4.11.2 Domestic Courts Act as the Primary Venue if ISDS Is Not Included

In some cases, investment agreements have not provided for any investor-state arbitration. In these agreements, disputes must be primarily brought through domestic courts. One drawback of having domestic courts act as the only or primary venue for dispute settlement, is that in both Canada and the UK, courts are unable to apply standards found in the treaty itself if it is not enacted domestically (though they may rely on international treaties to help interpret domestic law).[311]

The inability of investors to enforce treaty obligations through domestic courts, can provide State Parties with greater flexibility regarding public policy, making it an attractive option.[312] If treaty obligations are directly enforceable through ISDS, and domestic law infringes treaty obligations (without falling into an allowable exception), ISDS cases in the past have led to both damages against the State Party, and subsequent changes to domestic public policy.[313] For example, the *Ethyl* case in 1997 under NAFTA, Canada had put in a ban on the import and interprovincial trade of a gasoline additive. Ethyl brought forth a claim in ISDS based on this ban interfering with treaty obligations under NAFTA, leading to a settlement for 19.5M in damages and the Canadian government reversing the ban that had been in place.[314]

While there have been criticisms and concerns regarding ISDS, it can still be preferable to domestic courts if there are concerns regarding the judicial systems of one or both parties. Some domestic legal systems may act with bias regarding disputes that involve their own government, or more generally may not uphold the rule of law in an effective manner.[315] In a bilateral treaty

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[311] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 79; Ruth Sullivan, *Statutory Interpretation* (Toronto, Irwin Law 2016) at 311.
[312] Ciurak, *supra* note 81 at 14.
[313] Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 5.
[314] *Ibid*; *Ethyl Corporation v Canada*, UNCITRAL (NAFTA), Award on Jurisdiction (24 June 1998).
[315] Leon E Trakman "Choosing domestic courts over investor-state arbitration: Australia's repudiation of the status quo" (2012) 35 UNSWLJ 979 at 988.

between two developed nations with very similar legal systems, like Canada and the UK, these concerns should be less of an issue.

Despite the concerns some have for allowing investment disputes to be handled by domestic courts, there have been several examples of recent IIAs without ISDS provisions. As already mentioned, Canada took this approach in the CUSMA recently. Australia, a similar sized developed nation and common law jurisdiction has also foregone ISDS in several agreements. Australia released a policy statement in 2011 discussing the use of ISDS. They repeated many of the common criticisms heard regarding ISDS and indicated that they would not be pursuing ISDS in future agreements.[316] While the subsequent governing party reverted to considering ISDS on a case-by-case basis,[317] their relatively recent agreements with developed nations such as the United States, New Zealand, and Japan do not include ISDS provisions, although their agreements with developing nations generally do.[318] This aligns with an UNCTAD report that suggested foregoing ISDS and relying more on state-to-state dispute settlement and domestic courts if the jurisdictions involved have more respected and qualified judicial systems.[319]

[316] Department of Foreign Affairs and Trade (Australia), "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity" (1 April 2011) at 14, online: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf.
[317] Luke Nottage, "Investor-State Arbitration Policy and Practice in Australia" (27 June 2016) Centre for International Governance and Innovation Investor-State Arbitration Series Paper No 6 at 3, online: https://www.cigionline.org/publications/investor-state-arbitration-policy-and-practice-australia.
[318] *Ibid* at 1.
[319] UNCTAD, "UNCTAD's Reform Package for the International Investment Regime" (2018) Investment Policy Hub at 53, online: https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-.

4.11.3 State-to-State Dispute Settlement (SSDS) Is Inadequate as a Primary Venue to Resolve Disputes

ISDS refers to when private parties can make claims against governments, whereas SSDS refers to when a government is willing to advocate on behalf of a private party so that disputes are settled through a process between the governments that signed the agreement.[320] While there has been increasing criticism of ISDS, SSDS remains a staple in modern investment agreements. According to the UNCTAD IIA Mapping Project, only 16 out of 2571 IIAs do not include some form of SSDS.[321]

To this end, IIAs, including the recently negotiated CETA, CPTPP, and CUSMA, all include some combination of consultations, and the option to proceed with mediations, arbitration, or other dispute resolution methods at the state-to-state level.[322] The requirement for a company to petition their government to take their claim forward acts as a filter against frivolous lawsuits, leaving this as more of an option of last resort and one that is rarely used.[323] This may be seen as beneficial by both Canada and the UK, though investors could have concerns regarding the difficulty in having their petitions heard. As previously mentioned, in ISDS, investors may at times interfere with domestic public policy. Governments must consider diplomatic and political factors, and so may be unwilling to proceed with a claim that could lead to interference with the other State Party's public policy.[324] Though the option for states to negotiate with each other, rather than states

[320] *Ibid* at 52.
[321] UNCTAD, Investment Policy Hub, online: https://investmentpolicyhubold.unctad.org/#iiaInnerMenu.
[322] CPTPP, ch 28; CETA, ch 29; CUSMA, ch 31.
[323] UNCTAD, "Reform Package", *supra* note 319 at 52—53.
[324] Nathalie Bernasconi-Osterwalder, "State-State Dispute Settlement in Investment Treaties" (October 2014) International Institute for Sustainable Development Best Practices Series at 20, online: https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

being bound by arbitrator decisions initiated by private companies, allows for more flexible solutions to disputes as well.

Presumably, if no ISDS provisions were included in the agreement, reliance on SSDS would increase as it would be the sole method for enforcing standards found in the treaty itself. Issues have arisen in some international agreements where SSDS has remained ineffective due to parties refusing to appoint arbitrators, which was seen in a Mexico-US dispute under NAFTA.[325] Including provisions that require a roster to be appointed by both Canada and the UK, with an appointment mechanism in place in case one of the parties opts not to appoint anyone is one way to prevent this type of issue. The Canada-China bilateral investment treaty for example includes a provision that allows the Secretary-General of ICSID to appoint panelists if the parties fail to appoint them.[326]

4.11.4 Reformed ISDS is Becoming Increasingly Popular for Balancing Investor and State Interests

Given the criticisms of investor-state arbitration, there has been growing support for the use of reformed ISDS. A recent Issues Note produced by UNCTAD discussed ways that recent treaties have attempted to reform ISDS, including provisions related to creating a standing tribunal, limiting the scope of ISDS, and improving its procedures.[327] CETA is an example of a recent agreement that includes a mixture of these modern reforms. CETA provides for 15 permanent panelists (rather than *ad hoc* arbitrators), and none would be appointed by investors. Five would be appointed from Canada, five from the EU, and five would be nationals of third-party countries,

[325] Simon Lester, Inu Manak & Andrej Arpas, "Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process" (2019) 18:1 World Trade Rev 133.
[326] Canada-China, art 24.
[327] UNCTAD, "Reform Package", *supra* note 319.

with a random allocation of tribunal members to divisions to hear each case.[328] It also creates an appellate body, which traditional ISDS lacks.[329] CETA limits the application of ISDS as well, restricting it to only certain sections of the investment chapter (e.g. it does not apply to prohibitions on performance requirements).[330]

The UNCTAD Issues Note highlighted 16 "reform elements" that have been included in recent agreements, some of which could be appropriate for a Canada-UK PTA, if some form of ISDS were to be included.[331] One type of reform, which will be discussed more in the "investor obligations" section, is the inclusion of standards for investor conduct which, if not met, preclude the investor from making a claim through ISDS.[332] This could be done by defining the scope of ISDS to only apply in situations where claimants have met obligations set out in the investment agreement.[333] A limited version of investor obligations was seen in CETA, which again is discussed in more detail in the investor obligations section.

Finally, were reformed ISDS to be included in the agreement, there would also be potential to include a provision providing for the future accession to a potential multilateral investment court (MIC), were one to be created. Canada and the EU, after completing negotiations on CETA, agreed to co-host talks to develop a MIC that could be applied to disputes under multiple IIAs.[334] Those in favour of building an investment court system have argued that it would be a permanent body,

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[328] CETA, art 8.27.
[329] CETA, arts 8.27—8.28.
[330] CETA, art 8.18(1).
[331] UNCTAD, "Reform Package", *supra* note 319.
[332] Nathalie Bernasconi-Osterwalder et al, "Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements" (9 January 2018) International Institute for Sustainable Development at 21, online: https://www.iisd.org/sites/default/files/meterial/harnessing-investment-sustainable-development.pdf.
[333] *Ibid*.
[334] "European Union and Canada co-host discussions on a multilateral investment court, International Institute for Sustainable Development" (13 March 2017) International Institute for Sustainable Development, online: https://www.iisd.org/itn/2017/03/13/european-union-and-canada-co-host-discussions-on-a-multilateral-investment-court/.

work transparently, have tenured and qualified judges that are not appointed on an *ad hoc* basis by the parties involved, and would include an appellate body.[335] This would prevent the appointment of arbitrators who also act as counsel (or experts) in other ISDS proceedings. It would also improve the substantive consistency of decisions by having the same tribunal deal with multiple disputes, with an appellate mechanism in place in case concerns of the substantive decision-making still do arise. As a MIC does not currently exist, a Canada-UK PTA cannot be subject to one at the moment. But the door can be left open for one to be applied to this agreement in the future, as was done in CETA.

4.11.5 Prediction: Canada and the UK Will Likely Not Use Traditional ISDS

Given the state of flux that ISDS is currently in, and the fact that neither Canada nor the UK have a clearly stated preference regarding ISDS, we are proposing two options for dispute resolution. We do not believe traditional ISDS would be appropriate, given the growing criticism and concerns it has had, and so believe ISDS should either be left out entirely, or included in a way that has procedural and substantive reforms. The two options we are proposing are as follows:

4.11.5.1 Options 1: No ISDS with Domestic Courts as the Primary Venue for Investor Claims

Based on the growing concerns regarding ISDS, and apparent preference to avoid that route by the UK, one option we recommend is that no ISDS provisions be included in the agreement. Given the well respected and established common law court systems, proceeding with the bulk of disputes through these venues appears to be an appropriate option for a Canada-UK agreement, and aligns with public comments made by both countries. Bilateral investment is already very high

[335] European Commission, "The Multilateral Investment Court Project" (10 October 2018), online: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

between the two countries, with high levels of investment protection despite no historical investment agreement or treaty standards between the two countries.[336] SSDS should also remain an option, as it allows at least one avenue for investors to attempt to enforce treaty standards, though with the need to go through their government which could act as a filter against frivolous lawsuits.

4.11.5.2 Option 2: Improved ISDS with a More Limited Scope of Application

In the alternative, if Canada and the UK feel the need to include some form of ISDS, we recommend a heavily reformed version of ISDS. We would recommend modelling it to some extent on CETA, with an emphasis on limiting the scope of ISDS (e.g. it would not apply to market access, prohibitions on performance requirements, and some other more peripheral investment chapter provisions) and creating investor obligations to encourage adherence to certain standards in the investment agreement by having arbitrators consider these breaches when coming up with a remedy (see the "Investor Obligations" section for further details).

UNCTAD has also discussed provisions that limit both the legal remedies available, and the types of damages that may be awarded, both of which could help reduce concerns regarding ISDS unduly interfering with State Parties.[337] Other reforms related to transparency of proceedings, promoting independence of arbitrators, or even the inclusion of an appellate mechanism could also be included, though we have primarily focused on areas that limit the scope of ISDS and create investor obligations. An appellate mechanism for example may not be preferable in a bilateral treaty, simply due to the extra costs involved.

[336] Global Affairs Canada, *supra* note 105.
[337] UNCTAD, "Reform Package", *supra* note 319.

If reformed ISDS were to be proceeded with, we would also recommend including a provision that provides for the accession to a MIC, were one to be created in the future. This could provide a more cost effective appellate mechanism, if the MIC included one, as it would be funded by a wider range of countries and apply to multiple treaties. It would also allow Canada to continue to promote the idea of a MIC on the international stage, though in this particular agreement the scope of investors abilities to seek recourse against State Parties would still be quite limited compared to traditional ISDS.

4.12 Review of Arbitration Awards

In the dispute resolution section, we recommend one of two options in relation to dispute settlement: 1) no ISDS; or 2) heavily reformed ISDS. Review of arbitration award provisions are more relevant if some form of ISDS is included, but could still apply to SSDS arbitration awards regardless (though these are rarely used). Articles 50-52 of ICSID is one way of provided a limited review mechanism. Article 50 allows the Secretary General of ICSID to help in the interpretation of an award, in cases where the parties dispute the scope and meaning of the award.[338] Article 51 provides that a party can seek a revision of an award, if a material fact was discovered after the award was made, and ignorance of the material fact was not due to negligence.[339] Article 52 on the other hand provides limited grounds for where an award may be annulled. The grounds include the following: 1) the Tribunal was not properly constituted; 2) the Tribunal manifestly exceeded its powers; 3) there was corruption on the part of a member of the Tribunal; 4) there has been a serious departure from a fundamental rule of procedure; or 5) the award failed to state the reasons

[338] Convention on the settlement of investment disputes between States and nationals of other States, 17 October 1966 (as amended 10 April 2006), art 50 [ICSID].
[339] *Ibid*, art 51.

on which it is based.[340] While the grounds are very limited and do not include substantive appeals on errors of law or fact, this provision allows arbitration awards that breach these fairly fundamental procedural and fairness principles to be annulled.

CETA, CPTPP, and CUSMA all include ICSID procedures as part of their ISDS dispute mechanism (though CUSMA's does not apply to Canada).[341] This appears to be a non-controversial set of provisions, and could be included in a Canada-UK PTA, though do not ultimately provide any grounds for appealing on substantive issues such as errors of law or fact. One alternative review mechanism that could be included would be to provide for an entire appellate tribunal in the ISDS process itself, as seen in CETA. An appellate tribunal like the one found in CETA, does provide grounds for appeal on both errors of law and fact, which can help improve consistency in and predictability in ISDS decision-making. [342]

4.12.1 Prediction: Canada and the UK are Unlikely to Include a Bilateral Appellate Mechanism

The drawback of including a full appellate mechanism in a Canada-UK PTA would be the cost, which in a bilateral treaty, may not be as practical an option as it would be in larger multilateral agreement. Setting the standard of including an appellate mechanism in bilateral treaties could lead to the need to fund and manage appellate tribunals for each separate treaty that includes these types of provisions. Instead, if an appellate mechanism is of substantial interest to both parties, pursuing a multilateral investment court could be a more efficient option, as it could be applied to multiple treaties. We therefore recommend that within a Canada-UK PTA itself,

[340] *Ibid*, art 52(1).
[341] CETA, art 8.41(3); CPTPP, art 9.29(9); CUSMA, art 14.D.13(9).
[342] CETA, art 8.28.

references to ICSID procedure that would allow very limited reviews based on procedural issues, but not to include an appellate mechanism for ISDS.

4.13 Articles Promoting Transparency

Canada and the UK are likely to include articles promoting transparency within the Investment Chapter. Transparency in international investment law generally entails "making information and procedures accessible to other parties and the public, holding decision-makers accountable for their decisions, and providing avenues for criticisms or complaints to be heard and redressed".[343] As both Parties have indicated their support of increased transparency in the investment law context under CETA, specifically by incorporating the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Transparency into the agreement, it is likely that they would want to maintain a similar level of protection in the Investment Chapter.[344]

4.13.1 Two varieties of tTansparency: Internal and External

According to Krista Nadakavukaren Schefer, there are two types of transparency that can be addressed in the investment context: internal and external transparency.[345] The rationale for both internal and external transparency provisions is to establish a more open relationship between the host state, its domestic population, and foreign investors.[346]

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[343] Schefer, *supra* note 4 at 535.
[344] CETA, art 8.36.
[345] Schefer, *supra* note 4 at 535.
[346] Shahla F Ali & Odysseas G Repousis, "Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat" (2017) 45:2 Denv J Intl L & Pol'y 225 at 227.

4.13.1.1 Articles Concerning Internal Transparency

Articles concerning internal transparency aim to ensure that the host State is facilitating access to all necessary information for interested and existing foreign investors.[347] For example, provisions focused on internal transparency could encourage the host State to publicize relevant policies and legislation, "ensure administrative consistency, and…offer information/contact points where potential investors can receive information about the process of investing."[348] Both Canada and the UK have included articles concerning internal transparency in their other IIAs.

Canada has included articles concerning internal transparency in both its BITs and PTAs. In Canada's most recent BITs with developing states like Moldova, Hong Kong, and Mongolia, each contains essentially the same article on transparency which is focused on producing more internal transparency.[349] Parties are required to ensure the public availability of "its laws, regulation, procedures, and administrative rulings of general application" on matters covered in the Agreement, as well as requiring Parties to publish proposed measures in advance and provide a "reasonable opportunity" for stakeholders to comment on them.[350] Similarly, in both CPTPP and CETA, Canada has included transparency Chapters which include articles concerning internal transparency that reflect the ones mentioned above.[351]

Alternatively, while the UK alone has not included articles concerning transparency in their previous BITs, they have included them in their IIAs as part of the EU. In the EU-Armenia Agreement, the Parties agreed to an entire Chapter on transparency which included such articles

[347] Schefer, *supra* note 4 at 535.
[348] *Ibid*.
[349] Canada-Moldova; Canada-Hong Kong; Canada-Mongolia.
[350] Canada-Moldova, art 12; Canada-Hong Kong, art 12; Canada-Mongolia, art 12.
[351] CETA, ch 27; CPTPP, ch 26, s B.

concerning internal transparency, ranging from publication guarantees to providing "contact points" for effective communication between the Parties on matters arising from the agreement.[352] Additionally, as previously mentioned, CETA also includes a transparency Chapter which details several articles concerning internal transparency.[353]

4.13.1.2 Articles Concerning External Transparency

External transparency is aimed at increasing the transparency of an agreement's investment dispute settlement mechanism.[354] As the outcome from investment disputes can have specific public consequences, articles concerning external transparency attempt to bring more openness to the process by addressing such issues as the public's access to documents including awards and party submissions, public hearings, and third party participation.[355]

Both Canada and the UK have address external transparency concerns in their previous IIAs. In Canada's most recent preferential trade agreements—CPTPP and CETA—give particular attention to articles concerning external transparency. Both PTAs require the registration of disputes, public hearings, the publication of party submissions and awards, as well as third-party submissions.[356] On the other hand, while the UK most recent BITs with Mexico, Colombia, and Serbia do not contain transparency requirements, the EU's most recent PTAs have all contained articles concerning external transparency. For example, in the EU-Singapore investment agreement, Articles 3.16 and 3.17 provide for transparency of dispute settlement proceeding by,

[352] EU-Armenia, arts 309—310(1).
[353] CETA, ch 27; CPTPP, ch 26, s B.
[354] Schefer, *supra* note 4 at 536.
[355] *Ibid*.
[356] CPTPP, arts 9.23(3)—9.24; CETA, art 8.36.

for example, allowing public access to documents, public hearings, and accepting certain non-disputing party submissions.[357]

4.13.1.3 Amicus Participation

One external transparency mechanism of particular note is *amicus* participation. *Amicus* participation is a legal tool that allows individuals and interest groups to make submissions during an arbitration proceeding to which they are not a direct party, also referred to as third-party submissions.[358] The rationale behind *amicus* participation is that investor-State arbitration proceedings often involve a State's legislation or regulations and, as such, the proceeding's outcome can have an impact on third-parties and therefore they should have the opportunity to participate.[359]

Amicus curiae, or friend of the court, is the legal title given to third-party participants. Their traditional role is to provide the adjudicator with information which as a result affords them a more comprehensive understanding of the particular issue they are adjudicating.[360] In addition, by providing such information to the adjudicator, they will also be more alive to the third-party's underlying interests in the outcome.[361] Though adjudicators may be expressly authorized under an IIA to admit and consider third-party submissions, typically they are not be required to do so.[362] In the Investment Chapter, Canada and the UK are likely in make reference to amicus participation by way of the UNCITRAL Rules of Transparency, as is the case under CETA.[363]

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[357] EU-Singapore, arts 3.16—3.17.
[358] Schefer, *supra* note 4 at 544.
[359] *Ibid*.
[360] *Ibid*.
[361] *Ibid*.
[362] *Ibid*.
[363] CETA, ch 27.

4.13.2 UNCITRAL Rules of Transparency

An important change with respect to external transparency came with the coming into force of the UNCITRAL Rules of Transparency in 2014. The UNCITRAL Rules of Transparency consist of a "set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration," including the publication of proceedings documents, ensuring the "openness of investor-state arbitration hearings," and the participation of both Contracting parties and non-state actors, through *amicus curiae* submissions.[364] However, the UNCITRAL Rules of Transparency only apply to treaties which allow for UNCITRAL arbitration and were signed after April 14, 2014.[365]

In addition, the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (also known as the "Mauritius Convention") allows for UNCITRAL Rules of Transparency on any investor-state arbitration involving a Convention party under the UNCITRAL Arbitration Rules, unless the Contracting Parties agree otherwise. While both Canada and the UK have signed the Mauritius Convention, only Canada has ratified it.[366] Nevertheless, since the Investment Chapter is likely to be modelled from CETA, it is likely to also include CETA's specific adoptions of the *UNCITRAL Rules of Transparency*.

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[364] UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (Vienna: UNCITRAL Publishing, 2014) online: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf; United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014 (18 October 2017) [*Mauritius Convention*]; Ali & Repousis, *supra* note 346 at 242.

[365] UNCITRAL, *Rules on Transparency*, *supra* note 364, art 1(1).

[366] UNCITRAL, "Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)" online: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html; Ali & Repousis, *supra* note 346 at 243.

Under CETA Article 8.36, both Canada and the EU agreed that the *UNCITRAL Rules of Transparency* would apply to their investment arbitration proceedings arising under CETA. Among the external transparency consideration which arise from the *UNCITRAL Rules of Transparency*, it is important to highlight Articles 4 and 5 which allow for submissions based on "the specific issues of fact or law in the arbitration" to be made by "third person(s)" and "non-disputing Party" to the treaty.[367] However, it is important to highlight that the arbitral tribunal has the discretion to accept submissions after consultation with the disputing parties, but it is not required to accept or consider them.[368]

4.13.3 Predictions: *Canada and the UK Will Likely Adopt CETA's Transparency Provisions*

Since both Canada and the UK have signaled their commitment to transparency, independently of CETA, it is likely that the Investment Chapter will contain articles concerning transparency.

4.13.3.1 Internal Transparency

It is likely that Canada and the UK would agree to include the existing articles concerning internal transparency under CETA Chapter 27.[369] Though these articles do not pertain exclusively to investment, they do provide for many of the hallmarks of internal transparency, including the requirement to publish any "laws, regulations, procedures and administrative rulings of general application" pertaining to CETA, as well as commitments to provide information of and respond to questions pertaining to CETA.[370]

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[367] UNCITRAL, *Rules of Transparency*, *supra* note 364, arts 4(1), 5(1).
[368] *Ibid*, art 4(1).
[369] CETA, ch 27.
[370] CETA, arts 27.1—27.2.

4.13.3.2 External Transparency & Amicus Participation

It is likely that Canada and the UK would agree to include external transparency provisions, which are similar to those in the CETA based on the *UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration.* In the alternative, if Canada and the UK decide not include investor-state arbitration in their Investment Chapter, it is possible that certain articles concerning transparency could be adapted to apply to a State-to-State dispute settlement mechanism. A precedent for this exist in the CUSMA's Dispute Settlement Chapter. Under Article 14.D.8(1), notices, written submissions to the tribunal, and the tribunal's order awards and decisions are all required be made public.[371] As well, Article 14.D.8(2), the tribunal is required to conduct their hearings in public and only close them where necessary.[372] While Canada and the UK could attempt to adapt the *UNCITRAL Rules on Transparency* for a State-to-State dispute settlement mechanism, the notable absence of a provision allowing for *amicus* participation under CUSMA suggest that such a novel inclusion may be unlikely.

5 Potentially Innovative Provisions and Related Chapters

As previously mentioned, since Canada and the UK have recently negotiated an investment chapter together under CETA, it provides a starting point from which to base negotiations for a new PTA. Having already come to an agreement on CETA, there should be substantial agreement for the majority of standard provisions found in an Investment Chapter, allowing the Parties more time to negotiate the inclusion of innovative provisions. Recent developments as seen in CUSMA,

[371] CUSMA, art 14.D.8(1).
[372] CUSMA, art 14.D.8(2).

CPTPP, and other international agreements offer examples of where Canada and the UK can expand their investment and related chapters from the terminology found in CETA. Negotiations for a Canada-UK Investment Chapter would likely address innovative provisions such as Accession to a Multilateral Investment Court decisions, Investment Facilitation provisions, and commitments to "progressive provisions" on the environment, labour, and human rights.

5.1 Accession to a (Potential) Future Multilateral Investment Court

Despite not including provisions for a bilateral investment court, both parties may support the creation of a Multilateral Investment Court. Canada has demonstrated clear interest in a MIC, as seen when they hosted discussions along with the EU on the potential for building a MIC.[373] As discussed in the dispute resolution section, an established MIC would be able to address many of the criticisms traditional ISDS has received.

In CETA, Article 8.29 not only provides for the accession to a MIC were one to be established, but also creates the positive obligation on the Parties to "pursue the establishment" of a MIC.[374] A similar provision is found in the recent EU-Vietnam trade and investment agreement.[375] A MIC represents a compromise between providing investor protections with remedies directly available to the investors (i.e. without having to go through SSDS), while also addressing many of the criticisms of traditional ISDS.

Accession to a MIC would be appropriate to include in a Canada-UK PTA, if some form of ISDS were included in the agreement. If no ISDS is included, that would likely be because the

[373] *Supra* note 334.
[374] CETA, art 8.29.
[375] EU-Vietnam, art 3.41.

Parties have determined they do not want to be bound by an international decision-maker, suggesting they would not want a MIC to apply either. As discussed in the dispute resolution section, we believe there are two valid options on how to proceed regarding ISDS. Therefore, we would only recommend including a provision like the one found in CETA regarding accession to a MIC, if the agreement itself already provides for ISDS in some form.

5.2 Investment Facilitation

The Canada-UK Investment Chapter is likely to include articles aimed at providing investment facilitation mechanisms for the Canada-UK economic relationship. According to the OECD, investment facilitation means the use of "tools, policies and processes that foster a transparent, predictable and efficient regulatory and administrative framework for investment" which provide the host State's economy with maximum benefits.[376] By agreeing to articles aimed at investment facilitation, Canada and the UK could jointly and separately develop administrative tools and engage in regulatory cooperation in an effort to attract more investors by making foreign direct investment easier.

5.2.1 Investment Facilitation Aims to Increase Investment Inflow

Agreeing to articles aimed at investment facilitation within the Canada-UK Investment Chapter would likely further their shared objective to increase investment inflows by reducing administrative and regulatory barriers for investors to invest abroad. Both Canada and the UK have an interest in attracting investment. For the UK, Brexit uncertainty has resulted in decrease

[376] Ana Novik & Alexandre de Crombrugghe, "Towards an International Framework for Investment Facilitation," (2018) OECD Investment Insights at 1, online: https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf.

investment, with some firms scaling down or ending UK production, particularly in the area of industrial activity.[377] According to the Economist Intelligence Unit, while foreign direct investment inflows were expected to drop from US$64.7bn in 2017 to below US$20bn in 2019, with a forecasted recovery to below US$60bn by 2023.[378] On the other hand, Canada's real GDP growth slowed from 3% in 2017 to 1.8% in 2018 partly as a result of weak business investment.[379] However, while foreign direct investment flows have been trending down warded since 2013, 2018 saw the highest annual total since 2015 at CAN$51.3bn.[380] According to the Department of Finance's Advisory Council on Economic Growth, foreign direct investment "is important for the productivity and innovation" of the Canadian economy.[381] In early March, the Bank of Canada acknowledged that as household spending falls, economic growth will be dependent on investment.[382] Such a dependency will make it necessary for Canada to maintain foreign investors' interest.[383] As a result, developing articles aimed at investment facilitation would likely be advantageous for Canada and the UK if they produced increase inflows of foreign direct investment.

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[377] Economist Intelligence Unit, "Country Report: United Kingdom", *supra* note 111.
[378] *Ibid*.
[379] Economist Intelligence Unit, "Country Report: Canada", (London: The Economist Intelligence Unit, 2019 at 8 (accessed 31 March 2019).
[380] Trade Commissioner Service (Canada), "FDI Flows into Canada are on the rise" (15 November 2018): https://www.tradecommissioner.gc.ca/canadexport/0003259.aspx?lang=eng; Theophilos Argitis & Erik Hertzberg, "Foreign investment in Canada hits 3-year high despite oil woes" BNN Bloomberg (28 Feb 2019), online: https://www.bnnbloomberg.ca/foreign-investment-hits-3-year-high-in-canada-despite-oil-woes-1.1221740.
[381] Advisory Council on Economic Growth (Canada), "Bringing Foreign Investment to Canada" (20 October 2016) at 2, online: https://www.budget.gc.ca/aceg-ccce/pdf/foreign-investment-investisseurs-etrangers-eng.pdf.
[382] Lynn Patterson, "Economic Progress Report: Sensible Shifts in Household Spending"(7 March 2019) Bank of Canada, online: https://www.bankofcanada.ca/2019/03/economic-progress-report-sensible-shifts-in-household-spending/.
[383] Argitis & Hertzberg, *supra* note 380.

5.2.2 Central Elements of Investment Facilitation

As noted, there are three identifiable elements of an investment facilitation frameworks: tools, policies, and processes.[384] First, various tools could be developed by the host State to assist investors in order to better understand and comply with relevant regulations and procedures. Second, policies could be developed and re-shaped by the host State in an effort to make them more transparent, predictable and effective. Third, processes can be established by the host-State to ensure that these tools and policies actually facilitate investment. Such processes could engage the public, industry and other government agencies to develop "useful and impactful" tools and policies while also adequately providing "monitoring and evaluation of existing tools, mechanisms and policies."[385]

While these three elements require primarily the host State to take actions which encourage investment inflows, international cooperation could be agreed to in order to provide enhanced investment facilitation. Such shared responsibility could be born out of a negotiated provision within an investment agreement, where both parties agree to jointly establish tools, processes, and procedures. As both Canada and the UK are likely aiming to increase investments inflows, it is possible that they could engage in a discussion on including investment facilitation articles within the Investment Chapter.

5.2.3 Brazil: Leading the way with Investment Facilitation

The most notable example of an investment agreement containing investment facilitation-focused articles is Brazil's Cooperation and Facilitation of Investment Agreements ("CFIAs"). CFIAs are a new international investment instrument developed by Brazil which focuses on

[384] Novik & de Crombrugghe, *supra* note 376 at 5.
[385] *Ibid*.

establishing a collaborative economic relationship rather than setting out investor protections and host-State obligations.[386] The language used in the Brazil-Ethiopia CFIA's preamble illustrates this, as it speaks to "creat[ing] and maintain[ing] favourable investments of investors", establishing "a strategic partnership", and "[s]eeking to create a mechanism for technical dialogue and foster government initiatives that may contribute to a significant increase in mutual investment".[387] While Brazil has concluded nine CFIAs with countries like Mexico, Colombia, Ethiopia, and Guyana, only the CFIA with Angola is in force.

Brazil's CFIAs contain both traditional and non-traditional substantive investor protections. While the CFIAs do contain classical investment protection standards like national treatment, most-favoured-nation treatment and expropriation, they do not include an ad-hoc investor arbitration mechanism, but rather a non-traditional State-to-State dispute settlement mechanism, focused on dispute prevention.[388] Notably, Brazil's CFIAs contain two novel investment facilitation mechanisms.

In order to facilitate increased investment flow, Brazil's CFIAs introduce two mechanisms for producing a dialogue between the Contracting Parties: The Joint Committee and the Ombudsperson. A Joint Committee is made up of representatives of both Contracting Parties, tasked with supervising the CFIA's implementation and execution.[389] Under Article 17(4), the Joint Committee's functions and responsibilities includes a variety of investment facilitation measures, such as coordinating "mutually agreed cooperation and facilitation agendas", consulting

[386] Natali Cinelli Moreira, "Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development" (13 September 2018), *Kluwer Arbitration Blog*, online: http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development.
[387] Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, 11 April 2018 (not in force), Preamble [Brazil-Ethiopia]; Though Brazil-Ethiopia is not in force, it is used in this report because it is the only available CFIA that is in English.
[388] Brazil-Ethiopia, arts 5—7.
[389] Brazil-Ethiopia, art 17.

stakeholders on their views with respect to the CFIA's work, as well as resolving "issues or disputes concerning investments of investors of a Contracting Party".[390] In addition, the Ombudsperson is to be established in each Contracting Party's territory to act as a go-between for investors and the State, providing "[i]nformation sharing on investment policies and regulatory issues" as well as "addressing of specific difficulties and complaints from investors."[391] While it remains to be seen whether these provisions are successful in providing investment facilitation, they are a positive step towards shifting the tone of investment agreement negotiations away from exclusively being a protection instrument.

While Brazil's CFIAs are an encouraging example of international agreements with a focus on investment facilitation, it is important to note that Brazil's experience has been limited to agreements with developing countries who may not have the institutional frameworks to provide the type of administrative facilitation that is already taking place in Canada and the UK, by government agencies like the Canadian Trade Commissioner Service and the UK's Department for International Trade.[392] However, Brazil's experience has triggered a wider discussion of investment facilitation, particularly at the WTO.

5.2.4 WTO Initiatives to develop a Multilateral Investment Facilitation Framework

In 2017, a group of WTO members known as the "Friends of Investment Facilitation for Development" (FIFD) began a dialogue about investment facilitation for developing states.[393] The

[390] Brazil-Ethiopia, art 17.
[391] Ministry of Industry, Foreign Trade and Services (Brazil), "Brazil's Experience on Investment Facilitation" MDIC FIFD Workshop on Investment Facilitation Development at slide 6, online: https://www.wto.org/english/tratop_e/invest_e/01_opening_remarks_arabe_neto_brazil.pdf; Brazil- Ethiopia, art 18.
[392] See The Canadian Trade Commissioner Service, online: <: https://www.tradecommissioner.gc.ca/united-kingdom-royaume-uni/index.aspx?lang=eng and the UK Department for International Trade, online: https://www.gov.uk/world/organisations/department-for-international-trade-canada.
[393] WTO, "Investment facilitation: Relationship between trade and investment", MC11 IN BRIEF, online: https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm.

rationale behind this group was that as the WTO has helped to facilitate global trade, perhaps it could do the same for global investment.[394] The FIFD argues that the goal of investment facilitation is to create "a more efficient, predictable and 'investment-friendly' business climate" by reducing the difficulties investor face in "establish[ing] operations, conduct[ing] their day-to-day business, and expand[ing] their investments".[395] In December 2017, both Canada and the EU were party to a WTO Joint Ministerial Statement on Investment Facilitation of Development that called for multilateral cooperation in developing investment facilitation in an effort to strength the global economy In addition, the WTO held a meeting of the Structured Discussions on Investment Facilitation for Development on March 4, 2019, in an effort to develop further elements of a multilateral framework to facilitate investment.[396] As of now, "71 developing and developed" WTO members have agreed to discuss the potential of a multilateral framework on investment facilitation.[397]

However, it is important to stress that investment facilitation is not favoured by all. Opponents to investment facilitation suggest that it may "hinder the ability of members to regulate investment coming into their home markets."[398] While small steps have been taken towards a multilateral investment facilitation agreement at the WTO level, it is possible for countries like

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[394] *Ibid*.
[395] Khalil Hamdani, "Investment facilitation at the WTO is not investment redux" (4 June 2018) International Centre for Trade and Sustainable Development, online: https://www.ictsd.org/opinion/investment-facilitation-at-the-wto-is-not-investment-redux.
[396] WTO, "DG Azevêdo urges open and inclusive discussions on investment facilitation" (4 March 2019), online: https://www.wto.org/english/news_e/spra_e/spra250_e.htm. These included: "1. Improving the transparency and predictability of investment measures; 2. Streamlining and speeding up administrative procedures and requirements; 3. Enhancing international cooperation, information sharing, and the exchange of best practices; 4. Exploring technical assistance and capacity building support, and 5. Looking at how this topic relates to other issues in the global economy – including, for example, the challenges faced by smaller businesses."
[397] WTO, "Joint Ministerial Statement on Investment Facilitation for Development", WT/MIN(17)/59 (13 December 2017); Hamdani, *supra* note 395.
[398] *Supra* note 393.

Canada and the UK, who, in principle, have supported the idea of investment facilitation, to develop their own approach.

5.2.5 Administrative and Regulatory Methods of Investment Facilitation

Canada and the UK are likely to develop articles in their Investment Chapter that focus on two methods of providing investment facilitation: administrative investment facilitation and regulatory cooperation agreements.

5.2.5.1 Agreeing to Cooperate on Administrative Investment Facilitation Mechanisms

An agreement to establish administrative investment facilitation mechanisms could be included in an Investment Chapter. These mechanisms focus on tools, jointly developed by both Parties, which make it easier for investors to receive information and direction on how to appropriately comply with the necessary regulatory requirements for investing in either Canada or the UK.[399] For example, the Parties could develop an online portal where investors may not only acquire information about investing in Canada or the UK, but also potential contact support staff who can guide investors through the process. These sorts of administrative investment facilitation mechanisms are likely to provide the most benefit to small- and medium- size businesses (SMEs), who may not have the resources to access legal advice for all of their investment needs.

Creating joint administrative investment facilitation mechanisms would not likely be difficult, as both Canada and the UK already have developed national frameworks for providing administrative investment facilitation. For example, Export Development Canada provides both information relating specifically to investing in the United Kingdom online, as well as providing

[399] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (Geneva: United Nations Publishing, 2018) at 82—83, online: https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

Market Access Advisors for more specific matters.[400] The UK provides similar support for investors through the Department for International Trade.[401]

One model-article that Canada and the UK could include in their Investment Chapter comes from the Brazil-Ethiopia CFIA. Under Article 22, titled "Cooperation between agencies responsible for investment promotion", both Contracting Parties agreed to "promote cooperation between their investment promotion agencies" in other to facilitate investment in the other Contracting Party's territory.[402] As such, the Investment Chapter could include a similar article which encourages joint cooperation through Export Development Canada and the UK's Department for International Trade in order to enhance the administrative investment facilitation mechanisms of both Parties, with the hope that it will increase investment inflows.

5.2.5.2 Agreeing to Regulatory Cooperation can create Further Investment Facilitation

Investment facilitation can occur as a result of regulatory cooperation. Regulatory cooperation is defined under the CUSMA as "an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection."[403] According to the OECD, the most important benefit States wish to obtain from international regulatory cooperation is increased trade and investment flows.[404] Conversely, a lack of international regulatory cooperation can lead to "unnecessary regulatory divergences" between

[400] Economic Development Canada, online: https://www.edc.ca/en/country-info/country/united-kingdom.html.
[401] UK Department for International Trade, online: https://www.gov.uk/world/organisations/department-for-international-trade-canada.
[402] Brazil-Ethiopia, art 22.
[403] CUSMA, art 28.1.
[404] OECD Regulatory Policy Division, "International Regulatory Co-operation: Adapting rulemaking for an interconnected world" (February 2018) OECD Policy Brief at 2, online: http://www.oecd.org/gov/regulatory-policy/international-regulatory-cooperation-policy-brief-2018.pdf.

States that result in increased costs to "businesses, citizens, and governments."[405] These increased costs are likely to reduced foreign investment as investors encounter "significant costs to identify the relevant regulatory requirements, adapt their production processes to comply with them, and prove conformity in order to sell them abroad."[406]

One way to encourage regulatory cooperation is by including a "Regulatory Cooperation Agreement" ("RCA") as part of a PTA. Though an RCA will not exclusively focus on investment, it is likely to have a positive effect on investment facilitation for both Parties. The RCA's purpose is to reduce the regulatory burden, making it easier for firms to do business both at home and abroad.[407] According to CETA Article 21.3(c), one of the objectives of regulatory cooperation is to "facilitate bilateral…investment in a way that: builds on existing cooperative arrangements; reduces unnecessary differences in regulation; and identifies new ways of working for cooperation in specific sectors".[408] The inclusion of a RCA in the Investment Chapter would likely assist both Canada's and the UK's objective to increase investment inflows by making it easier for investors to expand, establish or move their business operations from the home state to the host state.[409]

CETA and CUSMA are two examples where RCAs have been included in PTAs.[410] Both RCAs provide for the creation of a "Regulatory Cooperation Forum" where the Parties engage in discussions on "a broad range of regulatory measures" with a goal to "improve regulatory planning, promote transparency, and enhance the efficacy of regulations by seeking to reduce duplication and misalignment."[411] The Forum creates a joint effort to resolve "unnecessary

[405] *Ibid* at 3.
[406] *Ibid*.
[407] Treasury Board of Canada Secretariat, "Canada's regulatory cooperation activities" (15 March 2019), online: https://www.canada.ca/en/treasury-board-secretariat/services/regulatory-cooperation/canada-regulatory-cooperation-activities.html.
[408] CETA, art 21.3(c).
[409] OECD Regulatory Policy Division, *supra* note 404. 2.
[410] CETA, art 21; CUSMA, art 28.1.
[411] Treasury Board of Canada Secretariat, *supra* note 407.

regulatory differences, eliminate duplicative requirements and processes, harmonize or align regulations, shape information and experiences, and adopt international standards."[412] For foreign investors, such regulatory cooperation may encourage investment by making it harmonizing regulatory activities such as inspections, certification and protect testing and approvals.[413]

One area where RCAs could be expanded upon is by including a dispute prevention mechanism that encourages regulatory cooperation. Dispute prevention mechanisms encourage Contracting Parties, as well as potentially affected investors, to identify their concerns with a host State's regulation and submit them to be assessed by a third-party, in a non-litigious setting. Traditionally, IIAs have empower investors to challenge a State's domestic regulations if they perceived to be in breach of an investor's treaty protections. For example, investors have successfully challenged Canada's domestic regulations through *ad hoc* investor arbitration on two occasions.[414] Investors may use such treaty-based litigation to encourage the host State to abandon, weaken, or defer a regulatory measure, though there is no clear evidence that States are likely to take "regulatory self-censorship" as a direct result of treaty-based litigation.[415] Nevertheless, in addition to "regulatory chill", *ad hoc* investor arbitration generally creates significant costs, both monetarily and reputationally, that could perhaps otherwise be avoided.[416]

One model for a dispute prevention mechanism is illustrated in the Brazil-Ethiopia CFIA. Under Article 23, in keeping with their intention to develop a "strategic partnership" and use "mechanisms for technical dialogue", a Contracting Party may initiate a "dispute prevention procedure" with the Joint Committee if it "considers…a specific measure adopted by the other

[412] *Ibid*.
[413] *Ibid*.
[414] Sinclair, "Canada's Track Record Under NAFTA Chapter 11", *supra* note 46 at 5, 7.
[415] Joachim Pohl, *supra* note 17 at 61—62.
[416] *Ibid* at 61.

Contracting Party constitutes a breach of this Agreement".[417] The Joint Committee will receive submissions, including any made by an affected investors or third-party, and thereafter prepare a report of its findings.[418] Only after Article 23 has been exhausted will Contracting Parties be allowed to initiate a "final and binding" State-to-State *ad hoc* arbitration.[419] Such mechanisms likely reduce the litigious-nature of the disputes as well as perhaps some of the costs associated with traditional investor-dispute arbitration. However, the Brazil-Ethiopia CFIA is not in-force and as such, no empirical evidence can prove these benefits.

Canada and the UK would likely be open to further regulatory cooperation, as evidenced by each State's domestic efforts to comply with international obligations. For example, proposed regulatory measures in Canada are required, as part of their mandated regulatory impact assessment, to consider whether it complies with Canada's international obligations, including investment agreement obligations.[420] This is also part of the UK's regulatory impact assessment process.[421] As such measures are already beginning implemented domestically, it is likely that Canada and the UK would be open to engaging in deeper regulatory cooperation which could develop best regulatory practices.

5.2.6 Prediction*: Canada and the UK are Likely to Include Investment Facilitation Mechanisms*

The Investment Chapter is likely to include both an article requiring an administrative investment facilitation mechanism be created as well as including an RCA within the larger PTA.

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[417] Brazil-Ethiopia, art 23(1).
[418] Brazil-Ethiopia, preamble, art 23.
[419] Brazil-Ethiopia, art 24.
[420] Treasury Board of Canada Secretariat, "Cabinet Directive on Regulation" (7 September 2018) at 5.2.5, online: https://www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/cabinet-directive-regulation.html.
[421] See the "Regulatory impact assessment (RIA) template on GOV.UK, "Regulatory impact assessment template for government policies", Guidance (update 6 March 2019), online: https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies.

The article requiring an administrative investment facilitation to be established will likely mirror Article 22 in the Brazil-Ethiopia CFIA.[422] The article will require that both Canada and the UK "shall" cooperate through their domestic investment promotion agencies in order to develop administrative investment facilitation mechanisms, like online portals, in order to jointly increase investment inflows to both States.[423] Additionally, such a provision could be added to the article to encourage a joint committee to develop a future "investment facilitation" strategies, modelled from Article 25 of the Brazil-Ethiopia CFIA.[424]

Additionally, Canada and the UK are likely to follow CETA by including an RCA within the larger PTA. Using the "Regulatory Cooperation Forum" as its main vehicle, the Parties could agree to develop best practices that homogenize their respective domestic regulatory measures, making it easier for investors to comply with both regimes. Furthermore, a dispute-prevention mechanism, modelled off Article 23 of the Brazil-Ethiopia CFIA, which would allow a State's regulatory measure to be assessed by a Joint Committee.[425] A provision could be included within the RCA for the Joint Committee to not only assess whether the regulatory measures breaches the Investment Chapter's protections, but to also assess the differences between the impugned measure and the other Parties similar measure, to determine if there a best practice could be developed.

5.3 Investor Obligations

One new area of development is creating investor obligations to affect investor behaviour. Investors do not technically by international law need to meet treaty obligations (or standards), but a treaty can set standards and preclude investors from benefiting from ISDS if they do not meet

[422] Brazil-Ethiopia, art 22.
[423] Brazil-Ethiopia, art 22.
[424] Brazil-Ethiopia, art 25.
[425] Brazil-Ethiopia, art 23.

them.[426] This has already been done in a limited way in CETA, in that treaty arbitration tribunals can deny an investor access to ISDS where the investor has engaged in "fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process".[427]

The International Institute for Sustainable Development (IISD) has developed draft provisions that expand upon this CETA provision, for example precluding investors who are in violation of domestic law, or who do not meet environmental, labour, or human rights standards from using ISDS.[428] These types of obligations would only be included in an investment agreement if some form of ISDS were included, though could be a method to promote Canada's inclusive trade agenda while also limiting the scope of ISDS, which both parties could likely agree to. These provisions can also affect the scope of the Investment Chapter by denying the benefits of the treaty if certain conditions are not met. Draft provisions may also be found in other sources such as the book "Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators" by J. Anthony VanDuzer, Penelope Simons, and Graham Mayeda.[429]

5.3.1 Prediction: Canada and the UK Will Likely Include Investor Obligations

Investor obligations can be used to achieve progressive objectives. Canada is likely to pursue investor obligations to provide "teeth" to its inclusive trade agenda. The UK may be amenable to investor obligations as well, particularly as these provisions recognize state sovereignty and right to regulate. Specifically, we would recommend that arbitrators may: 1) factor

[426] Bernasconi-Osterwalder et al *supra* note 332 at 21.
[427] CETA, art 8.18(3).
[428] Bernasconi-Osterwalder et al *supra* note 332 at 9—11.
[429] J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 292—371.

in relevant breaches by investors to treaty standards or domestic law when determining a remedy, including the quantum of damages to be awarded; and 2) allow Parties to submit counterclaims against investors for damages they received because of the investors breach of the treaty obligations and standards. The treaty standards arbitrators may consider should not be restricted to the investment chapter (e.g. corporate social responsibility – which would further encourage adherence to these voluntary guidelines), but should also refer to standards found in other chapters of the PTA such as those on labour, environment, or human rights. Including these will open investors up to liability, unless they are following treaty standards as well. This should both help reduce the number of investor claims through ISDS, as well as damages awarded against the Parties in certain circumstances.

We do not have predictions for the specific wording or even the precise scope of what investor obligations should cover. The draft Investment Chapter includes examples from the IISD article; however, these have yet to be included in an international agreement and it is unclear how a tribunal would interpret them. Canada and the UK, if they included investor obligations, would likely need to draft new text with clear and precise language, to ensure they would be interpreted by an ISDS tribunal in a predictable manner.

5.4 Related Chapters

According to Nobel-Laurette Joseph Stiglitz, investors have fundamentally altered the original purpose of investment agreements, from investor protection provisions as a *quid-pro-quo* for foreign direct investment to an investors' tool for challenging unfavourable host state regulation in areas like the environment, health and safety.[430] Many modern investment

[430] David Gaukrodger, "The balance between investor protection and the right to regulate in investment treaties: A scoping paper" (February 2017) OECD Working Paper on International Investment at 7, online: https://www.oecd-

agreements, especially between developed countries, are part of a larger PTA which often include whole chapters on the environment, labour, and human rights.

5.4.1 Environmental Provisions

Environmental protection can be achieved in a number of ways in a PTA. As discussed above, it can be incorporated into the general exceptions provision of the investment chapter.[431] Alternatively, environmental concerns may be given their own chapter in the PTA. Each of CETA, CUSMA, and CPTPP include Environmental Chapters.[432] All three of these agreements obligate the parties to enforce existing environmental laws and prevent them from reducing environmental protections for the purposes of attracting trade or investment.[433]

Environmental chapters may also include a variety of soft and hard obligations, though these differ between each agreement. For example, CUSMA has provisions related to air quality and marine litter which are not found in CPTPP or CETA.[434] CPTPP and CUSMA both include provisions relating to protection of the marine environment from ship pollution and protection of the ozone layer not found in CETA.[435] CETA on the other hand has fewer obligations, and recognizes the right of parties to set their own environmental law and policy.[436] This could be a point of contention between Canada and the UK, as Canada would likely be looking to include higher standards such as those in CUSMA or CPTPP to promote its inclusive trade agenda, whereas the UK would likely see these as infringing on their regulatory space.

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ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en.

[431] See, *supra* section 5.10.
[432] CETA, ch 24; CUSMA, ch 24; CPTPP, ch 20.
[433] CETA, art 24.5; CUSMA, art 24.4; CPTPP, art 20.3.
[434] CUSMA, arts 24.11—24.12.
[435] CUSMA, arts 24.9-24.10; CPTPP, arts 20.5-20.6.
[436] CETA, art 24.4.

Another way to potentially raise environmental standards would be to place environmental obligations on investors through provisions in the Investment Chapter. As discussed in the Investor Obligation Section (section 5.3), failure to adhere to investor obligations may affect remedies awarded, or even allow for counterclaims by the Parties.

Environmental standards found in a separate chapter are also typically subject to a separate dispute resolution mechanism. As seen in CUSMA, CPTPP, and CETA, all three include dispute resolution mechanisms available to State Parties when it comes to obligations in the environmental chapter. These mechanisms are in addition to the general state-to-state dispute resolution that is available to the Parties as well.[437] This may alleviate some of the UK's potential concerns regarding higher standards affecting their regulatory space, as the lack of applicable ISDS mechanism would reduce the likelihood of claims against them for failure to adhere to standards found in an environmental chapter.

5.4.1.1 Prediction: The Environment Chapter Will Likely Go Beyond CETA

The environmental chapter would likely be closer in nature to CUSMA than CETA, in accordance with Canada's inclusive trade agenda. Soft language, rather than hard obligatory language, could be used if there is disagreement over the inclusion of the additional environmental standards found in CUSMA. This would allow for both additional specific environmental standards to be promoted (for example, protections against marine pollution), while also respecting parliamentary sovereignty. Continuing with the standard of ISDS not applying to the environmental chapter would also align with the motivations of the Parties. Finally, investor

[437] CUSMA, art 24.32; CPTPP, art 20.23; CETA, art 24.16.

obligations could be included as another way to raise environmental standards, without creating liability for the Parties themselves.

5.4.2 Labour Standards

Including provisions related to labour standards specifically within an investment chapter is not something that is seen in any of CETA, CPTPP, or CUSMA. The only mention of labour within any of their investment chapters is found in CUSMA, where Article 14.17 encourages the promotion of corporate social responsibility (i.e. voluntary standards), which includes labour in its list of areas the standards should address.[438] CETA to some extent carved out the ability to regulate in pursuit of legitimate policy objectives, which could likely be applied to labour standards (though they are not specifically mentioned).[439]

Separate chapters on labour, within these broader preferential trade agreements, are found in all three of CETA, CPTPP, and CUSMA. These chapters all refer to International Labour Organization standards and state that it is inappropriate to reduce labour standards for the purpose of encouraging investment (or trade).[440] CUSMA takes it one step further than both CETA and CPTPP, by including obligatory language related to eliminating discrimination in the workplace (with specific reference to sexual orientation, gender identity, pregnancy, etc), and increased protections for migrant workers, which are to be included in domestic policies and law.[441]

CETA, CPTPP, and CUSMA also all limit their remedies for labour provisions in the labour chapter to SSDS (either described within the chapter itself, or in each agreements respective

[438] CPTPP, art 14.17.
[439] CETA, art 8.9.
[440] CETA, arts 23.3—23.4; CUSMA, arts 23.1—23.4; CPTPP, arts 19.1—19.4.
[441] CPTPP, arts 23.8—23.9.

dispute resolution chapter), with remedies not directly available to private parties.[442] They require that panelists have specific knowledge related to labour law, to ensure the appropriate expertise is included in the dispute resolution process.[443] The Canadian Labour Congress has criticized this as providing limited recourse, unlike other disputes related to investment that may proceed through ISDS.[444] However, providing easily accessible recourse to private parties to affect public policy decisions (such as labour standards) as previously discussed does not appear to be a priority for the UK or Canada.

5.4.2.1 Prediction: The Parties Will Likely Include a Labour Chapter

Regarding labour standards in a Canada-UK agreement, both countries have fairly robust domestic laws regarding labour standards already, and so including more modern terminology similar to that found in CUSMA should not be particularly controversial for either party to include in a broader preferential trade agreement. Including the terminology found in CUSMA Chapter 23 would align with Canada's inclusive trade agenda.[445] In terms of including labour provisions within an investment chapter itself, promoting corporate social responsibility which is also found in CUSMA should be something both parties can agree to, given that it is only a soft obligation to "encourage" the voluntary use of corporate social responsibility. Finally, carving out regulatory space in pursuit of legitimate policy goals, as seen in CETA Article 8.9, is also something both countries would likely have an interest in, given the concerns that have been raised regarding ISDS and its ability to interfere with public policy.

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[442] CETA, arts 23.11; CUSMA, art 23.17; CPTPP, art 19.15.
[443] CETA, art 23.10(7); CUSMA, art 31.8(3)(a); CPTPP, art 28.9(5).
[444] Canadian Labour Congress, "Canadian and European trade unions: EU not following through with promises on CETA review" (25 September 2018), online: http://canadianlabour.ca/news/news-archive/canadian-and-european-trade-unions-eu-not-following-through-promises-ceta-review.
[445] Ciuriak, *supra* note 81 at 3—4.

5.4.3 Human Rights Standards

Including human rights protections in PTAs is consistent with Canada's inclusive trade agenda. Human rights are a broad concept which includes gender equality, indigenous rights, democratic rights, and others. Labour rights, as discussed above, may also fall within the ambit of human rights. Many PTAs explicitly mention protecting and promoting human rights. This promotion and protection can be included in preambular statements, specific provisions, and full chapters. The language is usually hortatory, exhorting states to pursue goals without imposing consequences for failing to meet the stated goals. The language is hortatory because states are reluctant to relinquish sovereignty over human rights, which are often seen as domestic issues.[446] Some provisions, however, have "teeth" and impose legal obligations.

Canada's inclusive trade agenda specifically targets promoting and protecting human rights in investment agreements and PTAs. Canada sought, for example, to include stand-alone gender and Indigenous chapters in CUSMA, although they were ultimately unsuccessful.[447] Canada will likely find a willing partner in the UK, and a resulting PTA has the potential to include human rights protections. In particular, Canada has pursued including gender and indigenous rights in trade agreements.[448]

While the parties could agree to include other human rights provisions, such as for example, democratic rights or human rights in general, this analysis concentrates on gender and indigenous rights as two likely priorities for Canada in the negotiations. The content of these

[446] Hugh Stephens, "Canada's Progressive Trade Agenda and a Free Trade Agreement with China: Are they Incompatible?" (October 2018) 11:27 University Calgary School of Public Policy Publications 1—13.
[447] Global Affairs Canada, "Address by the Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement" (14 August 2017) https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html.
[448] *Ibid*.

provisions would likely influence the content of any other human rights provisions. For example, if Canada and the UK agree to limit these provisions to merely hortatory language, then they are unlikely to include stronger language in a chapter on, for example, democratic rights.

5.4.3.1 Canada will Likely Negotiate to Include a Gender Chapter

The UK and Canada are likely to agree to include a Gender Chapter. Both countries are developed nations and both countries have announced commitments to advancing gender equality through trade.[449]

With CETA as the starting point, Canada is likely to negotiate to include a chapter protecting gender equality analogous to the Canada-Israel FTA. Canada has included strong protections for gender in recent PTAs. Of the four PTAs that include stand-alone gender chapters, Canada is signatory to two.[450] The update to the Canada-Chile FTA included a gender appendix, the first of its kind, with 7 provisions acknowledging the role of gender in trade and affirming the parties' commitment to protect and promote gender equality domestically.[451]

Canada and Israel went a step further, including a full Gender Chapter in the updated Canada-Israel FTA.[452] This Chapter also goes beyond the Canada-Chile FTA because its provisions are subject to dispute settlement.[453] The Canada-Chile FTA creates binding obligations on Parties, but the Canada-Israel FTA goes further by subjecting those obligations to state-to-state

[449] *Ibid*; House of Commons (Canada) International Trade Committee, *Trade and the Commonwealth: Developing Countries*, Fifth Report of Session 2017-19 at para 69. Online: https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/667/667.pdf.
[450] Canada-Israel Free Trade Agreement, 31 July 1996 (amended 28 May 2018, but not yet in force); Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile, 5 December 1996 (entered into force 5 July 1997) [Canada-Chile]; Chile-Uruguay BIT (2010), 25 March 2010 (entered into force 18 March 2012) [Chile-Uruguay]; Argentina-Chile BIT (1991), 2 August 1991 (entered into force 1 January 1995) [Argentina-Chile].
[451] Canada-Chile, appendix II, ch N.
[452] Canada-Israel, ch 13.
[453] *Ibid*, art 13.6(2).

dispute settlement. The Canada-Israel Chapter is the current gold standard in gender rights.[454] Furthermore, it is an agreement between developed nations. Because of this, the Gender Chapter in the Canada-Israel FTA will likely represent Canada's goal in negotiating with the UK.

Canada accepted lesser protection for gender equality CETA, CUSMA, and CPTPP. But these agreements are not devoid of gender and human rights protections. While lacking a gender chapter, the CETA includes human rights, and specifically gender rights, under the definition of conduct which violates FET in Article 8.10. Specifically, conduct violates FET if it constitutes "targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious beliefs."[455] Including gender rights in the definition of FET gives "teeth" and enforceability to gender equality provisions.

5.4.3.2 Canada Will Likely Negotiate to Include an Indigenous Chapter

Canada is also likely to pursue including an Indigenous Chapter in a Canada-UK PTA. Minister Freeland stated that Canada intended to include an Indigenous Chapter in CUSMA.[456] Canada will likely rely on CUSMA as a starting point for negotiations on Indigenous rights because CETA and the CPTPP are silent on Indigenous protections. While Canada was ultimately unsuccessful in including an Indigenous Chapter, CUSMA does include several specific provisions addressing Indigenous rights. The most powerful provision is a general exclusion for measures to fulfill legal obligations to Indigenous peoples.[457] The general exclusion for Indigenous legal

[454] Alexandre Larouche-Maltais & Barbara MacLaren, *Making Gender-Responsive Free Trade Agreements* (January 2019), The Conference Board of Canada at 27, online: https://www.conferenceboard.ca/temp/c7ae7de1-b6bf-4fcd-9287-2b89d9c580ad/10077_GenderandTrade-RPT.pdf.
[455] CETA, art 8.10.
[456] Global Affairs Canada, "Address by the Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement" *supra* note 447.
[457] CUSMA, art 32.5.

obligations applies to all of the agreement, including the Investment Chapter. Perry Belgarde, National Chief of the Assembly of First Nations, lauded this provision as the strongest provision of its kind in a trade or investment agreement.[458] CUSMA also included other specific provisions protecting Indigenous rights. For example, the Textiles Chapter provides for duty-free treatment of Indigenous handicrafts.[459]

Unlike CUSMA, where each party has significant Indigenous populations, an Indigenous rights Chapter in a Canada-UK PTA would primarily affect Canada and UK investors in Canada. The UK's interest in negotiating an Indigenous Chapter would be to protect UK investors in Canada, because the UK does not acknowledge an Indigenous population. Canada, on the other hand, will seek to protect its right to regulate in respect of Indigenous issues in a way that could disadvantage UK investors. Thus, while this provision primarily affects Canada, it could nevertheless be contentious. As a result, Canada may need to settle for hortatory language or specific provisions with only limited impact on an investment chapter.

5.4.3.3 Prediction: Canada and the UK Will Likely Agree to Include Chapters or Specific Provisions that Promote and Protect Gender Equality and Indigenous Rights

Consistent with its inclusive trade agenda, Canada will likely seek to include chapters that address specific human rights issues in a Canada-UK PTA. Specifically, Canada will likely pursue including a Gender Chapter and an Indigenous Chapter. The UK will likely agree to including a Gender Chapter but will likely resist an Indigenous Chapter. If the UK refuses to agree to full chapters for either issue, Canada will likely negotiate to include provisions that address gender and

[458] Perry Belgarde, "By Including Indigenous Peoples, the USMCA Breaks New Ground" (4 October 2018) Maclean's https://www.macleans.ca/opinion/by-including-indigenous-peoples-the-usmca-breaks-new-ground/.
[459] CUSMA, art 6.2(1).

Indigenous rights, possibly in general exclusions that apply to all or part of the Agreement. Canada will likely also press for provisions with "teeth," that the parties can enforce through dispute settlement.

6 Conclusion

In this paper, we have attempted to provide a fulsome analysis of the likely content of the Investment Chapter in a potential Canada-UK PTA. We conducted an analysis of contextual factors and Party objectives, which we used to predict the provisions related to investment that Canada and the UK would likely agree to include in a Canada-UK PTA.

Based on several contextual factors and considering the Parties' objectives, Canada and the UK are likely to agree to an investment chapter that is substantially similar to that which they adopted under CETA, but with a few alterations and additions. Those provisions which will likely be substantially similar include the MFN, Expropriation, Transfer of Funds, General Exceptions, Market Access, Transparency, and Scope provisions.

Those provisions which will likely change include the Prohibitions on Performance Requirements, Fair and Equitable Treatment provision, and the ISDS provisions. The Prohibition on Performance Requirement provisions would likely mirror those found in CUSMA, as they contain additional prohibitions as well as carve-outs for the sovereign right to regulate. The Fair and Equitable Treatment provision will likely adopt a more restrictive stance to legitimate expectations than CETA. It will likely mirror the CPTTP and CUSMA paragraphs on legitimate expectations. Traditional ISDS will probably not be included, leaving two potential options: 1) no ISDS with protection of investors primarily left to domestic courts; or 2) reformed ISDS with procedural improvements and limitations to its scope. If reformed ISDS were included, there is

also the opportunity to indirectly create investor obligations by having ISDS be conditional upon certain standards being met by the investor, which to some extent is seen in CETA.

Additionally, the Canada-UK Investment Chapter will likely include innovative provisions, which push the boundaries of conventional international investment law. While some of these provisions have been included in past agreements, some could reflect recent innovations, such as the Gender Chapter in the Canada-Israel FTA. While these provisions would relate to investment, they may not be included in the investment chapter but could have their own chapters in the PTA. These include, innovations to ISDS, investment facilitation, and provisions which address the externalities of investment, such as environmental, labour, and human rights provisions.

While it is impossible to determine with absolute certainty the provisions which will be included in the Canada-UK Investment Chapter, we based our predictions on what is known about both parties' interests and objectives in reaching an agreement as well as the broader context of negotiations. In addition to this paper, we construed our predictions as draft provisions, which we include in Appendix I and II below.

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Appendix 1: Draft Canada-UK Investment Chapter

This Appendix contains draft provisions for a Canada-UK Investment Chapter. These draft provisions are based on the research and analysis we conducted. We concluded that the draft Canada-UK Investment Chapter will likely resemble the investment chapter in CETA. Based on the factors we identified, however, Canada and the UK will likely agree to some changes from CETA. Therefore, some provisions from CETA have been replaced, in whole or in part, with provisions from other investment agreements, such as CUSMA and CPTPP, or academic research.

The provisions drawn from CETA and other investment agreements have retained their drafted language in the vast majority of cases. Treaty language consistency is beneficial for states for a number of reasons, according to Professors Wolfgang Alschner and Dimitriy Skougarevskiy.[1] As neither Party has a current model BIT and both Parties have agreed to CETA, we rely on CETA as the textual basis for the provisions we predict will be included in a Canada-UK Investment Chapter. In addition, deviating from established text causes uncertainty for Parties and investors: changing the language can change the legal meaning.[2] Thus, we use CETA as a precedent in the draft provisions except where, as discussed in our report, the parties are likely to depart from CETA. While we included some draft provisions for related chapters, drafting the full content of these chapters fell outside the scope of this project.

[1] Wolfgang Alschner and Dimitriy Skougarevskiy, "Mapping the Universe of International Investment Agreements", 2016:19 J Intl Econ L 561 at 565.
[2] *Ibid*.

Chapter X – Investment

Section A – Scope and Definition

Article X.1 – Definitions[3]

activities carried out in the exercise of governmental authority means activities carried out neither on a commercial basis nor in competition with one or more economic operators;

attachment means the seizure of property of a disputing party to secure or ensure the satisfaction of an award;

confidential or protected information means:

confidential business information; or
information which is protected against disclosure to the public;
in the case of information of the respondent, under the law of the respondent;
in the case of other information, under a law or rules that the Tribunal determines to be applicable to the disclosure of such information;

covered investment means, with respect to a Party, an investment:

a. in its territory;
b. made in accordance with the applicable law at the time the investment is made;
c. directly or indirectly owned or controlled by an investor of the other Party; and
d. existing on the date of entry into force of this Agreement, or made or acquired thereafter;

disputing party means the investor that initiates proceedings pursuant to Section G (Investor-State Dispute Settlement)[4] or the respondent. For the purposes of Section G (State-to-State Dispute Settlement) and without prejudice to Article X.12 (Subrogation), an investor does not include a Party;

disputing parties means both the investor and the respondent;

enjoin means an order to prohibit or restrain an action;

enterprise means an enterprise as defined in Article A.1 (General Definitions)[5] and a branch or representative office of an enterprise;

ICSID means the International Centre for Settlement of Investment Disputes;

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[3] CETA, art 8.1.
[4] Any References to Section G will be removed if the Parties do not agree to include Investor-State Dispute Settlement.
[5] See Appendix II, art A.1, definition of "enterprise."

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington on 18 March 1965;

intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights; and, if such rights are provided by a Party's law, utility model rights;

investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

a. an enterprise;
b. shares, stocks and other forms of equity participation in an enterprise;
c. bonds, debentures and other debt instruments of an enterprise;
d. a loan to an enterprise;
e. any other kind of interest in an enterprise;
f. an interest arising from:
    i. a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources,
    ii. a turnkey, construction, production or revenue-sharing contract; or
    iii. other similar contracts;
g. intellectual property rights;
h. other moveable property, tangible or intangible, or immovable property and related rights; and
i. claims to money or claims to performance under a contract.

For greater certainty, **claims to money** does not include:

a. claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.
b. the domestic financing of such contracts; or
c. any order, judgment, or arbitral award related to sub-subparagraph (a) or (b).

Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment;

investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;

For the purposes of this definition, **an enterprise of a Party** is:

1. an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
2. an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a);

locally established enterprise means a juridical person that is constituted or organised under the laws of the respondent and that an investor of the other Party owns or controls directly or indirectly;

natural person means:

a. in the case of Canada, a natural person who is a citizen or permanent resident of Canada; and
b. in the case of the United Kingdom, a natural person who is a citizen or permanent resident of the United Kingdom;

A natural person who is a citizen of Canada and who is also a citizen of the United Kingdom is deemed to be exclusively a natural person of the Party of his or her dominant and effective nationality.

A natural person who is a citizen of the United Kingdom or is a citizen of Canada, and is also a permanent resident of the other Party, is deemed to be exclusively a natural person of the Party of his or her nationality or citizenship, as applicable;

New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958;

non-disputing Party means Canada, if the United Kingdom is the respondent, or the United Kingdom, if Canada is the respondent;

respondent means Canada or the United Kingdom;

returns means all amounts yielded by an investment or reinvestment, including profits, royalties and interest or other fees and payments in kind;

third party funding means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute;

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law; and

UNCITRAL Transparency Rules means the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;

Secretary-General means the Secretary-General of ICSID.

Article X.2 – Scope[6]

1. This Chapter applies to a measure adopted or maintained by a Party in its territory relating to:

    a. an investor of the other Party;
    b. a covered investment; and
    c. with respect to Article X.4 (Performance Requirements), any investments in its territory.

2. With respect to the establishment or acquisition of a covered investment, Sections B (Establishment of Investments) and C (Non Discriminatory Treatment) do not apply to a measure relating to:

    a. activities carried out in the exercise of governmental authority.

3. For Canada, Sections B (Establishment of Investments) and C (Non Discriminatory Treatment) do not apply to a measure with respect to cultural industries.

4. Claims may be submitted by an investor under this Chapter only in accordance with Article X.16 (Scope), and in compliance with the procedures set out in Section G (Investor-State Dispute Settlement). Claims in respect of an obligation set out in Section B are excluded from the scope of Section G. Claims under Section C (Non Discriminatory Treatment) with respect to the establishment or acquisition of a covered investment are excluded from the scope of Section G (Investor-State Dispute Settlement). Section D (Investment Protections) applies only to a covered investment and to investors in respect of their covered investment.

Section B – Establishment of Investments

Article X.3 – Market Access[7]

1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the

[6] CETA, art 8.2.
[7] CETA, art 8.4.

territory of a national, provincial, territorial, regional or local level of government, a measure that:

a. imposes limitations on:
    i. the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test;
    ii. the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
    iii. the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
    iv. the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or
    v. the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or
b. restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.

2. For greater certainty, the following are consistent with paragraph 1:

    a. a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure;
    b. a measure requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition, for example in the fields of energy, transportation and telecommunications;
    c. a measure restricting the concentration of ownership to ensure fair competition;
    d. a measure seeking to ensure the conservation and protection of natural resources and the environment, including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban;
    e. a measure limiting the number of authorisations granted because of technical or physical constraints, for example telecommunications spectrum and frequencies; or
    f. a measure requiring that a certain percentage of the shareholders, owners, partners, or directors of an enterprise be qualified or practice a certain profession such as lawyers or accountants.

Article X.4 – Performance Requirements[8]

[8] CPTPP, art 9.10.

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:

    a. to export a given level or percentage of goods or services;
    b. to achieve a given level or percentage of domestic content;
    c. to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
    d. to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;
    e. to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;
    f. to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;
    g. to supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market;
    h.
        i. to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; or
        ii. that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; or
    i. to adopt:
        i. a given rate or amount of royalty under a licence contract; or
        ii. a given duration of the term of a licence contract,

    in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future licence contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the licence contract is concluded between the investor and a Party.

2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:

    a. to achieve a given level or percentage of domestic content;
    b. to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

c. to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment; or
d. to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings.

3.

a. Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
b. Paragraphs 1(f), 1(h) and 1(i) shall not apply:
    i. if a Party authorises use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
    ii. if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after a judicial or administrative process to be anticompetitive under the Party's competition laws.
c. Paragraph 1(i) shall not apply if the requirement is imposed or the commitment or undertaking is enforced by a tribunal as equitable remuneration under the Party's copyright laws.
d. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
    i. necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
    ii. necessary to protect human, animal or plant life or health; or
    iii. related to the conservation of living or non-living exhaustible natural resources.
e. Paragraphs 1(a), 1(b), 1(c), 2(a) and 2(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
f. Paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 1(i), 2(a) and 2(b) shall not apply to government procurement.
g. Paragraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

h. Paragraphs (1)(h) and (1)(i) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

4. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement, or enforcing a commitment or undertaking, to employ or train workers in its territory provided that the employment or training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its territory.

5. For greater certainty, paragraphs 1 and 2 shall not apply to any commitment, undertaking or requirement other than those set out in those paragraphs.

6. This Article does not preclude enforcement of any commitment, undertaking or requirement between private parties, if a Party did not impose or require the commitment, undertaking or requirement.

Section C – Non Discriminatory Treatment

Article X.5 – National Treatment[9]

1. 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.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada or the UK, other than at the federal level treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of Canada in its territory and to investments of such investors.

3. The treatment accorded by a Party under paragraph 1 means, treatment no less favourable than the most favourable treatment accorded, in like situations, by the government to investors of the other Party in its territory and to investments of such investors.

Article X.6 – Most Favoured Nation[10]

[9] CETA, art 8.6.
[10] CETA, art 8.7.

1. 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.[11]

2. For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada or the United Kingdom, other than at the federal level, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of a third country.

3. Paragraph 1 does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results of or work done by those accredited services and service suppliers.

4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

Section D – Investment Protection

Article X.7 – Investment and Regulatory Measures[12]

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Chapter.

[11] CPTPP, art 9.4, n 14: For greater certainty, whether treatment is accorded in “like circumstances” under Article X.6 (National Treatment) or Article X.5 (Most-Favoured-Nation Treatment) distinguishes between investors or investments on the basis of legitimate public welfare objectives.
[12] CETA, art 8.9.

3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy:
    a. in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
    b. in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,

   does not constitute a breach of the provisions of this Chapter.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.

Article X.8 – Treatment of Investors and of Covered Investments[13]

1. 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 and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

    a. denial of justice in criminal, civil or administrative proceedings;
    b. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
    c. manifest arbitrariness;
    d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
    e. abusive treatment of investors, such as coercion, duress and harassment; or
    f. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review and, upon agreement of both parties, revise the content of the obligation to provide fair and equitable treatment.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to a covered investment as a result.

5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.

[13] CETA, art 8.10; except for para 4 which is CUSMA, art 14.6(4).

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

Article X.9 – Compensation for Losses[14]

Notwithstanding Article X.15.5(b) (Denial of Benefits), each Party shall accord to investors of the other Party, whose covered investments suffer losses owing to armed conflict, civil strife, a state of emergency or natural disaster in its territory, treatment no less favourable than that it accords to its own investors or to the investors of a third country, whichever is more favourable to the investor concerned, as regards restitution, indemnification, compensation or other settlement.

Article X.10 – Expropriation[15]

1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except:

    a. for a public purpose;
    b. in accordance with due process of law;
    c. in a non-discriminatory manner; and
    d. on payment of prompt, adequate and effective compensation.

    For greater certainty, this paragraph shall be interpreted in accordance with Annex X-A (Expropriation).

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely

[14] CETA, art 8.11.
[15] CETA, art 8.12.

convertible currency accepted by the investor.

4. The affected investor shall have the right, under the law of the expropriating Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the TRIPS Agreement.

6. For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement and Chapter G (Intellectual Property), do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement or Chapter G (Intellectual Property)[16] does not establish an expropriation.

Article X.11 – Transfers of Funds[17]

1. Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay in a freely convertible currency and at the market rate of exchange applicable on the date of transfer. Such transfers include:

    a. contributions to capital, such as principal and additional funds to maintain, develop or increase the covered investment;
    b. profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the covered investment;
    c. proceeds from the sale or liquidation of the whole or a part of the covered investment;
    d. payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement;
    e. payments made pursuant to Articles X.9 (Compensation for Losses) and X.10 (Expropriation);
    f. earnings and other remuneration of foreign personnel working in connection with an investment; and
    g. payments of damages pursuant to an award issued under Section G (Investor-State Dispute Settlement).

[16] Drafting the full content of an Intellectual Property Chapter fell outside the scope of this project. We did not include a draft Intellectual Property chapter.
[17] CETA, art 8.13.

2. A Party shall not require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party.

3. Nothing in this Article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws[18] relating to:

    a. bankruptcy, insolvency or the protection of the rights of creditors;
    b. transfers between related financial institutions;
    c. issuing, trading or dealing in securities or derivatives[19];
    d. criminal or penal offences;
    e. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; and
    f. the satisfaction of judgments in adjudicatory proceedings.

Article X.12 – Subrogation[20]

If a Party, or an agency of a Party, makes a payment under an indemnity, guarantee or contract of insurance that it has entered into in respect of an investment made by one of its investors in the territory of the other Party, the other Party shall recognise that the Party or its agency shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment. These rights may be exercised by the Party or an agency of the Party, or by the investor if the Party or an agency of the Party so authorises.

Section E – Investment Facilitation

Article X.13 – Investment Promotion[21]

1. The Parties shall promote cooperation between their investment promotion agencies in order to facilitate investment in the territory of the other Party.

2. Without restricting the term "investment promotion agencies", it includes:

    a. Export Development Canada; and
    b. Department for International Trade.

[18] CUSMA, art14.9(5) n 11: For greater certainty, this Article does not preclude the equitable, non-discriminatory, and good faith application of a Party's law relating to its social security, public retirement, or compulsory savings programs.
[19] CUSMA, art 14.9(5)(b).
[20] CETA, art 8.14.
[21] Brazil-Ethiopia, art 22.

Section F – Reservations and Exceptions

Article X.14 – Reservations and Exceptions[22]

1. Articles X.3 (Market Access) through X.6 (Most Favoured Nation) do not apply to:

    a. an existing non-conforming measure that is maintained by a Party at the level of:
        i. a national government, as set out by that Party in its Schedule to Annex I;[23]
        ii. a provincial, territorial, or regional government, as set out by that Party in its Schedule to Annex I; or
        iii. a local government;
    b. the continuation or prompt renewal of a non-conforming measure referred to in subparagraph (a); or
    c. an amendment to a non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X.3 (Market Access) through X.6 (Most Favoured Nation).

2. Articles X.3 (Market Access) through X.6 (Most Favoured Nation) do not apply to a measure that a Party adopts or maintains with respect to a sector, subsector or activity, as set out by that Party in its Schedule to Annex II.

3. Without prejudice to Articles X.8 (Treatment of Investors and of Covered Investments) and X.10 (Expropriation), a Party shall not adopt a measure or series of measures after the date of entry into force of this Agreement and covered by its Schedule to Annex II, that require, directly or indirectly, an investor of the other Party, by reason of nationality, to sell or otherwise dispose of an investment existing at the time the measure or series of measures become effective.

4. In respect of intellectual property rights, a Party may derogate from Articles X.4.1(f) (Performance Requirements), X.5 (National Treatment), and X.6 (Most Favoured Nation) if permitted by the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement.

5. Articles X.3 (Market Access), X.5 (National Treatment), X.6 (Most Favoured Nation) do not apply to:

    a. procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered

[22] CETA, art 8.15.
[23] We have not included drafts of these annexes because the annexes are sector, industry, and country specific.

procurement" within the meaning of Article H.2 (Government Procurement Chapter - Scope and coverage)[24]; or
b. subsidies, or government support relating to trade in services, provided by a Party.

Article X.15 – Denial of Benefits[25]

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

    a. an investor of a third country owns or controls the enterprise; and
    b. the denying Party adopts or maintains a measure with respect to the third country that:
        i. relates to the maintenance of international peace and security; and
        ii. prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

Section G – Investor-State Dispute Settlement[26]

Article X.16 – Scope[27]

1. Without prejudice to the rights and obligations of the Parties under Chapter I (State-to-State Dispute Settlement)[28], an investor of a Party may submit to the tribunal constituted under this Section a claim that the other Party has breached an obligation under:

    a. Section C (Non Discriminatory Treatment), with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or
    b. Section D (Investment Protection),

[24] Drafting the full content of a Government Procurement Chapter fell outside the scope of this project. We have not included a Government Procurement Chapter.
[25] CETA, art 8.16.
[26] Note that our draft for Section G (Investor-State Dispute Settlement) would only be relevant if Canada and the UK wanted to proceed with some form of ISDS. In our report, we also acknowledged that no ISDS is a very viable option, similar to what is seen in CUSMA. If no ISDS were included, this Section would not be relevant.
This Section pulls elements from both CETA, CPTPP, and recommended draft provisions from IISD. The general aim was to provide for an ISDS system that had similar limits to its scope as seen in CETA (see Scope section, and Annexes on Debt Restructuring, Joint Declarations, etc), but that did not provide for a permanent tribunal + appellate mechanism (i.e. pulled more traditional ISDS elements from CPTPP).
[27] CETA, art 8.18 (except provisions #6-7)
[28] Drafting the full content of a State-to-State Dispute Settlement Chapter fell outside the scope of this project. We did not include a draft State-to-State Dispute Settlement Chapter.

where the investor claims to have suffered loss or damage as a result of the alleged breach.

2. Claims under subparagraph 1(a) with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment.

3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

4. A claim with respect to restructuring of debt issued by a Party may only be submitted under this Section in accordance with Annex X-B (Public Debt).

5. The tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.

6. Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an investor or its investment is alleged by a Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.[29]

7. A Party may initiate a counterclaim against the investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement by the investor.

Article X.17 – Consultations[30]

1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article X.20 (Submission of a Claim to Arbitration).[31] Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4.

[29] Paragraphs #6-7 are based off of wording found in an article by the IISD, "Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements" (2018).
These paragraphs provide arbitrators the power to consider investor obligations and allow Parties to issue counterclaims, which can contribute to a more balanced ISDS process where investors face liability as well.
[30] CETA, art 8.19.
[31] Submission of a Claim to Arbitration section.

2. Unless the disputing parties agree otherwise, the place of consultation shall be:

    a. Ottawa, if the measures challenged are measures of Canada; or
    b. London, if the measures challenged are measures of the United Kingdom.

3. The disputing parties may hold the consultations through videoconference or other means where appropriate, such as in the case where the investor is a small or medium-sized enterprise.

4. The investor shall submit to the other Party a request for consultations setting out:

    a. the name and address of the investor and, if such request is submitted on behalf of a locally established enterprise, the name, address and place of incorporation of the locally established enterprise;
    b. if there is more than one investor, the name and address of each investor and, if there is more than one locally established enterprise, the name, address and place of incorporation of each locally established enterprise;
    c. the provisions of this Agreement alleged to have been breached;
    d. the legal and the factual basis for the claim, including the measures at issue; and
    e. the relief sought and the estimated amount of damages claimed.

    The request for consultations shall contain evidence establishing that the investor is an investor of the other Party and that it owns or controls the investment including, if applicable, that it owns or controls the locally established enterprise on whose behalf the request is submitted.

5. The requirements of the request for consultations set out in paragraph 4 shall be met with sufficient specificity to allow the respondent Party to effectively engage in consultations and to prepare its defence.

6. A request for consultations must be submitted within:

    a. three years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor or, as applicable, the locally established enterprise, has incurred loss or damage thereby; or
    b. two years after an investor or, as applicable, the locally established enterprise, ceases to pursue claims or proceedings before a tribunal or court under the law of a Party, or when such proceedings have otherwise ended and, in any event, no later than 10 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby.

7. In the event that the investor has not submitted a claim pursuant to Article X.20 (Submission of a Claim to Arbitration) within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and

shall not submit a claim under this Section with respect to the same measures.[32] This period may be extended by agreement of the disputing parties.

Article X.18 – Mediation[33]

1. The disputing parties may at any time agree to have recourse to mediation.

2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties, if available, the rules for mediation adopted by the Commission.[34]

3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary-General of ICSID appoint the mediator.

4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.

5. If the disputing parties agree to have recourse to mediation, Articles X.17.6 and X.17.7 (Consultations) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.

Article X.19 – Procedural and Other Requirements for the Submission of a Claim to Arbitration[35]

1. An investor may only submit a claim pursuant to Article X.20 (Submission of a Claim to Arbitration) if the investor:

    a. delivers to the respondent, with the submission of a claim, its consent to the settlement of the dispute by the tribunal in accordance with the procedures set out in this Section;
    b. allows at least 180 days to elapse from the submission of the request for consultations;
    c. has fulfilled the requirements related to the request for consultations;

[32] Reference to the notice requesting determination of the respondent removed (relevant to EU, not Canada-UK).
[33] CETA, art 8.20.
[34] This previously referenced a Committee established under CETA. Both CUSMA and CPTPP similarly establish a "Commission" in a separate Chapter, which among other purposes, can be involved in ISDS. We have not drafted an Administrative Chapter (e.g. CUSMA, ch 30 and CPTPP, ch 27), however the Commission here would perform a similar function. All other references to the Commission refer to the same administrative body.
[35] CETA, art 8.22

d. does not identify a measure in its claim that was not identified in its request for consultations;
e. withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and
f. waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

2. If the claim submitted pursuant to Article X.20 (Submission of a Claim to Arbitration) is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, the requirements in subparagraphs 1(e) and (f) apply both to the investor and the locally established enterprise.

3. The requirements of subparagraphs 1(e) and (f) and paragraph 2 do not apply in respect of a locally established enterprise if the respondent or the investor's host state has deprived the investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling those requirements.

4. Upon request of the respondent, the tribunal shall decline jurisdiction if the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.

5. The waiver provided pursuant to subparagraph 1(f) or paragraph 2 as applicable shall cease to apply:

    a. if the tribunal rejects the claim on the basis of a failure to meet the requirements of paragraph 1 or 2 or on any other procedural or jurisdictional grounds;
    b. if the tribunal dismisses the claim pursuant to Article X.26.4 or Article X.26.5 (Conduct of Arbitration); or
    c. if the investor withdraws its claim, in conformity with the applicable rules under Article X.20.2 (Submission of Claims to Arbitration), within 12 months of the constitution of the division of the tribunal.

Article X.20 – Submission of a Claim to Arbitration[36]

1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by:

    a. an investor of a Party on its own behalf; or

[36] CETA, art 8.23 (wording change from "the Tribunal" to "Arbitration", to be more consistent with CPTPP and because there is no single standing Tribunal).

b. an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.

2. A claim may be submitted under the following rules:

    a. the ICSID Convention and Rules of Procedure for Arbitration Proceedings;
    b. the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply;
    c. the UNCITRAL Arbitration Rules; or
    d. any other rules on agreement of the disputing parties.

3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c).

4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention.

5. The investor may, when submitting its claim, propose that a sole Member of the tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.

6. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the tribunal under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted by the Commission.[37]

7. A claim is submitted for dispute settlement under this Section when:

    a. the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;
    b. the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;
    c. the notice under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or
    d. the request or notice initiating proceedings is received by the respondent in accordance with the rules agreed upon pursuant to subparagraph 2(d).

8. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.

[37] Changed to reflect use of "Commission" instead of CETA Committee.

Article X.21 – Proceedings Under Another International Agreement[38]

Where a claim is brought pursuant to this Section and another international agreement and:

a. there is a potential for overlapping compensation; or
b. the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,

the tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

Article X.22 – Consent to the Settlement of the Dispute by Arbitration[39]

1. The respondent and disputing party consents to the settlement of the dispute by the tribunal in accordance with the procedures set out in this Section.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

    a. Article 25 of the ICSID Convention and Chapter II of Schedule C of the ICSID Additional Facility Rules regarding written consent of the disputing parties; and,
    b. Article II of the New York Convention for an agreement in writing.

Article X.23 – Third Party Funding[40]

1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the tribunal the name and address of the third party funder.
2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

Article X.24 – Conditions and Limitations on Consent of Each Party[41]

[38] CETA, art 8.24.
[39] CETA, art 8.25.
[40] CETA, art 8.26.
[41] CPTPP, art 9.21.

1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the disputing party first acquired, or should have first acquired, knowledge of the breach alleged under Article X.20.1 (Submission of a Claim to Arbitration) and knowledge that the disputing party (for claims brought under Article X.20.1(a)) or the enterprise (for claims brought under Article X.20.1(b))[42] has incurred loss or damage.

2. No claim shall be submitted to arbitration under this Section unless:

    a. the disputing party consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
    b. the notice of arbitration is accompanied:
        i. for claims submitted to arbitration under Article X.20.1(a) (Submission of a Claim to Arbitration), by the disputing party's written waiver; and
        ii. for claims submitted to arbitration under Article X.20.1(b) (Submission of a Claim to Arbitration), by the disputing party's and the enterprise's written waivers

    of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article X.20 (Submission of a Claim to Arbitration).

3. Notwithstanding paragraph 2(b), the disputing party (for claims brought under Article X.20.1(a) (Submission of a Claim to Arbitration)) and the disputing party or the enterprise (for claims brought under Article X.20.1(b) (Submission of a Claim to Arbitration)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the disputing party's or the enterprise's rights and interests during the pendency of the arbitration.

Article X.25 – Selection of Arbitrators[43]

1. Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

[42] Paragraphs 1(a) & (b) of the Submission of a Claim to the tribunal section.
[43] CPTPP Art 9.22.

3. If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the disputing party as the presiding arbitrator unless the disputing parties agree otherwise.

4. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

    a. the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
    b. a disputing party referred to in Article X.201(a) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing party agrees in writing to the appointment of each individual member of the tribunal; and
    c. a disputing party referred to in Article X.20.1(b) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing party and the enterprise agree in writing to the appointment of each individual member of the tribunal.[44]

5. The Commission shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter I (State-to-State Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct[45] to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.

Article X.26 – Conduct of the Arbitration[46]

1. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article X.20.2 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

[44] CPTPP Art 9.22.5, which would have immediately followed this section, was removed due to non-applicability.
[45] Code of Conduct would be defined in Chapter I (State-to-State Dispute Settlement). We did not include a draft Chapter I.
[46] CPTPP, art 9.23.

2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the disputing party may be made under Article X.33 (Awards) or that a claim is manifestly without legal merit.

    a. An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
    b. On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
    c. In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the disputing party may be made under Article X.33 (Awards), the tribunal shall assume to be true the disputing party's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
    d. The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the disputing party's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. For greater certainty, if an investor of a Party submits a claim under this Section,[47] the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

8. A respondent may not assert as a defence, counterclaim, right of set-off or for any other reason, that the disputing party has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

9. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article X.20 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

10. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any comments and issue its decision or award no later than 45 days after the expiration of the 60 day comment period.

[47] Removed reference to Minimum Standard of Treatment - that section of CPTPP is not found in our draft (nor is it in CETA).

11. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article X.33 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article X.29 (Transparency of Proceedings).

12. In the event that a multilateral investment tribunal is developed in the future under other institutional arrangements, the Parties shall consider whether claims under this Section should be subject to that multilateral investment tribunal, and make such transitional arrangements as needed.[48]

Article X.27 – Applicable Law and Interpretation[49]

1. When rendering its decision, the tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the tribunal shall not be binding upon the courts or the authorities of that Party.

3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Commission may issue an interpretation of this Agreement. An interpretation issued by the Commission shall be binding on the tribunal established under this Section. The Commission may decide that an interpretation shall have binding effect from a specific date.[50]

Article X.28 – Discontinuance[51]

[48] Paragraph 12 was added to this section based on CETA Art 8.29, as well as the wording found in paragraph 11 of this same section.
[49] CETA, art 8.31.
[50] Changed to reflect use of "Commission" instead of CETA Committee.
[51] CETA, art 8.35.

If, following the submission of a claim under this Section, the investor fails to take any steps in the proceeding during 180 consecutive days or such period as the disputing parties may agree, the investor is deemed to have withdrawn its claim and to have discontinued the proceeding. The tribunal shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the tribunal shall lapse.

Article X.29 – Transparency of Proceedings[52]

1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.

2. The request for consultations[53], the agreement to mediate, the notice of intent to challenge a Member of the tribunal, the decision on challenge to a Member of the tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules. all such documents will be made publicly available, subject to the redaction of confidential or protected information, by communication to the repository.[54]

3. Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.

4. Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

5. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should be sensitive to disclosed information designated as confidential and protected information so as to only disclose what is necessary to comply with its laws.

Article X.30 – Information sharing[55]

A disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of

[52] CETA, art 8.36; In addition, several of the provisions from CETA - Chapter 27: Transparency are also likely to be included.
[53] Reference to the notice requesting determination of the respondent removed (relevant to EU, not Canada-UK).
[54] CETA. art 8.36(4): Last two sentences added.
[55] CETA, art 8.37.

proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information contained in those documents.[56]

Article X.31 – Expert Reports[57]

Without prejudice to the appointment of other kinds of experts when authorised by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

Article X.32 – Consolidation[58]

1. If two or more claims have been submitted separately to arbitration under Article X.20.1 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

    a. the names and addresses of all the disputing parties sought to be covered by the order;
    b. the nature of the order sought; and
    c. the grounds on which the order is sought.

3. Unless the Secretary-General finds within a period of 30 days after the date of receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three arbitrators:

    a. one arbitrator appointed by agreement of the disputing party;
    b. one arbitrator appointed by the respondent; and
    c. the presiding arbitrator appointed by the Secretary-General, provided that the presiding arbitrator is not a national of the respondent or of a Party of any disputing party.

[56] 8.37.2 removed - referred to EU issues only.
[57] CPTPP, art 9.27.
[58] CPTPP, art 9.28.

5. If, within a period of 60 days after the date when the Secretary-General receives a request made under paragraph 2, the respondent fails or the disputing party fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

6. If a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article X.20.1 (Submission of a Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

    a. assume jurisdiction over, and hear and determine together, all or part of the claims;
    b. assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
    c. instruct a tribunal previously established under Article X.25 (Selection of Arbitrators) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
        i. that tribunal, on request of a disputing party that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the disputing parties shall be appointed pursuant to paragraphs 4(a) and 5; and
        ii. that tribunal shall decide whether a prior hearing shall be repeated.

7. If a tribunal has been established under this Article, a disputing party that has submitted a claim to arbitration under Article X.20.1 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6. The request shall specify:

    a. the name and address of the disputing party;
    b. the nature of the order sought; and
    c. the grounds on which the order is sought.

    The disputing party shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article X.25 (Selection of Arbitrators) shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On the application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article X.25 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceedings.

Article X.33 – Awards[59]

1. When a tribunal makes a final award, the tribunal may award, separately or in combination, only:

    a. monetary damages and any applicable interest; and
    b. restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

2. For greater certainty, if an investor of a Party submits a claim to arbitration under Article X.20.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.

3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules.

4. For greater certainty, for claims alleging the breach of an obligation under Sections C or D[60] with respect to an attempt to make an investment, when an award is made in favour of the disputing party, the only damages that may be awarded are those that the disputing party has proven were sustained in the attempt to make the investment, provided that the disputing party also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.

5. Subject to paragraph 1, if a claim is submitted to arbitration under Article X.20.1(b) (Submission of a Claim to Arbitration) and an award is made in favour of the enterprise:

    a. an award of restitution of property shall provide that restitution be made to the enterprise;
    b. an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
    c. the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic law with respect to the relief provided in the award.

[59] CPTPP, art 9.29.
[60] Reference changed from "Section A", as the sections are different from those found in CPTPP.

6. A tribunal shall not award punitive damages.

7. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

8. Subject to paragraph 9 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

9. A disputing party shall not seek enforcement of a final award until:

    a. in the case of a final award made under the ICSID Convention:
        i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
        ii. revision or annulment proceedings have been completed; and
    b. in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article X.20.2(d) (Submission of a Claim to Arbitration):
        i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
        ii. a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

10. Each Party shall provide for the enforcement of an award in its territory.

11. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the disputing party, a panel shall be established under Article I.7 (Establishment of a Panel)[61]. The requesting Party may seek in those proceedings:

    a. a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
    b. in accordance with Article I.17 (Initial Report), a recommendation that the respondent abide by or comply with the final award.

12. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 11.

13. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

[61] Article I.7 is a reference to the State-to-State Dispute Settlement chapter.

Article X.34 – Enforcement of Awards[62]

1. An award issued pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.

2. Subject to paragraph 3, a disputing party shall recognise and comply with an award without delay.

3. A disputing party shall not seek enforcement of a final award until:

    a. in the case of a final award issued under the ICSID Convention:
        i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
        ii. enforcement of the award has been stayed and revision or annulment proceedings have been completed;
    b. in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article X. 20.2(d) (Submission of a Claim to Arbitration):
        i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
        ii. enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought.

5. A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

6. For greater certainty, if a claim has been submitted pursuant to Article X.20.1(a) (Submission of a Claim to Arbitration), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention.

Article X.35 – Role of the Parties[63]

1. A Party shall not bring an international claim, in respect of a claim submitted pursuant to Article X.20 (Submission of a Claim to Arbitration), unless the other Party has failed to abide by and comply with the award rendered in that dispute.

[62] CETA, art 8.41.
[63] CETA, art 8.42.

2. Paragraph 1 shall not exclude the possibility of dispute settlement under Chapter I (State-to-State Dispute Settlement) in respect of a measure of general application even if that measure is alleged to have breached this Agreement as regards a specific investment in respect of which a claim has been submitted pursuant to Article X.20 (Submission of a Claim to Arbitration) and is without prejudice to Article X.26.2 (Conduct of the Arbitration).[64]

3. Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

Article X.36 – Service of Documents[65]

Delivery of notice and other documents to a Party shall be made to the place named for that Party in Annex X-X (Service of Documents on a Party Under Section B).[66] A Party shall promptly make publicly available and notify the other Parties of any change to the place referred to in that Annex.

Article X.37 – Exclusion[67]

The dispute settlement provisions of this Section and of Chapter I (State-to-State Dispute Settlement) do not apply to the matters referred to in Annex X-C (Exclusions from Dispute Settlement).

Section H: Investor Obligations[68]

Article X.38 – Corporate Social Responsibility[69]

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

[64] This previously referenced the CETA, art 8.38 (Non Disputing Party); that Article was not included, as a similar provision was already found within the Conduct of the Arbitration section.
[65] CPTPP, art 9.30.
[66] This Annex is not included in the draft.
[67] CETA, art 8.45.
[68] Investor Obligations is a new section not found in CETA.
[69] CPTPP, art 9.17

Article X.39 – Investor Obligations[70]

1. Investors and investments shall comply with all laws, regulations, administrative guidelines and policies of the host state concerning the establishment, acquisition, management, operation and disposition of investments.

2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998, as well as by the law in the Host State on labour standards.

3. Investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

4. Investors and their investments shall conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring tax benefits are not reduced through base erosion and profit shifting practices. Investors shall avoid undertaking aggressive tax or other financial practices which have such effects. Investors and their investments shall provide the financial information required by the host state to ensure compliance with the applicable laws.

Annexes to Chapter X (Investment)

Annex X-A Expropriation[71]

The Parties confirm their shared understanding that:

1. Expropriation may be direct or indirect:

    a. direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
    b. indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the

[70] While we predict that investor obligations could form part of a Canada-UK agreement, there is very little precedent from which to draw example provisions. We have included a few example provisions that were developed by the IISD in the article "Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements" (2018). Some of the terminology in the IISD draft provisions is vague and has not been interpreted by tribunals, making it unclear how these provisions would operate in practice. We do not suggest that the provisions we include are sufficient; rather these provisions provide examples of the types of issues that could be included as investor obligations. For additional examples, see J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013) at 292—371.

[71] CETA, Annex 8-A.

investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:

    a. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
    b. the duration of the measure or series of measures of a Party;
    c. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
    d. the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in the 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.

Annex X-B – Public Debt[72]

1. For the purposes of this Annex:

    negotiated restructuring means the restructuring or rescheduling of debt of a Party that has been affected through

    a. a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or
    b. a debt exchange or other similar process in which the holders of no less than 75 per cent of the aggregate principal amount of the outstanding debt subject to restructuring have consented to such debt exchange or other process; and

    governing law of a debt instrument means a jurisdiction's laws applicable to that debt instrument.

2. No claim that a restructuring of debt of a Party breaches an obligation under Sections C and D may be submitted, or if already submitted continue, under Section F if the restructuring is a negotiated restructuring at the time of submission, or becomes a

[72] CETA, Annex 8-B.

negotiated restructuring after such submission, except for a claim that the restructuring violates Article X.5 (National Treatment) or X.6 (Most Favoured Nation).

3. Notwithstanding Article X.19.1(b) (Procedural and Other Requirements for the Submission of a Claim to Arbitration) and subject to paragraph 2, an investor of a Party may not submit a claim under Section G (Investor-State Dispute Settlement) that a restructuring of debt of a Party breaches an obligation under Sections C and D (other than Article X.5 (National Treatment) or X.6 (Most Favoured Nation)) unless 270 days have elapsed from the date of submission by the disputing party of the written request for consultations pursuant to Article X.10.6 (Expropriation).

4. For greater certainty, **debt of a Party** means a debt instrument of any level of government of a Party.

Annex X-C – Exclusions from Dispute Settlement[73]

A decision by Canada following a review under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), regarding whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions under Section G (Investor-State Dispute Settlement), or to Chapter I (State-to-State Dispute Settlement). For greater certainty, this exclusion is without prejudice to the right of a Party to have recourse to Chapter I (State-to-State Dispute Settlement) with respect to the consistency of a measure with a Party's reservations, as set out in the Party's Schedule to Annexes I, II or III, as appropriate.

Annex X-D – Joint Declaration Concerning Article X.10.6[74]

Mindful that the tribunal for the resolution of investment disputes between investors and states is meant to enforce the obligations referred to in Article X.16 (Scope), and is not an appeal mechanism for the decisions of domestic courts, the Parties recall that the domestic courts of each Party are responsible for the determination of the existence and validity of intellectual property rights. The Parties further recognise that each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement regarding intellectual property within their own legal system and practice. The Parties agree to review the relation between intellectual property rights and investment disciplines within three years after entry into force of this Agreement or at the request of a Party. Further to this review and to the extent required, the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article X.27.3 (Applicable Law and Interpretation).

[73] CETA, Annex 8-C.
[74] CETA, Annex 8-D

Annex 8-E – Joint Declaration on Articles 8.16, 9.8, and 28.6[75]

With respect to Articles X.15, J.8 (Denial of benefits)[76] and I.6 (National security), the Parties confirm their understanding that measures that are "related to the maintenance of international peace and security" include the protection of human rights.

[75] CETA, Annex 8-E.

[76] Article J.8 is a reference to CETA, art 9.8 from the chapter on Cross Border Trade in Services. A draft of this chapter was not included.

Appendix II: Other Draft Chapters and Provisions

Preamble[77]

Canada, of the one part, the United Kingdom, of the other part, hereafter jointly referred to as "the Parties," resolve to:

FURTHER strengthen their close economic relationship and build upon their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation;

CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment;

ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment;

AND

REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in The Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security;

RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;

RECOGNISING the importance of increased engagement by indigenous peoples in trade and investment;[78]

SEEKING to facilitate women's equal access to and ability to benefit from the opportunities created by this Agreement and to support the conditions for women's full participation in domestic, regional, and international trade and investment;[79]

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives,

[77] We include a draft preamble, which includes the recitations of CETA as well as recitations drawn from CUSMA. Unless otherwise indicated, the draft text is drawn from CETA, preamble.
[78] CUSMA, preamble.
[79] CUSMA, preamble.

such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;

AFFIRMING their commitments as parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support;

RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories;

REAFFIRMING their commitment to promote sustainable development and the development of international trade and investment in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;[80]

PROMOTE the protection and enforcement of labour rights, the improvement of working conditions, the strengthening of cooperation and the Parties' capacity on labour issues;[81]

ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct;

IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters;

RECOGNISING the strong link between innovation and trade, and the importance of innovation to future economic growth, and affirming their commitment to encourage the expansion of cooperation in the area of innovation, as well as the related areas of research and development and science and technology, and to promote the involvement of relevant public and private sector entities;

HAVE AGREED AS FOLLOWS:

[80] CUSMA, preamble.
[81] CUSMA, preamble.

Chapter A: General Definitions and Initial Provisions[82]

Article A.1 – General Definitions

For the purposes of this Agreement and unless otherwise specified:

administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

a. a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of the other Party in a specific case; or
b. a ruling that adjudicates with respect to a particular act or practice;

Agreement on Agriculture means the Agreement on Agriculture, contained in Annex 1A to the WTO Agreement;

agricultural good means a product listed in Annex 1 to the Agreement on Agriculture;

Anti-dumping Agreement means the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, contained in Annex 1A to the WTO Agreement;

CPC means the provisional Central Product Classification as set out in Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, CPC prov, 1991;

cultural industries means persons engaged in:

a. a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of the other Party in a specific case; or
b. the production, distribution, sale or exhibition of film or video recordings;
c. the production, distribution, sale or exhibition of audio or video music recordings;
d. the publication, distribution or sale of music in print or machine-readable form; or
e. radio-communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;

Customs Valuation Agreement means the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, contained in Annex 1A to the WTO Agreement;

[82] Drafting the full content of a General Definitions Chapter fell outside the scope of this project. We include some general definitions drawn from CETA for greater clarity. See CETA, art 1.1.

days means calendar days, including weekends and holidays;

DSU means the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, contained in Annex 2 to the WTO Agreement;

enterprise means an entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture or other association;

existing means in effect on the date of entry into force of this Agreement;

GATS means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement;

GATT 1994 means the *General Agreement on Tariffs and Trade 1994*, contained in Annex 1A to the WTO Agreement;

goods of a Party means domestic products as these are understood in the GATT 1994 or such goods as the Parties may decide, and includes originating goods of that Party;

government procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale;

measure includes a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party;

national means a natural person who, for Canada, is a citizen of Canada and, for the United Kingdom, is a citizen of the United Kingdom;

originating means qualifying under the rules of origin set out in the *Protocol on Rules of Origin and Origin Procedures*;

Parties means, on the one hand, the United Kingdom, and on the other hand, Canada;

person means a natural person or an enterprise;

person of a Party means a national or an enterprise of a Party;

Safeguards Agreement means the *Agreement on Safeguards*, contained in Annex 1A to the WTO Agreement;

sanitary or phytosanitary measure means a measure referred to in Annex A, paragraph 1 of the *SPS Agreement*;

SCM Agreement means the *Agreement on Subsidies and Countervailing Measures*, contained in Annex 1A to the WTO Agreement;

service supplier means a person that supplies or seeks to supply a service;

SPS Agreement means the *Agreement on the Application of Sanitary and Phytosanitary Measures*, contained in Annex 1A to the WTO Agreement;

state enterprise means an enterprise that is owned or controlled by a Party;

TBT Agreement means the *Agreement on Technical Barriers to Trade*, contained in Annex 1A to the WTO Agreement;

territory means the territory where this Agreement applies as set out under Article 1.3;

third country means a country or territory outside the geographic scope of application of this Agreement;

TRIPS Agreement means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement;

Vienna Convention on the Law of Treaties means the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969;

WTO means the World Trade Organization; and

WTO Agreement means the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994.

Chapter B: Regulatory cooperation[83]

Article B.1 – Scope

This Chapter applies to the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by…Chapter X (Investment)…

[83] Drafting the full content of a Regulatory Cooperation Chapter fell outside the scope of this project. We include CETA, ch 21. CETA, ch 21 (Regulatory Cooperation) refers to multiple other Chapters, which we have not referenced here because we have not drafted them. We have included a reference to the Investment Chapter, unlike CETA. We include examples that would apply to Chapter X (Investment) specifically but not the Chapter in full.

Article B.2 – Principles[84]

1. Without limiting the ability of each Party to carry out its regulatory, legislative and policy activities, the Parties are committed to further develop regulatory cooperation in light of their mutual interest in order to:

    a. prevent and eliminate unnecessary barriers to trade and investment;
    b. enhance the climate for competitiveness and innovation, including by pursuing regulatory compatibility, recognition of equivalence, and convergence; and
    c. promote transparent, efficient and effective regulatory processes that support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchange and enhanced use of best practices.

Article B.3 – Objectives of regulatory cooperation[85]

The objectives of regulatory cooperation include to:

a. facilitate bilateral trade and investment in a way that:
    i. builds on existing cooperative arrangements;
    ii. reduces unnecessary differences in regulation; and
    iii. identifies new ways of working for cooperation in specific sectors;

Article B.4 – Regulatory cooperation activities[86]

The Parties endeavour to fulfil the objectives set out in Article B.3 by undertaking regulatory cooperation activities, including identifying the appropriate approach to reduce adverse effects of existing regulatory differences on bilateral trade and investment in sectors identified by a Party, including, when appropriate, through greater convergence, mutual recognition, minimising the use of trade and investment distorting regulatory instruments, and the use of international standards, including standards and guides for conformity assessment.

Article B.5 – Compatibility of regulatory measures

With a view to enhancing convergence and compatibility between the regulatory measures of the Parties, each Party shall, when appropriate, consider the regulatory measures or initiatives of the other Party on the same or related topics. A Party is not prevented from adopting different

[84] CETA, art 21.2(5)(a).
[85] CETA, art 21.3(c).
[86] CETA, art 21.4(r).

regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party.

Article B.6 – The Regulatory Cooperation Forum

1. A Regulatory Cooperation Forum ("RCF") is established to facilitate and promote regulatory cooperation between the Parties in accordance with this Chapter.

2. The RCF shall perform the following functions:

    a. provide a forum to discuss regulatory policy issues of mutual interest that the Parties have identified through, among others, consultations conducted in accordance with Article B.7;
    b. assist individual regulators to identify potential partners for cooperation activities and provide them with appropriate tools for that purpose, such as model confidentiality agreements;
    c. review regulatory initiatives, whether in progress or anticipated, that a Party considers may provide potential for cooperation. The reviews, which will be carried out in consultation with regulatory departments and agencies, should support the implementation of this Chapter; and
    d. encourage the development of bilateral cooperation activities in accordance with Article B.4 and, on the basis of information obtained from regulatory departments and agencies, review the progress, achievements and best practices of regulatory cooperation initiatives in specific sectors.

3. The RCF shall be co-chaired by a senior representative of the Government of Canada at the level of a Deputy Minister, equivalent or designate, and a senior representative of the United Kingdom at the level of a Director General, equivalent or designate, and shall comprise relevant officials of each Party. The Parties may by mutual consent invite other interested parties to participate in the meetings of the RCF.

4. The RCF shall:

    a. adopt its terms of reference, procedures and work-plan at its first meeting after the entry into force of this Agreement;
    b. meet within one year from the date of entry into force of this Agreement and at least annually thereafter, unless the Parties decide otherwise; and
    c. report to the Canada-UK Joint Committee on the implementation of this Chapter, as appropriate.

Article B.7 – Consultations with private entities

In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and

interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate.

Article B.8 – Contact points

1. The contact points for communication between the Parties on matters arising under this Chapter are:

    a. in the case of Canada, the Technical Barriers and Regulations Division of Global Affairs Canada, or its successor; and
    b. in the case of the United Kingdom, the Department for International Trade, or its successor.

2. Each contact point is responsible for consulting and coordinating with its respective regulatory departments and agencies, as appropriate, on matters arising under this Chapter.

Chapter C: Exceptions[87]

Article C.1 - General Exceptions[88]

1. For the purposes of … Sections B (Establishment of Investment) and C (Non Discriminatory Treatment) of Chapter X (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources.

2. For the purposes of … Sections B (Establishment of Investments) and C (Non Discriminatory Treatment) of Chapter X (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:

[87] Drafting the full content of an Exceptions Chapter fell outside the scope of this project. However, Canada and the UK will likely agree to include an Exceptions Chapter similar to CETA. We have included draft exceptions provisions drawn from CETA that will likely be included in a Canada-UK PTA. See CETA, ch 28.
[88] CETA, art 28.3.

a. to protect public security or public morals or to maintain public order;
b. to protect human, animal or plant life or health; or
c. to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
    i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
    ii. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
    iii. safety.

Article C.2 - National Security[89]

1. Nothing in this Agreement shall be construed:

    a. to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or
    b. to prevent a Party from taking an action that it considers necessary to protect its essential security interests:
        i. connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;
        ii. taken in time of war or other emergency in international relations; or
        iii. relating to fissionable and fusionable materials or the materials from which they are derived; or
    c. prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.

Article C.3 - Culture[90]

The Parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapter X (Investment).

Article C.4: Indigenous Peoples Rights[91]

[89] CETA, art 28.6.
[90] CETA, art 28.9.
[91] Drafting the full content of an Indigenous Chapter fell outside the scope of this project. We have not provided draft text of an Indigenous Chapter. In the absence of a precedent Indigenous Chapter, we include the Indigenous

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.[92]

Article C.5 – Recognition of prudential measures for financial services[93]

1. A Party may recognise a prudential measure for financial regulation in the application of a measure covered by this Agreement, particularly in relation to…Chapter X (Investment)… That recognition may be:

    a. accorded unilaterally;
    b. achieved through harmonisation or other means; or
    c. based upon an agreement or arrangement with the third country.

2. A Party according recognition of a prudential measure shall provide adequate opportunity to the other Party to demonstrate that circumstances exist in which there are or will be equivalent regulation, oversight, implementation of regulation and, if appropriate, procedures concerning the sharing of information between the Parties.

3. If a Party recognises a prudential measure under subparagraph 1(c) and the circumstances described in paragraph 2 exist, the Party shall provide adequate opportunity to the other Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.

Chapter D: Environment[94]

Exception from CUSMA, art 32.5. If Canada and the UK cannot agree to include an Indigenous Chapter, then they will likely agree to include at least an exception analogous to CUSMA, art 32.5.

[92] For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the Constitution Act 1982 or those set out in self-government agreements between a central or regional level of government and indigenous peoples. [Footnote in original]

[93] CETA, art 13.5; see also CPTPP, art 11.11. We include an example of a prudential exception for financial regulation. CETA and CPTPP include these exceptions in their respective Financial Services Chapters. We include the exception in the General Exceptions Chapter to ensure the exception applies to Chapter X (Investment) specifically as well as any other Chapters the parties choose.

[94] Drafting the full content of an Environment Chapter fell outside the scope of this project. However, we included example provisions from CUSMA, which are not found in CETA, including but not limited to arts D.2, D.3 below. CUSMA creates stronger environmental obligations and would likely serve as the model for an Environment Chapter in a Canada-UK PTA. However, the UK may prefer to avoid some of the obligatory language found in CUSMA, and set aspirational rather than obligatory standards, though we have not attempted those changes in the examples provided.

Article D.1 – Upholding levels of protection[95]

1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.

2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment.

Article D.2 – Protection of the Marine Environment from Ship Pollution[96]

1. The Parties recognize the importance of protecting and preserving the marine environment. To that end, each Party shall take measures to prevent the pollution of the marine environment from ships.

2. The Parties also recognize the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures to prevent the pollution of the marine environment from ships. Each Party shall make publicly available appropriate information about its programs and activities, including cooperative programs, that are related to the prevention of pollution of the marine environment from ships.

3. The Parties shall cooperate to address matters of mutual interest with respect to pollution of the marine environment from ships. Areas of cooperation may include:

    a. accidental pollution from ships;
    b. pollution from routine operations of ships;
    c. deliberate pollution from ships;
    d. development of technologies to minimise ship-generated waste;
    e. emissions from ships;
    f. adequacy of port waste reception facilities;
    g. increased protection in special geographic areas; and
    h. enforcement measures including notifications to flag States and, as appropriate, by port States.

[95] CETA, art 24.5.
[96] CUSMA, art 24.10.

Article D.3: Environmental Impact Assessment[97]

1. Each Party shall maintain appropriate procedures for assessing the environmental impacts of proposed projects that are subject to an action by that Party's central level of government that may cause significant effects on the environment with a view to avoiding, minimizing, or mitigating adverse effects.

2. Each Party shall ensure that such procedures provide for the disclosure of information to the public and, in accordance with its law, allow for public participation.

Chapter E – Trade and Labour[98]

Article E.1: Violence Against Workers[99]

The Parties recognize that workers and labour organizations must be able to exercise the rights set out in Article E.X (Labour Rights) in a climate that is free from violence, threats, and intimidation, and the imperative of governments to effectively address incidents of violence, threats, and intimidation against workers. Accordingly, no Party shall fail to address cases of violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article E.X (Labour Rights), through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

Article E.2: Migrant Workers[100]

The Parties recognize the vulnerability of migrant workers with respect to labour protections. Accordingly, in implementing Article E.X (Labour Rights), each Party shall ensure that migrant workers are protected under its labour laws, whether they are nationals or non- nationals of the Party.

Article E.3: Discrimination in the Workplace[101]

The Parties recognize the goal of eliminating discrimination in employment and occupation and support the goal of promoting equality of women in the workplace.

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[97] CUSMA, art 24.7.
[98] Drafting the full content of an Environment Chapter fell outside the scope of this project. However, we included example provisions from CUSMA, which are not found in CETA, including but not limited to arts E.1—E.4 below. CUSMA creates stronger labour obligations and would likely serve as the model for a Labour Chapter in a Canada-UK PTA.
[99] CUSMA, art 23.7.
[100] CUSMA, art 23.8.
[101] CUSMA, art 23.9.

Accordingly, each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.

Article E.4: Public Awareness and Procedural Guarantees[102]

1. Each Party shall promote public awareness of its labour laws, including by ensuring that information related to its labour laws and enforcement and compliance procedures is publicly available.

2. Each Party shall ensure that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labour laws. These tribunals may include administrative tribunals, quasi-judicial tribunals, judicial tribunals, or labour tribunals, as provided for in each Party's law.

3. Each Party shall ensure that proceedings before these tribunals for the enforcement of its labour laws:

    a. are fair, equitable and transparent;
    b. comply with due process of law;
    c. do not entail unreasonable fees or time limits or unwarranted delay; and
    d. that any hearings in these proceedings are open to the public, except where the administration of justice otherwise requires, and in accordance with its applicable laws.

4. Each Party shall ensure that:

    a. the parties to these proceedings are entitled to support or defend their respective positions, including by presenting information or evidence; and
    b. final decisions on the merits of the case:
        i. are based on information or evidence in respect of which the parties were offered the opportunity to be heard;
        ii. state the reasons on which they are based; and
        iii. are available in writing without undue delay to the parties to the proceedings and, consistent with its law, to the public.

5. Each Party shall provide, as appropriate, that parties to these proceedings have the right to seek review and, if warranted, correction of decisions issued in these proceedings.

6. Each Party shall ensure that tribunals that conduct or review these proceedings are impartial and independent.

[102] CUSMA, art 23.10.

7. Each Party shall ensure that the parties to these proceedings have access to remedies under its law for the effective enforcement of their rights under its labour laws and that these remedies are executed in a timely manner.

8. Each Party shall provide procedures to effectively enforce the final decisions of its tribunals in these proceedings.

9. For greater certainty, and without prejudice to whether a tribunal's decision is inconsistent with a Party's obligations under this Chapter, nothing in this Chapter shall be construed to require a tribunal of a Party to reopen a decision that it has made in a particular matter.

10. Each Party shall ensure that other types of proceedings within its labour bodies for the implementation of its labour laws:

    a. are fair and equitable;
    b. are conducted by officials who meet appropriate guarantees of impartiality;
    c. do not entail unreasonable fees or time limits or unwarranted delay; and
    d. document and communicate decisions to persons directly affected by these proceedings.

Chapter F: Trade and Gender[103]

Article F.1: General Provisions[104]

1. The Parties acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth and the key role that gender-responsive policies can play in achieving sustainable economic development. Inclusive economic growth aims to distribute benefits among the entire population by providing equitable opportunities for participation of women and men in business, industry and the labour market.

2. The Parties recall Goal 5 of the Sustainable Development Goals in the United Nations 2030 Agenda for Sustainable Development, which is to achieve gender equality and empower all women and girls. The Parties reaffirm the importance of promoting gender equality policies and practices, and building the capacity of the Parties in this area,

[103] Drafting the full content of a Gender Chapter fell outside the scope of this project. If the parties agree to include a Gender Chapter, it will likely be modelled on the Trade and Gender Chapter included in the Canada-Israel FTA. While predicting the draft text of a Gender Chapter in a Canada-UK FTA goes beyond the scope of this project, we have included the text of the Trade and Gender Chapter from the Canada-Israel FTA. This Chapter will provide useful precedent for Canadian and British negotiators.
[104] Canada-Israel, ch 13.

including in non-government sectors, in order to promote equal rights, treatment and opportunity between men and women and the elimination of all forms of discrimination against women.

3. The Parties reaffirm the obligations in Chapter E (Trade and Labour) as they relate to gender. The Parties also reaffirm commitments made in Article 16.4 as they relate to gender, including the Parties' commitments to the OECD Guidelines for Multinational Enterprises and the requirement under the Guidelines to establish a National Contact Point.

4. The Parties acknowledge that international trade and investment are engines of economic growth, and that improving women's access to opportunities and removing constraints in their countries enhances their possibility to engage in economic activities, both domestically and internationally, and contributes to sustainable economic development.

5. The Parties also acknowledge that women's enhanced participation in the labour market and their economic independence and access to, and ownership of, economic resources contribute to sustainable and inclusive economic growth, prosperity, competitiveness and the well-being of society.

6. The Parties affirm their commitment to promoting gender equality through, as appropriate, laws, regulations, policies and practices.

7. Each Party shall domestically promote public knowledge of its gender equality laws, regulations, policies and practices.

Article F.2: International Agreements

1. Each Party reaffirms its commitment to implement effectively the obligations under the Convention on the Elimination of all Forms of Discrimination Against Women, adopted by the United Nations General Assembly on 18 December 1979, and notes the general recommendations made under its Committee.

2. Each Party reaffirms its commitment to implement effectively its obligations under other international agreements addressing gender equality or women's rights to which it is party.

Article F.3: Cooperation Activities

1. The Parties acknowledge the benefit of sharing their respective experiences in designing, implementing, monitoring and strengthening policies and programs to encourage women's participation in national and international economies. Accordingly, and subject

to the availability of resources, the Parties shall develop programs of cooperative activities based on their mutual interests.

2. The aim of the cooperation activities will be to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by this Agreement. These activities shall be carried out with inclusive participation of women.

3. The Parties shall encourage the involvement of their respective government institutions, businesses, labour unions, education and research organizations, other non-governmental organizations, and their representatives, as appropriate, in the cooperation activities decided upon by the Parties.

4. Areas of cooperation may include:

    a. encouraging capacity-building and skills enhancement of women at work and in business;
    b. promoting financial inclusion for women, including financial training, access to finance, and financial assistance;
    c. advancing women's leadership and developing women's networks in business and trade;
    d. developing better practices to promote gender equality within enterprises;
    e. fostering women's representation in decision making and positions of authority in the public and private sectors, including on corporate boards;
    f. promoting female entrepreneurship and women's participation in international trade, including by improving women's access to, and participation and leadership in, science, technology and innovation;
    g. conducting gender-based analysis;
    h. sharing methods and procedures for the collection of sex-disaggregated data, the use of indicators, and the analysis of gender-focused statistics related to trade; and
    i. other issues as decided by the Parties.

5. The Parties may carry out activities in the cooperation areas set out in paragraph 4 through various means as they may decide, including workshops, internships, collaborative research, specific exchanges of specialised technical knowledge and other activities as decided by the Parties.

Article F.4: Trade and Gender Committee

1. The Parties hereby establish a Trade and Gender Committee ("Committee") composed of relevant representatives from each Party.

2. The Committee shall normally convene once a year or as decided by the Parties, in person or by any other technological means available, to consider any matter arising under this Chapter. The Committee shall:

a. determine, organise and facilitate the cooperation activities and exchange of information under Article 13.3;
b. report, and make recommendations as appropriate, to the Commission for its consideration on any matter related to this Chapter;
c. discuss any matter of common interest, including joint proposals to support policies and other initiatives on trade and gender;
d. consider matters related to the implementation and operation of this Chapter; and
e. carry out other duties as determined by the Parties.

3. In the performance of its duties, the Committee may work with and encourage other committees, subcommittees, working groups and other bodies established under this Agreement to integrate gender-related commitments, considerations and activities into their work.

4. The Committee may request that the Commission refer work to be conducted under this Article to any other committees, subcommittees, working groups or other bodies established under this Agreement.

5. The Committee may seek the advice of a non-governmental person or group, including by inviting an expert to participate in meetings.

6. The Committee shall consider undertaking a review of the implementation of this Chapter, with a view to improving its operation and effectiveness, within five years of the entry into force of this Agreement, and periodically thereafter as the Parties decide.

7. Each Party may report publicly on the activities developed under this Chapter.

8. To facilitate communication between the Parties regarding the implementation of this Chapter, each Party designates the Coordinator appointed pursuant to Article 18.2 (Coordinators) as its point of contact for the purposes of this Chapter.

Article F.5: Relation to Chapter E (Trade and Labour)

In the event of any inconsistency between this Chapter and Chapter E (Trade and Labour), the latter shall prevail to the extent of the inconsistency.

Article F.6: Dispute Settlement

1. The Parties shall make all possible efforts, through dialogue, consultations and cooperation, to resolve any matter that may arise relating to this Chapter.

2. If the Parties cannot resolve the matter in accordance with paragraph 1, they may consent to submit the matter to dispute settlement in accordance with Chapter I (State-to-State Dispute Settlement).