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TRADING AWAY DEMOCRACY

HOW CETA'S INVESTOR PROTECTION RULES THREATEN THE PUBLIC GOOD IN CANADA AND THE EU

Executive Summary

On September 26, 2014, Canada and the European Union (EU) announced the conclusion of a far-reaching economic integration agreement, the Comprehensive Economic and Trade Agreement (CETA). The agreement includes an investor-state dispute settlement (ISDS) mechanism, which could unleash a corporate litigation boom against Canada, the EU and individual EU member states, and could dangerously thwart government efforts to protect citizens and the environment.

The ISDS mechanism gives foreign corporations the ability to directly sue countries at private international tribunals for compensation over health, environmental, financial and other domestic safeguards that they believe undermine their rights.

These investor-state lawsuits are decided by private commercial arbitrators who are paid for each case they hear, with a clear tendency to interpret the law in favour of investors.

ISDS can prevent governments from acting in the public interest both directly when a corporation sues a state, and indirectly by discouraging legislation for fear of triggering a suit. Globally, investors have challenged laws that protect public health such as anti-smoking laws, bans on toxics and mining, requirements for environmental impact assessments, and regulations relating to hazardous waste, tax measures and fiscal policies.

Key findings:

- 1. Canada's experience with the North American Free Trade Agreement (NAFTA) illustrates the dangers of investment arbitration.** Under NAFTA, Canada has been sued 35 times, has lost or settled six claims, and has paid damages to foreign investors totalling over C\$171.5 million. Ongoing investor claims challenge a wide range of government measures that allegedly diminish the value of foreign investments – from a moratorium on fracking and a related revocation of drilling permits to a decision by Canadian courts to invalidate pharmaceutical patents which were not sufficiently innovative or useful. Foreign investors are currently seeking several billions of dollars in damages from the Canadian government.
- 2. CETA's investor protections would arguably grant even greater rights to foreign investors than NAFTA, increasing the risk that foreign investors will use CETA to constrain future government policy:**

- a) By protecting investors' "legitimate expectations" under the so-called "fair and equitable treatment" clause, CETA risks codifying a very expansive interpretation of the clause that would create the "right" to a stable regulatory environment. This would give investors a powerful weapon to fight regulatory changes, even if implemented in light of new knowledge or democratic choice.
- b) CETA would give foreign investors more rights to challenge financial regulations than NAFTA, where they were mostly limited to a bank's (still wide-ranging) rights to transfer funds freely and to be protected from expropriation. CETA expands their rights to include highly elastic concepts such as fair and equitable treatment, which threatens to hamstring regulators charged with protecting consumers and the stability of the financial system in an emergency.

3. The risks to Canada of being sued by banks, insurers and holding companies will increase significantly with CETA. These risks are evident as speculative investors, backed by investment lawyers, are increasingly using investment arbitration to scavenge for profits by suing governments experiencing financial crises. EU investment stocks in Canada are significant in the financial sector, which would gain far-reaching litigation rights under CETA.

4. CETA would increase the risk to the EU and its member states of challenges by Canadian investors in the mining and oil and gas extraction sectors. Canadian investment stocks in the EU are significant in these sectors, and Canadian mining companies are already engaged in a number of controversial natural resource projects across the EU. Mining specialists are celebrating CETA as a “landmark” agreement, which could have “major implications for miners.” Oil, mining and gas corporations around the world are increasingly turning to investment arbitration.

5. Canadian subsidiaries of US-headquartered multinationals will also be able to use CETA to sue European governments, even if the EU eventually excludes or limits investor-state dispute settlement within the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation with the US. This is particularly worrying for Europeans as US corporations dominate the Canadian economy. EU-based subsidiaries of foreign companies would also have the same power to challenge measures in Canada.

6. EU, Canadian and U.S. companies are already among the most frequent users of investment arbitration, so there is every reason to expect that they will use CETA to rein in government measures in Canada and Europe. Fifty-three percent (or 299) of all known investor-state disputes globally were brought

by investors from the EU. US investors have filed 22 percent (or 127) of all known investor-state cases. Canadian investors are the fifth most frequent users of investment arbitration.

7. Opposition to investor-state provisions in CETA is growing on both sides of the Atlantic amongst civil society organisations, trade unions, and even EU member states. In response, the European Commission and the Canadian government have begun a misleading propaganda effort aimed at downplaying the risks of investment arbitration and diverting attention from the fundamental problems of the system by focusing on cosmetic reforms.

8. The “reforms” that the European Commission and the Canadian government have promised to dispel concerns about ISDS will not prevent abuse by investors and arbitrators. On the contrary, CETA will significantly expand the scope of investment arbitration, exposing the EU, its member states and Canada to unpredictable and unprecedented liability risks.

There is no need for the creation of a special legal regime to protect foreign investors, especially in stable jurisdictions like the EU and Canada. Today’s multinationals are amongst the most successful and sophisticated in the world, capable of evaluating risk and the expected returns on that risk. Should the risk be too great, options such as regular courts, private insurance and public investment guarantee schemes are all readily available to them.

Trading Away Democracy calls on legislators in Canada and the EU to reject the investment protection provisions in CETA and in future treaties, including the controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).



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