How CETA’s investor protection rules could result in a boom of investor claims against Canada and the EU

Canada at the mercy of European banks

Investment flows between the EU and Canada are significant and noteworthy in a number of ways. A high volume of investment flows means that a substantive amount of investors will acquire the rights to sue under the trade treaty. Also, the sectors in which investors place their FDI stock is relevant since corporations from certain sectors are more avid users of ISDS than others.

In 2015, European investors invested almost US$200 billion in Canada (FDI stock). A third of this investment was in manufacturing (almost US$67 billion). European investors also invested significantly in the management of companies and enterprises (US$47 billion) and in the finance and insurance sector (US$26 billion).

The finance and insurance sector is of particular significance as this sector will gain greater litigation rights in CETA than exist under NAFTA. This suggests that the risks for Canada of being sued by banks, insurers and holding companies will increase significantly with CETA (see Annex 1). These risks are evident as speculative investors, backed by investment lawyers, are increasingly using investment arbitration to scavenge for profits by suing governments in financial crises.

EU investors are the main users of the ISDS system. Investors from EU member states have initiated 61% of all known ISDS disputes worldwide. In particular, investors from the Netherlands, the UK and Germany are the most active in terms of bringing ISDS cases according to the United Nations. Coincidentally, most investment is coming to Canada from exactly those EU countries where investors are notorious claimants in investor-state disputes: the Netherlands and the UK (2nd and 4th biggest investors in Canada respectively in 2015). EU investors have initiated at least 40 investment treaty disputes related to financial and insurance activities involving 25 countries from Burundi to Russia. The reasons for the lawsuits range from restructuring of public debt and default on or amendment of sovereign bonds, capital control in the context of financial crisis, enactment of Emergency Laws and other measures to deal with country’s economic crisis, withdrawal of previous commitments to provide State support to the foreign-owned bank, restructuring of the banking sector, to nationalisation of Banks.

Canadian mining companies: a threat to Europe

In 2015, Canadian investors invested US$174 billion in Europe (FDI stock). A third of this investment was in the finance and insurance sector (US$66 billion). The management of companies and enterprises (US$39 billion) and mining and oil and gas extraction (US$31 billion) were also sectors where Canadians invested the most in Europe.

Transnational corporations in the mining and oil and gas extraction sector are increasingly turning to international arbitration tribunals. In May 2016, one in four cases at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, related to oil, mining and gas. It is also the sector in which Canadian companies have gained a reputation as “the worst offenders in environmental, human rights and other abuses around the world.”

Canadian mining companies are already engaged in a number of controversial natural resource projects across the EU (See Image 1 and Box 3). If CETA’s investment chapter goes into effect, Canadian mining companies will be able to threaten and file similar lawsuits against the EU.

Box 3
A WARNING FOR EUROPE: THE CASE OF ROŞIA MONTANĂ

Roşia Montană is located in the Romanian Apuseni Mountains and is home of Europe’s largest gold deposit. In early 2000, Gabriel Resources obtained permits to mine gold in Roşia Montană. The mining project would lead to the destruction of four mountains, displacement of populations and the contamination of the environment through the use of cyanide.

Since its onset, the project was strongly opposed by local communities who challenged the legality of key permits and had them permanently annulled by national courts.

In 2013, Gabriel Resources attempted to pressure Romania’s government into passing a law that would approve the mine through parliament but this triggered national protests. The company is also under investigation in Romania in connection with tax evasion and money laundering.

In July 2015, Gabriel Resources filed a claim against the government of Romania for unfair treatment.