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$60 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.
As Dalradian Resources is looking to develop a gold mine at Curraghinalt in Northern Ireland, environmentalists have warned of the potentially destructive impacts of the project, particularly on a nearby nature conservation area, and have questioned the absence of an environmental impact assessment for the project.

In October 2013, following strong community opposition motivated by concerns about environmental destruction, water contamination and loss of livelihoods, the regional government of Galicia, Spain, temporarily halted the development of an open-pit mine in Corcoesto by mining company Edgewater. In October 2015, Edgewater notified Spain of an investor-state dispute under the bilateral investment treaty between Spain and Panama.

Conservationists and indigenous groups have sounded alarm bells about the minerals exploitation boom in Lapland, Finland. Contaminated water and heavy metal waste from projects like First Quantum Minerals’ nickel mine in Sodankylä could bring permanent damage to the ecosystem and negatively impact indigenous communities and the region’s tourist industry.

Citizens are trying to stop open-pit mines developed by Eldorado Gold in the Halkidiki region of Northern Greece (Skouries, Olympias, Stratoni). People fear the clearing of pristine forest, water contamination through cyanide use and loss of livelihoods in the tourism, farming, fishing and beekeeping sectors.

Gabriel Resources is using investment pacts from the 1990s to sue Romania (See Box 3). Community resistance over environmental destruction and the displacement of villagers has put the company’s planned gold and silver mine in Roșia Montană on hold.

Locals and environmentalists in Bulgaria are trying to stop the approval of the Krumovgrad open-pit gold and silver mine developed by Dundee Precious Metals in the Natura 2000 site Ada Tepe. Concerns relate to pollution, strains on limited water resources and threats to the livelihoods of local farmers.
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At the same time as promoting the interests of its mining sector in Europe, the Canadian government also used CETA negotiations as a way to undermine key European legislation on behalf to its oil and gas sector. The Canadian government has worked for years on behalf of oil and gas companies operating in Canada to weaken and subvert the proposed European Fuel Quality Directive, which requires EU fuel suppliers to decrease the carbon intensity of their fuels. This directive was meant to account for the higher greenhouse gas emissions from high carbon fuels such as oil derived from the Canadian tar sands, which requires more energy than conventional oil to be extracted and processed.

After many years of delay, the European Commission has released new measures which recognize that tar sands oil is more carbon intensive, but does not require EU companies to use a higher carbon intensity value if they import it. The result, after intensive lobbying by Canada, is a system that is not going to discourage oil companies from using and investing in the tar sands.

Four out of every five U.S.-owned firms operating in EU member states (41,811 firms) could gain new rights to attack European Union and EU member state policies using CETA’s ISDS mechanism.

CETA: A Trojan horse for US corporations

But CETA will not only allow Canadian businesses to sue EU governments and EU investors to file claims against Canada. Canadian subsidiaries of US-headquartered multinationals (see Image 2) will be also able to use CETA to launch investor-state challenges against European governments – even if the EU eventually excludes or limits investor-state dispute settlement within the Transatlantic.