Trading Away Democracy

Trade and Investment Partnership (TTIP) currently under negotiation. EU-based subsidiaries of foreign-owned companies would also have the same power to challenge measures in Canada.

US control of the Canadian economy is of particular concern in the context of CETA because US investors have been the most aggressive users of investment arbitration globally, having filed around a fifth (138 cases) of all known investor-state cases by mid-2016. Statistical evidence suggests that there is a particularly strong tendency among investment arbitrators to adopt investor-friendly interpretations of the law when the claimant is from the US. The legal industry that seeks out every opportunity to sue countries, too, is dominated by US lawyers. Of the top 20 law firms representing claimants and/or defendants in investor-state disputes, 15 are headquartered in the US.

Suing your own government through CETA

Notably, both European and Canadian investors have learned how to sue their own governments as “foreign” investors by registering abroad. Recent examples of this “treaty shopping” include Calgary-based oil and gas company Lone Pine challenging a fracking moratorium and a related revocation of drilling permits in the Canadian province of Quebec (see Box 1) and Spanish conglomerate Abengoa suing Spain under the Energy Charter Treaty’s foreign investor rights via a Luxembourg-registered subsidiary over subsidy cuts in the solar energy sector.

As more and more companies have structured their investments through a dense network of subsidiaries, the EU and Canada can expect similar claims under CETA (see Annex 1). This includes subsidiaries of European corporations with substantial business activities in Canada, including Shell Canada (owned by Royal Dutch Shell), British Petroleum Canada (owned by British Petroleum), Mercedes-Benz Canada (owned by German giant Mercedes-Benz) and Total E. & P. Canada. All will be able to use CETA to sue European governments, provided their investment is structured accordingly. Similarly, aircraft and train manufacturer Bombardier – a Canadian company from Quebec with installations in Ireland – could use CETA to sue the Canadian government.

Moving into propaganda mode in response to public outcry

Opposition to investor-state provisions in CETA is growing on both sides of the Atlantic. Civil society organisations and trade unions in both Canada and Europe have for years raised concerns about CETA and have specifically called for the removal of ISDS from the agreement. But after five years of secret negotiations, widespread citizen opposition and the election of a new government in Canada, CETA has only been cosmetically changed.

CETA, like all recent trade agreements, reduces the space for public policy, and adds constraints for governments striving to provide services or regulate in the public interest.

While we take stock of the improvements that have been made to the investor-state provisions, we find them insufficient. [...] The changes still beg the question of why an ICS or ISDS is needed at all between countries with fully developed and effective court systems.

Joint statement of the Canadian Labour Congress (CLC) & the European Trade Union Confederation (ETUC)

The European Commission and the Canadian government have begun a misleading propaganda drive. Their strategy: to appease the public by diverting attention from the fundamental problems of the system by focusing on cosmetic reforms.

But a closer look at these “reforms” in the final CETA text (See Annex 2) shows that they will not “protect governments’ right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law”, as the European Commission claims. On the contrary, CETA’s investor rights are arguably even more expansive than those in agreements such as NAFTA – most notably by protecting investors’ “legitimate expectations” under the so-called “fair and equitable treatment” clause and on investor-state disputes with regard to financial services (see Annexes 1 and 2).

Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts.

Deutscher Richterbund, Germany’s largest association of judges and public prosecutors.