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

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Are existing treaties a good reason to negotiate even more?

To justify its approach, the European Commission often refers to the over 3,000 existing investment treaties globally that include investor-state arbitration. The only way to address the loopholes of these agreements and prevent abuse, the Commission claims, is by reforming the current system through new deals that better balance investor rights and the right to regulate. Such changes could subsequently inform other agreements and would directly override some existing ones (such as the eight bilateral treaties between Canada and Eastern European countries which will be replaced through CETA).54

First, CETA shows that there is no genuine attempt to rebalance the investment regime. It offers sweeping rights but demands no obligations for investors (see Annexes 1 and 2). Second, new treaties are not the only reform option; existing deals that have proven dangerous can be ended, allowed to expire or be renegotiated – approaches currently being taken by South Africa, Indonesia, Bolivia, Ecuador and Venezuela, and which are also options for the eight existing bilateral agreements between Canada and EU member states. Third, the Commission is silent on the fact that its approach will significantly expand the scope of investment arbitration – rather than just “reform” what is already in place.

BOX 4

A WARNING FOR EUROPE AND CANADA: CASES STILL POSSIBLE UNDER THE REVISED INVESTMENT CHAPTER OF CETA51

The European Commission has rebranded the investment-state dispute settlement mechanism of CETA, the Investment Court System (ICS). But a close analysis of the most controversial ISDS cases from recent years reveals that those disputes could still be launched and likely prosper under ICS. (See Annexes 1 and 2).

Corporations against climate change and democracy – TransCanada vs. USA: In January 2016, Canadian pipeline developer TransCanada announced its intent to sue the US52 on the basis of the North American Free Trade Agreement (NAFTA) for President Obama’s rejection of the contested Keystone XL oil pipeline from Canada’s tar sand fields to refineries in the US. The project, which, according to critics would have amped up carbon emissions and quickened the pace of global climate change, had faced mounting citizen opposition. TransCanada is demanding a stunning US$15 billion in damages.

Could TransCanada file a similar case on the basis of the EU’s ICS proposal? Yes

Corporations against public health – Philip Morris vs. Uruguay: In February 2010, multinational tobacco company Philip Morris International (PMI) launched an investment arbitration lawsuit against Uruguay, on the basis of the country’s bilateral investment treaty (BIT) with Switzerland.53 PMI claims that the anti-smoking legislation enacted by the Uruguayan government, in particular the ban on selling more than one type of cigarettes under a single brand name (single presentation) and the requirement that graphic warnings about the risks of smoking cover at least 80% of the cigarette pack, “go far beyond any legitimate public health goal” and deprive PMI’s trademark from its commercial value. PMI demands US$25 million in compensation54. In its ruling of July 2016, the Tribunal dismissed all of PMI’s accusations and ordered the company to pay part of Uruguay’s legal costs55. This positive result, however, should not mask the fact that PMI dragged Uruguay for 7 years through a lawsuit that should not have been allowed in the first place. US$ 27 million were spent on lawyers, arbitrators and in administrative costs. This is more than PMI’s compensation demands. Furthermore, this lawsuit has caused major delays in the implementation of more stringent anti-tobacco measures such as plain-tobacco-packaging in Uruguay56.

Could Philip Morris file a similar case on the basis of the EU’s ICS proposal? Yes

Corporations against environmental protection – Bilcon vs. Canada: In March 2015, an arbitration tribunal constituted under the North American Free Trade Agreement (NAFTA) ruled that a Canadian environmental review process violated NAFTA’s investment protection rules. Bilcon, a U.S. company, wanted to build a large quarry and marine terminal in an ecologically sensitive coastal area in Eastern Canada. It planned to mine and crush basalt and then ship it by sea to the U.S. In 2007, after extensive study and public consultation, a government-established environmental assessment panel recommended against the project due to its likely negative environmental impacts. The governments of Nova Scotia and Canada followed the panel’s recommendation and denied approval. Bilcon then sued and won its investor–state dispute under NAFTA. The firm is seeking over US$300 million in damages57.

Could Bilcon win a similar case on the basis of the EU’s ICS proposal? Yes
Currently, 21 out of 28 EU member states – representing well over 95 percent of the EU economy – do not have investor-state arbitration provisions with Canada. More generally, most existing investment agreements of EU member states are with capital importers. CETA and other agreements with capital exporting countries (including the US, Japan and China) will massively expand the scope of investment arbitration, exposing EU member states to unpredictable and unprecedented liability risks.

Canada is likewise increasing the number of trade and investment agreements with capital exporting countries, including most recently the Canada-Korea Free Trade Agreement (CKFTA) and the controversial Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), which entered into force on October, 1st 2014.

**Conclusion**

Opposition to the previously unknown investor-state dispute settlement has ballooned in the last years. In CETA, the European Commission and the Canadian government have claimed to reform provisions on investor-state arbitration in a bid to win over public support. However, the minor tweaks and adjustment provide little assurance that the system will not be abused as it has been in the past: as a weapon to limit the powers of elected governments and to fight regulation – particularly in sectors where stricter rules are needed such as finance and mining (see Annexes 1 and 2).

Foreign investment can be risky, but there is no need for the creation of a special legal regime to protect foreign investors, who, like everyone else in society, have access to domestic legal systems to address grievances. 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 private insurance, public investment guarantee schemes or, indeed, recourse to regular domestic courts are all readily available.

We therefore call on the European Commission, the Canadian government, EU member states and parliamentarians on both sides of the Atlantic to reject the current CETA text which includes investor-state arbitration. It should also be ruled out of all existing and future trade agreements of both Canada and the EU – including the controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

Our societies won’t be able to confront the challenges we are facing – from combating climate change and social inequality to preventing another financial crisis – when they are stuck in a legal straight-jacket, with the constant threat of multi-billion corporate disputes against policy changes. What we need instead are strong regulatory mechanisms to stop abuse by multinational corporations – not a carte blanche for them to trample over democracy, people’s rights and our planet.