DEMOCRACY

CETA

TRADING AWAY DEMOCRACY

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

September 2016

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 included an investor-state dispute settlement (ISDS) mechanism, later tweaked and re-branded as ICS (Investment Court System) in February 2016, 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.

ICS, an ISDS mechanism, gives foreign corporations the ability to directly sue countries at 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. While the Commission has described the tribunals as 'public', Germany's largest association of judges and public prosecutors says neither the proposed procedure for the appointment of members of the ICS nor their position meet the international requirements for the independence of courts and that the ICS emerges not as an international court, but rather as a permanent court of arbitration.

ICS 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.

Trading Away Democracy

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

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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 37 times, has lost or settled eight claims, and has paid damages to foreign investors totalling over US$171.3 million[1]. 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 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. The claim of Canadian Gabriel Resources against the government of Romania, which decided not to allow the Roşia Montană gold mine as the project would result in environmental destruction and the displacement of villagers, gives a good impression of the type of claims EU member states can expect from Canadian companies.

3. **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.

4. **EU, Canadian and US 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. Sixty-one per cent (or 425 cases) of all known investor-state disputes globally were brought by investors from the EU. U.S. Investors have filled around a fifth (or 138)[2] of all known investor-state cases. Canadian investors are the fifth most frequent users of investment arbitration (or 39 cases). Together, EU, US and Canadian investors have filled 602 cases against States, out of the 696 known cases.

5. **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 diverted attention from the fundamental problems of the system by focusing on cosmetic reforms.

6. **The "reforms" that the European Commission and the Canadian government have agreed 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.

7. **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 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.

8. **The risk 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.

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 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.

Trading Away Democracy

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

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). Following the Canadian general elections and faced with growing and widespread criticism, the agreement was tweaked and finally released on 29th February 2016[3]. It has confirmed many of the concerns raised by independent analysts, which have not been appeased by the revised final version.

This analysis shows how CETA's investor rights could unleash a corporate litigation boom against Canada, the EU and its member states – including through the Canadian subsidiaries of US multinational corporations. It argues that CETA could dangerously thwart government efforts to protect citizens and the environment, and that states could be forced to pay billions of dollars in compensation to investors for profits "lost" due to regulation in the public interest.

CETA constrains governments in a broad range of areas, including intellectual property, public procurement, public and financial services, and food sovereignty. But for citizens in both the EU and Canada, ironclad "investor rights" protections are the most controversial way that CETA will limit the powers of elected governments.

This brief argues that, contrary to public assurances, the EU and Canada have not tamed these dangerous corporate rights in CETA. It calls on legislators in Canada and the EU to reject the current CETA text which includes investor-state arbitration.

The investment chapter of CETA contains an investor-state dispute settlement (ISDS) mechanism, re-branded as Investment Court System (ICS). ICS grants corporations the special privilege to bypass domestic courts and to instead directly sue states at, in reality, private international tribunals for compensation over health, environmental, financial and other domestic safeguards that they believe undermine their rights. This parallel justice system is available only to foreign, not domestic, investors, let alone ordinary people.

This doesn't change anything because the standards on the basis of which judgements are rendered remain the same.

Nigel Blackaby, arbitration lawyer with Freshfields on the EU's ICS proposal[4]

Chevron argues that the mere existence of ISDS is important as it acts as a deterrent.

EU Commission official about a meeting with Chevron on ISDS, 29th April 2014[5]

It's a lobbying tool in the sense that you can go in and say, 'Ok, if you do this, we will be suing you for compensation.' […] **It does change behaviour in certain cases.**

Peter Kirby, law firm Fasken Martineau, on investor-state arbitration[6]

Investor-state lawsuits are decided by private commercial arbitrators. The European Commission has relabelled them members of the different tribunals, but they still lack the independent and financially-disinterest that judges should adhere to. Investment lawyers deciding on CETA cases, will be paid for each case they hear, and so can still be characterised as "for-profit arbitrators". Globally, investment arbitration is the purview of only a small number of individuals and firms with a revolving door to industry and a clear tendency to interpret the law in favour of the investor.[7]

The number of investor claims against states has exploded in recent years, from a dozen in the mid-1990s to 696 known cases by mid-2016.[8] One policy area after another has come under attack as investors have challenged anti-smoking laws, tax measures, fiscal policies, bans of toxics and mining, requirements for environmental impact assessments and regulations relating to hazardous waste (see Boxes 1 and 2). The amount of taxpayer money that states have been ordered to pay in penalties has also sky-rocketed, often including compensation to investors for the loss of anticipated *future* profits.

Because the arbitrators can levy monetary penalties against governments, the fear or actual threat of a costly investor-state claim can create a "policy chill" which discourages new government initiatives[9]. Five years after the investor rights in the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico came into force, a former official of the Canadian government described the effect: "I've seen the letters from the New York and D.C. law firms coming up to the Canadian government on virtually every new environmental regulation […] Virtually all of the initiatives were targeted and most of them never saw the light of day."[10]

BOX 1

SOME OMINOUS INVESTOR-STATE DISPUTES UNDER NAFTA

Corporations against environmental treaties – SD Myers vs. Canada: Canada is a signatory to the international Basel Convention, which stipulates that hazardous waste should be disposed of in the country of origin of the waste. Canada put a temporary ban on the export of toxic PCB wastes from November 1995 to February 1997. It was applied generally, and not just to any particular country or company. Nonetheless, US waste disposal firm SD Myers launched a successful NAFTA suit against the ban. The arbitration panel ruled against Canada and awarded the investor compensation of US$6.05 million plus interest.[11]

Corporations against environmental and health protection – Ethyl vs. Canada: When the Canadian Parliament banned the import and transportation of a toxic petrol additive on environmental and health protection grounds in 1997, the US producer Ethyl sued on the basis of the NAFTA agreement for US$201 million in compensation. Canada agreed in a settlement to pay US$13 million and withdrew the ban.[12]

Corporations against fracking moratoria – Lone Pine vs. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ('fracking') for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed an investor-state lawsuit based on the North American Free Trade Agreement (NAFTA), challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US$109.8 million plus interest in damages.[13]

A close analysis of this case revealed that this dispute could still be launched under ICS, the investor-state dispute settlement (ISDS) mechanism in the revised investment chapter of CETA.[14]

Corporations against court rulings on medicine patents – Eli Lilly vs. Canada: The US$370 million[15] NAFTA claim launched in 2013 by US-based pharmaceutical giant Eli Lilly shows how ISDS is increasingly a challenge to domestic courts and law. Under Canadian law, the Federal Court of Canada is the ultimate arbiter of the validity of patents. Eli Lilly disagrees with the court's decision to reject its supplementary patent applications for two reformulated drugs (olanzapine and atomoxetine) because they were not sufficiently innovative. In total, nine different Canadian judges have heard Eli Lilly's arguments and the company has lost at every stage. If Eli Lilly wins a favourable ruling from the NAFTA arbitration panel, it will have effectively trumped the highest levels of judicial decision-making in Canada.[16]

NAFTA lessons bode ill for CETA

Canada's experience with NAFTA amply illustrates the dangers of investment arbitration. There have been 37 investor-state claims against Canada under NAFTA, and the number continues to grow. So far, Canada has lost or settled eight claims and paid damages to foreign investors totalling over US$171.3 million. Canadian taxpayers have also paid tens of millions of dollars in legal costs defending against these claims.[17]

Ongoing NAFTA claims challenge a wide range of government measures that allegedly diminish the value of foreign investments, including a moratorium on fracking by the Quebec provincial government, a moratorium on offshore wind projects on Lake Ontario, provisions under the Ontario *Green Energy Act* to promote renewable energies, and a decision by a Canadian court to invalidate two pharmaceutical patents on the basis that they were not sufficiently innovative or useful (see Box 1). Cumulatively, foreign investors are currently seeking several billions of dollars in damages from the Canadian government.[18]

EU and Canadian investors are among the main users of investment arbitration. Almost two-thirds (or 463) of all know investor-state disputes globally were brought by investors from the EU and from Canada.

Canadian investors rank fifth among the users of investment arbitration, outnumbered only by investors from the US, the Netherlands, UK and Germany.[19]

There is every reason to expect that CETA will pave the way for more such claims against the Canadian government, as well as against the EU and its member states. CETA's investment chapter arguably grants even greater rights to foreign investors than does in 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 Annex 1). CETA would significantly increase the risk of investor-state challenges to Canadian policies given that European investors have initiated 61 per cent of all known disputes (425 cases) as of mid-2016[20].

BOX 2

HOW EU CORPORATIONS USE INVESTOR-STATE ARBITRATION

EU corporations versus environmental protection – Vattenfall vs. Germany I & II: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking US$1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled after Germany agreed to water down the environmental standards. In 2012, Vattenfall launched a second lawsuit seeking US$5.14 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster. The German government has already spent over US$3.54 million to defend the case, and expects a total of US$9.98 million in legal costs[21]. Both actions were taken under the Energy Charter Treaty.[22]

A close analysis of the dispute Vattenfall vs. Germany I (over a coal-fired power plant in Hamburg) revealed that it could still be launched under ICS, the investor-state dispute settlement (ISDS) mechanism in the revised investment chapter of CETA.[23]

EU corporations versus anti-discrimination – Piero Foresti and others vs. South Africa: In 2007, Italian and Luxembourg investors sued South Africa for US$350 million because a new mining law contained anti-discrimination rules from the country's *Black Economic Empowerment Act*, which aims to redress some of the injustices of the apartheid regime. The law required mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa's investment treaties with Italy and Luxembourg) was closed in 2010, after the investors received new licenses requiring a much lower divestment of shares.[24]

EU corporations against policies to combat economic crises – Investors vs. Argentina, Cyprus and Greece: When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis it was hit by over 40 lawsuits from investors. By January 2014, the country had been ordered to pay a total of US$980 million in compensation. Among the claimants were several EU multinationals, including Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain). Similar cases have now been brought against Cyprus and Greece.[25]

Corporations against the minimum wage – Veolia vs. Egypt: Since 2012, the French utility company Veolia has been suing Egypt based on the bilateral investment agreement between France and Egypt for an alleged breach of a contract for waste disposal in the city of Alexandria. The city had refused to make changes to the contract which Veolia wanted in order to meet higher costs – in part due to the introduction of a minimum wage. In addition, according to Veolia, the local police had failed to prevent the massive theft of dustbins by the local population. According to media reports, Veolia is seeking US$90.9 million in compensation.[26]

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.

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).[27]

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.[28]

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.[29] 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).[30] EU investors have initiated at least 40 investment treaty disputes related to financial and insurance activities involving 25 countries from Burundi to Russia.[31] 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.[32]

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 entreprises (US$39 billion) and mining and oil and gas extraction (US$31 billion)[33] 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[34]. 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."[35]

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

IMAGE 1

CONTROVERSIAL EUROPEAN PROJECTS BY CANADIAN MINING COMPANIES

WILL CETA's INVESTMENT CHAPTER HELP BREAK COMMUNITY RESISTANCE?

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.

and all of its 28 member states. No wonder mining specialists are celebrating CETA as a "landmark" agreement, which could have "major implications for miners."[36]

> **Probably the most significant development in the Comprehensive Economic and Trade Agreement (CETA) for miners on both sides of the Atlantic is the inclusion of an investor-state provision.**
>
> Mining publication *Mineweb*[37]

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[38]. 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.[39]

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.[40]

> **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.**[41]

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

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[42]. 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[43]. 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[44].

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.[45]

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[46] and trade unions[47] 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)[48]

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 [49]. 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[50]

BOX 4

A WARNING FOR EUROPE AND CANADA: CASES STILL POSSIBLE UNDER THE REVISED INVESTMENT CHAPTER OF CETA[51]

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 US[52] 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$25 million in compensation[54]. In its ruling of July 2016, the Tribunal dismissed all of PMI's accusations and ordered the company to pay part of Uruguay's legal costs[55]. This positive result, however, should not mask the fact that PMI dragged Uruguay for 7 years through a lawsuit that should not have been allowed in the first place. US$ 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 Uruguay[56].

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 damages[57].

Could Bilcon win a similar case on the basis of the EU's ICS proposal? **Yes**

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).[58]

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.

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)[59] and the controversial Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), which entered into force on October, 1st 2014.[60]

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.

Academics have begun to question whether ISDS delivers the benefits it is supposed to, in the form of increased investment. Foreign investors can protect themselves against egregious governmental abuse by purchasing political-risk insurance [...]**.**

The Economist[61]

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.

ANNEX 1

A GUIDE TO CETA'S MOST DANGEROUS CORPORATE RIGHTS

TRADE SPEAK: WHAT'S WRITTEN IN CETA[62]	TRANSLATION: WHY IT IS DANGEROUS[63]
Definition of investment: « 'Investment' means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment [...]. » Then follows a long, non-exhaustive list of « forms that an investment may take », ranging from shares over debt instruments to intellectual property rights. (Chapter 8, Article 1)	The definition of « investment » is very important because it determines which foreign capital is protected. A broad – and open-ended – definition such as in CETA not only covers actual enterprises in the host state, but a vast universe ranging from the value of a trademark, alleged promises made by a state controlled entity or government authority in a secret contract to sovereign debt. This exposes states to unpredictable legal risks.
Definition of investor: « Investor means a Party, a natural person or an enterprise of a Party [...] that seeks to make, is making or has made an investment in the territory of the other Party ». An « enterprise of a Party » must either have « substantial business activities in the territory of that Party » or « be directly or indirectly owned or controlled » by a natural person of or an enterprise with substantial business activity in that Party (Chapter 8, Article 1)	The definition of « investor » is important because it determines who is protected. While much will depend on the arbitrators' interpretation of « substantial business activities », CETA does prevent blatant treaty abuse through mailbox companies (such as a Canadian firm suing Canada via a shall construction in the Netherlands). But this will not prevent the thousands of US- and EU- owned corporations with subsidiaries in Canada to sue EU governments via CETA and vice versa (see page 9). That an investor is also protected if he/she only indirectly owns or controls the investment further opens the gate to treaty shopping.
National treatment: "Each party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory" (Chapter 8, Article 6)	Foreign investors have to be treated at least as favourably as domestic ones. This has been interpreted as a prohibition of any measure that *de facto* disadvantages foreigners – even if not on purpose. For example, a Canadian ban on the export of a toxic waste (applying to all investors and in line with an international environmental treaty) was found to favour Canadian firms because they could continue their business while a US competitor could not ship the waste to the US to treat it there (see page 5)
Fair and equitable treatment (FET): "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment (...)." Then follows a list of examples which would constitute a breach of this obligation: "denial of justice", "fundamental breach of due process", "manifest arbitrariness," "targeted discrimination" and "abusive treatment of investors." (Chapter 8, Article 10)	This potentially catch-all clause is the most dangerous for taxpayers and regulators: it is used most often and successfully by investors when attacking public interest measures. The inclusion of "manifest arbitrariness" as one of the criteria that investors can invoke as a breach of this clause in CETA leaves the door wide open for investors to sue and for arbitrators to interpret it to their discretion. When studying what investors have argued in emblematic public interest cases, we found that it is not uncommon for companies to argue that the measures sanctioned by the State were "arbitrary"[64]. In three-quarters of cases won by US investors, tribunals found an FET violation[65].

TRADE SPEAK: WHAT'S WRITTEN IN CETA[62]	TRANSLATION: WHY IT IS DANGEROUS[63]
Protection of investors' legitimate expectations: "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated" (Chapter 8, Article 10)	Tribunals have already interpreted the FET concept as protecting investors' "legitimate expectations" - even if the term is not part of existing treaties such as NAFTA. They have also considered it as creating a right to a stable regulatory context – binding governments to not alter laws, regulations or other measures, even in light of new knowledge or democratic choices. In the Quebec case where community opposition led to a moratorium on fracking, Lone Pine argues that the "revocation" of its gas exploration permits violated its "legitimate expectation of a stable business and legal environment."[66] CETA goes into the direction of codifying such expansive interpretations of FET, widening the concept's scope and giving investors a powerful weapon to fight tighter rules. It is especially troubling that CETA does not define what type of "specific representation" by a state would create a "legitimate expectation".
Committee on Services and Investment: "The Committee Services and Investment may [...] recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation" (Chapter 8, Article 44)	CETA creates various new institutions that can change the substance of the treaty in the future. This can cut both ways. There is growing concern that this might lead in the long run to an even wider codification of the scope of FET
Expropriation: "A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (...), except: a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) on payment of prompt, adequate and effective compensation" (Chapter 8, Article 12) "For greater certainty, except in rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations." (Chapter 8, Annex 8-A)	From a certain, investor-friendly view, almost any law or regulatory measure can be considered an indirect "expropriation" when it has the effect of lowering profits. Tribunals have interpreted legitimate health, environmental and other public safeguards in this way, ordering states to pay compensation. Would CETA's annex on public welfare measures prevent this? Not necessarily. A State would have to prove that a measure was "designed and applied to protect legitimate public welfare objectives" and it is not "manifestly excessive". Even in cases where the government's measure that led to dispute was undeniably for a public purpose, investors have claimed the policies were illegitimate and excessive. For example, TransCanada argued that the US administration's decision on the pipeline was not for a legitimate public policy objective[67]. It would be up to a tribunal of unaccountable for-profit arbitrators – not independent judges – to decide.
Most-Favoured-Nation (MFN) Treatment: "Each party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory." CETA clarifies that this "does not include" ISDS provisions in other deals and that "substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment" [...] absent measures adopted by a Party pursuant to such obligations." (Chapter 8, Article 7)	Arbitrators have used MFN provisions like a "magic wand"[68] that allows investors in ISDS proceedings to "import" more favourable rights from other treaties signed by the host state. This multiplies the risks of successful attacks against public policy. CETA's MFN wording somewhat addresses this cherry-picking, but remains open to interpretation by arbitrators and it is ambiguous. In particular, why does CETA not clearly bar the "import" of substantive obligations from other agreements? It does so only in the absence of "measures [...] pursuant to such obligations" in other treaties and the term "measure" is defined extremely broadly in CETA.

TRADE SPEAK: WHAT'S WRITTEN IN CETA[62]	TRANSLATION: WHY IT IS DANGEROUS[63]
Consent to arbitration: Claims may be submitted under the usual investor-state arbitration rules such as the ICSID convention and the UNCITRAL rules. (Chapter 8, Articles 23 and 25) There is no requirement to first exhaust local remedies.	This is where the EU in effect says: our courts are not good enough for foreign investors. Unlike domestic firms and ordinary people, foreign investors will have the exclusive right to bypass domestic legal systems and sue the EU and its member states directly at international tribunals, which will judge whether policies are right or wrong and can order vast sums of taxpayer money to be paid as compensation.
The tribunal deciding the cases: Investor claims will be decided by a "tribunal" of three chosen from a pool of 15 "members" appointed by the CETA Joint Committee. They will receive a "monthly retainer fee" to be determined by the Committee, but will otherwise be paid according to the "Administrative and Financial Regulations of the ICSID Convention." (Chapter 8, Article 27)	Investor-state disputes will not be decided by independent judges with a fixed salary. Rather, rulings will come from for-profit arbitrators who are paid by the case – with lucrative US$3,000 per day according to the ICSID schedule of fees and on top of a monthly retainer fee – with a strong incentive to decide in favour of the one party that can bring claims in the future: the investor.
Final award: When a tribunal finds that a state violated CETA's investor rights, it "may only award, separately or in combination: (a) monetary damages and any applicable interest; (b) restitution of property." "Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided." (Chapter 8, Article 39)	Damages awards can amount to serious raids on public budgets, and can be enforced by seizing state property in many other countries around the world. One of the highest known awards to date, US$ 50 billion, was made against Russia. In 2003, the Czech Republic had to pay a media corporation US$354 million – the equivalent of the country's national health budget at the time[69]. Tribunals often order compensation for expected *future* profits, like in a case against Libya which had to pay US$900 million for "lost profits" from "real and certain lost opportunities" of a tourism project, even though the investor had only invested US$5 million and construction never started[70].
Article 21 of CETA's chapter on financial services allows for **investor-state disputes with regard to financial services** when "an investor claims that a Party has breached Articles 8.10 (Investment - Treatment of investors and of covered investments), 8.11 (Investment - Compensation for losses), 8.12 (Investment - Expropriation), 8.13 (Investment - Transfers), 8.16 (Investment - Denial of benefits), 13.3 (Financial Services – National treatment), or 13.4 (Financial Services – Most-favoured-nation treatment)" or "in which Article 13.16.1 [on prudential carve-outs in the financial sector] has been invoked." (Chapter 13, Article 21)	Under CETA, foreign investors have more rights to challenge financial regulations than under previous treaties like NAFTA. This threatens to hamstring regulations charged with protecting consumers and financial stability in an emergency. Under NAFTA, investor lawsuits in the financial sector were mostly limited to a bank's (still wide-ranging) rights to transfer funds freely and be protected from expropriation. CETA expands their rights to include highly elastic concepts such as fair and equitable treatment. Canada's financial services negotiators themselves warned that this would "create a chilling effect that will have negative consequences for the overall economy of the country."[71]
Free transfer of capital: "Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay…" Then follows a list of examples of types of transfers, including profits, interest and payments made under a contract. (Chapter 8, Article 13)	This provision would allow the investor to withdraw all investment-related monies, reducing the ability of countries to deal with out- and inflows of capital, balance of payment and other macroeconomic crises. This is a de facto ban on capital controls. While Article 28.4 allows for quite limited temporary safeguard measures with regard to capital movements and payments and Article 28.5 permits some restrictions in case of serious balance of payments and external financial difficulties. These exceptions are far too restrictive to regulate cross border capital flows in the public interest.
Survival clause: "In the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date." (Chapter 30, Article 9)	Even if CETA is terminated, investors could still bring claims for 20 more years for investments made before the termination. This "zombie clause" allows the corporate super rights to live on after the rest of CETA is dead.

ANNEX 2

A GUIDE TO CETA'S FALSE-COMFORT PARAGRAPHS

PR SPEAK: WHAT'S WRITTEN IN CETA[72]	REALITY CHECK: WHY IT PROVIDES ONLY FALSE COMFORT
Investment and regulatory measures: "For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section." (Chapter 8, Article 9)	A closer look at this paragraph shows that it provides false comfort. Unlike in article 9.4 which clearly prohibits any requirement for states to compensate investors when eliminating subsidies, article 8.9 does not exclude compensation orders when states change laws and regulations and such changes violate any other obligations of CETA such as FET.
Investment and regulatory measures II: "For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity." (Chapter 8, Article 9)	Reading it against article 9.4 makes clear that the EU does not want to shield public policy measures from compensation orders. So, states will be able to regulate, but can still be forced to pay billions in compensation. A high level European Commission representative, speaking at an event in the US, recently admitted that: "This is not an exception like the general exception… It is a guiding principle which informs" the tribunal's deliberation[73]. In addition, the right to regulate is linked to legitimate policy objectives. For-profit arbitrators will decide whether an objective was "legitimate". This is an easy hurdle to clear for arbitrators intent on getting public compensation for an investor. For instance, measures which are legitimate but which appear "manifestly excessive" (Chapter 8, Annex A, Point 3) could be considered indirect expropriation.
Ethics: "The Members of the Tribunal shall be independent." They shall comply with guidelines on conflicts of interest or a code of conduct and "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." (Chapter 8, Article 30)	This falls short of real institutional safeguards to ensure arbitrator independence and impartiality, such as fixed salaries. It is particularly worrying that the so called "members" of the tribunals will neither be banned from acting as private lawyers (though not as counsel in other investment claims) and that there is no cooling-off period before or after their appointment. So, they could be part of the small club of investment arbitrators who have so far decided the majority of investment disputes, have encouraged claims and grown their business with expansive, investor-friendly interpretations of the law.
Frivolous and unfounded claims: The defendant state can "file an objection that a claim is manifestly without legal merit" or an "objection […] that, as a matter of law, a claim […] is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true." It is up to the tribunal to decide. (Chapter 8, articles 32 and 33)	This is a clear case of letting the fox guard the hen house. The question of whether a claim proceeds will be decided by arbitrators, whose income depends on the case going ahead. This clear conflict of interest may help to explain why not a single dismissal of a frivolous claim is known[74] even though some existing treaties allow for it. Another problem is that many investor-state disputes can be fit easily within the wide ambit of the investor privileges granted in CETA. Egregious investor challenges of sound policies such as the Lone Pine and Vattenfall challenges, for example, are very unlikely to be dismissed under such mechanisms.

PR SPEAK: WHAT'S WRITTEN IN CETA[72]	REALITY CHECK: WHY IT PROVIDES ONLY FALSE COMFORT
Final award: A tribunal can award "only" monetary damages or restitution of property (Chapter 8, Article 39). According to the EU, this means that an order of a tribunal "cannot lead to the repeal of a measure adopted by Parliaments in the Union, a Member State or Canada."[75]	This won't stop government from "voluntarily" repealing measures when a major lawsuit has been filed or threatened by a deep-pocketed company. Examples of such regulatory chill include the watering down of environmental controls for a coal-fired power plant when Germany settled a claim by Swedish energy company Vattenfall (see page 6) and New Zealand's announcement that it will delay its plain-tobacco-packaging legislation until after Philip Morris' claim against Australia's anti-smoking rules has been resolved.[76] This chilling effect on government regulation is arguably the main function of the global investment regime.
Appeal mechanism: An Appellate Tribunal is hereby established to review awards […] The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts […] (c) the grounds set out in Article 52 (1) (a) through (e) of the ICSID Convention" (Chapter 8, Article 28)	This could potentially contribute to more coherent decisions but does not fix any of the fundamental problems mentioned above (privileging of foreign investors, not fully independent tribunals, one-sidedness of the system … etc). It should also be noted that the mandate of the Appellate Tribunal would be very limited, and would fall short of a juridical revision procedure as known under national law. For example, collection of new evidence or hearing of additional experts and witnesses would be excluded.
Binding interpretations: "Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may […] recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal." (Chapter 8, Article 31)	In practice, it is very difficult to get consensus on binding interpretations. In the 20-year history of NAFTA, which has a similar clause, agreement has been reached for only two such interpretations, despite a wave of investor claims. Also, arbitrators have often been unwilling to accept the "binding" interpretations and annexes intended to rein in their discretion.[77]
CETA contains a number of **exceptions** scattered across the deal, such as for "reasonable measures for prudential reasons" in the financial sector, for example, to ensure "the integrity and stability of a Party's financial system" (Chapter 13, Article 16) or "to protect human, animal or plant life or health" (Chapter 28, Article 3.2)	The exceptions are usually limited to a few sectors and to only some investor rights. They are also formulated in narrow terms, putting the burden of proof on governments. For example, safeguard measures to ensure financial stability have to be "*strictly necessary*" and may only be taken "in *exceptional* circumstances" with "*serious* difficulties for the operation of the economic and monetary union". For policies to tackle "*serious* balance-of-payments or external financial difficulties," CETA even states that they should "avoid *unnecessary* damage to the *commercial, economic and financial* interests of any other Party" (Chapter 28, Articles 4 and 5). It will be up to arbitrators to decide whether a policy was "strictly necessary" or whether it caused "unnecessary" costs for the investor. This is an easy hurdle to clear for an arbitrator intent on getting public compensation for a bank or other investor.
Reservations: CETA's investment rules are subject to state-specific reservations relating to specific economic sectors or types of measures listed in special annexes. Annex I lists "existing measures" that are not in conformity with CETA rules but can be maintained. Annex II lists "reservations for future measures" that governments will be able to introduce in the future that would otherwise not be possible under CETA. All sectors and measures that governments have not explicitly excluded them by listing them in the annexes are automatically covered. (Annexes I and II)	The reservations have severe limitations: Annex I reservations are subject to a legal ratchet, meaning they can only be changed in the future if they are made more consistent with CETA. Also, neither the Annex I nor the Annex II reservations apply to the most dangerous investor standard, fair and equitable treatment. Moreover, European member states have little experience with CETA's "negative listing" approach where the state has to list all of its exceptions up front rather than indicating the sectors it wants covered by CETA. The reservations scheduled by European governments vary widely and are often inconsistent. For example, Bulgaria has reserved its ban on fracking but France, which has a similar ban, has taken no such reservation.

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18 See note 16.

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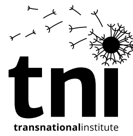

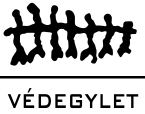

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