

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 million¹. 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.