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]