

ANNEX 1

A GUIDE TO CETA'S MOST DANGEROUS CORPORATE RIGHTS

TRADE SPEAK: WHAT'S WRITTEN IN CETA⁶²

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)

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 or an enterprise with substantial business activity in that Party (Chapter 8, Article 1)

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)

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)

TRANSLATION: WHY IT IS DANGEROUS⁶³

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.

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 shell 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.

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)

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 violation⁶⁵.