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TRADING AWAY DEMOCRACY

How CETA's investor protection rules threaten the public good in Canada and the EU

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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 includes an investor-state dispute settlement (ISDS) mechanism, 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.

The ISDS mechanism gives foreign corporations the ability to directly sue countries at private 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.

ISDS 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.

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 35 times, has lost or settled six claims, and has paid damages to foreign investors totalling over C$171.5 million. 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'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 create the "right" to a stable regulatory environment. This 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.

3. **The risks 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.

4. **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.

5. **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.

6. **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. Fifty-three percent (or 299) of all known investor-state disputes globally were brought by investors from the EU. U.S. investors have filed 22 percent (or 127) of all known investor-state cases. Canadian investors are the fifth most frequent users of investment arbitration.

7. **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 begun a misleading propaganda effort aimed at downplaying the risks of investment arbitration and diverting attention from the fundamental problems of the system by focusing on cosmetic reforms.

8. **The "reforms" that the European Commission and the Canadian government have promised 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.

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 legislators in Canada and the EU to reject the investment protection provisions in CETA and in future treaties, including the controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

Trading Away Democracy

How CETA's investor protection rules threaten the public good in 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). The release of the final text, which both the European Commission and the Canadian government insist cannot be changed, has confirmed many of the concerns raised by independent analysts, based on leaked texts, during the five years of negotiations.[1]

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, and have even expanded them in key areas, increasing the risk that foreign investors will use them to constrain future government policy. It calls on legislators in Canada and the EU to reject the investment protection provisions in CETA and in future treaties, including the controversial EU-US Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

> **Investor-state arbitration is a cat-and-mouse game that favours the arbitrators** [...] **who are not subject to judicial override if they interpret a treaty incorrectly or unreasonably and who have a track record of exploiting legal ambiguity to expand their power over states, investors, public finances, and so on.**
>
> Gus van Harten, Associate Professor, Osgoode Hall Law School[3]

> **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[7]

The dangers of investor-state dispute settlement

The investment chapter of CETA contains an investor-state dispute settlement (ISDS) mechanism. ISDS grants corporations the special privilege to bypass domestic courts and to instead directly sue states at private international tribunals for compensation over health, environmental, financial and other domestic safeguards that they believe undermine their rights. These "private courts" are available only to foreign, not domestic, investors, let alone ordinary people.

Investor-state lawsuits are decided by private commercial arbitrators rather than independent and financially-disinterested judges. There is no judicial right of appeal and arbitrators are paid for each case they hear, and so are sometimes referred to 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.[2]

The number of investor claims against states has exploded in recent years, from a dozen in the mid-1990s to 568 known cases by the end of 2013.[4] 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 skyrocketed, often including compensation to investors for the loss of anticipated *future* profits.

Because the private 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.[5] 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."[6]

BOX 1

A WARNING FOR EUROPE: 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 (€4.7 million)[8] plus interest.[9]

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 (€158.7 million) in compensation. Canada agreed in a settlement to pay US$13 million (€10.2 million) and withdrew the ban.[10]

Corporations against democracy and the environment – Lone Pine vs. Canada: In 2011, the provincial government of Quebec responded to public pressure and concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ("fracking") for oil and gas exploration under and near the St. Lawrence River. In 2012, Calgary-based Lone Pine Resources Inc. (via an incorporation in the US tax haven Delaware) launched a NAFTA challenge of the fracking moratorium and a related revocation of drilling permits. The company is seeking C$250 million (€175.7 million) plus interest in damages.[11]

Corporations against court rulings on medicine patents – Eli Lilly vs. Canada: The C$500 million (€351.5 million) 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.[12]

Corporations against research requirements – Mobil Investments & Murphy Oil vs. Canada: In 2007, US-incorporated Mobil Investments Inc. (a subsidiary of the world's largest company by revenue, US oil giant ExxonMobil) and Murphy Oil Corporation filed a NAFTA claim against Canada because in 2004 the province of Newfoundland and Labrador had implemented a requirement that off-shore oil companies must invest a portion of revenues in local research and development. NAFTA (implemented in 1994) included a "reservation" for research and development requirements which was believed to provide protection for these rules. But in 2012, the arbitrators ruled against Canada, arguing that the research rules were a "performance requirement" banned by NAFTA and that the reservation only protected rules that were in place in 1994. The oil companies sought C$65 million (€45.7 million) in compensation, but no final award on compensation has yet been made public.[13]

NAFTA lessons bode ill for CETA

Canada's experience with NAFTA amply illustrates the dangers of investment arbitration. There have been 35 investor-state claims against Canada under NAFTA, and the number continues to grow. So far, Canada has lost or settled six claims and paid damages to foreign investors totalling over C$171.5 million (€121 million). Canadian taxpayers have also paid tens of millions of dollars in legal costs defending against these claims.[14]

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.[15]

EU and Canadian companies are among the main users of investment arbitration. Fifty-three percent (or 299) of all known investor-state disputes globally were brought by investors from the EU.

Canadian investors rank fifth among the users of investment arbitration, outnumbered only by investors from the US, the Netherlands, UK and Germany.[16]

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 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). EU and Canadian companies are already among the most frequent users of investment arbitration.

BOX 2

A WARNING FOR CANADA: 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 €1.4 billion (C$1.9 billion) plus interest in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled out of court after Germany agreed to water down the environmental standards. In 2012, Vattenfall launched a second lawsuit seeking €4.7 billion (C$6.6 billion) for lost profits related to two of its nuclear power plants after the German government's decision to phase out nuclear energy after the Fukushima nuclear disaster. Both actions were taken under the Energy Charter Treaty.[17]

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 (€276.5 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.[18]

EU corporations against policies to combat economic crises – Investors vs. Argentina 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 (€774.4 million) in compensation. Among the claimants were several EU multinationals, including Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain). The Slovak Poštová Banka and its Cypriot shareholder Istrokapital are currently suing Greece on account of the restructuring of the country's sovereign debt – after having bought Greek government bonds at a knockdown price.[19]

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 €82 million (C$116.6 million) in compensation.[20]

Investors against implementing EU law – Micula Brothers and others vs. Romania: During the late 1990s, Swedish investors were given incentives for regional development in Romania. In 2005, the incentives were removed as part of reforms to the country's tax and customs regime in the context of its move to join the EU. The investors launched their claim in 2006 on the basis of the Sweden-Romania bilateral investment deal. While the European Commission intervened in the case, confirming that it had required Romania to terminate the incentives, the tribunal argued that a state cannot shun liability towards investors by relying on EU objections and has ordered Romania to pay US$250 million (€197.5 million). Other tribunals have also rejected the argument that EU law should take precedence over investment treaties between EU member states.[21]

BOX 3

FOREIGN DIRECT INVESTMENT (FDI) BETWEEN THE EU AND CANADA

EU INVESTMENT IN CANADA	CANADIAN INVESTMENT IN THE EU
EU = No. 2 source of FDI	Canada = No. 4 source of FDI
FDI stock in 2012: US$180.9 billion (€142.9 billion)	FDI stock in 2012: US$183.3 billion (€144.8 billion)
Over 25% of all FDI in Canada	4% of all FDI in the EU
Mostly from the Netherlands, the UK, Luxembourg, and France	Mostly to the UK, Luxembourg, the Netherlands, and Ireland
Mainly in: - manufacturing (including for oil, coal, metals, minerals) - management of companies and enterprises (including holdings) - finance & insurance	Mainly in: - finance & insurance - mining and oil & gas extraction - management of companies and enterprises (including holdings)

Source: Statistics Canada, Canadian representation to the EU

More mining and banking disputes?

Investment flows between the EU and Canada are significant (see Box 3) and noteworthy in a number of ways.

In Canada, EU investment stocks are considerable in one sector that gained greater litigation rights in CETA than exist under NAFTA – the financial sector. 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.[22] Also, 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.

In Europe, the amount of Canadian investment in the mining and oil and gas extraction sectors is striking. Transnational corporations in these sectors are increasingly turning to international arbitration tribunals; in early 2013, more than one in three cases at the International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, were related to oil, mining or gas.[23] 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."[24]

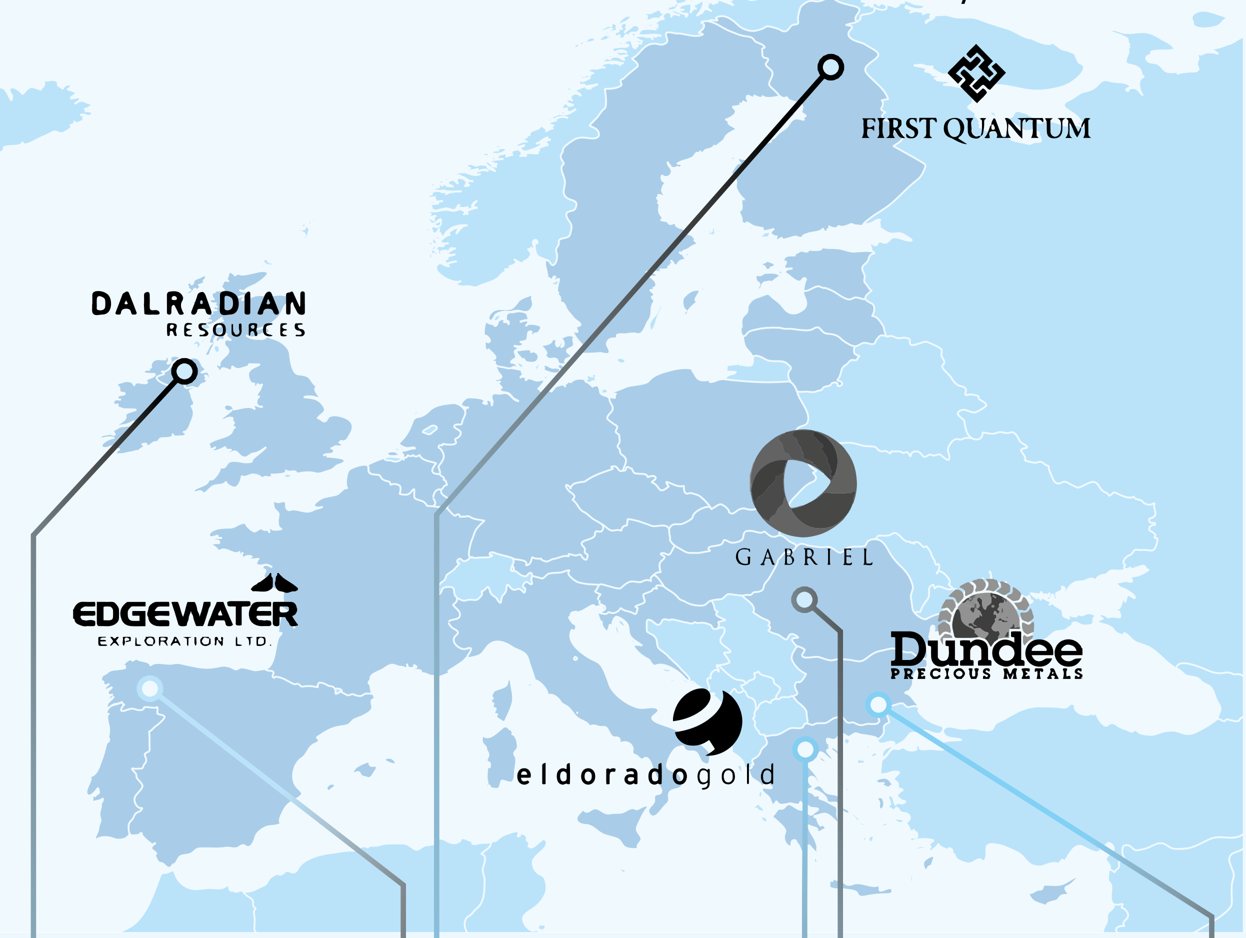
Canadian mining companies are already engaged in a number of controversial natural resource projects across the EU (see Image 1). In one case, Canadian mining company Gabriel Resources threatened to sue the Romanian government on the basis of an existing bilateral investment treaty between Canada and Romania (one of eight existing treaties between Canada and Eastern European EU member states[25]) because in response to strong community resistance the government rejected a proposed gold and silver mine in Roşia Montană. If CETA's investment chapter goes into effect, Canadian mining companies will be able to threaten and file similar lawsuits against the EU 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."[26]

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*[27]

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**.

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 has threatened to use investment pacts from the 1990s to sue **Romania** for US$4 billion in damages, almost two percent of the country's GDP. 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.

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.[28] 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.[29] 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.[30]

CETA: A Trojan horse for US corporations

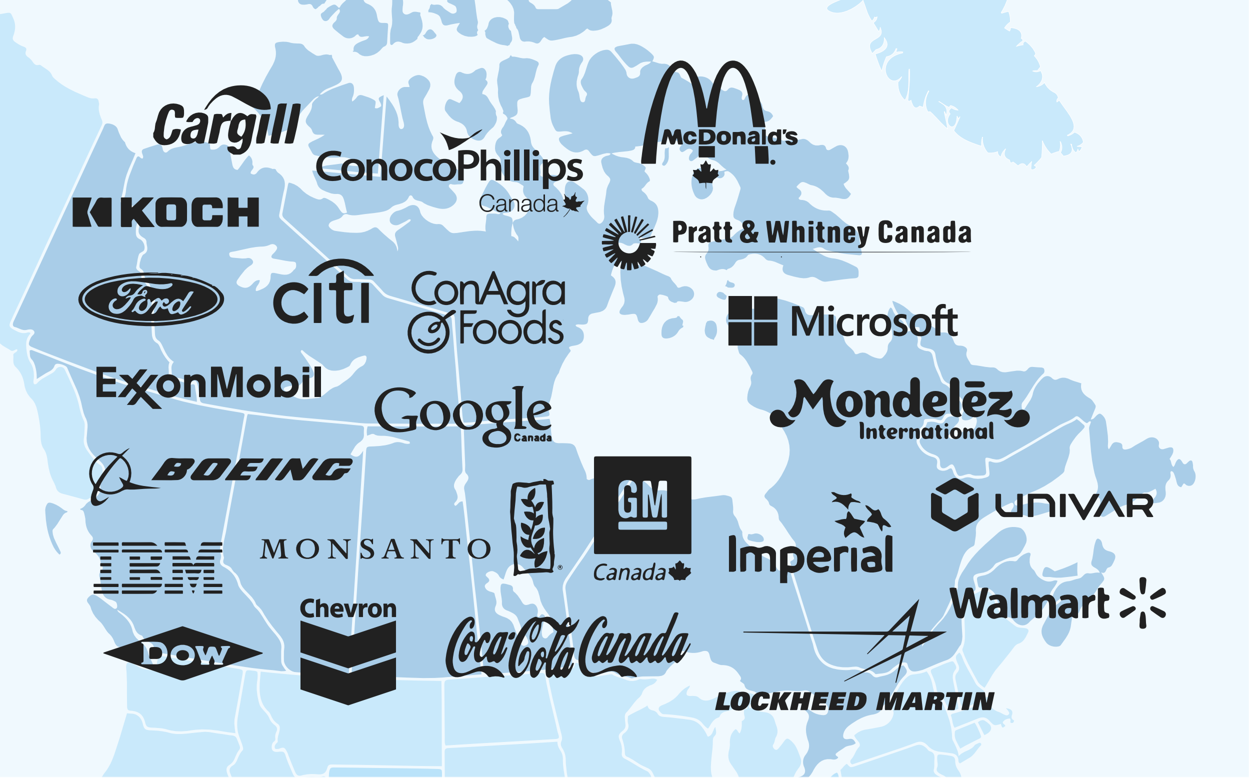
But CETA will not only allow Canadian businesses to sue EU governments and EU investors to file claims against Canada. Canadian subsidiaries of US-headquartered multinationals (see Image 2) will be also able to use CETA to launch investor-state challenges against European governments – even if the EU 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.

> **Canadian subsidiaries of US-headquartered multinationals will be able to use CETA to launch suits against European governments.**

This is particularly worrying for Europeans as US corporations dominate the Canadian economy.[31] Over half of annual foreign investment into Canada is from the US (59.9 percent of investments from 1985 to 2014). During that same period, 76.78 percent of foreign investments were for the acquisition of existing Canadian companies, rather than investment in new businesses. The total value of those acquisitions was C$1,104.3 billion[32] (€797.49 billion). Some 39.7 percent of all large enterprises in Canada are foreign owned.[33]

IMAGE 2

SUING THROUGH CETA: SOME SUBSIDIARIES OF US-BASED COMPANIES WITH 'SUBSTANTIAL BUSINESS INTERESTS' 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 22 percent (127 cases) of all known investor-state cases by the end of 2013.[34] 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.[35] 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.[36]

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.[37]

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), Total E. & P. Canada and BP Canada Energy Group ULC. 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 organizations[38] and trade unions[39] 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, citizens are now told that the text is final and that no changes to CETA will be possible. In Europe, attempts to influence CETA through widespread citizen participation in both the European Commission's public consultations on ISDS[40] and through a proposed European Citizen's Initiative have been rejected.[41]

> **It is imperative that the failings of the NAFTA are not replicated, let alone aggravated, by any future CETA. This applies to investor rights in the first instance. We oppose the inclusion of an investor-state arbitration mechanism in the agreement.**
>
> Joint statement of the Canadian Labour Congress (CLC) & the European Trade Union Confederation (ETUC)[42]

As far back as 2011, the European Parliament also made it clear that "given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes."[43] This position was confirmed in September 2014 when all centre-left and liberal parties of the European Parliament raised concerns about investor-state dispute settlement in CETA during a public debate.[44] The need for ISDS has also been questioned by some EU member states, most notably the German government, which has called for amending the CETA investment chapter to ensure that it won't endanger emergency measures such as sovereign debt restructuring and banking bail-outs – a call which was supported by many EU member states.[45]

There even seem to be some concerns about ISDS within the European Commission. In his presidency priorities, the new Commission President Jean-Claude Juncker wrote, "Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes."[46]

In response to these widespread concerns the European Commission and the Canadian government have become increasingly defensive, and have begun a misleading propaganda drive. Their strategy: to appease the public by downplaying the risks of investment arbitration and to divert 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 "prevent any abuse of the investment protection rules and investor-state dispute settlement systems," as the European Commission claims.[47] 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). This is not surprising: the "reforms" are an echo chamber of what the business community has proposed to re-legitimise investor-state arbitration while leaving its problematic core intact.[48]

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).[49]

This argument is not credible for a number of reasons. 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.

> **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*[53]

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)[50] and the controversial Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), which entered into force on October 1, 2014.[51] CETA would significantly increase the risk of investor-state challenges to Canadian policies given that European investors have initiated 53 percent of all known disputes (299 cases) as of the end of 2013.[52]

Conclusion

Opposition to the previously unknown investor-state dispute settlement has ballooned in the last year. 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 business from the consequences of their actions, 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 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 any 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 straightjacket, 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[54]	TRANSLATION: WHY IT IS DANGEROUS[55]
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 10, Article X.3)	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 holiday homes and short-term speculative investment 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 10, Article X.3)	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 covered investors from using the treaty, including US- and EU-owned corporations with subsidiaries in Canada able to sue EU governments via CETA and vice versa (see page 9).
Definition of measure: "Measure includes a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party." (Chapter 10, Article X.3)	This allows everything that a state or the EU can do to be challenged by an investor. The measures range from local to European/Canadian federal laws enacted by parliaments, executive decisions, and even court verdicts.
National Treatment: "Each Party shall accord to investors of the other Party and to covered investments, 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 10, Article X.6.1)	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 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 Box 1 on 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 10, Article X.9)	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. For example, in its case against Australia, tobacco giant Philip Morris argues that the country's tobacco plain packaging law was "arbitrary" because the claimed health benefits are "contradicted by facts" and other policies to reduce smoking without a negative effect on Philip Morris were available[56] – framing its claim precisely on the grounds listed in CETA. In three-quarters of cases won by US investors, tribunals found an FET violation.[57]

TRADE SPEAK: WHAT'S WRITTEN IN CETA[54]	TRANSLATION: WHY IT IS DANGEROUS[55]
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 10, Article X.9)	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."[58] 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."
Expropriation: "Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation […], except: a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) against payment of prompt, adequate and effective compensation." (Chapter 10, Article X.11.1) "For greater certainty, except in rare circumstance where the impact of the 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 expropriation." (Chapter 10, Annex X.11)	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 as in the Philip Morris case, investors could challenge this). In "rare circumstances" a public welfare measure could still be considered an expropriation, for which the public would have to pay compensation. 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 investors of the other Party and to covered investments treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, expansion, conduct, the 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 10, Article X.7.1-4)	Arbitrators have used MFN provisions like a "magic wand"[59] 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 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[54]	TRANSLATION: WHY IT IS DANGEROUS[55]
Investor-state dispute settlement: "The respondent consents to the submission of a claim to arbitration under this Section in accordance with the procedures set out under this Agreement." (Chapter 10, Article X.24)	This is where the EU and Canada in effect say: 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 Canada, the EU and its member states directly at private international tribunals, which will judge whether policies are right or wrong and can order vast sums of taxpayer money to be paid as compensation.
Arbitration tribunal: Usually, "the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties." (Chapter 10, Article X.25)	Investor-state disputes will not be decided by independent judges with secure tenure and a fixed salary and who are assigned to cases fairly by lottery or rotation. Rather, rulings will come from for-profit arbitrators who are paid by the case or by the hour, with a clear incentive to decide in favour of the one party that can bring claims in the future: the investor.[60]
Final award: When a tribunal finds that a state violated CETA's investor rights it "may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property." "Monetary damages cannot be greater than the loss suffered by the investor." (Chapter 10, Article X.36)	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$2.4 billion, was made against Ecuador. This is just under three percent of the country's GDP.[61] 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.[62] 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.[63]
Article 20 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 X.12 (Investment Transfers), X.11 (Investment – Expropriation, X.10 (Investment – Compensation for Losses), X.9 (Investment – Treatment of Investors and of Covered Investments), X.15 (Investment – Denial of Benefits), X.3 (Financial Services – National Treatment) or X.4 (Financial Services – Most Favoured National Treatment)" or "in which Article 15.1. [on prudential measures in the financial sector] has been invoked." (Chapter 15, Article 20)	Under CETA, foreign investors have more rights to challenge financial regulations than under previous treaties like NAFTA. This threatens to hamstring regulators 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."[64]
Survival clause: "In the event that the present Agreement is terminated, the provisions of [Chapter X Investment] shall continue to be effective for a further period of 20 years from that date in respect of investments made before the date of termination of the present Agreement." (Chapter 34, Article X.08.2).	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 NO-NONSENSE GUIDE TO CETA'S FALSE-COMFORT PARAGRAPHS

PR SPEAK: WHAT'S WRITTEN IN CETA[65]	REALITY CHECK: WHY IT PROVIDES ONLY FALSE COMFORT[66]
Arbitrator independence: "Arbitrators shall comply with the International Bar Association [IBA] Guidelines on Conflicts of Interest in International Arbitration or any other supplemental rules" that are still to be adopted by the EU and Canada once CETA is in force." (Chapter 10, Article X.25)	This falls very short of real reforms to ensure arbitrator independence and impartiality, such as security of tenure and fixed salaries. Existing codes of conduct such as the IBA guidelines have not prevented a small club of arbitrators from deciding in the majority of investor-state disputes, allowing them to encourage claims and grow the arbitration business with expansive, investor-friendly interpretations of the law.[67] The IBA guidelines (which were written by the arbitrators) do not even define what a conflict of interest is, let alone ban blatant ones such as situations in which arbitrators work on the side as lawyers.
Choice of arbitrators: If the parties cannot agree on the arbitrators, "the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed" from "a list of individuals" with certain experience that the EU and Canada still have to agree upon (the so-called roster). (Chapter 10, Article X.25)	This will not dispel concerns about arbitrator bias. If the parties cannot agree on an arbitrator, an executive official (the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), where most known investor-state arbitrations take place), will be the default appointing authority. ICSID has close links to the arbitration industry and arguably similar interests in growing the business. And the roster? It may never be set up. A similar commitment was made under NAFTA, but there is still no roster 20 years later.
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 10, Articles X.29 and X.30)	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[68] 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.
Final award: A tribunal can award "only" monetary damages or restitution of property (Chapter 10, Article X.36). 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."[69]	This won't stop governments 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 Box 2 on 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.[70] This chilling effect on government regulation is arguably the main function of the global investment regime.

PR SPEAK: WHAT'S WRITTEN IN CETA[65]	REALITY CHECK: WHY IT PROVIDES ONLY FALSE COMFORT[66]
Appeal mechanism: The EU and Canada set up a forum to consult, amongst other things on "whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement." (Chapter 10, Article 42)	Unlike in a proper court system, decisions by investment tribunals are not reviewable (except for annulment and set-aside proceedings that address a narrow range of procedural errors and are heard by another private arbitration tribunal or by a court in a place chosen by the original arbitrators). A proper appeal option based on an independent court could bring more coherent decisions and rein in arbitrator adventurism. Yet this is clearly a long way from reality: in CETA the appeal clause only expresses vague, non-binding intentions which have been included in other treaties for at least 10 years.
Binding interpretations: "Where serious concerns arise as regards matters of interpretation that may affect investment," the EU and Canada may adopt "interpretations of the Agreement" which "shall be binding on a Tribunal." (Chapter 10, Article X.27)	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.[71]
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 15, Article 15.1) or "to protect human, animal or plant life or health." (Chapter 32, Article X.02.2)	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 32, Articles X.03 and X.04). 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 by listing them in the annexes are automatically covered. (Annex 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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