Joint Interpretative Declaration on CETA

Unpacking the "clarifications" on investment protection

The investment protection chapter included in the Comprehensive Economic and Trade Agreement (CETA)[1] enshrines expansive and ill-defined provisions that can be used by corporations to launch arbitration disputes. It does not prevent investor attacks against regulations protecting the public interest and the environment, and is therefore a threat to democratic decision-making in Europe and Canada. Finally, the Investment Court System (ICS) proposal, while incorporating some procedural changes compared to the Investor-State Dispute Settlement (ISDS) Mechanism that it replaced, does not solve the problem that arbitrators have a financial incentive to interpret the law in favour of investors[2].

The Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union[3] (sent on 10th October to all EU Member States) does not change or clarify any of the specific provisions in CETA's text. Instead, it is a reaffirmation that investors can bypass the domestic court systems and will enjoy ample rights without any obligations.

Steven Shrybman from the law firm Goldblatt Partners LLP, has argued this Declaration would have no legal impact on the actual text of the agreement because it can not be considered as an "interpretative declaration" under international law[4]. Furthermore, he concluded: "In our opinion, no party could credibly present such a document as an 'interpretative declaration' to a Tribunal called upon to determine an investor rights dispute. Moreover, in the unlikely event that should occur, a Tribunal that gave it any consideration would risk its own credibility[5]."

A passage-by-passage analysis of the Joint Interpretative Declaration:

> *Text of the Joint Interpretative Declaration (JID): "CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent dispute resolution".*

The text of the Interpretative Declaration is a mere reaffirmation of Art. 8.9 (Chapter 8 on Investment, CETA text[6]) It does not add to or clarify the original text of the trade agreement. Rather, it asserts the adequacy of the original agreement without addressing concerns about how the right to regulate will be protected under CETA. The European Commission has repeatedly argued that the right to regulate is protected, but the details of the text do not support that statement.

> *Text JID: "CETA will not result in foreign investors being treated more favourably than domestic investors"*

Under CETA, foreign investors will enjoy the right to sue states at international tribunals. This is a right national investors do not have. Therefore, foreign investors will be treated more favourably than domestic ones.

Text JID: CETA does not privilege recourse to the investment court system set up by the agreement. Investors may choose instead to pursue available recourse in domestic courts.

This is already the case with all investment treaties. Any investor can choose to go to national courts or international arbitration. CETA failed to include exhaustion of local remedies as a pre-condition for investors to be able to sue at international tribunals.

Text JID: "CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits.

Under most of the 3000 investment protection treaties that exist worldwide, governments may change their laws. Therefore, the declaration merely provides a false comfort statement. The EU and Canada would have made a real difference if the declaration would had indicated instead that investors could not sue governments for changes to their laws.

Text JID: "Furthermore, CETA clarifies that any compensation due to an investor will be based on an objective determination by the Tribunal […]"

Every arbitrator that has ever ruled in an investment treaty dispute would argue that their rulings are objective. Yet, evidence has shown that is not the case. CETA has not addressed the inherent bias in the ISDS system under which arbitrators are paid by the parties on a case by case basis. As a result, those deciding investor-state claims will still have a strong financial incentive to interpret the law in favour of the investor, compromising their objectivity.

Text JID: "[…] and will not be greater than the loss suffered by the investor."

Investors usually argue that the losses suffered include projected future profits. Nothing in CETA or in this declaration prevents that Tribunal award disproportionately high compensation that outweighs the actual amount of money invested by the foreign investor.

Text JID: "CETA includes clearly defined investment protection standards, […]"

CETA includes ample and ill-defined rights for foreign investors. The text contains innumerable loopholes and uses language that provides a false sense of comfort. When sued by investors, states will have to prove that the measures they took: were not "arbitrary", did not damage the "legitimate expectation" of the investor, were not "manifestly excessive" and were for a "legitimate" public policy. But, the definition of what is as arbitrary, excessive or legitimate has been left open for interpretation.

Text JID: "[…] including on fair and equitable treatment […]"

It is highly problematic that CETA includes the most widely-used and expansively interpreted investment protection standard: Fair and Equitable Treatment. The list developed in CETA may appear to narrow the scope of this dangerous clause. But, in reality, the inclusion of "manifest arbitrariness" as one of the conditions that investors can invoke as a breach of this clause leaves the door open for investors to sue on this basis, and for arbitrators to interpret it at their discretion. When studying what investors have argued in emblematic public interest cases, a recent report co-published by TNI found that it is not uncommon for companies to argue that the measures sanctioned by the State were "arbitrary" (for details see ICS put to the test[7]). What constitutes manifest arbitrariness is not well defined and there is ample room for arbitrators to exercise "unwelcome discretion". Furthermore, CETA widened the fair and equitable treatment concept by explicitly allowing tribunals to take into account the notion of investors' "legitimate expectations".

Text JID: "[…] and expropriation and provides clear guidance to dispute resolution Tribunals on how these standards should be applied."

CETA enables investors to continue arguing that measures taken to protect public health, safety or the environment have an effect equivalent to expropriation. The annex that is meant to clarify the article on indirect expropriation does nothing to prevent this. It says that only "legitimate" public policy measures that are not "manifestly excessive" would be out of reach from indirect expropriation claims. But, what are the criteria to determine whether the government measure is legitimate and when it is excessive? Even in past cases where a disputed measure was undeniably for a public purpose, investors have claimed that policies were illegitimate and excessive (for examples see ICS put to the test)[8].

Text JID: CETA requires a real economic link with the economies of Canada or the European Union in order for a firm to benefit from the agreement and prevents "shell" or "mail box" companies established in Canada or the European Union by investors of other countries from bringing claims against Canada or the European Union and its Member States. The European Union and Canada are committed to review regularly the content of the obligation to provide fair and equitable treatment, to ensure that it reflects their intentions (including as stated in this Declaration) and that it will not be interpreted in a broader manner than they intended.

Even if CETA prevents the abuse by mailbox companies, it will empower 41,811 US firms and all the Canadian investors in the EU with new rights to sue. Four out of every five U.S.-owned firms operating in EU member states (41,811 firms) have a subsidiary in Canada. As long as they organise their investment structure so the Canadian subsidiary could claim some portion of ownership of its European investment, they could gain new rights to attack European Union and EU member state policies using CETA's ICS mechanism[9].

Text JID: "In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals."

These "binding notes of interpretations" are only valid if they are made before a legal measure or regulation is passed – not even in the period between when a measure is passed and when it comes into effect. This means that such interpretation can only be made in response to an undesired arbitration award that the Parties do not want to see repeated; damages must still be paid on the original claim.

Experience with NAFTA, which has included such a provision for decades, has shown that it does not have a significant effect. In the history of NAFTA, binding interpretations have only been used twice and not very successfully. Furthermore, governments already had the right to issue authoritative interpretations of agreements, as established by the Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) so this is not a new feature in CETA. Finally, the NAFTA experience shows that arbitrators have regularly ignored what treaty parties intended by their interpretations – it is naïve to believe that they will treat the EU any better.

Text JID: "CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment tribunals. "

CETA takes away from investors the ability to nominate an arbitrator, but the proposal does not secure the independence of "the members of the tribunal", does not eliminate financial incentives, and does not prevent pro-investor bias among the Tribunal panel. The investor dispute resolution mechanism proposed in CETA is still an asymmetric system where only investors can initiate lawsuits against states. Furthermore, the parties still pay the Tribunal's fees and costs for each case and there is no cap on what members of the Tribunal can earn. Therefore, the financial incentive to rule in favour of investors, in order to ensure that they continue believing in the system and initiating new cases, remains.

Text JID: "The members of these Tribunal will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada for a fixed term. Cases will be heard by three randomly selected members."

The fact that members of the Tribunal are "qualified for judicial office" does not mean that those appointed to resolve disputes under CETA are subject to the fundamental safeguards that ensure the independence of judges in national legal systems. Germany's largest association of judges and public prosecutors (15,000 judges and prosecutors are members) has argued that "neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts".

Text JID: "Strict ethical rules for these individuals have been set to ensure their independence and impartiality, the absence of conflict of interest, bias or appearance of bias."

There are flaws in the proposed ethics requirements, with no cooling-off period either before or after serving on the roster of arbitrators. Also, there is no explicit ban on taking on other cases as arbitrators, which can potentially create conflicts of interests. The only restriction is that arbitrators cannot act as counsel in parallel to their appointment.

> *Text JID: The European Union and its Member States and Canada have agreed to begin immediately further work on a code of conduct to further ensure the impartiality of the members of the Tribunals, on the method and level of their remuneration and the process for their selection. The common aim is to conclude the work by the entry into force of CETA.*

The impartiality of the members of the Tribunal will not be ensured as long as they are paid by the parties on a case-by-case basis[10]. In any case, this is a mere intention of good will for the future rather than a detailed interpretation of the current text.

> *Text JID: CETA is the first agreement to include an Appeal mechanism which will allow the correction of errors and ensure the consistency of the decisions of the Tribunal of first instance.*

This could potentially contribute to more coherent decisions, but does not assure that those will not be coherent decisions in favour of the investors. Members of the Appeal Tribunal will decide based on the same substantive investors rights granted in the text. Therefore, having an Appeal mechanism does not solve any of the fundamental problems mentioned above.

> *Text JID: "Canada and the European Union and its Member States are committed to monitoring the operation of all these investment rules, to addressing in a timely manner any shortcomings that may emerge and to exploring ways in which to continually improve their operation over time. Therefore, CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court."*

CETA is not even close to bringing real change from the current ISDS system. Under CETA and this interpretative declaration:

- investors will still be able to challenge public policy legislation.
- investors will still be allowed to bypass the domestic court system and have exclusive access to a parallel justice system.
- for-profit lawyers will still be able to decide on matters of public policy.

If the European Union and Canada are serious about their promises to protect citizens and the environment, they will put an end to investment arbitration, starting with the removal of investment protection provisions from CETA.

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[1] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
[2] https://www.tni.org/en/publication/ceta-trading-away-democracy-2016-version
[3] https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2016/10/11/ceta-verklaring
[4] http://canadians.org/sites/default/files/CETA%2520Opinion%2520Final%2520%252800918287%2529.pdf
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[9] http://www.citizen.org/ documents/EU-ISDS-liability.pdf
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