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Comments on the Leaked "Final Draft"

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Abstract:
Comments are offered on the "final draft" of the EU-Canada Joint Interpretive Declaration on the CETA (dated 5 October 2016). For eight reasons, I argue that the Declaration does very little to alleviate key concerns arising from the CETA's proposed special rights and privileges for foreign investors.

Keywords:
CETA, foreign investors, ISDS, ICS

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THE EU-CANADA JOINT INTERPRETIVE DECLARATION ON THE CETA

COMMENTS ON THE LEAKED "FINAL DRAFT"

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I offer these comments on the "final draft" of the EU-Canada Joint Interpretive Declaration on the CETA (dated 5 October 2016) (the Declaration).[1] For eight reasons, I argue that the Declaration does very little to alleviate key concerns arising from the CETA's proposed special rights and privileges for foreign investors.[2]

1. The Declaration sidesteps key concerns about democracy and regulation

At the heart of criticisms of the CETA's provisions on foreign investor protection is the concern that costly foreign investor claims will deter future democratic and regulatory decisions. The Declaration repeatedly uses evasive language to avoid this issue.

The Declaration states repeatedly that the EU, its member states, and Canada can still pass laws and regulations under the CETA. That is true. Yet it misses the real criticism that, under the CETA, legislatures and governments will face new and potentially massive financial risks when they go ahead with laws or regulations that disadvantage foreign investors. The problem is not that the CETA prevents laws and regulations outright. It is that the CETA will make some laws and regulations too risky to pursue by putting an uncertain and potentially huge price tag on them.

For example, the Declaration states that Canada and the EU "recognize the importance" of the right to regulate and that the CETA will not "prevent" legislatures and governments from making decisions in the public interest. In the same vein, it states that the CETA "preserves the ability" of the EU, its member states, and Canada "to adopt and apply" their laws and regulations; that the CETA "does not prevent governments from regulating" public services; and that "governments may change their laws".[3]

All of these statements avoid the key concern: CETA tribunals will have the power to order the EU, a member state, or Canada to pay uncapped amounts of compensation to foreign investors.[4] In turn, the uncertain prospect of financial liability for governments creates a special advantage for foreign investors

[1] This final draft is a leaked document and may not reflect the text of any Joint Interpretive Declaration that is released officially.
[2] The comments are based on a wider body of work by the author including "The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and Europe-Vietnam FTA" (2016) 1 *University of Bologna Law Journal* 138; "The EC and UNCTAD reform agendas: Do they ensure independence, openness, and fairness in investment treaty arbitration?" in S. Hindelang and M. Krajewski (eds.) *Shifting Paradigms in International Investment Law* (Oxford University Press, 2016); "Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA", Osgoode Legal Studies Research Paper No. 59/2014 (July 2014); and *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).
[3] *EU-Canada Joint Interpretive Declaration on the CETA* ("final draft" dated 5 October 2016).
[4] Unlike in state-state dispute settlement at the World Trade Organization, the CETA orders to compensate foreign investors typically come without any opportunity for a government to adjust its decision and avoid liability after a tribunal has interpreted the CETA and decided that a foreign investor's rights were violated.

in legislative and regulatory decision-making by deterring health, safety, environmental, financial security, consumer, labour, cultural, or any other measures that foreign investors oppose. The risk for countries and the EU – and the new leverage for foreign investors – would be greatest when the foreign investor is a large multinational or a billionaire who can afford an army of lawyers and thus credibly threaten CETA claims.[5]

2. The Declaration downplays the CETA's impediments to public services

The Declaration states that the CETA "will not prevent governments… from bringing back under public control services that governments had chosen to privatise".[6] This statement is misleading because, again, it avoids the concern that the CETA would put a new and uncertain price tag on attempts to regulate private service providers or reverse a failed privatization.

The point is demonstrated by the example of water. The CETA states that, if the EU, a member state, or Canada permit "the commercial use of a specific water source", they must do so "in a manner consistent with" the CETA.[7] Thus, the CETA subjects any commercial use of a water source – potentially including private operation of water systems as well as water removals – to the CETA's powerful foreign investor protection system. In turn, foreign investors will be able to bring claims against any law, regulation, or other measure of government that affects their water-related assets. As in various ISDS cases to date, foreign investors could invoke any of their broad CETA rights to seek compensation.[8] The Declaration acknowledges the prospect of a compensation order for "the loss suffered by the investor".[9] Based on the CETA language and the extensive case law under similar treaties, such "loss" would very likely include an investor's reasonably-expected future profits.

In these circumstances, how will governments react when they face even a low risk of losing a CETA claim? If the amounts at stake run into the hundreds of millions or billions of dollars, any responsible government can be expected to think twice about this risk. In turn, the CETA gives foreign investors in the water sector a major legal advantage over anyone with a conflicting interest in laws and regulations on water conservation, safety, and affordability.

3. The Declaration does not address the lack of independence and fairness in ICS

The Declaration emphasizes the positive, though limited, reforms to investor-state dispute settlement (ISDS) represented by the CETA's foreign investor protection tribunals – also known as its "Investment Court System" (ICS). Yet the Declaration does not address the outstanding problems with the ICS from the perspective of judicial independence and procedural fairness. In particular, the Declaration does not address two troubling loopholes that (1) allow an ICS tribunal member to work secretly on the side (and

[5] It may also arise where a foreign investor can arrange financial backing from hedge funds or other entitles that speculate in international litigation.
[6] *Supra* note 3.
[7] CETA Article 1.9(3).
[8] For an outline of such cases, see G. Van Harten, *Sovereign Choices and Sovereign Constraints* (Oxford University Press, 2013) 4-5, 10-13, and 83-90.
[9] *Supra* note 3.

be paid lucratively by a foreign investor) as an ISDS arbitrator[10] and (2) give ICS tribunal members a direct financial interest, ISDS-style, in the frequency of claims by foreign investors.[11]

The Declaration also avoids entirely the "disappeared" Article 23 on procedural fairness in ICS. Article 23 first emerged in the European Union's original ICS proposals for the TTIP.[12] It would have given third parties who are affected by a foreign investor's claim a limited right of standing in the ICS process. That was a significant step to address procedural unfairness in ISDS, whereby parties whose interests are affected by foreign investor claims nevertheless have no right of standing in the adjudication of those claims. For unknown reasons, Article 23 was dropped from the CETA. It is an example of how Canada and the EU failed to carry through with the promise of reform to address a deeply unfair aspect of ISDS.[13]

4. The Declaration does not address the CETA's lack of respect for domestic courts

The Declaration states that foreign investors "must continue to respect domestic requirements, including rules and regulations".[14] That statement is untrue. The CETA would give foreign investors alone a right to access an extraordinarily powerful system of international adjudication in order to protect them from the rules and requirements of legislatures, governments, and courts.

Worse, foreign investors have also been relieved of the usual requirement to show, before bringing an international claim against a country, that there is something wrong with the country's courts or, in the case of the EU and its member states, with the EU courts. By dropping this requirement, both the CETA and the Declaration are premised on the absurd presumption that courts in Europe and Canada are so flawed that foreign investors need not even offer an explanation before being allowed to skip domestic courts and proceed directly to an international claim.[15]

5. The Declaration falsely claims that the CETA establishes clear rules

The Declaration states that the CETA has "clearly defined" standards to protect foreign investors and that it provides "clear guidance" to tribunals on how to apply them.[16] In fact, the CETA leaves a range of key issues unresolved and open to interpretation by tribunals. This uncertainty favours deep-pocketed foreign investors: if they lose, they face the risk of millions in legal fees, but if they win, the sued country may have to pay billions in compensation (in addition to legal fees).

An example of the CETA's ambiguity is its handling of the foreign investor right to "fair and equitable treatment". This right has been used more than any other to order compensation for foreign investors. The CETA firstly is not clear on whether the list of elements of this right, laid out in CETA Article 8.10(2),

[10] CETA Article 8.30(1) [omitting ISDS arbitrator from the list of prohibited side activities]. The European Commission has been aware of this omission since at least November 2015.
[11] CETA Article 8.27(14). G. Van Harten, "ISDS in the Revised CETA: Positive Steps, But Is It a 'Gold Standard'?", CIGI Investor-State Arbitration Commentary Series No. 6 (2016).
[12] European Union, "Transatlantic Trade and Investment Partnership – Trade in Services, Investment and E-Commerce – Chapter II-Investment, EU-proposed text of TTIP investment chapter" (12 November 2015), Article 23.
[13] Van Harten, *supra* note 11.
[14] *Supra* note 3.
[15] Van Harten, "The European Union's Emerging Approach", *supra* note 2.
[16] *Supra* note 3.

is a closed list – as often claimed by the European Commission. If Canada and the European Union wanted to agree to a list that was reliably closed, they could have done so by making that point clear in the CETA, such as by inserting the word "only" before "if the measure" in Article 8.10(2). Even after the Declaration, however, Canada and the EU have left the point open to the interpretation that the list is not closed.[17]

Secondly, Article 8.10 inserts the notoriously vague concept of a foreign investor's "legitimate expectations" – originally read into investment treaties by ISDS arbitrators and now endorsed in the CETA – into the analysis of whether an investor has been denied fair and equitable treatment. Based on the ISDS experience, the CETA's use of this concept opens a door to highly-expansive, pro-investor interpretations of foreign investor rights.

Thirdly, the CETA refers to the concept of "a specific representation to an investor to induce a covered investment" when it defines foreign investor rights under Article 8.10. Here, remarkably, the "specific representation" to a foreign investor need not be in writing. Rather, the CETA is open to the interpretation that a state have to compensate a foreign investor based on a verbal representation by an official in a closed meeting with an investor's representative and without any formal written record. In ISDS cases,[18] the tribunal's factual conclusions about these kinds of representations, reconstructed from conflicting oral recollections about conversations, has been unsettling, to say the least. In a worst case scenario, the open-ended language in Article 8.10 allows a corrupt official to make secret deals with foreign investors that would create immense financial risks for any future effort by the legislature or government to regulate the foreign investor.

Another example of ambiguity in the CETA arises in Article 8.7(4), which gives foreign investors a right to "most-favoured-nation" (MFN) treatment. As framed in the CETA, this "me too" clause may potentially be used to import into the CETA, from other investment treaties of an EU member state or Canada, foreign investor rights that are even broader than those in the CETA. The key uncertainty in the text of Article 8.7(4) comes from its second sentence, which states:

> Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

I have underlined the problematic part of this sentence. The underlined words allow tribunals to conclude, for example, that a country's passage of an implementing law under another investment treaty means that substantive obligations in the other treaty – such as an expansive definition of fair and equitable treatment – will qualify as "treatment" under CETA Article 8.7(4) and thus can found a broader claim to compensation under the CETA.

[17] In past NAFTA cases, investment treaty arbitrators have disregarded the shared views of all states parties to NAFTA when interpreting ambiguous language in the investment chapter in order to favour the foreign investor's preferred interpretation (see e.g. the *Pope & Talbot* tribunal's interpretation of national treatment) and, in the case of Article 8.10, the foreign investors' preferred interpretation seems very likely to be that the list is not fully closed, so that expansive and concepts such as the "right to a stable regulatory framework" can be read into Article 8.10. The most important problem with this concept is that it allows tribunals to award massive compensation for generally-applicable regulatory measures introduced for a public purpose in virtually any area of state activity, where it has reduced the value of foreign-owned assets including their anticipated future earnings.

[18] e.g. *Metalclad Corporation v United Mexican States* (Merits) (30 August 2000), 16 ICSID Rev 168, 40 ILM 36.

One cannot be sure whether a tribunal will arrive at this conclusion – but it is the very uncertainty of that issue, in a lopsided system of protection and remedies, that favours deep-pocketed investors. One must also realistic in the face of a long history of expansive interpretations by ICS-type tribunals in ISDS cases to date, as I have documented at length.[19] The use of ICS instead of classical ISDS in the CETA may alter the risk assessment, but it clearly does not remove the risk. And it is the fact of the risk – i.e. a non-negligible risk of potentially-massive liability for the state – that gives foreign investors their special bargaining power to undermine democratic regulation.

As a final example of uncertainty, the CETA will give tribunals the power to classify legitimate public policies as "manifestly excessive" and, on that basis, as an indirect expropriation that requires full compensation of the affected foreign investors. This loophole in the CETA Annex on indirect expropriation undermines any reassurance the Annex might otherwise give to legislators and regulators. It makes it more likely that a proposed law or regulation will carry a non-negligible risk of potentially massive liability – premised on one's guesswork about what an ICS tribunal will think was "manifestly excessive" years after the law or regulation was introduced.

The Declaration does not resolve any of these important ambiguities in the CETA text. Thus, it seems to be premised on wishful thinking about how ICS tribunals will react to the ambiguities. Sometimes wishful thinking pays off. More often, for governments facing foreign investor claims, it has not.[20]

6. The Declaration is misleading about the CETA's threat to aboriginal rights

The Declaration asserts that the CETA protects rights and interests of Canada's aboriginal (i.e. indigenous) peoples.[21] To my knowledge, no consultation ever took place with aboriginal peoples during the CETA's negotiation by the right-wing Conservative government of Stephen Harper. Only in the course of litigation was it confirmed that the Harper government had not consulted with aboriginal peoples when negotiating similar agreements, marked especially by the *Canada-China Foreign Investment Promotion and Protection Agreement*.[22]

The CETA's foreign investor protection system is a threat to aboriginal rights and interests. Its relevant exceptions, allowing for preferential treatment of Canada's aboriginal peoples compared to foreign investors, do not preserve aboriginal rights in general in the face of this threat. If Canada and the EU wanted to protect indigenous peoples' rights effectively, they should have agreed in binding terms to disallow any foreign investor claim against a law, regulation, or other measure that is aimed at furthering indigenous rights. Neither the CETA nor the Declaration take this step.

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[19] *Supra* note 8; G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration (part two)" (2016) 52 *Osgoode Hall Law Journal* 1; G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50 *Osgoode Hall Law Journal* 211.

[20] In the NAFTA experience, there evidently were expectations on the part of the NAFTA governments about the limited meaning of the NAFTA investment chapter, and the same has been true for other investment treaties. These expectations have been dashed over and over by tribunals operating in a context that is very similar to the ICS model. See G. Van Harten, "Five Justifications for Investment Treaties: A Critical Discussion" (2010) 2(1) *Trade, Law and Development* 19.

[21] *Supra* note 3.

[22] G. Van Harten, *Sold Down the Yangtze: Canada's Lopsided Investment Deal with China* (Lorimer, 2015), chapters 22-24 and 38.

7. The Declaration and the CETA do not incorporate any foreign investor responsibilities, corresponding to their powerful rights

Another key problem with the CETA is its gross favouritism toward foreign investors. Foreign investors obtain extraordinarily powerful rights to bring international claims against countries. Yet these rights come without responsibilities that are enforceable in the same process, whether based on claims by governments or victims of corporate abuse. The Declaration avoids this issue entirely. Instead, it diverts attention by highlighting other parts of CETA that put far weaker environmental and labour responsibilities on governments – not foreign investors.

There are two problems with this approach. First, government responsibilities can themselves still be frustrated by foreign investors' far more powerful protections in the CETA. Put differently, the CETA would force governments to make new and difficult choices between, on the one hand, protecting their citizens from environmental or labour abuse and, on the other hand, protecting their taxpayers from the risk of having to compensate foreign investors.

Second, the CETA's provisions on government responsibilities for environmental and labour protection pale in comparison to the CETA's rights for foreign investors. For example:

- The CETA's environmental and labour provisions do not allow for claims by the victims of environmental or labour abuse – unlike the foreign investor protection system.
- They likewise do not allow such claims without requiring individuals to go to a country's courts first, before bringing an international claim.
- They do not provide anything like the broadly-framed rights and protections given to foreign investors.
- They do not allow for uncapped and highly-enforceable compensation orders for victims of environmental or labour abuse, as for foreign investors.
- They do not include, for such victims, the many procedural advantages available to foreign investors under the CETA.

Not all of these elements should be extended to international environmental and labour protection, in my view. Some are as inappropriate for investor responsibilities as they are for investor protections. Yet that is not the point. The point is that the CETA would create a huge gap in its paltry protections for workers and the public compared to its protections for foreign investors. The Declaration does not address this favourtism.

8. The Declaration appears to be a political document, not a legally binding instrument

The Declaration could be misleading for non-lawyers, who might think that the Declaration will alter or override the CETA. On the contrary, the Declaration appears not even to be a legally binding document but rather a political or promotional statement. It does not change the CETA's legal terms as agreed between Canada and Europe and it has little prospect to affect how the CETA is interpreted and applied.[23]

[23] Based on principles of treaty interpretation, the CETA will be interpreted primarily according to the text of its relevant provisions, the surrounding text for those provisions in the CETA, and the object and purpose of the CETA as characterized in the CETA text. The Declaration would play a subsidiary role, if any, in this interpretive process.

Indeed, the Declaration can be seen as a lost opportunity to clarify the CETA. Under the CETA, a legally binding clarification can be issued through the vehicle of a "note of interpretation". Yet the Declaration does not use the language one would expect for a note of interpretation.[24] It also mentions the option of issuing a note of interpretation without clarifying that the Declaration is intended to have a similar effect. On this basis, there is a significant reason to doubt that the Declaration is a binding document.

It seems especially misleading for Canada and the EU to assert in the Declaration that its aim is "to provide a clear and unambiguous statement" of what Canada and the EU agreed in the CETA. A statement that is not clearly binding is unreliable as a means to clarify the CETA. For the Declaration to be binding, it would need to be clearly identified as such. Even then, as discussed earlier in this paper, the content of the Declaration does not respond to key concerns and resolve risky ambiguities arising from the CETA.

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The CETA's special protections for foreign investors are out of step with principles of democratic regulation, independence and fairness in adjudication, and balance in the allocation of rights and responsibilities. The Declaration does not ameliorate the resulting concerns. Overall, it furthers the CETA's skewing of state decision-making in favour of large multinationals, wealthy individuals, and speculators in international litigation.

[24] The absence of these legal elements contrasts with the notes of interpretation similarly issued by Canada, Mexico, and the U.S. as authorized under the NAFTA investment chapter. See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).