The Canada-EU Comprehensive Economic and Trade Agreement (CETA), Mega-Treaty on Behalf of Transnational Capital

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"The Parties hereby establish a free trade area…"

— CETA Article 1.4

"Trade, like Religion, is what every Body talks of, but few understand: the very Term is dubious, and in its ordinary Acceptation, not sufficiently explain'd."

— Daniel Defoe, *A Plan of the English Commerce* (1728)

The Canada-European Union Comprehensive Economic and Trade Agreement(CETA), like other looming mega-treaties, is a comprehensive vehicle for expanding the scope of transnational investment by rolling back the capacity of governments to regulate in the public interest. The attack on democratic governance is not restricted to the notorious Investor-State Dispute Settlement (ISDS) mechanism, which privileges transnational capital by creating a parallel legal system exclusive to transnational investors. The invasive claims of transnational investors permeate the entire treaty.

Canada and the EU are already among the world's most open economies. Tariffs are at a historic all-time low. CETA's primary mission is to eliminate "non-tariff barriers" – namely the laws and regulations constructed over decades of struggle to limit corporate power and support the services and policies needed to defend workers, citizens and the environment. CETA is an investment treaty embedded in a comprehensive deregulatory project.

'Free Trade' and the Expanding Investor Universe

The treaty leaves existing regulations and policies in Canada and the EU vulnerable to investor challenges – directly through ISDS, or indirectly through corporate-driven state-to-state dispute mechanisms. It also forecloses the use of essential policy tools which progressive governments will need to reverse the social destruction which is feeding an authoritarian, nationalist and xenophobic right.

The treaty builds on an expansive definition of investment which broadens its scope beyond existing treaties between Canada and the EU. It is virtually identical to the leaked draft investment chapter in the Transatlantic Trade and Investment Partnership (TTIP).

The “legally scrubbed” official CETA text states, tautologically: “Investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment” (CETA, 2014: 39). Characteristics of an investment include “the expectation of gain or profit.” In addition to direct investment in an enterprise, ‘investment’ includes stocks, shares, bonds and other debt instruments; concessions, “including to search for, cultivate, extract or exploit natural resources”; intellectual property rights and “other moveable property, tangible or intangible, or immovable property and related rights,” and “claims to money or claims to performance under a contract” (CETA 2014: 39ff). A corporation need only demonstrate a “legitimate expectation” of profit to challenge regulatory obstacles to realising that expectation.

The market access and national treatment provisions set out in the investment chapter apply to governments at every level, erasing all restrictions in the name of ‘non-discrimination’. The treaty prohibits governments from managing foreign investment for distinct objectives, and prohibits any restrictions on profit repatriation.

‘Indirect Expropriation’

The investment chapter ‘reaffirms’ governments’ rights to regulate in the public interest, but investors are guaranteed expanded “fair and equitable treatment” and protection against “indirect expropriation” of anticipated profits through the adoption of new laws and regulations. The dispute settlement body will determine whether indirect expropriation has occurred through a ‘fact-based inquiry that takes into consideration, among other factors: the extent to which the measure or series of measures *interferes with distinct, reasonable investment-backed expectations’* (CETA, 2014: 331; my emphasis). Indirect or ‘regulatory expropriation’ has enabled a growing number of successful investor challenges to public interest laws, regulations and court decisions through investor-to-state lawsuits.

Public services are exempted from market access, national treatment and performance requirements and the most-favoured-nation provisions of the investment chapter *only* to the extent that they are ‘carried out neither on a commercial basis nor in competition with one or more economic operators’. This is the phantom public sector carve-out established in the World Trade Organisation’s (WTO) General Agreement on Trade in Services (GATS) agreement. As there are pockets of private business in most public services, few meet these criteria. Parties must explicitly reserve the services they wish to exclude – the negative list approach – based on the United Nations’ 1991 Central Product Classification, whose thousands of entries blur the distinction between public and private and manufacturing and services. Standstill and ratchet clauses freeze current levels of privatisation, making it difficult, and costly, for governments to take privatised services back into public hands.

CETA’s Domestic Regulation chapter is not restricted to services. Governments must ensure that any regulatory restrictions they maintain or adopt ‘do not unduly complicate or delay the supply of a service, *or the pursuit of any other economic activity*’ (CETA, 2014: 91; my emphasis). Article 2 of the chapter on Technical Barriers to Trade reinforces limits on regulation by stipulating that technical regulations must “not be more trade-restrictive than necessary to fulfill a legitimate objective.”

The chapter on Government Procurement widens corporate penetration into governments at every level by generalising ‘national treatment’ and prohibiting ‘offsets’, defined as ‘any condition or undertaking that encourages local development’.

The Financial Services chapter allows for loosely-defined ‘prudential measures’ but weakens the potential to restrict the size or market share of financial institutions even where such measures are ‘non-discriminatory’ with respect to foreign and national investors. Governments seeking to restrict the introduction of new financial ‘products’, or limit the size of financial corporations, will find that financial corporations have, through CETA, insured themselves against regulatory risk.

The chapter on Regulatory Cooperation commits signatories to ‘remove unnecessary barriers to trade and investment’ and ‘enhance competitiveness’ through an unaccountable Regulatory Cooperation Forum, which institutionalises corporate lobbying. The Forum is tasked with reducing compliance costs, exploring ‘alternatives’ to regulation, and promoting the ‘recognition of equivalence and convergence’ – a blunt instrument for levelling protection. Governments will share ‘non-public information’ with their Forum counterparts *before* the information is shared with lawmakers or the public – all ‘without limiting the ability of each Party to carry out its regulatory, legislative and policy activities’!

Regulatory approaches are to be ‘technology-neutral’ – a requirement at odds with the vague promise in the chapter on Trade and the Environment in which the parties ‘commit to cooperate in means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies’.

How important is investment (and its proxy ‘trade in services’) compared with trade in goods in CETA? The treaty provisions cease to apply 180 days after notice of intention to terminate. However Chapter 8 (Investment) remains in force for a full twenty years (CETA 2014: Article 30.9).

Labour’s Agenda?

After the Brexit vote, the European Commission announced that CETA – scheduled to be signed at the EU-Canada summit in late October – would be treated as a ‘mixed agreement’, requiring approval by the national parliaments of EU member states as well as by the main EU institutions. But the Commission proposes that the treaty enter immediately into ‘provisional’ force following approval by the European Council and European Parliament, meaning that its investment provisions would apply for some years before full ratification, and even if one or more member state voted to sink the deal.

Unions and our civil society allies are unanimous in calling for the removal of ISDS from the treaty. The European Commission’s rebranding of ISDS as an investment court fails to eliminate its fundamental toxicity (See for example Eberhart, 2016) and should be rejected on similar grounds.

But ISDS is only one element, albeit a major one, in CETA’s comprehensive corporate power grab. Transnational investors can press their claims through state-to-state dispute mechanisms, as the WTO’s Dispute Settlement Body demonstrates. The expansive claims of transnational investors are systematically built into the treaty; corporate confiscation of democratic governance links the chapters. ISDS cannot be surgically excised, leaving a text which then somehow serves as a vehicle for a progressive trade agenda. Nor can a sweeping charter of investor claims be ‘balanced’ by inserting stronger provisions to defend labour rights or protect the environment. CETA is fundamentally hostile to democracy and the labour movement; it has to be scrapped, not ‘improved’.

Behind CETA, or course, lurks the Transatlantic Trade and Investment Partnership (TTIP). Should TTIP fail, many of its ambitions can be realised through CETA. The majority of U.S. transnationals have Canadian subsidiaries with activities and 'expectations of profit or gain' in the EU. They can use ISDS and other provisions to feed their growing appetites. EU corporations can sue the government of Canada, but also use Canadian subsidiaries to attack European regulations they find inconvenient, reinforcing the EU's current retreat from regulation.

For long decades, labour has been fighting purely defensive battles against the neo-liberal trade and investment agenda; we lack an agenda of our own. Lost ground will not be reclaimed on what is fundamentally hostile territory. Crisis, stagnation and the longest investor strike in recent history will not be reversed through stronger doses of neo-liberalism. Substantial programs of public investment are needed to address mass unemployment, inequality, disintegrating public services and climate change. CETA and its flanking treaties effectively preclude them. •

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