COMMENTARY

The Gold-Plated CETA: Whose gold and at what cost?

Howard Mann
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While the Comprehensive Economic and Trade Agreement (CETA) text was in long-term legal scrub, it took a back seat to discussions over the Trans-Pacific Partnership (TPP) Agreement concluded by the Conservative government during the last election campaign. TPP has attracted vocal opposition from very diverse sources in Canada, including major innovators, labour unions and organizations focused on achieving sustainable development. With the release now of the final text, new debate is needed on CETA as well.

Included in the statement released by Canada and the European Union (EU) was the announcement that the investor–state arbitration model long entrenched in Canada's international agreements has been replaced by a system that more closely resembles an international court. This EU-proposed court system seeks to address substantial unease in civil society and governments in Europe, and to some extent in Canada, with the system of international arbitration for transnational investment disputes that has become fraught with cronyism, conflict of interest and unpredictability.

International Trade Minister Chrystia Freeland stated that, with these changes in the agreement, "our dispute resolution process is brought up in this agreement to the 21st century democratic standards that Canadians demand."[1] The new court-like system includes independent judges, an appeals process and, generally, more transparency and predictability. There can be little doubt that this is a significant improvement over the previous arbitration process.

But this view begs three questions. First, since Canada and the EU already have highly developed court systems, why have a new international court that can override these domestic institutions at all? Second, what does this mean for Canada's signature on TPP, which does not contain the new dispute settlement mechanism that Canadians expect for the 21st century? Third, and more critically, does the rest of the agreement also reflect 21st century needs and standards?

As to the first question, the dispute settlement mechanism will still give foreign investors special rights and remedies to challenge government actions that they see as unfavourable to them. This gives one economic stakeholder a very significant legal advantage over all other actors and stakeholders in the economy. It will still allow this one class of economic actor to circumvent domestic courts and the same domestic law that applies to everyone else by going directly to international dispute settlement that applies international law to protect their investor rights. It reflects the trickle-down economics of a past century and impinges on the ability of individuals and governments to expand economic opportunities for other actors.

[1] H. Mann. (2016, March 9). New debate needed on Canada–EU trade deal. Retrieved from https://www.hilltimes.com/2016/03/09/new-debate-needed-on-canada-eu-trade-deal/53463/53463

The justification for giving these extraordinary rights and remedies to one stakeholder in the international economy is that these mechanisms will attract new investors to new places. However, this justification fails to stand up to empirical evidence developed over the past 10–15 years that shows that these types of special rights for investors have no impact on investment flows between developed countries, and indeed on such flows between developed and developing countries. In short, there is simply no payoff for governments that put their countries at risk of exposure to international dispute settlement processes that circumvent domestic courts. The empirical evidence on this is unequivocal.

Second question: Given the declaration by Minister Freeland that the revised dispute settlement process has been brought up to the 21st century democratic standards that Canadians expect, what does this mean for TPP? The TPP Agreement has the same dispute settlement mechanism as in the original CETA text, though without a number of the extra safeguards for states that even CETA had. It is based on a model that also expands international arbitration over many domestic law contracts and permits at the expense of domestic courts. Presumably, this model no longer reflects the democratic value of Canadians, as indicated by the minister, and thus Canada should now be leading the effort to replace the TPP process with the new investor court process.

The dilemma for Canada is that we have now become policy-takers in our trade negotiations, not policy-makers. The lack of consistency in approach and the result on such key issues shows the need for a deeper level of review of our trade and investment policies and negotiating objectives.

And finally, do the other provisions of CETA also reflect 21st century goals and standards? Let's take the Intellectual Property Rights (IPR) rules, for example, which go further to favour European drug manufacturers over Canadian manufacturers and Canada's health care system than any previous IPR agreement. They remain unchanged now.

There is also the chapter on domestic regulation that goes further in limiting government rights to review and regulate new investments in every sector of the economy than any previous treaty has gone. Again, no change. There has been no public discussion of how these provisions will impact the right to regulate under the investment chapter.

In fact, CETA features a long list of limitations on government's ability to maximize the value that Canadians derive from foreign investment. These restrictions are paralleled in the now much-debated TPP. Why are they not being equally debated here?

In both TPP and CETA, it is the chapters that do not directly relate to trade that make the agreements "comprehensive." The economic impacts anticipated from CETA's trade liberalization are actually very small, estimated most reliably in the EU to be between 0.02 and 0.03 per cent in the long term. But the non-trade chapters are fully geared to expanding the legal rights of existing large businesses and multinational companies, thus continuing the ongoing loss of legal equality of average citizens and small and medium-sized businesses compared to the large economic actors under these agreements. These chapters simply replicate and deepen provisions from five, 10 and 20 years ago, or more. Rather than promote a strong recognition of the need for such economic agreements to promote inclusive growth that reverses decades-long growth in income inequality, they promote the same processes that lead to this inequality. Rather than ensure climate change measures will prevail over trade rights, they do the opposite. The inclusion of ever deeper versions of 1980s- and 1990s-type provisions simply cements the growth of legal rights of the existing major economic actors, at the expense of other economic actors' and governments' abilities to regulate the economy. CETA (and TPP) will continue to expand and entrench the legal inequality between economic actors, and the economic inequality that these rights serve to protect. They do not reflect the needs for sustainable development, for inclusive growth, for addressing climate change. They are not intended to do so.

The UN Sustainable Development Goals (SDGs) adopted in 2015 provide a framework to realign the goals of trade and economic agreements for the future

rather than just replicate the measures of the past, measures that continue to work against sustainable development needs. With the growing concerns over TPP, the inconsistent approaches between TPP and CETA on key democratic principles and the need to address climate change, it is time for Canada to lead in re-evaluating what type of trade agreements are needed for this century, as opposed to simply continuing to replicate and deepen what was done in the last century. Canada now has a unique opportunity to step back, reflect and then return to lead global trade law into a sustainable development era.

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Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700
Fax: +1 (204) 958-7710
Website: www.iisd.org
Twitter: @IISD_news

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