

RED LIGHT FOR CETA!

CANADA

EUROPE

In July 2015, the European Parliament called on the Commission to protect the EU's right to regulate, to ensure equal treatment of foreign and domestic investors, to address investors' responsibilities, and to replace ISDS with a new system subject to democratic principles and scrutiny, in which investment disputes would be resolved by professional judges, respecting EU and Member State jurisdiction.

THIS BRIEF ADDRESSES THE CORE PROBLEMS OF CETA'S INVESTMENT COURT SYSTEM, BASED ON THE REPORT "INVESTMENT PROTECTION IN CETA: GOLD STANDARD OR MISSED OPPORTUNITY?". IT CAN BE FOUND ON TTIP-LEAKS.ORG

CETA INVESTMENT RULES FAIL TO PROTECT THE RIGHT TO REGULATE IN THE PUBLIC INTEREST

In CETA, the protection of the right to regulate is too vague to be effective. Ultimately, the investment tribunals will decide which regulations or measures are permissible on grounds of public interest and which are not. The list of "legitimate" policy objectives in the text does not mention many of the objectives recognised in UNCTAD's policy guidelines (such as human rights, the provision of essential social services, or the prevention of tax evasion). Furthermore, there is no mechanism to allow the EU or Canada to guide the interpretation of this "public interest" defence – to allow the inclusion of additional policy objectives – or to ensure its proper application. This means it will be up to tribunals to decide on a case-by-case basis (page 8-9).

CETA INVESTMENT TRIBUNALS ARE NOT SUBJECT TO DEMOCRATIC PRINCIPLES AND SCRUTINY WHILE GIVING GREATER RIGHTS TO FOREIGN INVESTORS

CETA investment tribunals act outside the realm of our democratic systems: their decisions are not subject to the scrutiny of EU supreme or constitutional courts. CETA establishes an investor-state dispute resolution procedure and a set of investment rights which are only available to foreign investors. These investors therefore benefit from greater rights than domestic investors, through a parallel judicial system they can use to sue the EU and its Member States. This system not only fails to provide for an appropriate level of democratic oversight in cases that concern legitimate public policy objectives, but also violates the principle of equality before the law, which is at the root of our democracies (page 11).

CETA INVESTMENT TRIBUNALS ARE NOT OBLIGED TO RESPECT THE JURISDICTION OF DOMESTIC COURTS, MAY CONTRADICT DOMESTIC LAW, AND ARE NOT OBLIGED TO ENSURE CONSISTENCY OF JUDICIAL DECISIONS

CETA does not require that foreign investors exhaust domestic (or EU) remedies before they can bring a case to an investment tribunal. CETA investment tribunals are not even required to refer cases to the European Court of Justice or to national supreme courts to ensure the correct and consistent interpretation of domestic or EU laws. This gives the CETA legal regime de facto supremacy over the decisions of courts of the EU and its member states. Effectively, foreign investors will be able to circumvent national and EU jurisdictions and there will be no recourse to domestic or EU courts to address a tribunals' incorrect interpretation or application of domestic or EU law. To protect the public interest will be severely impaired. This is of particular concern when cases may concern issues such as environmental protection, labour standards or fundamental human rights (page 13).

CETA INVESTMENT TRIBUNALS ARE NOT COMPOSED OF INDEPENDENT PROFESSIONAL JUDGES

A judge is professional only if s/he serves exclusively and permanently in this capacity. By contrast, the members of CETA investment tribunals will be allowed to carry out other professional activities in addition to sitting on ICS panels. This will invariably lead to conflict of interest. The members of CETA investment tribunals will, to start with, not be subject to a code of conduct. Even when a code of conduct is put in place, they will not be barred from adopting decisions in conflict of interest. Nor will violation of the code of conduct justify the annulment of such decisions (page 12-13).

CETA PROVISIONS ON "EXPROPRIATION" AND "FAIR AND EQUITABLE TREATMENT" REMAIN TOO BROAD

CETA defines "indirect expropriation" using vague and undefined expressions such as "substantial deprivation" of the "fundamental attributes" of property. While EU Member States have the right to adopt measures to achieve "legitimate public welfare objectives", investment tribunals may find that the measure constitutes an "indirect expropriation" if it considers the measure to be "so severe in light of its purpose that it appears to be manifestly excessive" (page 10-11). Furthermore, investors' "legitimate expectations" are still to be taken into account when tribunals consider if there has been a breach of the "fair and equitable treatment" standard. These expectations can be based on any "specific representation" – meaning that governments may even find themselves bound by verbal assurances given to investors by individual state officials (page 7-8).

CETA DOES NOT INCORPORATE THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS OR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

CETA ignores the issue of responsible business conduct almost entirely. The text fails to include a single reference to the UN Guiding Principles, widely regarded as an international benchmark in this regard. The Guiding Principles i) require States' to protect human rights against abuses of business enterprises, ii) affirm corporations' responsibility to respect human rights, and iii) require for victims to have access to effective remedy. CETA's only relevant reference to the OECD Guidelines – in the preamble – merely "encourages" enterprises to heed the guidelines. This means that while investors enjoy a wide range of protections under CETA, they incur practically no obligations. CETA completely fails to address the concern that this imbalance has created a lucrative market for investor-state litigation, and that it may hinder legitimate attempts to remedy harmful business conduct in domestic legal systems (page 14-15).

THE FINAL CETA TEXT IGNORES ALMOST ALL OF THE EUROPEAN PARLIAMENT'S STIPULATIONS.
WE THEREFORE CALL ON THE EUROPEAN PARLIAMENT TO STOP CETA.