



Seattle to Brussels Network

Seattle to Brussels analysis

The European Commission's note on

“Investment Provisions in the EU-Canada free trade agreement ” is

a lobby document, not an objective and complete presentation on the issue

At the end of 2013 the European Commission produced a note presenting and explaining the “Investment Provisions in the EU-Canada free trade agreement” (CETA).

The European Commission's note

(http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf) must be regarded as a lobby instrument to rally support in parliaments and public opinion, but it is definitely not a complete and objective presentation of where the negotiation texts really stand. The discrepancy between the Commission's note and the texts (of which leaked full versions were seen by S2B) demonstrates once again that more transparency is needed and that only the texts themselves can give an objective picture of where negotiations stand.

S2B analysis of the Commission's note

The first part of the note deals with the provisions of the investment protection chapter. In the introductory paragraph, the Commission claims that “*the EU and Canada agreed to bring very significant clarifications to the key substantive provisions*” and that “*the arbitrators will now have strict and detailed guidance when these provisions are invoked by an investor*”. However this is not the case, especially not with the Fair and Equitable Treatment (FET) standard as shown below.

Under point 1 of the first part, the Commission claims that CETA reaffirms the right to regulate. This is not the case. There is not a general paragraph reaffirming this right in the 21 November CETA text that would apply to the whole text. There is only such a paragraph in the annex on expropriation. And expropriation is less used to attack general policies than the FET standard.

Under point 2 the Commission claims that there is a precise definition of the FET standard in CETA. This is misleading as becomes clear when looking at the relevant part in the 21 November CETA text.

The definition given in the CETA text is of a hybrid form: it combines a more precise closed list in one article with open ended and vague formulations in other articles. The sum of that is vague and open ended and therefore multi-interpretable by arbitrators in an investment tribunal.

In its note the Commission only presents the closed list which sums up manifest breaches that everyone can agree with (like discrimination on racial grounds) and only one of the other articles. However that other article is misrepresented. The Commission says that it means that *“a breach of legitimate expectations is limited to situations where the investments took place ONLY (my emphasis) because of a promise made by the state that was subsequently not honoured”*. This is not what the article in the 21 November CETA text says. It in fact says *“when applying the above FET obligation a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation”*. It does not say that the investment only took place because of this representation. So the actual scope of the article is broader than the Commission wants us to believe.

More problematic is that the Commission does not say that:

- 1- the Parties can every [...] year review (i.e. amend) the content of the FET obligation
- 2- in addition to the closed list, a breach of the FET obligation can also result from *“the FET obligation recognized in the general practice of States accepted as law”*. This is a vague formulation which leaves a lot of space for the arbitrators to make interpretations.

Under point 5 the Commission says that the agreement makes clear that the obligation to provide “full protection and security” does not cover protection against changes of laws and regulations. The 21 November CETA text does not say that with so many words. It only says that this obligation refers to physical security of investors and covered investments.

In point 8 the Commission says that CETA like other EU FTAs permits the adoption and enforcement of prudential measures. However these are limited to balance of payment problems and to “strictly necessary” measures -that cannot exceed 6 months only- restricting transfers (of capital and payments) in case of serious difficulties for the operation of monetary or exchange rate policy.

In the second part on ISDS the Commission claims under point 4 that CETA has introduced a binding code of conduct for arbitrators. However that code is not there yet. It will be adopted by a joint committee within two years after the entry into force or provisional application (this is undecided in the 15 November CETA ISDS text). But worse, the text says that the arbitrators have to follow this code OR the International Bar Association Guidelines on Conflict of Interest in International Arbitration (which is a general code not geared to ISDS) which means that the code is NOT binding.

Under point 7 of the second part the Commission says that all hearings and all documents will be open. However, not everything will be open and public as the 15 November text foresees several exceptions allowing arbitral tribunals to hold information confidential and parts of hearings in private, for instance to protect the “integrity of the arbitral process” or “confidential business information”, but also even for “logistical reasons”.

Under point 8 the Commission boasts that CETA provides for the possibility to establish an appellate mechanism, but there is no real commitment in the text to indeed do so.

Under point 9 the Commission says that there are explicit provisions for mediation for investment disputes, but this is completely voluntary.

Under point 10 the Commission states that there is “absolute clarity” that a state cannot be forced to repeal a measure. The 15 November CETA text does indeed allow the Arbitration tribunal to only impose monetary damages or restitution of property (which may also be replaced by monetary damages). However it is clear that the threat of such damages or the threat to use the ISDS may be

enough for governments to repeal measures as has happened so often in out of court settlements between the investor and the targeted governments.

Under point 11 the Commission says that CETA foresees effective mechanisms for the Parties to the agreement to issue binding interpretations. However these interpretations are only valid if they are made before the measures were taken (and not even after the measures were taken but before the measures were put into question). 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 again, but then they will have paid damages at least once already.

Other critical points in the texts not mentioned in the Commission's note

In addition to the elements addressed in the Commission's note, there are other important critical remarks to be made about provisions in the CETA textsⁱⁱ[i].

In the investment protection chapter, the definition of investment is defined too broadly, covering any kind of asset, independent of whether or not investments are associated with an existing enterprise in the host state.

The investment protection chapter contains a "most favoured nation" (MFN) clause which will allow foreign investors to invoke any rights given to investors from other countries, including rights given under other investment treaties. This will nullify any new element or formulation or "reforms" or "modernisation" that the CETA text may contain as investors will be allowed to use the provisions and the language of other investments treaties that Canada or the EU have ratified instead! To a certain extent the EU is aware of this problem as it has excluded the market access provisions and the investor to state procedures of the investment chapter from the scope of the MFN clause; but this will not prevent investors to invoke other elements from other investment treaties, especially the way investment protection standards have been formulated.

The text contains an umbrella clause (absent in Canadian BITs) that will substantially broaden the scope of the treaty and makes it possible for investors to claim a breach of a contract or of other commitments made by the authorities of the host state as a violation of the treaty itself and the subject of investor-to- state dispute settlement.

The text contains a "survival" clause which extends the validity of its provisions to not less than 20 years after the termination of the agreement for investments that were made before the date of termination.

The text contains a long article on general exceptions (e.g. with regard to privacy, health) but these are all quite vague and the Commission wants to limit them to market access so that they do not apply to the investment protection standards or national or MFN treatment.

In the ISDS chapter the Commission has introduced the possibility of arbitration with one arbitrator for SME's or when the damages claimed are low. This will lead to increased litigation as it will make ISDS less costly and more accessible.

The chapter foresees wide competences for a joint "Committee on Services and Investment" so that it can – after completion of the respective legal requirements and procedures of the Parties- adopt and propose amendments, rules, interpretations, etc. This will add to make CETA a "live" agreement

that can be adapted to circumstances. Question is however how the parliaments, civil society and the general public will be able to scrutinise the continuous expansion of the agreement.

CONCLUSION: Let us not lose sight of the forest behind the trees

There is more to the investment provisions than the European Commission wants the public to see. Moreover, despite of all the small or larger reforms that are being introduced in CETA (in comparison with the EU member state BITS) the investor to state arbitration system that it will establish remains far inferior to the domestic legal system of the EU and Canada (or later with TTIP, the USA).

ISDS is precisely and only meant to allow foreign companies to have greater rights than domestic companies and citizens and to disregard domestic laws. CETA and later TTIP will surrender the judgement of what policies are right or wrong to three unaccountable private arbitrators. And because of the sheer size of the North Atlantic investments they will extend the coverage of the ISDS enormously. This should not be allowed to happen.

i The most recent texts sent by the European Commission to the Member States date from 15 November (for the ISDS part) and 21 November (for the rest of the Investment chapter). The latter was redistributed among the member states on 7 January 2014.

ii See also Nathalie Bernasconi, *The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?* IISD, 26 June 2013.
http://www.iisd.org/pdf/2013/iisd_itn_june_2013_en.pdf