The CETA Deception

How the Harper government's public relations campaign misrepresents the Canada-European Union Comprehensive Economic and Trade Agreement

A report by The Council of Canadians

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About the Council of Canadians

Founded in 1985, the Council of Canadians is Canada's largest public advocacy organization, with members and chapters across the country. We work through our volunteer network and with national and international partners to promote progressive policies on fair trade, clean water, energy security, public health care, and other issues of social and economic concern to Canadians. The Council of Canadians does not accept money from corporations or governments, but is sustained entirely by the volunteer energy and financial assistance of its members.

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Background

In April 2012, the Harper government made its first real attempt to explain to Canadians what it hopes to achieve through its now three-year-old free trade negotiations with the European Union. Prime Minister Stephen Harper dispatched 18 of his ministers to press conferences across the country, enlisted marketing support from several big business lobby groups, and created a new webpage to try to demystify a Comprehensive Economic and Trade Agreement (CETA) the Canadian public has heard little about.

A recent *Postmedia* news article quoting internal government documents confirms the government's April campaign was a response to growing concerns about CETA, particularly among the over 40 and counting municipal governments seeking exemptions from the deal. The objective, according to the article, was "to 'generate widespread support for the ongoing Canada-EU trade negotiations' by having parliamentarians visit local companies likely to benefit from CETA, and for the Tory caucus members to highlight possible benefits to workers and families in their communities. The goal, however, was also to 'counter negative rhetoric around the Canada-EU trade negotiations by creating more real awareness of the issues and benefits at stake.'"[1]

Unfortunately, where there was once a cavernous lack of information about CETA, there is now an abundance of misinformation. In its propaganda campaign, the Harper government is purposely confusing what critics have been saying about CETA, and is resorting to complete falsehoods in some cases. One especially ridiculous claim is that CETA has been one of the most "transparent trade negotiations in Canadian history." Meanwhile the text for the agreement is off limits to the public – Canadians will have no say in what the deal looks like before it is signed. The public relations exercise was a desperate attempt to calm growing fears about Canada's broadest, most intrusive trade, investment and economic governance pact since NAFTA.

Another dubious claim from the Harper government is that CETA will create $12 billion in new wealth and put $1,000 into the pockets of every working family, which is supposed to be equivalent to creating 80,000 new jobs. The magic $12-billion figure, which is based on a Canada-EU joint assessment prior to the lingering EU debt crisis, has been seriously discredited. An independent assessment of CETA done for the European Commission in 2011 estimates a GDP boost of between one-quarter and one-half of

[1] Tories launched cross-country PR push in support of EU trade deal: documents, Postmedia News, July 9, 2012.

that amount, or between $3 billion and $6 billion.[2] However, even the lower estimate needs to be taken with a grain of salt since the economic modelling used to calculate all these numbers assumes full employment, total reinvestment of trade gains into new production, and other conditions that don't currently exist in the real world. In fact, studies have shown that CETA will result in substantial job losses by increasing Canada's existing trade deficit with EU countries while reinforcing an imbalanced trade relationship where we export raw resources to the EU and import high-value manufactured goods.[3]

This report is a response to the Harper government's failed offensive on CETA and its free trade agenda generally. Specifically, we address a list of "myths" the government feels CETA critics are spreading about the deal.[4] In the process, we explain how far removed CETA is from what most of us would consider trade. We also provide recommendations at the end of each section about how the risks CETA poses to Canada could be mitigated if a deal is eventually signed. This report can also be used more broadly for challenging the Harper government's free trade agenda, including the NAFTA-plus Trans-Pacific Partnership trade agreement, which Canada was invited to join in June 2012. These "next generation" trade and investment deals offer very little to Canadian exporters in terms of new market access. But they are extremely effective tools for pushing an ideological "free market" agenda to the extreme, putting public services, sustainable development and democracy at great risk without any prospect of creating good jobs or rebalancing wealth inequality in Canada or internationally. To borrow from the global Occupy movement, these are trade deals for the 1% that the 99% has a responsibility to challenge.

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1. Public services and Canada's public health care system

What the Harper government says:

Free trade agreements (FTAs) do not threaten Canada's public services. Canada's FTAs exclude health care, public education and other social services maintained for a public purpose. Canada's FTAs do not force governments to privatize, contract out, or deregulate public services.

What we say:

Public pressure in Canada forced the Liberal government of the time to seek and win protections in NAFTA for Canada's public health care system. The very fact that a government needs to carve

[2] A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, Final Report, June 2011: http://www.eucanada-sia.org/docs/EU-Canada_SIA_Final_Report.pdf

[3] Stanford, Jim. "Out of Equilibrium: The Impact of EU-Canada Free Trade on the Real Economy," October 2010: http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/10/Out_of_Equilibrium.pdf

[4] Department of Foreign Affairs and International Trade, "Myths and Realities About Canada's Free Trade Agreements," April 2012: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/myths-mythes.aspx?view=d (last accessed July 2, 2012)

something like health care out of a trade deal is proof these deals would otherwise affect how those services are provided or regulated. In fact, trade and investment liberalization through agreements like NAFTA and CETA is designed to shrink government and encourage the spread of new competitive markets in areas where they don't currently exist such as public health care and other public services.

The NAFTA protections took the form of a general (Annex I) reservation (or, in simpler terms, carve outs) for Canada's existing federal-provincial/territorial public health care system, and a broader (Annex II) reservation that would allow governments to introduce new health measures in the future that would otherwise not be possible under restrictive trade and investment rules. Neither type of protection (Annex I or II) is perfect, but in combination they were supposed to give Canada and its provinces the space to maintain and improve health care. They do not fully protect Canada from private investor lawsuits under NAFTA's generous investment protection chapter, a contentious aspect of trade agreements that we address below. Importantly, the reservations don't protect against claims under the controversial expropriation and compensation provisions (Article 1110 of NAFTA).

The Canada-EU trade negotiations could undermine these limited protections in NAFTA. According to Scott Sinclair, a senior trade researcher with the Canadian Centre for Policy Alternatives (CCPA), one of the European Commission's highest priorities in the Canadian trade negotiations is to expand coverage of provincial and local government measures. To meet that goal, the commission "has demanded that Canada abandon the NAFTA Annex I general reservation [for health care]," he explains. "Canada has reportedly agreed, which means provincial governments will be required to negotiate exemptions for specific non-conforming measures in the health sector, or to rely exclusively on the Annex II reservation."[5]

A review of the initial provincial offers to the EU from October 2011 shows they vary wildly in what they carve out of CETA and what they do not. No province or territory has taken any reservations (i.e. requested carve outs) related to their health sectors, or many other public service sectors for that matter. As Sinclair suggests, the provinces and territories appear to be relying on an Annex II reservation at the federal level for measures related to "income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care," but only "to the extent that they are social services *established or maintained for a public purpose*." (Emphasis added.)

In health care delivery, health insurance and education, there is considerable and growing private investment in Canada. Provinces such as Quebec, British Columbia and Ontario are looking to increase private, for-profit health care services, making it more difficult for Canada to insist its health system is maintained purely for public purposes. Similarly, Canada's education system has private components. Regardless, the decision in both cases is not Canada's to make. A challenge to whether these services meet the "public purposes" criteria in the Annex II reservation would depend on the ruling of a trade or investment dispute panel.

[5] Sinclair, Scott. "The CETA and Health Care Reservations: A briefing note for the Canadian Health Coalition," March 2011, Pg. 1:
http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2011/03/CETA%20and%20Health%20Care.pdf

Provincial governments have shown similar neglect when it comes to their right, or the right of their municipalities, to expand or create new public services in areas such as transit, energy, recycling or water treatment and delivery. EU negotiators, on the other hand, are seeking a broad (Annex II) reservation (carve out) for these municipally delivered services.[6] Canada's refusal to do the same tells the EU and European private service companies that Canada is "open for business" in these areas. (We describe this below with respect to water services.)

Recommendation

The CCPA's Sinclair suggests:

> **In order to provide maximum protection for health care and to safeguard its ability to expand coverage of public health insurance, Canada should negotiate a new exemption (modeled on the cultural exemption in recent Canadian bilaterals)... This exemption would stipulate that nothing in the CETA shall be construed to apply to measures adopted or maintained by a party with respect to health care or public health insurance.[7]**

Similar language could and should be included with respect to education and all other public and social services. The important thing is to make sure the reservation is not weakened by a caveat that the services are maintained exclusively for a public purpose. Even where there is some degree of private involvement, government should maintain the space to create new services (ex. pharmacare and home care) without fear of trade challenges.

This would be simple if protecting public services was really what the Harper government and the EU were looking to do in CETA. But it's more likely that both governments see CETA as a tool to further chip away at the kinds of services governments are legitimately expected to provide. What most of us consider essential services that help make society more equal would become just another source of corporate profit.

2. The right to regulate – health and environmental standards

What the Harper government says:

Canada's FTAs do not prevent governments from regulating standards that protect the public, including in the areas of the environment, labour, health care and safety. Nothing in any of Canada's FTAs would exempt foreign service providers from Canadian laws and regulations. Canada's FTAs do not compromise the environmental protection measures that Canada has implemented.

[6] Canadian Union of Public Employees, legal opinion by Steven Shrybman of the initial Canadian services and investment offers, July 2012 (http://scfp.ca/updir/Shrybman_CETA_opinion_E.pdf)
[7] Ibid, pg. 2

What we say:

Free trade, whether in Canada's agreements with other countries or at the World Trade Organization, is absolutely designed to limit when, where and how governments regulate. CETA in particular, as well as the Trans-Pacific Partnership trade agreement (TPP), will contain chapters on sanitary and phytosanitary standards (ex. food safety standards), technical barriers to trade (ex. EU regulations on toxic chemicals that are more stringent than North American versions), and regulatory cooperation. These deals also contain investment chapters that give corporations tools to enforce their rights to be free from what they consider overly burdensome regulation.

In each case, the goal of these chapters within trade deals is to limit opportunities for governments to introduce new rules and regulations that have the effect of impacting trade and investment flows, even if that was not the intention of the rules. Though full scale harmonization of health, safety and environmental rules is difficult, free trade deals talk of mutual recognition of existing standards, avoiding new regulation as the best and least trade-distorting option, and providing governments – often at the request of big corporations – with tools to frustrate or delay the introduction of new standards by their trading partners.

Three recent WTO losses in the United States show how the process can work. A U.S. voluntary "dolphin-safe" tuna labelling program, a ban on flavoured cigarettes to discourage children from smoking, and country-of-origin labelling (COOL) for meat products have all been declared illegal technical barriers to trade by the WTO. Todd Tucker with the U.S. group Public Citizen has commented at length on the way each case undermines the regulatory authority of the U.S. government even where there is no protectionist intent, where the measures apply equally to domestic and foreign products or producers, and where the regulation is flexible, or the measure has little demonstrable effect on the market.[8] In the COOL case, which was brought against the U.S. by Canada and Mexico, the Canadian government even objected to a letter the Obama administration sent to meat processors asking them to voluntarily include more information about where animals were raised and slaughtered.

Canada's ferocious lobbying against the EU Fuel Quality Directive (FQD) provides another good example of where trade agreements and environmental policy contradict each other. Canada insists that a European proposal to list tar sands crude as more polluting than conventional crude is discriminatory, not based on sound science, and would be easily defeated at the WTO. So even though science has proven that tar sands production is more carbon-intensive than most conventional oil production, WTO cases like the ones mentioned above shed doubt on whether the FQD would survive a challenge.

CETA would give the Canadian government, as well as big oil companies, even more tools to frustrate the EU's ambitions to enact even modest climate policies like the FQD. For example, the proposed regulatory cooperation chapter would allow Canada to put procedural hurdles in front of new EU regulations and vice versa. Imagine being told a new greenhouse gas reduction policy for the tar sands was being blocked by the EU at the request of Shell, Total, BP or other multinational companies heavily

[8] Tucker, Todd, "America, meet your meat master." Eyes On Trade blog, July 3, 2012 (http://citizen.typepad.com/eyesontrade/2012/07/meet-your-meat-master.html#more)

invested in Alberta. Imagine then that Canada moved ahead with the new rules only to find itself in front of an investor-state dispute panel and on the hook for hundreds of millions of dollars in damages for hurting the profits of Big Oil.

As legal opinions have shown, it's not a far flung scenario.[9] The Harper government's claim that "nothing in any of Canada's FTAs would exempt foreign service providers from Canadian laws and regulations" is very simply wrong. Under bilateral investment treaties, including the investment chapter in NAFTA and a similar chapter planned for CETA, foreign corporations can, and more frequently than ever do, challenge regulations and laws that undermine their profits.

For example, S.D. Meyers fought and won a NAFTA investment case against Canada for a temporary ban in the mid 1990s on toxic PCB waste imports from Canada to the United States. This activity was illegal under U.S. law, and Canada was arguably under treaty obligations not to allow PCB exports. Nonetheless, a NAFTA panel found that Canada had violated the national treatment and minimum standards of treatment rights of S.D. Myers, awarding the firm $5 million in compensation.

Since NAFTA was signed, foreign firms have used the deal's extreme investor rights to challenge pesticide laws in Quebec, a ban on trade in gasoline containing the suspected neurotoxin MMT, an environmental assessment of a quarry in Nova Scotia, how hunting licences are given out in Northern Canada, Ontario's Green Energy Act, decisions not to build quarries or dump sites in Ontario, and sustainable development measures for offshore oil and gas development in Newfoundland and Labrador. In each case, the fact that the investor was foreign allowed it to skirt national courts to attack measures that got in the way of corporate profits.

The investor-to-state dispute settlement process, which we look at again below, fundamentally undermines health and environmental regulation. Governments may continue to regulate where a policy has been found to violate investment rights, but only after paying fines of tens and even hundreds of millions of dollars.

The chill effect of this process undoubtedly plays a role at the federal and provincial levels when governments decide how to develop new regulations – and that is precisely the point. Trade deals actually reinforce the Harper government's plans to reduce "red tape" for oil, gas and mining projects, and other economic activities. As Canada lowers its standards to attract investment – a practice that is actually discouraged in the preamble to CETA's investment chapter – our future efforts to strengthen environmental or public health protections will be easy targets for companies to challenge under CETA and other trade deals.

[9] Potential Impacts of the Proposed Canada-European Union Comprehensive Economic and Trade Agreement (CETA) on the Pace and Character of Oil Sands Development, a legal opinion prepared by Steven Shrybman (Sack Goldblatt Mitchell LLP), November 2010 (http://canadians.org/trade/documents/CETA/legal-opinion-CETA-tarsands.pdf)

Recommendation

The Canadian government should reserve the right to domestic regulation regarding public services, culture, finance, public health and the environment. Any regulatory harmonization efforts must adopt the higher standard that exists in either Canada or the European Union. Municipalities, provinces and territories, and the federal government must retain the right to develop even higher standards of protection than currently exist in the European Union or with any other trading partner, without fear of having these standards challenged as impediments to trade and investment.

3. Water services and regulation

What the Harper government says:

Canada's FTAs do not prevent governments from setting standards to ensure that Canadians have access to safe drinking water. Canada's FTAs do not force governments to privatize, contract out or deregulate water-related services. All companies operating in Canada, whether domestic or foreign, must respect Canadian laws and regulations. Free trade agreements could not force Canada to export its water.

What we say:

First, what we **DON'T** say: The Council of Canadians has not claimed that CETA will lead to bulk water exports to the EU. The concept of pipes across the Atlantic is ludicrous (though it must be said some investors have proposed shipping water to dry or drought-prone countries via tankers). This strategy of conflation, which has since been adopted by big business lobby groups, is clearly designed to ridicule critics of CETA by ignoring their legitimate questions about why Canada is not prepared to exclude water services from the deal.

The Council of Canadians and the Canadian Union of Public Employees have written two reports on the threat that CETA poses to water services. In the report *Full of Holes: Newly leaked documents show Canada is opening the door widely to private water companies in trade negotiations with European Union*, we compared a leaked copy of Canada's initial services and investment offers to what the EU was proposing. As of January 2012, EU negotiators wanted to reserve the right "to adopt or maintain any measure at any level of government with respect to services relating to the collection, purification and distribution of water, including the provision of drinking water, water management, and waste water management."[10] Since then, the EU has revised this language so that only drinking water is carved out of CETA. But Canada's provinces have made no similar request, which is a signal to the EU and large private water companies such as Suez and Veolia that Canada is "open for business" for water profiteers.[11]

[10] The EU has since amended this reservation so that it only excludes drinking water services. Sanitation services would be covered by CETA as they are for the EU in the General Agreement on Trade in Services (GATS).
[11] CUPE and Council of Canadians, "Full of Holes: Newly leaked documents show Canada is opening the door widely to private water companies in trade negotiations with European Union," January 2012: http://canadians.org/trade/documents/CETA/CETA-water-brief-Jan12.pdf

While it is true that nothing in CETA will be able to force municipal governments or Crown corporations to privatize or contract out water services, there are limits in services agreements on how covered sectors can be regulated. For example, CETA would ban limits on the number of investments a firm can make, the value of its transactions, or its total number of operations. Foreign ownership caps, such as those that exist in financial services, fisheries, telecommunications and other sectors in Canada, would be prohibited, as well as measures requiring a certain type of legal entity or joint venture to deliver the service. Furthermore, as a recent CUPE legal opinion of Canada's initial CETA offers says, "Where water systems are privatized, efforts to establish water standards or water rates have been challenged as infringing investor rights under international investment rules very much like those proposed for CETA."[12]

Remunicipalization (bringing private services back into public hands) where privatization has failed, or where unforeseen circumstances demand it, becomes expensive under CETA because Canada would be required to compensate a firm not just for its assets, but for its projected profits over the course of a contract. These contracts can run as long as 20 or 30 years. In Canada, where the federal government is tying transfer payments for water infrastructure to the consideration of private-public partnerships, there is a risk that CETA will make it difficult to hold water firms involved in P3s accountable for cost overruns or poor service. There is an added risk in CETA procurement rules that may give firms competing in P3 projects the right to challenge a municipal decision to keep the service public.

Recommendation

The Council of Canadians and CUPE made a simple request to the federal, provincial and territorial governments in our January 2012 report. If governments truly wanted to exclude water services from trade and investment liberalization rules that encourage privatization, our offers to the EU must be changed to reflect this, and to mirror what the EU is seeking. "These CETA carve outs should apply across the board to public services, in particular to all health and education services, regardless of existing private investment in these sectors. But municipal services must be excluded also, such as transit, waste management, energy and other social services," we stated in the report.

4. Culture

What the Harper government says:

Canada's FTAs, including NAFTA, have not prevented Canada from protecting its cultural interests. The preservation and promotion of Canada's cultural diversity is among the Government of Canada's core objectives. These same allegations were made during the NAFTA negotiations 25 years ago. Yet today, Canadian culture is thriving like never before. Canadian books, television, visual arts, music, and

[12] CUPE legal opinion on CETA services and investment offers, July 2012, pg 14 (http://scfp.ca/updir/Shrybman_CETA_opinion_E.pdf)

countless other art forms are at the forefront of the world stage. Canada would continue to meet its cultural objectives in a Canada-EU FTA.

What we say:

Canada typically negotiates into its free trade deals a broad cultural exemption covering the myriad of policies that protect Canada's cultural industries and its cultural sovereignty. These policies include foreign ownership restrictions in key sectors such as publishing, broadcasting and telecommunications, as well as subsidies and other government supports for arts and culture. Without explicitly reserving the right to ignore trade rules on market access, national treatment for foreign companies, bans on performance requirements, foreign ownership caps, and other measures, governments would have difficulty supporting and promoting national cultural production.

That was then, and this is now. The Harper government is consciously shrinking government in a number of areas and cultural policy has not escaped this ideological campaign. For example, the CBC, the National Film Board of Canada, and Telefilm Canada, a national film funding agency, all lost government support in the last budget. The CBC and its French-language version, Radio-Canada, will have their budgets cut by $115 million over the next three years.[13] This is in a media environment where in 2010, 97% of box office films were from the United States,[14] and 81% and 67% of English and French language drama and comedy programs were non-Canadian, respectively.[15] In 2008, the Harper government cut $45 million in funding that promoted Canadian culture abroad and has not kept its promise to replace it.

The issue of foreign ownership has been a tricky one for the Harper government. High-profile corporate takeover bids of Potash Corporation and the Toronto Stock Exchange (TSE) have tested the Harper government's ideological limits for how "open" a market should be. The government ultimately rejected an Australian company's bid for Potash while the London Stock Exchange dropped its plans to merge with TMX Group, which runs the TSE. However, one big takeover did slide past the "net benefit" filter somehow.

In January 2012, the Minister of Canadian Heritage and Official Languages, James Moore, let international publishing giant Bertelsmann AG, the European owner of Random House, take full control of Canadian publishing company McClelland & Stewart. Reports at the time indicated the Minister was approached by Random House for an exemption from applicable provisions of the Investment Canada Act, which should have outlawed the foreign takeover, or at least required a thorough review. But as reported in *The Globe and Mail*, "The McCLelland & Stewart decision follows earlier ministerial decisions that allowed companies such as Amazon and Apple to bypass Canadian distribution channels in

[13] "CBC to cut jobs, programs over next 3 years," CBC online article, April 4, 2012 (http://www.cbc.ca/news/canada/story/2012/04/04/cbc-budget-cuts.html)
[14] Department of Canadian Heritage, Canadian Films' Share of the Box Office Revenues, 2010 (http://www.pch.gc.ca/pgm/flm-vid/bxffce-eng.cfm)
[15] CRTC Communications Monitoring Report - July 2011 (http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2011/cmr2011.pdf)

apparent contravention of the act, leaving publishers with the impression that the law has become a dead letter."[16]

Pierre Marc Johnson, Quebec's lead negotiator in the CETA talks, told the Conference of Montreal in June 2012 that there was still no consensus with the EU on how to protect culture and cultural diversity. The EU does not like how broad Canada's typical definition of culture is in trade deals, or the measures that are protected. As the McCLelland & Stewart example indicates, EU firms have an interest in publishing and news media. The EU is also pushing hard to open Canada's telecommunications network to more foreign ownership (it's capped now at 47 per cent) and to deregulate it in the process. Initial Canadian offers to the EU in services and investment, which were leaked in January 2012, show Canada trying to protect its telecom sector. But there is no guarantee Canadian negotiators will be able to hold onto that protection.

It is clear the Harper government is misleading people when it claims that the preservation of cultural diversity is one of its core objectives. In other words, we should not take stated commitments to protect culture in CETA or other trade agreements for granted. The government needs to be watched closely.

The right of countries to foster local culture through government supports is enshrined in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This right was particularly important to Canada in 2005, when the convention was ratified. That was partly because we live next door to the largest global exporter of cultural products: the United States of America. The UN convention asserts that "the cultural aspects of development are as important as its economic aspects." It also states that parties "shall foster mutual supportiveness between this Convention and the other treaties to which they are parties." They shall do this "without subordinating this Convention to any other treaty."[17]

Without a broad cultural exemption, the investment guarantees in free trade deals and investment treaties for firms operating in the cultural industries would, in fact, overpower the UNESCO convention and most other non trade-related treaties. This was what eventually sunk the proposed Multilateral Agreement on Investment (MAI) in the late 1990s. Canadian and European artists rose up against what they considered to be "a direct threat against the cultural policies of states and their capacity to subsidize their film industry and other sectors of artistic creation."[18] Public debate forced Canada, France and several other OECD countries involved in the MAI talks to demand an exemption for audiovisual and film industries. Public opposition to the MAI led to its collapse shortly afterwards.

[16] Barber, John, "Bertelsmann takes full control of McClelland & Stewart," Globe and Mail, January 10, 2012 (http://www.theglobeandmail.com/arts/books-and-media/bertelsmann-takes-full-control-of-mcclelland-stewart/article1355844/)

[17] UNESCO convention text: http://unesdoc.unesco.org/images/0014/001429/142919e.pdf

[18] The "Trade and Culture" Issue, at the Origin of the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, a presentation of the Coalition for Cultural Diversity (http://www.cdc-ccd.org/IMG/pdf/Culture-trade_history_Eng.pdf)

Recommendation

Canada must insist on including in CETA the same broad cultural exemption as Canada has included in all post-NAFTA free trade agreements.

5. Investment protection

What the Harper government says:

It is a myth that free trade agreements allow foreign investors and foreign companies to challenge Canadian laws and regulations. Canada's FTAs do not allow foreign investors or companies to force a government to change its laws and regulations. Including mechanisms for dispute resolution through international arbitration in FTAs does not restrict any level of government from legitimately legislating in the public interest. Canadian and foreign investors alike are subject to all of Canada's laws and regulations pertaining to environmental, labour, health care, building and safety standards.

What we say:

Every one of the above statements on investment protection is false. Investor-state dispute settlement (ISDS) mechanisms – like those in NAFTA's Chapter 11, Canada's Foreign Investment Protection and Promotion Agreements (FIPAs), and more than 3,000 other international agreements between nations – are increasingly used by corporations to challenge laws and regulations. There is scant evidence these treaties increase investment into or out of countries. But they do allow foreign companies to invoke their own ample rights under free trade deals to sue governments for hundreds of millions of dollars in front of unaccountable trade tribunals when company profits are said to be unfairly affected by public policies, decisions or regulations.

The lack of clarity in what "fair treatment" for corporations means, and the lack of transparency in ISDS proceedings, some of which are never made public, have given investment arbitrators wide berth to decide what constitutes acceptable government policy. According to Gus Van Harten, an expert on investment arbitration at Osgoode Law School, there is evidence of a tendency globally for paid arbitrators to interpret investor rights expansively, meaning in the interest of the companies, even when resolving contested issues of law.[19] This would tend to make the investor-state dispute settlement process more attractive to a greater number of companies, and more financially rewarding for the limited pool of arbitrators.

Law firms specializing in investor-state arbitration are also helping to perpetuate this process. Average hourly rates of between $500 and $1,000 have helped make suing governments "one of the fastest-developing areas of international law, combining elements of private dispute settlement, treaty law and public policy," according to a Transnational Institute and Corporate Europe Observatory report. These

[19] Van Harten, Gus. "Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern," Investment Treaty News, IISD, April 13, 2012 http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/

law firms have become "ambulance chasers," they explain. And why not when, according to the report, "law firms or individual lawyers can profit even when they settle before a final trial, which happens with many disputes." If a company can't raise the funds, enterprising investment lawyers have come up with a solution, the report continues:

> The latest development in the investment arbitration world is the arrival of a phalanx of funds that finance international arbitration by paying the legal fees and initial costs to pursue a claim in return for getting a share of the amount that is awarded.[20]

Canada is the sixth most sued country under this regime, according to a recent UN Conference on Trade and Development report.[21] And while it's true that the NAFTA record is mixed (Canada has won a few cases), it is ludicrous to claim, as Conservative MPs and Canadian trade negotiators often do, that this proves ISDS is a balanced system. Canada has paid, or is set to pay more than $200 million in awards or settlements to corporations because of NAFTA investment lawsuits.

A shocking $130 million of that went to settle an investment dispute with AbitibiBowater before a tribunal could make a final decision on the matter. In that case, the pulp and papermaker claimed that numerous NAFTA rights, including for minimum standards of treatment, were disregarded when the Newfoundland and Labrador government expropriated a mill and took back water and timber rights after the company closed its last mill in the province. According to the Canadian Centre for Policy Alternatives, the decision was significant for three main reasons:

> *First, it is the largest NAFTA-related monetary settlement to date. Second, Abitibi-Bowater was compensated, in large part, for the loss of water and timber rights on Crown lands, which are not considered compensable rights under Canadian constitutional law. Finally, while the Canadian federal government has stated that it will not seek to recover the costs of the settlement from the Newfoundland government in this instance, in future it intends to hold provincial and territorial governments liable for any NAFTA-related damages paid by the federal government.*[22]

Globally, the situation is just as bad. In 2011, an investment panel awarded Chevron $77.74 million USD in a case against Ecuador. Earlier this year, a Canadian court upheld a $77 million 2009 NAFTA investment award to Cargill in its dispute against Mexico's tax on imported soft drinks containing High Fructose Corn Syrup, an alternative to sugar. Philip Morris is suing the Australian and Uruguayan governments under separate bilateral treaties because of plain packaging (public health) laws for

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[20] Legalized Profiteering: How corporate lawyers are fueling an investment arbitration boom," a report by Transnational Institute and Corporate Europe Observatory, November 2011 (http://www.tni.org/sites/www.tni.org/files/download/legalised_profiteering-web.pdf)

[21] UNCTAD, "Latest Developments in Investor-State Arbitration," April 2012 (http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf)

[22] NAFTA Chapter 11 Investor-State Disputes (to October 2010), Compiled by Scott Sinclair, Trade and Investment Research Project Canadian Centre for Policy Alternatives http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf

cigarettes. And Vattenfall, a Swedish energy company, is seeking as much as $1 billion in compensation from the German government because of a political decision to phase out nuclear power following the Japanese Fukushima nuclear disaster.

Last year, the Council of Canadians urged Parliament to adopt the position of the Australian government on investor-state arbitration. Partly in response to the cigarette controversy, the Gillard government in Australia released a new trade policy document in April 2011 that discontinues a former practice of negotiating investor-state dispute procedures in trade agreements.[23] As we told our government's parliamentary trade committee when it was studying the Canada-EU negotiations, there is no reason to continue to include an investor-to-state dispute settlement process in Canadian trade agreements, least of all with the European Union where the courts could easily handle Canadian investment cases.

This is, in fact, the preference of the EU Parliament. Its June 8, 2011 resolution on the Canada-EU trade deal states that: "given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes."[24]

Recommendation

The Harper government should stop including investor-state dispute settlement mechanisms in trade agreements. It should also pull out of or renegotiate existing investment treaties to remove these mechanisms, following the example set by Australia.

6. Drug costs and pharmaceutical policy

What the Harper government says:

It is a myth that a Canada-EU free trade agreement would increase drug and health care costs. With respect to intellectual property protection in the pharmaceutical sector, the Government of Canada has always sought to strike a balance between promoting innovation and job creation and ensuring that Canadians continue to have access to the affordable drugs they need. The prices charged for patented medicines sold in Canada are regulated by the Patented Medicines Pricing Review Board. This will not change under a free trade agreement with the EU. The Government of Canada continues to consult with industry stakeholders and the provinces and territories to ensure that the best interests of Canadians are reflected in the Canada-EU trade negotiations.

[23] Gillard Government Trade Policy Statement, April 2011 (http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf)

[24] European Parliament resolution of 8 June 2011 on EU-Canada trade relations http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0257+0+DOC+XML+V0//EN&language=EN

What we say:

There are many things wrong with this collection of misleading statements on drug prices. First, it is absolutely not a myth – more like an inevitability – that CETA would increase drug costs in Canada if the agreement contains the new patent changes being sought by the EU. An authoritative study by Paul Grootendorst (University of Toronto, Faculty of Pharmacy) and Aidan Hollis (University of Calgary, Department of Economics) found that lengthening the period of exclusivity for innovative drugs in Canada, as the EU is forcefully proposing, would increase the cost of public and private drug plans in Canada by at least $2.8 billion. The bulk of that cost would fall on provincial governments, which cover about 45 per cent of total prescription drug spending in Canada.[25]

Second, it is simply not true that Canada has "always sought" to strike a balance in our drug regime between the profitability of pharmaceutical companies and affordability for consumers. In fact, previous government decisions have seriously undermined our ability to keep drug costs low. According to the Canadian Health Coalition, we pay 30 per cent more for prescription drugs than the international norm. This is the result of changes to Canada's drug regime brought in by Brian Mulroney's Conservative government between 1987 and 1992. Importantly, these changes extended patents from seven years to between 17 to 20 years, and eventually abolished a "compulsory licensing" system whereby generic drug manufacturers could introduce low-cost versions of brand name drugs within five to seven years by paying a royalty fee to the patent holder.

Mulroney offered this legacy gift to Big Pharma in exchange for promises by the mostly foreign owned brand name drug firms to spend 10 per cent of sales on research and development in Canada. According to a June 2012 study from Canada's generic drug association, after a decade of meeting this promise between 1993 and 2002, Big Pharma has consistently missed spending targets, which dipped to 6.7 per cent of sales last year.[26] The generics industry in Canada is concerned that CETA intellectual property changes will further tip the balance against them without any comparable gains in new jobs by the brand name companies.

Third, drug prices are already poorly regulated by the Patented Medicines Pricing Review Board (PMPRB), so the thought that "this will not change" under CETA is hardly encouraging. One of the reasons why drugs are so expensive in Canada is that the PMPRB sets Canadian drug prices based on the average price of seven countries where prices are typically highest. Marc Andre Gagnon with Carleton University's School of Public Policy has estimated that basing Canadian prices on a basket of 13

[25] Grootendorst and Hollis, "CETA: An Economic Impact Assessment of Proposed Pharmaceutical Intellectual Property Provisions," February 7, 2011:
http://www.canadiangenerics.ca/en/news/docs/02.07.11CETAEconomicImpactAssessment-FinalEnglish.pdf
[26] The Real Story: R&D Spending by Brand-Name Drug Companies in Canada (1988-2011):
http://www.canadiangenerics.ca/en/advocacy/docs/TheRealStory_2012.pdf

comparable Organisation for Economic Co-operation and Development (OECD) countries instead of seven, as the PMPRB explored doing in 2006, would generate about $2 billion in annual savings.[27]

A national pharmacare program would also significantly lower costs. Replacing private drug plans with a provincial or federal drug insurance program would save another $2.9 billion annually, says Gagnon in another article.[28] But as we saw in the sections above on public services, Canada's ability to create new universal programs in the future is seriously undermined by CETA and other trade agreements like it that give companies, such as private health insurers, powerful legal tools to frustrate measures that will undermine their profits.

Finally, regarding provincial consultation, we now know the provinces have written to the Harper government asking for compensation in the event that drug costs increase (yet again) after signing CETA. The fact that the Harper government is resorting to propaganda about CETA's proposed intellectual property chapter implies it is ready to make at least some of the changes the EU is demanding. Canada's drug regime should change, but not in the ways proposed by the EU in CETA.

Recommendation

Canada should refuse to negotiate intellectual property rights chapters within its trade agreements. These discussions are better held at more open, international bodies such as the World Intellectual Property Organization (WIPO), the United Nations, or even the World Trade Organization. Any changes to Canadian drug policy should be based on domestic policy considerations and domestic preferences, not because of pressure from trading partners. To cut drug costs, the Harper government should introduce a mandatory national pharmacare program and reform how the PMPRB determines drug prices.

7. Municipal democracy and procurement

What the Harper government says:

It's a myth that a Canada-EU free trade agreement would prevent Canada's municipal governments from sourcing goods and services locally. Canada's municipalities may continue to use existing selection criteria such as quality, price (including transportation costs and duties), technical requirements or relevant experience in competitive bids. A Canada-EU trade agreement would not prevent governments from addressing the needs of their constituents and providing support to local businesses through grants,

[27] Gagnon, Marc Andre, "The $2-billion extra price tag of brand-name drugs in Canada," *The Hill Times*, February 7, 2011 (http://www.pharmaceuticalpolicy.ca/pprc-news/hill-times-op-ed-dr-marc-andre-gagnon-2-billion-extra-price-tag-brand-name-drugs-canada)

[28] Gagnon, Marc Andre, "Why Our Prescription Drugs Are Too Expensive and What We Can Do About It," Huffington Post, June 20, 2011 (http://www.huffingtonpost.ca/marcandre-gagnon/prescription-drug-costs_b_877024.html)

loans and fiscal incentives. Projects below a threshold dollar value would not be subject to the agreement, nor would the procurement of services such as research and development, financial, public administration, education or health care services. Canada's procurement system is already quite open at all levels of government, currently allowing local and other companies to compete for government contracts. When foreign suppliers win bids, they usually source and hire locally.

What we say:

The Trade Justice Network has produced a "mythbuster" report to show each of these claims for what they are: diversions from the main issue. You'll find this report and others on the Council of Canadians' website at www.canadians.org/CETA. In a nutshell, CETA's procurement chapter, which is essentially finished (i.e. there are no more brackets in the text to show disagreement between Canada and the EU), clearly forbids municipalities from placing a value on the local content in the goods, services or construction projects they purchase.

The second general principle in Article IV (on Non-Discrimination) of the CETA procurement chapter states:

> *With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:*
>
> *(a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or*
>
> *(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.*

The text is identical to that found at the WTO's plurilateral (or voluntary) Government Procurement Agreement, which has not been signed by all WTO members. Most countries avoid making significant – or even any – procurement commitments because they recognize that public spending is a tool that many levels of government can use to encourage or guide economic development. Canada's procurement offer at the WTO excludes Crown corporations, municipalities and public utilities. Some provinces have also carved out energy, transit, cultural products, or other purchases where they spend strategically or locally. Canada's lead CETA negotiator told a parliamentary trade committee in June 2012 that the procurement offer to the EU is much more "ambitious" than at the WTO, but that the EU is demanding more.

Part (b) of the above non-discrimination principle is perhaps more important than part (a) because it shows that CETA rules apply regardless of the nationality of the bidding firm. Not only European, but also Canadian bidders will have the right under CETA to challenge any preference they feel a municipality showed to another bidder based on the local content in their bid. Covered cities or towns will, for the first time, lose the right to "Buy Canadian," for example. They will not be allowed to

stipulate up front, in an open and transparent way, that points will be awarded to bidding firms based on how much Canadian or local content their product or service contains.

The Harper government and many provinces have been telling municipal governments that they are already covered by similar procurement rules in interprovincial trade agreements, but this is not accurate. The Agreement on Internal Trade, for example, has allowances for "Buy Canadian" policies. It also allows for exceptions to the rules where a municipality can demonstrate local development priorities, for example to encourage development or employment in rundown parts of town. CETA, on the other hand, says that, "With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset," where "offset" is defined in the text as:

> *any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement;*

As the Harper government admits in its CETA propaganda, Canada's procurement is already open and transparent. European firms already bid on and win many municipal contracts. So what is the problem? There isn't one. There is simply an unreasonable request by the EU to expand the opportunities for its firms to dispute local government decision making. The European Commission admits that similar procurement rules for member states and municipal governments in the EU are burdensome and increase the costs of tendering for public purchases.[29] Where markets can be shown to be open, these burdensome procurement rules can actually be waived.

More than 40 cities, towns and school boards representing more than 5.5 million people do not want it to get that far. They have all passed motions requesting to be excluded from CETA's procurement rules, and for a greater say at the negotiating table. The Council of Canadians is one of several groups across Canada encouraging local councillors to stand up for democracy by opposing CETA's unreasonable restrictions on municipalities.

Recommendation

Canada should not offer the EU any more on procurement than what the government has committed to in the plurilateral WTO Agreement on Government Procurement, which was already a step too far. Under no circumstances should municipalities be bound by these procurement rules, which unfairly and unreasonably restrict their ability to use public spending as a sustainable development and local job creation tool.

[29] Klotz, Robert. "Production and wholesale of conventional electricity in Germany exempted from EU public procurement rules," Lexology, June 19, 2012 (http://bit.ly/M3EIZ9 - registration required)

8. Transparency and public consultations

What the Harper government says:

It is a myth that the Government of Canada is negotiating a Canada-EU free trade agreement secretly. The Canada-EU trade negotiations have been and continue to be the most open and transparent trade negotiations in Canadian history. The Government of Canada is committed to keeping Canadians informed about the negotiations and to consulting as extensively as possible to ensure that an agreement meets the needs of Canadians. An agreement will be signed only if it is in the best interests of Canadians. The Government of Canada has solicited input since the launch of negotiations and has received valuable input from civil society groups, companies and industry associations from across Canada. Also, Canadian government officials have been actively consulting with business, civil society and other interested Canadians. Under the Treaties in Parliament process, the Canada-EU trade agreement will be publicly tabled in the House of Commons.

What we say:

Where to start? Going from top to bottom, all preferential trade agreements outside the World Trade Organization are negotiated in secret. Yes, even the maligned WTO generally makes negotiating texts available. Free trade advocates and negotiators say bilateral or regional trade deals need secrecy in order to get the best, most comprehensive deal possible. But when the final agreement is going to affect how you deliver public services, how you regulate food safety, environmental and other public health measures, how much your drugs will cost, how open and free your Internet is, the stability of your financial architecture, how much foreign investment you should allow in cultural industries and more, there should be an obligation to negotiate openly with full public knowledge and input.

There should be that obligation, but the reality is there isn't and the Harper government is clearly keeping Canadians in the dark about this deal. So on principle, the government cannot say it is committed to keeping Canadians informed. The reality is the complete opposite. The lack of public consultation about CETA and other trade deals also hollows out the government's promise it will only sign agreements that are in the best interests of Canadians. That's a value judgement from a Conservative government that strongly believes the free market does everything best. This government will consider CETA a good deal if it helps further the ideological neo-liberal view of the Harper government of what Canada should look like: a country with smaller government, more privatization and less regulation.

Finally, there are the Harper government's claims about consultation and the parliamentary process. The Department of Foreign Affairs and International Trade did solicit input on CETA. Right before the 2008 Christmas break, on December 20, the government posted a request for views on the possibility of a comprehensive deal with the EU on the DFAIT website and in the government's own newspaper, *The Canada Gazette*.[30] The deadline for submissions was January 20. The department then issued a

[30] See DFAIT website: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/EU-neg-UE.aspx?lang=eng&view=d

questionnaire for business groups, asking, in part, what policies and regulations, including those related to public health or the environment, Canada should try to dismantle in the EU through the negotiations. All of this happened online, with very little notice and with no attempt to broadly advertise the consultation process, or make it more accessible.

Since CETA negotiations began in October 2010, DFAIT has offered separate post-negotiating round briefings to business and civil society groups. It's hard to know if different information is shared in each briefing. From a civil society perspective, these briefings were not active consultations. DFAIT provides updates by phone to interested groups, but the government has admitted it takes no formal notes of any feedback provided by civil society groups. There is no documentation of the exchanges and no evidence that anything mentioned during the phone calls could possibly affect the CETA negotiations. The DFAIT briefings are often interesting, and the Council of Canadians shares their full content on its website after each briefing, but they are far from being true consultations.

If CETA is eventually signed, there will be a parliamentary process. Legislation will be introduced to ratify the agreement, it will be debated in the House of Commons, a committee will try and fail to make any amendments (which will be blocked by the Conservative majority on the committee), and the deal will be passed as if there had been no public discussion at all.

Recommendation

The federal and provincial governments have a responsibility to provide an open and accessible opportunity for interested groups and the public to make meaningful changes to CETA before it is signed. This could easily take place after initial negotiations have concluded and before any deal is signed. It is more involved and time consuming, but the only acceptably democratic way.

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Conclusion

According to most reports, Canada and the EU would like to sign their Comprehensive Economic and Trade Agreement before the end of 2012. It is uncertain whether this deadline will be met given delays in the negotiations. Some of those delays are undoubtedly the result of controversial aspects of CETA including proposed rules on government procurement, intellectual property rights, regulation, public services, investment and culture. If these are controversial within the closed-door negotiations, they should be – and indeed are – increasingly controversial outside as well.

Unfortunately, instead of engaging those concerns in a respectful way, the Harper government has initiated a communications strategy designed to belittle opposition and avoid any discussion of its free trade agenda with the EU and elsewhere. It's a strategy that may come back to haunt the government.

The European Parliament recently voted overwhelmingly against ratification of the Anti-Counterfeiting Trade Agreement, a multi-nation intellectual property rights enforcement pact that has been roundly criticized for the secrecy under which it was negotiated, and for the ways it could upset privacy rights and hurt online innovation.[31] The Trans-Pacific Partnership negotiations, which Canada was only recently asked to join, are also being met with growing antipathy or opposition due to their extreme secrecy and how they appear to have little to do with trade.

This report looked at the many ways CETA goes beyond trade to affect a number of important public policy areas. It offers some recommendations for how CETA could be improved to protect public services, the right to regulate, cultural policy, and municipal democracy. Whether you agree or not, it's difficult to defend the ongoing secrecy of the TPP, ACTA and CETA negotiations. If these are supposed to be 21st century or "next-generation" free trade deals, they should be negotiated in 21st century ways – openly, transparently, and with broad public input.

[31] Melvin, Don. "EU Parliament rejects ACTA anti-piracy treaty," Associated Press, July 4, 2012: http://news.yahoo.com/eu-parliament-rejects-acta-anti-piracy-treaty-113036271--finance.html

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