



by **Stuart Trew**

We brought the CETA Trojan Horse to Toronto, along with a big banner message calling for details of the deal to be made public.

Free Trade Fatigue Haunts Transatlantic Corporate **“Rights” Negotiations** How a European public consultation on investor-state dispute settlement could turn the tide against CETA

A February 2014 German television news story about free trade negotiations between the European Union (EU) and the United States challenges the myth that an eventual Trans-Atlantic Trade and Investment Partnership (TTIP) will create noticeable growth and tens of thousands of high-paying jobs. In the clip, Director General of European trade policy Karel De Gucht is confronted by a European Commission report showing possible annual GDP gains from the TTIP of about 0.05 per cent.

“That is not the big effect you are always talking about,” says the interviewer in the clip, which is available on the Council of Canadians website. De Gucht is speechless for a moment

and asks to stop the interview before sheepishly enquiring, “Is that the study that we have commissioned?”

The scene is shocking when you consider how much time, energy and money is being put into finishing this underwhelming deal when its true purpose is to hamstring governments and communities that want to make trade, investment and economic development more equitable and sustainable.

Sound familiar?

Like De Gucht, Prime Minister Harper and his Cabinet ministers have only hollow promises when talking about Canada’s still unfinished Comprehensive Economic and Trade Agreement

(CETA) with the EU. Their main message is the deal would be worth only \$12 billion to the Canadian economy – and that’s if you take the government’s numbers seriously, which we shouldn’t. Subsequent assessments suggest a one-time boost of between \$3 billion and \$6 billion.

Put another way, Canada and the EU estimate tariff savings from CETA of about \$225 million annually for Canadian exporters. Compare that to the estimated \$1 billion more per year that public and private health plans, not to mention patients, are expected to pay for prescription drugs because of patent extensions in the deal. Those are huge public losses for small private gains.

Then there is the unknown price tag on banning municipal and most provincial “buy local” policies, reduced rights for farmers to save seed from year to year, and a national freeze on the expansion or introduction of new public services. Another unseen cost is from the wave of investor-state litigation Canada can expect from EU-based companies, just as we’ve experienced under NAFTA.

It is no wonder that in Canada and the EU free trade fatigue is setting in that could, with luck and some hard work on our part, jeopardize the bigger deals like CETA and the TTIP.

CETA “most investor-friendly set of corporate rights” ever drafted by Canada

Resistance to both transatlantic deals is possibly strongest related to their investment protection chapters and the investor-state dispute settlement (ISDS) process. Canada has experienced the constraints of an investment protection chapter in NAFTA since 1994. U.S. investors have successfully challenged several environmental policies, such as a ban on export of toxic waste, scoring about \$170 million in awards or settlements from the federal government. EU member states are now facing investor lawsuits against plans to phase out nuclear power, financial stability measures following the 2008 crisis, and the nationalization of failed private services.

Transatlantic opposition to reproducing the investor-state mistake in CETA got a boost recently by two events. The first came in December when the Trade Justice Network leaked a November 2013 draft of the CETA investment chapters. The second event was the announcement by the European Commission in January that it would be consulting EU member states and the public on whether the EU-U.S. deal should include an ISDS process.

The two events are putting considerable pressure on the Commission to widen the consultation so that it considers the investment chapters in CETA

as well. They also put pressure on the federal government in Ottawa to reciprocate by reviewing Canada’s investor “rights” deals as well.

“In my opinion, the Investment Chapter, if it continues on what appears to be its present course, will provide foreign investors into Canada with the most investor-friendly set of corporate rights ever drafted by the Canadian government,” said Howard Mann of the International Institute for Sustainable Development in a presentation to a parliamentary trade committee in December. Mann suggests Canada is doing this “quite knowingly and deliberately,” though government statements misleadingly imply it will narrow the scope of these investment protections.

“The consequences of this increase in investor rights, coupled with a robust investor-to-state dispute settlement mechanism under the agreement, will be a growing substantive scope for many more investors to challenge more government measures based on higher levels of corporate rights, including future human health and environmental measures at the federal and provincial levels.”

Investor “rights” treaties under a European microscope

On February 10, the EurActiv news site reported on the CETA investment leak, claiming that “multinationals will have wide-ranging powers to sue EU states that enact health or environmental laws breaching their ‘legitimate expectations’ of profit.” The article quotes the European Commission, saying that CETA “reaffirms the right of the EU and Canada to regulate to pursue legitimate public policy objectives.” But it adds that “no such right is affirmed over the whole text, merely a sub-chapter of it that deals with expropriation.”

The reality is that, just as in NAFTA, the “right to regulate” is constrained by the excessive investment “rights” chapter in CETA, as well as all other chapters in the agreement. Communities have a right to set the environmental policies they want, but not if they breach an inves-

tor’s so-called minimum standards of treatment. It’s not up to the government to decide which policies are legitimate – a three-person tribunal of paid arbitrators will decide. Their ruling is final, even when they are wrong.

An open-ended definition of “fair and equitable treatment” will offer corporations many more opportunities to sue Canada, the EU or EU member states for profit losses from any number of legitimate government decisions. The possible inclusion of a so-called “umbrella clause” that would let investors take any breach of contract with government to private arbitration instead of the courts is another way corporations can overturn government decisions.

These questions continue to dog investment negotiations between Canada and the EU. Meanwhile, European politicians’, labour, consumer and environmental groups’ opposition to these investment rules in CETA and the TTIP has forced the Commission to hold a public consultation, which is expected to wrap up by June.

Two transatlantic civil society statements, one regarding CETA and the other the TTIP, signed by hundreds of organizations, ask that legislators on both sides of the Atlantic refuse to endorse the treaties until the extreme ISDS process has been removed. The French government has proclaimed its preference for a state-to-state dispute process only. German politicians of all stripes are going cold on investment arbitration as well. The debate will almost certainly play out in upcoming European parliamentary and Commission elections. And it will only get louder as EU and U.S. fair trade groups collaborate to defeat the TTIP.

The Conservative government in Ottawa will continue to promote its new deal with the EU at every opportunity. But we can take courage in the reality that the deal does not exist yet, and that the public debate about investor rights in Europe could have profound effects on CETA negotiations.