

**AN OPEN LETTER TO THE PARLIAMENT OF WALLONIA AND BELGIAN VOTERS
ON THE PROPOSED CETA AND ITS FOREIGN INVESTOR PROTECTION SYSTEM
17 October 2016**

Note: This letter contains the opinions of its individual supporters and should not be attributed to any organization or institution with which each is affiliated. It does not represent legal or other professional advice of any kind.

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To the Parliament of Wallonia and Belgian voters:

We are Canadian academics with extensive collective expertise in investor-state dispute settlement (ISDS) and related issues under Canada's trade and investment agreements. We are also among a small group of Canadian experts in this field who do not work in law firms or government as ISDS lawyers/ arbitrators.

We write after reading news reports this past weekend about the scare tactics employed by Canadian politicians and business representatives in an effort to influence your legislative and government processes. We do not think that these voices represent accurately Canada's experience under the foreign investor protection system that the CETA would expand. We are aware that many Canadians have expressed deep concern about this foreign investor protection system due to Canada's experience with a similar system under the North American Free Trade Agreement (NAFTA) and in debates about the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), among other agreements.

While we focus here on adverse consequences of the foreign investor protections in the CETA, we are also aware that the agreement will impose new constraints in many other areas of public policy beyond what we discuss. They include but are not limited to pharmaceutical regulation, public health, agriculture, government procurement, public services, labour rights, and market access. We note that other academics have raised significant concerns about the CETA in these areas.

Since the NAFTA came into effect in 1994, Canada has been and remains the *only* Western developed country that has agreed to ISDS on a comprehensive basis while in the more vulnerable capital-importing position. In the case of NAFTA, Canada agreed to ISDS on this basis with the U.S. and Canada has since faced more foreign investor claims than all but a handful of countries, has paid compensation in response to numerous claims, and has altered government decisions or decision-making processes in order to accommodate foreign investor interests and to reduce risks of potentially massive liability.

Business spokespersons who have defended these concessions of Canadian democracy and sovereignty often represent foreign companies in Canada or Canadian companies that may own companies abroad and be interested in bringing claims against Canada. It is perhaps understandable, though still very regrettable, that large businesses are keen to acquire special rights and special access to public money through ISDS.

Reforms to ISDS in the CETA, relied on by Canadian officials to describe the CETA misleadingly as "progressive", are inadequate to address major concerns about the CETA. The major concerns include the undermining of democratic regulation, the special privileging of foreign investors, the lack of judicial independence and procedural fairness in the adjudicative process, and the lack of respect for domestic courts and domestic institutions. In particular, the "Investment Court System" (ICS) in the CETA does not remove the financial threat posed by foreign investor claims to democratic regulation, does not alter the unjustified and gross favouring of foreign investors over anyone else who has a conflicting right or interest, and does not establish a proper court with the usual safeguards of independence and fairness.

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These problems with the CETA's foreign investor protections remain outstanding, despite the recent Joint Interpretive Declaration issued by Canada and the EU (in all of the various forms in which that Declaration became public).

We are heartened that your democratic processes in Wallonia have allowed for close and careful consideration of the CETA's flaws as part of a genuine and thoughtful debate. We wish Canadians had been permitted to have a similar debate based on a vote in Canada's Parliament and provincial legislatures, but that has not been the case under the Harper government or the Trudeau government. In contrast to the views expressed undiplomatically by some Canadian politicians and business representatives, it appears to us that Belgian democracy has been exercised responsibly, as it should be, to allow parliamentary votes on the quasi-constitutional structures created by foreign investor protection agreements like the CETA.

In Canada, our democracy has suffered because the federal government has insisted on pushing through agreements like the NAFTA and the CETA without legislative votes at the federal and provincial levels. As a result, and without the corresponding endorsements by our elected representatives, we have been left with a foreign investor protection system that binds all levels of government and that will bind all future elected governments in Canada for a very long time. Our experience hints at the dangers faced by European democracy in the case of the CETA.

Whatever decisions you take, we urge you not to succumb to the same types of tactics used to mislead and scare Canadians into undermining our democracy on behalf of foreign investors. Canada and the European Commission have been aware for years that the CETA faced significant public and academic opposition due to its foreign investor protections. Yet they declined to remove these non-trade elements from the CETA.

In a context where there is no credible justification for including ISDS or ICS in the CETA – given the greater reliability, independence, and fairness of Canadian and European democratic and judicial processes – it still surprises us how big business groups and governments acting on their behalf ferociously cling to such a deeply flawed and undemocratic model.

In case they are of interest, we have noted below a few additional documents indicating concerns with the foreign investor protection system. We have also listed a larger sample of relevant publications by the signatories.

From what we can see, you have shown great courage in opposing the CETA and, based on our observations of how the foreign investor protection system has been pushed on Canadians over the years, we wish to express our support for your democratic choices.

Yours sincerely,

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John R. Calvert
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Additional documents

Gus Van Harten, David Schneiderman, Kyla Tienhaara, and over 70 other academics, *Public Statement on the International Investment Regime* (31 August 2010)

<http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>.

Gus Van Harten, "The EU-Canada Joint Interpretive Declaration on the CETA" (2016) *Osgoode Legal Studies Research Paper No. 6/ 2016*

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850281.

David Schneiderman, "Listening to Investors (And Others): *Audi Alteram Partem* and the Future of International Investment Law" (2016) *CIGI Investor-State Arbitration Series Paper No. 8*. https://www.cigionline.org/sites/default/files/isa_paper_series_no.8web.pdf

A sample of relevant publications by the signatories

David R. Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (University of British Columbia Press, 2015).

David R. Boyd, "Investor State Arbitration: A Dangerous and Expensive Obstacle to Climate Action" *Toronto Star* (January 11, 2016)

Marjorie Griffin Cohen (with Steven McBride), *Global Turbulence: Social Activists' and State Responses to Globalization* (Ashgate, 2003).

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Stephen Gill (with Claire Cutler) (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014).

Ronald Labonté (with M. McKee), "European Commission's proposals on trade secrets", Editorial, *British Medical Journal* (2015).

Ronald Labonté (with P. Baker, S. Friel, and A. Schram), "Trade and Investment liberalization, food systems change and ultra-processed food consumption: a natural experiment contrasting the soft drinks markets of Peru and Bolivia" (2016) 12(24) *Globalization and Health* 1.

Ronald Labonté (with A. Schram and A. Ruckert), "The Trans-Pacific Partnership: Is It Everything We Feared For Health?" (2016) 5(8) *International Journal of Health Policy and Management* 487.

David Schneiderman, "Canadian Constitutionalism and Sovereignty After NAFTA" (1994) 5 *Constitutional Forum* 93.

David Schneiderman, "Property Rights, Investor Rights, and Regulatory Innovation: Comparing Constitutional Cultures in Transition" (2006) 4 *International Journal of Constitutional Law* 371.

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Dayna Nadine Scott, "The Networked Infrastructure of Fossil Capitalism: Implications of the New Pipeline Debates for Environmental Justice in Canada" (2013) 43 *Revue générale de droit* 11.

Dayna Nadine Scott (with Lauren Rakowski, Laila Zahra Harris, and Troy Dixon) (eds), *Our Chemical Selves: Gender, Toxics, and Environmental Health* (University of British Columbia Press, 2015).

Dayna Nadine Scott (with Gus Van Harten), "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2016) 7 *Journal of International Dispute Settlement* 92.

Kyla Tienhaara, "Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?" (2008) 17 *Yearbook of International Environmental Law* 139.

Kyla Tienhaara, *The Expropriation of Environmental Governance* (Cambridge University Press, 2009).

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Gus Van Harten, "Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA" (2014) *Osgoode Legal Studies Research Paper No. 59/ 2014*.

Gus Van Harten, "ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'?" (2016) *CIGI Investor-State Commentary Series No. 6*.

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