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Tar Sands and the CETA

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The recent decision by the European Union (EU) to disregard Canadian government pressure and forge ahead with regulations that recognise the higher green-house-gas intensity of fuel produced from tar sands and oil shale is encouraging. The Canadian government has lobbied furiously against Article 7a of the European Fuel Quality Directive (FQD) and is even threatening to challenge the measure under international trade rules.

The Canadian government position flies in the face of increased scientific certainty that the ever-expanding exploitation of oil sands reserves within Canada and around the world would lead to disastrous climate change. In the words of climate scientist James Hansen, "Policy makers need to understand that these unconventional fossil fuels, which are as dirty and polluting as coal, must be left in the ground if we wish future generations to have a liveable planet (Hansen, 2009: 173)."

Effective environmental regulation of the Canadian tar sands is absolutely necessary, yet will likely only occur in either of two ways:

- Canadian governments will come to their senses and curb the pace and scale of development, while protecting the region's First Nations, downstream communities and the global environment.
- Governments and consumers in both importing and non-importing countries will apply pressure on Canada and the industry to fully account for the high environmental costs of this form of energy production, thereby making alternative, less polluting forms of energy, more viable.

The proposed investment protection rules in the Can-EU Comprehensive Economic and Trade Agreement (CETA), however, could obstruct both these paths to a more environmentally sustainable future.

Investor Rights Under the CETA

The investment protection provisions as proposed by Canada are based on a slightly revised version of the NAFTA's investment chapter (Chapter 11). They include strong investor rights and investor-state dispute settlement.

Investor-state dispute settlement has not been a feature of previous European-wide trade agreements. Nor have European Union (EU) trade treaties included many of the NAFTA Chapter 11's substantive protections for investors, which include:

- an extremely broad definition of investment (NAFTA Article 1139),
- right of establishment (Articles 1102 and 1103),
- minimum standards of treatment (Article 1105), and

- compensation for direct and indirect expropriation (Article 1110),

The inclusion of such investment protection provisions in the CETA—together with investor-state dispute settlement—would result in new threats to environmental protection and other public interest regulations in Canada and Europe.

North American experience under the NAFTA underlines that such investment protection rules, especially investor-state dispute settlement, pose significant threats to environmental regulation.

As of the end of 2010, 29 of the 66 investor-state disputes under the NAFTA have involved environmental regulation or natural resource management issues, making it by far the most contested public policy area (Sinclair 2010).

Canada has already lost four investor-state cases under the NAFTA Chapter 11 and paid out damages totalling $CAD 157 million. The three most significant losses from an environmental protection perspective are:

- In Ethyl vs. Canada, international and inter-provincial trade of the gasoline additive MMT was banned by Canada for health reasons and its interference with anti-pollution systems in automobiles. Ethyl, the manufacturer of MMT, sued and Canada settled. Under the terms of settlement, Canada paid approximately $16 million for damage to the investor's reputation, issued a statement that MMT did not pose a health or environmental threat, and withdrew the ban.

- In SD Myers vs. Canada, a U.S. company successfully challenged a Canadian ban on the export of toxic PCB wastes. In its defence, Canada cited the Basel Convention on the the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The tribunal rejected Canada's arguments and awarded the investor $20 million.

- The AbitibiBowater vs. Canada dispute arose in 2008 when the company closed its last remaining pulp and paper mill in the province of Newfoundland and Labrador. The provincial government enacted legislation to return the company's water use and timber rights to the crown and to expropriate certain AbitibiBowater lands and assets. The investor sued under the NAFTA and the federal government settled, paying the company $130 million. AbitibiBowater was compensated for the loss of water and timber rights on public lands, even though these are not considered compensable rights under Canadian law.

Strong investment protections are very likely to be included in the CETA, despite the negative effects Canada has already experienced under the NAFTA Chapter 11.

Canadian Regulation of the Tar Sands

The controversy spurred by a recent conservation proposal by the Albertan provincial government provides an instructive example of how such investment protection provisions could impede future regulation of the tar sands (Tait et. al., 2011).

In April 2011, the Alberta government announced a plan to protect 20% of the land in the tar sands area. This very modest plan affected only a tiny amount (.02%) of recoverable reserves. The government is offering to compensate investors in this region for their out-of-pocket costs, plus interest. But many investors have reacted strongly, demanding compensation for the revenues they might have gained by fully developing the resource.

Under domestic law, this difference would normally be resolved through negotiation. At the end of the day, it is the role of government to balance all interests, including the protection of the environment, in determining appropriate levels of compensation. As long as due process is respected, the courts will generally defer to the legislature.

But it would be an entirely different matter if such a case were to be decided under the investment provisions of the NAFTA Chapter 11 or those proposed for the CETA.

These problematic provisions within those agreements include:

- **The broad definition of protected investments, which includes natural resource concessions.** Under domestic law, access to publicly owned

natural resources is a conditional right, not an ownership right.

- **The requirement for compensation to be paid for both direct and indirect expropriation.** Under domestic law, expropriation usually means the transfer of property for the state's own use or benefit, not mere regulation which adversely affects investment interests

- **Highly prescriptive terms regarding the amount of compensation to be paid to investors, including payment at fair market value of the affected assets.** Democratically elected governments, however, must balance other interests and may, for example, legitimately decide that simply compensating an investor for out-of-pocket costs plus interest is reasonable and appropriate. Furthermore, governments must also consider investor liabilities, such as environmental remediation of contaminated sites, before compensation claims are settled.

Most importantly, under investor-state arbitration all these delicate determinations are left to unaccountable arbitral tribunals that are not subject to the same checks and balances as domestic courts. Arbitration can be invoked unilaterally by investors who do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching a claim. The arbitral tribunals can rule on major issues of public policy and can order governments to pay substantial compensation awards to investors. Tribunal decisions are insulated from review by any domestic or international court.

If such tribunals were to accept the view of the tar sands investors that the Alberta government is obligated to provide full compensation for foregone revenues, effective regulation becomes practically impossible. Even the risk that foreign investors might win such a case is itself a barrier to adopting necessary regulation. There are already major European-owned oil companies active in the Canadian tar sands and the entrenchment of excessive investor rights and investor-state arbitration in the CETA would make effective environmental regulation even more difficult and costly.

International Pressure on Canada for Better Tar Sands Regulation

There is already considerable international pressure on Canada to clean up its act in the tar sands. The U.S. is the main consumer of Canadian heavy oil (or bitumen) and some state governments, notably California, have crafted regulations that take account of the higher carbon content and greenhouse gas (GHG) intensity of fuel produced from unconventional sources such as the tar sands. More recently, there has been strong grassroots pressure on the U.S. federal government to withhold approval of new pipelines to bring larger volumes of Western Canadian bitumen to U.S. refineries on the Gulf Coast, from where it can be shipped to international markets including Europe.

As noted, the Canadian federal and Albertan provincial governments have also vigorously lobbied against the European FQD, which mandates that the European transport sector reduce its GHG emissions from fuel by 6% by 2020. The directive sets a specific GHG value for oil sands and oil shale fuel, which is 23% above conventional crude. This figure is based on peer-reviewed scientific evidence that accounts for the higher GHG emissions released in the production of fuel produced from oil sands.

The Canadian government strenuously objects to assigning a different value to fuel produced from oil sands, charging that it is discriminatory, even though it is based on scientific evidence and applies to fuels produced from oil sands around the world, not just in Canada.

Given the demonstrated hostility of the Canadian government towards the FQD, it would be completely reasonable for the EU to take steps to guarantee that the FQD cannot be challenged under the CETA.

A reservation exempting the FQD to the extent that it is consistent with WTO obligations and an article referring any disputes over the FQD to the WTO would be entirely appropriate. Such a reservation could avoid a dispute under the CETA brought by the Canadian government, ensuring that any government-to-government dispute occurs at the WTO. But the safest way to avoid disputes brought by foreign investors to the FQD or other European environmental regulations

is to not include investor-state dispute settlement in the CETA.

Unfortunately, EU negotiators are not taking such sensible precautions to protect environmental regulation from CETA investment rules. The recently leaked mandate for the CETA investment chapter reveals that those in charge of EU investment protection rules have learned little from the negative experience under NAFTA chapter 11. Instead, the EU negotiating mandate aims at an investment chapter in the CETA that would emphasize maximum protection for foreign investors over democratic rights and environmental protection (Inside U.S. Trade, 2011).

Conclusion

The case for including full investment protection and investor-state dispute settlement in the CETA is weak. The Canadian government has expressed concern about investments in certain eastern European countries, where Canadian mining companies are involved in controversial projects. At the same time, the EC is insisting that the actions of Canadian provincial and municipal governments, which deliver public utilities such as waste, water and public transit coveted by European multinationals, be bound by the CETA's investment protection rules.

Ironically, the NAFTA investor-state arbitration mechanism was originally characterized as a last-resort remedy in situations where the domestic courts, specifically in the Mexican regime of that era, could not be trusted to redress valid investor concerns. Fifteen years of experience, however, has demonstrated that the sweeping powers and protections afforded to investors by the NAFTA Chapter 11 have repeatedly been invoked in order to frustrate the legitimate exercise of democratic governmental authority. In too many cases, those efforts have succeeded.

Both the EU and Canada, however, have "mature, democratic systems of justice that are available to protect all investors (Van Harten and Schneiderman, 2010)." Moreover, the risks that the CETA investment protection provisions pose to environmental protection, particularly in controversial matters such as tar sands regulation, are significant. There is little justification for providing extraordinary substantive and procedural rights to foreign investors, over and above those already provided by our respective domestic legal systems.

Clearly, the NAFTA's undemocratic protection of investors at the expense of the public and the environment should not be entrenched or expanded in the CETA. One source of hope is that the European Parliament has new authority to oversee and ratify the EU's new trade and investment treaties, including the CETA. It should do all that it can to prevent the EU negotiators from taking this irresponsible and unnecessary step.

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