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Marie-Eve Belzile
Clerk of the Standing Senate Committee on Foreign Affairs and International Trade
House of Commons
Ottawa, Ontario
By email to: Marie-Eve.Belzile@sen.parl.gc.ca

Re: Bill C-30 and the CETA's foreign investor protection provisions

Dear Ms. Belzile:

As part of my submission to the Committee, I have attached a short article in which I discuss four basic conditions for an international investor-state dispute resolution mechanism: judicially independence, procedural fairness, balanced in the allocation of rights and responsibilities, and respect for domestic courts.

Unfortunately, these conditions have not been met in the case of the CETA's proposed investment chapter and "investment court system" (ICS) and in this respect the CETA favours large multinationals and very wealthy individuals who are able to qualify as "foreign investors" and finance claims against Canada or Europe at the expense of ordinary Canadians and Europeans.

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More specifically, I would like to highlight three proposed amendments to Bill C-30. The proposed amendments are indicated below in bold.

s. 9

"The Agreement is approved **to the extent that it has been approved by the European Union and/ or European Member States, as applicable.**"

Rationale: This amendment would ensure that Parliament's approval of the CETA is reciprocal to the approval of the European Parliament and other European Union institutions. It would also prevent a situation in which our Parliament has approved the CETA without a corresponding approval, beyond provisional application, by the European Parliament and other European institutions.

s. 8(3) and throughout

[**Delete references to Section F of Chapter Eight and Article 13.21 both in s. 8(3) and throughout Bill C-30.**]

Rationale: These deletions would ensure reciprocal parliamentary approval of the CETA. Since the European Parliament and other European institutions have not approved provisional application of the relevant parts of the CETA, I suggest that Parliament should not do so either. Otherwise, Parliament will have left to Canada's federal executive branch aspects of CETA approval that have not been approved by the European Parliament and European member states' national or sub-national legislatures.

Put differently, Parliament should not leave it to the federal executive branch to ensure reciprocal approval of the CETA, where the European Parliament and member states' legislatures have themselves not left it to European or national executive branches to approve those parts of the CETA not approved for provisional application by the EU.

s. 11

"11 (1) The Minister may
(a) propose the names of individuals to serve as members of the tribunals established under Section F of Chapter Eight of the Agreement; and
(b) propose the names of individuals to be included in the sub-lists referred to in paragraph 1 of Article 29.8 of the Agreement.
(2) The Minister's proposals under sub-section (a) shall be made jointly with the Minister of Justice and the Minister of Environment and Climate Change after a process of public consultation."

I have suggested here a way to make the proposals for membership of the CETA

Chapter Eight tribunals more broad-based and accountable. I chose to add the Minister of Justice in addition to the Minister of Trade due to the exceptional degree to which Chapter Eight would transfer ultimate judicial sovereignty over private claims against the Canadian state from Canadian courts to Chapter Eight tribunals and because of the desirability of appointing individuals with genuine judicial credentials at a senior level of the courts. I chose to add the Minister of Environment and Climate Change because, in Canada's NAFTA-related experience of investor-state arbitration, more claims have been brought against Canada in the environmental field than other fields of decision-making and it would be desirable to ensure that some Canadian members of the tribunals have credibility in that field. Another option might be to include the Minister of Inter-governmental Affairs due to the prospect that provincial, territorial, and municipal measures may be subject to private foreign investor claims under the CETA. Though the process obviously should not become unwieldy, I wish to stress that appointments to the Chapter Eight tribunals, unlike other CETA tribunals, can be compared in their functional significance to an appointment to the Supreme Court of Canada.

While I think a more broad-based appointment process is the most important step, as indicated above, I have also suggested a public consultation process because I have a concern, based on observations of investor-state arbitration over many years, that members of the relevant legal/ arbitration industry will seek behind the scenes to influence the appointments process in self-serving ways, creating a basis for public doubt about appointees and a tainted process. I fear that concentration of appointing power in the trade ministry, based on a closed process, may facilitate such influence.

Thank you for the opportunity to make this submission to the Committee.

Yours very truly,

Gus Van Harten
Professor