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Chinese Checkmate; Poring Over Our Trade Deal with China, Gus Van Harten finds Canada Gave Up Plenty for Nothing in Return

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Byline: Brian Milner

Gus Van Harten doesn't look or sound like a firebrand waging war on a lucrative corner of the law game--and trying to save our cherished democratic values in the process. But don't be fooled by the Osgoode Hall law professor's mild manner and deep respect for the legal system. He would like nothing more than to blow up the burgeoning business of private arbitrations that hand foreign investors a remarkable weapon in disputes with governments--and huge fees to a coterie of international lawyers.

Van Harten, 44, an expert in international investment law, has been railing publicly against these usually secretive investor-state arbitrations since publishing his doctoral thesis on the subject nearly a decade ago. (1) "It's inappropriate to use a for-profit arbitration mechanism to resolve public-law disputes," he says. "You lose judicial independence, you lose procedural fairness--the core elements of those [legal] principles we've known about for 200 years."

What's more, the ascendance of arbitration marks "a fundamental and profound shift in institutional power" that undermines democracy.

Investor-state dispute settlements, or ISDSs, have sprouted like weeds since the late 1990s thanks to their inclusion in the North American Free Trade Agreement and a raft of bilateral trade and investment pacts around the world. (2)

When Van Harten started his research at the London School of Economics in 2002, few lawyers were aware of this new source of fat fees. By the time he left in 2007, major law firms were investing heavily in a growth market. "This is several billion dollars in total revenues worldwide, earned primarily by lawyers and arbitrators associated with large law firms," he says. "It's actually gotten to the point where you have third-party financiers...linking up with the lawyers to evaluate potential claims and then finance them" in exchange for a share of the spoils. (3)

Van Harten considers ISDSs a menace even when governments win reciprocal rights for their own investors. But what really perplexes him are pacts stacked in favour of one side. Of the hundreds of such deals he has analyzed, none has ever struck him as more lopsided than Canada's investment treaty with Beijing, which the Harper government rushed through Parliament in September, 2014, without a detailed public review.

As Van Harten reads it, Beijing gave up virtually none of its protectionist measures, which can make life difficult for any foreign investor. So market access remains about the same. Yet

Canada opened its doors wide, even to state-controlled Chinese companies that have been devouring strategic assets around the world. The title of his surprisingly digestible book on the treaty--Sold Down the Yangtze--sums up his view. "I had never seen concessions of that nature," Van Harten says.

Ever the thorough academic, he urges me to check out annex D-34 of the treaty, where China retains the right of investment screening in line with all of its existing laws. So if the mayor of some Chinese city invokes a municipal law to keep out a Canadian company, arbitration is not an option. By contrast, Chinese operators in Canada have even more rights than Canadians, who still have to take claims of unfair treatment to the courts. Private arbitrators are far more likely than judges to award damages stemming from legitimate changes in laws or regulations.

Aggrieved Chinese companies, meanwhile, can haul Ottawa before a panel of three international lawyers over actions by politicians, regulators, the courts or any other body at any level. If the arbitrators decide after their closed-door hearing that, say, a new local health ordinance or a provincial employment standard would harm the investor's interests, they can order Ottawa to fork out whatever compensation they consider appropriate. There is no cap, no judicial review of their decisions and no public scrutiny.

The more such cases, the greater the fees. But only foreign investors or companies can file claims. Governments are reduced to playing defence. Multinationals have used the threat of these suits to pressure governments to abandon, delay or weaken measures they don't like and then have used their successes as leverage elsewhere.

Some governments are re-evaluating investment policies in response to the design flaws baked into the private arbitration process. That includes Germany and other European Union members that fear its inclusion in trade and investment pacts negotiated by the EU with Canada and the U.S. will enable foreign investors to subvert environmental and social policies. (4) The Trans-Pacific Partnership could face similar hurdles.

As for Canada, it has already given away what could have been a key bargaining chip in a wider free-trade deal with China. Ottawa could regain a measure of sovereignty in dealing with Chinese investors, but only by ceding ground elsewhere, Van Harten says. "I'm worried they'll be too eager to agree to another concessionary agreement, this time on a much broader basis."

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1. While working on his PhD, Van Harten was a legal adviser to the Maher Arar inquiry.

2. Number of Canadian treaties allowing ISDSs: 37

3. Number of known investor lawsuits against Canada: more than 30, all under NAFTA

4. The first case against Canada was filed by Ethyl Corp. over a gasoline additive ban. Ottawa cancelled the ban in 1998 and paid out close to $20 million.