Making Sense of

2nd edition

An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement

Making Sense of CETA – 2nd edition
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Contents

Introduction

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Seven years after negotiations began on the EU–Canada Comprehensive Economic and Trade Agreement (CETA), political leaders appear finally ready to sign the deal at a ceremony in Brussels in October. Much has changed since then. For Europe, CETA started as a low-profile agreement with broad, if mostly disinterested, political support. It is now the target of a resurgent progressive coalition of social justice groups, environmental organisations and labour, who perceive the deal, correctly, as a threat to democracy on both sides of the Atlantic. Public opinion has also shifted, with many Europeans now keenly aware of the broad similarities between the imminent CETA and the politically toxic Transatlantic Trade and Investment Partnership (TTIP).

The concurrent challenges of climate change and extreme inequality have shattered political illusions about the sustainability—social and environmental—of our current economic model. European and Canadian trade policy, with its priority on market openness, export-led growth, corporate profits, deregulation and special privileges for investors, was and remains an attempt to legally disqualify alternatives to free-market globalization. CETA would transform and weaken the capacity of governments to respond to economic, social and environmental challenges at precisely the moment when responsiveness and innovation in public policy are needed most.

In September 2014, the Canadian Centre for Policy Alternatives and German NGO PowerShift co-published an analysis of the final draft CETA text under the title '*Making Sense of the CETA*.'[1] This new edition analyses the final legal text of CETA as made available in February 2016, and is the most comprehensive independent review of the agreement to date. It finds that, more than just a trade deal, CETA is a sweeping constitution-style document restricting public policy options in areas as diverse as intellectual property rights (copyright, trademarks, patents and Internet governance), government procurement, food safety, financial regulation, the temporary movement of workers, domestic regulation and public services, to name just a few of the topics explored in this analysis.

1 Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood, eds. (2014) Making Sense of the CETA: An analysis of the final text of the Canada-European Union Comprehensive Economic and Trade Agreement. Canadian Centre for Policy Alternatives. https://www.policyalternatives.ca/publications/reports/making-sense-ceta

Of special note, an investment chapter in CETA, and the planned establishment of an *'investment court system'*, would make the *'right to regulate'* conditional on the approval of unelected private arbitrators. Our analysis shows that, while CETA's safeguards for labour and the environment are mainly voluntary and generally unenforceable, the investor protections are just the opposite: strong, binding and fully enforceable.

The final CETA text pays lip service to public concerns about investor–state dispute settlement (ISDS) by making some procedural improvements to the badly flawed system. Yet foreign investors still receive special legal rights to sue governments over measures negatively affecting their investments. Under CETA's new investment court system, the substantive protections afforded to foreign investors remain largely intact. This will expose taxpayers in both Canada and the EU to huge financial liabilities and almost certainly put a chill on future progressive public policy. Canada's experience under NAFTA confirms this.

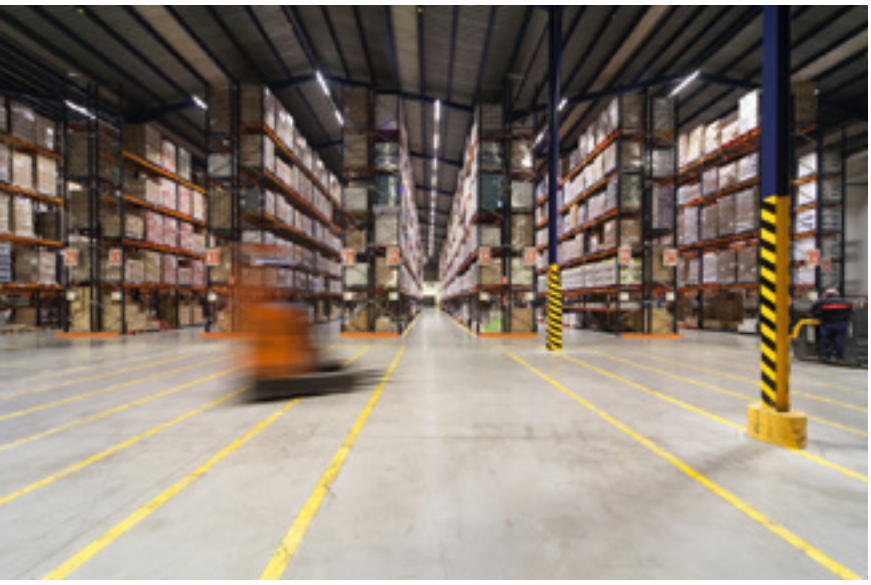
Canada is the most-sued NAFTA party despite its highly developed legal system and strong protections for private property. Many of these challenges involve environmental protection policies. Just last year, Canada lost a disturbing NAFTA dispute over an environmental assessment that recommended against a massive quarry in an environmentally sensitive region. Canada currently faces a raft of claims as a result of progressive public policies, such as banning natural gas fracking in the province of Quebec.

The modest procedural improvements to the ISDS process in CETA would not preclude the kinds of cases we are witnessing with increasing frequency around the world—corporate challenges to public interest regulation and the management of scarce natural resources—or make it more likely that governments would win these disputes. On the contrary, CETA would almost certainly increase the number of such lawsuits against legitimate European public policies, putting even more deregulatory pressure on governments.

CETA contains no clear carve-out exempting public services from the agreement's liberalisation rules. Instead, a complex patchwork of country-by-country exceptions provide only partial and uneven protection. For Europe, the agreement is unique in that the EU and member states had to use a *'negative list'* approach in which all sectors and measures are automatically covered unless governments expressly excluded them. And while some public and essential services are excluded from some of CETA's liberalising provisions, key reservations are vaguely worded or flawed.

For example, drinking water services are excluded in CETA, but wastewater services are covered in most European countries. Likewise, the reservation for postal services would effectively lock in the current levels of privatisation and deregulation of postal services in Europe. More fundamentally, CETA constrains the freedom of elected governments to bring privatised services back into the public sector. Once foreign investors are established in a privatised sector, efforts to restore public services can trigger foreign investor claims for compensation.

CETA's rules restricting how governments can regulate are not, as often claimed, simply about establishing a level playing field for foreign and domestic firms. In several areas, CETA absolutely limits how governments can regulate, and enables challenges even to non-discriminatory regulations affecting foreign investors and service providers. CETA's investment rules, for example, prohibit governments from limiting the number of enterprises or total assets in a sector. These prohibitions apply even when such limits do not discriminate in favour of local providers,



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which could interfere with efforts to prevent financial firms from becoming *'too big to fail,'* for example.

Finally, CETA does not safeguard the precautionary principle. Instead, under the guise of regulatory cooperation, it establishes formal channels for foreign businesses to be heard early in the regulatory process, enabling them to apply pressure against the adoption of regulations they don't like. Importantly for Europe, CETA's regulatory cooperation institutions would be open to Canadian subsidiaries of major U.S. chemical, biotech and energy firms.

Given these and other flaws uncovered in the following analysis, it is baffling that Canada's trade minister, Chrystia Freeland, and her European counterpart, Cecilia Malmström, are portraying CETA as a *'progressive trade agreement.'* Other than some relatively minor changes, it is essentially the same deal negotiated by Canada's former Conservative government, one of the most right-wing regimes in recent Canadian history. In fact, CETA is a *'gold-standard'* agreement only in the sense that it goes further than previous free trade treaties in elevating the *'gold-plated'* rights of corporations and foreign investors above the welfare of citizens and the broader public interest.

If the European Commission and the new Canadian government are serious about making CETA a truly progressive agreement, they should not be able to get away with mere rebranding exercises or other empty gestures with little legal impact. Both jurisdictions need to step back from this deeply flawed text. If, however, they press ahead and sign CETA in October as planned, it will set the stage for a long and contentious debate over ratification, first in the European Parliament and then in the legislatures of the EU member states and Canada. Disregarding serious public concerns about CETA's negative impacts, which this analysis validates, is an undemocratic and dangerous course of action. Citizens on both sides of the Atlantic deserve better.

Executive summary

This collection of short reports describes and analyses many of the most contentious aspects of the proposed Canada–EU Comprehensive Economic and Trade Agreement (CETA). Dozens of trade and investment experts in Canada and the EU have collaborated to provide a diversity of perspectives on the proposed agreement, but all agree that CETA, as it is written, threatens the public good on both sides of the Atlantic. In a wide variety of policy areas only loosely related to trade, CETA elevates the rights of corporations and foreign investors above the welfare of citizens and the broader public interest.

Photo: Chris Grodotzki / campact, flickr (Creative Commons license)

INVESTOR–STATE DISPUTE SETTLEMENT

The latest CETA text pays lip service to public concerns about investor–state dispute settlement (ISDS) by replacing it with what the EU and Canada are calling an Investment Court System. While it improves some procedural aspects of ISDS—for example, by making arbitrators less prone to conflicts of interest—the protections afforded to investors in this new *'court'* system are largely unchanged.

Under CETA, foreign investors still receive extraordinary legal rights to sue governments for measures that may negatively affect their investments. These protections, which are not available to domestic investors or ordinary citizens, would expose taxpayers to huge financial liabilities and threaten to chill public policy. Although the text mentions a so-called right to regulate, the clause is a guideline and does not adequately protect public interest regulation.

FINANCIAL SERVICES

By allowing more cross-border financial services and facilitating greater direct investment in the financial sector, CETA would encourage the financial industry to take greater risks—for example, by engaging in speculative investment—in order to survive in a more competitive international market. CETA would also limit the regulatory options available to governments to address financial instability by, among other measures, giving the financial industry an institutionalised voice in the regulatory process.

Ignoring the lessons of the financial crisis, CETA would open the financial services sectors in the EU and Canada to greater competition and put downward pressure on prudential regulation in ways that make both Parties more vulnerable to financial shocks and contagion. Furthermore,

key financial services provisions in CETA are enforceable through the ISDS mechanism, so governments could effectively be forced to pay banks for the privilege of regulating them.

TRADE IN SERVICES

CETA would restrict governments' capacity to regulate the entry and activity of foreign service suppliers in the domestic market, even when such regulations do not discriminate based on the country of origin of firms. By ensuring market access and preferential treatment for foreign service suppliers, CETA threatens the viability of public services and local service suppliers.

CETA includes exceptions to the services rules, but its *'negative list'* approach means that all services are covered by default unless specifically excluded by negotiators. Moreover, through its *'standstill'* and *'ratchet'* mechanisms, CETA forces governments to make any future regulatory decisions in the direction of even greater liberalisation, including for many of the services that are on the list of exceptions.

PUBLIC SERVICES

While a limited number of public services are excluded from some of CETA's liberalising provisions, key reservations are vaguely worded or flawed. The agreement's investment protections would restrict the capacity of governments to expand public services or to create new ones in the future.

CETA conflicts with the freedom of elected governments to bring privatised services back into the public sector. Once foreign investors are established in a privatised sector, efforts to restore public services can trigger claims for compensation, effectively locking in privatisation.

DOMESTIC REGULATION

CETA would constrain policy flexibility in areas only loosely related to trade by mandating that licensing and qualification requirements—as well as any measure relating to those regulations—be *'as simple as possible'*. CETA interprets even non-discriminatory regulations as potential trade barriers.

The scope of the domestic regulation provisions is broader than in other agreements and even trumps other areas in CETA. Regulations concerning not just services but also *'all other economic activities'* are covered with only a narrow set of reservations.

REGULATORY COOPERATION

CETA would create a set of institutions and processes for foreign governments (and their corporate lobbyists) to have a say in the creation of new domestic regulations, which could delay or halt the introduction of public interest legislation and undermine the precautionary principle. The range of regulatory areas covered by these rules is extensive, including not just goods and services, but also investment and other areas only loosely connected to trade.

Any attempt to *'harmonise'* regulations between the EU and Canada threatens to push standards down to the lowest common denominator. Moreover, business lobbyists could use this process to push for regulatory changes that are too controversial to be included in the text of CETA itself.

INTELLECTUAL PROPERTY RIGHTS

CETA would strengthen the position of patent holders relative to innovators and consumers, which would encourage the

already destructive practice of patent trolling in software and other industries. Because intellectual property is covered by the investor–state dispute mechanism in CETA, patent holders may be able to sue governments for future regulations designed to reduce the power of patent trolls.

CETA does not directly threaten Internet freedom, but by locking in the current system of industry-friendly intellectual property rules in Canada and the EU, CETA would prevent governments from returning to a more user-friendly intellectual property regime in the future.

AGRICULTURE

The ratification of CETA would be a severe setback for efforts to encourage non-industrial farming practices and sustainable agriculture on both sides of the Atlantic. For example, by expanding duty-free import quotas (e.g. for milk and meat), CETA would expose Canadian and European farmers to considerable competitive pressure, which could encourage more profitable (for some) but less sustainable farming practices.

Furthermore, CETA raises concerns around processing and production standards, particularly in Europe. Practices that are considered safe in Canada, such as the surface treatment of meat with acetic acid, the use of hormones in beef production, and the use of genetically modified organisms, are restricted in the EU on the basis of the precautionary principle. Under CETA, those precautions could be attacked on the basis of the *'aftercare principle'* employed in Canada's *'science-based'* regulatory approach.

CETA also undercuts the current system of geographical indications for European products. Of the 1,308 food items, 2,883 wines and 332 liquors protected in the EU, only 173 are protected in the CETA text.

CLIMATE AND ENERGY

CETA's provisions for investment protection coupled with its weak protections for environmental and resource measures will undermine sustainable climate and energy policy in the future. Efforts to stop fossil fuel–based energy production and promote renewable energy will be threatened by CETA, which poses a grave danger to any measures put in place to reach the goals that the EU and Canada agreed to in the 2015 Paris Agreement.

CETA lacks any provisions that clearly protect regulations and measures aimed at curbing climate change or promoting renewable energy from investor attacks. The agreement's Trade and Sustainable Development chapter is thin and does not contain any concrete obligations for the Parties to develop future-oriented and climate-friendly policies.

LABOUR RIGHTS

Despite its positive rhetoric regarding the rights of workers, CETA fails to introduce the kind of binding and enforceable labour provisions that would protect and improve labour standards in the EU and Canada.

Several EU member states as well as Canada have not ratified some of the International Labour Organisation's core labour standards or priority governance conventions. The CETA text encourages but does not obligate them to do so.

Tellingly, the labour chapter in CETA is exempt from the general dispute settlement provisions of the agreement. In the event of a dispute over a labour standards violation, CETA merely requires the Parties to engage in non-binding consultations.

CANADA-SPECIFIC CONCERNS

Most concerns about CETA are shared by Europeans and Canadians, but a handful of CETA's impacts would be felt more negatively in Canada.

Under CETA, Canada would be forced to make unilateral changes to its intellectual property regime for pharmaceuticals that would increase drug costs. For the first time in a Canadian trade agreement, CETA would apply restrictive procurement rules to municipal and provincial governments, which could undermine local and regional development initiatives. CETA could also come into conflict with the rights of Indigenous peoples, whose traditional lands are often the target of foreign resource companies.

Other areas of Canadian concern include the impact of CETA on supply-managed agricultural sectors, and how the chapter on the temporary entry of business persons will affect the domestic labour market.

RATIFICATION PROCESS

For the purposes of ratification in the EU, CETA has been presented as a *'mixed'* agreement. This means that, following the decision of the Council of Ministers (expected autumn 2016) and the vote in the European Parliament (expected late 2016/early 2017), all 28 EU member states must ratify the treaty. Hower, the European Commission and many member states are pushing for *'provisional implementation'* of CETA even before the national ratification processes.

At all stages of the ratification process, CETA's critics in Europe will have opportunities to organise against CETA's implementation. Legal actions against the agreement have already started: CETA is being challenged before the European Court of Justice and, at the member state level, before the German Federal Constitutional Court.

In Canada, CETA must be passed into law nationally before it comes into force, which will require the approval of both the elected federal Parliament and the appointed Senate. The current government is strongly in favour of CETA and will push for its ratification as early as autumn 2016, despite opposition from a variety of municipalities and public interest organisations.

Investment protection and dispute settlement in CETA

PowerShift e. V. and Canadian Centre for Policy Alternatives (CCPA) *

The European Commission and Canada had the opportunity in the Comprehensive Economic and Trade Agreement (CETA) to drop or significantly limit and reform the controversial investor–state dispute settlement (ISDS) system. They failed to do so. In fact, despite giving it a new name (the Investment Court System), European and Canadian negotiators retained in CETA the worst parts of the ISDS model and even considerably extended its scope geographically.

As the following analysis of CETA's chapter on investment protection (Chapter 8) reveals, the updated provisions in the final text merely adjust certain procedural aspects of the ISDS system without addressing the inherent threats posed by it, namely a limitation of democratic rights and the rule of law. Novel wording in CETA affirming the *'right to regulate'* cannot be relied on to protect public interest regulation from investor–state challenges.

As such, the growing number of European citizens and decision-makers already wary of, or opposed to, the inclusion of ISDS in the EU's Canadian and U.S. free trade agreements cannot feel secure in the Commission's assurances it has made the process more fair, transparent and accommodating of their concerns.[1]

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REFORMING OR REPEATING THE ISDS MISTAKE?

The European Commission is satisfied with the final CETA text, the German Ministry of Economics sees its approach confirmed within it, and many members of the European Parliament are relieved. All welcomed the outcome of the negotiations and believe that CETA will become the cornerstone of a global reform of the investment protection regime. However, this point of view masks one very crucial point: the people of Europe disagree.

During a EU-wide online consultation in 2014, 97 % of participants said they were against the investment provisions in

* We'd like to thank Malte Marwedel (Research Associate, Albert-Ludwigs-Universität Freiburg, Germany) for his help with this chapter.

1 See the Commission report of 13 January 2015, p.3 (http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf).

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CETA. Since the final report of the public consultation on investment protection was published, many European decision-makers appear to have ignored the heated political debate and the ongoing protests of millions of citizens. Policy-makers in Europe still consider the implementation of new privileges for foreign investors as politically crucial.

Generally speaking, Chapter 8 of CETA enables investors of one Party (Canada or the EU) to sue the other Party for vast amounts in damages if they believe they have suffered losses from a state's regulatory measures (e.g. for the protection of health, the environment, consumers or the stability of the financial system). Cases are not heard by the courts but by private arbitrators with the authority to judge the legitimacy of state actions against the investor protections in treaties such as CETA. EU member states have signed many bilateral investment treaties (BITs) with each other and with non-EU countries. However, the inclusion of ISDS in CETA would considerably expand the global reach of investment arbitration, multiplying the risk of litigation at the expense of the common good on both sides of the Atlantic.[2]

Of particular importance to Europeans is how many US corporations with subsidiaries in Canada will be able to access CETA's ISDS process if they cleverly structure their investments in the EU. According to recent estimates, 81 % of US enterprises active in the EU (about 42,000 firms) would conceivably fit the definition of a Canadian *'investor'* with recourse to ISDS under the EU–Canada agreement. US companies are already known for this kind of aggressive exploitation of the ISDS system.[3] Should the provisions on investment protection in CETA survive, if or when the agreement is ratified, there would be virtually no need to incorporate them in the Transatlantic Trade and Investment Partnership (TTIP).

By the same token, if CETA passes with Chapter 8 intact, any further adaption of the provisions on investment protection in TTIP, without a corresponding change to CETA, would be futile. Companies could simply choose the regional agreement that is more favourable for their purpose, i.e. CETA over TTIP. Therefore, the announced transatlantic *'reformation'* of investment protection would reach a dead end with CETA. The vague promise of a future *'multilateral investment tribunal'* (CETA Article 8.29) could remain unfulfilled indefinitely.

Faced with growing public discontent about the EU–US trade agreement, the European Parliament recently demanded *'to replace the ISDS system [in TTIP] with a*

2 Concerning the parallels between criticism of ISDS in TTIP and CETA, see (in German) Eberhardt, *'Investitionsschutz am Scheideweg – TTIP und die Zukunft des globalen Investitionsrechts, Internationale Politikanalyse'*, May 2014, with problematic real-life examples on p. 7 and 12 (http://library.fes.de/pdf-files/iez/global/10773-20140603.pdf); for an English analysis see Van Harten, *'A Report on the Flawed Proposals for Investor-State Dispute Settlement (ISDS) in TTIP and CETA'*, 10 April 2015, Osgoode Legal Studies Research Paper No. 16/2015, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595189).

3 See the report by Public Citizen, *'Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP'* (https://www.citizen.org/documents/EU-ISDS-liability.pdf).

new system for resolving disputes between investors and states' that would be more in line with democratic principles and the rule of law.[4] Parliament additionally demanded that foreign investors should *'benefit from no greater rights than domestic investors'*. However, the new CETA investment chapter shows the Commission is not ready for such fundamental changes. If the European Parliament takes its own red lines in the TTIP negotiations seriously it will have to reject CETA.

THE STRONG CASE AGAINST INVESTMENT PROTECTION AND ISDS

To date, no convincing arguments for including investment protection and ISDS in CETA have been put forward. In the EU and Canada, foreign investors already enjoy extensive protection through the legal system: property rights are fully enforceable in impartial courts. There is thus no need for securing special rights for foreign investors under international law—a point that has been stressed time and again by the current German federal government, among others.[5] Equally important, CETA grants these privileges to investors without demanding they take on any responsibilities in return. Investor obligations, such as the provision of employment opportunities, respect for human, workers' and consumer rights, or the observance of health and environmental standards, are not enforceable through ISDS and notoriously difficult to enforce through other international channels.

In practice, CETA offers substantive and privileged protection—above what is available under the law for domestic investors and citizens—for the property and expected profits of foreign investors. These rights by far exceed existing EU law and constitutional protections and can go as far as securing investors' interests from legitimate democratic political change.[6] A more limited protection against discrimination only (an option in the CETA negotiations) would have helped avoid situations where foreign investors are worse off than domestic investors. At the same time, this limited approach would ensure that a state's regulatory discretion in matters of general public interest is protected effectively, as investor rights would no longer exceed the scope of existing laws and constitutions.[7]

Instead, through the protection standards in CETA's investment chapter, foreign investors can sue for compensation against *'indirect'* expropriation measures or when they believe a state action has undermined their lost future profits. The very broadly worded right to fair and equitable treatment (FET) in Article 8.10, as well as the protection against indirect expropriation according to Article 8.12 and Annex 8A CETA, provide extensive levels of protection for foreign investors.[8]

4 See the European Parliament decision of 8 July 2015, with recommendations regarding TTIP negotiations, 2014/2228(INI), p. 2. d) xv. (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN).

5 For a more detailed discussion of the counter-arguments of the Commission, see analysis of PowerShift (footnote 8), p.3 ff. Concerning the position by the federal government, see, inter alia, Federal Minister of Economics Gabriel's speech in the Federal Diet (Bundestag) on 25 September 2014 (http://www.bmwi.de/DE/Themen/aussenwirtschaft,did=656586.html).

6 In particular, investors are protected extensively through the broadly termed right to fair and equitable treatment (FET), Art. 8.10 para. 1-4, as well as the protection from indirect expropriation in Art. 8.12 para 1(2) and Annex 8-A CETA. See also National Treatment, Art. 8.6. para. 2 CETA; compare Art. 3 of the proposal for a more diligent and narrow: *'Modell Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA'*, p.9f, as drafted by international law professor Markus Krajewski, and as commissioned by the BMWi (http://www.bmwi.de/BMWi/ Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bm-wi2012,sprache=de,rwb=true.pdf).

7 Compare with Krajewski/Hoffmann (footnote 13), p. 9.

8 Also note the standard of National Treatment, Article 8.6(2) CETA; compare Article 3 of the draft for a more narrow and diligent version of the standard in: *'Modell Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA'*, p. 9f., developed by Professor Markus Krajewski, commissioned by the German federal ministry for economic affairs and energy (partly in English): http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bm-wi2012,sprache=de,rwb=true.pdf

WHAT IS INVESTOR–STATE DISPUTE SETTLEMENT?

Canadian Centre for Policy Alternatives

'Investor–state dispute settlement (ISDS) is a non-judicial arbitration process that allows foreign investors to seek compensation for government decisions that adversely affect their investments. ISDS is given the force of international law by being enshrined in trade and investment protection agreements like CETA and the Transatlantic Trade and Investment Partnership, and is available exclusively to foreign investors, who are not required to exhaust domestic legal remedies before launching suits against host governments.

'Multinational companies and wealthy individuals have used ISDS to challenge a broad range of laws, regulations and policies, including measures related to public health, environmental protection, financial regulation and resource management. In some circumstances the threat of an ISDS claim gives foreign investors a powerful tool to deter governments from introducing policies or regulations they don't like.

'ISDS cases are usually decided by tribunals of three members: one chosen by the foreign investor, one by the challenged government and a third by mutual agreement of both parties (or, failing that, by an outside appointing authority). Tribunal decisions are subject to limited or no review in any court, whether domestic or international. Even so, in many countries their awards of public compensation to foreign investors are directly enforceable, comparable to high court decisions.

'Since the 1990s, recourse to ISDS has exploded, from a hardly noticeable number of cases to about 70 per year today. Canada has been sued 39 times under NAFTA's ISDS process, nearly always by U.S. investors, and has paid over $190 million (€ 130 million) in known awards or settlements. This record makes Canada the most-sued developed country in the world. At the same time, Canadian companies are lodging more and more cases internationally against environmental or resource management decisions in countries where they have prominent energy and mining interests.

'European corporations are also highly litigious, being responsible for roughly half of all known ISDS cases worldwide. Seven out of the top 10 countries that are home to companies suing under investment treaties are EU members. The number of ISDS claims and the amount of ordered compensation continues to grow worldwide.'

Efforts to limit and specify the protection standards in CETA (in comparison to older agreements) have not been successful, since many of the legal concepts provide a wide scope of interpretation, leaving far too much discretion to arbitrators. Of particular concern, Article 8.10(4) gives arbitrators the right to consider whether the *'legitimate expectation'* of the investor has been upset by state action. Investment arbitration panels have repeatedly used this criterion in the past to expansively interpret the standard of fair and equitable treatment.

The revised CETA investment chapter includes new wording confirming the state's right to regulate. But it would be a mistake to believe governments will be able to use this provision to successfully defend against challenges to their regulations, since it still leaves arbitrators with huge discretion in deciding if the state measures in dispute are legitimate.

Trade and investment tribunals have consistently ruled that while governments have the right to regulate it is constrained by treaty obligations entered into voluntarily. According to the WTO Appellate Body, for example, trade agreements *'discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder'*. Regarding a bilateral investment treaty dispute against Hungary, the panel stated: *'It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries'*.

Having been told repeatedly by tribunals that obligations in trade agreements discipline and set boundaries on the right to regulate, negotiators cannot legitimately claim that simply affirming the right to regulate adequately protects governments from successful treaty challenges to their regulations. In other words, in the current draft of CETA the *'right to regulate'* is merely a vague norm to be interpreted during the ISDS process itself, offering arbitrators considerable leeway to decide in favour of the investor, i. e. against state regulation.

The final CETA text incorporates some long overdue improvements to the ISDS process. For instance, claimants in a dispute (the investors or corporations) no longer directly influence the choice of arbitrators. CETA establishes a permanent investment tribunal, or roster, made up of 15 arbitrators to be appointed by the EU and Canada. Of them, five will be Canadian and five European nationals, with the remainder appointed from third countries. This and a set five-year term (with possibility of one renewal) are meant to safeguard

STATEMENT ON THE ESTABLISHMENT OF AN INVESTMENT TRIBUNAL IN TTIP
by the Association of German judges

*"The German Magistrates Association rejects the proposal of the European Commission to establish an investment court within the framework of the Transatlantic Trade and Investment Partnership (TTIP). The DRB sees neither a legal basis nor a need for such a court." (...) The creation of special courts for certain groups of litigants is the wrong way forward. (...) The German Magistrates Association sees no need for the establishment of a special court for investors. (...) Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts. As such, the ICS emerges not as an international court, but rather as a permanent court of arbitration."**

the impartiality of arbitrators. Investment disputes under CETA will be decided by three arbitrators selected from this roster by the investment tribunal president (a rotating position): one must be from the Canadian pool, one from the EU pool, and a final chosen from among the third-country group who will serve as chair of that particular ISDS case.

Despite these procedural changes, which have been given the name of an Investment Court System, there are major deficiencies in the CETA process with regard to the rule of law, in particular around judicial independence. For instance, Investment Arbitrator is not a full-time job. Even though Article 8.30 prevents arbitrators from acting *'as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'*, they may still sit as arbitrators in other ISDS cases in addition to their role on the CETA investment tribunal.

Additionally, tribunal members will still be paid per case, creating a financial incentive to try a large number of investor claims, which is mainly achieved by ruling expansively in the interest of investors. One obvious solution for avoiding possible conflicts of interest would be to appoint arbitrators on a full-time, salaried basis and prohibit members of the roster from holding a second office, exactly as the Commission considered as late as March 2015. Instead, the final CETA text postpones incorporation of such important safeguards by way of possible future amendments. From a political point of view, despite the Commission's optimism, such an ex post amendment is hardly feasible.

STILL NO IMMEDIATE POSSIBILITY TO APPEAL ISDS RULINGS

A further source of concern is that the Commission apparently did not insist on the full incorporation of an appellate body during the initial phase of CETA's implementation. An appeal mechanism could ensure some degree of accountability over the members of the investment tribunal. It might also guarantee uniform implementation of the agreement, particularly if it operated on the basis of precedent. Furthermore, an appellate body could allow states to get a more accurate understanding of the potential risks of litigation and thereby enable the legislative branch to respond to such risks through sensitive policy choices.

* See statement by the Association of German Judges, http://canadians.org/sites/default/files/tpp-deutsche-richterbund-opinion-0216.pdf

Even though the negotiating parties envisage incorporating an appellate tribunal into the ISDS mechanism, its realisation is deferred into the future, with no concrete deadline.[9] The detailed configuration and establishment of an appellate tribunal could easily drag out for many years. In the meantime, the tribunals' decisions against a state would be enforceable, as they are now under similar treaties, without any possibility of substantial legal recourse.

This aspect of CETA's investment chapter is a step backward in comparison to EU proposals in the TTIP negotiations, which included the immediate incorporation of an appellate body. Furthermore, the Commission has demonstrated half-heartedness in relation to safeguards of due process. While the TTIP proposal foresees new participatory rights for all affected parties (e.g. citizens, NGOs, associations, competitors of the suing investor, etc.), these were swept under the rug during the negotiations with Canada.

CONCLUDING REMARKS

The proposed Investment Court System in CETA, with its permanent roster of arbitrators and potential (but likely unrealisable) appeals process, is not a convincing response to the threats posed by ISDS. Despite some procedural improvements compared to other agreements, an expansion of ISDS to cover transatlantic investments must be firmly rejected. There are further material legal concerns with the ISDS process in CETA and TTIP. The incorporation of a parallel quasi-judicial system disconnected from the European courts could come into conflict with the principle of the autonomy of the European legal order, since ISDS poses a threat to the effective and uniform application of EU law.

Despite these Europe-wide constitutional considerations, the Commission is still proposing that CETA should come into effect provisionally after a decision by Council and with the support of the European Parliament. Acknowledging the strength of public and member state concerns, the Commission appears to have accepted that it must omit CETA's investment protection and ISDS process from provisional application. In fact, as investment protection is not an exclusive competence of the EU, member states government must be involved in the decision-making process concerning ISDS. It is to be hoped that some national parliaments will assert their authority by rejecting these unnecessary and imbalanced investor rights.[10]

9 see Art. 8.28 para. 7 CETA.

10 See analysis by ClientEarth, *'Legality of investor-state dispute settlement (ISDS) under EU law'*, 22th October 2015, p. 3 ad 7 http://documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf.

The financial services chapter: Inflating bank profits at the expense of citizens

***Myriam Vander Stichele**, SOMO*

Canada weathered the financial crisis of 2007-08 better than many other countries and regions, including the European Union (EU). According to the International Monetary Fund (IMF) and other experts, this was because Canada had much stricter regulations and supervision, and its domestic banking and financial sector is less open to foreign investment and competition.[1] The six largest Canadian banks, for example, control over 90 per cent of the country's banking assets and are protected from foreign takeovers via mergers and acquisitions.

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Despite these lessons, the financial services chapter of the EU–Canada Comprehensive Economic and Trade Agreement (CETA) would ensure a wider opening of the financial sector and the financial markets in Canada and the EU. CETA will not only allow more cross-border financial services (e.g. advice on portfolio investments), but also facilitate more investments (including takeovers) in each other's financial sectors (e.g. the establishment of bank branches). Advocates of free trade hail the enhanced investment competition between EU-based and Canadian banks and other financial service suppliers. A clear downside is that it makes the financial systems in both Canada and the EU more interconnected and vulnerable to external shocks and contagion.

Obligations found elsewhere in CETA further enhance the risk of rapid spillovers and financial instability in times of crisis. For example, the agreement's final provisions require the Parties (Canada and the EU) to authorise any payments and transfers on their current accounts (Article 30.4), and create an obligation to consult

1 See for instance Giovanni Aversa (editor), *'Canada's financial system among federal regulation and economic crisis. Strengths and vulnerabilities'*, E-encyclopedia of banking, stock exchange and finance, Assonebb (http://www.bankpedia.org/index.php/en/89-english/c/23915-canadas-financial-system-among-federal-regulation-and-economic-crisis-strengths-and-vulnerabilities-encyclopedia); and Chrystia Freeland, *'What Toronto can teach New York and London'*, Financial Times, 29 January 2010.

with a view to liberalising transfers of very large amounts money and investment payments, i.e. capital and financial accounts (Article 30.5). CETA also imposes many conditions on measures taken by a country in financial difficulty to restrict payments and movement of capital (see Articles 28.4, 28.5 in the exceptions chapter), even when the recent crisis clearly proved the importance of curbing speculative capital flows as a means to prevent financial crises.

In general we can say the increased competition envisioned in CETA ensures that the financial industry, in order to capture markets, will display more risk-taking behaviour, sell more high-risk financial products, and reduce services to less affluent clients. The CETA dynamic thus runs counter to post-crisis attempts to reform the financial sector, remove the key causes of financial instability, reduce risk-taking behaviour, shrink the size of the financial sector (i.e. *'too big to fail'*), and ensure better protection of consumers and the economy as a whole.

Meanwhile, the CETA text restricts the ability of governments, parliaments and other public institutions to regulate finance in the public interest, whether to prevent a financial crisis and/or reform the financial sector, except in cases where Canada or the EU have made specific exemptions from treaty rules. The agreement would also expand the rights of foreign investors to challenge financial regulations through investor–state dispute settlement, and apply unprecedented and controversial restrictions to non-discriminatory domestic regulation, such as licensing requirements in the financial services sector.

KEY PROVISIONS

'Market access' rules in CETA's financial services chapter (Article 13.6) prohibit financial regulators from taking measures that would limit the participation of foreign capital in a domestic bank or other domestic financial company, or from limiting the number of financial service providers of the other party, the total value of their financial transactions or the total number of their service operations. Taken at face value, such rules contradict measures that need to be taken to reduce bubbles in the financial sector and trim *'too big to fail'* banks and insurance companies (to avoid more costly bailouts with taxpayer money). Interestingly, though regulators are generally prohibited by CETA from requiring financial services to be supplied through specific types of legal entities, it remains permissible *'where under the laws of the Party the range of financial services supplied by the financial institution may not be supplied through a single entity'* (Article 13.6.3 [b]). This clarification may allow for the separation of speculative and basic retail banking operations, which is being considered by the EU and other regulators as a way to curb future financial crises and bailouts.[2]

CETA defines which laws and other measures are to be allowed as prudential measures to regulate the financial sector (Article 13.16, referred to as the *'prudential carveout'*). The definition deviates somewhat from other free trade agreements (FTAs) in that prudential measures are not only those protecting investors, clients and financial stability, but importantly also include interventions to ensure the integrity and responsibility of a financial institution. Moreover, Annex 13B of the financial services chapter lists a number of guarantees to ensure that prudential regulations are not unduly restricted by CETA. While this additional protection for financial regulation is unprecedented in a trade and investment agreement with the EU, it remains to be seen what its practical scope will be. Additionally, it does not

2 It is unclear how far the CETA caveat will hold, as it is not included in the Trade in Services Agreement (TiSA) currently being negotiated behind closed doors between the EU, Canada and 21 other WTO member countries, and which covers mostly the same financial services .

seem likely this improved language will be included in the Trade in Services Agreement (TiSA), where both the EU and Canada are negotiating on the same financial services.

CETA circumscribes how licensing and qualification requirements and procedures may be applied, and it will make it more difficult for regulators and supervisors to act and react by stipulating such rules must be established in advance and in the most objective and simplest way for financial service providers and investors (Article 12.3, applicable to the financial sector by means of Article 13.2.6). Licensing and qualifications are important, not only to guarantee the integrity of the scandal-riddled financial sector, but also to deal with new products and future regulatory challenges relating, inter alia, to technical and digital innovations (called fintech).

Within three years of CETA coming into force, the EU and Canada will have to negotiate rules restricting performance requirements for investments in the financial industry. If no agreement is reached within that period, the performance requirements applicable to investments in general (i.e. those mentioned in Article 8.5 of the investment chapter) will automatically apply. These would greatly restrict government policy space to regulate foreign financial investors (e.g. foreign banks and foreign hedge fund managers) to ensure beneficial impacts on the domestic economy. Importantly, the Article 8.5 performance requirements prohibit regulators from restricting the sale of a good or service (e.g. money transfers) by relating them to the volume or value of financial services exports or foreign exchange earnings. Allowing such freedom for services and capital movements in the financial sector can become very financially destabilizing because they can exhaust the financial reserves of a country (current and capital accounts) and increase pressures to devalue the currency.

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Market opening in CETA takes place through *'schedules'* in which parties list the subsectors or measures they wish to exclude from liberalisation and deregulation. This *'negative list'* approach to making commitments, which is quite new for the EU, implies that all financial service sectors are to be opened up unless they have been explicitly excluded. The EU should be aware of (the impact of) all the financial services it has liberalized.

Negative listing has the effect of automatically subjecting new financial services (i.e. services or sectors developed after CETA is signed) to competition from foreign financial services suppliers and investors without knowing what the effect might be. Article 13.14 creates some space for government regulation of new services—e.g. the parties *'may determine the institutional and juridical form through which the new financial service may be supplied and may require authorisation for the supply of the service'*—but it is quite limited. Where the negative impacts of a service (e.g. a risky investment or fintech product that results in customers losing money) become apparent only at a later stage, or when unforeseen consequences should materialise, CETA leaves very little scope

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to reverse market access schedules (Article 30.2).

Such guarantees that markets will remain open are a big win for investors, who want the certainty they can reduce their costs by preempting future regulation and that they will be able continue their presence. Many Canadian provinces have included exemptions from foreign takeovers, and guarantees that provincial laws will remain applicable to the foreign financial industry, in order to ensure that financial services are adapted to local circumstances. Europe, on the other hand, has included few, if any, guarantees of this nature.

NEW INDUSTRY PRIVILEGES, FEWER DATA PROTECTIONS

CETA provides no assurances of better financial services to businesses and the general public or sufficient financing for the much-needed transition to a more socially and environmentally sustainable society in Canada and the EU. CETA does, however, stand to substantially increase the profitability of the financial industry by extending the ways and instruments at its disposal to protect its interests. Consider the following new privileges CETA would extend to the EU and Canadian financial sectors:

➔ General investment protections—including to *'fair and equitable treatment and full protection and security'*, compensation for losses and particular expropriations, permission to transfer all money related to the investment, etc.—will be fully applicable to the financial sector (Article 13.2.3).[3]

➔ The option to sue the government under the investor–state dispute settlement (ISDS) process (the *'Investment Court System'*) if a financial service provider or an investor thereof deems a regulation or other measure to be in breach of the abovementioned investment protections. Belgium, Greece and Cyprus have already faced investment claims over measures taken to address the impacts of the financial crisis. Interestingly, suing a government over losses arising from existing and new prudential financial regulations appears to be somewhat more difficult than in other FTAs. Specifically, an investor–state challenge to financial regulation can be declined at the outset by decision of a Canada–EU Financial Services Committee (to be instituted under CETA) or, failing this, the CETA Joint Committee (Articles 13.1–6 and 13.16, Annex 13B). However, where Canada and the EU fail to reach consensus in these bodies, or the procedures are not respected within the periods as determined by CETA, regulatory measures remain open to challenge.

➔ Some government bonds, referred to as *'public debt'*, are also subject to ISDS.

3 Article 13.20 states: *'The CETA Joint Committee may establish a list of at least 15 individuals, chosen on the basis of objectivity, reliability, and sound judgement, who are willing and able to serve as arbitrators'*, and, *'The arbitrators included on the list must have expertise or experience in financial services law or regulation or in the practice thereof, which may include the regulation of financial service suppliers.'* Given the novelty of these reforms to the ISDS process, it is far from clear how this will affect arbitration related to financial services.

Annex 8B excludes claims in relation to bonds that are not being paid out (in full) as a result of a *'restructuring'* of the debt if at least 75 per cent of the bond holders have consented to such a debt reduction process. By implication, in other circumstances where governments confronted with a financial crisis act to reduce public debt to protect public interests, bond holders may bring claims for full repayment under ISDS—at the expense of the taxpayer. Some hedge funds, referred to as vulture funds, specialise in exploiting defaults on government debt and refuse to consent in a debt reduction.

➜ In addition to ISDS, financial services suppliers and investors are protected by state-to-state dispute settlement for breach of other articles in the agreement.

While financial services firms and investors are generously protected by CETA's investment rules, the privacy of their clients and the general public is not. Article 13.15 states the EU and Canada should maintain *'adequate'* safeguards to protect privacy and that the transfer of personal information related to financial information should happen in accordance with the laws where the transfer originates. However, CETA also requires each party to *'permit a financial institution or a cross-border financial service supplier of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in its ordinary course of business'*. This raises many questions in the context of current data protection discussions, for example with respect to the Privacy Shield framework for EU–US personal data transfers.

For instance, what are *'adequate'* safeguards? Who will check whether the data transfer only happens for processing and for ordinary business purposes? How will the EU verify that personal information will be protected in Canada in the same way as required by the EU or vice versa? Financial and personal data are a highly attractive target for hackers, intelligence agencies and marketers, which means that strong safeguards are needed to protect them. The financial industry has already demonstrated its opposition to restrictive laws aimed at the protection and localisation of personal financial data because of the alleged impediment to flexibility and the cost involved.[4]

CURBING THE RIGHT TO REFORM

Last but not least, CETA also provides the financial sector with the means to directly influence democratic decision-making around prospective financial legislation and regulation. The EU and Canada have agreed they shall, *'to the extent possible'*, provide the financial sector and other stakeholders a reasonable opportunity to comment on a law, regulation, procedure or other measure that a country or the EU is proposing to adopt regarding the financial sector (Article 13.11). The financial sector has considerable resources at its disposal. And, based on its response to post-crisis financial reforms, its lobbyists have demonstrated they can seriously undermine financial legislation aimed at protecting people, governmental budgets and the economy from abusive practices and financial instability or crises. There are no provisions in CETA that guarantee comments received during the regulatory development stage will be balanced against inputs or arguments from outside the financial sector, and that the public interest will be prioritised.

In Annex 13C, the EU and Canada commit to establish dialogues on regulations that relate to international standards and

4 For example, the US financial industry lobbied vigorously against the US government's position to permit the localisation of financial data in the TPP, and threatened not to support the treaty if the right to freely transfer all data, including financial data, was not assured. The TiSA negotiations also discuss the transfer of financial data, and not just for processing purposes.

cross-border financial stability. Missing are strong frameworks for permanent cooperation between supervisors to swiftly detect risky behavior, prevent abusive practices, protect customers, pinpoint financially unstable situations, and act immediately and in unison in times of financial crisis. The impacts of the 2008 financial crisis were so much more severe in Europe than in Canada in part because the EU had a much more open, liberalised financial sector with incomplete regulations and supervision, and insufficient frameworks to cooperate in times of crisis. With the EU already dragging its feet on needed reforms, ratifying CETA would make them all the more difficult to realise or to put in place the appropriate mechanisms to cooperate with Canada to handle the next financial crisis.

Public services under threat

Roeline Knottnerus, *Transnational Institute*
with ***Scott Sinclair,*** *Canadian Centre for Policy Alternatives*

Public utilities and services such as health care, education, social services, public transport, energy distribution, water provision, postal services, housing and cultural services are essential to the overall public good and vitally important for economic development, social solidarity and democratic choice.[1] Under expansive trade and investment treaties, however, public services tend to be regarded as actual or potential markets, ripe for commercialization. In this regard, CETA is even more far-reaching than previous trade treaties in the way it limits governments' ability to create, expand, restore and regulate public services.

CETA is the most wide-ranging agreement ever concluded by the EU in the area of services and investment. CETA offers Canadian and European service providers extensive additional opportunities in terms of market access, the protection of their investments and the enforceability of their commercial rights. In CETA, public services are affected by obligations and commitments in the chapters on investment, cross-border trade in services, and government procurement, as well as by cross-cutting rules on market access, non-discrimination (national treatment, most-favoured-nation treatment) and investment protection (notably the controversial and highly problematic *'fair and equitable treatment'* and indirect expropriation clauses).

1 Markus Krajewski, *'Public services in bilateral free trade agreements of the EU'*, AK Wien, EPSU, FSESP and EGÖD, November 2011.

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The European Commission claims public services are fully protected in CETA, as in all EU trade agreements, since investors and service providers from one Party will have to respect all applicable regulations in the other Party's territory. However, CETA does not ensure that the Parties committed to the agreement will remain free to provide and regulate public services as they choose. CETA reduces public policy space in the name of market access and protecting the rights of foreign service providers and investors. It effectively constrains the scope for governments—at the local, state, national and regional levels—to provide public services and regulate them in the public interest.

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Contrary to what the Commission claims, only those services *'supplied in the exercise of governmental authority'*, which means those *'not supplied on a commercial basis, nor in competition with one or more service suppliers'*, are fully excluded from the treaty. There are very few public service sectors where there is no competition between suppliers, and the concepts of *'competition'* and *'commercial basis'* are not legally defined. As such, any services supplied for any form of remuneration, or by more than one service provider, can be regarded as being supplied on a commercial basis and/or in competition with other service suppliers. In practice, therefore, this exclusion is very narrow and totally inadequate to protect most public services from trade and investment challenges.[2]

LIST THEM OR LOSE THEM

CETA's lack of a comprehensive exclusion for public services forces governments who wish to protect them to rely on country- or party-specific exceptions known as *'reservations'*. Previous EU trade treaties have done this through a *'positive list'* approach where member states listed those sectors (or services) they agreed to cover, and under what conditions, under the treaty's services and investment obligations. In CETA, for the first time, the EU and member states used a *'negative list'* approach in which all sectors and measures pertaining to trade and investment in services are automatically covered unless governments expressly carve them out in reservations listed within two annexes to the agreement (Annex I and Annex II). This change in approach was a major victory for corporate lobby groups on both sides of the Atlantic who wanted to ensure maximum coverage (maximum liberalization) of services.

Annex I reservations exempt (or *'grandparent'*) existing measures that would otherwise violate CETA. Governments may change these measures, or amend regulations in sectors protected in Annex I, but only in ways that make them more consistent with the treaty. These reservations are subject to a so-called *'ratchet clause'*: if an exempted measure is amended or eliminated it cannot later be restored. Reservations in Annex 1 can exclude existing measures at the EU level as well as the level of national, regional, territorial, provincial or local governments. For services listed in Annex I, renationalisation or remunicipalisation is not an option. For example, the EU's Annex I reservation for postal services is very narrow, which means CETA would effectively lock in the current levels of privatisation and deregulation of postal services in Europe.[3]

Annex II reservations aim to provide flexibility for governments to maintain or adopt

2 Only core government services of no commercial interest, such as *'police and judiciary, prisons, statutory social security schemes, border security, air traffic control, etc.'*, are protected by the governmental authority exclusion. European Commission, *'Reflections Paper on Services of General Interest in Bilateral FTAs'*, 2011.

3 Thomas Fritz, *'Why is trade policy important for workers and public services?'*, presentation to seminar *'Challenging the liberalisation of public services in TTIP and beyond'*, Vienna, 15 January 2015 (http://thomas-fritz.org/english/why-is-trade-policy-important-for-workers-and-public-services).

measures that would otherwise be inconsistent with CETA's rules related to market access, national treatment, most-favoured-nation treatment, performance requirements, or the make-up of senior management and boards of directors. However, many important European reservations related to public services are ambiguously worded, referring, for example, to *'services which receive public funding or State support in any form are therefore not considered to be privately funded'*.[4] Such vague language creates legal uncertainty about the scope of the reservations and leaves Parties vulnerable to investment claims—where it will be up to arbitrators to decide on the conformity of a contested measure. Other Annex II reservations provide only partial, or incomplete, protection. Drinking water services, for example, are excluded from CETA's market access and national treatment obligations by the EU's Annex II reservations, but wastewater services are not protected.[5] Moreover, CETA's investment protection disciplines still fully apply to all water services.

The EU's Annex II reservation on market access and investment, applicable to all sectors, allows governments to use public monopolies or offer exclusive rights to private operators for services considered public utilities at the national or local level. This reservation, while beneficial, is far from adequate.[6] The term *'public utilities'* is not defined, leaving it open to dispute. Furthermore, the reservation protects against challenges under only one part of CETA's market access rule (Article 8.4.1 [a][i]). For example, governments remain fully exposed to challenges under CETA's controversial provisions on fair and equitable treatment (Article 8.10) and expropriation (Article 8.12), against which no reservations are allowed.

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LOCKING IN PRIVATISATION AND RESTRICTING THE RIGHT TO REGULATE

Consequently, returning a previously privatised service to the public sector could provoke an investor–state claim that compensation is due to the former private service provider. Sensitive decisions about what level of compensation, if any, is fair or adequate will be not be made by elected governments or the domestic courts, but by CETA's investment arbitration tribunals. Under threat of such claims, initiatives like the drive to remunicipalise water services in France could become a very costly affair indeed.[7] In this context it is important to note that Canadian pension funds have

4 See, for example, the European Annex II reservations for Health services and Education services, CETA, Annex II, Schedule of the European Union.

5 Certain EU governments, such as Germany, have taken supplementary national reservations that exclude wastewater services.

6 For detailed critisim of this wording, which appears in previous EU trade treaites, see Krajewski, 2011.

7 In a recent parliamentary plenary debate on CETA, the Dutch trade minister, L. Ploumen, said the Annex II exemptions preserve the right to determine and regulate public services, including the right to reverse liberalisations. But, for reasons discussed above, this is not a defensible positon. See transcript here: https://www.tweedekamer.nl/kamerstukken/detail?id=2016D23660&did=2016D23660.

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major shares in privatised water services, for example in the UK.[8]

Except where specific reservations apply, CETA generally prohibits governments from limiting market access, for example through quotas on the number of service suppliers or requirements that they take a specific legal form (such as not-for-profit organisations). Importantly, these market access provisions prohibit limiting access to a market even when such limits do not discriminate in favour of local providers.[9] These prohibitions are modelled on language in the General Agreement on Trade in Services (GATS), but in CETA the prohibitions on limiting market access are applied not only to services, but more generally to *'economic activities'*.[10]

Such restrictions could affect, for example, the prescription quota that some EU member states maintain to curtail the cost of health care, in which doctors are required to prescribe patients a specific share of cheaper, mainly generic pharmaceuticals.

8 Maude Barlow, *'Fighting TTIP, CETA and ISDS: Lessons from Canada'*, Council of Canadians, April 2016, p. 12.

9 Ellen Gould, *'Public Services, in Making Sense of CETA'*, Canadian Centre for Policy Alternatives, September 2014.

10 Ibid.

Under CETA, these rules could be challenged as a breach of market access provisions.[11] CETA also bans performance requirements (Article 8.5) that governments frequently use as a tool to harness investment to promote wider societal goals, including the improvement of environmental standards or the stimulation of local employment.

CETA will be the EU's first major free trade and investment agreement with a Party with a similar level of development to its own, whose commercial providers of health care, education, energy, transport or environmental services are likely to have a real market interest in the EU. A clear carve-out exempting all measures related to the provision and regulation of public services would have been infinitely preferable to the current patchwork of reservations that provides only partial and piecemeal protection for vital pubic services.[12] Contrary to official assurances, public and essential services are not fully protected. CETA, as drafted, conflicts with the freedom of democratically elected governments to provide and regulate public services in the public interest.

11 Thomas Fritz, *'CETA and TTIP: Potential impacts on health and social services'*, working paper commissioned by the European Federation of Public Service Unions (EPSU), April 2016, p.10.

12 Krajewski, *'Model clauses for the exclusion of public services from trade and investment agreements'*, study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions, February 2016: *'the trade agreements signed by the EU since 1995 were agreements with developing countries and emerging markets (e.g. Mexico, Chile, South Korea, Peru, etc.). There are no significant commercial suppliers of public services with a market access interest in the EU in these countries. To the contrary, EU suppliers of public services were interested in market access in these countries. Hence, the EU commitments and the model protecting public services was never put to a real test. This may change significantly with the signature of CETA and even more so TTIP or TiSA'*.

Trade in services

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KEY POINTS

When most people think of free trade, they think of trade in goods such as coffee, cars and chemicals. Reducing barriers to trade in goods is one of the purposes of CETA, but the deal is also designed to liberalise trade in services such as transportation, insurance and communication. Since the principal barriers to international trade in services are government regulations, CETA's chapter on cross-border trade in services (Chapter 9) has significant public policy as well as commercial implications.[1]

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The chapter includes provisions on national treatment (Article 9.3), most-favoured-nation (MFN) (Article 9.5) and market access (Article 9.6) that are intended to liberalise services trade between Canada and the EU. The national treatment and MFN provisions require governments to treat foreign service suppliers at least as well as domestic service suppliers or the service suppliers of other trading partners. The market access provisions prevent governments from imposing economic needs tests or other limits on the total number of service suppliers, the value of their services, or the outputs of those services. In sum, CETA opens the door to foreign service suppliers by restricting governments' capacity to regulate their entry and activity in the domestic market, even when such regulations do not discriminate between foreign and domestic service suppliers.

There are various exceptions and caveats to the services provisions, but the scope of the chapter is still extremely broad. Unlike the General Agreement on Trade in Services (GATS), CETA employs a negative list approach to liberalisation, which means all services are covered by default unless specifically excluded by negotiators. Furthermore, CETA contains a standstill and ratchet mechanism that locks in the current level of services liberalisation in each country and prevents governments from

* We'd like to thank Thomas Fritz (PowerShift e.V.) for his help with this chapter. This chapter is based on his previous work on CETA. See Thomas Fritz (2015), Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, Hans-Böckler-Foundation (http://www.boeckler.de/pdf_fof/S-2014-779-1-3.pdf).

1 The total value of commercial services trade between Canada and the EU was approximately €15.6 billion ($22.7 billion in August 2016) in 2013, while the total value of merchandise goods trade was approximately €56.7 billion ($82.7 billion). See Statistics Canada, 'Table 376-0036: International transactions in services, by selected countries', and 'Table 228-0069: Merchandise imports, exports and trade balance, customs and balance of payments basis for all countries, by seasonal adjustment and principal trading partners' (http://www5.statcan.gc.ca/cansim).

backtracking on any further liberalisation that may be undertaken voluntarily.

As a result, CETA will make it more difficult for countries to protect and expand public services. It will also become more difficult to regulate private service suppliers over time.

ANALYSIS OF KEY PROVISIONS

Scope

CETA's chapter on cross-border trade in services encompasses two modes of providing services: (i) 'from the territory of a party into the territory of the other party', which corresponds to GATS Mode 1 (cross-border supply); and (ii) 'in the territory of a party to the service consumer of the other party', which corresponds to GATS Mode 2 (consumption abroad) (Article 9.1). GATS Mode 3 (commercial presence) is covered by the investment provisions in Chapter 8 while GATS Mode 4 (presence of natural persons) is covered by the temporary entry provisions in Chapter 10.

CETA's provisions for non-discrimination (national treatment and most-favoured-nation) in its services chapter are not new for a free trade agreement. Where CETA diverges from existing deals like NAFTA is by ensuring market access for foreign suppliers in both its services and investment chapters. That means under CETA governments cannot limit a foreign supplier's presence in the domestic services market even if the treatment is non-discriminatory. Monopolies and exclusive suppliers are prohibited by default under these provisions.

The services chapter does contain some general exceptions. Excluded are 'services supplied in the exercise of governmental authority' (Article 9.2(2)(a)), although in practice this reservation is very narrow (see section on public services below). The chapter also excludes audiovisual services for the EU, cultural industries for Canada, and financial services for both. Air transport services are exempted in general, but some specific air transport services, such as ground-handling services, are explicitly included. Public procurement, as long as it is not for the purpose of commercial resale, is excluded, as are subsidies and other forms of state support (Article 9.2(2)(f) and (g)). By contrast, Chapter 9 does not include any specific protection for labour or social standards.

Negative listing

In addition to the general exceptions described above, both Canada and the EU have established party-specific exceptions to the liberalisation provisions of the investment and services chapters. However, in contrast to the GATS, which takes a so-called positive list approach to liberalisation, CETA takes a 'negative list' approach.

A positive list means the liberalising provisions of the deal only apply to the areas and measures that the parties have specifically included in their schedule of commitments. In CETA's negative list, by contrast, all areas that are not listed in the parties' schedules may be subject in principle to liberalisation. This approach is also referred to as 'list it or lose it', because what is not explicitly included in the negative list cannot be protected from future liberalisation. That applies not only to existing services, but also to newly emerging services—for example, in the area of e-commerce. Due to this unrestricted reach, the negative list is not transparent. It is scarcely discernible which areas are to be completely liberalised now or in the future.

CETA's negative list of reservations contains restrictions on the fundamental liberalisation principles of establishment (market access, performance

requirements) and non-discrimination (national treatment, most-favoured-nation). These restrictions are divided into Annex I (Reservations for Existing Measures and Liberalisation Commitments) and Annex II (Reservations for Future Measures). In the case of the EU, the annexes contain both EU-wide exceptions and member state–specific exceptions. For Canada, the list of reservations is separated into federal and provincial exceptions.

Annex I contains reservations for 'existing non-conforming measures', be they laws, regulations or other government activities. Annex I is the weaker list because it only protects actions a party is already taking and not necessarily any future actions. These reservations are also subject to the 'standstill' and 'ratchet' mechanisms (see below).

Annex II, by contrast, contains exceptions for current and future actions and measures taken by the party. Annex II reservations are intended to allow the implementation of more discriminatory regulations or the revision of former deregulations. For this reason it is sometimes referred to as the 'policy space' appendix; however, the extent to which the reservations contained in Annex II actually protect such policy space depends largely on their specific wording. An analysis of Annex II reservations shows there are definitely loopholes in some areas (see public services section below).

CETA's negative listing approach has also led to large inconsistencies in national reservations (i.e. country-specific exceptions) for public and essential services. Germany, for example, has supplemented EU-wide reservations with a broad national reservation insulating health care from the treaty, but other EU member states such as the United Kingdom and Hungary have left key parts of their health care systems exposed. This inconsistency is also evident in many other sectors, such as waste management or waste-water treatment. The result is a patchwork quilt of protections that weakens the social fabric of Europe. It also illustrates how treaties such as CETA and TTIP enable a single conservative government, either deliberately or through carelessness, to lock in services deregulation for all future governments.

Standstill and ratchet

All services in the EU and Canada, including those listed in Annex I but not those listed in Annex II, are subject to CETA's standstill and ratchet mechanisms. The standstill mechanism locks in the current level of services liberalisation, while the ratchet mechanism requires that future liberalisation automatically becomes a CETA commitment. The mechanisms are found in the investment chapter (Articles 8.15(1)(a) and (c)) and in the services chapter (Articles 9.7(1)(a) and (c)), although not explicitly. Instead, the standstill and ratchet mechanisms arise from specific wording in the reservations provisions.

Firstly, the exceptions to the services chapter refer only to 'existing non-conforming measures' (Article 9.7(1)(a)), but not to any future actions. Therefore, governments cannot enact new measures that violate the terms of the deal. The current level of liberalisation is locked in, which is the standstill effect.

Secondly, any measures taken by a party may not 'decrease conformity' with the CETA provisions on non-discrimination and market access. Modifications are permissible, according to Article 9.7(1)(c) only:

➜ *to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.3 [national treatment], 9.5 [most-favoured-nation], and 9.6 [market access].*

In other words, any changes made to a party's investment and services regime are only allowed to the extent that they

increase liberalisation within the meaning of the CETA rules. This applies even if the party wants to reverse a voluntary decision made after the implementation of CETA, hence 'as it existed immediately before the amendment came into effect' and not 'at the time of entry into force of this agreement'. Although not named in the text, this is a de facto ratchet mechanism.

Examples of Annex I reservations

In Annex I of its schedule the EU has included a very narrow market access reservation for postal services:

➔ *In the EU, the organisation of the siting of letter boxes on the public highway, the issuing of postage stamps, and the provision of the registered mail service used in the course of judicial or administrative procedures may be restricted in accordance with national legislation.*

In addition, the EU reserves the right to bind the issuing of licences for the provision of postal services to universal service obligations. Due to the standstill and ratchet mechanisms, any extension of the activities of public postal companies or postal companies acting on behalf of the public sector that go beyond the areas cited here (i.e. siting of letter boxes, the issuing of postage stamps, and the handling of judicial or administrative mail) may, under certain circumstances, constitute an infringement of CETA rules.

It should be noted here that, despite past liberalisations and privatisations in the postal sector, it cannot be ruled out in principle that the state will change its preferences. It is important to understand that in the EU, contrary to popular belief, only Malta and the Netherlands have fully privatised their formerly public postal services. In the majority of member states, although these services have been transformed into private-law entities, most remain 100 per cent state owned. In some other cases governments retain lower shareholdings. The German government, for example, has a 21 per cent share in Deutsche Post AG through its development bank KFW.[2] The public interest in this sector thus still exists and a potential extension of state activities should not be ruled out categorically.

Another Annex I reservation on the part of the EU concerns railway transport:

➔ *The provision of rail transport services requires a licence, which can only be granted to railway undertakings established in a Member State of the EU.*

Licences for cross-border rail transport are thus given only to rail companies established in the EU. Because of the standstill clauses an extension of the requirements that goes beyond the prerequisite of establishment—for example, the imposition of certain public service obligations—may be considered an infringement of CETA.

Germany's Annex I list also includes various restrictions on the licensing of doctors, emergency services or telemedicine services. If these restrictions were relaxed after CETA came into force—for example, by making the licencing process easier—these liberalisations would become a binding treaty obligation on the basis of the ratchet mechanism. Revising them at a later date would possibly be a violation of CETA.

Public services and the public utilities exception

Public services are effectively covered by CETA. Although 'services supplied in the exercise of governmental authority' are excluded from the chapters on investment and cross-border trade in services, the exception is narrowly defined in Article 9.1 as:

2 Deutsche Post DHL Group (2016), Shareholder Structure (http://www.dpdhl.com/en/investors/shares/shareholder_structure.html).

➔ *any service that is not supplied on a commercial basis, or in competition with one or more service suppliers.*

There is a wide array of services where public providers exist alongside private companies or private operators providing services on behalf of the state (e.g. utilities, transport, education, health care, culture). In all of these areas, situations of competition can arise, meaning that these areas fall outside the narrow scope of 'governmental authority' as defined in CETA.

The EU has included a limited exception for public services in Annex II—the so-called public utilities reservation—which has also been used in other EU free trade agreements. It looks like this:

➔ ***Type of Reservation:*** *Market Access*

➔ ***Description:*** *Investment*

➔ *In all Member States of the EU, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.... Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical. This reservation does not apply to telecommunications and to computer and related services.*

This reservation also contains an indicative list of service sectors subjected to monopolies or exclusive rights. Unfortunately, though vital, the reservation is far from adequate. The term 'public utilities' is not even defined, leaving it open to dispute. The public utilities reservation is also exposed to several loopholes.

First, the reservation is far from comprehensive, protecting against challenges under only one part of CETA's market access obligations, not under national treatment, most-favoured-nation treatment or investment protection standards. So, for example, European governments that seek to restore, expand or create public services are fully exposed to challenges under CETA's controversial fair and equitable treatment and expropriation obligations.

Second, most public services are not provided as a 'public monopoly' or as the 'exclusive right' of private providers. Services delegated to private operators are often in competition—for example, in care services or waste disposal—and are therefore not provided as an 'exclusive' right.

Third, the exclusion of telecommunications from this reservation contradicts the EU universal service directive (Directive 2002/22/EC), which explicitly permits the imposition of universal service obligations on the providers of electronic communication networks. These obligations can be considered 'specific service obligations' as referred to in this reservation. Universal service obligations include, among others, an obligation to provide the service to all end-users, regardless of their geographical location, and at affordable prices.

Limiting how and what government regulates

Ellen Gould, *Canadian Centre for Policy Alternatives*

The CETA chapter on domestic regulation (Chapter 12) is not, as sometimes claimed, about establishing a level playing field for foreign and domestic firms. Rather, it prescribes and limits how Canadian and EU governments may regulate the private sector even when there is no discrimination that directly or indirectly favours local companies. In relation to the international GATS (General Agreement on Trade in Services) negotiations, questions have been raised about whether it is legitimate for trade panels to be given the right to rule on societal choices over non-discriminatory regulation.[1]

Should the process for approving a nuclear reactor, a food processing plant, or a bank be, first and foremost, *'as simple as possible'*, as CETA's domestic regulation chapter requires? Or should the public interest qualify how simple the process should be, and determine what other criteria may be more important in setting rules to protect the public?

Despite the significance of these questions, the requirement in Chapter 12 for maximum simplicity and its other limitations on non-discriminatory regulations have sparked relatively little debate. This is unfortunate because CETA negotiators have exponentially expanded the reach of such domestic regulation provisions far beyond what is being considered at other negotiating tables. Chapter 12 would govern not only the regulation of services but also *'of all other economic activities'*. It would provide multiple avenues to attack the regulatory authority of governments over and above the ones created through CETA's investment chapter and other sections of the agreement.

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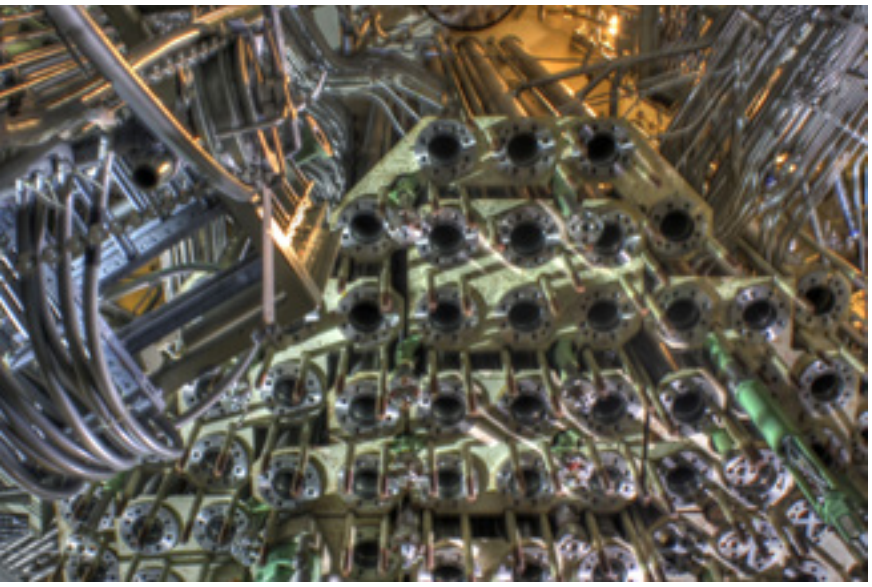
Furthermore, CETA negotiators have left key terms in Chapter 12 undefined—terms that are either untested or have been given very different legal interpretations in past trade disputes (e.g. at the World Trade Organisation). Consequently, CETA panels will have largely free rein to determine the extent of the chapter's deregulatory effects.

1 Mireille Cossy, *'Determining "likeness" under the GATS: Squaring the circle?'*, World Trade Organisation Economic Research and Statistics Division, Staff Working Paper ERSD-2006–08, September 2006, p. 44.



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KEY PROVISIONS

Article 12.2 – Scope

As specified in Article 12.2, the rules in Chapter 12 (described below) apply not only to licensing and qualification requirements and procedures, but any measure relating to these regulations.[2] Reading in Article 1.1's definition of *'measure'*, that means any *'law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party'* can be challenged as a violation of the domestic regulation chapter. For example, Chapter 12 would apply not only to specific requirements attached to mineral exploration permits, but also to laws relating to these permits, such as Swedish legislation restricting exploration near residential neighbourhoods.[3]

The scope of the chapter is further expanded by the fact its constraints on domestic regulation are not limited to services; they also apply to measures regulating the *'pursuit of any other economic activity'* that involves the establishment of a commercial presence, which could include mining, fracking, food processing, and chemical and pharmaceutical manufacturing. In addition, Chapter 12 has an even broader scope than other parts of the agreement, with no exceptions for local government regulations such as zoning.

Chapter 12 does not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures *'pursuant to an existing non-conforming measure'* set out by Canada and the EU in their schedules to Annex I. In other words, existing measures that are exempted from CETA's services and investment rules are also excluded from the domestic regulation chapter. A significant concern, however, is that only a narrow subset of the stronger Annex II reservations—which are meant to protect or carve out legislative or regulatory space for existing and future measures—are protected from Chapter 12.

For example, although many EU member states have taken Annex II reservations for the generation of nuclear energy (in an attempt to shield policy in this area from future trade disputes), in Chapter 12 only *'audiovisual services…health, education, and social services, gambling and betting services, and the collection, purification, and distribution of water'* are expressly protected. In other words, where European countries are still licensing nuclear reactors, measures related to nuclear

2 According to the definitions within Chapter 12, licensing procedures means *'administrative or procedural rules, including for the amendment or renewal of a licence, that must be adhered to in order to demonstrate compliance with licensing requirements'*; licensing requirements means *'substantive requirements, other than qualification requirements, that must be complied with in order to obtain, amend or renew an authorisation'*; qualification procedures means *'administrative or procedural rules that must be adhered to in order to demonstrate compliance with qualification requirements'*; and qualification requirements means *'substantive requirements relating to competency that must be complied with in order to obtain, amend or renew an authorisation'*.

3 *'Guidance for Exploration in Sweden'*, SveMin 2012. Unlike a number of other EU countries, Sweden has not registered any Annex I reservations for *'Mining and Quarrying'*, so its regulations regarding this sector are fully covered by Chapter 12.

energy would be fully subject to Chapter 12 requirements, including that the licensing and qualifications requirements be *'as simple as possible'* and not involve *'undue'* delays.

Article 12.3 (7) – Domestic regulations must be 'as simple as possible'

Chapter 12 makes it a violation for the Canadian federal government, the EU, provincial governments, member states and all local governments, except where Annex I and II reservations apply (see above), to adopt or maintain licensing and qualification procedures that are not *'as simple as possible'* or that *'unduly complicate or delay the supply of a service, or the pursuit of any other economic activity'* (Article 12.3 [7]). Since CETA's financial services chapter fully incorporates Chapter 12, CETA panels will be empowered to decide whether licensing procedures for banks are as simple as possible. Even the reforms to strengthen supervision and risk management recommended by the Basel Committee on Banking Supervision could be considered *'unduly complicated'* and therefore a violation of Chapter 12 if they are adopted.

The requirement to keep procedures *'as simple as possible'* is not qualified by any other consideration. For example, Canada's capital city of Ottawa has a rule to keep the language of its zoning bylaw *'as simple as possible'*, but this is balanced with *'the legal requirement for clear and precise legislation'*.[4] Likewise, the European Parliament's 2014 amendments to the EU directive on environmental impact assessment required member states to *'simplify'* environmental assessment procedures, but not to make them *'as simple as possible'* as CETA demands.[5]

How might a CETA panel determine whether MEPs had made licensing procedures *'as simple as possible'*? It could look at what is possible in different European jurisdictions. Despite EU directives, some central and eastern European countries have granted approvals to projects in sensitive areas without a proper environmental assessment.[6] This obviously makes licensing procedures a lot simpler for companies and may satisfy the panel that stronger requirements in another jurisdiction—even if they abide by EU directives—violate CETA's domestic regulation chapter.

The EU itself has advocated a broad interpretation of the term *'as simple as possible'* as it applies to regulation. In a WTO challenge against Argentina over import licensing, the EU argued that a requirement to ensure procedures are *'as simple as possible'* meant applicants should not have to contact *'numerous government entities'*. It is possible, then, that CETA could eventually require or lead to single-desk licensing systems, regardless of the constitutional authority of different levels of government over the same project. The EU also argued in that case that a licensing procedure requiring the submission of information *'not related'* to a license could not be construed as being *'as simple as possible'*. This was an invitation to future trade panels, established under CETA or any other agreement, to determine what information can be required for a license.[7]

Article 12.3 (1) and (2) – Other criteria limiting domestic regulations

Under Chapter 12, regulatory criteria must be *'clear and transparent, objective, and established in advance and made publicly*

4 City of Ottawa Zoning By-law—General Rules of Interpretation (Sec. 10-28)

5 Directive 2014/52/EU of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, 16 April 2014.

6 *'Implementation of Environmental Impact Assessments in Central and Eastern Europe'*, Ceeweb for Biodiversity Report, 2013 (http://www.ceeweb.org/wp-content/uploads/2012/01/Implementation-of-Environmental-Impact-Assessments-in-Central-and-Eastern-Europe.pdf).

7 WTO, Argentina – Measures Affecting the Importation of Goods – Reports of the Panel, 22 August 2014, para. 6.506. The panel declined to rule on these EU arguments.

accessible' (Article 12.3 [2]), making it a CETA violation if any of these five separate obligations are not met. Panels established as part of a trade dispute under CETA would interpret the meaning of these obligations in light of the objective to preclude *'the competent authority from exercising its power of assessment in an arbitrary manner'* (Article 12.3 [1]). While this may sound benign, keep in mind that past trade and investment dispute panels have given the word *'arbitrary'* very different meanings, from involving *'some degree of impropriety'* to not being *'founded on reason or fact'* to depending *'on individual discretion'*.[8]

In practice, licensing procedures that provide a role for ministerial discretion or public opinion could conflict with CETA's requirement in Chapter 12 that these procedures be based on *'objective'* criteria.[9] For example, the *Canadian Environmental Assessment Act* empowers the government to require more from assessments than what is strictly prescribed in the act's regulations if, in the minister's opinion, an activity could cause either adverse environmental effects *'or public concerns related to those effects'*.[10]

Development approval processes also often incorporate public consultation to obtain the opinions of local residents. Germany's building code, for example, mandates public participation in the planning process, enables *'aggrieved citizens'* to be heard on development proposals, and requires taking *'due account of the interests of neighbours'* if there are to be deviations from an official plan. The code also allows authorities to make decisions based on *'public interest'*, which could be challenged as a non-objective criterion under CETA's domestic regulation chapter.[11]

CETA's requirement for criteria (i.e. underlying licensing and qualification requirements and procedures) to be *'established in advance'* creates the same problems that have been raised in relation to GATS reform proposals for similar provisions.[12] As the chair of the GATS domestic regulation negotiations warned, *'a strict interpretation to the word "pre-established" might suggest that it would impose a significant limitation on the right of Members to modify their regulations'*.[13] Two examples of regulatory reform help illuminate the danger of this language in CETA.

Rocked by repeated food scandals—including the 2008 death of 21 people due to listeria contamination,[14] and a 2011 E. coli contamination at one of Canada's largest beef processing plants[15]—the Canadian government introduced a food safety act that imposed new licensing requirements on the meat processing industry.[16] Likewise, a UK inquiry into the fraudulent sale of horse meat recommended that meat traders and brokers be subjected to new regulations.[17] But CETA negotiators have made such licensing changes vulnerable

8 Christoph H. Schreuer, *'Protection against Arbitrary or Discriminatory Measures'*, in Catherine A. Rogers and Roger P. Alford, The Future of Investment Arbitration (Oxford University Press, 2009) pp. 183–198.

9 Article 12.3(3) states that ministerial discretion is consistent with the *'established in advance'* and *'publicly accessible'* criteria, but leaves it open to challenges on the basis that this discretion is exercised in an arbitrary manner, is not objective, or any other conflict with CETA.

10 Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52) (http://laws-lois.justice.gc.ca/eng/acts/C-15.21/page-3.html#h-8).

11 German Law Archive, *'Planning and Construction Law: Federal Building Code'* (http://germanlawarchive.iuscomp.org/?p=649).

12 *'Pre-established Regulations & Financial Services'*, Max Levin, Harrison Institute of Public Law, 19 May 2010.

13 Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Annotated Text, Informal Note by the Chairperson, Room Document (14 March 2010), para. 68.

14 Ontario Ministry of Health and Long Term Care, *'2008 Listerosis Outreak'* (http://www.health.gov.on.ca/en/public/publications/disease/listeria_2008.aspx).

15 Bill Curry, *'XL Foods recall was product of preventable errors, review finds'*, Globe and Mail, 5 June 2013.

16 Canada Food Inspection Agency, *'New Requirements for Industry'* (http://www.inspection.gc.ca/food/action-plan/initiatives/testing-and-labelling-safeguards/eng/1368749756218/1368749850595).

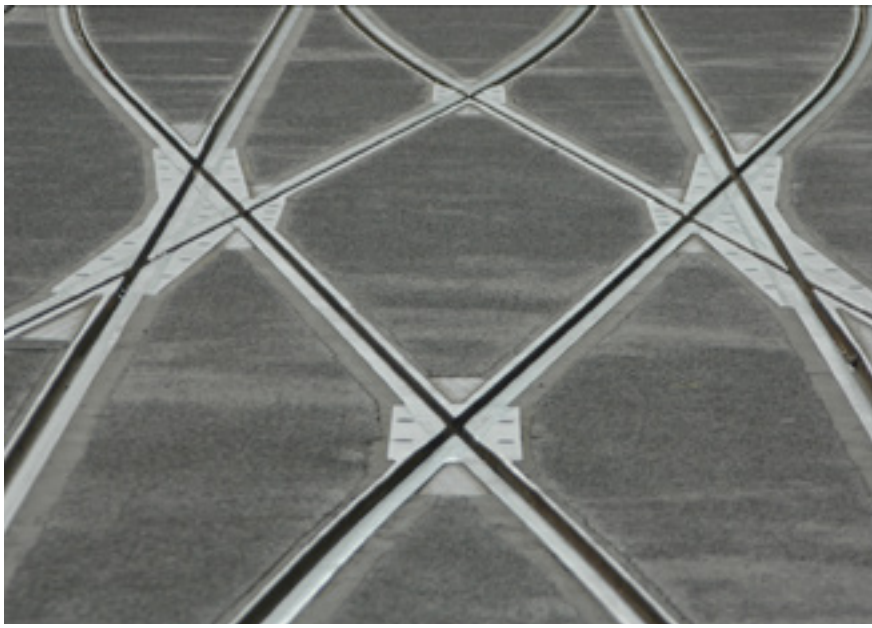
17 UK Government, *'Elliott Review into the Integrity and Assurance of Food Supply Network'*, Recommendations 30 and 31, December 2013.

to trade and investment disputes by not defining and setting constraints on what *'established in advance'* means (e.g. in advance of what?). Panels have been given leeway to impose strict interpretations that could limit the right to introduce new regulations.

Under Chapter 12, governments also have to ensure that licensing and qualification procedures and decisions are *'impartial with respect to all applicants'* (Article 12.3 [10]). Canada has taken reservations for aboriginal and minority affairs, i.e., it has reserved *'the right to adopt or maintain a measure conferring rights or privileges to a socially or economically disadvantaged minority'*. But the EU and its member states have not preserved their policy space to offer preferences for minority groups. European obligations under CETA may conflict with international and domestic law, such as the obligation to allocate exclusive fishing and hunting rights for the Sami people in Sweden.[18] CETA itself does not meet the impartiality standard, by making it easier for small and medium-sized businesses to use the provisions of the agreement.[19]

Chapter 12 further requires that qualification and licensing fees be *'reasonable'* and *'commensurate with the costs incurred'* and that they do not *'restrict the supply of a service or the pursuit of any other economic activity'* (Article 12.3 [8]). Since charging any fee restricts economic activity more than charging no fee at all, governments at all levels will be under pressure to keep their fees as low as possible.

Although local governments in particular are experiencing ever-shrinking sources of revenue, they will be prevented by CETA from raising funds from licensing fees for general operations. Even where governments have decided to lower fees so that they only cover the costs of administering a license, they might still face a trade dispute on claims the fees are not *'reasonable'*. The EU's authorisation fees for electronic communications networks, for example, may include *'costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control'*.[20] These fees would be vulnerable to dispute under CETA.



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HURRY UP APPROVALS, SLOW DOWN NEW REGULATION

The overall thrust of CETA's chapters pertaining to regulation is to speed up the regulatory process for business but put obstacles in the path of governments attempting to introduce new rules. In the chapter on technical barriers to trade, for example, governments are required

18 David Crouch, *'Sweden's indigenous Sami people win rights battle against state'*, The Guardian UK, 3 February 2016.

19 CETA Articles 8.19(3), 8.23(5), 8.27(9), 8.39(6), 19.9(2)(d) provide for special treatment of small and medium enterprises under the agreement.

20 European Union, *'Authorisation of electronic communications networks and services – summary'* (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l24164).

to give equal standing to persons (investors or companies) from the other Party in public consultations on proposed regulations: *'each Party shall permit persons of the other Party to participate on terms no less favourable than those accorded to its own persons'*.[21] Governments also have to give positive consideration if they receive requests from a CETA Party (Canada or the EU) to extend the comment period and to delay the implementation of a regulation.

In contrast with these provisions to slow down or block the introduction of new regulations, Chapter 12 imposes obligations that would tend to pressure governments to speed up regulatory approvals. Chapter 12 states: *'Each Party should establish the normal timeframe for the processing of an application'* and *'ensure that the processing of an authorisation application, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application'* (Article 12.3 [13]); *'shall initiate the processing of an application without undue delay'* (Article 12.3 [11]); and *'shall ensure that an authorisation is granted as soon as the competent authority determines that the conditions for the authorisation have been met, and once granted, that the authorisation enters into effect without undue delay'* (Article 12.3 [5]).

Based on these rules, any licensing process that involves *'undue delays'* could be challenged under CETA, regardless of whether these delays are caused by events, such as public opposition that prevents the construction of pipelines, court challenges to fracking, or other circumstances over which governments have little or no control.

For example, the European Commission has the authority to conduct formal investigations into proposed member state projects, such as the construction of nuclear power stations, to determine whether any state aid is being provided to these projects in violation of EU rules. Commission officials have said they are under no time pressure to complete these investigations, even though they may cause significant delays to projects that have already been licensed by local authorities.[22] The Commission's official description of its state aid procedures specifies that *'There is no legal deadline to complete an in-depth investigation'*, and member states must wait for the Commission's decision before proceeding.[23]

With CETA's requirements for project applications to be processed within a *'reasonable timeframe'*, and approvals implemented without *'undue delay'*, European governments could be caught between a CETA rock and a European Commission hard place in meeting their legally binding obligations.

21 CETA Article 4.6.1

22 *'EU regulators investigate EDF British nuclear project'*, Reuters UK, 18 December 2013 (http://uk.reuters.com/article/uk-eu-britain-nuclear-idUKBRE9BH0GF20131218).

23 European Commission, *'Competition – State aid procedures'* (http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html).

More cooperation for less regulation

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*and **Ronan O'Brien**, independent researcher, Brussels*

Note: If not stated otherwise, all references in this article refer to chapter 21 of the final CETA text published by the European Commission in 2016: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

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PRELIMINARY REMARKS

There are significant **differences between the way Canada and the EU regulates**. Normally, they are the result of Canadian and European representatives making legitimate choices to create new rules, or strengthen existing ones, based on a perceived public benefit. Should we bypass those democratic decisions in the name of trade? Canada is, for instance, the fifth largest producer of genetically modified products (GMOs) in the world.[1] A regulatory cooperation chapter in CETA (chapter 21) would give Canada, on behalf of its agricultural exporters, a new means to open EU markets to these restricted products, undermining existing and future European regulations.

CETA establishes institutions and processes for the alignment of regulations between the European Union and Canada. New and existing laws will go through a burdensome process in order to converge or otherwise make them equivalent. As this process is based on an international treaty, it stands above domestic legislation and institutions. In other words, it will be far more difficult and sometimes effectively impossible to undo the results of regulatory cooperation.

In principle, the regulatory cooperation chapter in CETA covers a vast area, including many domestic regulations that have little or no relationship to, or significant impact on, trade. Yet, the project of regulatory cooperation or convergence is

1 http://www.statista.com/statistics/271897/leading-countries-by-acreage-of-genetically-modified-crops/

central to the new generation of trade agreements like TPP, TTIP and CETA. These so called **living agreements** make the abolition of *'non-tariff barriers'* (e.g. regulations in the public interest) a permanent project long after CETA has been ratified and political attention has waned.

In post-NAFTA[2] efforts to harmonise Canadian and US regulations, notably the joint Regulatory Cooperation Council established in 2011, stakeholder input and involvement is clearly aimed primarily at business, focuses on trade impacts, and takes place in relation to sectors (e.g pesticides, chemicals, management, pharmaceuticals and biologics).[3] Efforts at transatlantic regulatory cooperation since 1995 must also be taken into account, since they have already led to lower social and environmental standards in some cases. A very prominent example of past regulatory cooperation is the Safe Harbour agreement that resulted in weaker data protections for EU citizens and was declared illegal by the European Court of Justice.[4]

ANALYSIS OF KEY PROVISIONS

Delays and pressure to harmonise regulations

Regulatory cooperation in CETA might **delay and prevent new regulations**, and chapter 21 applies pressure to harmonize wherever one Party to the agreement prefers that course of action. Article 21.2.6 states, *'Parties may undertake regulatory cooperation activities on a voluntary basis'*. They can decline, but *'if a Party refuses to initiate regulatory co-operation or withdraws from such co-operation, it should be prepared to explain the reasons for its decision to the other Party'*. In this way, CETA may put diplomatic and bureaucratic pressure on the Parties to undertake regulatory cooperation even in sensitive policy areas such as GMOs.

Article 21.4(b) and 21.4(e) state the Parties will endeavour to share information *'throughout the regulatory development process'*, and that this consultation and exchange *'should begin as early as possible in that process [...] so that comments and proposals for amendments may be taken into account'*. This ***'early warning system'*** would enable the other Party (i.e. the Canadian government) to make comments and propose amendments to draft regulations before the European Parliament has seen them. That is a lot of power to give a foreign entity over a domestic democratic institution.

Lower protections for Canadian and European citizens

Regulatory cooperation at the horizontal and sectorial levels is particularly dangerous for regulations in the public interest. For instance, CETA includes a chapter on bilateral dialogues and cooperation (chapter 25) with a section on biotechnology (Article 25.2), which covers *'any relevant issue of mutual interest to the Parties'*, and specifically *'any new legislation in the field of biotechnology'*.

Furthermore, chapter 21 contains a potential attack on the precautionary principle. Article 21.4(n)(iv) urges the Parties to *'conduct cooperative research agendas in order to [...] establish, when appropriate, a common scientific basis'*. This refers to the aftercare principle, or so-called **science-based approach**, which is applied

2 North Atlantic Free Trade Agreement. Established in 1994 between the US, Canada and Mexico.

3 Government of Canada, Canada-US Regulatory Cooperation Council News, March 2016, pp. 1-3 (http://www.trade.gov/rcc/documents/PCO_Newsletter_Feb_2016_EN.pdf).

4 More examples can be found in Lobbycontrol's and Corporate Europe Observatory's report, *'A dangerous regulatory duet: How transatlantic regulatory cooperation under TTIP will allow bureaucrats and big business to attack the public interest'*, 18 January 2016 (http://corporateeurope.org/international-trade/2016/01/dangerous-regulatory-duet).

in Canada and the United States.[5] An attack on the precautionary principle could weaken EU environmental protection laws and hinder the introduction of new rules and regulations to protect the environment and public health in the future.[6]

To give an example of the risk to public interest regulation, Canada has been highly litigious in the World Trade Organisation (WTO). In two high-profile cases, **Canada joined with the US in disputes against the EU on growth hormones in beef and market access for GMOs**. In both cases the EU argued on the basis of the precautionary principle and lost.[7] Given the weak legal reference in CETA to this otherwise well-established principle, the chances of these countries accepting strong precautionary regulation by the EU in the future will be effectively nil.[8]

Business influence and lack of transparency

Chapter 21 of CETA provides the basis for a very ambitious model of regulatory cooperation that might lead to undue and secret corporate influence on the legislative process. Its vague language also leaves a lot of space for interpretation in the future—by trade lawyers and arbitrators—on the way regulatory cooperation should work between Canada and the EU.

For instance, CETA states that, when regulating, *'each Party shall, when appropriate, consider the regulatory measures or initiatives of the other party on the same or related topics'* (Article 21.5). There is no indication that any of this will be an open process. For the EU, the consideration of North American regulations would take place before any formal proposal is made to the European Parliament and Council.

CETA will create a Regulatory Cooperation Forum (RCF) composed of officials from the two Parties, but with the potential for meetings to be opened to *'other interested parties'*. The RCF is tasked with reviewing progress on regulatory cooperation and reporting to the CETA Joint Committee. It would also discuss regulatory policy issues raised through consultations each Party has with *'private entities'*.

Beyond this, the RCF is only vaguely described, lacks accountability, and remains open to the direct influence of business lobbyists—**the one group with sufficient resources to attend such meetings**. The public and elected representatives on both sides of the Atlantic may only become aware that consultations are occurring after the legislative proposals resulting from them are introduced.

The work of the RCF is intertwined in CETA with other important institutions, such as the aforementioned CETA Joint Committee, other specialised committees, and sectoral dialogues. **The most active of this last group of subcommittees will almost certainly be the one established for Biotech Market Access Issues.**[9] But all specialised committees would prepare draft decisions for the CETA Joint Committee (Article 26.2.4). It seems likely these decisions, having been agreed by the two

5 The aftercare principle implies that the burden of proof in disputes regarding the harmfulness of a given product rests with the official body or individual complainant opposed to that product's authorisation (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2016-000887+0+DOC+XML+V0//EN).

6 The precautionary principle is a political philosophy of prevention and quick reaction to health risks for humans, animals, and plants, as well as to environmental protection matters. Where the available scientific data does not allow an extensive risk valuation, a precautionary approach allows for the prohibition of the commercial use of potentially noxious products (http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_de.htm). In contrast, the aftercare principle only allows for prohibition once the harmfulness of a product is proven beyond doubt.

7 BEUC: *'CETA fails the consumer crash test'*, May 2016 http://www.beuc.eu/publications/beuc-x-2016-045_lau_ceta_position_paper.pdf

8 For the EC-Biotech case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm; for the EC-Meat Hormones case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

9 In effect this means Canadian GMO access to the EU market. This is a continuation of a process established after the WTO panel ruled against the EU in the EU-Biotech case.

Photo: Pete Morawski,
PeteMora.com, flickr (Creative Commons license)

Parties with input from business groups, would be rubber stamped at this stage, giving CETA subcommittees considerable power in practice.

The process of regulatory cooperation, outlined in great detail in Article 21.4, is striking for what it leaves out. In all the examples of cooperation activities there is no **mention of transparency features** such as the publication of agendas, reports or participant lists from meetings. While the word *'transparency'* has been emphasised on the EU side in relation to CETA,[10] it appears only twice in chapter 21 (in Articles 21.2 and 21.3[b][ii]), more as a buzzword indicating business access than as a general commitment to openness.

CONCLUSION: BACKDOOR POLICY VIA TRADE AGREEMENTS

Regulatory cooperation in CETA is particularly dangerous because its character remains vague in the final text. With past experience in mind (e.g. Canada-US and EU-US cooperation efforts), this lack of clarity creates a real risk of lower social, environmental, and consumer standards and an undermining of democratic principles by strengthening the role of business lobbyists in the development of legislation. To enshrine regulatory cooperation in a trade agreement between the EU and Canada would permanently weaken the role of parliament and the public sector in setting regulation.

10 For example, it appears 35 times in the 31 pages of the European Commission document, *'Trade for all: Towards a more responsible trade and investment policy'*, October 2015.

Patents, copyright and innovation

Ante Wessels, *Foundation for a Free Information Infrastructure, e.V.*

The overreach of contemporary free trade agreements (FTAs) into areas of public interest regulation is perhaps no more apparent than in the field of intellectual property rights (IPR). Not content with the mere elimination of tariffs and other trade barriers, multinational corporations have pushed for FTAs to include new rules for patents and copyright that would better serve and protect commercial interests. The monopolistic nature of IPR creates issues for remix artists, sequential innovators and software developers, among other creators.[1] Strict IPR can also restrict and punish users based on how they choose to consume content. Furthermore, when these rules are enshrined in international agreements, they can no longer be changed by democratic governments.[2]

Photo: Sandip Bhattacharya, flickr (Creative Commons license)

Proposals to enhance IPR through trade agreements are extremely unpopular with Internet users and have been widely criticized by digital rights organizations, academics and innovative technology firms, among other groups. In 2012, the European Parliament overwhelmingly rejected the Anti-Counterfeiting Trade Agreement (ACTA) due to massive public and political opposition. ACTA threatened to criminalise everyday computer use and undermine EU innovation policy. Yet the EU is now contemplating ACTA's sibling, CETA. By ratifying CETA, the EU would be forced to maintain restrictive intellectual property protections that would hamper the EU's capacity to properly shape innovation policy in the future.

These provisions are contained in CETA's intellectual property chapter (Chapter 20). On digital rights issues, CETA's most troubling effect will be to benefit patent trolls—*'non-practicing entities'* that exploit the patent system to win damages from innovative companies without producing any goods or services themselves. CETA would strengthen the position of patent trolls by enhancing patent protections. Earlier leaked drafts of the agreement suggested CETA would also have serious implications for Internet freedom through enhanced copyright provisions.

1 FFII, EU law and the International Covenant on Economic, Social and Cultural Rights, 2013 (https://people.ffii.org/~ante/ipred/FFII-IPRED-2013-03.pdf).

2 See, generally, IP out of TAFTA, Civil Society Declaration (http://www.citizen.org/IP-out-of-TAFTA).

However, the final text is significantly watered down in these areas.

As such, while CETA is unlikely to have a big direct impact on users in the EU or Canada, it would still limit the EU's and Canada's ability to roll back IPR provisions that limit access to knowledge, participation in culture, and remix culture.

BACKGROUND

At its core, the patent troll issue is a software patent issue. Software (and products containing software) is often encumbered with hundreds or thousands of patents. Many software patents should never have been granted due to lax approval standards and unpredictable long-term applicability. No patent office in the world has been able to comprehensively address bad patents as their sheer volume in the area of software makes re-evaluation too costly.

The large number of patents creates a minefield for innovators. Software patents hamper follow-up innovation, create legal uncertainty, come with high transaction costs and limit interoperability. Non-practising entities (patent trolls) exploit this situation by acquiring patents at low cost—for instance, by buying bankrupted companies—and then litigating against developers or manufacturers that allegedly violate their intellectual property rights. The patents in question tend to have broad claims to trivial software methods such that infringement is unavoidable.

Patent trolls cause significant economic damage by litigating against innovators without producing goods or services themselves. An analysis by US researchers estimates that lawsuits filed by non-practicing entities are associated with half a trillion dollars of lost wealth from 1990 through 2010. Most of this loss represents a transfer from technology companies to patent trolls rather than an economically productive transfer from rentiers to small inventors. The pervasive risk of patent litigation reduces innovation incentives for otherwise creative and productive firms.[3]

The problem first developed in the US after the appeals process for patent cases was consolidated in the Court of Appeals for the Federal Circuit in 1982. The centralisation of patent proceedings prompted an expansionist interpretation and application of the US Patent Act. In the mid-1990s, software patents became much more easily available in the US and patent trolls emerged to exploit the new legal protections available to patent holders.[4]

The growing patent troll problem in the US eventually prompted the Supreme Court to overturn a series of judgments by the Court of Appeals for the Federal Circuit. The Supreme Court's rulings have limited the validity of software patents in the US. In response, patent applicants are increasingly turning to Europe where the centralisation of patent granting in the European Patent Office has produced a boom in software patentability comparable to the US in the 1990s. As American patent attorney Dennis Crouch has commented, *'most practitioners will agree that the US is now more restrictive in terms of subject matter eligibility and the new pan-European patent enforcement court makes those patents obtained in Europe all the more valuable'*.[5]

In the EU, rolling back the availability of software patents through legislation appears politically unlikely. Holders of large patent portfolios now have a vested interest in strong software patentability

3 James E. Bessen, Michael J. Meurer, and Jennifer Laurissa Ford, *'The Private and Social Costs of Patent Trolls'* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272).

4 For a short introduction to patent trolls, software patents and the US situation, see James Bessen, *'The patent troll crisis is really a software patent crisis'*, Washington Post, 3 September 2013 (https://www.washingtonpost.com/news/the-switch/wp/2013/09/03/the-patent-troll-crisis-is-really-a-software-patent-crisis/).

5 Dennis Crouch, *'US Patent Applicants Heading to the EPO'*, Patentlyo, 3 March 2016 (http://patentlyo.com/patent/2016/03/patent-applicants-heading.html).

because they can use the current rules to eliminate competition from start-ups and small- and medium-sized enterprises. These powerful patent holders have lobbied extensively not to limit the availability of new, or weaken protections for existing, patents. In part due to this lobbying, the European Commission tried, in 2002, to give software patents a stronger legal basis, but the attempt failed after public protests.[6]

The patent troll issue in the EU is exacerbated by rules that prevent the EU Court of Justice from intervening to discourage the harmful practice. The patent lobby succeeded in deliberately excluding the Court of Justice from the Unified Patent Court. According to Josef Drexl, director of the Max Planck Institute for Innovation and Competition, this decision by the EU *'could easily amount to a mistake of historic dimensions'*.[7]

Despite the cautionary example of economic damage and Supreme Court intervention in the US, the warnings from academics and innovation policy experts in the EU, and continued public opposition to excessive patent protections worldwide, the EU continues to push for more favourable conditions for patent trolls. ACTA, which was rejected by Europe in 2012, would have raised the bar for IPR enforcement well beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Since then, elements of ACTA (or worse) have appeared in other proposed trade agreements. For instance, the draft EU–Singapore agreement arguably allows for even higher damages than permitted under ACTA.[8]

KEY PROVISIONS

Patent trolls and innovation policy

CETA is the latest agreement to contain *'ACTA-plus'* IPR provisions. Whereas ACTA gave parties the right to exclude patents from the scope of the civil enforcement section (ACTA Section 2; Footnote 2), the CETA text does not contain such an exclusion. All the strong IPR enforcement measures in CETA will be available for patent rights holders, including the provisions on precautionary measures (Article 20.37), injunctions (Article 20.39) and damages (Article 20.40).

CETA strengthens the position of patent trolls in a second way. Although it is unlikely, the EU may eventually decide to roll back the protections offered to patent holders or otherwise reduce the power of patent trolls through legislation. Under CETA, any attempt to weaken intellectual property rights could be subject to an investor claim for compensation through CETA's Investment Court System (ICS) (see chapter 3 in this report).

As investment lawyer Pratyush Nath Upreti has argued, investors may be able to use existing investor–state dispute settlement (ISDS) mechanisms to challenge decisions of the Unified Patent Court (UPC).[9] Among other international treaties, investors could try to invoke TRIPS article 27(1) against the withholding or invalidation of software patents.[10] CETA would further expand the coverage of ISDS/ICS for patent cases, bring

6 Ingrid Marson, *'Software patent directive rejected'*, ZDNet, 5 July 2005 (http://www.zdnet.com/article/software-patent-directive-rejected/).

7 For the relevant quote and the lack of a legislative feedback loop, see: https://blog.ffii.org/unified-patent-court-a-mistake-of-historic-dimensions/ (original article not available any more: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553791).

8 Ante Wessels, *'ACTA-plus damages in EU-Singapore Free Trade Agreement'*, FFII blog entry, 26 September 2013 (https://blog.ffii.org/acta-plus-damages-in-eu-singapore-free-trade-agreement/).

9 Pratyush Nath Upreti, *'Can Investors Use the Proposed Unified Patent Court for Treaty Shopping?'*, EFILA blog entry, 11 May 2016 (https://efilablog.org/2016/05/11/can-investors-use-the-proposed-unified-patent-court-for-treaty-shopping/). Note that a single state may have to bear the litigation costs and damages awards, as explained Ante Wessels, *'FFII, UPC and ISDS: who would have to pay the damages awards?'*, FFII blog entry, 1 July 2016 (https://blog.ffii.org/upc-and-isds-who-would-have-to-pay-the-damages-awards/).

10 Ante Wessels, *'EU commission goes into denial mode regarding effect ISDS on software patents'*, FFII blog entry, 1 March 2016 (https://blog.ffii.org/eu-commission-goes-into-denial-mode-regarding-effect-isds-on-software-patents/).

EU legislative decisions under the scope of ISDS/ICS, and make it impossible for EU member states to withdraw from ISDS/ICS.

CETA would further distort the problematic implications of the UPC, which will be a specialized tribunal prone to expansive interpretation, without appeal to the EU Court of Justice, and without parliamentary influence on the development of law. Through CETA, the EU would further manoeuvre itself into a position from which it cannot challenge or roll back the power of patent trolls. In pandering to the holders of large patent portfolios that can eliminate competition from innovative start-ups and other small- and medium-sized enterprises, the EU is relinquishing its capacity to properly shape innovation policy and is inviting serious economic consequences.

Copyright and Internet freedom

Early drafts of CETA's IPR chapter included strict new rules for digital locks, liability for Internet service providers (ISPs), new criminal penalties for infringement, and other controversial copyright measures that largely overlapped with ACTA.[11] However, the final CETA text abandons most of these proposals. The copyright provisions that made it into the agreement are generally consistent with existing standards in the EU and Canada. According to IPR expert Michael Geist, this outcome *'represents a win for Canada'* because the EU was the party pushing for stronger copyright rules in the first place.[12]

CETA's copyright provisions are contained in the intellectual property chapter and they are generally watered down from earlier drafts.

➔ Article 20.7 requires Canada and the EU to comply with four specific international IPR agreements, including the Berne Convention and WIPO Copyright Treaty, but both parties already do so voluntarily.

➔ Article 20.8 ensures the protection of broadcast works, but falls short of earlier proposals to radically expand copyright protections for broadcasters. An exclusive right to broadcast in public places, for example, was dropped from the final text.

➔ Article 20.9 requires the parties to provide *'adequate legal protection and effective legal remedies'* for technological protection measures (TPMs) that are applied to copyrighted materials. These *'digital locks'* have been criticized by Internet freedom advocates, but the CETA text does not go beyond existing rules in either Canada or the EU. The text also provides for flexibility in how Article 20.9 is applied.

➔ Similarly, Article 20.10 requires the parties to provide *'adequate legal protection and effective legal remedies'* against the removal of rights management information (RMI). RMI is data attached to a work that identifies its rights holders and provides other legal information. Canada and the EU already protect RMI under their laws.

➔ Article 20.11 ensures limited liability for *'intermediary service providers'*, which mainly refers to Internet service providers, in the event of copyright infringement by users. The reversal here from earlier EU proposals is significant because limited liability for ISPs is crucial for Internet freedom. If an ISP can be held liable for a user's alleged copyright infringement, the ISP can be forced to identify that user to legal authorities or to censor offending content. The ISP is also at risk of litigation from copyright holders directly. Fortunately, CETA does not strip ISPs of their limited liability, which may have provoked increased surveillance of users and/or filtering of certain kinds of content.

11 Michael Geist, *'ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA'*, personal blog entry, 9 July 2012 (http://www.michaelgeist.ca/2012/07/ceta-acta-column/).

12 Michael Geist, *'How Canada Shaped the Copyright Rules in the EU Trade Deal'*, personal blog entry, 21 August 2014 (http://www.michaelgeist.ca/2014/08/canada-shaped-copyright-rules-eu-trade-deal/).

CETA's threat to agricultural markets and food quality

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INTRODUCTION

Small-scale farms and other alternatives to industrial agriculture will soon be confronted with the consequences of a new era of trade policy. The EU is eager to open its domestic market for many sensitive agricultural products, such as dairy and meat, that have been until now mostly protected from imports. Granting market access to foreign products through new bilateral free trade agreements (FTAs) would put small-scale agricultural producers—as well as sustainable agricultural practices in general—under severe pressure in the EU and elsewhere. The threat posed by new FTAs to small-scale farmers is evident in the final CETA text, especially in the agreement's provisions on market access and geographical indications.

In Germany, and throughout the EU, the market for meat and dairy is characterised by excessively low producer prices. EU agricultural policies have encouraged a production surplus, which drives down prices to primary producers, supposedly to make European farmers *'competitive'* on the global market. The main beneficiaries of the EU's low industrial prices are European industrial meat processors. If deals like CETA go ahead these large processors will be able to increase exports, leading to even greater revenues.

Photo: Rieke Petter/Albert Schweitzer Stiftung für unsere Mitwelt, flickr (Creative Commons license)

Currently, European domestic meat markets are protected through import tariffs, including on imports from Canada, to account for a significant price differential. For several years, Canadian pork has sold for up to 60 per cent less than European pork.[1] In 2014, despite the price crash in the European pork sector, the Canadian price was still 25 per cent lower. In part this is because Canadian pork producers are paid 15-35 per

1 OECD-FAO Agricultural Outlook 2015-2024. Database published July 2015. (www.agri-outlook.org).

	Existing tariff quotas (tonnes)	Actual imports	Quotas for duty-free Imports † in CETA	Total tariff quotas after implementation of CETA
Canada to EU				
Pork (hormone-free)	5,549	63	75,000	80,549
Beef (hormone-free)	4,162	42	45,840	50,002
EU to Canada				
Cheese	13,472	14,505	16,000	31,072
Industrial cheese				1,700

Infographic: Quotas for duty-free imports and exports of meat and dairy in CETA (tonnes)

Source: BMEL* , CETA text **
† Duty-free quota with transitional period of six years after ratification.

cent less than their European counterparts. Should CETA allow for an opening of those markets, under current conditions Canadian producers would be able to offer their products in the EU at a much cheaper price than comparable EU producers.

ANALYSIS OF KEY PROVISIONS

Market access: The cheapest provider exports

CETA[2] envisages a complete elimination of tariffs on almost all goods over a transitional period starting from the agreement's entry into force.[3] Both Parties have, however, negotiated special provisions for certain agricultural products in the form of quotas for duty-free imports of particularly sensitive products including, for the EU, beef and pork.

If CETA is implemented, the EU's quotas for Canadian pork and beef imports will increase twelve- to fourteen-fold relative to current levels.[4] Whether imports actually increase will depend on the Canadian export industry's ability to fill the new quota volume without the use of hormones or ractopamine (a controversial feed additive to accelerate the fattening process). Production standards are higher in Europe than in Canada and, in many cases, are still influenced by small-scale farmers. In Europe, the use of growth hormones or performance-increasing antibiotics is prohibited. In addition, European regulations and standards for livestock handling (e.g. space requirements, the kind of slatted floors to be used, authorisation procedures) are different than Canadian rules.[5]

2 Consolidated CETA text as published by the European Commission in February 2016: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

3 For market access, see chapter 2 of the CETA text: National Treatment and Market Access for Goods, page 9: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

* Statistics by BMEL: http://www.bmel-statistik.de/.

** See footnote 2

4 See CETA Chapter 2 – National Treatment and Market Access for Goods, p. 9ff, as well as Annex 2-A, p.231ff: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

5 ISN: Vergleich der Rahmenbedingungen in der Schweinehaltung in den USA und Deutschland, http://www.schweine.net/news/ttip-us-handelsbeauftragter-kein-zwang.html.

Photo: bauernverband, flickr (Creative Commons license)

Canadian slaughterhouses have not yet been able to fill the EU's duty-free quotas for pork and beef imports. However, as increased quotas would make it more attractive for Canadian producers and processors to produce hormone-free meat for export, CETA may give them the incentive to restructure their production chains and slaughtering processes. If that were to happen, the resulting increase in imports from Canada could put significant downward pressure on European meat prices.

The agreement would allow Canadian imports to encompass about 0.4 per cent of European pork consumption and 0.6 per cent of its beef consumption.[6] There is already a surplus of meat and dairy production in Europe, which is responsible for destructive producer prices. In order to ensure the continued existence of local agriculture, the meat industry must make it a priority to reduce production quantities and focus on consumer demands for high-quality, socially conscious products.

Transatlantic milk trade

While CETA would have a potentially destabilizing impact on the European meat market, proposed increases in dairy quotas in the agreement would also facilitate additional European cheese exports to Canada, putting comparable pressure on the Canadian dairy market.

Currently, Canada employs a supply management system for its dairy industry. This policy provides dairy farmers with fair, stable incomes by ensuring that the supply of dairy products is aligned with domestic demand. Producers are allotted a quota for production and are fined for every litre of milk produced in excess of their quota, while imports of dairy products are limited by tariffs. The price of milk in Canada is therefore aligned with the domestic cost of production, providing for a fair return to primary producers.

6 Directorate General for External Policies (2014): Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) concluded, Brussels, October 2014

ANIMAL WELFARE FOR FARM ANIMALS IN CETA

Olga Kikou, Compassion in World Farming

There is no language in CETA specific to *'animal welfare'* except briefly in the chapter on Regulatory Cooperation (Chapter 21). This oversight makes it difficult to assess any positives or shortcomings in CETA's approach to animal welfare, except of course when we compare the text to existing legislation and practices in Canada and the EU. The lack of attention given to animal welfare in CETA demonstrates an alarming trend among governments to sacrifice significant ethical principles and social values in the name of international trade.

In Article 21.4(s), the Parties commit to undertake regulatory cooperation activities in a wide variety of areas, including by *'exchanging information, expertise and experience in the field of animal welfare in order to promote collaboration on animal welfare between the Parties.'* However, plans for collaboration do not necessarily result in higher levels of protection for farm animals or the protection of existing standards.

Canada's standards for farm animal welfare are very weak compared to EU legislation. Indeed, Canadian agricultural policy is characterized by an overall lack of consideration for the well-being of farm animals. Codes of practice are outdated, often voluntary, and are not backed by strong enforcement provisions. Canada's Criminal Code includes some very limited protections for farm animals, but they exclude chicken and fish—i.e. the animals making up the majority of food production. The *Health of Animals Act* regulates the transportation of farm animals while the *Meat Inspection Act* sets down regulations for the slaughter of animals, but this federal legislation is generally considered inadequate for protecting animal welfare.

The European Union has recognized animals as sentient beings and requires Member States to ensure their welfare is respected. A series of regulations and directives covering different species at all stages of the farming process guarantee some minimum level of protection. In particular, EU-wide bans are in place to safeguard against the worst forms of cruelty. For example, barren battery cages for hens, veal crates, and sow stalls (after the first four weeks of pregnancy) are all banned in the EU. However, after a period of progress in enacting legislation, the EU is currently unwilling to produce new animal welfare legislation. The current Commission's strategy is to focus more on enforcement rather than to present new legislative measures.

An increase in the trade of animal products under CETA, without any safeguards for animal welfare standards at all phases of the production process, will erode current standards and may undermine future efforts to strengthen animal welfare rules in both the EU and Canada.

Thanks to this supply management system, the price paid to dairy producers in Canada is approximately 50 cents (€0,34) per kilogram.[7] In contrast, the price of milk in Europe dropped drastically in June 2016 to just 25.81 cents (€0,17) per kilogram.[8] The recent decline was the result of the abolition of the EU milk quota regime in April 2015. The EU's efforts to re-orient its agricultural policy toward exports—in order to lay the groundwork for trade agreements such as CETA—had the effect of slashing the price of milk paid to European producers.

The low price of milk in the EU is bound to undercut the higher, income-supporting Canadian milk price. The EU cheese industry would easily fill the new tariff quota space afforded under CETA. It should be noted that EU agricultural policy cannot claim to be *'sustainable'* if by exporting its surpluses to Canada it interferes with a socially oriented market regulation designed to support farmers.

Procedural quality versus product quality

In addition to liberalising agricultural markets, CETA threatens to weaken food safety standards. For example, the surface treatment of meat with chemical and organic substances may become more common. In Europe, carcases generally remain untreated after slaughtering, except in cases where they are washed with water. In Canada, however, it is common practice to clean carcases with chemicals such as chlorine. The EU has already relaxed standards for the surface treatment of beef carcasses with lactic acid[9] (perhaps as an early gift to Canadian and U.S. trade negotiators). In addition, the EU has been discussing for several months now whether to permit the surface treatment of poultry using acetic acid.

CETA may lock in these changes and encourage further deregulation. Weakening standards for slaughtering practices will not only be profitable for the Canadian poultry and meat processing industries, but also for their European counterparts, as it will allow for the further industrialisation of slaughtering processes. The EU has signalled its willingness to trade off high-quality meat processing and quality assurance practices for more chemically based treatments.[10] From an agricultural perspective, the trend is extremely problematic. Instead of this deregulatory approach, the EU should prioritise the protection of small-scale slaughterhouses, and promote ethical, safe and sustainable processing practices.

Photo: Bad Kleinkirchheim, flickr (Creative Commons license)

7 Canadian Dairy Commission (2016): http://www.cdc-ccl.gc.ca/CDC/index-eng.php?id=3810.

8 European Commission. European Milk Market Observatory: http://ec.europa.eu/agriculture/milk-market-observatory/latest-statistics/prices-margins_en.htm (last visited: 04.08.2016).

9 Commission Regulation (EU) No 101/2013 of 4 February 2013 concerning the use of lactic acid to reduce microbiological surface contamination on bovine carcases: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:034:0001:0003:EN:PDF.

10 Arbeitsgemeinschaft bäuerliche Landwirtschaft (2014): Freihandelsabkommen stoppen – unübersehbare Auswirkungen auf die bäuerliche Landwirtschaft, Berlin/Hamm, April 2014.

CETA AND GENETIC ENGINEERING

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CETA contains an article specifically referring to bilateral cooperation in the field of biotechnology (Article 25.2). Through this article, Canada and the EU commit to information exchange and further cooperation on a wide variety of critical biotechnology issues, including approval procedures for new products and procedures for dealing with the release of unauthorised genetically modified organisms (GMOs). The list of *'relevant issues'* for bilateral dialogue is non-exhaustive and can be expanded at any time. Notably, while trade promotion is a primary objective of the bilateral dialogue on biotechnology, there is no mention of environmental or consumer protection. It also makes no mention of efforts to limit the dominance of a very few corporations on the seed market.

In Canada, GMOs are widely used in agriculture. For example, more than 90 per cent of all rapeseed (canola) cultivation in Canada is genetically modified. Genetically modified rapeseed from Canada can even be found in food products that are allegedly GMO-free.[1] For example, Canadian honey often contains pollen from genetically modified rapeseed crops.[2] Like the EU, Canada has an approval procedure for genetically modified plants[3] and enforces a zero tolerance policy for species that are not approved. However, Canada has approved far more species than has the EU.

From the perspective of Canadian exporters, the EU's strict rules for biotech products are a barrier to trade—products that are not approved in the EU cannot be exported to the EU. Furthermore, goods that are contaminated with non-approved products must be withdrawn from the market. Canada has already challenged European rules for the approval of genetically modified plants through the World Trade Organisation (WTO).[4] In 2009, Canada and the EU reached a settlement that included the creation of a bilateral forum for the approval of new biotech products. In CETA, this dialogue is expanded to address a wider variety of biotech issues.

A dialogue shaped by the interests of the biotech industry

Even though CETA does not create a binding obligation on the EU to change its current approval procedure for GMOs, the parties commit to further dialogue and cooperation on GMOs and related issues. Problematically, the issues and objectives of the bilateral dialogue, as described in Article 25.2, are clearly designed to serve the interests of the biotech industry. For example, paragraph 25.2.1(c) specifically addresses the impacts of *'asynchronous'* approval processes for biotech products, which is a common complaint of biotech exporters.

1 http://www.oekotest.de/cgi/index.cgi?artnr=104985&bernr=04 (in German).

2 Pollen from genetically modified rapeseed crops has been found in Canadian honey on various occasions since the 1990s by Germany authorities (Chemischen und Veterinäruntersuchungsämter (CVUA) in Baden-Wuerttemberg) and the magazine Ökotest. See e.g. http://www.ua-bw.de/uploaddoc/cvuafr/JB2008_Gentechnik_Internet.pdf (in German).

3 The Regulation of Genetically Modified Food in the website of the Canadian Ministry of Health http://www.hc-sc.gc.ca/sr-sr/pubs/biotech/reg_gen_mod-eng.php

4 World Trade Organization dispute DS292 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm

CETA's mechanism for *'regulatory cooperation'* (see chapter on Regulatory Cooperation) is particularly important in this context, since the parties are bound by that mechanism to try to align their regulations over time. The regulatory cooperation mechanism raises the risk that future legislation in the field of biotechnology (e.g. for the regulation of new methods of genetic manipulation) is, from the very outset, influenced by the interests of the biotech industry.

Furthermore, it is particularly dangerous that the parties agree in paragraph 25.2.2(b) *'to promote efficient science-based approval processes for biotechnology products'*. In North America and among industry associations, the precautionary principle—the policy that precludes the approval of new products if they have not first been proven harmless to humans and the environment—is not considered *'science-based'*. Instead, Canadian regulators and the biotech industry take the approach that risk must be unequivocally proven before a product can be banned. This demand in CETA might seem harmless at first. Yet, one of the fundamental principles of the EU's regulatory processes is that policy makers decide whether or not a particular risk should be taken. Unlike a technocratic, *'science-based'* standard, policy makers can be held accountable by their voters in elections.

Canada is also a global leader in the development of international standards for so-called *'low-level presence'*.[5] Through trade policy, Canada and others intend to establish an internationally-accepted tolerance limit for GMO contamination, thus solving the problem of contamination without addressing the root cause. This approach not only contradicts the current EU approval process but it also clashes with a large segment of public opinion in Europe.[6]

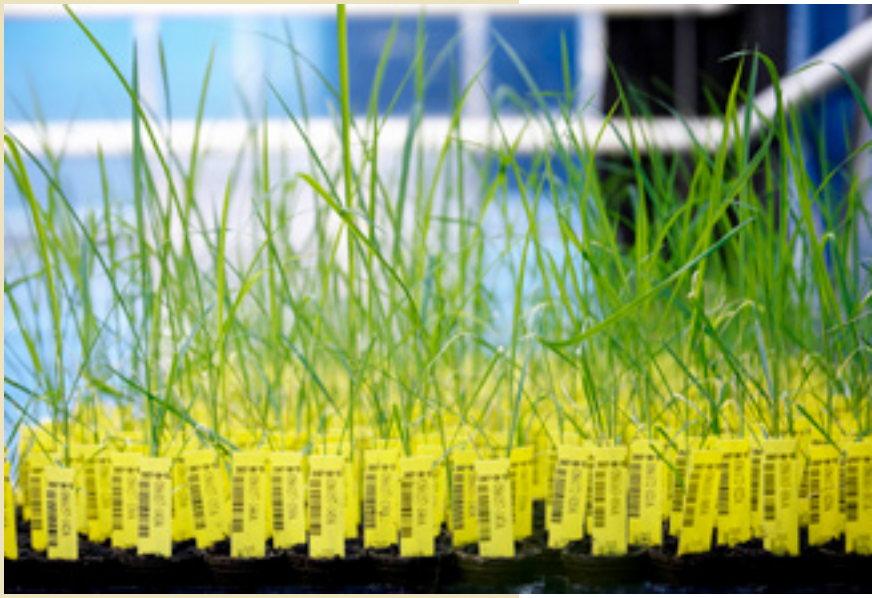

Photo: BASF - We create chemistry, flickr (Creative Commons license)

Finally, in addition to Article 25.2 on biotechnology, CETA's chapter on investment protection has a potential significance for biotechnology regulation. Canadian biotech corporations may be able to use the agreement's investor-state dispute settlement mechanism to sue governments in the EU for compensation over stricter or modified regulations related to genetic engineering (see chapter on ISDS). ISDS is just one more threat to the regulation of GMOs under CETA.

5 http://www.agbioforum.org/v16n1/v16n1a04-tranberg.htm

6 One of the very rare EU-wide surveys was the Eurobarometer survey published in February 2010. A key finding of this survey was that people in Europe *'do not see benefits of genetically modified food, consider genetically modified foods to be probably unsafe or even harmful and are not in favour of development of genetically modified food'*. See http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/ResultDoc/download/DocumentKy/55674

Degradation of regional quality

Geographical indications (GIs) are the names of specific regions and places that designate the origin of certain protected food products. GIs make it possible for small-scale farmers in specific regions to establish higher prices for well-known, high-quality food products, and they contribute to regional economic development by supporting value-added industries. Examples of important GIs in Germany alone include Frankfurter Grüne Soße (Frankfurt green sauce), Schwäbische Spätzle (Swabian egg noodles), Bayrische Brezen (Bavarian pretzels), Münchner Bier (beer from Munich) and Schwarzwälder Schinken (Black Forest ham). In 2015, 1,308 food products, 2,883 wines and 332 spirits were protected as GIs in Europe.[11]

CETA would only protect 173 products with geographic indications.[12] Although CETA contains a space where Canadian GIs can be listed, the space is totally empty. There is no such system for Canadian products, and Canadian producers of imitation food products would like to do away with GIs completely.[13] The list of GIs in CETA is unlikely to prevent imitations in Canada anyway. Under CETA, Canadian producers would still be allowed to distribute comparable products with English or French translations of the original name (e.g. *'Black Forest Ham'*). The European Commission claims it was not possible to negotiate comprehensive protection for English and French translations of GIs, which means they are effectively neutered in Canada.[14]

The CETA text allows for the possible addition of products to the list of protected GIs after the conclusion of the agreement. However, it also allows for products to be erased from the list if they are no longer regarded as relevant. Article 20.22.1 states *'the CETA Joint Committee, established under Article 26.1, may decide to amend Annex 20-A by adding geographical indications or by removing geographical indications which have ceased to be protected or have fallen into disuse in their place of origin'*.[15]

Because the CETA Joint Committee is ultimately responsible for this decision, Canada's consent will always be required if a product is to be added or removed from the list. Notably, while this committee would likely include the corporate sector in its decision-making processes for regulatory cooperation, it has no obligation to involve European national parliaments.[16] The future effectiveness of the GI system is called into question by CETA at exactly the moment it should be strengthened in Europe and internationally.

Closing the door to agrarian industrialisation

The ratification of CETA in its current form poses a considerable threat to local agriculture on both sides of the Atlantic. Rather than the promotion of exports and surplus production, what is needed are concerted efforts to safeguard regulatory standards for food quality and local economic development. Concretely, this includes efforts to foster animal welfare and non-GMO feeding, to strengthen the local production of protein feed, to ensure the right to resow seed from protected varieties, to stop back-door genetic modifications, and to reduce the use of pesticides and chemical fertilisers. These crucial initiatives are both obstructed and threatened by the pro-corporate trade policy found in CETA.

11 Friends of the Earth Europe (2016): Trading away EU Farmers, Brussels, April 2016.

12 In the CETA text, geographic indications are included in Chapter 20 – Intellectual Property, p.155ff and Annex 20-A, p.516ff: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

13 Agra-Europe (2015): TTIP: Hogan will *'Schnellstraße über den Atlantik'*, Agra-Europe 9/15, 23 February 2015.

14 German Bundestag (2015): Auswirkungen von TTIP und CETA auf geschützte geografische Herkunftsangaben und auf die Kennzeichnung von gentechnisch veränderten Lebensmitteln. Drucksache 18/4560, April 2015.

15 CETA Chapter 20, p.159 http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

16 Stoll P-T, Holterhus P, Gött H (2015): Die geplante Regulierungszusammenarbeit zwischen der Europäischen Union und Kanada sowie den USA nach den Entwürfen von TTIP und CETA. Vienna, June 2015.

Free trade or climate protection? Energy and climate policy-related threats posed by CETA

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There are long-standing tensions between the goals of increasing trade and of protecting the environment from harmful commercial activities. Today's generation of free trade agreements, for example, are designed to remove *'non-tariff barriers'* to trade, a goal that interferes considerably with the political and legal capacity of states to regulate in the public interest, and generally undermines democratic decision-making processes.

Perhaps most controversially, new agreements like CETA and TTIP give investors and corporations strong international legal rights to challenge government measures that have the effect of undermining a commercial activity or investment opportunity—even if the measures were enacted, first and foremost, to protect the environment or reduce greenhouse gas emissions.

These extensive protections offered to investors in CETA, together with the agreement's strong emphasis on the liberalisation of services and procurement, compromise two central aspects of sustainable energy and climate policy: the push to restrict and rapidly phase-out fossil fuel–based energy, and efforts to promote and develop alternative renewable energy sources.

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BACKGROUND

The international community has committed—most recently in the 2015 Paris Agreement—to limit the increase in global average temperature to *'well below 2°C above pre-industrial levels'*, and even to pursue efforts to limit the increase to 1.5°C, in order to significantly reduce the risks and impacts of climate change

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(UNFCCC 2015: Art. 2).[1] If the international community hopes to achieve its goals, greenhouse gas (GHG) emissions will need to be cut drastically—and in many sectors eliminated entirely—in the years and decades to come. In particular, there is an urgent need for governments to pursue the following mitigation efforts:

➔ Phasing out fossil fuels (coal, oil, gas) as an energy source, particularly for the generation of electricity and heat, and for transportation;

➔ Switching to renewable energy sources such as wind and solar power, biomass and hydroelectric, among others;

➔ Significantly improving energy efficiency in all economic and social sectors, as well as reducing energy consumption in the production of goods and services;

➔ Reducing GHG emissions from agriculture (e.g. by reducing destructive industrial agricultural practices); and

➔ Reducing transport distances through the promotion of regional economic cycles.

In contrast, free trade agreements are intended to promote trade in goods and services with little consideration for the environmental consequences. The external costs of climate-related damage—caused by longer transport distances, greater trade volumes, industrial agriculture or the destruction of local economies—are not taken into account, or play a subordinate role, in free trade negotiations.

1 UNFCCC 2015: United Nations Framework Convention on Climate Change, Paris Agreement, 12 December 2015. Downloaded at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf on 19.08.16.

Environmental regulations that restrict trade may even be targeted for elimination by trade negotiators.

Once an agreement like CETA is in place, however, it creates further risks that climate mitigation measures, like those described above, will be challenged as illegal trade barriers. For example, according to McGlade and Ekins (2015), assuming optimal economic efficiency, limiting the increase in global average temperature to 2°C would require that a third of all oil reserves, half of gas reserves and more than 80 per cent of coal reserves are left in the ground. In Canada, 75 per cent of oil reserves will need to remain undeveloped. These scientific findings clearly imply that increased production of unconventional oil conflicts with the 2°C goal.[2] And so, when assessing CETA from a climate policy perspective, it is crucial to ask whether the agreement facilitates or impedes efforts to reduce the extraction and use of fossil fuels in the future.

The final CETA text almost completely ignores climate change. Only the chapter on Trade and Environment (Chapter 24) mentions climate policy at all: Article 24.9.1 commits the Parties to promote trade and investment in environmental goods and services, while Article 24.12.1(e) provides for cooperation on environmental issues. However, the chapter is not enforceable through CETA's general dispute resolution process. It also does not include clear provisions that would allow climate policies to overrule, or otherwise be exempt from, CETA's market access, services liberalisation or investment protection rules. It is a huge oversight that two countries as committed as they say they are to fighting climate change would not safeguard their discretionary powers to regulate in favour of climate protection. Instead, CETA will make climate considerations secondary to the rights of business.

2 McGlade, Christophe; Ekins, Paul 2015: The geographical distribution of fossil fuels unused when limiting global warming to 2 °C, Nature 517, pp 187-190 (8 January 2015). doi:10.1038/nature14016

ANALYSIS OF KEY PROVISIONS

Investor protection for energy and mining corporations

In contrast to CETA's incomplete and toothless environmental chapter, the agreement's provisions for investor protection are extremely broad and can be enforced directly (i. e. without the support of government) through the agreement's investor–state dispute settlement (ISDS) mechanism (see chapter on ISDS). Essentially, CETA will make it possible for foreign investors of one Party to challenge the government policies, regulations or laws of the other that they feel violate the agreement's investment chapter, and to have these lawsuits decided by paid arbitrators instead of domestic courts. In 2015, for example, Canadian energy giant TransCanada launched a US$15-billion ISDS case against the U. S. government under the North American Free Trade Agreement (NAFTA), claiming the decision to cancel the Keystone XL tar sands pipeline violated the company's investor rights.

Environmental policy is hardly insulated from the threat of such investor lawsuits in CETA. On the surface it may appear Article 28.3.2 shields government measures that are deemed necessary to *'protect human, animal or plant life or health'* or *'for the conservation of living and non-living exhaustible natural resources'*, which cannot be challenged based on the investment chapter clauses (related to the those falling under the headings of *'establishment of investments (Section B)'* and *'non-discriminatory treatment'* (Section C)). But Article 8.2.4 of the investment chapter already rules out ISDS for violations of those sections in general. CETA negotiators could have made the Article 28.3 exceptions much stronger by also applying them to the *'investment protection'* provisions in Sub-Section 8-D of the investment chapter, which are the basis for many ISDS

CETA'S SUSTAINABILITY CHAPTER—WINDOW DRESSING FOR AN EMPTY HOUSE

Nelly Grotefendt, German NGO Forum on Environment and Development

EU trade policy has been heavily criticized on social and environmental grounds. The EU has responded by adding socially conscious rhetoric to trade agreements without actually changing the underlying policy logic or legal effect. Although CETA contains encouraging wording, it does not effectively protect workers' rights and the environment or ensure sustainability in Canada and the EU.

CETA's chapter on Trade and Sustainable Development (Chapter 22) is just four pages long and characterised by its use of cautious language. The chapter contains a number of references to non-binding approaches, without any further obligations under international law for the contracting Parties to promote sustainable development. Like the Trade and Environment chapter, the enforceability of CETA's sustainability chapter is limited by purely aspirational terms such as *'dialogue'*, *'promote'*, *'encourage'*, *'voluntary best practices'*, *'review'*, *'monitor'*, *'assess'*, *'transparency'* and *'public participation'*.

In its objectives, the sustainability chapter refers to international norms and declarations without establishing any real commitments. For example, Article 22.1.1 states *'the Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development'*. These statements have no legal substance; ultimately they pay mere lip service to the broader objectives of sustainable development.

Any dispute mechanisms contained in Chapter 22 are entirely voluntary. No reluctant government or international investor will be incentivised to promote sustainable management for the benefit of the common good. At best, all the agreement does is encourage Canada and the EU to undertake *'voluntary schemes relating to the sustainable production of goods and services'* and *'the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises'* (Article 22.3.2.).

cases related to environmental measures. The fact that they didn't tells us much about what kinds of investors CETA is designed to protect, and against what public policy measures.

The highly problematic and vague term *'fair and equitable treatment'* (FET) forms the substantive legal basis for many investment arbitration cases. Article 8.10.4 of CETA (*'Treatment of investors and covered investments'*) provides that, in determining whether FET has been violated, the arbitration tribunal may take into account *'whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated'*.

This language strengthens the hand of investors in the fossil fuel sector, as most countries follow a multistage approval and licencing process to conduct research

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on, exploit or extract raw materials. For example, the denial of subsequent authorisation after initial approval is granted may become the basis for an ISDS case (as it did in El Salvador in the case of a rejected gold mine project, and the Canadian province of Quebec, after it implemented a moratorium on hydraulic fracturing under the St. Lawrence River). In addition, the terms *'specific representation'* and *'legitimate expectations'* invite broad interpretation. Whether a friendly letter from a minister to an investor about a potential project creates a *'legitimate expectation'*, for example, would ultimately be determined by a panel of three arbitrators, rather than a legitimate court.

ISDS can also be invoked to challenge environmental measures when an investor (e.g. a multinational oil company) claims there has been an *'indirect expropriation'* of their investments. When assessing whether a measure constitutes indirect expropriation, *'the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations'* (Annex 8A) must be taken into consideration. Like the FET standard, indirect expropriation has been cited in many past ISDS cases to claim compensation from governments for their resource management measures.

Since they are subject to the FET and expropriation rules, investments in fossil fuel extraction projects and energy infrastructure are still largely protected and enforceable through ISDS. Article 8.1 clearly states that *'a concession... including to search for, cultivate, extract or exploit natural resources'* counts as a covered investment for the purposes of initiating investment arbitration. This means that urgently needed climate policies, including rules to increase energy

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efficiency or reduce energy consumption, as well as measures to reduce and phase-out fossil fuel–based energy generation, are at risk of provoking investor–state disputes. Because measures intended to reduce greenhouse gas emissions may soon make the extraction of fossil fuels unprofitable, there is a clear danger mining and resource companies will try to recoup their lost potential profits through ISDS at the cost of taxpayers in Canada and Europe.

Liberalisation of services and public procurement

Services are an increasingly important part of the energy industry related to the delivery of goods. Therefore, the comprehensive liberalisation of services under CETA constitutes a further potential constraint on proactive climate policies (see Trade in Services chapter).

CETA's provisions for market access in Article 9.6 of the Cross-Border Trade in Services chapter largely eliminate economic needs tests or quantitative restrictions on the number of service providers in a given sector. Even though the negative list approach enables contracting parties to include reservations on existing and future regulatory measures, it is doubtful that these will allow for a permanent restriction or prohibition of services, which e.g. fail to comply with certain energy efficiency criteria, or which rely on fossil fuels. On the Canadian side, some of the reservations to the agreement, as incorporated by its provinces and territories, are of considerable scope. On EU side, substantial reservations to the agreement were included only by Belgium, Bulgaria (with a fracking prohibition), Cyprus, Finland, France, Malta, the Netherlands, Portugal and the Slovakian Republic.

Just as the strict regulation of energy service companies becomes more important given the climate change imperative, so too can public procurement play a role in promoting renewable energy. Governments have traditionally been able to impose qualitative requirements, beyond

commercial considerations, when tendering procurement contracts (e.g. to require clean energy use in public buildings). Article 19.9.9 within CETA's Government Procurement chapter permits the inclusion of 'environmental characteristics' among the evaluation criteria for awarding public contracts. However, Article 19.14.5(a) requires that a contract be awarded to the supplier that has submitted the *'most advantageous'* tender, which is not defined and could be used to sideline higher-cost but more environmentally friendly bids. While most of CETA's provisions for public procurement are very detailed, a precise definition is not included for this crucial phrase.

Promotion of renewable energy delayed through regulatory cooperation

For the international community to meet its Paris Agreement commitments, a drastic reduction in fossil fuel–based energy must be complemented by the rapid development of new renewable energy sources. It also requires massive investment and reregulation to transform existing energy grids to link the use of renewables, energy saving technologies and energy efficiency programs.

In this context, it is extremely problematic that CETA's Regulatory Cooperation chapter (Chapter 21) encourages both Parties to improve competitiveness and efficiency through compatible *'regulatory approaches which are technology-neutral'* (Article 21.3(d)(iii)(A)). This concept of neutrality, in the context of the energy industry, directly contradicts efforts to promote clean energy technologies and discriminate against technologies that damage the environment. Though a Party is not required to cooperate on regulatory development, and can withdraw from cooperation activities, *'it should be prepared to explain the reasons for its decision to the other Party'* (see Regulatory Cooperation chapter).

Dilution of the EU Fuel Quality Directive

The European Commission's relative disregard for climate protection in its efforts to promote trade in fossil fuels is also evident in the conflicts surrounding CETA and the 2009 EU Fuel Quality Directive. Under the directive, which was designed to reduce CO^2 emissions in the transport sector by 6 per cent, different kinds of fuel were classified based on the intensity of their GHG emissions. Notably, a Stanford University study commissioned by the European Commission found that emissions from Canadian tar sands oil were 23 per cent higher than those from conventional oil. Because this classification was likely to have negative consequences for Canadian tar sands exports, the Canadian government initiated a lobbying campaign in Europe to oppose the proposal:

'Ministers and parliamentarians visited the Brussels offices, hired PR firms and developed a secret lobby strategy called "Pan-European Oil Sands Advocacy Strategy". Already in the first two years, the Canadians organized 110 lobby events in Europe—more than one per week. The scientific studies of the EU were doubted on the basis of questionable reports, EU politicians were accompanied to one-sided fact-finding visits to Canada and, amongst conservative energy politicians and European industry representatives, willing partners were found.'[3]

The Canadian campaign was supported by U.S. Trade Representative (and chief TTIP negotiator) Michael Froman, as well

3 Pötter, Bernhard 2014: Freier Markt für dreckiges Öl, taz 06.10.14, original German passage: *„Minister und Abgeordnete besuchten die Brüsseler Büros, heuerten PR-Firmen an und entwarfen eine geheime Lobbystrategie namens ´Pan European Oil Sands Advocacy Plan´. Allein in den ersten zwei Jahren organisierten die Kanadier 110 Lobbyveranstaltungen in Europa, mehr als eine pro Woche. Sie stellten mit zweifelhaften Gutachten die wissenschaftlichen Studien der EU infrage, flogen EU-Politiker zu einseitigen Informationsbesuchen nach Kanada und fanden unter konservativen Energiepolitikern und europäischen Industrievertretern willige Partner."*

as multinational oil corporations such as BP and Shell.[4]

Due in part to this external pressure, the European Commission weakened its own implementing legislation and effectively rendered the directive toothless. While the calculation tables for various types of oil were included as an annex in the directive, it no longer required the origin of oil to be revealed.[5] The European Parliament's Committee on the Environment and a slim majority of MEPs (337 to 325) opposed the dilution of the directive in December 2014, but since the required qualified majority of 376 votes was not achieved it passed anyway.

CONCLUSIONS AND RECOMMENDATIONS

As currently written, CETA is a several-thousand-page-long list of what governments cannot do to interfere with trade. As discussed, the agreement's chapters on investment, cross-border trade in services, regulatory cooperation and procurement, among others, will make it more difficult for governments to phase-out fossil fuels or promote and develop alternative energy sources. The Trade and Sustainable Development and Trade and Environment chapters are mostly rhetorical. From a climate policy perspective, therefore, CETA would be a major setback, to say the least.

Governments need to retain adequate regulatory flexibility to face the climate crisis head-on. For this to happen, the agreement will need to be significantly changed in at least two ways. First, the Investment chapter and ISDS process must be excluded entirely. Modest procedural reforms and the prospect of an Investment Court System (see ISDS chapter) do not go far enough to safeguard public policy, including strong environmental protection measures, from corporate lawsuits outside the regular court system. Second, CETA should include unambiguous language to protect and promote climate policy—including regulations designed to increase the share of renewable energy, to reduce energy use and to improve energy efficiency—meant to address Paris Agreement commitments to reduce GHG emissions.

The urgency of the climate crisis means we need to put the days of binding trade rules and voluntary climate obligations behind us—to flip that logic on its head so that sustainable trade is stimulated and environmental regulation prioritised.

4 Van Beek, Bas and others 2015: Freihandel. TTIP ist schon Realität, ZEIT Online 29.05.15. Downloaded from http://www.zeit.de/wirtschaft/2015-05/ttip-ceta-kosten on 29.05.15.

5 Pötter, Bernhard 2014.

Labour rights

***Angela Pfister**, Austrian Federation of Trade Unions*
***Éva Dessewffy**, Austrian Chamber of Labour*

Labour rights, including the right to form trade unions and the right to collective bargaining, contribute positively to social and economic development through higher average wages, lower earnings inequality and lower unemployment.[1] The importance of labour rights to global prosperity and worker justice is reflected in the core labour standards of the International Labour Organization (ILO) of which 187 countries are members.

In a globalised market economy, protecting labour rights through international agreements like the ILO is necessary in order to prevent a regulatory *'race to the bottom'*. Without international standards, countries may be pressured to weaken labour rights to compete with each other for foreign investment. Historically, competition for foreign investment has had precisely this negative effect.[2]

By setting the rules for trade and investment between parties, agreements like CETA could play a crucial role in the protection of labour rights. Trade agreements are especially important because they are often more enforceable than multilateral conventions like those developed and adopted by the ILO. To establish a common ground for fair trade between countries, new trade agreements must include strong and binding rules on minimum labour standards.

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CETA's proponents claim the deal establishes strong labour standards for the EU and Canada, but the actual protections in the text are poor. Unlike past EU trade agreements, CETA does not contain a clause stating that respect for human rights is an essential element of the agreement.[3] Moreover, CETA's labour chapter (Chapter 23) fails to introduce binding

1 *'Unions and Collective Bargaining: Economic Effects in a Global Environment'*, World Bank, Washington, 2003 (https://openknowledge.worldbank.org/handle/10986/15241).

2 Ronald B. Davies and Krishna Chaitanya Vadlamannati, *'A Race to the Bottom in Labour Standards? An Empirical Investigation'*, Journal of Development Economics, vol. 103 (July 2013): p. 1-14.

3 For comparison, see for example *'Chapter 1: Essential Elements'* in the EU's 2012 FTA with Colombia and Peru (http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf).

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and enforceable labour provisions that would ensure that core ILO labour standards are implemented and respected; it merely encourages the parties to strive for high labour standards. Indeed, in a revealing example of negotiators' priorities, the chapter on labour standards is exempt from the general dispute settlement mechanism governing the agreement.

Overall, CETA will not improve labour standards in the EU or Canada and may even put them at risk. By opening up trade between jurisdictions of varying labour standards without raising the bar to the highest common denominator, CETA may increase the downward pressure on labour conditions on both sides of the Atlantic. Furthermore, CETA makes it easier for employers to shift investment to where labour standards are lowest or even to challenge new regulations that may negatively affect their investments in the EU or Canada.

KEY PROVISIONS

No obligation to ratify missing ILO standards

Eight of the ILO's 190 conventions are identified as fundamental labour conventions, and all ILO member states are encouraged to ratify, implement and respect them. However, Canada has not ratified the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98) or the Convention concerning Minimum Age for Admission to Employment (No. 138). While the minimum age convention is expected to be ratified soon, the discussion about the ratification of the collective bargaining convention has not been concluded.

The level of ambition on labour rights in CETA does not correspond to the level of development in Canada and the EU member states. At best, CETA Article 23.3(4) calls on the parties to *'make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so.'*

Furthermore, CETA contains no suggestion to ratify, implement and adopt the ILO's Convention concerning Occupational Safety and Health and the Working Environment (No. 155), any of the ILO *'priority'* governance conventions (e.g. No. 81 and No. 129 on labour inspections, No. 122 on employment policy and No. 144 on international consultations), or the ILO conventions on labour mobility and the protection of migrant workers (No. 97 and No. 143). CETA will do little to advance the ratification of the many conventions that the EU member states and Canada have

JOINT STATEMENT ***by the Presidents of the Canadian Labour Congress (CLC), Hassan Yussuff, and the German Confederation of Trade Unions (DGB), Reiner Hoffmann, on the Final Text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), 22.06.2016***

In the light of the legal scrubbing process of the CETA text being completed, we, the presidents of the CLC and DGB, want to again reinforce our firm believe that what people on both sides of the Atlantic need are fair trade agreements. Market access for foreign businesses must not be achieved at the detriment of workers!

We therefore call on the federal governments of our respective countries, Canada and Germany:

- to repeal the EU-Canada Comprehensive Economic and Trade Agreement (CETA) as it currently stands;
- work for the resumption of negotiations between Canada and the EU, aiming at transforming CETA into a fair trade agreement that fully respects and promotes the rights of workers and their aspirations to decent work and decent lives; protecting the environment and the global climate, and which puts the interests of consumers before those of corporations.

In its current scope, CETA does not comply with any of the above, on the contrary. CETA is all the more important since it serves as a blueprint for the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU.

We trade union leaders are particularly concerned that:

- CETA does not adequately protect public services. Our demands for including a comprehensive exemption that excludes public services also from investment protection rules have not been met. What is more, in the liberalization of services, CETA pursues a negative list approach and contains a 'ratchet clause', that both pave the way for more sectors to be liberalized without an option to return them to the public hand. This must be rejected and replaced by a positive list that clearly defines areas and sectors which are open to liberalization;
- CETA contains a problematical chapter on investment protection as well as special rights for investors to sue states (Investment Court System - ICS), which must be scrapped;
- the right to regulate provision in CETA has not much substance. It does not sufficiently guarantee for regulations in the public interest to be protected from investors' complaints;
- CETA does not include effectively enforceable rules to protect and improve the rights of workers and employees, the chapter on Trade and Labor containing no sanctions against violations of workers' rights;
- CETA does not include any rules on making cross-border public procurement conditional on collective bargaining agreements or performance standards such as the requirement for local job creation: such allowances should be included.

Canadian Labour Congress
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not yet ratified. Notably, twelve EU member states as well as Canada have not yet ratified the important convention on occupational safety and health.[4]

CETA is a 'toothless tiger' on enforcement

The provisions in CETA's labour rights chapter cannot be effectively enforced. In contrast to CETA's binding investment court system designed to protect foreign investors, the labour chapter's compliance mechanism relies on a non-binding process of cooperation, dialog and recommendations to address labour rights violations.

The compliance mechanism has two main stages. First, one party may request consultations with another regarding an alleged violation of the labour chapter (Article 23.9). The parties may seek advice at this stage from CETA's joint Committee on Trade and Sustainable Development as well as from trade unions, industry associations, international organisations such as the ILO and other relevant stakeholders.

If the outcome of the consultations is not satisfactory to either party, a panel of experts may then be assembled to examine the matter (Article 23.10). The panel can issue a report and make recommendations to resolve the violation. However, in contrast to CETA's general dispute settlement provisions (Chapter 29) or CETA's investor–state dispute settlement mechanism (Chapter 8), the expert panel procedure ends at this stage.

In short, beyond triggering consultations, the chapter's commitments are empty and its enforcement mechanism lacks teeth. There are no fines, no penalties and no possibility of trade retaliation. Ultimately, even where an expert panel has ruled that a party violated its labour rights obligations under CETA, parties (and employers) are free to ignore the panel's recommendations.

Especially when contrasted with the powerful investor–state dispute settlement mechanism, CETA's labour chapter is a sad testament to the second-rate status of labour rights and protections. For fair trade to occur, labour rights in trade agreements should be fully enforceable and non-compliance met with sanctions. Unfortunately, CETA fails to meet these minimum requirements.

4 Austria, Bulgaria, Estonia, France, Germany, Greece, Italy, Lithuania, Malta, Poland, Romania and the United Kingdom have not ratified ILO Convention No. 155.

Canada-specific concerns

Scott Sinclair *and* ***Hadrian Mertins-Kirkwood****, CCPA*

Like much of Europe, Canada has been reshaped in recent decades by a neoliberal orthodoxy that favours privatisation of public services, austerity and the pursuit of free trade agreements that have hollowed out the manufacturing sector while making it more difficult for governments to pursue alternative economic development and job creation policies. The most important of these deals for Canada is the North American Free Trade Agreement (NAFTA), which came into force in 1994 and includes an early version of the investor–state dispute settlement (ISDS) process. Under NAFTA, Canada has experienced downward pressure on food safety and consumer protection measures, a sharp drop in high-value manufacturing as a share of exports, and an unwillingness among federal and provincial governments to introduce new public services or environmental protection measures, in part because they may attract ISDS claims by U.S. corporations.

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For Canadians, CETA is to some extent a continuation and deepening of this NAFTA model. Yet this purportedly *'gold-standard'* agreement also includes protections for investors and restrictions on government regulatory capacity that go beyond those in Canada's previous FTAs, including NAFTA. These unprecedented investor rights will undermine government sovereignty and policy flexibility on both sides of the Atlantic, with negative consequences for European and Canadian public services, labour and environmental rights, and other government measures taken in the public interest. At the same time, in certain areas, including intellectual property protections for pharmaceuticals, local government procurement, temporary entry, and agricultural supply management, Canada made one-sided concessions that will have pronounced negative impacts. Canadians also bring a unique perspective to the issues of investor–state dispute settlement and Indigenous rights.

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INTELLECTUAL PROPERTY RIGHTS FOR PHARMACEUTICALS

Canadians already pay more for prescription drugs than consumers in most other developed countries.[1] This is due, in large part, to an intellectual property rights regime that is extremely favourable to drug patent holders and brand-name pharmaceutical manufacturers. CETA is uniquely problematic for Canada in that it requires the government to make unilateral changes to patent regulations that will drive drug costs even higher.

Canadian negotiators successfully resisted EU demands to extend Canada's period of data protection to ten years, but agreed to lock in the current levels, which are high by international standards.[2] In addition, CETA will require two major changes to Canadian law. First, Canada must adopt a system of patent term restoration that would provide brand-name drug companies up to an additional two years of market exclusivity. Second, Canada must provide a right of appeal to brand-name drug companies in patent-linkage cases, which could delay the approval process for generic drugs by up to eighteen months.[3]

Taken together, these rules will extend the period of monopoly protection for higher-cost brand-name pharmaceuticals in Canada and delay the availability of cheaper generic drugs on the market. CETA's new pharmaceutical rules are predicted to

1 Canada ranks 4th among OECD countries for pharmaceutical spending per capita. See Organisation for Economic Co-operation and Development, *'Health resources: Pharmaceutical spending'*, OECD Data, 2016 (https://data.oecd.org/healthres/pharmaceutical-spending.htm).

2 Data protection refers to the data submitted to Health Canada by a drug company seeking authorisation for a new drug in order to demonstrate that it is safe and effective. The current term of data protection in Canada is eight years (plus six months for pediatric drugs).

3 Patent-linkage provisions, which require that health regulators must confirm that all of the relevant patents on a brand name product have expired before granting marketing approval to a generic version of a brand name drug, are prohibited in the EU.

increase Canadian drug costs by at least $850 million per year (€583 million)—seven per cent of current spending on patented drugs—once they are fully in effect.[4]

Coincidentally, that is close to the same amount (€600 million) Canadian consumers could potentially save on cheaper imported goods (if importers and retailers apply all tariff reductions on EU goods to shelf prices).[5] In other words, the costs of CETA's intellectual property rules nullify the potential benefits to Canadian consumers of tariff elimination.

PUBLIC PROCUREMENT

CETA will affect the public procurement of goods and services in both the EU and Canada in a number of ways. However, as with pharmaceutical patents, Canada made a number of unilateral concessions in CETA that may have significant repercussions. Most importantly, CETA's procurement rules apply to Canadian municipal and provincial governments for the first time in any Canadian trade deal.[6] Previous Canadian FTAs have mostly been limited to federal entities.

Under CETA, a wide range of Canadian sub-central entities will now be prohibited from favouring local suppliers or applying local content requirements to procurement contracts—both important economic development tools currently available to many governments. CETA not only guarantees non-discriminatory but unconditional access to the Canadian procurement market for EU companies. Under CETA, Canadian procuring entities cannot obligate EU suppliers to contribute positively to local economic development—even if such contract conditions apply equally to Canadian and EU companies.

TEMPORARY ENTRY FOR BUSINESS PERSONS

CETA's chapter on temporary entry contains provisions that will allow certain categories of workers to move between Canada and the EU without going through the usual immigration process. For workers covered by these provisions, economic needs tests are prohibited. That means states cannot limit the inflow of migrant workers under CETA even in regions where unemployment is high or local workers are available.[7]

Importantly, the provisions in CETA's temporary entry chapter *'confer no rights directly on natural or juridical persons'*.[8] In other words, the right of temporary entry is actually a right granted to employers to transfer workers across borders or hire new workers internationally. Unlike the free movement of workers across European borders, which is one of the EU's four fundamental freedoms, CETA's labour mobility provisions are not intended to create opportunities or provide protections for workers themselves. For example, they provide no path to permanent residency or immigration for temporary workers.

4 Joel Lexchin & Marc-André Gagnon, *'CETA and Pharmaceuticals: Impact of the trade agreement between Europe and Canada on the costs of patented drugs'*, Trade and Investment Series Briefing Paper, Canadian Centre for Policy Alternatives, October 2013 (https://www.policyalternatives.ca/publications/reports/ceta-and-pharmaceuticals).

5 In June 2016, the European Commission estimated CETA's tariff savings to European exporters (that could potentially be passed on to Canadian consumers) at €470 million, or approximately CAD 680 million. For reasons that are unclear, this number was updated to €600 million at some point in July 2016. See *'In Focus: Comprehensive Economic and Trade Agreement'*, European Commission, last updated June 2, 2016 (http://ec.europa.eu/trade/policy/in-focus/ceta); see https://web.archive.org/web/20160502152518/http://ec.europa.eu/trade/policy/in-focus/ceta/ for data as of June 2016.

6 In February 2010, Canada updated its WTO procurement commitments to include provincial government entities as decided by the provinces, but these do not include municipal governments or the broader MUSH sector (municipalities, universities, school boards and hospitals) as CETA does.

7 Hadrian Mertins-Kirkwood, *'Temporary Entry'*, in Making Sense of the CETA: An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement, eds. Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood, September 2014 (https://www.policyalternatives.ca/publications/reports/making-sense-ceta).

8 CETA Annex 10-E(7).

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Since the EU already provides for the free movement of labour internally, the potential impact of Canadian workers on the EU labour market under CETA is limited. For Canada, on the other hand, the employer-determined inflow of migrant workers from the EU could be quite disruptive. If Canadian governments cannot regulate the number of workers entering the country, employers may be able to drive down wages (and increase unemployment) by hiring precarious workers from abroad instead of hiring and training local workers.

SUPPLY MANAGEMENT IN AGRICULTURE

Canada employs a supply management system in its dairy, egg and poultry industries to ensure stable, affordable prices for consumers and decent, stable incomes for farmers. The system insulates these Canadian agricultural markets from the volatility of international food prices, which safeguards Canadian food security and supports the rural communities where farmers work and live. Unlike many countries, Canada provides no direct subsidies to its supply-managed industries.

European cheese producers can already export 13,608 tonnes of cheese tariff free to Canada every year. CETA will gradually increase that limit by 18,500 tonnes. Once fully implemented, CETA will give European cheese producers tariff-free access to nine per cent of the Canadian cheese market.[9] This new access granted to European producers (which are often subsidized) will displace Canadian cheese producers and strain the supply management system. Dairy farms supplying Canadian cheese producers will also be negatively impacted, reducing farm incomes and weakening rural communities.[10]

CANADA'S EXPERIENCE WITH ISDS

Investor–state dispute settlement is the most important issue in CETA for many in the EU and Canada (see chapter on ISDS). By providing foreign investors with a special, quasi-judicial mechanism for challenging government measures, the ISDS system erodes democratic governance and places foreign commercial interests above the domestic public interest. The proposed Investment Court System (ICS) in CETA includes procedural improvements over ISDS, but the substantive protections offered to foreign investors are essentially identical.

Canadians are uniquely sensitive to the dangers of investor–state arbitration because Canada is one of the most-sued developed countries in the world. Under NAFTA, Canada has faced at least 39 claims from foreign investors and has paid out damages of over $190 million (€130 million).

9 National Farmers Union, Agricultural Impacts of CETA: Submission to the House of Commons Standing Committee on Agriculture and Agri-food, December 5, 2014 (http://www.nfu.ca/story/agricultural-impacts-ceta).

10 In a tacit acknowledgement of the long-term threat CETA poses to the domestic dairy industry, the Canadian government has promised to provide billions of dollars in compensation to dairy farmers, although the details of the compensation package are still being worked out.

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Foreign (mostly U.S.) investors are claiming billions more in ongoing cases.[11]

Many of the cases that have been decided against Canada (or where the government settled in the investor's favour) involved challenges to public health and environmental decisions. For example, in 2015, a U.S. mining company successfully challenged a Canadian environmental review panel's decision to block a proposed quarry in an ecologically sensitive area. The dissenting arbitrator in that case, who was overruled by the other two panellists, called the ruling a *'remarkable step backwards'* for environmental protection in Canada.[12]

Just over a quarter of foreign direct investment (FDI) in Canada originates in the EU, and European investors are responsible for half of all ISDS cases worldwide.[13] Under CETA, Canadian federal, provincial and municipal government measures will be exposed to investor–state challenges from this large and highly litigious group of multinational corporations and private investors. Meanwhile, Canadian and U.S. investors will be able to use Canada as a platform for investor–state challenges against European government measures.[14]

INDIGENOUS RIGHTS

To put it mildly, Indigenous peoples in Canada have a troubled relationship with the Canadian state.[15] Among other serious

11 Scott Sinclair, NAFTA Chapter 11 Investor-State Disputes to January 1, 2015, Canadian Centre for Policy Alternatives, January 2015 (https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015).

12 Donald McRae quoted in Shawn McCarthy, *'NAFTA ruling in Nova Scotia quarry case sparks fears for future settlements'*, The Globe and Mail, March 24, 2015 (http://www.theglobeandmail.com/report-on-business/nafta-ruling-against-canada-sparks-fears-over-future-dispute-settlements/article23603613/).

13 Delegation of the European Union to Canada, *'EU-Canada Economic and Trade Relations'*, 2016 (http://eeas.europa.eu/delegations/canada/eu_canada/trade_relation/index_en.htm). UNCTAD, *'Investor-State Dispute Settlement: Review of Developments in 2015'*, June 2016 (http://investmentpolicyhub.unctad.org/Publications/Details/144).

14 Pia Eberhardt, Blair Redlin, and Cecile Toubeau, *'Trading Away Democracy: How CETA's Investor Protection Rules Threaten the Public Good in Canada and the EU'*, November 2014 (https://www.policyalternatives.ca/publications/reports/trading-away-democracy).

15 In 2015, the United Nations Human Rights Committee made more than a dozen recommendations for legal changes in Canada in respect to the treatment of Inuit, First Nations and Métis peoples. See a joint civil society–Indigenous association press statement (http://www.amnesty.ca/news/public-statements/joint-press-release/un-human-rights-report-shows-that-canada-is-failing).

issues, the federal government frequently supports natural resource development on lands traditionally and legally controlled by Indigenous peoples, but without properly seeking their consent. In response, some Indigenous peoples have resorted to legal challenges to protect their land. The Haida in British Columbia, for example, are one of several First Nations who mounted a successful legal challenge to a federally approved pipeline project that would carry oil from the Alberta tar sands through their territory.[16]

By extending extraordinary protections to foreign investors in CETA, Canada will further erode the rights of Indigenous peoples. Natural resources corporations in particular will now have one more set of rights available to them in land claim disputes. Through ISDS claims, Canada may be pressured to side with foreign investors over Indigenous groups or be forced to pay compensation. Although Canada negotiated a broad reservation for Aboriginal affairs in CETA it would not prevent foreign investors from claiming compensation for alleged expropriation or violations of fair and equitable treatment in cases involving Indigenous rights.

Canada's recent adoption of the UN Declaration on the Rights of Indigenous Peoples raises further questions. Among other provisions, the declaration requires governments to obtain the *'free, prior and informed consent'* of Indigenous peoples before adopting measures that affect them, which Canadian governments almost certainly did not do during the CETA negotiations.[17]

16 Geordon Omand, *'Northern Gateway pipeline approval stymied after court quashes approval'*, The Canadian Press, June 30, 2016 (http://www.stthomastimesjournal.com/2016/06/30/northern-gateway-pipeline-approval-stymied-after-court-quashes-approval-4).

17 See Article 19 (p. 8) in United Nations Declaration on the Rights of Indigenous Peoples, United Nations, March 2008 (http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

CETA ratification in Canada and Europe: Multiple opportunities for contesting the agreement

Michael Efler, *More Democracy e. V., Germany*

CETA negotiations were launched in 2009 and finished shortly before the presentation of a final English version of the CETA text in February 2016. On 5 July 2016, the European Commission transferred the final text of the treaty (translated into all official EU languages) to the Council of the European Union, where national ministers from each EU country meet to adopt laws and coordinate policies. The Commission proposes to sign and conclude CETA as a *'mixed'* agreement. This means that each EU member state must approve those portions of the agreement that fall outside EU competency.

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APPROVAL BY THE COUNCIL OF THE EU

In autumn 2016, the Council will decide whether to approve the signing of the agreement. It is unclear whether this decision must be adopted unanimously or by qualified majority. If it requires unanimity then any one member state could veto the proposal. This would require either an explicit *'No'* vote at the meeting or the state representative's absence—an abstention during the vote is not enough to prevent approval. As of mid-2016, Belgium, Slovenia, Hungary, Poland, Romania, Bulgaria and Austria were not sure whether they would consent to the agreement.

If only a qualified majority is required, at least 55 per cent of the member states representing 65 per cent of the EU population must agree to approve the signed agreement. Germany and France alone would not be able to block a qualified majority; they would need the support of other member states such as, for example, Romania and Belgium.

In addition to approving the signed agreement, the Council of the EU will decide in late 2016 whether the agreement should be applied provisionally at the EU level (i. e. enter into force) even before

CANADA'S RATIFICATION PROCESS FOR CETA

Hadrian Mertins-Kirkwood, CCPA

For Canada, ratification of a free trade agreement occurs in three stages.[1] First, the prime minister signs the agreement with the other Party's head of state—in this case the European Commission president—which confirms the negotiations have ended and the text is finalized. Second, the government introduces legislation in Canada's House of Commons (Parliament) to ratify and implement the agreement. By convention, members of parliament have at least 21 days to debate the text during second reading of the legislation, after which it is sent to the international trade committee for further study. Based on the report of this committee, members of parliament must then recommend, through a vote at third reading, whether the government should ratify the treaty or not. This recommendation is not legally binding, since ratification is ultimately a decision of the federal cabinet (executive).

Third, the implementing legislation for CETA would travel to the Senate for further debate—in the chamber and possibly at committee—and a vote. Only after a free trade agreement has been signed, ratified and legislated domestically can it come into force in Canada, on the date agreed to with the other Party. The implementing legislation ensures that domestic law aligns with and gives force to the terms of the treaty. In the case of CETA, because it affects many matters falling within provincial jurisdiction, each province and territory will also need to take steps, possibly but not necessarily through legislation, to implement the agreement within their areas of jurisdiction.

It is not clear how much political resistance the Canadian government will meet when it proceeds with the CETA ratification process. Canada's two largest political parties, the Liberals and the Conservatives, support the agreement while the left-wing New Democratic Party has not taken a firm position for or against it. Public opinion polls show that, in principle, Canadians support expanding trade deals. However, this support falls apart on issues such as copyright and patent term extension,[2] investor–state dispute settlement,[3] and the prohibition in CETA on local preferences on public procurement.[4] Since 2010, more than 50 Canadian municipalities, including major cities like Toronto, Victoria and Hamilton, have passed motions opposed to CETA's procurement restrictions or even to the whole agreement.[5] A majority of Canadian trade unions, and several high-profile environmental and other NGOs, also oppose the agreement in full or part.

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1 For an overview of the ratification process, see Laura Barnett (2008), *'Canada's Approach to the Treaty-Making Process'*, Library of Parliament Background Paper No. 2008-45-E. Parliament of Canada (http://www.lop.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm); also Scott Sinclair (2008), New Treaty Approval Process Misses the Mark, Canadian Centre for Policy Alternatives (https://www.policyalternatives.ca/publications/reports/new-treaty-approval-process-misses-mark).

2 Canadian Health Coalition, *'Strong majority of Canadians oppose drug patent extension in Canada-EU trade deal: poll'*, press release, September 16, 2012 (http://healthcoalition.ca/strong-majority-of-canadians-oppose-drug-patent-extension-in-canada-eu-trade-deal-poll/).

3 Ethan Cox, *'Could free trade deals become an election issue'*, Ricochet, September 16, 2015 (https://ricochet.media/en/591/could-free-trade-become-an-election-issue).

4 Council of Canadians, *'Majority of Canadians oppose "buy local" ban in Canada–EU trade deal: poll'*, press release, November 28, 2013 (http://canadians.org/media/majority-canadians-oppose-buy-local-ban-canada-eu-trade-deal-poll).

5 See CETA resolution map: https://www.google.com/maps/d/viewer?ll=59.445075%2C-96.855469&spn=32.895683%2C87.890625&t=m&vpsrc=6&msa=0&z=3&source=embed&ie=UTF8&mid=1h1OoyxoDI_9Dd_TXxq-wAvHc-yQ0.

receiving approval from national parliaments. A majority of member states seem to support provisional application. However, there are a number of critical voices that either have fundamental problems with the text of CETA (Austria) or at least want the matter to be discussed in national parliaments first (Netherlands, Luxembourg and Germany).

The scope of a possible provisional application is also contentious. In July 2016, the European Commission proposed to apply the entire agreement provisionally, but some member states want to at least exclude the CETA provisions on investment protection and investor–state dispute settlement (ISDS).

THE VOTE IN THE EUROPEAN PARLIAMENT

The next step in ratification—a decision by the European Parliament—will take place as early as December 2016 or, at the latest, in spring 2017. Without Parliament's consent, CETA cannot enter into force. So far, the European Parliament has scarcely considered the CETA agreement. However, we might expect its position to reflect MEP opinions on the proposed EU–US Transatlantic Trade and Investment Partnership (TTIP).

Parliament's 2015 resolution on TTIP, agreed by a relatively wide majority of MEPs, established the standards that TTIP must meet to gain parliamentary approval. CETA crosses several of the red lines in this resolution. For example, CETA incorporates a *'negative list'* approach for services liberalisation (see Trade in Services chapter) that Parliament rejected in TTIP. It also remains to be seen how MEPs will react to changes in CETA's investor–state dispute settlement mechanism (see Investment chapter)—for example, the establishment of a new Investment Court System (ICS)—to account for concerns about excessive investor protections in TTIP. Falling public support for CETA and TTIP, in particular related to investor rights, may also affect the parliamentary vote.

RATIFICATION IN THE MEMBER STATES

Even if the European Parliament consents to CETA, all EU member states must also ratify, which usually involves votes on the agreement in national parliaments (only in Malta does approval by the government suffice). If a member state does not consent to the agreement, ratification fails.

Things will be more complicated and more interesting in countries such as Germany and Belgium where the approval of the agreement by several chambers of parliament or regional parliaments is needed. In Germany, for example, those states with regional-federal government coalitions could influence or prevent ratification in the Bundesrat, the upper house of the German parliament. In Belgium, several regional parliaments have already positioned themselves as hostile to CETA.

Furthermore, in about half of EU member states referendums on CETA are legally possible. In most countries a referendum can only be based on a decision of the parliament or the government. But in Hungary, Lithuania and the Netherlands the public can bring about a referendum directly. In the Netherlands an NGO alliance is already preparing for this possibility.

Once every member state has completed its domestic ratification procedure, the EU Council must once again formally declare the conclusion of the agreement. Due to uncertainty about CETA in many member states, it is not clear when, or if, the Council will get to this point.

POSSIBILITIES FOR LEGAL ACTION

In addition to political opposition, CETA is also vulnerable to legal challenges. At the European level, work is underway to take CETA to the European Court of Justice (ECJ), to challenge the consistency of the investment protection provisions with European law. In earlier rulings, the ECJ has reserved for itself a monopoly on the interpretation of EU law, which could be jeopardised by the introduction of ISDS/ICS. Even national constitutional law could be violated: in Germany, several constitutional complaints against CETA have already been filed.

Overall, the ratification process is likely to drag on at the EU level until the end of 2016 or spring 2017. The subsequent ratification in the member states will likely take at least two years to complete (the German government expects it to take as many as four years). CETA is therefore by no means a done deal.

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