

Introduction



Photo: Jed Sullivan, flickr (Creative Commons license)

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,

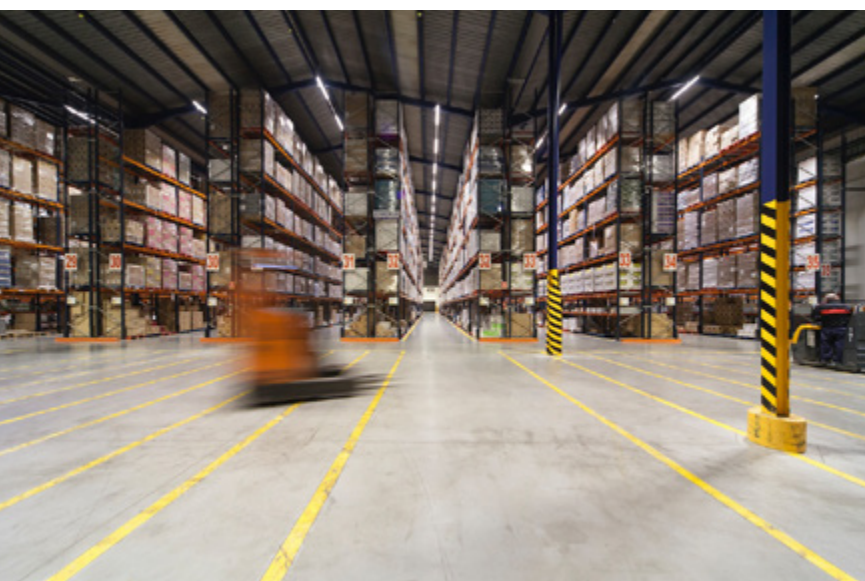


Photo: Philips Communications, flickr (Creative Commons license)

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.

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