

Canada-specific concerns

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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.

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



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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/unpfi/documents/DRIPS_en.pdf).