

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

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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.

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.



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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

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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.

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.