

EU-CANADA NETWORK POLICY BRIEF

CETA: The Foundation for a ‘Progressive’ EU-Canada Trade and Investment Partnership?

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Executive summary

Following the votes for Brexit and Donald Trump, the European Union (EU) and Canada emphasised the importance of their trade and investment partnership as a means of defending the liberal international order and delivering ‘progressive’ policies. At the heart of this relationship lies the Comprehensive Economic and Trade Agreement (CETA). EU Trade Commissioner Cecilia Malmström (Malmström 2016, 2) described CETA as demonstrating “that Europe and Canada mean what we say when we say we want a trade policy that [is] progressive and upholds our shared values”. In this policy memo, I set out why:

- the label ‘progressive’ is best seen as an exercise in rebranding CETA in the face of political opposition in Europe if we examine the agreement’s supposedly key policy innovation, the Investment Court System (ICS); and
- ‘upholding shared values’ through CETA beyond trade and investment liberalisation will be difficult given the limited nature of the agreement’s sustainable development, labour, and environmental provisions, as well as the continued political relevance of transatlantic regulatory divergence.

Introduction

In the wake of the votes for Brexit and Donald Trump, much hay has been made of the promise of the EU-Canada relationship to not only defend the liberal international order but also to deliver ‘progressive’ policies. Both sides have stated that the CETA that came into (provisional) effect in September 2017 embodies this ambition. In the words of EU Trade Commissioner Cecilia Malmström (Malmström 2016, 2), CETA is not only “the best trade agreement the EU has ever negotiated”, but it will also “demonstrate that Europe and Canada mean what we say when we say we want a trade policy that [is] progressive and upholds our shared values”. Addressing the European Parliament before its vote on CETA’s ratification in February 2017, Justin Trudeau (cited in European Parliament 2017) also emphasised that “[w]ith CETA, together we have built something. Something important. Especially at this moment, on your continent and mine.” But how much of a foundation is CETA for a ‘progressive’ trade and investment partnership?

In this policy brief, I set out why talk of a ‘progressive’ CETA is an exercise in rebranding in the wake of the agreement’s politicisation in the EU. This is particularly notable in respect of the agreement’s supposed key policy innovation: the Investment Court System (ICS), which replaces previous forms of investor-state dispute settlement (ISDS). ‘Upholding shared values’ through CETA beyond trade and investment liberalisation will also be difficult given the limited reach of its sustainable development, labour, and environmental provisions – as well as the continued political relevance of transatlantic regulatory divergence.

Old wine in new bottles²

The CETA negotiations only became strongly politicised in the EU because of the fallout from the EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiations, which kicked

² This section draws extensively on research published by Siles-Brügge (2017).

off in the summer of 2013. The focus of civil society campaigners contesting TTIP was the proposed agreement's investor protection provisions, notably ISDS, a mechanism allowing foreign investors recourse to independent arbitration tribunals in response to perceived violations of their investor rights. ISDS was branded as a 'threat to democracy' and a form of 'corporate rule' (e.g. CEO 2013). The text of CETA as negotiated at that stage (formal talks had initially concluded in September 2014) also featured such provisions, and in the uproar over TTIP, there was considerable opposition in the EU to taking CETA further.

In response, the European Commission consulted with leading Social Democratic politicians in the European Parliament and in Germany (a key swing constituency on TTIP) and devised a new proposal for the TTIP investor protection talks: the so-called Investment Court System (ICS) (see European Commission 2015a). This was also mostly incorporated into CETA during the agreement's legal 'scrubbing' phase.

Crucially, the Commission shifted its discourse on investor protection to sell the ICS. Whereas ISDS in TTIP/CETA had been presented in purely economic terms as a means of boosting flows of foreign direct investment (FDI) (e.g. European Commission 2010, 5), ICS was now presented as an opportunity to reform the flawed nature of the global investor protection regime in a more 'progressive vein.' It included a proposal to establish a Multilateral Investment Court (MIC) based on the ICS' working methods. The ICS would be premised on 'publicly-appointed judges' (European Commission 2015b), working within a system that, according to Malmström (cited in European Commission 2015b), would be "subject to democratic principles and public scrutiny". When it came to signing and ratifying CETA from mid-2016 to early 2017, civil society groups that remained opposed to ICS were equated to the sovereigntist economic populists who stood in the way of 'progressive' globalisation. This discourse also resonated with the European Court of Justice (ECJ). In its recent Opinion 1/17 – in a case brought by Belgium in response to the 'Walloon veto' over signature of CETA in September 2016 – the Court found that the ICS in CETA was compatible with EU law. This was in significant part because it did not permit the Tribunal and Appellate Tribunal "to call into question the level of protection of public interest determined by the Union following a democratic process" (ECJ 2019).

However, if we examine the substance of ICS we find that many of the key features of the pre-existing regime of investment treaty arbitration have remained in place. It works with tweaked, rather than fundamentally reformed standards of investor protection. These will still likely allow for expansive interpretation in favour of claimants bringing cases contesting public interest decision-making (T&E *et al.* 2015). While the ICS eliminates the ability for investors to initiate parallel claims (i.e. in both domestic tribunals and the ICS), it does not require the exhaustion of domestic remedies (investors can continue venue shopping). Turning to the most vaunted provisions within the ICS – the appointing of 15 'judges' which would sit in divisions to rule on cases, greater transparency, a new appeals process, and a code of conduct for the 'judges' – these fail to address an underlying systemic problem: the fundamental conflict of interest facing 'judges' without fixed tenure deriving income from disputes that *only* foreign investors can bring (Van Harten 2016). Moreover, rather than representing a break with the past, what was then still called a 'roster of arbitrators' had already been agreed in the CETA talks in late 2013 (European Commission 2013). A supposedly key progressive element of CETA is thus largely about 'rebranding' in the face of political opposition.

Upholding ‘shared values’?

Trade and investment liberalisation trumps other objectives

In terms of CETA’s progressive promise, much has been made of the provisions on ‘Trade and sustainable development’ (Chapter 22), ‘Trade and labour’ (Chapter 23) and ‘Trade environment’ (Chapter 24). They include provisions on “cooperation” in these fields (Articles 22.3, 23.7 and 24.12); on the ‘right to regulate and levels of protection’ (Articles 23.2 and 24.3) – emphasising the Parties’ right to maintain whatever level of protection they deem appropriate – and, notably, on ‘upholding levels of protection’ (Articles 23.4 and 24.5) which stipulate that the parties ‘shall not waive or otherwise derogate from’ labour and environmental laws or fail to enforce these ‘to encourage trade or investment.’

However, the ‘chilling effects’ that provisions on investor protection or regulatory cooperation in trade agreements can induce on regulation and law-making are not captured by these articles (De Ville and Siles-Brügge 2017, 1497-99). They are either more subtle, (shaping agenda-setting) or affecting future regulation. Where the objective is either protecting foreign investors through expansive rights or, in the case of regulatory cooperation, eliminating non-tariff barriers to trade, other policy objectives are likely to come second. In the case of CETA, we already have at least one instance of where the negotiations – and the leverage they provided to relevant EU and Canadian interests – were likely a factor in the European Commission’s decision to water down its proposal for a ‘fuel quality directive’, which meant excluding Canadian oil from the tar sands from the list of ‘dirty fuels’ (this would have limited imports from this source) (De Ville and Siles-Brügge 2016, 86-9).

Continued regulatory divergence

When EU and Canadian policymakers speak of ‘shared values’ they also underplay the extent to which there remains politically significant transatlantic regulatory divergence. This includes differences in both jurisdictions’ approach to the vexed issue of sanitary and phytosanitary (SPS) measures. The EU’s more explicitly precautionary approach (which has led to a ban on, for example, growth-promoting hormones in beef) is still perceived as a trade irritant in Ottawa, which is more closely aligned to the ‘sound science’ model associated with the US and the WTO SPS Agreement (Couvreur 2015, 268-71). This might explain why the provisions in CETA on SPS are quite limited in scope, as they touch upon an area of considerable domestic sensitivity in the EU (Young 2015, 1263). Canadian cattle farmers have expressed concern that they will be unable to utilise the additional market access under CETA because of existing SPS barriers (Winslow 2017). Given a US administration that is aggressively pursuing traditional US interests in attacking the EU model of regulation in this area – through at least two outlets, ongoing negotiations with the EU and discussions on future trade negotiations with a post-Brexit UK (USTR 2019a, 2-3; USTR 2019b, 2-3) – such a divergence is not likely to be helpful in crafting a deep trade and regulatory partnership. Even in other areas, the specific substantive regulatory alignment brought about by CETA has been relatively limited (Young 2015, 1267) – notwithstanding the agreement’s potential to water down standards by ‘chilling’ regulation (see above).

Overstating the ‘progressive’ partnership?

CETA is not only less ‘progressive’ than the rhetoric of its advocates, but is also unlikely to be the basis for a particularly deep partnership, given ongoing regulatory differences and the limited nature of substantive regulatory alignment. The label itself is largely an exercise in

rebranding, rather than in fundamentally rethinking some of the more problematic elements of trade and investment agreements, such as investor protection.

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