

Briefing Note on Key Provisions of Bill C-30

The Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act

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General description

Bill C-30 received first reading in the House of Commons on October 31, 2016.¹ The Act's stated purpose is to implement the Comprehensive Economic and Trade Agreement negotiated between Canada and the European Union (Bill C-30, Section 7). Its provisions are binding on Canada (Bill C-30, Section 6).

The Act has four parts:

- Part 1 gives Parliament's approval to CETA, authorizes the spending on the institutional and administrative funds required by CETA, and empowers cabinet to issue orders in accordance with CETA's provisions;
- Part 2 makes the "customary amendments" to federal legislation when trade agreements are signed, such as those related to tariffs and quotas, but also amends other laws, including the Patent Act, the Trade-marks Act, the In-



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vestment Canada Act, the Food and Drugs Act and the Coasting Trade Act to conform with concessions Canada made to the EU in the CETA negotiations;

- Part 3 contains consequential amendments and
- Part 4 contains co-ordinating amendments and the coming-into-force provision.

This briefing note analyzes parts 1 and 2, which contain the bill's main provisions.

Challenges to CETA's ratification in Europe

Bill C-30 amends Canadian legislation in ways that will have significant impacts—such as sharp increases in drug costs to Canadian consumers—despite serious doubts about whether CETA will ever be ratified by all the EU member states. So far, the biggest roadblocks are in the Netherlands, Belgium and Germany, with the following initiatives threatening ratification.

The Netherlands

Referendum. Campaigners in the Netherlands already have two-thirds of the names required to force a referendum on CETA if the agreement is ratified by the Dutch government. A vote against CETA with more than a 30% turnout would obligate the Dutch parliament to override ratification of CETA. A recent precedent is the April 2016 Dutch referendum that rejected an EU economic co-operation agreement with the Ukraine.

Belgium

Opposition to CETA's investor–state dispute settlement mechanism from Belgian sub-national jurisdictions. Four Belgian jurisdictions, whose consent is essential for the Belgian government's CETA ratification, have declared they “do not intend to ratify CETA on the basis of the system for resolving disputes between investors and Parties set out in Chapter 8 of CETA, as it stands on the day on which CETA is signed.” If any of these regional parliaments refuses to ratify CETA the Belgian federal government is bound to communicate this decision to the European Council, which is bound in turn to notify Canada that provisional application has failed.²

European Court of Justice (ECJ) examination of CETA. Belgium has asked the ECJ for an opinion on the compatibility of CETA's investment court system with the EU Treaties.

Germany

Opposition from the Bundesrat. With a bicameral parliament, CETA must be ratified by both of Germany's houses. The second chamber (Bundesrat), representing Germany's 16 federal states, is currently controlled by anti-CETA Greens and left parties.

Constitutional court challenge against CETA. In mid-October the German constitutional court gave a preliminary ruling that allowed the German government to sign CETA, but only under strict conditions. One of the most important is that if the court eventually rules that any aspect of CETA is unconstitutional, then provisional application must end. Subsequently, the European Council has stated: "If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated."³

Key Impacts of Bill C-30

1. Bill C-30 paves the way for CETA investor–state disputes against Canada by:

- Amending the Commercial Arbitration Act to add CETA to the list of Canada's agreements that have investor–state dispute provisions, enabling tribunal awards made under these agreements to be enforced through Canadian courts (Bill C-30, Section 90);
- Committing Canada to pay its share of the fees and expenses of investor–state tribunal members, as well as expenses incurred by the tribunals (Bill C-30, Section 13); and
- Empowering the minister of international trade to propose members of the tribunals established under CETA (Chapter 8, Section F: Resolution of investment disputes between investors and states) (Bill C-30, Section 11.1.a).

While the bill is silent on this point, the Canadian government has said it intends to mirror the EU's provisional application of CETA.⁴ The EU has stated: "All of these provisions [investment protection and the investment court system] having been excluded from the scope of provisional application of CETA, the Commission and the Council confirm that they will not enter into force before the ratification of CETA by all Member States."

Canada already ranks sixth out of 131 countries in the number of investor–state suits taken against it under existing agreements like NAFTA. With CETA, Canada will likely have many more such cases since European corporations have launched half the investor–state cases that have occurred worldwide, three times the number launched by U.S. corporations. Seven out of the top 10 countries that are the home base of companies suing under investment treaties are EU members.⁵

2. Bill C-30 extends Canada’s CETA concessions to the U.S.

Bill C-30 makes major amendments to Canada’s Patent Act, the most critical being an extension of drug patent rights for up to two years. Bill C-30 extends this concession Canada afforded to the EU in the context of the CETA negotiations to patent holders from all WTO members, including the U.S. (Bill C-30, Section 32.2).

Bill C-30’s amendments to the Investment Canada Act, which increase the threshold for review of a foreign takeover of a Canadian company from \$600 million to \$1.5 billion (Bill C-30, Section 80), provides this CETA benefit not only to EU investors but also to all “trade agreement investors.” Trade agreement investors are defined to include investors from parties to NAFTA as well other trade agreements.

With Canada facing potentially difficult bargaining with the proposed renegotiation of NAFTA, it will already have unilaterally provided concessions to the U.S. through CETA.

3. Bill C-30 extends patent rights for brand-name pharmaceutical corporations

Bill C-30 contains 30 pages of amendments to Canada’s Patent Act as required by CETA. The amendments provide for “certificates of supplementary protection,” effectively extending drug patents up to an extra two years and delaying the introduction of cheaper generic drugs on the Canadian pharmaceutical market (Bill C-30, Section 59).

Bill C-30’s Section 39 enables the governor-in-council to make regulations for appeals to decisions and orders related to patent infringements. Patent holders will be able to appeal notices of compliance granted to generic drugs, with the result that there could be an additional six to 18 months before generics can be introduced into the market.

Canada already pays the second highest per capita drug costs in the OECD.⁶ The impact of this extension of patent rights to pharmaceutical companies and other CETA provisions has been projected to increase annual drug costs for Canadians by at least 7% for patented drugs (\$850 million per year). This is roughly equal to the projected savings Canadian consumers would get from CETA tariff reductions on EU products.

Canada resisted pressure from the EU to extend terms of data protection to 10 years (from the current eight years of market exclusivity). But Bill C-30 amends the Food and Drugs Act (which governs data protection) to provide regulation-making authority to Health Canada to implement obligations under international agreements.⁷ As experts, including Carleton University professor Marc-André Gagnon, have pointed out, decisions about how vaguely worded data protection obligations in trade agreements are implemented could have major impacts on drug costs.⁸

4. Bill C-30 leaves water covered by CETA

Bill C-30, Section 4 (Non-application of Act and Agreement to water) states that:

For greater certainty, nothing in this Act or the Agreement, except Chapters Twenty-Two [Trade and Sustainable Development] and Twenty-Four [Trade and Environment] of the Agreement, applies to *natural* surface or ground water in liquid, gaseous or solid state. (Emphasis added.)

CETA Article 1.9.3 specifies that, “Where a Party permits the commercial use of a specific water source, it shall do so in a manner consistent with the Agreement,” which means CETA challenges could be launched if *commercial* uses of water had been allowed and governments subsequently discriminated in favour of local or publicly owned water users or denied commercial use. Bill C-30 cannot annul any part of CETA, so Section 4 of the act must be read consistently with CETA Article 1.9.3. Bill C-30, Section 3 states, “this Act...is to be interpreted in a manner consistent with the Agreement.”

5. Bill C-30 weakens the Coasting Trade Act

The Coasting Trade Act regulates carriage of passengers and cargo by ship within Canadian waters and currently imposes strict limitations on foreign ships in this sector. Bill C-30, Section 91 imposes five pages of amendments to the Coasting Trade Act to allow European involvement in Canada’s coasting trade. Certain kinds of shipping between Montreal and Halifax, shipping of empty containers, and public and private dredging work will be opened up to European companies who have a record of employing international labour at very low wages.

6. Bill C-30 implements tariff changes that will likely result in job losses, lower economic growth and a decline in government revenues

The bill amends the Customs Tariff Act and implements the staged CETA tariff cuts for EU imports into Canada (Bill C-30, Section 97). Under CETA, tariffs will generally be eliminated on Canada–EU trade, but they are already low (on average 3.5% for EU exports to Canada and 2.2% for Canadian exports to the EU).

A 2008 study commissioned by Canada and the EU estimated the potential economic gains from CETA from tariff reductions and other provisions at a 0.77% increase in Canada’s GDP. However, the study was based on assumptions that do not hold up in the real world, including that corporations invest all the savings they get from tariff elimination, there is full employment, and those who lose under CETA are compensated by those who win. Moreover, the 2008 study was not based on the actual negotiated text of the agreement.

Working from the final text and with a more realistic set of assumptions, a 2016 Tufts University study estimated that in its first seven years CETA would result in a net loss of 23,000 Canadian jobs, push down average incomes in Canada by \$2,650, shrink the economy by 0.96% and reduce government revenues by 0.12%.⁹ Bill C-30 does not contain any measures to compensate workers in affected sectors, such as dairy farming or auto manufacturing, or otherwise address the inequitable economic consequences of implementing CETA.

Notes

- 1 Bill C-30: *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures*, 1st Reading, October 31, 2016, 42nd Parliament, 1st Session, 2015-2106, Ottawa: Minister of International Trade, 2016, section 7.
- 2 Council of the European Union, *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part — Statements to the Council minutes*, October 27, 2016, <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>, p. 28.
- 3 Council of the European Union, *CETA Statements*, p. 14.
- 4 See testimony of CETA chief negotiator Steve Verheul in: House of Commons Standing Committee on International Trade, *Evidence* (Issue No. 44, November 15, 2016), 42nd Parliament, 1st Session, 2016, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8598587>.
- 5 See UNCTAD Investment Policy Hub, at <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.
- 6 OECD. “Pharmaceutical spending Total, US dollars/capita, 2014.” <https://data.oecd.org/chart/4HOq>.
- 7 Jennifer Ledwell, “Pharmaceutical patent rights get a boost in Canada under CETA-driven legislation,” November 14, 2016. <https://www.marks-clerk.com/Home/Knowledge-News/Articles/Canadian-IP-law-changes-under-CETA.aspx#.WEavFnOcEkd>.
- 8 Barbara Sibbald, “Brand Name Drug Costs Expected to Rise under CETA,” *Canadian Medical Association Journal*, November 29, 2016. http://www.cmaj.ca/site/earlyreleases/29nov16_brand-name-drug-costs-expected-to-rise-under-ceta-cmaj.109-5363.xhtml.
- 9 Pierre Kohler and Servaas Storm, *CETA Without Blinders: How Cutting ‘Trade Costs and More’ Will Cause Unemployment, Inequality and Welfare Losses*, GDAE Working Paper 16-03, Tufts University, September 2016.



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