Submission to the Parliamentary Committee on International Trade (CIIT)

Regarding 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

Canadian Centre for Policy Alternatives[1]
November 30, 2016

Thank you for the invitation to be part of your deliberations on whether or not Canada should ratify the Comprehensive Economic and Trade Agreement (CETA) with the European Union. The Canadian Centre for Policy Alternatives is an independent, non-partisan research institute with a long record of analyzing Canadian trade and investment treaties, particularly regarding their impacts on public policy, public interest regulation and democratic decision-making. This written submission, accompanying our presentation to the committee, argues that for Canada the costs of ratification outweigh the rather modest trade benefits.

The final version of the CETA text is a lengthy and complex document that needs to be examined thoroughly by parliamentarians. The committee should take the time needed to ensure that all issues are aired and, importantly, that all stakeholders and members of the public who want to be heard are given that opportunity.

CCPA
CANADIAN CENTRE for POLICY ALTERNATIVES
CENTRE CANADIEN de POLITIQUES ALTERNATIVES

Concerns with the process

In that light, the decision to table Bill C-30 without the 21 sitting-days' notice stipulated in the 2008 procedures for ratifying international treaties is regrettable. We note with concern that CETA is being rushed through both the Canadian and EU parliaments with limited debate.

As the committee is well aware, the signing of CETA by EU member states was not a forgone conclusion. The inability of Belgium to sign delayed the Canada–EU summit at the end of October, but there were also concerns raised by several other European governments. These concerns — related to the investment court system, threats to public services, erosion of the precautionary principle and other matters — were ultimately placated through the negotiation of a Canada-EU joint interpretive instrument. This committee will need to understand whether this response actually addresses the identified concerns.

There has also been, to our knowledge, no public discussion of the Canadian government's contingency plans in case one or more EU member states fail to ratify the treaty. While Canada is mirroring the EU's approach to provisional application of CETA, Bill C-30 also contains certain unilateral, non-reciprocal changes to Canadian law, notably regarding supplementary protection certificates. Will these costly changes be permanent, even if CETA ratification fails in Europe? Bill C-30 does not appear to address this possibility.

These are just some of many reasons why sufficient time should be taken to ensure that all the concerns with CETA are fully debated and that interested stakeholders and citizens have the opportunity to be heard.

The conduct and openness of both the Canadian government and the European Union, in ratifying CETA, could well be a factor when European member states vote on CETA ratification over the next several years. Recent events in the U.S. have borne out the risks of a public backlash when complex and controversial trade deals are pushed ahead without full public debate and scrutiny.

Macroeconomic impacts

The macroeconomic impact of CETA will likely be quite modest, or even negative, despite assurances that the deal will provide widespread benefits to Canadians. Barriers to trade are already low between the two economies, so the further elimination of tariffs will have only a marginal impact on trade. This is not to downplay the potential new export opportunities in sectors such as seafood, where EU tariffs peak, or the negative impacts in certain domestic sectors such as autos[2] and dairy, but we need to recognize the limited potential for CETA to affect Canada-EU trade in any significant way.

Few studies exist to quantify CETA's potential macroeconomic impact and those that do are outdated. The widely cited Canada-EU joint study from 2008, for example, does not reflect the final negotiated text of the agreement, is based on deeply flawed assumptions, and therefore offers little indication of CETA's likely consequences.[3] The only economic impact assessment based on the final CETA text, from Tufts University, predicts CETA will actually have a slightly negative effect on the Canadian economy.[4]

According to the Tufts study, CETA will slow Canadian GDP growth by an average of 0.12% per year from 2017 to 2030 and reduce the labour share of income in Canada by 1.74% (the equivalent of 23,000 net job losses). The small transfer of wealth from workers to corporations under CETA will act as a drag on overall economic activity. Furthermore, this study does not account for increased drug costs in Canada as a result of CETA's intellectual property rules (see below), which will greatly add to the economic costs of the deal.

Investment court system

The most controversial aspect of CETA — in the EU as in Canada — is the inclusion of an investor-state dispute settlement (ISDS) process that has no place in any agreement claiming to be "progressive." Canada's NAFTA experience with ISDS speaks for itself. We have been sued more times than Mexico, with corporations successfully challenging non-discriminatory public interest regulations, contrary to the stated purpose of investment protection.[5]

Far from addressing the problems with ISDS, CETA pays lip service to them while entrenching and expanding the ISDS regime through an "investment court system" (ICS). While it improves some procedural aspects of ISDS — for example, by making arbitrators less prone to conflicts of interest — the substantive protections afforded to investors are largely unchanged.

Under CETA, foreign investors still receive special legal rights to sue governments for measures that may negatively affect their investments. These protections, which are not available to domestic investors or ordinary citizens, would expose taxpayers to financial liabilities and threaten to chill progressive public policy. Governments will likely shy away from introducing measures — including those that aim to meet climate obligations in the Paris Agreement — if they are facing threats of costly trade and investment lawsuits from affected foreign investors. Although the investment chapter and the joint instrument refer to a "right to regulate," parties must do so in conformity with their CETA obligations and commitments.

CETA's vague definition of "fair and equitable treatment" in Article 8.10 of the investment chapter says that when assessing whether the provision has been breached, an investor-state tribunal "may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

This language goes beyond protections for foreign investors in NAFTA's investment chapter (Article 1105) and will almost certainly result in more successful investor lawsuits, including those related to environmental protection and natural resource conservation measures. European corporations are very active users of ISDS, having launched half the investor–state cases that have occurred worldwide. This is 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.[6]

These risks represent another liability to the Canadian government that has not been adequately factored into CETA's cost-benefit analyses. Legal fees alone for ISDS cases can run into millions of dollars per case.

Given that Canadian firms will have faster and fairer recourse to European courts for any dispute over European government decisions, there is no convincing argument for creating a separate investor-only arbitration system in CETA. The flipside of this is also true — Canadian courts are more than capable of addressing legal issues related to fair treatment, arbitrary discrimination and/or expropriation raised by European firms.

Patents and drug costs

Canadians already pay more for their drugs than consumers in most other developed countries.[7] This is due, in large part, to an intellectual property rights regime that is extremely favourable to drug patent holders and brand-name manufacturers. While it does not affect the EU's intellectual property regime for pharmaceuticals, CETA is uniquely problematic for Canadians because it will require Canada to make unilateral changes to its patent regulations that will drive drug costs higher.

Canadian negotiators successfully resisted EU demands that Canada extend its period of data protection to 10 years, but agreed to lock in its current levels, which are high by international standards. In addition, CETA will require two major changes to Canadian law. First, Canada must adopt a system of patent term restoration (supplementary protection certificates) 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 18 months.

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. In a 2013 study Joel Lexchin and Marc-André Gagnon estimated that "if CETA was fully implemented today, it would increase the average market exclusivity for patented drugs by 383 days, or 1.05 years, which would bring an additional yearly cost of $850 million, or seven per cent of total annual costs for patented drugs."[8]

These increased costs will put more pressure on provincial health care systems, private drug plans and individual consumers. In fact, the costs of CETA's stricter intellectual property rules are roughly equal to the potential savings to Canadian consumers of tariff elimination on EU imports to Canada (if importers and retailers were to pass along all tariff reductions on EU goods to shelf prices).[9] In other words, the costs of CETA's intellectual property rules nullify the potential benefits to Canadian consumers of tariff elimination.

Public services

Contrary to what Canada and the EU have asserted in their joint interpretive instrument, public services are far from adequately protected in CETA. In fact, they are exposed to a greater extent than in past Canadian free trade agreements — more evidence against the claim that CETA is anything close to a progressive deal.

For example, unlike in any other trade agreement CETA for the first time incorporates the market access restrictions for services into the investment chapter (Article 8.4). It also includes restrictions on how services (publicly and privately delivered) can be regulated (in Chapter 12 on Domestic Regulation) that have been rebuffed in other international fora, including the General Agreement on Trade in Services negotiations.

With respect to public services, the "interpretive instrument" attached to CETA by Canada and the European Commission explains:

> The European Union and its Member States and Canada affirm and recognise the right of governments, at all levels, to provide and support the provision of public services including *in areas such as public health and education, social services and housing and the collection, purification and distribution of water.*

This statement is framed as an illustrative, open list ("areas such as"), but the highlighted sectors are those where both parties have taken Annex II reservations, the strongest allowed by CETA. The declaration is misleading in that it implies all public services are equally protected when in fact CETA contains a patchwork quilt of reservations that provide varying levels of protection for public services.

The "instrument" also says "CETA does not prevent governments from regulating the provision of these services in the public interest." But this is true only if these regulations are consistent with CETA and the parties' obligations and commitments therein. Furthermore, while it's true "CETA will not require governments to privatize any service," the basic purpose of its investment and trade-in-services provisions is to encourage greater liberalization (i.e., foreign competition and therefore commercialization) of services.

A government that hopes to expand services in an area where foreign investors are already established will be exposed to claims for compensation from affected foreign investors (and to government-to-government dispute settlement). CETA allows no reservations against Article 8.12 (Expropriation) or Article 8.10 (Treatment of investors and covered investments). Therefore, even in areas where Canada or the EU has an Annex II reservation (such as for health care or social services) they could still be targeted with investor–state lawsuits from affected foreign investors.

The EU has taken an Annex II reservation for public utilities. This much-criticized reservation is vaguely worded and applies against only one aspect of the market access provisions — the prohibition of monopolies and exclusive service supplier arrangements. It is conceivable, but far from certain, the joint "interpretive instrument," as part of the legal context of the treaty, might encourage tribunals to take a more expansive view of the EU public utilities reservation.

Canada, however, *has not taken a general reservation comparable to the EU's public utilities reservation*. Instead, it takes a sector-by-sector approach to protecting its policy flexibility in the area of public services. For example, Canada has taken an Annex II reservation against market access for drinking water services, but has fully covered wastewater services and a range of other environmental services. In those areas where Canada has not taken a reservation against market access, Canadian governments at all levels cannot restore public monopolies or exclusive services supplier arrangements once the sector is opened up to competition. Existing public monopolies and exclusive supplier arrangements at the local government level are protected by an Annex I general reservation, but these are subject to standstill and ratchet.

These non-conforming measures can only be changed to make them more CETA-consistent (standstill). Furthermore, contrary to what the "instrument" asserts, in these instances, once any government chooses to privatize a service, they or future governments cannot bring these services back under public control without violating CETA's market access obligations (the ratchet effect).

CETA's services and investment obligations cover concessions such as those contracting public and essential services to private providers. At the end of the concession, a government could return the service to the public sector, provided they had a reservation against CETA's market access obligation. However, if a government chose to terminate a concession before the end of its term, or it ended because of a disagreement between the private provider and the public authorities, the party would be exposed to the possibility of an investor–state claim. Disputes over whether the concessionaire had adequately fulfilled the terms of the contract could be decided by investment tribunals, rather than through the domestic courts or according to the dispute resolution provisions specified in the concession agreement.

Canada and the EU should have, and still could, amend CETA to include a fully effective, unequivocal carve-out for public services. One straightforward proposal for such a model clause reads: "This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest."[10]

Domestic regulation

The CETA chapter on domestic regulation (Chapter 12) prescribes and limits how governments, at all levels, may regulate even when there is no discrimination that directly or indirectly favours local companies.[11]

Many key terms in Chapter 12 are undefined, untested or have been given very different legal interpretations in past trade disputes, including within the World Trade Organization. For example, what does it mean to say licensing and qualification procedures must be "as simple as possible," or that they should not "unduly complicate or delay the supply of a service, or the pursuit of any other economic activity"? Likewise, the chapter stipulates that regulatory criteria must be "clear and transparent, objective, and established in advance and made publicly accessible" (Article 12.3 [2]), without clearly defining such tests. Consequently, CETA panels will have too much latitude to second-guess non-discriminatory regulations.

Furthermore, CETA's requirement for criteria underlying licensing and qualification requirements and procedures to be "established in advance" creates the same problems that have been raised in relation to GATS reform proposals.[12] As the chair of the GATS domestic regulation negotiations warned, "a strict interpretation to the word ‘pre-established’ might suggest that it would impose a significant limitation on the right of Members to modify their regulations.”[13]

Yet, the stress in Chapter 12 on maximum simplicity, transparency and impartiality in regulations has sparked relatively little debate. This is unfortunate because CETA greatly expands the reach of such domestic regulation provisions, which have been controversial in other negotiating fora.[14]

For example, Chapter 12 would govern not only the regulation of services but also measures regulating the “pursuit of any other economic activity” that involves the establishment of a commercial presence.[15] These limits on how governments can regulate are also incorporated into the financial services chapter, raising questions about how CETA might limit a government’s ability to respond to financial instability and crises in the future. It would be unwise to gloss over these complexities in CETA, especially since they are not found in any other Canadian trade agreement and we have no way of knowing how they will be interpreted.

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 it did on pharmaceutical patents, Canada made a number of concessions in CETA that may have significant repercussions. Most importantly, CETA’s procurement rules apply to Canadian municipal and provincial governments, as well as the broader public sector (academic institutions, schools and hospitals) for the first time in any Canadian regional trade deal. Previous Canadian free trade agreements have mostly been limited to federal entities, while amendments to Canada’s WTO-level procurement commitments in 2010 included provincial governments, but not local governments or 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 local development tools currently available to and used by many governments. By prohibiting offsets, which are defined as “any condition or undertaking that encourages local development,” CETA’s procurement provisions not only guarantee non-discriminatory but *unconditional* access to the Canadian procurement market for EU suppliers. 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 suppliers.

Under the EU procurement directives Canadian firms with a European presence already have full access to the European procurement market. In practical terms, CETA will create few new opportunities for Canadian suppliers of goods and services but will potentially hamstring the ability of governments at all levels to initiate progressive procurement policies.

Temporary movement of workers

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 Canada cannot limit the importation of temporary workers by EU firms under CETA even in regions where unemployment is high or local workers are available.[16]

The right of temporary entry is actually a right granted to employers to transfer workers across borders or to hire new workers internationally. With the exception of certain categories of professionals, 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.

For Canada, 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 from abroad instead of hiring and training local workers. The temporary entry provisions in CETA stand in contrast to the Canadian Temporary Foreign Worker Program, which requires a labour market impact assessment before migrant workers can be hired.

Sustainable development, labour and environment

In contrast to the strong protections for investors and rights for corporations in CETA, its labour, environment and sustainable development chapters are essentially toothless. The labour rights and environment chapters in CETA are exempt from the general dispute settlement provisions of the agreement. In the event of a dispute over a labour standards violation, CETA merely requires the Parties to engage in non-binding consultations.

In other words, governments down to the local level can lower their environmental or labour standards to attract investment with relatively little public recourse. But when environmental, consumer protection or other standards are strengthened in a way that affects foreign investors they can be disputed before a specialized court with the right to hand out expensive penalties to government. Once again, we ask how such a clear discrepancy between the power of labour and business is acceptable in a deal claiming to be progressive?

Conclusion

As our federal government frequently points out, CETA is much more than a trade deal. It is a complex free trade and investment agreement that should be thoroughly studied before a decision is made on ratification. It is not enough to just to assess which export sectors stand to gain and lose from EU tariff elimination. We hope that by flagging some of CETA's more problematic chapters and provisions we will help you in your deliberations.

With the rejection of a CETA-like agreement between the EU and the United States, much of European public opinion is now squarely focused against this agreement. Moves by the EU parliament to rush through ratifying legislation are unlikely to convince anyone that CETA is truly in their best interests. Given this sensitive political context, particularly in light of the rise of authoritarian populist parties in several European countries, it would be prudent for both Canada and the EU to take the time to get CETA right. The text must be changed, or Canada risks seeing the deal falter in the EU member state ratification process.

Notes

1 This brief was prepared by Scott Sinclair, with assistance from Stuart Trew and Hadrian Mertins-Kirkwood.

2 See Jim Stanford, "CETA and Canada's Auto Industry: Making a bad situation worse." Canadian Centre for Policy Alternatives. May 27, 2014. https://www.policyalternatives.ca/publications/reports/ceta-and-canada%E2%80%98s-auto-industry.

3 See Jim Stanford. "Out of Equilibrium: The Impact of EU-Canada Free Trade on the Real Economy." Canadian Centre for Policy Alternatives. October 27, 2010. https://www.policyalternatives.ca/publications/reports/out-equilibrium.

4 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 (http://www.ase.tufts.edu/gdae/policy_research/ceta_simulations.html).

5 Scott Sinclair, with Hadrian Mertins-Kirkwood. "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015." Canadian Centre for Policy Alternatives. January 14, 2015. https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015.

6 See *UNCTAD Investment Policy Hub*, at http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry.

7 Elizabeth Church, "Canada among top pharmaceutical spenders on OECD list," *The Globe and Mail*, November 4, 2015, http://www.theglobeandmail.com/news/national/canada-one-of-top-pharmaceutical-spenders-on-oecd-list-report/article27086827.

8 Joel Lexchin, Marc-André Gagnon. "CETA and Pharmaceuticals: Impact of the trade agreement between Europe and Canada on the costs of patented drugs." Canadian Centre for Policy Alternatives. October 31, 2013. https://www.policyalternatives.ca/publications/reports/ceta-and-pharmaceuticals.

9 "Based on 2009- 2011 data, once fully implemented, EU exporters would save on average duty payments on industrial goods of €470 million ($CAD 670 million) annually;" European Commission. "CETA: Summary of the Final Negotiating Results." p. 2. http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf

10 See Markus Krajewski. "Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements." Study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions. February 2016. http://www.epsu.org/sites/default/files/article/files/Study%20M%20Krajewski_Model%20clauses%20for%20the%20exclusion%20of%20public%20services_2016.pdf.

11 This section is based on the analysis by Ellen Gould in *Making Sense of CETA*, Canadian Centre for Policy Alternatives. October 2016. https://www.policyalternatives.ca/publications/reports/making-sense-ceta-2016.

12 "'Pre-established' Regulations & Financial Services", Max Levin, Harrison Institute of Public Law, 19 May 2010

13 Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Annotated Text, Informal Note by the Chairperson, Room Document (March 14, 2010), para. 68.

14 Mireille Cossy, "Determining 'likeness' under the GATS: Squaring the circle?", World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2006–08, September 2006, p. 44.

15 Chapter 12 disciplines do not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures "pursuant to an existing non-conforming measure" set out by Canada and the EU in their schedules to Annex I. Strangely, however, only a subset of the stronger Annex II reservations — which are meant to protect or carve out legislative or regulatory space for existing and *future* measures — are protected from Chapter 12.

16 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).

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

www.policyalternatives.ca