

## *Executive summary*

# **In pursuit of a consistent European Parliament position on two transatlantic trade agreements**

**Analysis of the conformity of CETA with the European Parliament's 8 July 2015 Resolution on TTIP**

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As CETA will provide US firms with subsidiaries in Canada investment and trade opportunities in the EU and having regard to the precedential value of CETA for TTIP, it is imperative for the European Parliament to ensure sufficient consistency between its position on CETA and its resolution of 8 July 2015 on TTIP. This study analyses the conformity of CETA with the recommendations that the EP has made in its most recent TTIP resolution. It concludes that CETA deviates significantly from the EP's TTIP recommendations. While CETA is largely in line with the EP's offensive TTIP advices (with regard to liberalisation of services and government procurement or protection of geographical indications), it does not respect important defensive conditions (with regard to the protection of human rights, the use of safeguards and the respect of policy space in the areas of trade in services or investment protection). CETA also clearly disappoints with regard to the wish of the EP to promote social and environmental protection throughout the agreement. These departures from the EP's position risk sending a signal to future FTA partners, the US in particular, that the EU is willing to compromise on some of its core positions.

Since the entry into force of the Lisbon Treaty, the European Parliament (EP) has become unequivocally competent, jointly with the Council, for concluding European Union (EU) trade and investment agreements. It has taken some time (about one legislature) before the European Parliament has fully organised itself to completely fulfil this role. Arguably, and in tandem with the unprecedented public attention for this agreement, the EP is for the first time fully assuming its role as democratic guard of EU trade agreements during the Transatlantic Trade and Investment Partnership (TTIP) negotiations. This has resulted in a clear position towards these negotiations as formulated in its resolution of 8 July 2015.

The EP has acted as a more passive bystander vis-à-vis another transatlantic and comprehensive trade agreement, in the so-called Comprehensive Economic and Trade Agreement with Canada (CETA). Nonetheless, it will have to take position and vote on this agreement late 2016.

This study analyses to what extent CETA complies with the conditions the European Parliament has formulated for its support for TTIP. There are at least two reasons why consistency between the EP's position on CETA and TTIP are imperative. First, as the most ambitious EU trade agreement so far, with an advanced industrialised economy, CETA will act as a precedent for the TTIP negotiations. Every concession or omission that the EU makes in CETA will be difficult to withhold from the US in TTIP. Second, as many US firms have subsidiaries in Canada, certain obligations undertaken in CETA will already affect commercial relations between the EU and American firms. This applies especially to the investment protection chapter. CETA might hence also act as a backdoor for TTIP.

This analysis concludes that CETA deviates significantly from the EP's 8 July 2015 TTIP resolution. While CETA is largely in line with the offensive recommendations of the European Parliament's TTIP resolution, it goes importantly against recommendations about the protection of policy space for governments in the EU when regulating services or investment. CETA also disappoints with regard to the wishes articulated by the EU to use such a comprehensive trade agreement to protect and promote human rights, social and environmental standards. Not only are the chapters on sustainable development, labour and environmental protection not enforceable before the dispute settlement mechanism, these objectives are also nearly completely absent in the rest of the agreement.

## Introduction

This report reviews the text of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada<sup>1</sup> in the light of positions taken by the European Parliament vis-à-vis both the CETA itself and, especially, the Transatlantic Trade and Investment Partnership (TTIP).

CETA is important in its own right and therefore already deserves close scrutiny. If ratified, CETA will be the second most important bilateral trade agreement in force in terms of trade flows<sup>2</sup>. This agreement also is the most ambitious EU trade agreement in terms of scope and depth so far<sup>3</sup>.

But more importantly, it is widely recognised that CETA will have significant spill-over effects on TTIP. As many US multinationals have subsidiaries in Canada, CETA will represent them with new investment and trade opportunities even absent TTIP (act as a backdoor). More crucially, it is often considered to be the case that CETA will act as a precedent for TTIP, in the sense that it is difficult to withhold concessions to and agreements with Canada in CETA from the US in TTIP. For both reasons, **it is imperative for the European Parliament to ensure sufficient consistency between its positions on CETA and TTIP.**

Moreover, the European Parliament has not been involved in CETA as early and extensively as has been the case for TTIP, *inter alia* because the launch of the CETA negotiations (May 2009) preceded the entry into force of the Lisbon Treaty (December 2009) that gave the European Parliament unequivocal consent powers in trade agreements. The TTIP negotiations, on the other hand, have unleashed unprecedented debate on EU trade policy. This has also resulted in a sharpening of the position the European Parliament is taking vis-à-vis 21<sup>st</sup> century trade and investment agreements. The lesser involvement of the EP during the CETA negotiations should be compensated by comprehensive and profound deliberations on the final text. It is fair to say that the positions adopted by the European Parliament on CETA (see *infra*) date not only from a different legislature (with a different composition of the EP) but also from a different era, when EU trade policy was raising less public attention than it does now. They can hence not be the exclusive benchmarks against which CETA should now be tested.

For all these reasons, it seems desirable, timely and necessary to study to what extent CETA is in line with the EP's most recent position vis-à-vis TTIP. This can guide MEPs in their decision on CETA when it will be submitted before the Parliament in late 2016, as is currently expected.

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<sup>1</sup> The consolidated text of the agreement has been made available in September 2014 here: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>2</sup> Canada is the 12th trading partner of the EU. The only higher ranked trading partner with which the EU has a free trade agreement in force is South Korea, see [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_122530.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf).

<sup>3</sup> As has been recognised by Trade Commissioner Malmström for example here: [http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc\\_154022.pdf](http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154022.pdf).

## Data and methodology

The two documents central to this analysis are:

- the consolidated CETA text as published on 26 September 2014
- the European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (P8\_TA-PROV(2015)0252)

Furthermore, two European Parliament positions on CETA are included in the analysis:

- European Parliament resolution of 8 June 2011 on EU-Canada trade relations (P7\_TA(2011)0257)
- European Parliament resolution of 10 December 2013 containing the European Parliament's recommendation to the Council, the Commission and the European External Action Service on the negotiations for an EU-Canada Strategic Partnership Agreement (2013/2133(INI)).

In the remainder of this analysis, we outline the recommendations adopted by the European Parliament vis-à-vis the TTIP negotiations in its resolution of 8 July 2015. For a large selection of these recommendations we analyse to what extent the CETA text is in conformity with them. Where relevant, we complete this comparison with recommendations delivered by the EP in its CETA resolutions of 8 June 2011 and 10 December 2013. The citations and recitals of these resolutions will be taken into account when interpreting the substantial recommendations.

Not all recommendations in the resolution will be discussed<sup>4</sup>. We will only verify if the CETA text complies with recommendations made in the TTIP resolution if these are sufficiently *concrete* and *falsifiable*. For example, the first recommendation of the resolution cited below is too broad and hence not falsifiable:

*'(a) (i) to ensure that transparent ... negotiations lead to an ambitious, comprehensive and balanced trade and investment agreement of a high standard that would promote sustainable growth with shared benefits across Member States, with mutual and reciprocal benefits between the partners, increase international competitiveness and open up new opportunities for EU companies, in particular SMEs, support the creation of high-quality jobs for European citizens, directly benefit European consumers; the content and the implementation of the agreement are more important than the speed of the negotiations;'*

However, most of the vague objectives listed in this recommendation are repeated more concretely later in the resolution and will hence be checked for in the CETA text.

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<sup>4</sup> In total, the 2015 TTIP resolution contains 60 recommendations.

## Analysis

- *'(a) (vi) to ensure ... the inclusion of a legally binding and suspensive human rights clause'*

The CETA in itself does not contain a clause that stipulates that respect for human rights constitutes 'an essential element' of the agreement. It merely reaffirms 'their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights'.

The overarching Strategic Partnership Agreement (SPA) organising the relations between the EU and Canada does contain an essential element clause (art. 2.1), and art. 28.7 of the SPA recognises 'that a particularly serious and substantial violation of human rights ... could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)'. However, what accounts for a 'particularly serious and substantial violation of human rights' is defined very restrictively in Art. 28.3: 'The Parties consider that, for a situation to constitute a "particularly serious and substantial violation" of Article 2(1), its gravity and nature would have to be of an exceptional sort such as a coup d'état or grave crimes that threaten the peace, security and well-being of the international community'.

Consequently, the applicability of the human rights clause is severely limited, also in comparison to other recent EU free trade agreements. This might dilute the EU's ability to include strong human rights clauses in future agreements, including TTIP. This recommendation is less than fully met.

- *'(b) (iii) to have a safeguard clause incorporated in the agreement ... which would be invoked where a rise of imports of a particular product threatened to cause serious harm to domestic production, with specific reference to food production and to the energy-intensive, carbon-leakage, chemicals, raw materials and steel sectors in the EU'*

The CETA does not contain a separate safeguard mechanism. It only reconfirms the rights and obligations of each party under Article XIX of GATT 1994 and the WTO Agreement on Safeguards (Chapter 5). There is additionally a special safeguard for Canada for agricultural products, but none for the EU. The CETA includes neither a 'bilateral safeguard clause' as in the free trade agreement between the EU and the Republic of Korea (KOREU, Chapter 3, Section A)<sup>5</sup>, nor a 'special safeguard clause' for any of the mentioned sectors, as has been attached to KOREU for the car sector at the EU side.

Hence, this recommendation is clearly not met in CETA.

- *'(b) (v) to increase market access for services according to a "hybrid list approach", using for market access "positive lists" ... while ensuring that possible stand-still and*

<sup>5</sup> Also the association agreements of the EU with Central America as well as with Colombia and Peru include bilateral safeguard clauses and stabilisation mechanisms for bananas.

*ratchet clauses only apply to non-discrimination provisions ... and using "negative list approach" for national treatment*

The CETA deviates from the normal practice of the EU by liberalising, for the first time, services through a 'negative list approach'<sup>6</sup>. This means that the obligations of the EU in CETA in terms of national treatment, most-favoured nation, market access, performance requirements and senior management and boards of directors apply for all sectors, unless the parties explicitly list as exemptions measures that are in violation of these obligations in annexes, or sectors where it reserves the right to adopt any new measures. Reservations listed in Annex I exempt existing measures from the CETA obligations while Annex II reservations not only allows countries to maintain in specified sectors measures in violation of the obligations but also to adopt violating measures in the future. A ratchet effect thus applies to those exemptions made in Annex I, where changes can only be made if they go in a more liberalising direction.

The difference between positive and negative listing is clearly significant, and cannot be reduced to a mere 'technical choice', as the European Commission often puts it. As Krajewski notes (2011: 12): 'the negative list approach tends to have more liberalising effect, because all sectors and measures are subject to the core obligations while a positive list approach requires specific liberalisation commitments. The shift from a positive to a negative list approach requires detailed and careful scheduling disciplines as any "omission" of a measure results in a liberalisation commitment ("list it or lose it")'.

In sum, neither the recommendation not to use a negative list approach, nor the advice not to have a ratchet and stand-still clause beyond non-discrimination provisions are met.

- *'(b) (vi) meaningfully address and remove ... restrictions on maritime and air transport services owned by European businesses ... and in relation to capital restrictions on foreign ownership of airlines*

CETA will provide limited additional market access for European companies to carry empty containers, to provide ship cargo from Halifax to Montreal (Canada Federal Annex II), or to bid in dredging projects (Canadian Government Procurement Market Access Offer). CETA does not elevate the restrictions on cabotage, nor does it change the 25% limit on foreign ownership of voting rights in Canadian airlines. Air services are explicitly excluded from Chapter 10 on Investment and Chapter 11 on Cross-border trade in services. CETA does include a number of liberalisation commitments in so-called auxiliary air transport services.

Hence, depending on one's interpretation of the word 'meaningfully', this recommendation is met 'little' to 'some' extent.

<sup>6</sup> For example, in two recent EU free trade agreements with Korea and Singapore that have, respectively, entered into force and been concluded, the EU has held on to the positive list approach.

- (b) (vii) exclude current and future Services of General Interest as well as Services of General Economic Interest from the scope of application of [CETA]

As CETA applies a negative list approach to the liberalisation of services, the unambiguous exclusion of Services of General Interest (SGI) and Services of General Economic Interest (SGEI) (in short: public services) becomes imperative to meet this requirement. As Krajewski argues (2011: 31) 'the distinction between positive and negative list approaches is crucial for the determination of the impact of trade agreements on public services. In particular, while a positive list approach allows countries wishing to maintain a maximum level of regulatory flexibility in a certain sector to refrain from making any commitments in that sector by simply not including it in their schedules, a negative list approach precludes this technique. Instead, countries must list those sectors specifically in their Annexes and also positively mention those measures they wish to maintain or carefully design a regulatory carve-out for future measures'.

However, no such unequivocal exclusion is foreseen. CETA does contain a number of more circumscribed exclusions and reservations that seem to fail to protect public services beyond doubt.

Chapters 10 on "Investment" and 11 on "Cross-border trade in services" do not apply to 'services supplied in the exercise of governmental authority' (Articles 10.1 and 11.1), defined as 'any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers', similar to the GATS Art. I 3(b) exception. This exception has been criticized as being very narrow and risking to expose sectors considered as Services of General Interest or (especially) Services of General Economic Interest to the obligations of CETA. As Krajewski has summarised (2011: 23) '[t]here seems to be a growing consensus in the academic literature and in trade practice that ... [this] only covers those governmental activities which are considered as core sovereign functions (e.g. police, judiciary)... This means that most public services, including social, health, educational services as well as network-based and universal services are not covered by this exemption clause'.

For market access with regard to investment 'in all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators' (EU Annex II). Public utilities are defined to 'exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical. This reservation does not apply to telecommunications and to computer and related services.' This public utilities clause has been criticised as the term 'public utilities' is ambiguous and as these are only exempted from market access obligations, but not other obligations of the agreement. Krajewski concludes that 'this does not provide sufficient regulatory space and flexibility from the domestic regulatory perspective' (2011: 35).

It seems that because of this lack of unambiguous exclusion of public services from the agreement, Germany has chosen to rather be safe than sorry by taking a broad Annex II reservation for health and social services across all five CETA obligations, namely market access, national treatment, most-favoured nation, performance requirements and senior management and boards of directors (EU Annex II: Reservations applicable in Germany).

There is hence no general exception for Services of General Interest and Services of General Economic Interest from the entire application of the Agreement, only a hierarchical combination of exceptions and reservations, leaving parts of the group of SGI and SGEI vulnerable to challenges under the agreement. This important recommendation is thus only partially met.

- (b) (viii) ensure mutual recognition of professional qualifications

CETA contains a separate chapter on the mutual recognition of professional qualifications (Ch. 13) establishing the procedures for such cooperation (and guidelines for agreements in a separate Annex), as well as a 'Joint Committee on Cooperation for the Recognition of Qualifications'. CETA empowers not only Relevant Authorities but also professional bodies to negotiate mutual recognition agreements. In this area, CETA is a living agreement facilitating the future actual mutual recognition of professional qualifications.

This recommendation seems to be met satisfactorily.

- (b) (x) to combine market access negotiations on financial services with convergence in financial regulation at the highest level ... to ensure that these cooperation efforts do not limit the EU and member states regulatory and supervisory sovereignty, including their ability to ban certain financial products and activities

CETA contains a separate chapter on financial services<sup>7</sup> (Ch. 15). The chapter contains obligations not only on market access but also on national treatment and most favoured nation. Furthermore, there are provisions on effective and transparent regulation. There is an article on "prudential carve-out" (art. 15) stating that 'nothing in this Agreement shall prevent a Party from adopting or maintaining reasonable measures for prudential reasons'. However, criticisms have lamented that prudential regulation could still be the subject of litigation under ISDS, while the meaning of "reasonable measures" is unclear.

In sum, this recommendation is met to considerable extent.

<sup>7</sup> Financial services and the issue of prudential carve-out were one of the last outstanding issues in the CETA negotiations that have only been resolved at the very end. While Canada was demanding a strong prudential carve-out, the EU was arguing for an approach that treats financial services more like other services sectors.

- *(b) (xi) to establish enhanced cooperation ... to set global higher standards against financial and tax criminality and corruption*

There are no provisions in CETA on cooperation against financial and tax criminality and corruption. However, the Strategic Partnership Agreement between the EU and Canada does contain a brief and declaratory article on cooperation on taxation (article 11).

Hence, this recommendation is only respected to very limited extent.

- *(b) (xii) to ensure that the EU's acquis on data privacy is not compromised through the liberalisation of data flows ... to incorporate, as a key point, a comprehensive and unambiguous horizontal self-standing provision ... that fully exempts the existing and future EU legal framework for the protection of personal data from the agreement without any condition that it must be consistent with other parts of the [agreement]*

In Chapter 32 on Exceptions, article 2 'General Exceptions', point 2 reads: 'For the purposes of Chapters X, Y and Z (Cross-Border Trade in Services, Telecommunications, and Temporary Entry and Stay of Natural Persons for Business Purposes), Investment Section 2 (Establishment of Investments) and Investment Section 3 (Non-Discriminatory Treatment), a Party may adopt or enforce a measure necessary:

- ...
- (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to
  - ...
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.'

There is consequently not a full exemption of EU acquis on data privacy from the agreement, but a more limited protection of measures that are subject to a *necessity test*. This recommendation is hence not fully met.

- *(b) (xv) to include an ambitious chapter on competition ensuring that European competition law is properly respected particularly in the digital world*

CETA contains a brief chapter (Ch. 19) on Competition Policy, merely confirming the commitment to apply their respective competition laws in a transparent, non-discriminatory and fair manner. Nothing in the chapter is subject to any form of dispute settlement.

Given the word 'ambitious' in this recommendation, it can be concluded that it is only limitedly respected.

- *(b) (xviii) to ensure via a legally binding general clause applicable to the entire agreement, in full compliance with the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, that the parties, reserve their right to adopt or maintain any measure (in particularly those of a regulatory*

*and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity*

The commitment of the Parties to the UNESCO convention is reaffirmed in the preamble of CETA.

In Chapter 8 on Subsidies, Chapter 10 on Investment, Chapter 11 on Cross-Border Trade in Services, Chapter 14 on Domestic Regulation and Chapter 21 on Government Procurement (and repeated in Chapter 32 on Exceptions) the EU has excluded the application of the chapters for "audio-visual services", while Canada carved out the whole "cultural industries". Hence, the reservation taken by the EU to protect cultural and linguistic diversity through a carve-out of cultural services is more limited than is the case for Canada. The reservation is neither an exemption that is applicable to the entire agreement, nor does it guarantee the right to adopt or maintain *any* measure with respect to the protection or promotion of cultural and linguistic diversity as it is limited to the sector of audio-visual services.

Hence, this recommendation is only partially met.

- *(b) (xx) to confirm that fixed book price systems and price fixing for newspapers and magazines will not be challenged by the obligation under the ... agreement*

There are no obligations in CETA on fixed prices for books, newspapers or magazines. However, while Canada has positively excluded 'cultural industries', including 'publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form', the EU has only excluded audio-visual services (see *supra*).

This recommendation is thus not explicitly overstepped, but equally not unequivocally respected.

- *(b) (xxii) ... significantly opening up the [Canadian government procurement] market ... at federal and sub-federal level alike*

For the first time in Canadian history, all sub-federal levels (provincial and municipal government bodies) will be covered by an international trade agreement. This will increase opportunities to the Canadian procurement markets, but effective access will at the same time be limited due to thresholds in terms of value and several specific exceptions. However, it has been criticised on the Canadian side that these commitments can have a significant effect on a number of local employment programs in Canada, like "buy local" food programs of provincial hospitals or schools or the Green Energy Act in Ontario (Sinclair, Trew & Mertins-Kirkwood 2014: 26).

This recommendation is met to significant extent.

- *(b) (xxiv) to promote ... cooperation at the international level in order to promote common sustainability standards for public procurement at all federal and sub-federal levels ... and the adoption and observation of social responsibility standards by businesses based on the Guidelines for Multinational Enterprises of the ... OECD*

There is no explicit engagement in CETA to encourage international cooperation to promote sustainability standards for public procurement.

Respect by enterprises for internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises, is encouraged in the preamble of CETA, but there are no substantial positive obligations in this regard in the rest of the agreement. With regard to bilateral dialogue on raw materials specifically, activities to support corporate social responsibility is encouraged.

This recommendation is hence only partially met.

- (c) (i) ... to support, whilst fully respecting regulatory autonomy, the establishment of a structured dialogue and cooperation between regulators in the most transparent way possible and involving stakeholders; to include cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services ... to ensure similarly that it will not affect standards that have yet to be set in areas where the legislation or the standards are very different in [Canada] as compared with the EU, such as, for example, the implementation of existing (framework) legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals); to ensure that any provisions on regulatory cooperation in [CETA] do not set a procedural requirement for the adoption of Union acts concerned by it nor give rise to enforceable rights in that regard

Regulatory cooperation in CETA might potentially be as contentious as in TTIP, as the EU's and Canada's regulatory systems and philosophies resemble the transatlantic differences between the EU and the US, and Canada has been a complainant before the WTO against EU regulations on the use of hormones in beef, asbestos or genetically modified organisms.

Chapter 26 on Regulatory Cooperation in CETA is, however, much less ambitious than what is negotiated in TTIP. The chapter mainly includes intentions, as can be illustrated by the following paragraph (Article 26.2): 'the parties *may undertake* regulatory cooperation activities, *on a voluntary basis*. For greater certainty, *neither Party is obliged* to enter into particular regulatory cooperation activities, and either Party may refuse to cooperate or may withdraw from cooperation. However, if a Party refuses to initiate regulatory cooperation or withdraws from such cooperation, it should be prepared to explain the reasons for its decision to the other Party' (emphases added). This is followed by articles including soft commitments formulated similarly as 'endeavour to' or 'may include'.

Hence, CETA does not go very far (compared to proposals for TTIP) in including the issues enlisted in this recommendation, while the guarantees about non-interference

with EU levels of protection and regulatory procedures are consequently more certain<sup>8</sup>. This recommendation is consequently met to considerable degree.

- (c) (viii) to define clearly, in the context of future regulatory cooperation, which measures concern TBT and duplicated or redundant administrative burdens and formalities and which are linked to fundamental standards and regulations, or procedures serving a public policy objective

As the CETA chapter on regulatory cooperation is rather vague (see previous bullet point), also no clear demarcation between purely technical standards and administrative burdens and fundamental standards and regulations is made, leaving room for interpretation about which regulations or standards are covered by the regulatory cooperation commitments.

But as these commitments are voluntary, it can be concluded that this recommendation is mostly met.

- (c) (ix) to fully respect the established regulatory systems on both sides of the Atlantic, as well as the European Parliament's role within the EU's decision-making process and its democratic scrutiny over EU regulatory processes when creating the framework for future cooperation while at the same time ensuring the utmost transparency and being vigilant about having a balanced involvement of stakeholders within the consultations included in the development of a regulatory proposal and do not delay the European legislative process; to specify the role, the composition and the legal status of the Regulatory Cooperation Body, taking into consideration that any direct and compulsory application of its recommendations would imply a breach of the law-making procedures laid down in the Treaties; to also monitor that it fully preserves the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies;

That this chapter should not limit 'the ability of each Party to carry out its regulatory, legislative and policy activities' is explicitly recognised, and as the regulatory cooperation activities are formulated as intentions rather than obligations, there seems to be no direct threat to them from more detailed commitments.

The role and composition of the Regulatory Cooperation Forum is specified in article 26.6. As it currently stands, it would have no legislative authority or any other direct effect of its recommendations. However, there are, from a democratic point of view, two potentially dangerous stipulations in article 26.7 on Further Cooperation of the Parties:

- <sup>8</sup> It has to be noted that this EP recommendation for TTIP contains a contradiction by simultaneously calling for the inclusion of 'cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services' while ensuring that 'any provisions on regulatory cooperation in TTIP do not set a procedural requirement for the adoption of Union acts concerned by it nor give rise to enforceable rights in that regard'.

'The <CETA committee to be determined> shall endorse the detailed measures under paragraph 6 within 1 year from the date of entry into force of the Agreement unless extended by the Parties' and 'The Parties may make modifications or corrections to the detailed measures referred to in paragraph 6. Any modification or correction to the detailed measures shall be endorsed by the <relevant CETA committee>'. Hence, the role and composition of the RCF might be changed after the entry into force of the Agreement without the need to go through domestic ratification and hence without control by the European Parliament.

This recommendation is largely respected.

- (d) (ii) to ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda and the core international environmental agreements

This demand for a legally binding sustainable development chapter reiterates the position adopted by the European Parliament in its 2010 resolution on 'Human rights, social and environmental standards in international trade agreements' (P7\_TA(2010)0434), as well as in its 2011 CETA resolution (art. 8).

CETA contains a Chapter (23) on Trade and Sustainable Development and two separate chapters on Trade and Labour (24) and Trade and Environment (25).

The overarching chapter on trade and sustainable development contains the objectives, principles of transparency and co-operation and promotion in the area of sustainable development as well as the institutional arrangements to do so. The two other chapters contain more specific commitments.

Canada has only ratified 6 out of the 8 core labour conventions, failing to ratify ILO core labour conventions 98 (on right to organize and collective bargaining) and 138 (on minimum age). However, the Chapter on Trade and Labour entails merely aspirations of both parties to ratify and effectively implement the 8 core labour conventions, as well as that its labour law and practices promote the Decent Work Agenda.

Moreover, these and other commitments are not enforceable before the dispute settlement mechanism that applies to the rest of the agreement, as art. 11 states that 'For any matter arising under this Chapter where there is disagreement between the Parties, the Parties shall only have recourse to the rules and procedures provided for in this chapter'. The compliance with these commitments is hence merely *promoted* through government consultations, domestic advisory groups and eventually a Panel of Experts that can issue recommendations, but cannot be *enforced* through dispute settlement.

Similar observations with regard to good intentions but lack of enforceability through a real dispute settlement mechanism applies to the Chapter on Trade and Environment.

Hence, because of the lack of enforceability of the provisions on labour and environment, this recommendation is unsatisfactorily met.

- (d) (iii) to ensure that labour and environmental standards are not limited to the trade and sustainable development chapter but are equally included in other areas of the agreement, such as investment, trade in services, regulatory cooperation and public procurement;

Both the broad concept of sustainable development and of labour standards specifically are only mentioned in the respective Chapters (23, 24, 25), in the preamble and the Chapter on Administrative and Institutional Provisions (30), but not in the other areas mentioned.

For environmental standards, there are a number of exemptions from obligations in the Chapter on Investment (art. 10.4: 'measures seeking to ensure the conservation and protection of natural resources and the environment, including limitations on the availability, number and scope of concessions granted, and the imposition of moratoria or bans [are consistent]' or art. 10.11.3 'do not constitute indirect expropriations') and on Government Procurement (art. 21.6: 'for greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment').

But there are no positive obligations to take labour and environmental standards into account in for example government procurement decisions. Hence, this recommendation is met to only very limited extent.

- (d) (iv) to ensure that labour and environmental standards are made enforceable, ... to ensure that the implementation of and compliance with labour provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement

As explained with regard to article (d) (ii), while social partners and civil society are involved in monitoring the implementation of the chapters on sustainable development, labour and the environment, the obligations therein are not made enforceable through the general dispute settlement mechanism applying to the rest of the agreement.

Hence, this recommendation is only partially met.

- (d) (v) to ensure, in full respect of national legislation, that employees of transatlantic companies, registered under EU member state law, have access to information and consultation in line with the European works council directive

There is no reference in CETA to the European works council directive or the rights of employees of transatlantic companies registered under EU member state law to information and consultation.

This recommendation is not respected.

- *(d) (vi) to ensure that the economic, employment, social, and environmental impact of TTIP, is also examined by means of a thorough and objective ex-ante trade sustainability impact assessment (SIA) ... to conduct comparative in-depth impact studies for each Member State and an evaluation of the competitiveness of EU sectors and their counterparts in [Canada] with the aim to make projections on job losses and gains in the sectors affected in each Member State, whereby the adjustment costs could be partly taken up by EU and Member State funding;*

A trade SIA on CETA has been done and the final report has been published in June 2011 (hence when the specifics of the deal were still unknown). This SIA has focused on economic, employment, environment and social consequences. While it has executed disaggregated sectoral analyses, it has not made separate analyses for each of the Member States, these are only sporadically mentioned in terms of current and future market shares and gains.

The Commission has not yet issued a report explaining how it took this SIA (and for example the recommendation to exclude ISDS from the agreement) into account.

All in all, this recommendation is partly met.

- *(d) (vii) to retain the objective of dedicating a specific chapter to energy, including industrial raw materials; ... emphasises that this energy chapter must integrate clear guarantees that the EU's environmental standards and climate action goals must not be undermined;*

CETA does not include a separate chapter on energy and/or raw materials. Commitments are limited to an article (29.5) in Chapter 29 on Dialogues and Bilateral Cooperation where a bilateral dialogue is fostered through the establishment of a forum.

This advice is respected to only very limited extent.

- *(d) (xi) to ensure that [CETA] contributes to the sustainable management of fishery resources, particularly through cooperation between the parties in combatting illegal, unreported and unregulated fishing (IUU)*

Article 25.11 of the Chapter on Trade and Environment includes commitments to act and cooperate to ensure sustainable fishing and combat IUU fishing. Remember, however, that commitments made in this chapter are not enforceable under the dispute settlement procedures that apply to the rest of the agreement.

This recommendation is less than fully met.

- *(d) (xii) to ensure that [CETA] includes a specific chapter on SME's*

CETA does not include a specific chapter on small and medium-sized enterprises. SMEs are only mentioned three times in the entire text, in the chapters on Investment, Electronic Commerce and Government Procurement.

This recommendation is not respected.

- *(d) (xiii) to ensure that [CETA] contains a comprehensive chapter on investment including provisions on both market access and investment protection ... address investors' obligations and responsibilities by referring, inter alia, to the OECD principles for multinational enterprises and to the UN principles on Business and human rights as benchmarks*

CETA does include a comprehensive chapter (10) on investment (covering a very broad definition of 'investment') including provisions on market access (section 2), non-discriminatory treatment (section 3) and investment protection (section 4) as well as investor-state dispute settlement (section 6). However, the Investment Chapter does not include obligations and responsibilities for investors.

This recommendation is hence only partly met.

- *(d) (xiv) to ensure that investment protection provisions are limited to post-establishment provisions and focus on national treatment, most-favoured nation, fair and equitable treatment and protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation; standards of protection and definitions of investor and investment should be drawn up in a precise legal manner protecting the right to regulate in the public interest, clarifying the meaning of indirect expropriation and preventing unfounded or frivolous claims; free transfer of capital should be in line with the EU treaty provisions and should include a prudential carve-out not limited in time in the case of financial crises;*

The first sentence is understood here to mean that investor-state dispute settlement does not cover market access, but only national treatment, most-favoured-nation treatment (both Section 3) and fair and equitable treatment (FET), expropriation and right to compensation (Section 4). This is indeed the case. FET and indirect expropriation are defined to some extent and the right to regulate is recognized with regard to the latter (art 10.9 and Annex 10.11.3), but inevitably there is room for interpretation, for example what constitutes 'a legitimate expectation' of an investor (art. 10.9). Claims manifestly without legal merit (art. 10.29) and unfounded as a matter of law (art. 10.30) may be prevented. A separate annex to the financial services chapter provides a carve-out with regard to investment in financial services 'in pursuance of the preservation of the restoration of financial stability, in response to a system-wide crisis'. Furthermore, an annex on public debt provides an exception for (a negotiated restructuring of) public debt.

Hence, this recommendation is largely met.

- *(d) (xv) to ensure that foreign investors are treated in a non-discriminatory fashion while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where*



*consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives;*

The investor-state dispute settlement mechanism in CETA (Chapter 10, Section 6) does not comply with any of the requirements in this recommendation, as ISDS gives greater litigation rights to foreign than to domestic investors, the ISDS system is not replaced, judges are not publicly appointed and independent and there is no appellate mechanism foreseen (cfr. Van Harten 2014).

Hence, this recommendation is completely breached.

At the time of writing, it is reported that European and Canadian negotiators are exploring the possibility to use the 'legal scrubbing' phase to significantly amend the provisions on investment protection in CETA. This could lead to the (partial) introduction of the reformed approach on investment protection that the European Commission has presented in the context of TTIP, the so-called Investment Court System. However, even under this system, not all aspects of the above recommendations are met. Foreign investors would still get a special status under this system, while the right to regulate is not unambiguously recognized, but subjected to a necessity test, to give two examples.

- *(d) (xvi) to ensure that [CETA] includes an ambitious, balanced and modern chapter on and precisely defined areas of intellectual property rights, including recognition and enhanced protection of geographical indications and reflects a fair and efficient level of protection, without impeding the EU's need to reform its copyright system and while ensuring a fair balance of IPRs and the public interest, in particular the need to preserve access to affordable medicines by continuing to support the TRIPS flexibilities;*

CETA includes an ambitious chapter (22) on intellectual property, including an annex on geographical indications. Flexibilities through the Doha Declaration on the TRIPS Agreement and Public Health of 14 November 2001, the Decision of the WTO General Council of 30 August 2003 on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health and the Protocol amending the TRIPS Agreement of 6 December 2005 are recognised in art. 3 of Chapter 22. However, as elaborated in the next point, it is argued that CETA might lead to higher medicine prices in Canada (cfr. Lexchin & Gagnon 2014), while having little to no foreseeable effect on the EU.

All in all, this recommendation is mostly met.

- *(d) (xvii) ... cautions against attempting to introduce provisions on substantive patent law, in particular with regard to issues relating to patentability and grace periods, into the TTIP*

Art. 9 of Chapter 22 (IPR) on patents includes an art. 9.2 on *Sui Generis* protection for Pharmaceuticals. According to the Canadian Centre for Policy Alternatives, this leads to a de facto extension of patents by up to 2 years for Canada. Art. 9 bis on Patent Linkage Mechanisms Relating to Pharmaceutical Products provides right of appeal to brand

name drug companies against marketing approvals to generic versions of drugs, while art. 10 on Protection of undisclosed data relating to pharmaceutical products locks in Canada's current period of data protection at eight years (Sinclair, Trew & Mertins-Kirkwood 2014: 57-61). All of these do not require changes to the IPR regime for the EU, however.

Hence, it can be concluded that this recommendation is rather not respected.

- *(d) (xviii) to ensure that the IPR chapter does not include provisions on the liability of internet intermediaries or on criminal sanctions as a tool for enforcement, as having been previously rejected by Parliament including the proposed ACTA treaty*

In contrast to earlier leaks of EU demands, the final CETA text does not contain liability rules for internet intermediaries (but rather exceptions to liabilities in art. 5.5 of Chapter 22), or other provisions that reintroduce language from the rejected ACTA.

Hence, this recommendation can be considered as being met.

- *(d) (xix) to secure full recognition and strong legal protection of EU geographical indications*

Chapter 22 includes an art. 7 on Geographical Indications. Annex 1 – Part A to this article provides protection to 173 geographical indications in the EU.

This recommendation is hence met.

- *(e) (ii) ... to improve transparency, including access to all negotiating documents for the Members of Parliament, including consolidated texts*

The CETA negotiations have been held mostly behind closed door, resembling the pre-TTIP approach to trade negotiations by the European Commission. While the European Commission has published a number of statements explaining its position, pro-actively or responding to leaks, it has neither, as in TTIP, published position papers for most of the CETA chapters, nor has it published any textual proposal during the negotiations. Also all the other steps taken by the European Commission as part of its 'transparency initiative' in TTIP have been lacking in CETA.

Hence, this recommendation has rather not been met in CETA.

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## Conclusions

In the new political context since the start of the TTIP negotiations of a more widely and intensely debated EU trade policy, the European Parliament has formulated in July 2015 its recommendations for this transatlantic agreement. Before TTIP will (eventually) be concluded, the EP will have to vote (most likely towards the end of 2016) on another transatlantic agreement, the Comprehensive Economic and Trade Agreement with Canada. As there are obvious links between CETA and TTIP (CETA being widely seen as

a template; the political fact that it is difficult to withhold concessions made to Canada from the United States; and the possibility for American enterprises with subsidiaries in Canada to use certain provisions of CETA), the premise of this report has been that the European Parliament should ensure that there is sufficient consistency between its position adopted vis-à-vis the TTIP negotiations and the position it will take when voting on CETA in the coming months. The risk for the European Parliament of agreeing with provisions in CETA that deviate from its position on TTIP is a loss of influence over the latter negotiations<sup>9</sup>. This might also weaken the hand of EU negotiators in TTIP, as they can less credibly claim that their hands are tight by the position adopted by the EP. Adopting CETA while it deviates significantly from the recent position of the EP on modern trade agreements, might send a signal to the EU's FTA partners that the Union is willing to compromise on its core red lines.

















This report has shown that the CETA text does not fully respect the recommendations of the European Parliament on TTIP, and that on some issues it contradicts the European Parliament's position completely. The offensive interests of the EU are rather well served in CETA, with ambitious tariff, services and government procurement commitments and significant protection of geographical indications. But the sustainability impact assessment on CETA has estimated that this will (only) lead to increases in real GDP in the EU over the long term of 0.02% to 0.03%. On the other hand, where the European Parliament has pleaded to conserve policy space and to use modern trade agreements to not only liberalise trade but also promote sustainable development, the CETA disappoints the recommendations of the EP. This is especially the case with regard to the demands for a safeguard clause, a strong and enforceable human rights clause, the approach to liberalising services, the exclusion of public services, enforceable commitments on labour and environmental standards, the mainstreaming of sustainable development throughout the agreement and, last but not least, the exclusion of ISDS.

Members of European Parliament will have to decide if the increased market access opportunities achieved (resulting in very limited extra growth) outweighs the inherent threats to policy space and lack of genuine promotion of sustainable development in the agreement. More importantly, when making this decision, MEPs should be aware of the consequences their choice will have for their credibility of being willing to uphold their red lines adopted vis-à-vis TTIP and other future trade agreements.





<sup>9</sup> The same goes, by the way, for the important plurilateral trade in services agreement (TiSA) negotiations. The European Parliament adopted by a very wide majority a report (2015/2233(INI)) that lays out recommendations for the TiSA. These recommendations included a call 'to exclude public services and audiovisual services from the scope of application of the agreement, and to take a cautious approach to cultural services' as well as 'to reject the application of standstill and ratchet clauses to all market access commitments and national treatment commitments and to reject their application to sensitive sectors, such as public and cultural services, public procurement, Mode 4, transport, and financial services'. Both recommendations are not met in CETA, and this seems to be in contradiction with another recommendation of the TiSA report, namely 'to ensure synergies and consistency between the bilateral, plurilateral and multilateral agreements currently being negotiated'.

#### ANNEX: graphic overview of compliance of CETA with the European Parliament Resolution of 8 July 2015 on TTIP

Article	Topic	Conformity
(a) (vi)	human rights clause	
(b) (iii)	safeguard clause	
(b) (v)	hybrid list approach to services	
(b) (vi)	eliminate restrictions on transport services	
(b) (vii)	exclusion of public services	
(b) (viii)	mutual recognition of professional qualifications	
(b) (x)	market access and regulatory convergence in financial services	
(b) (xi)	cooperation against financial and tax criminality and corruption	
(b) (xii)	data protection	
(b) (xv)	competition law	
(b) (xviii)	exception culturelle	
(b) (xx)	fixed book, newspaper and magazine prices	
(b) (xxii)	opening of Canadian government procurement at federal and subfederal level	
(b) (xxiv)	promote sustainability and corporate social responsibility in government procurement	
(c) (i)	regulatory cooperation and preservation of standards and regulatory sovereignty	
(c) (viii)	clear demarcation between technical and administrative and fundamental rules and standards	
(c) (ix)	no infringement of decision-making process and clear definition of role and composition of RCF	

(d) (ii)	binding environmental and labour standards	
(d) (iii)	mainstreaming of labour and environmental standards	
(d) (iv)	labour and environmental standards: enforceable, inclusion of social partners, dispute settlement	
(d) (v)	extension of European works council directive	
(d) (vi)	SIA and Member State-level IAs	
(d) (vii)	chapter on energy and raw materials not undermining environmental and climate policies	
(d) (xi)	sustainable fishing	
(d) (xii)	specific chapter on SMEs	
(d) (xiii)	investment chapter including market access and protection, obligations and responsibilities of investors	
(d) (xiv)	conditions for investment protection	
(d) (xv)	replacement of ISDS	
(d) (xvi)	conditions for IPR, including Gis and access to medicines	
(d) (xvii)	no provisions on patent law, patentability, grace periods	
(d) (xviii)	no liability, criminal sanctions for internet intermediaries as in ACTA	
(d) (xix)	full recognition and strong legal protection of Gis	
(e) (ii)	transparency, full access to documents for MEPs	

#### Legend

Colour	Meaning
	The recommendation is mostly to fully respected
	The recommendation is rather respected
	The recommendation is rather violated
	The recommendation is mostly to fully violated

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