

CETA : the Making of the Comprehensive Economic and Trade Agreement Between Canada and the EU



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Canada Program

In France, Canadian issues are often considered through Québec's cultural and political dynamics. It would be unfortunate, however, to miss out on the benefits of the Canadian model out of a lack of interest for the country's Anglophone regions.

The uniqueness of Canada's political institutions stems from the fact that they seek to integrate several layers of diversity: national and linguistic minorities, immigrants from diverse backgrounds and native populations. Today, the country offers an original approach on major topics such as federalism and multiculturalism.

Meanwhile, the aircraft and transportation industry, energy and mining, as well as sustainable development are key to the country's economic prosperity, which is reflected in its international trade policy. Knowing about Canada's economic environment is crucial, especially whilst the Comprehensive Economic and Trade Agreement is in the process of being ratified.

Canada also plays a very special role on the international scene. It was instrumental to the emergence of the concept of peacekeeping missions in the 1950's, an idea that Canada has consistently linked to a foreign policy agenda of poverty reduction and human rights defense.

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Abstract

Once ratified, the Comprehensive and Economic Trade Agreement (CETA) could ultimately eliminate all tariff barriers between the European Union and Canada. CETA is also a new generation Free-Trade Agreement: it includes the opening of public procurement, the facilitation of cross investments and cooperation in the area of regulation.

Its long negotiation process illustrated important changes that are happening in the way trade agreements are negotiated, both in Canada and in the EU.

A wide variety of actors was involved. Because the federal government of Canada cannot implement international commitments in areas of provincial jurisdiction, the European Union requested that the provinces should be included in the discussions – Quebec and Ontario being the most interested. From the EU side, Germany, France and the United Kingdom led the process. Labor and trade unions as well as lobbying groups also supported the project.

Following the signing of the agreement in October 2013, the ratification process was delayed because of the start of the TTIP negotiations between the European Union and the United States. Canadian civil society organizations had already expressed criticism, which was echoed by their European counterparts, particularly worried about the investor state dispute settlement (ISDS) system. The legal scrubbing phase resulted in a compromise on this point.

The new Prime Minister Justin Trudeau, who replaced Conservative leader Stephen Harper in October 2015, has considered the implementation of the agreement as Canada's top priority regarding international trade.

Résumé

Une fois ratifié et mis en œuvre, l'Accord Économique et Commercial Global (AECG) pourrait éliminer presque toutes les barrières tarifaires entre l'Union européenne et le Canada. L'AECG est également un accord de libre-échange de nouvelle génération : il inclut en effet l'ouverture des marchés publics, la facilitation des investissements croisés et la coopération en matière de réglementation.

Cependant, les longues négociations ont montré combien les processus de discussion menant à l'adoption de traités de libre-échange ont évolué, que ce soit au Canada ou au sein de l'Union.

De nombreux acteurs sont intervenus. Parce que le gouvernement fédéral du Canada ne peut pas mettre en œuvre les engagements internationaux relevant de juridictions provinciales, l'Union européenne a demandé que les provinces soient impliquées dans les discussions – le Québec et l'Ontario étant les plus intéressées. Côté européen, l'Allemagne, la France et le Royaume-Uni ont été moteurs. Les organisations syndicales et patronales ainsi que les lobbies ont également soutenu le projet.

À l'issue de la signature de l'AECG en octobre 2013, le processus de ratification s'est trouvé ralenti par le démarrage des négociations entre l'Union européenne et les États-Unis sur le TTIP. Si les organisations de la société civile canadienne avaient déjà exprimé des critiques, elles ont alors été relayées par leurs homologues européennes, inquiètes notamment du système de règlement des différends entre investisseurs et États (RDIE). La phase de révision juridique a abouti à des compromis sur ce point.

Le nouveau premier ministre canadien Justin Trudeau, qui a remplacé le conservateur Steven Harper en octobre 2015, considère la mise en œuvre de l'accord comme la priorité de son pays en matière de commerce international.

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Introduction

The decision on the side of the Canadian government and the EU to start negotiations about a Comprehensive Economic and Trade Agreement occurred at a time when, on the one hand, political and overall public sentiments were driven by a globalization euphoria, and, on the other hand, it became obvious that efforts by the World Trade Organization to foster multilateral trade liberalization were running into serious problems. The way out of the impasse was seen to lay in regional and bilateral agreements. Canada and the EU were among the many political jurisdictions who jumped on this band wagon, and the result has been a mushrooming of preferential trade agreements. Given the long and cordial history of relations between Canada and the EU, the move towards trade negotiations seemed a natural decision. The EU is Canada's second-largest trading partner – behind the United States – accounting for 9.4% of Canada's total external trade in goods in 2014. Canada is the EU's twelfth largest trading partner, accounting for 1.7% of the EU's total external trade in goods in 2014.¹ For Canada, engaging in a large and integrated market such as the EU would open many doors for its businesses outside of a North American context.² As for the EU, ratifying CETA was seen as giving critical clout for the European Commission's "Global Europe 2006 Strategy".³

Engaging in global trade in goods and services is widely considered as a critical ingredient for a strong economic growth path. History supports such a view, at least partially: between 1950 and 2008 global trade increased close to 27-fold; by contrast, global GDP grew seven-fold over the same period⁴. The value for the trade elasticity of income was 1.3 for the period 1950 to 1970, and increased with the second wave of economic globalization to 2.2. for the period 1986-2000. Since then, we observe a return to the relatively lower value of the first period, and for the period

1. See more at: <http://ec.europa.eu>.

2. "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership", A Joint Study by the European Commission and the Government of Canada, 2008.

3. S. Dierckx, "European Unions and the Repoliticization of Transnational Capital: Labor's Stance Regarding FTT, TTIP and CETA", June 2, 2015.

4. B. Hoekman, "The Global Trade Slowdown: A New Normal?", Centre for Economic Policy Research (CEPR), 2015.

2008 to 2013, the elasticity value decreased to 0.7.⁵ The decrease in the value of trade elasticity indicates that it takes a rather strong dose of optimism to expect string effects for domestic growth in income and jobs from the wave of new trade agreements. Optimists are even more challenged with regards to sub-areas of trade, in particular in Europe. The economies of the European Union and in particular the economies of the Eurozone are plagued with a low-growth / low inflation / high unemployment constellation, that makes them entities with relatively low import capacities. And yet, political representatives in Canada as well as in the EU argue that CETA will come with strong positive economic effects for both entities. There are arguments for such an optimistic stance. CETA is more than a trade agreement, and one can even argue that it is an agreement where the reduction of tariffs and quotas is a by-product of a much more comprehensive program of economic liberalization. CETA will remove 100% of customs duties on industrial products, and more than 90% on agricultural products, over the period of a maximum of seven years.⁶ Most prominently, however, CETA is about regulatory cooperation and thus a vehicle that is meant to overcome non-tariff obstacles for cross-border trade in goods and services. Additionally, CETA heralds the international opening of a so-far widely protected market, namely the market for public procurement. And finally it encompasses the mutual regulation of foreign direct investments – one of the foremost vehicles of globalization and the build-up of value chains between national economies.

This report will deal mainly with the political processes in the negotiations between Canada and the EU by analyzing the interplay between main political actors in trade policy-making. Despite the differences in the political and institutional set-up, we argue that Canada and the EU are similar in that in both cases trade liberalization was favored not only by federal agencies (federal government in case of Canada and the Commission in case of the EU) but also by sub-federal units as well as by powerful business organizations. In the case of Canada, main drivers were the provinces of Quebec and Ontario, and in case of the EU it was France, the United Kingdom and Germany that pushed for the start of negotiations. Moreover, in both cases business lobby groups were critical actors. In Canada as well as in the EU, civil society organizations became powerful voices that created massive problems in the end-phase of CETA talks. We will closely analyze the interplay between those groups of actors.

5. C. Constantinescu, A. Mattoo and M. Ruta, “The Global Trade Slowdown: Cyclical or Structural?”, IMF Working Papers, January 2015.

6. See the EU Commission page on CETA here: <http://ec.europa.eu> and the Global Affairs Canada page on CETA here: <http://international.gc.ca>.

When it comes to the respective governance regimes, we are confronted with a paradox. At the request of the EU, Canada included from the very start of the negotiations its ten provinces, three territories and municipalities, not least in order to deal with the fact that the federal government has the right to ratify international agreements but that it comes down to the provinces and territories to implement those agreements. The European Commission, on the other hand, gained the power to conduct trade agreements early on with the Treaty of Rome and so far spearheaded negotiations with little direct involvement from its member states. As we will show, though, the Commission seems to have overestimated its actual power when it comes to CETA. While Canadian civil society groups began lobbying against CETA as early as 2008, civil society groups of EU member states only began lobbying against CETA when the negotiations on an agreement between the US and the EU (TTIP) were launched in July of 2013. Despite starting late, the influence of civil society on the fate of CETA was strong, and actually re-shaped a critical part of the original agreement text.

This paper begins by providing a brief historical overview of trade relations between Canada and the EU; then presents an overview of CETA and the reasons why CETA should be considered a 21st century agreement. We then delve into the interplay of the main actors involved in the CETA processes, in particular the impact of civil society organizations

The start of the negotiations

The trade relationship between Canada and the European Union (EU) dates back to 1959, when the government of Canada and the European Atomic Energy Community (Euratom) agreed to cooperate on the peaceful uses of atomic energy.⁷ More general agreements regarding trade and economic cooperation date back to 1976, with the bilateral “Framework Agreement for Commercial and Economic Cooperation”.⁸ This agreement is the EU’s oldest formal relationship of this type as it marks its first economic cooperation with another industrialized country. A key outcome of this framework was the creation of the Joint Cooperation Committee (JCC). The JCC’s main role, which persists to this day, is to provide a forum for structured dialogue between Canada and the EU. Building upon the wider 1976 agreement, Canada and the EU have conducted multiple sectorial agreements. These include agreements on: Science and Technology (1996), Higher Education and Training (1995,2000), Custom Cooperation (1998), Mutual Recognition (1998), Veterinary Equivalency (1998), Competition Cooperation Agreement (1999) and a Wine and Spirits Agreement (2004).⁹ Beyond these sectorial agreements, there are a variety of agreements in existence that were created to settle specific issues. Examples include the WTO dispute about scallops (1996), and the Bilateral Framework on Regulatory Cooperation and Transparency (2004).¹⁰

In the early 2000s, both Canada and the EU began thinking about the potential benefits of a closer cooperation. Canada was interested in a bilateral trade agreement with the EU because of the EU’s importance in global trade as well as Canada’s strong dependence on its neighbor in the South. Furthermore, the EU’s market contains 500 million potential new consumers for Canadian businesses, with an estimated Gross Domestic Product (GDP) of \$19 trillion USD.¹¹ In March, 2009, Canada published its “Seizing Global Advantages: A Global Commerce Strategy for Securing Canada’s Growth and Prosperity”. This outlines Canada’s commitment to creating a stronger and competitive business environment for Canadian

7. “Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership”, *op. cit.*

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

11. “Canada – European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations”, Foreign Affairs and International Trade Canada.

companies.¹² It states that Canada is striving towards becoming a more competitive player in the North American context. Since its publication, trade between provinces and EU member states has increased. In 2010, Quebec and Ontario were the two largest exporting provinces to the EU. Their total exports valued at \$17.2 billion USD and \$7.7 billion USD respectively.¹³

While Canada's interest in a bilateral agreement with the EU is obvious, the EU's interest in Canada is less evident, as Canada is only the EU's twelfth largest trading partner. The main reason why the EU was interested in starting CETA negotiations may have been the chance to "test" one of the pillars of its 2006 Global Europe Strategy, namely the goal to include public procurement in new trade agreements.

Besides procurement, two other factors as to why the EU was willing to deepen its economic relationship with a seemingly non-crucial economic partner can be seen (i) in the failure of several multilateral trade and investment negotiations, such as the Multilateral Agreement on Investment (MAI) and the WTO Doha Round as well as (ii) the increasing geo-political and geo-economic threat posed by emerging markets such as China.¹⁴ These factors have made the EU more committed towards pursuing its Global Europe Strategy goals through fostering unprecedented economic cooperation with new partners. Furthermore, as the Joint Study (see below) explained, Canada and the EU did not make the best use of their trade potential. The total trade between Canada and the EU is almost the same size as the total trade between India and the EU, yet the Canadian economy is one and a half times larger than the Indian economy. Similarly, Canada's GDP is one and a half times larger than South Korea's, yet EU trade with Canada is 25% less than it is with South Korea.¹⁵ Overall, Canada seemed like an opportunistic choice to begin the more export-driven trade principles laid out in the Global Europe strategy as there is clear room for growth between the two entities as well as a place to test procurement outside of Europe, laying it as a foundation for future Free Trade Agreements (FTAs).

As both parties identified economic potential in a more comprehensive economic cooperation, the EU and Canada further

12. "Seizing Global Advantages: A Global Commerce Strategy for Securing Canada's Growth and Prosperity". March 2009.

13. "Negotiations Towards a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union", Report of the Standing Committee on International Trade, March 2012.

14. S. Dierckx, *Ibid.*

15. "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership", *op. cit.*

discussed possibilities during the Canada–EU summit in Berlin in 2007. During the Summit, the EU and Canada decided to conduct a joint study examining the cost and benefits of pursuing a closer economic partnership. They focused particularly on the potential impact of eliminating existing barriers to trade such as non-tariff barriers, the flow of goods, services and capital.¹⁶ The “Joint Study on Assessing the Cost and Benefits of a Closer EU-Canada Economic Partnership” was released on October 16th, 2008. It outlines potential economic benefits for both the EU and Canada and concludes that the diverse and developed economic ‘DNA’ of the EU and Canada converge on a wide variety of subjects, and that it would therefore be useful to compare policy approaches.¹⁷ It suggests that cooperation could be enhanced in areas relating to energy, the environment as well as science and technology. The study hypothesizes that Canadian industrial and exporting sectors, such as metal, transportation and electronic equipment would benefit most from increased cooperation. As for the EU, the machinery, chemical and transportation sectors are projected to benefit most from CETA.

With the potential economic advantages presented by the joint study, both parties decided to pursue closer economic cooperation during the 2008 Canada-EU Summit in Quebec. The 2008 Summit focused on the analysis and identification of specific subjects that could be covered in the negotiations. As a result, the parties joined and released the “Canada-EU Joint Report: Towards a Comprehensive Economic and Trade Agreement”, in March 2009. The report outlines a broad negotiation agenda, of which trade liberalization is a main component.¹⁸ At the 2009 Canada-EU Summit in Prague, both parties eventually announced the formal start of negotiations.

CETA is the most far-reaching bilateral agreement that the EU has negotiated with any non-EU nation and is more comprehensive than any of the agreements currently in place.¹⁹ CETA will eliminate 98% of custom duties and import tariffs as soon as it is ratified and 100% of tariffs within the next seven years.²⁰ While this trade liberalization is a key feature of CETA, it needs to be stressed that it is not the abolishment of tariffs that

16. “Negotiations Towards a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union”, *op. cit.*

17. “Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership”, *op. cit.*

18. “Negotiations Towards a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union”, *op. cit.*

19. See more at: <http://ukandeu.ac.uk>.

20. See more at: <http://ec.europa.eu>.

makes CETA so important, given that Canada and the EU already have low tariffs. This new-era agreement between Canada and the EU is comprehensive for three main reasons: public procurement, investment, and regulatory cooperation.

The unlimited access to public procurement in CETA will open up two large, externally closed markets. Public procurement already exists within the EU and the emphasis placed by the EU on gaining access to provincial service and procurement is a test-run to get public procurement aboard in other bilateral or multilateral agreements that the EU is negotiating.²¹ If the current CETA draft is ratified, procurement will be the greatest victory for the EU as it has successfully negotiated procurement in a way that shifts it from ‘non-discriminatory’ access to ‘unconditional access’.²² When European Trade Commissioner Cecilia Malmström addressed the European Parliament on December 9, 2015, she referred to procurement as the second major success of the EU in the CETA negotiations (after the elimination of 98 % of duties on exports). She said that “Canada opens up procurement more in CETA than in the WTO’s Government Procurement Agreement, NAFTA, and the Transpacific Partnership.”²³

In terms of trade policy, the final version of the investment chapter in CETA can also be seen as a step into a new direction that sets it apart from other exiting bilateral trade agreements. This last version came into being in a rather unusual way: The initial version of investor state dispute settlement (ISDS) that was part of the investment chapter was modelled along the version that has been used in over 3,000 existing trade agreements.²⁴ Due to the fact that this system is the international norm, neither Canada or the EU could have foreseen civil society discontent with ISDS (see in detail section 2 and 3). When it became obvious that a number of EU member states were running into deep political problems with the initial ISDS version due to strong political opposition of civil society organizations, both sides – encouraged also by the change in federal government in Canada – decided to use the ‘legal scrubbing’ phase for a far-reaching reform of the ISDS-mechanism.

The third component that makes CETA a comprehensive agreement beyond a pure trade agreement is the chapter on regulatory cooperation.

21. Canada-Europe Transatlantic Dialogue: Seeking Transnational Solutions to 21st Century Problems. A. de Mestral and S. Mullen, “The Investment Provisions of the CETA”, *CETA Policy Briefs Series*, October 2013.

22. S. Sinclair, S. Trew and H. Mertins-Kirkwood (eds.), “Making Sense of the CETA – An Analysis of the Final Text of the CETA”, Canadian Center for Policy Alternatives, September 2014.

23. C. Malmström, “CETA: Europe’s Next Trade Step”, European Commission, 9 December 2015.

24. See more at: www.europarl.europa.eu.

One element of regulatory cooperation is the mutual acceptance mechanism, which can take form through approximation, negotiation of mutual recognition (NMR) or mutual recognition agreements (MRAs). Approximation is the most serious form of regulatory cooperation as it attempts to align national legislations. NMRs are more bilateral as two parties are agreeing that specific regulations, while different in form, are equivalent in effect. MRAs are the least ambitious form of regulatory cooperation as they accept differences in national standards and mainly focus on labeling for exports.²⁵ The second element of regulatory cooperation is CETA's negative list approach, which states that all goods and services, except for the ones listed, are subject to liberalization. This is a large expansion in scope for an economic trade agreement, as both sides are agreeing to liberalize sectors that do not yet exist.²⁶

Public procurement, the investment chapter and regulatory cooperation set CETA apart from existing trade agreements. This is important in the context of where future agreements will go, and their level of integration.

25. A. R. Young and J. Peterson, *Parochial Global Europe: 21st Century Trade Politics*, "Chapter 7 – Limited Liberalization through Regulatory Cooperation", 2014.

26. T. Fritz, "Public Services Under Attack – TTIP, CETA, and the Secretive Collusion Between Business Lobbyists and Trade Negotiators", October 2015, available at: www.tni.org.

Multiple Trade Policy Actors

In Canada

Canada is a federal political entity, and this feature is critical with regards to trade policy where the federal government is the actor that negotiates international agreements and treaties but needs the active support of the provinces and territories in order to eventually enact an agreement. Trade policy is one of the political issues that sparked deep debates and also ignited conflicts in the past, and thus is a political arena where not only state actors play a critical role but where civil society organizations have a long history of political voice. When it comes to CETA, three main actors can be identified that pushed negotiations forward. These are the Canadian government, spearheaded by then-Prime Minister Harper; some Provinces, particularly Quebec and Ontario; and finally business lobby groups. Due to the pro-liberalization agenda of the Progressive Conservative Party, the Harper government repeatedly pushed for the CETA negotiations, as it believed that CETA's success would help the Harper government not only in elections but also would create a more competitive economic arena at home. The CETA negotiations represent the first time that Canadian provinces were fully involved in negotiating a FTA. Quebec and Ontario in particular were key initiators throughout the negotiation process, due to their prioritization of an open market economy and the relatively strong orientation of businesses towards EU markets.

The push for CETA was replicated in the sentiments of the population: a 2014 poll, for example, found that a cross party supporter base saw the value in CETA. The data showed also that there were differences between supporters of the main Canadian political parties: whereas 78 % of Conservatives supported the Canada-EU agreement, only about 53 % of NDP voters and 56% of Liberals were in favor of the deal.²⁷ With this information, the Tories attempted to portray the Liberal party as uncommitted to CETA. They also tried to depict the NDP leader Thomas Muclair as unwilling to pursue CETA for ideological reasons. In any case, over the long period of CETA negotiations it was the Conservative Party that spearheaded the pursuit of the agreement.

27. J. Geddes, "Why Stephen Harper has Reason to Celebrate CETA", *Macleans*, August 5, 2014.

Beyond the Harper government, the Canadian provinces are another main actor in the CETA negotiations. Prior consultation mechanisms between the federal government and provinces or territories, held since the 1980's, were not very successful.²⁸ This was the first time they were so heavily involved.²⁹ Past agreements between Canada and the EU indicate that it is hard to achieve a successful FTA without the inclusion of Canadian provinces in negotiations. A push towards a more comprehensive economic agreement was tested with the 2004 "Canada-EU Trade Investment Enhancement Agreement" (TIEA). The TIEA was meant to bring Canada-EU business relations to the next level by expanding trade into areas such as competition, science and technology, e-commerce, and sustainable development.³⁰ Because these sectors lie outside of the national government's jurisdiction, the provinces needed to be involved during the negotiation stages from the very beginning. The EU, however, refused to include the provinces during the initial stages of the negotiations because of their high interest in sub-federal level procurement, which they felt the provinces may not look favorably upon.³¹ The negotiations for TIEA were halted in 2006 after two years of discussions. Many EU officials blamed the Canadian provinces for its failure.³² It is important to note, however, that the agreement encompassed a wide range of procurement issues and the provinces were not consulted until the final negotiation stages.³³ After the failure of the TIEA, the member states of the EU were very indecisive about a FTA with Canada without the inclusion of all Canadian provinces. The strong position of the EU was evident before talks of a Canada-EU CETA began. At the 2007 World Economic Forum in Davos, Quebec Premier Jean Charest raised questions that suggested the interest in a new Canada-EU trade agreement. His suggestion, however, was immediately turned down by the European Trade Commissioner Peter Mandelson when he made it clear that Canada "should not bother... unless the other provinces were on board."³⁴ Mandelson's statement clearly communicated the EU's position on a potential CETA.

28. P. Fafard and P. Leblond, *Twenty-First Century Trade Agreements: Challenges for Canadian Federalism*, The Federal Idea, September 2012.

29. C. J. Kukucha, "Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations", in K. Hübner (ed.), *Europe, Canada and the Comprehensive Economic and Trade Agreement*, New York, Routledge, 2011.

30. Canadian Government – Global Affairs. See more at: www.international.gc.ca.

31. C. J. Kukucha, *op. cit.*

32. C. J. Kukucha, *op. cit.*

33. C. J. Kukucha, "Canadian Sub-Federal Governments and CETA: Overarching Themes and Future Trends", *International Journal*, Department of Political Science, University of Lethbridge, Canada, 2013.

34. K. Dougherty, "Former Premier to Represent Quebec in Trade Talks with EU; Johnson to Spell Out Province's Priorities," *The Gazette*, May 7, 2009.

The inclusion and participation of provinces into the negotiation processes for CETA was discussed numerous times. These discussions concluded that due to Canada's federalist nature, the federal government will hold sole jurisdiction over regulation of trade and commerce. Due to the comprehensive nature of such an agreement, it was projected that there had to be commitments made in areas of shared federal-provincial and federal-territorial jurisdiction.³⁵ The combined efforts of the federal government alongside business lobby groups eventually got provincial governments on board with opening CETA negotiations. Currently, all Canadian provinces, with the exception of Newfoundland³⁶, are in full support of the CETA. This is an unprecedented success of the Canadian government.

Quebec stands out amongst Canadian provinces as an important provincial actor throughout the CETA negotiations. Due to its ties with the EU, specifically its historical ties and bilateral economic relationships with France and the UK, Quebec has always been a strong supporter of CETA.³⁷ Trade is a large component of Quebec's overall economy. Over the past thirty years, Quebec has exported, both within and outside of Canada, more than half of its GDP.³⁸ While the US remains Quebec's largest trading partner, its trade with the EU has increased over the years, with total exported goods equating a total of \$7.4 billion USD per year.³⁹ The negotiations for all provinces in Canada have prioritized open markets with the reduction of tariffs and technical barriers to trade.⁴⁰ However, Quebec was heavily involved throughout the CETA negotiation process since it sought to protect its supply management for all dairy products. The efforts of Quebec have been successful as they are granted the right to keep their supply management. Thus, Quebec had a major influence in the negotiation process, especially towards the end, with regards to the language relating to agriculture in CETA.

35. "Negotiations Towards a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union", *op. cit.*

36. Newfoundland and Labrador had initially withdrawn from the deal over a dispute concerning a "\$400 millions fisheries fund related to the loss of minimum processing requirements under the deal". Prime Minister Justin Trudeau supported the fund during his campaign and it is unclear at this point what the negotiation between the province and the federal government has achieved. Read: James McLeod, "N.L. government still negotiating CETA, premier says", *The Telegram*, March 17, 2016, available at: www.thetelegram.com.

37. "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership", *op. cit.*

38. P. M. Johnson, P. Muzzi and V. Bastien, "The Voice of Quebec in the CETA Negotiations", *International Journal*, December 2013.

39. *Ibid.*

40. C. J. Kukucha, "Canadian Sub-Federal Governments and CETA: Overarching Themes and Future Trends", *op. cit.*

Quebec also identified significant labor market problems caused by demographic challenges. These have been overlooked by many parties, including the European Commission and federal government officials during negotiations. During the early stages of CETA negotiations, Quebec suggested that there should be a section that included the “recognition of professional qualifications”.⁴¹ In order for this to happen, Quebec had to cooperate with other Canadian provincial governments, as well as territorial and the federal governments. All the governments were eventually able to get together and write a final draft. Later on, this was added to the CETA text. Once the agreement is ratified by both parties, this chapter, due to the efforts of Quebec, will allow both Canadian and EU professional associations to conduct mutual recognition agreements.

Besides Quebec, Ontario also plays a key role in the CETA. Although it is difficult to determine Ontario’s role throughout the CETA negotiations, it was important for the federal government to get Ontario on board due to the relatively strong industrial base of the province that may have come under competitive pressure due to far-reaching liberalization policies. Trade figures suggest that Quebec and Ontario are the two provinces with the strongest economic ties to the EU. The EU is Ontario’s second largest export destination and trading partner.⁴² As one of the key manufacturing provinces in Canada, it is important for Ontario’s economy that tariffs on these manufactured goods are eliminated.⁴³ Thus, having access to the world’s second largest market may serve Ontario well.

Business lobby groups also played an influential role throughout the CETA negotiation process. When assessing the overall trend of business groups involvement in CETA, Canadian groups fall behind their European counterparts. The Canadian business input in negotiations has been much lower than initially projected.⁴⁴ The only exception to this is Canada Europe Round Table for Business (CERT) that accompanied the negotiations critically. However, both Canadian and European business groups have been heavily involved with CETA due to Canadian government and EU’s ‘reverse lobbying’. Reverse lobbying is a phenomenon where public authorities lobby business groups to lobby themselves.⁴⁵ For Canada, it was evident that most of the reverse lobbying took place during the initial stages of the CETA negotiations. Trade Minister Peter Van Loan

41. P. M. Johnson, P. Muzzi and V. Bastien, *op. cit.*

42. Government of Canada, “How CETA Will Benefit Ontario”, available at: www.philmccolemanmp.ca.

43. *Ibid.*

44. T. Fritz, *op. cit.*

45. *Ibid.*

exemplifies reverse lobbying when he lobbied local and regional changes of commerce to lobby provincial and territorial governments.⁴⁶

After the successful reverse lobbying of the Harper government, the already pro-CETA groups lobbied the government in order to influence policy and speed up the processes of negotiating their top priorities. For example, on March 12th, 2013, the Canadian Council of chief Executives (CCCE) along with the Canadian Chamber of Commerce and the Canadian Manufacturers and Exporters (CME), sent a joint letter to Edward Fast, who served as the Minister of International Trade from May 2011 to November 2015. The letter was a confirmation as well as a re-assertion of their commitments to the CETA. The letter also proposed that ratifying CETA as quickly as possible should be at the top of Harper's agenda.⁴⁷ Collectively, these business groups represent a large number of Canadian companies and are able to influence policy due to the legitimate relationships they hold with government officials.

While the Canadian business lobby groups are smaller in scope compared to their European counterparts, they are still effective. For example, CCCE members alone collectively administer about \$6 trillion USD in assets and their average annual revenue is estimated to be around \$850 billion USD. This implies that this group is ultimately responsible for the majority of Canada's exports, investment and development.⁴⁸ Moreover, due to the power of these business groups, they are able to meet with government officials on a regular basis, which makes lobbying overall much more effective. For instance, CERT has held a number of Executive Roundtable discussions in Ottawa with CEO's and government officials. During these round-table discussions, they were able to present the policy recommendations that they had drafted. The 2003 "CERT Action Program", for example, was presented to government officials and included draft policy recommendations to remove market distortion inefficiencies in the Canada-EU trade policies.⁴⁹ The policies are then adopted at the Executive Roundtables before being submitted to government officials, who issue recommendations that are discussed during CETA negotiation meetings and Canada-EU Summit meetings.⁵⁰

The Canadian federal government has sole jurisdiction over the

46. "CETA and Corporate Lobbying – Corporations Hold Power Over Negotiations", The Council of Canadians, 2014.

47. "Canada-EU Trade Deal Urged by Business Groups", *CBC News*, March 12, 2013.

48. M. Thompson, "CETA, the Corporate Lobby and the New Transatlantic Economy", *disinfo.com*, June 2015.

49. See more at: <http://canada-europe.org>.

50. See more at: <http://canada-europe.org>.

regulation of trade and commerce of any international bilateral trade agreements that are conducted between Canada and another party. Provinces and territories are typically limited to an advisory role during international trade agreement negotiations. The Canadian Parliament, however, notes that this has been changing over the past years as the role of provinces and territories has been strengthened.⁵¹ As mentioned above, this is due to the fact that these agreements are tapping into sub-federal jurisdiction, where discussions regarding implementation have not been clarified. In order to keep its liability, the federal government typically includes a ‘federal clause’ in all its bilateral and multilateral international trade agreements.⁵² This clause enables the federal government to incorporate provincial jurisdiction into an agreement. It is ultimately used to inform the other party that the federal government may have trouble implementing some parts of the negotiated agreement before any provincial cooperation is assured. In a long term context, however, this clause is not strong enough for Canada to convince its trade partners to sign onto a huge bilateral trade agreement like CETA, without deeper involvement from the provinces.

The Canadian federal system has been undergoing major changes with regards to bilateral trade agreements and the role of provinces. It is important to note that “unlike other federal states, Canada does not have clearly defined constitutional guidelines regarding the international activity of non-central governments.”⁵³ Although the federal government has jurisdiction over trade and commerce, all provinces of Canada are given jurisdiction over property and civil rights. These property and civil rights include the regulation of contracts that are needed to conduct international trade.⁵⁴ It is therefore important that all provinces be involved in trade agreement negotiations to ensure their effective implementation in Canadian law.

The inclusion of provinces into CETA has created a different dynamic during negotiation meetings. The provinces have been involved in all the negotiation rounds that took place from 2009 to 2014. Due to the number of representation from provinces, territories and sometimes municipalities, this has led to a significant Canadian attendance and some representatives have stated that there have been over 100 persons representing the

51. The Parliament of Canada. See more at: www.lop.parl.gc.ca.

52. *Ibid.*

53. C. J. Kukucha, “Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations”, in K. Hübner (ed.), *Europe, Canada and the Comprehensive Economic and Trade Agreement*, New York, Routledge, 2011.

54. *Ibid.*

provinces and municipalities, in contrast to a dozen people on the EU side.⁵⁵ During specific sector negotiations, the ratio of representation from each side was consistent, around fifteen Canadian officials negotiated with two or three European officials.⁵⁶

There has been significant discussion around the implementation of CETA in Canada once it is ratified by the EU. One key reason as to why the EU has pushed for the inclusion of provinces into negotiations is because it will eventually be the provinces that will be given responsibility to implement many of CETA's provisions.⁵⁷ In response to these concerns, the federal government promised to fulfill the responsibility of application and implementation of CETA. With regards to sectors such as agriculture, labor, and energy, which fall under sub-federal jurisdiction, the provinces and territories will be responsible for the application and implantation of CETA within their own jurisdictions.⁵⁸

In the EU

The key players on the European side that pushed for an agreement with Canada were the European Commission (EC), specific member states (France, the UK and Germany), as well as lobby groups. In the course of the negotiations, civil society organization emerged as relevant actors in the process of trade policy-making. The Treaty of Lisbon, concluded in 2007 and entered into force in 2009, confers to the EU exclusive competence over trade in goods and services, commercial aspects of intellectual property and foreign direct investment. Article 207 of the Lisbon Treaty granted the EC these powers and replaced the former agreement concerning trade, Article 133 of the 1957 Treaty of the European Community.⁵⁹ The EC generally acts as the EU's executive and has the sole legislative initiative in most policy areas, trade being one of its competencies.⁶⁰ Within the Commission, bilateral and multilateral trade negotiations are led by the Directorate General (DG) for Trade. The DG-Trade, one of thirty-three DGs, is committed to liberalizing global trade by

55. P. Fafarda and P. Leblond, *Twenty-First Century Trade Agreement: Challenges for Canadian Federalism*, Graduate School of Public and International Affairs, University of Ottawa, September 2012.

56. C. J. Kukucha, "Canadian Sub-Federal Governments and CETA: Overarching Themes and Future Trends", *International Journal*, Department of Political Science, University of Lethbridge, Canada, 2013

57. P. Fafarda and P. Leblond, *op.cit.*

58. "Negotiations Towards a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union", *op. cit.*

59. P. Fafarda and P. Leblond, *op.cit.*

60. K. Archick, "The EU- Q&A. Congressional Research Service", January 19, 2016.

fostering economic, social and environmental development.⁶¹

While the Commission took the lead in the negotiations, France, the UK and Germany were particularly interested in forging a closer relationship with Canada. France's historical connection with Canada and its ongoing extensive economic partnership are the two key reasons why the nation supports CETA. France's historical connection with French-speaking provinces and regions of Canada has created an ongoing cultural exchange between the francophone entities. French people represent the second largest group of people travelling to Canada and France is the third most popular destination for Canadians to travel to, after the US and the UK. This shared cultural heritage translates into strong economic ties. France is Canada's ninth largest trading partner and fourth largest within the EU. In 2014, Canada-France trade amounted to \$9.2 billion CAD. France is also Canada's third largest partner in the world for services, and second largest in Europe. There are 550 French companies in Canada which provide around 96,000 jobs and 220 Canadian companies in France which provide 21,000 jobs.⁶² Several Canadian provinces and territories have their own formal relationship with France, and not surprisingly Quebec has the most extensive relationship.⁶³ The Ministry of Transports of Quebec (MTQ), for instance, does not officially cooperate with European organizations, but does cooperate with France.⁶⁴ Canada and France have created several economic and commercial cooperation mechanisms including a Joint Economic Action Plan, renewed in 2014.⁶⁵

Similar to France, the UK has strong historical and thereby economic ties with Canada. Canada is a member of the Commonwealth and its system of parliamentary democracy is heavily influenced by the British system. Cultural exchange through travel fosters an ongoing connection. The UK is the primary travel destination of Canadians within the EU and the second globally, after the US.⁶⁶ Again, this connection translates into economics. The UK is Canada's most important commercial partner in Europe and second biggest trading partner in the world after the US.⁶⁷ In 2010, bilateral trade accounted to more than \$27.1 billion CAD. There is a particularly strong relationship in Science, Technology and Innovation

61. Directorate General for Trade Management Plan 2015.

62. "Economic Relations Between Canada and France Summary", November 2015.

63. *Ibid.*, p. 3.

64. *Ibid.*, p. 124.

65. See more at: www.canadainternational.gc.ca.

66. See more at: www41.statcan.gc.ca.

67. See more at: www.canadainternational.gc.ca.

(STI) and the UK is a major supplier of Canadian oil imports.⁶⁸ The UK has always positioned itself as a ‘free trade’ advocate and when CETA was taking shape in October of 2013, the UK Government Press released a statement in favor of the agreement.⁶⁹

Besides France and the UK, Germany’s role in CETA cannot be overlooked. It is difficult to pinpoint Germany’s role throughout the CETA negotiation process, as Germany remained publicly relatively quiet about CETA until it took a position against ISDS in 2014. It should be noted, though, that diplomatic representatives state that Germany very much pushed in favor of opening negotiations with Canada⁷⁰.

The third important actors on the European side of the CETA negotiations are the lobby groups. The EU involved lobby groups in the early stages of negotiation talks to help them identify profit-limiting trade barriers with Canada, so that they could work on eliminating those through the proposed agreement.⁷¹ While there are many lobby groups, there are three specifically that are important in the context of CETA: the European Round Table of Industrialists (ERT), BusinessEurope and the European Services Forum (ESF).

The ERT is a forum that brings together fifty Chief Executives and chairs from major multinational companies across a variety of European industrial and technical sectors. It was founded in the 1980s when there was a lack of dynamism, innovation and competitiveness in the European economy that led to a period known as “eurosclerosis”.⁷² ERT was one of the main lobby groups that advocated for the completion of the single market project and wrote “Europe 1990: An Agenda for Action”, which became the basis for the Commission’s White Paper.⁷³ This highlights the extent to which larger lobby groups have been influential in the EU’s liberalization path. ERT is one of the main groups featured in the 2013 documentary “The Brussels Business – Who Runs the European Union” by Friedrich Moser and Matthieu Lietaert.

Another important lobby group is BusinessEurope, which represents twenty million companies across thirty-four countries. Its key aim is to ensure that the interests of European companies are defended in European

68. See more at: www.canadainternational.gc.ca. See also “Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership”, *op. cit.*

69. C. Hermann, “Neoliberalism in the European Union”, *FORBA Discussion Paper*, No. 3/2007, p. 10.

70. Based on talks at UBC that followed Chatham House trules.

71. “CETA and Corporate Lobbying”, The Council of Canadians, available at: <http://canadians.org>.

72. See more at: <http://www.ert.eu>.

73. C. Hermann, *op. cit.*

institutions and to strengthen corporate competitiveness. This group is notorious for having written key portions of the EU's 2006 Global Europe export-led growth strategy, which aggressively pushes for FTAs. BusinessEurope, in the eyes of the civil society sector, is recognized as having "privileged access" to European political leaders. President Jürgen Thimann of BusinessEurope has expressed that he views CETA as a "new benchmark for bilateral economic integration" moving forward, another concern for civil society groups.⁷⁴

The third key group, ESF, that is a member of BusinessEurope, represents more than thirty major service companies across a variety of sectors. These include services such as audio-visual (European Broadcasting Union), water and power (Veolia Environment), finance and insurance (Deutsch Bank AG, Lloyd's of London), postal services, engineering and architecture, and shipping and telecom (France Telecom, Vodafone). ESF was established in the late 1990s by the chairman of Barclays Bank at the request of Leon Brittan, EU Trade Commissioner at the time, so that the group could help the EU with the General Agreement on Trade and Services (GATS) negotiations at the WTO in 2000.⁷⁵

Just as with the Member States, it is challenging to highlight specific examples of these groups' involvement throughout the CETA process. Their long history of collaboration with the EU, and how they have influenced EU trade policy, is evidence of a sturdy relationship. A November 2015 report released by a multitude of NGOs on the Corporate Europe Platform notes that CETA and TTIP are heavily influenced by the 'reverse lobbying' that goes on between the EU and BusinessEurope and ESF.⁷⁶ Furthermore, according to a 2009 Corporate Europe Observatory, a top European trade official admitted that "while the door is open to NGOs [he had] indeed made efforts to make more contacts with business" and as a result "industry walks through that door more often than others."⁷⁷

One can distinguish five main phases for a FTA like CETA. The first phase is the 'prior to negotiation' period that consists of three steps. When the initiative of a trade negotiation emerges within the Commission, the Commission is then required to hold a public consultation. The Commission held a web-based civil society consultation on the various aspects of the Canada-EU trade and investment relationship in February and March of 2008.⁷⁸ The general consensus among respondents was that

74. "CETA and Corporate Lobbying", *op. cit.*

75. *Ibid.*

76. T. Fritz, *op. cit.*

77. "CETA and Corporate Lobbying", *op. cit.*

78. "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership", *op. cit.*

enhanced economic cooperation with Canada was desirable.⁷⁹ After the consultation, the Commission then commissions an assessment of impact report and begins a scoping exercise, which is an informal dialogue with the country they are considering.⁸⁰ The Sustainable Impact Assessment (SIA) totaled 468 pages and was published in June of 2011.⁸¹ This report provided trade negotiators and policy makers with an assessment of economic, social and environmental impacts that are likely to arise from the proposed change in trade policy. A key part of putting together this assessment was to talk and consult with stakeholders and hold meetings in Brussels. The EU reached out to over 350 civil society actors, trade associations, academic institutions and government agencies.⁸² The scoping exercise was discussed at the seventeenth Canada-EU summit in October 2008. The joint scoping group met three times, in 2008 and 2009.⁸³ The Joint Report on the Canada-EU Scoping exercise was released in March of 2009 and paved the way for the start of CETA negotiations at the Canada-EU Summit on May 6, 2009 in Prague.⁸⁴ Last stage in the 'prior to negotiation' period is the mandate stage. Based on the information collected in the first step, the Commission makes a recommendation to the Council to officially begin negotiations. The Council either declines the request or authorizes it, in which case it provides the Commission with a set of 'negotiating directives'. If the Commission negotiates outside of these directives it runs the chance that the Council will ultimately reject the agreement.⁸⁵

Second comes the negotiation stage. While the Commission leads the negotiations, specifically the DG Trade and its negotiation teams and chief negotiators, the process is fluid. The Commission can go to the Council for updated negotiation directives and can pull on expertise from a variety of DGs.⁸⁶ The Commission has to keep two committees informed throughout the negotiation process, the Trade Policy Committee (which is composed of Member State representatives and advises the Council) and the Standing Committee for International Trade of the European Parliament.⁸⁷ The draft texts compiled during negotiations are not made public, and the text is only

79. *Ibid.*

80. "Trade Negotiation Step by Step", DG Trade, 2013, p. 3.

81. "Final Report: A Trade SIA Relating to the Negotiations of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada", European Commission, June 2011. See more at: <http://trade.ec.europa.eu>.

82. See more at: <http://trade.ec.europa.eu>.

83. See more at: www.international.gc.ca.

84. See more at: www.canadainternational.gc.ca.

85. P. Fafarda and P. Leblond, *op.cit.*, p. 15.

86. "Trade Negotiation Step by Step", *op. cit.*, p. 4.

87. P. Fafarda and P. Leblond, *op.cit.*, p. 15.

made public once negotiations are closed. This is when public opinion in Europe claimed there was a lack of transparency in the CETA process. Indeed, a draft was leaked on August 13th, 2014 by German television show Tagesschau.⁸⁸ A draft negotiated text was released by the Commission and the Canadian government in August 2014, however, once negotiations were completed. Both parties subsequently released the final text of CETA on February 29, 2016, once ‘legal scrubbing’ was completed.⁸⁹⁹⁰

The third phase is the initialing phase. This begins when all negotiations and legal scrubbing is complete. Both parties then ‘initial’ the English text of the proposed agreement and then the Council and the Parliament are provided with the text.⁹¹ At this point, the Commission can choose to publish an updated version of the text, with a disclaimer that this is bon-binding. The agreement also needs to be translated into the EU’s twenty-four languages, which is expected to take about six months in the case of CETA.⁹²

The final two stages are signing and ratification. Once the initialing is completed, the Commission proposes that the Council signs the agreement. After the Council has signed it, it moves to the European Parliament for ratification. The agreement then goes back to the Council for a second decision that formally ratifies the agreement for the EU in a final decision to conclude.⁹³

There are cases, however, where the signing and ratification will follow a ‘mixed agreement protocol’, which means that the EU cannot legally conclude the agreement on its own, but that it has to be adopted in the national parliaments of all twenty-eight member states.⁹⁴ It is not yet decided yet whether CETA falls into this category, but in September of 2014, the German Federal Ministry of Economics published its legal opinion on CETA and concluded that it should follow the mixed agreement protocol.⁹⁵ Based on various interviews with EU officials and representatives of member states, it seems fair to conclude that CETA will be categorized as a mixed agreement.⁹⁶

88. See more at: <https://stop-ttip.org>.

89. “Trade Negotiation Step by Step”, *op. cit.*, p. 5.

90. European Federation of Public Service Unions- European Parliament holds first debate on CETA-finally! December 15, 2015. Paragraph 2.

91. “Trade Negotiation Step by Step”, *op. it.*

92. See more at: <https://stop-ttip.org>.

93. P. Fafarda and P. Leblond, *op.cit.*, p.15.

94. “Trade Negotiation Step by Step”, *op. cit.*, p. 6.

95. See more at: www.bmwi.de.

96. Contact Kurt Hübner for details.

Caught between TTIP and ISDS

The dynamics of the CETA negotiations were impacted by the start of the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union in July 2013. Before then, the European Civil Society had shown little interest for CETA. This changed after TTIP negotiations began and were amplified by the May 2014 European Parliament elections.⁹⁷ In Europe, TTIP and CETA became increasingly interconnected, and it was suggested that CETA would not have received any attention from civil society if TTIP negotiations had not started.

CETA negotiations resulted in a paradoxical outcome. At the request of the EU, Canada heavily involved its provinces and territories in the negotiations, partly because the EU anticipated that the public procurement clause would not be seen positively by Canadian provinces. The Canadian side did not have a similar sentiment towards the Commission as it was assumed that trade policy would be mainly in the hands of DG Trade and the Council. As it turned out, DG Trade came under intense pressure from civil society organizations and consequently from some member states that had to deal with massive protests against CETA. Some EU Member States, such as Germany, Austria and France, have vocally proclaimed that they would reject an agreement that includes ISDS. Many of these concerns were raised before CETA negotiations closed in October of 2014, and yet the Commission did not incorporate these concerns into their final negotiations. This showcases that while they were aware of the uncertainty of some Member States, they were confident in their ability to push through the agreement. Furthermore, since the 2009 ratification of the Lisbon Treaty, the Parliament has gained significant power and their support is crucial in ratifying CETA. Additionally, since some European citizens and EU member states had a negative view of the agreement, the Commission would have been well advised to involve them better in the negotiations from the beginning. While the EU was concerned

97. K. Archick, "The 2014 European Parliament Elections – Outcomes and Implications", *The Federation of American Scientists*, July 24, 2014.

about Canada's strong federalism and its implications for CETA negotiations, it arguably over-estimated its own power over the member states, especially in case CETA will be categorized as a mixed agreement.

Across the Atlantic, civil society groups in both Canada and the EU share similar concerns with regards to CETA. In Canada, groups rather quickly focused on public procurement and ISDS provisions. Civil society groups claimed that ISDS gives multinational corporations the ability to automatically sue its partner country at private international tribunals at the cost of environmental, financial and democratic rights.⁹⁸ Another argument against ISDS is that the investor lawsuits could be decided by private multinational companies due to the likelihood that firms may sway some commercial arbitrators to interpret the law in favor of the investor.⁹⁹ Civil society group also note that these court cases will be costly, due to the nature of their complexity and a large majority of the public will be unable to understand them, let alone oppose them. Global statistics indicate that US companies, alongside with Canadian and EU companies, are the most frequent users of ISDS in other bilateral trade agreements.¹⁰⁰

Canadian civil society groups mobilized much earlier than their European counterparts. In large part, this is due to the experience Canada has with other FTAs, the North American Free Trade Agreement (NAFTA) being a good example. This has arguably created an inferiority complex amongst Canadian civil society groups and the majority of the public, as they perceive themselves to be the second best to the United States.

The lack of balance in favour of US companies seems evident in NAFTA's ISDS provision. Under NAFTA, Canada has been sued thirty-five times, and as a result, has had to pay over \$171.5 million CAD to American multinational corporations.¹⁰¹ Thus, Canadian civil society groups as well as those Canadians who are skeptical of CETA extrapolate their political fears and started to apply it towards CETA early on. With NAFTA in mind, civil society groups mobilized much faster than groups in Europe. The Council of Canadians, founded in 1985, mobilizes a network of over sixty chapters across Canada.¹⁰² It is one of the leading civil society groups that has focused on CETA in Canada and raised concerns as early as 2008, when Primers Jean Charest, Dalton McGuinty and Gary Doer, introduced

98. P. Eberhardt, B. Redlin and C. Toubeau, "Trading Away Democracy – How CETA's Investor Protection Rules Threaten the Public Good in Canada and the EU", Scott Harris, November 2014, p. 2.

99. *Ibid.*

100. *Ibid.*

101. *Ibid.*

102. See more at: <http://canadians.org>.

and discussed the potential agreement with European government officials.¹⁰³

Although civil society groups in Canada mobilized more rapidly than European groups, they were less effective in impacting or influencing the CETA negotiation process. They were less effective because of their failure in lobbying the federal and provincial governments. As a result, they had to re-strategize as to how their demands were going to be communicated to Canadian and EU officials. Their new strategy included two components. The first was to reach out to municipalities rather than provincial or the federal government officials. Second, acknowledging the large scale of EU civil society groups, they made attempts to reach out and collaborate with these groups.

One success that Canadian civil society groups did have was their organization of information online. The Council of Canadians was able to set up a CETA Google Group, named “Canada-EU CETA”. They were able to effectively use this online platform to publicize and report any news, press release, schedules of events and civil society campaigns on a regular basis.¹⁰⁴ This platform is still used by many civil society groups as well as scholars such as Scott Sinclair and Stuart Trew, to not only keep track of any news, but also to post any leaked documents regarding CETA.

As mentioned, the ISDS clause has become a hot topic in the agenda of Canadian civil society groups. Many groups express concerns about ISDS because they believe this provision clause will have no social or economic benefits. Moreover, civil society groups claim that the ISDS clause will “undermine [the] democratic rights [of Canadian and EU citizens] to decide public policy and public interest regulations.”¹⁰⁵ However, compared to Europe where civil society groups have been able to collect over 3 million signatures against CETA, Canadian organizations has been fairly ineffective and unsuccessful in raising awareness and protesting against provincial and federal governments. The failure and defeat of civil society groups in Canada can be seen through a recent statement that was published by the incoming trade minister Chrystia Freeland who stated that there was “no opposition” to CETA in Canada when consultations were held.¹⁰⁶

103. S. Trew, “Correcting the Democratic Deficit in the CETA Negotiations: Civil Society Engagement in the Provinces, Municipalities and Europe”, *International Journal*, 2013, p. 570.

104. S. Trew”, *ibid*.

105. P. M. Johnson, P. Muzzi and V. Bastien, *op. cit.*, p. 561.

106. See more at: www.cbc.ca/news.

Until the legal scrubbing of the CETA text was finalized on February 29, 2016, the Canadian government was pushing for keeping the initial ISDS-clause in the text. Canada's adherence to the ISDS system is due to the fact that it is currently involved in a variety of multilateral trade agreements with developing countries and hopes to sign more free trade agreements with other parties in the future. Aaron Cosbey, a development economist at the International Institute for Sustainable Development (IISD) explains the stance of the Trudeau government on ISDS when stating, "Many have [questioned] whether investor-state dispute mechanisms are even needed in an agreement between countries with properly functioning domestic avenues for legal redress. This misses the point. Both Canada and the EU anticipate eventually signing more FTAs with countries where legal systems are not so well developed and neither would want their respective partners in the future agreements citing CETA as precedent for anything less than what they see as strong investor protection."¹⁰⁷ And yet, in February 2016 it was announced that CETA will have a new ISDS mechanism with a new investment court system (ICS). The ICS will have independent, fully qualified judges that will hold transparent proceedings. In addition, the ICS will consist of a Tribunal of First Instance and an Appeal Tribunal.¹⁰⁸

Although the Trudeau government seemed eager to speed up CETA's scrubbing process, many have commented on the influence of US soft power on Canada. In the context of the ISDS dispute, the EU has been trying to introduce the ICS into the TTIP, while the US is uncompromising about sticking to ISDS. It can be argued that the soft power of the US was felt by the Trudeau government and that Trudeau was in a dilemma, caught between accepting ICS in CETA during the scrubbing process (in order to speed up the road to ratification) and enhancing relationships with Washington. Due to the upcoming elections and uncertainty regarding future US trade policy, CETA seemed like a safer choice for Trudeau and he decided to negotiate on specific elements of the ISDS provision during the scrubbing process.

The suggestion to reform the ISDS clause to an ICS clause was introduced during the fall of 2015. Steve Verheul, the leading negotiator for Canada, admittedly stated that the suggestion to reform ISDS came as a "significant surprise".¹⁰⁹

107. A. Cosbey, "Inside CETA: Unpacking the EU-Canada Free Trade Deal", *Biores*, Vol. 8, No. 9, November 3, 2014. p.24.

108. See more at: <http://europa.eu>.

109. J. McGregor, "EU Quietly Asks Canada to Rework Trade Deal's Thorny Investment Clause", *CBC News*, January 21, 2016. See more at: <http://www.cbc.ca/news>.

Two factors contribute to the late, yet unprecedented uniformity amongst EU anti-CETA civil society groups: the beginning of the TTIP negotiations with the United States in July 2013; a generally more skeptical view of globalization and of the promises of free trade in times of economic crisis and uncertainty.

European civil society organizations focused on two CETA topics, ISDS and the fact that the commitments on service were negotiated, for the first time in the EU, on the basis of a ‘negative list’ approach. The main concern with ISDS is that it could unleash a corporate litigation boom against the EU and its member states. Currently, twenty-one out of twenty-eight Member States do not have inter-state arbitration provisions with Canada, which equates to 95 % of the EU economy.¹¹⁰ The original ISDS provision (from the August 2014 text), therefore, was seen as a major change for the EU. The November 2014 report “Trading Away Democracy: How CETA’s Investor Protection Rules Threaten the Public Good in Canada and the EU” by a conglomerate of NGOs and civil society groups argues that ISDS can prevent national governments from acting in the public interest both directly (if its actions trigger a lawsuit) and indirectly (when it fears its actions may trigger a lawsuit).¹¹¹ The report suggests that not exempting regulations in sensitive public service sectors (such as water, education and health for instance) is dangerous.¹¹² Other specific concerns on the European side include the ability of Canadian firms, through ISDS, to attack European policies regarding genetically modified organisms (GMOs) which are stricter than in Canada, under the pretext that preventing GMOs would be a distortion of trade.¹¹³ Another raised concern is that CETA will undermine EU climate policy and its fight against climate change.¹¹⁴ More specifically, civil society argues that the ISDS provision would increase the risk of the EU and Member States being challenged by Canadian investors in the mining and oil and gas sectors.¹¹⁵ Canadian companies are already involved in some controversial natural resource projects within the EU, such as Dalradian Gold Ltd in Northern Ireland, Edgewater Exploration Ltd in Galicia, Spain, and Dundee precious metals in Bulgaria.¹¹⁶ This is worrisome to civil society groups, especially environmental ones, as oil and gas corporations are increasingly turning to

110. S. Trew, *op. cit.*

111. *Ibid.*

112. T. Fritz, *op. cit.*, p. 4.

113. “European Civil Society Calls for a Halt to Negotiations for CETA with Canada”, Association Internationale de Techniciens, Experts et Chercheurs (AITEC), January 11, 2011.

114. *Ibid.*

115. P. Eberhardt, B. Redlin and C. Toubeau, *op. cit.*

115. *Ibid.*

investment arbitration. In 2013, one third of all cases at the International Center for Settlement of Investor Disputes (ICSID) were related to oil, mining or gas.¹¹⁷ Another concern that European civil society groups have concerning ISDS is that many of the Canadian subsidiaries of US headquartered multinational companies will be able to use CETA to launch investor-state challenges against the EU and its Member States, even if the EU were to omit ISDS from the TTIP. This is worrying as US companies dominate the Canadian market, with over half of annual foreign investment into Canada hailing from the US.¹¹⁸ Again, this highlights the idea that EU civil society groups only became vested in the anti-CETA campaign because TTIP negotiations began.

Besides ISDS, the second contentious point in CETA for European civil society groups is its negative list approach. Negative listing means that all services, except the ones listed, are subject to liberalization. This is a radical departure from the EU's positive list system which it has always used and represents a large victory for corporate lobby, as negative listing dramatically expands the scope of trade agreements since governments are agreeing to liberalize sectors that do not yet exist.¹¹⁹ European public sector groups found it unacceptable that the EU changed the way it dealt with public services in trade agreements without discussion with civil society.¹²⁰

Despite only mobilizing three years after negotiations began, a stark contrast to Canada, the campaigns launched by European civil society groups have had much more success than those in Canada in swapping opinion, and represent the largest cohesion amongst civil society in the EU's history. In March 2014, members of various European NGOs came together to discuss creating a European Citizens Initiative (ECI) Against TTIP and CETA. Behind the ECI stand 148 civil society groups from eighteen EU Member States.¹²¹ This represents one of the largest anti-CETA platforms, yet it is fully intertwined with anti-TTIP messaging and only arose with the onset of TTIP negotiations.¹²² Due to the fact that the 1998 Multilateral Agreement on Investment (MAI) was defeated because of civil society resistance, the groups believe they can be successful.¹²³ The

117. *Ibid.*

118. *Ibid.*

119. T. Fritz, *op. cit.*, p. 3.

120. T. Healy, "Canadian and European Unions and the Canada–EU CETA Negotiations", *Globalizations*, Vol. 11, No. 1, February 6, 2014, p. 66.

121. "European Citizens' Initiative Demands: Stop Negotiations for TTIP and CETA", July 15, 2015. See more at: <https://stop-ttip.org>.

122. "What is the Problem?", Blog Stop TTIP. See more at: <https://stop-ttip.org>.

123. "European Citizens' Initiative Demands: Stop Negotiations for TTIP and CETA", *op. cit.*

ECI was launched in July of 2014 in Brussels and sought to gather one million anti TTIP and CETA signatures from across the EU in one year.¹²⁴ Between July 2014 and June 2015, the STOP TTIP ECI campaign collected 3,284,289 signatures from across the EU, meeting their goal by an excess of two million.

The protests were not without echo. Besides the 2013 publication, the Commission launched an online consultation about ISDS in TTIP between March 27 and July 13, 2014. Nearly 150,000 people participated which led to a brief collapse of the Commission's consultation server. The results were clear as 97 % of respondents rejected ISDS. Despite these results, Malmström said that she was against re-opening negotiations, which makes sense as this would have unleashed a Pandora's Box and be politically unheard of.¹²⁵ Taking the results and civil protests into consideration, however, the DG trade identified in their DG Trade Management Plan 2015 that they are aiming to find an effective ISDS mechanism.¹²⁶ The Commission has been successful and proposed a new ISC system that would replace ISDS in all forthcoming European investment negotiations, including TTIP.¹²⁷ When presenting this idea on September 16, 2015 Malmström said "Today, we're delivering on our promise- to propose a new, modernized system of investment courts, subject to democratic principles and public scrutiny.... What has clearly come out of the debate is that the old, traditional form of dispute resolution suffers from a fundamental lack of trust. However, EU investors are the most frequent users of the existing model, which individual EU countries have developed over time. This means that Europe must take the responsibility to reform and modernize it. We must take the global lead on the path to reform... It's very important to have an open and transparent exchange of views on this widely debated issue."¹²⁸ In December 2015, Malmström indicated that with the cooperation of the newly elected Canadian government, the ISDS provisions will be improved through thorough scrubbing.¹²⁹ Across the European Parliament, a significant number of Social Democratic MEPs oppose ISDS. In a speech on November 10, 2015, MEP Soren Moisa said "the number of MEPs opposing

124. M. Perez, "Challenging the Corporate Trade and Investment Agenda in Europe", Institute for Policy Studies, September 7, 2014, p. 2.

125. "What is the Problem?", *op. cit.* See more at: <https://stop-ttip.org>.

126. "Trade Management Plan 2015", Directorate General – European Commission, July 28, 2015, p. 16.

127. See more at: <http://europa.eu>.

128. See more at: <http://europa.eu>.

129. "European Parliament Holds First Debate on CETA-finally!" European Federation of Public Service Unions (EPSU), December 15, 2015. See more at: www.epsu.org and "CETA: Europe's Next Trade Step", *op. cit.*

ISDS is much higher than the number of MEPs opposing CETA. ISDS is the thorn in the flesh of CETA. The only way to confront the issue is head-on.... [as] this is about principles and legitimacy; if an improved text can make the treaty more acceptable and legitimate for European and Canadian society, it would be absurd not to seize the opportunity.”¹³⁰ Gianni Pittella, MEP and S&D leader, and President of Parliament, Martin Schultz, believe that ISDS needs to be upgraded to something like ICS.¹³¹ The fact that the Commission has created an updated ISDS system, ICS, for future FTAs highlights the success of European civil society. While ICS has not been officially included in CETA, the scrubbed CETA draft includes many ICS mechanisms in its ISDS provision. While European groups mobilized later than Canadian ones, their protests were heard and the Commission has made significant amendments to ISDS.

¹³⁰. See more at: www.euractiv.com.

¹³¹. See more at: www.euractiv.com.

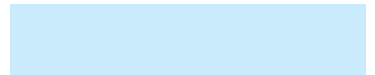
Conclusion

From the very beginning, CETA was seen as an enormously ambitious agreement, in terms of scope and also in terms of setting new norms and rules for trade policy of the EU as well as for Canada. As it turned out, in case of a successful ratification process, CETA also will be seen as an agreement that quite substantially changed the ways of trade policy-making. This holds from the very start for Canada where provinces and territories have been included the first time in trade policy affairs. It also holds for the EU where civil society organizations triggered a re-shaping of the ways trade agreements are negotiated as well as trade policy elements are being defined.

While the European Commission was concerned with gaining the support from Canadian provinces and territories in order to achieve a workable agreement, it overestimated its own capability to create homogeneity and support within its own camp. The Commission neglected to foresee protest by civil society groups and was caught off guard by the mounting protests against some CETA provisions. While CETA remains to be ratified, the agreement is already a success as it was able to change public perception of FTAs and create an expectation for more transparency in future FTA negotiations.

Glossary

- ▀ CAD: Canadian Dollars
- ▀ CCCE: Canadian Council of Chief Executives
- ▀ CERT: Canada Europe Round Table for Business
- ▀ CETA: Comprehensive Free-Trade Agreement
- ▀ CME: Canadian Manufacturers and Exporters
- ▀ EC: European Commission
- ▀ ERT: European Round Table of Industrialists
- ▀ ESF: European Services Forum
- ▀ EURATOM: European Atomic Energy Community
- ▀ FTA: Free-Trade Agreement
- ▀ GATS: General Agreement on Trade and Services
- ▀ GDP: Gross Domestic Product
- ▀ GMOS: Genetically Modified Organisms
- ▀ ICS: Investment Court System
- ▀ ISDS: Investor State Dispute Settlement
- ▀ JCC: Joint Cooperation Committee
- ▀ MAI: Multilateral Agreement on Investment
- ▀ MRA: Mutual Recognition Agreements
- ▀ MTQ: Ministry of Transports of Quebec
- ▀ NAFTA: North American Free Trade Agreement
- ▀ NDP: New Democratic Party
- ▀ NMR: Negotiation of Mutual Recognition
- ▀ TIEA: Trade and Investment Enhancement Agreement
- ▀ TTIP: Transatlantic Trade and Investment Partnership
- ▀ USD: US Dollars
- ▀ WTO: World Trade Organization



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