

## **On the power of and lack of democratic control on the CETA committees (and why this should worry us)**

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### **1. Introduction**

Trade and investment agreements merit special attention. Not only do they contain rights and obligations that are binding under international law like other international agreements, but they also include institutional arrangements that deal with the implementation and enforcement of these obligations. One of the specific features of trade and investment agreements, is that governments can face serious financial consequences in the form of compensation obligations or other sanctions if they are considered to have breached the treaty obligations. This marks a significant difference with other international agreements like international labour, human rights or environmental agreements that have no mechanisms for direct sanctions and remedies.

Trade and investment agreements are thus unique compared to other treaties.

One example of such a treaty is the so called Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada that currently awaits ratification by EU member states.

CETA merits special attention because of the direct implications for people in Canada and the EU and beyond. Reason is that CETA is the new model for EU trade agreements. As the name already clarifies the ambition of the EU for this new model goes far beyond a limited classical trade agreement and instead aspires a much broader and deeper comprehensive bilateral economic agreement. It is this CETA model that currently is also used in the EU negotiations with other countries, such as the ongoing negotiations with Indonesia. So the question if parliaments of EU member-states should agree to the current text of this EU agreement with Canada is broader: should they agree to this more general model or not.

There is a long list of substantive issues that led to wide opposition to the CETA agreement in its current form. The concerns reach from requirements related to commercial use of natural water resources<sup>1</sup>, standards and procedures related to agriculture, food production or other goods and services, far reaching obligations related to intellectual property rights<sup>2</sup>, the resulting preferential

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1 See e.g. <http://europeanwater.org/european-water-resources/reports-publications/674-ceta-and-water-a-guide-for-activists>

2 It is for example believed that the decision by Canada to join the controversial UPOV 91 agreement was driven by the CETA negotiation process. If CETA should fully enter into force, future Canadian governments would be prevented from revising this decision. For more on UPOV 91 and trade agreements see <https://www.bothends.org/en/Whats-new/Publicaties/UPOV-91-and-trade-agreements-Compromising-farmers-right-to-save-and-sell-seeds/>

treatment of foreign investor in the field of investment protection<sup>3</sup>, to the question how to prevent that CETA obligations in the commercial field undermine social and environmental objectives of EU and its member states.

What we want to do in this brief discussion paper is to focus on the institutional arrangements and committees that CETA would create, as provided for in Chapter 26 of CETA. Despite the fact that this is a crucial chapter in the treaty, it hasn't yet received the necessary scrutiny.

The main points of concern are related to the powers granted to the new committees that are formed under this Chapter, in particular their mandate to change the substance of rights and obligation of states under CETA after its ratification despite the fact that they are not under any meaningful democratic control.

## **2. Institutions created by CETA**

CETA includes various new institutions and bodies. When one looks at the CETA text one can distinguish between two types.

### **A) Institutions for implementation and enforcement of the signed CETA text**

The most well known CETA institutions are those set up for the implementation and enforcement of the CETA agreement.

This includes the Investment Court System (ICS) that can decide about financial compensation claims by foreign investors, and that allows foreign investors to make use of the controversial Investor to State Dispute Settlement mechanism (ISDS) of CETA.

Another is the Dispute Settlement Mechanism established in Section C of the CETA text. This mechanism roughly follows the model of the Dispute Settlement Body of the WTO and can decide about the implementation of trade sanctions under Article 29.14 should a breach of certain parts of the CETA text be found.

Besides these two, CETA also includes various other less powerful institutions such as those established in the chapters on trade and substantiate development like the Domestic Advisory Groups.

These institutions and their respective powers currently attract most of the (international) attention. However CETA also includes another type of institutions which urgently need attention because of their potential to undermine existing democratic processes.

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<sup>3</sup> See a.g, the related Open letter to the Dutch government from 2020: <https://www.bothends.org/en/Whats-new/Letters/Open-letter-to-the-Dutch-government-vote-against-CETA/> and the related publication on CETA's Investor Protection Rules from 2016 [https://www.bothends.org/uploaded\\_files/document/CETA-Trading\\_Away\\_Democracy-2016en.pdf](https://www.bothends.org/uploaded_files/document/CETA-Trading_Away_Democracy-2016en.pdf)

## **B) Chapter 26: Institutions of CETA with a mandate to change the rights and obligations of states after ratification**

Besides institutions like those mentioned above, CETA also includes another type of institutions. These are CETA Treaty bodies that have the power to amend the treaty and to adopt new decisions *after* the ratification of CETA and that are legally binding upon the contracting parties. This is regulated in Chapter 26 of CETA on Administrative and Institutional Provisions.

Usually, once a state has signed and ratified a treaty, the substance of the treaty is stable and does not change over time. CETA however, contains various institutional provisions that allow to make changes to the related state obligations.

This innovation marks a significant change for Parliaments and other democratic bodies. In the past, Parliamentarians only had to engage with a treaty text during its negotiation. Once negotiated and ratified, it usually didn't require their attention.

This changes with CETA, which has therefore already been called a "*living agreement*".

### **B.1 The CETA Joint Committee and "specialised CETA committees"**

Chapter 26 of CETA contains the administrative and institutional provisions. It establishes the so called CETA Joint Committee (Art. 26.1) various Specialised committees (Art. 26.2), and it regulates the decision making (Art. 26.3) information sharing (Art. 26.4) and the meetings of these committees, as well as the establishment of a CETA contact point by the parties to the treaty (Art. 26.5)

Central to these arrangements is the Joint Committee. Under its auspices there will be various Specialised committees dealing with specific detailed issues in relation to the treaty chapter for which they will be responsible. Chapter 26 now mentions thirteen of these Specialised CETA committees:

1. – the Committee on Trade in Goods,
2. – the Committee on Agriculture
3. – the Committee on Wines and Spirits
4. – the Committee on Services and Investment,
5. – the Joint Committee on Mutual Recognition of Professional Qualifications,
6. – the Joint Customs Cooperation Committee,
7. – the Joint Management Committee on Sanitary and Phytosanitary Measures,
8. – the Committee on Government Procurement,
9. – the Financial Services Committee,
10. – the Committee on Trade and Sustainable Development,
11. – the Regulatory Cooperation Forum,
12. – the CETA Committee on Geographical Indications,
13. – the Joint Sectoral Group (concerning good manufacturing practices for pharmaceutical products.)

However, this current list of specialised committees might change over time and become longer since CETA not only allows the Joint Committee to change the tasks of the Specialised Committees as agreed in Art.26.1(5)(g) but also to establish new ones, as given by Art.26.1(5)(h)

## B.2 The power of the CETA committees

The creation of all these new administrative institutions that allegedly are of a “purely technocratic” nature is worrisome. CETA confers upon these committees (the Joint Committee and the Special Committees) the power to agree and adopt decisions that are binding upon the contracting parties [Art. 26.2(4)]. The committees are also mandated to amend the Treaty itself [Art.26.1(5)(c)]

Given the powers granted to the state-to-state dispute settlement mechanism of CETA under Art. 29.14 and the Investment Court System, any changes of the rights and obligation of member states that might be introduced by the CETA Committees might have far reaching economic and financial consequences, if a state should be found to have breached these *new* obligations.

## B.3 An example: Art. 8.10(3) of CETA

Under art 8.10(3) the CETA Joint Committee can adopt any extension of the so called ‘Fair and Equitable Treatment’ obligation of the investment protection agreement of CETA. These so called ‘fair and equitable treatment’ (FET) obligations historically have been the main reason for the most far-reaching decisions made by ISDS tribunals in the past. In fact, the fair and equitable treatment (FET) standard has become a “catch-all” clause for investors, allowing them to succeed where their expropriation, non-discrimination and other claims have failed, with the resulting in almost half of all known Investor-State Dispute Settlement (ISDS) claims being based on the failure of states to meet FET obligations.

Already in 2014 a study on the Impact of Investor-State-Dispute Settlement (ISDS) made for the Dutch Ministry of Foreign Affairs explicitly warned that ‘fair and equitable treatment’ (FET) provision “*could be seized by [...] investors to bring ‘long-shot’ claims against the Netherlands aspiring to be awarded damages. Hence careful drafting shall be employed to meet such concerns [...] to limit the types of government measures that could be successfully challenged*”<sup>4</sup> A particular problem in this respect is the notion of investors’ “legitimate expectations,” pursuant to which several tribunals for example decided that states breached their obligations when they denied environmental permits, arguing that the investor had a legitimate expectation to be granted such a

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4 see p.101. In “The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Study”, prepared in 2014 for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands Reference: MINBUZA-2014.78850] available at [https://www.staten-generaal.nl/eu/overig/20140909/resultaten\\_onderzoek\\_naar\\_isds\\_in/document3/f=/vjn8eq227uww.pdf](https://www.staten-generaal.nl/eu/overig/20140909/resultaten_onderzoek_naar_isds_in/document3/f=/vjn8eq227uww.pdf)

permit<sup>5</sup>. But also other generally applicable environmental and health regulations have been challenged for alleged violations of FET obligations.<sup>6</sup>

Because of this, many parliamentarians stated that they only would be able to agree to CETA if there would be a clear definition of the rights and “legitimate expectations” of investors that CETA would want to protect. Consequently, huge efforts were made by proponents of an ISDS mechanism in CETA to restrict related investor rights to a “more acceptable” level. As a consequence, under Art 8.10 (2) a list of six points has been established with a clearer definition when a Government acts in violation of the obligation of “fair and equitable treatment” of an investor.

However, while Parliaments analysing the current CETA text for ratification might find these modified FET obligations acceptable, they also duly should take note of the powers they would grant to CETA committees under Art. 8.10(3) to change these obligations.

Thus, once parliaments ratified the agreement they would not be able to have a similar decision power if the CETA Joint Committee should decide to re-introduce more far reaching obligations that originally had been taken out to make ratification more acceptable to Parliaments.

#### **B.4 The freedom and autonomy of the CETA committees**

The power, freedom and autonomy these CETA Committees are granted are problematic from a point of view of good governance and democratic control.

The freedom and autonomy of the committees is not only reflected by the freedom to decide who would participate in these meetings (Art. 26.2(5)) and to decide on the agenda of the meetings themselves, but also to freely modify their own rules of procedures. (Art. 26.2(4))

Art. 21.1(5)(b) also gives the joint CETA committee more or less full freedom in deciding if and how it wants to engage with the private sector and civil society organisations. This raises concerns about transparency and potentiality selective or preferential access of special interest groups or alleged experts to the related decision making process in these committees.

At the same time external democratic control of the decision making in the committees is frustrated by Art.26.4 on information sharing, that requires that if “*a Party submits information to a committee that it considered as confidential or protected from disclosure under its law the other Party shall treat that information as confidential*”. This is problematic since it gives a Party a lot of leeway to declare something ‘confidential’, without this being checked or challenged.

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5 For example in the ISDS case *Tecmed v. Mexico* arbitrators found - based on the FET clause in the Bilateral Investment Treaty (BIT) between Mexico and Spain - that even though the Environmental Protection Agency’s appeared to have been acting consistent with national law, this did not prevent them from constituting a violation of international law under the BIT Another similar example would be the ISDS case *Renco v. Peru (II)* (PCA Case No. 2019-46)

6 In 2021 UNCTAD reported that in total 33 known ISDS cases directly related to public health have been initiated against developed and developing countries, and that investors in these cases most frequently relied on the FET and indirect expropriation standard [https://unctad.org/system/files/official-document/diaepcbinf2021d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf)

Such freedoms without sufficient checks and balances merit special attention since the CETA committees also have the autonomy to propose new binding obligations of states for adoption by the CETA Joint Committee, or even to take decisions on their own, depending on what the CETA text specifically might provide for.

Art.26.4 on confidentiality of CETA meetings is of particular concern in relation to Art. 26.2(4) that is granting full freedom to committees to modify their own rules of procedures as they see fit, Together, both Articles have shown to form a toxic mix. With as consequence that in the past even the draft agendas of meetings were declared to be secret documents<sup>7</sup> or released only with certain sections blacked out.<sup>8</sup> All this seems to neglect that independent of CETA the EUs' current own internal decision making processes have been widely challenged as being insufficiently transparent and that too many EU internal documents are classified as confidential. This has not only been done so by the EU ombudsman<sup>9</sup> but also by the Dutch government and nine other EU member states<sup>10</sup>

### **B.5 The power of parliaments and democratic controls of CETA committees**

Once instituted it is unclear how democratic control of the CETA committed will be assured since there is no direct formal role foreseen for national Parliaments nor the EU parliament.

Generally speaking, decisions adopted by the CETA Joint Committee, immediately become binding on the parties under international law. In other words; the Committee decision is not subject to any subsequent approval by any other EU or Member State institutions. The decisions become binding on parties merely by virtue of their adoption by the CETA joint committee<sup>11</sup>.

The only way of influencing the decision-making process would require Parliamentarians to have the capacity to follow the discussions in the various CETA committees, organise the related political discussion at the national level and then ensure that their government represents their wishes adequately in the EU Council. This will be very challenging, as currently, Parliamentarians have no independent means to directly control how their government acts in the EU trade policy committee,.

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7 as an example here the leaked confidential Draft agenda for the meeting of the CETA SPS Joint Management Committee <https://stoptipitalia.files.wordpress.com/2018/03/draft-agenda-sps-committee.pdf>

8 as an example how the agendas of CETA committee meetings are censored here the example of the CETA Agriculture Committee 21/09/2020] [https://www.foodwatch.org/fileadmin/-DE/Themen/Freihandelsabkommen/Annex\\_3\\_-\\_Annotated\\_Agenda\\_2020\\_CETA\\_Agriculture\\_Committee\\_meeting\\_.pdf](https://www.foodwatch.org/fileadmin/-DE/Themen/Freihandelsabkommen/Annex_3_-_Annotated_Agenda_2020_CETA_Agriculture_Committee_meeting_.pdf)

9 <https://www.statewatch.org/news/2018/february/eu-refugee-crisis-latest-news-from-across-europe-29-1-18-4-2-18/>

10 in January 2020 the Governments of Netherlands together with, Belgium, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, Slovenia and Sweden highlighted in a joint non-paper that Increasing transparency & accountability are key to a better functioning of the Union' and noted the "current disconnection between the EU's transparency policy and citizens' expectations" <https://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2019/06/18/non-paper---transparency-and-accountability/Non-paper+BE-DEN-EST-FIN-IRE-LAT-LUX-NL-SLOV-SWE.pdf>

11 Weiß, W. (2018). Delegation to treaty bodies in EU agreements: Constitutional constraints and proposals for strengthening the European Parliament. *European Constitutional Law Review*, 14(3), 532-566.

### 3. Conclusions

The power to apply trade sanctions or internationally enforceable compensation claims by foreign investors in case a state should breach its related CETA obligations makes CETA a very powerful agreement.

The institutional arrangement under Chapter 26 that allow CETA committees to change the substance of the rights and obligations of states under this treaty once it has been ratified therefore merit special attention.

This is a matter of concern not only for EU member states and Canada, since it seems to be the intend of the EU to use this *CETA model* of a *living agreement* also for it other future EU trade and investment agreements with other countries.

### 4. Recommended reading:

Meyer-Ohlendorf, Nils; Christiane Gerstetter and Inga Bach (2016): Regulatory Cooperation under CETA: Implications for Environmental Policies. Ecologic Institute: Berlin.

<https://www.ecologic.eu/sites/files/publication/2016/2586-regulatorische-kooperation-greenpeace-ceta.pdf>

Repasi, R. (2017). Dynamisation of International Trade Cooperation - Powers and limits of Joint Committees in CETA. *Questions of International Law*, 2017(41), 73-95.

<http://hdl.handle.net/1765/103933>

Weiß, W. (2018). Delegation to treaty bodies in EU agreements: Constitutional constraints and proposals for strengthening the European Parliament. *European Constitutional Law Review*, 14(3), 532-566. <https://doi.org/10.1017/S1574019618000305>

Stoll, P. T., Holterhus, T. P. and Gött, H. (2015): 'Die geplante Regulierungszusammenarbeit zwischen der Europäischen Union und Kanada sowie den USA nach den Entwürfen von CETA und TTIP'. Vienna: Arbeitskammer, Rechtsgutachten, 2015. Available online at:

[http://www.ablev.de/fileadmin/Dokumente/AbL\\_ev/Welthandel/2015\\_Rechtsgutachten\\_TTIP\\_CETA\\_Regulierungszusammenarbeit.pdf](http://www.ablev.de/fileadmin/Dokumente/AbL_ev/Welthandel/2015_Rechtsgutachten_TTIP_CETA_Regulierungszusammenarbeit.pdf).

The text of the CETA agreement:

[https://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](https://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)