

# Report to the Prime Minister

## The impact of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada on the environment, climate and health

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7 September 2017

*Translated by foodwatch, with the support of  
Campact, Client Earth, Friends of the Earth, Greenpeace Netherlands, Institut Veblen  
from the original document "Rapport au Premier Ministre - L'impact de l'Accord Économique  
et Commercial Global entre l'Union européenne et le Canada (AECG/CETA) sur  
l'environnement, le climat et la santé, 7 Septembre 2017» available at <http://bit.ly/2jNb57D>*

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# SUMMARY

In a Mission letter dated 5 July 2017 to the president of the commission Katheline Schubert, the Prime Minister engaged the commission to "provide an objective, scientific and quantitative perspective on the impact of CETA on the environment, the climate, and health, should all of its provisions be fully enforced". To this end, we were to:

- "evaluate CETA's effect on trade in the various goods and services, according to their carbon footprint, and its direct and indirect effects on greenhouse gas emissions, on the spread of clean technologies, and on production methods";
- evaluate "the consequences of enforcement of the agreement on environmental and sanitary standards in France and the European Union, and on the capacity of states to regulate in the areas of environment and health";
- "formulate recommendations for measures to address the expected negative effects";
- propose "a robust and sustainable framework for monitoring and evaluation of the actual effects of the agreement on the environment, climate and health";
- propose "a methodology for organizing transversal thinking on European trade policy, with particular emphasis on incorporating the issues of conservation of the planet and public health into trade agreements".

Given the very short period of time allowed to us to produce our report, we have been obliged to concentrate on the first four points and have not addressed the future perspectives implied in the last point to any depth. We nevertheless propose some avenues towards this in our conclusion. Neither have we been able to provide original quantitative assessments on the impact of CETA: time was short, and such studies are intrinsically very difficult to perform.

The following introduction must serve as a summary of its contents. We summarize our principal conclusions, the evidence for which is presented and discussed in the main body of the text, and present our recommendations.

This treaty comes in the wake of a very long list of trade agreements signed by the European Union. Negotiated over many years with a country which is close to us in many ways, it has generated concerns and questions in wider society. At the most general level, the reasons for this are doubtless that the expected benefits from free trade agreements have in the past been over-estimated by their advocates, while their redistributive consequences have been minimized, and negative externalities simply ignored. Liberalized trade is yet not always the bearer of a net increase in global well-being: this will increase only when the net economic gains outweigh the losses caused by liberalization (negative externalities). In addition, concerns expressed include the loss of sovereignty, the undermining of democratic principles, and the social dumping which may be caused by free trade agreements. These concerns merit serious appraisal, since It may reveal imprecisions and contradictions in the text of the agreement itself, or its application in practice. The critics of CETA take this approach. Their argument is strengthened by the lack of transparency in the negotiations, the fact that the European Commission and Canada were forced by public pressure to amend the original text on several important points, and to produce an "interpretative instrument" detailing the intentions of both sides on a series of controversial issues.

The final product does not lack ambition. The European Commission and Canada have both made a substantial effort to produce a new-generation agreement, a global agreement, which is said to be "comprehensive". New-generation implies not only the usual concern with a reduction both in customs tariffs – which are already generally low despite some "tariff peaks" in some sectors – and in non-tariff barriers to trade, but also the inclusion of numerous other elements which concern all aspects of the economy, such as investment, public tenders, telecommunications, and online commerce, as well as the environment and health, with the objective of simplifying transactions and closing ties between the EU and Canada across the board. The European Commission and Canada have also taken care to address the question of certain differences in collective preferences between the two entities, and to recognize such differences as legitimate. One of the implications of this is the explicit recognition of the right of the parties to regulate in pursuit of legitimate objectives of public policy, as long as these measures do not constitute a means of arbitrary discrimination or protectionism in disguise.

The final agreement is also very difficult to read and summarize, reflecting the complexity of the procedures and institutions foreseen in the agreement. Strictly speaking, the text of the treaty is completed by three protocols and several annexes, which serve to detail the content of the agreement, to interpret certain provisions, to limit the application of other provisions, or provide for particular exceptions to the commitments of either the EU or Canada. In total these texts run to more than 2,300 pages. To all this must be added the Joint Interpretative instrument and 38 declarations.

The Joint Interpretative instrument is a novelty, and is particularly welcome, since it endeavours to detail simply and clearly a shared interpretation between the EU and Canada in numerous areas which were subject to criticism, such as the right to regulate, co-operation about legislation, investment protection, and environmental protection... Its existence considerably eases the readability of the agreement. Even if its legal scope may raise questions, it shall be taken into account by judges ruling on trade disputes between the parties.

At institutional level, the agreement establishes a variety of different bodies. Two of these are particularly noteworthy: the Investment Court System (ICS) and the Regulatory Co-operation Forum (RCF); but there are many others, including a Joint Committee, and around ten specialized committees. The CETA agreement is said to be living; in other words it has a dynamic, evolving aspect. Like all framework agreements, its content will be detailed and completed by the co-operation bodies it creates. The "living" character of the agreement avoids fixing the relations between the EU and Canada in a rapidly-changing world, but inevitably raises uncertainties and risks as to the manner in which this evolution plays out. This is why it is essential to attentively monitor the operating rules that the co-operating bodies will set up. CETA treaty does not prioritize concerns relating to the protection of the environment

In a very short period of time, the commission has organized hearings of various stakeholders, and has studied the reports and contributions provided by them. The concerns raised by the interested parties have been examined against the 2,300 pages already referenced. Our conclusions to the questions posed directly by the Prime Minister's commissioning letter are as follows:

- The text of the agreement states several times that the existing environmental and sanitary standards in France and the EU shall not be undermined by the CETA agreement. The capacity of the States to regulate in the area of the environment and health is retained as a guiding principle. The existing EU legislation linked to the application of the precautionary principle has not been called into question. The absence of explicit reference to this term in the agreement text however raises uncertainty about the possibility of a dispute with Canada with respect to future legislation.
- There is evidently a tension between the risk of protectionist instrumentalization of environmental and sanitary policy on the one hand, and the risk that private interests contest existing regulations, or block their reinforcement, on the other. These risks are nothing new. The intervention of private interests in the formulation of regulation would exist in the absence of CETA. It must nevertheless be determined whether CETA increases this risk or not, in particular through the operation of the ICS and the RCF.
- Beyond its obvious geopolitical importance, the ICS has no real utility in the relations between the EU and Canada. The only solid justification for its introduction is the desire of the European Union to treat all of its potential trade partners equally and, to this end, to establish a general framework for any bilateral free trade agreements that it may negotiate in future. The ICS might equally be justified by the absence of real or supposed neutrality in national courts' ruling on foreign investors, but this argument may rebound should this system introduce an asymmetry in the treatment of national and foreign companies. Finally, it should be noted that there are great differences to observe between the system in its present form, and private arbitration (nomination of permanent judges by the parties to the agreement with no right to appeal).
- The RCF is a discussion forum, and in view of the reduction in regulatory differences between the EU and Canada, a source of increased cost and reduced effectiveness. When these differences are technical and it acts to harmonize certification procedures, evaluate compliance, or test procedures, the existence of this forum is not criticized. But in the areas of the environment and health, the differences in the regulations reflect the different collective national preferences, not inefficiencies which must be eliminated. The agreement specifies several times that there will be no interference. Moreover, co-operation is purely voluntary (even if the partner which refuses to discuss a harmonization would be obliged to justify this).
- In all, it is very difficult to appreciate the consequence of the ICS and the RCF on the second risk cited above. The agreement text seems to give all necessary guarantees, but it is in the actual functioning of the ICS and the RCF that the risks exist. With respect to the RCF, in order to avoid "regulatory capture", the solution will lie in the care brought to the appointment of its members, and in particular the verification of the absence of conflicts of interest, the transparency of its proceedings, and the proposals which are formulated there. To avoid the ICS mechanism impeding the capacity of the contracting parties to regulate it is imperative that no ambiguity is present in the norms that the tribunals will apply.

- With respect to agriculture, the agreement will bring a limited increase in European imports of Canadian pork and beef, which risks negatively affecting the already weakened EU farm sector, even if it is true that in return the processed dairy products will benefit from recognition of numerous protected geographical indications. But above all, farming practices are very different in the EU and in Canada. Although the agreement provides for the creation of a specific Canadian beef sector guaranteed to be hormone-free for export to the EU and a ractopamine-free pork sector, it is silent on the questions of animal well-being, and feedstuffs of animal origin (meat-and-bone meal or no?) and the use of antibiotics as growth promoters. Moreover, if one considers CETA as a model agreement for future regional agreements, it will be difficult to avoid conceding higher meat tariff quotas to new partners, which may change the scale of the problems significantly. The risk is that CETA does not create favourable conditions for achieving the objectives of the ecological transition in agriculture (with the preservation of pasturage and integrated crop-livestock farming), especially in the long-troubled suckling-cows sector.
- The biotechnology question requires particular vigilance, notably with respect to the new genetic engineering techniques which may be assimilated into transgenic products, thus entering into the area by GMO regulations in Europe, while Canada has already decided not to adopt such regulations.
- The chapters of the agreement concerning the environment have the merit of actually existing, but they do not contain any binding commitment, only reaffirming the partners' general commitment to the environment and sustainable development. The agreement's lack of ambition on this point is regrettable. The agreement has not introduced risks, but rather has missed opportunities. For example, there is no mention of the commitment to reducing subsidies to environmentally damaging practices, and in particular the subsidies to fossil energy and fisheries. This absence is regrettable for the future: should CETA wish to be a model for future agreements, it may be difficult to reach agreement on these kinds of measures with other partners.
- The most notable absence from the agreement concerns climate change. This is explained by the particular political circumstances in Canada at the time of the negotiation of the agreement, and its timing with respect to the Paris Agreement. The absence is evident in three aspects: 1) the purely trade aspects (nothing has been done to limit the trade in fossil fuels and the rise in CO<sub>2</sub> emissions caused by increased shipping and aviation traffic induced by the increased trade flows); 2) the investment aspect (nothing has been done to encourage the updating and adoption of low-carbon technologies, nor any exclusion clause for measures to combat climate change from the ICS); 3) the political economy aspect (nothing for the convergence of legislation or other means to combat climate change).

Given that this is so, without prejudice as to the decision whether or not to ratify CETA, and what may be determined at national and European levels on these subjects beyond this, in particular in the area of agriculture, the commission has formulated the following recommendations.

**1) To continuously assure transparency, particularly with respect to the civil society, and balance between the cooperation regulatory bodies involved**

The proceedings of the Regulatory Co-operation Forum must be completely transparent. In particular this must include the publication of its agenda in advance, the accounts of its proposals and conclusions, and the opinions and position statements of the various authorities on projects affecting regulations, all with sufficient promptness to enable timely reaction to them. It will also be important to assure balanced representation drawn from the breadth of civil society (companies, local authorities, NGOs) within the regulatory bodies set up by the agreement.

**2) Set up a monitoring committee**

The commission recommends that a national committee charged with monitoring the implementation of CETA be set up, which can be consulted to evaluate the sanitary and environmental impact of future free trade agreements, and which will oversee the monitoring of sensitive topics such as new techniques for the obtaining of genetically-modified species and the evolution of regulation of phytosanitary products (for example, the classification of endocrine disruptors). This committee should be composed of scientific experts to assure a multidisciplinary approach.

**3) Complement the ratification instrument**

If it is decided to ratify the treaty, the commission recommends that France complements the deposition of the ratification instrument by the adoption of an interpretative declaration which details the sense in which it has decided to interpret its provisions or procedures, whose scope with respect to sanitary measures and the environment is insufficiently clear within the agreement.

**4) Institute informative labelling about production methods for products of animal origin**

Beyond the derogating "Born, raised, slaughtered" system, it is necessary to put in place a system of consumer information on the type of production (use of antibiotics and growth promoters, animal well-being, environment, transgenic organisms). This will avoid the adopted rules being challenged on the grounds of non-discrimination.

**5) Tighten inspection and certification procedures for animal and plant products**

For animal products, the commission advises that the inspections and tests (for hormones and ractopamine) of Canadian meat arriving at European borders be reinforced. The commission recommends that the OAV be instructed to travel to Canada as soon as possible to assure the effectiveness of "hormone-free" and "ractopamine-free" certification programmes there, and to obtain guarantees on the resources mobilized to respond to the substantial increases in such trade flows. For plant products, an OAV inspection mission will be necessary to ensure that the various derogations granted to Canada for the importation to the EU of several species of wood are being respected.

**6) Insist on the necessary reciprocity in future negotiations**

The commission considers that the European Commission should adopt a more balanced attitude to the negotiations of the agricultural aspects of the free trade agreements. It



currently deals with third-country requests for recognition of EU sanitary standards for open markets and lifting sanitary barriers to market entry in third countries by two different pathways. In the name of reciprocity, an improvement in European coordination would allow the sanitary barriers in place in third countries to be taken into account before granting access to the European market to food products from those third countries.

Based on the conclusions of the European Council meeting of 21 October 2016 which indicates that "the commercial interests of the EU imply notably to fully assure the defence and promotion of social and environmental norms which benefit the consumer", reciprocal measures should be introduced into European legislation with the aim of avoiding distortions caused by free trade agreements.

#### **7) Introduce a climate "veto" to the protection of investments**

Should a foreign investor initiate a dispute to contest a measure adopted to combat climate change, the commission recommends the introduction to the CETA treaty of procedures which will allow the contracting parties to determine, elsewhere than an ICS tribunal, if such a measure is in accordance with the treaty. If the contracting parties find it in accordance, the case of the investor will be rejected. In practice, such a "veto" mechanism will permit contracting parties to ensure that their climate policies are unhindered by challenges based on the investment chapter procedures.

#### **8) Compensate for the negative direct effects of CETA on the climate by the possible introduction of complementary provisions within the treaty, or by a specific bilateral agreement between the EU and Canada**

Should it be judged impossible to reopen a discussion on the text of the agreement, the commission recommends the negotiation and conclusion, in parallel with the finalization of CETA, of a climate agreement between the EU and Canada which assures that CETA is carbon-neutral, interconnects carbon trading agreements, and introduces specific taxation on maritime transportation. It is desirable that Canada and the European Union jointly promote a global price for carbon in the context of the joint actions to which the two parties are already committed.

#### **9) Press for the restriction of petroleum extraction from tar sands**

At bilateral level, the commission recommends the prioritization of the question of non-conventional petroleum resources on the agenda of the Regulatory Co-operation Forum, including the study of procedures which aim to forbid or limit their usage by Member States who wish to do so, and the regulation of investments which aim to explore for or extract fossil resources. Unilaterally, the European Union should proceed to a revision of the Directive concerning the quality of petrol and diesel fuels, to take clear account of the real difference in greenhouse gas emissions between different products.

#### **Guidance for future agreements**

If it is desired that future bilateral trade agreements negotiated by the European Union should be truly global, it is essential to take into account, beyond the treaty's traditional and innovative trade aspects, environmental aspects in general, and climate change issues in particular, upon which CETA either disappoints or is frankly silent. This may be achieved

within the trade agreement itself, or within the framework of dedicated bilateral agreements signed simultaneously.

Furthermore, new-generation agreements will have to meet public expectations with respect to the environment, health and animal well-being. The central role of agriculture in the management of landscapes and biomass production is central to these expectations: it is essential that future agreements take sustainable agriculture goals into account.

Finally, although a certain degree of confidentiality in the negotiations may be legitimate with respect to purely trade aspects, total transparency towards civil society is required when environmental or sanitary issues are addressed.

# CHAPTER 1: AN OUTLINE OF THE AGREEMENT

The Comprehensive Economic and Trade Agreement (CETA <sup>1</sup>) between the European Union, its Member States and Canada, is an extremely long and complex agreement. It has been presented as a "new generation" free trade agreement, that includes not only the abolition of customs tariffs, but above all a reduction in the regulatory barriers to the exchange of goods and services, and an agreement on investment. The essential difficulty is of achieving these objectives while preserving consumer and environmental protections and workers' rights, without bringing the right of each party to regulate to achieve legitimate objectives into dispute (such as health for example). This desire to achieve a "balanced" text, simplifying trade, while preserving existing rules and protections, is stated in an explicit fashion in the preamble of the final document, and developed throughout its various chapters. An essential aspect to which we will return in this report is its "living" aspect, whose dynamic nature brings a certain number of ambiguities or even risks. Finally, the agreement's degree of ambition with respect to the environment and to health (or, to put it informally, what's missing), must also be discussed, given that it purports to be a "model" for the future bilateral trade negotiations of the Union.

This agreement is the final product of a tradition of co-operation: both economic entities have been linked for 40 years by a "framework agreement for trade and economic co-operation" embodied by annual meetings and the work of a Co-operation Committee which considers matters relevant to economic co-operation. Agreements on veterinary standards in animal transportation (1999), wines and spirits (2003), civil aviation safety (2009), and aviation transportation (2009) pre-date CETA. The veterinary and wines and spirits agreements are to be integrated into CETA during its implementation.

Taken as a whole, CETA comprises multiple instruments that total more than 2300 pages. The treaty itself runs to 30 chapters and 453 pages, which contain the principal commitments of the contracting parties. The balance of the document is formed by a long series of annexes. Three protocols are dedicated to detailed discussion of terms and concepts of the treaty, or to further expand on the commitments of the contracting parties. Annexe 2-A contains the tariff agreements (the terms of the reduction in customs tariffs) respectively for Canada and the European Union. Most of the other annexes aim to detail the contents of the agreement and furnish interpretations which may limit the application and scope of certain provisions. Finally, annexes I and II, entitled "reserves", contain the exceptions for each of the contracting parties with respect to certain of their commitments. The body of these annexes forms an integral part of the Comprehensive Economic and Trade Agreement and will be fully binding on the contracting parties. Conforming to the practice established in the mixed agreements concluded by the European Union and its Member States, the provisions which relate to the exclusive competence of the European Union will be furthermore the object of a provisional application, from 21 September 2017, within the limits decided by the 28 October 2016 decision of the European Council pertaining to the provisional application of CETA. Come in addition to the text of CETA and its annexes other instruments which must be taken into account when enforcing the agreement.

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<sup>1</sup> In French CETA is known as L'Accord économique et commercial global (AECG).

The Joint Interpretative instrument between Canada on one side, the European Union and its Member States on the other, clarifies the sense of certain commitments. This serves as the basis of proper interpretation of the treaty. When the treaty's provisions are implemented, the instrument may be cited as a privileged document (though not exclusively so) when interpreting the sense of its enforcement, notably in the case of dispute between the two parties when the agreement is applied.

Finally, mention must be made of the 38 declarations of the European Union or its Member States which are annexed to the minutes of adoption by the Council when it decided to authorize the signing of CETA<sup>2</sup>. Certain of these declarations bear upon the questions of division of competences between the Union and its Member States or the practical implementation of the procedures by which the Union will determine its position at the CETA Joint Committee. Others aim to clarify the sense of certain commitments or to recall certain essential principles which must guide the enforcement of the treaty. These are internal European Union documents. They have only policy application and do not apply to Canada. However, those that emanate from the Council or from the European Commission fix the interpretative line of the Union. These will therefore be essential to consider each time it becomes necessary to allay uncertainty in the manner of CETA implementation.

The agreement considers itself "modern and progressive"<sup>3</sup>. Its vast scope will be extended by the co-operation bodies that it has instituted. It aims to regulate such numerous and varied sectors such as the trade in goods and services, public tenders, and investment.

The abolition of customs tariffs on trade between the two parties is the "traditional" part of this free trade agreement<sup>4</sup>. The average duties (*ad valorem* applied and equivalent *ad valorem* of specific duties) applied by Canada to European exports is 4.6%, and that imposed by Europe on Canadian products is 3.3%<sup>5</sup>.

Agriculture—and particularly in Canada with an average duty of 7.3% compared with 11.6% in Europe—is considerably more protected on either side than industry (1.9% against 2.5% respectively)<sup>6</sup>. Let us note that France, taking into account the structure of its agricultural exports, faces higher tariffs than the European average when its goods enter Canada (29.0%). These average levels of duty hide existing peaks at the level of individual products<sup>7</sup>, on both sides. This is notably the consequence of Canada's highly regulated dairy sector with its existing milk quotas<sup>8</sup>. In the case of European imports, several products are also protected<sup>9</sup>.

Most duties for agricultural products will be abolished when the agreement comes into effect<sup>10</sup>. For other products (cereals for example), their abolition will be progressive, over a period of 3, 5, or 7 years depending on the product. Certain products considered sensitive will escape liberalization (chicken and turkey meat, eggs, and egg products). Others will be

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<sup>2</sup> European Council, Comprehensive Economic and Trade Agreement (CETA) between Canada, on one side, and the European Union and its Member States on the other side-Declarations in minutes by the Council 27 October 2016.

<sup>3</sup> Joint Interpretative Instrument, point 1

<sup>4</sup> Most customs barriers must be eliminated to the extent enforced by the agreement.

<sup>5</sup> Data source: MacMaps HS6, CEPII.

<sup>6</sup> A complete measurement of protection of agricultural markets must take into account the complex question of internal production subsidies.

<sup>7</sup> Ice cream, eggs, certain non-alcoholic drinks, carcasses and cuts of fresh or frozen beef are taxed at more than 25% by Canada. Customs duties on many confectionery products also approach 20%.

<sup>8</sup> Butter and other dairy fat products, powdered milk, fresh cheese, grated or powdered cheese, yoghurt, and chocolate are all taxed at more than 100% on entry to Canada.

<sup>9</sup> Deterrent levels of duty (more than 100%) are also applied to sugar beet and frozen beef offal. Then there are the 35 product categories whose tariff levels are between 50 and 90%, such as tobacco, sugar, beef, cereal pellets, or olive oil. (These figures include the *ad valorem* equivalent of specific tariffs imposed *ad valorem* on certain agricultural products.)

<sup>10</sup> 90.9% of tariff lines for Canada and 92.2% for the EU

the subject of quotas: Canadian cheese, and European meat (beef, pork) and fresh corn (see annexe 1).

The EU has obtained recognition of 145 designations of origin (DO), which will confer a degree of protection similar to that conferred by European law in countries where such labelling already exists.

The liberalization of services will become commonplace, with the adoption of an approach termed "negative listing" which states as a principle the freedom of access to services and service suppliers of the other party, limited by the reserves expressly maintained by the contracting parties. The opening of public tenders is widespread, in particular in Canada. CETA is the first agreement in which Canada has accepted that foreign companies may participate in public tenders not only at federal level, but also at provincial and municipal level. Canadian investors in Europe and European investors in Canada will be offered an increased level of protection which aims to secure their operations.

CETA also puts in place numerous procedures for regulatory co-operation with the aim of reducing the impact of non-tariff obstacles to trade. The Regulatory Co-operation Forum will be the privileged forum for this co-operation. But it will not be the only body involved in these activities.

The European Commission takes the view that the relationship with Canada constitutes a laboratory for the implementation of a new European policy with respect to international trade because of the similarity in standard of living between the two economic areas<sup>11</sup>, the respect paid to regulation and the longstanding economic co-operation between the sides. It would be difficult to obtain terms from other commercial partners which have not been obtained from Canada, and for future partners to refuse terms that Canada has already accepted. This would make CETA a "model" for future agreements that the European Commission may wish to negotiate.

The CETA text grants an important place to the collective preferences of the contracting parties. Three chapters are dedicated to sustainable development, labour, and the environment. Furthermore, numerous provisions within the agreement have been drafted to reconcile the commitment of the contracting parties in favour of more open markets and their right to adopt higher levels of protection of the environment and health. A Committee on Trade and Sustainable Development tasked with assessing the impact of CETA on environmental and health questions has been created.

Finally, CETA is a "living" agreement which does not fix the commitments of the contracting parties. These are destined to evolve, towards stronger trade and investment discipline, but also in favour of the increasing emphasis on sustainable development policy. To this end, CETA has put in place an extremely dense institutional architecture. The Joint Committee of CETA is the principal body. It will have wide powers to make binding decisions on the contracting parties or to amend the text of the agreement. Other specialized committees have also been granted important functions. The ensemble concludes with the establishment of a multi-level governance whose implications in practice for the contracting parties—and

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<sup>11</sup> With a per capita income of 44,000 USD, Canada is similar to Finland or Belgium and slightly ahead of France in terms of standard of living. The quality of products and services and importance granted to consumer safety are highly likely to be comparable, in spite of the differences in collective preferences which may exist, and a very different regulatory approach whose issues will be discussed in this report.

notably on the Member States of the Union, who are not directly represented on these committees—are not always clear<sup>12</sup>.

The effects of the agreement on the environment are in part linked very directly to its economic impact, whether through the progression of trade and therefore transport, or on the impact on national production and its attendant emissions.

The volume of trade between the two regions is determined by their economic weight (and the similarity between these two weights) and the costs of the trade (distance, customs tariffs, and regulatory differences)<sup>13</sup>. The regions are distant and each transaction between them will be accompanied by an increase in transportation and emissions. The customs tariffs imposed on bilateral trade are high in certain sectors, and their abolition will entail significant additional trade. However, these factors are counterbalanced by the fact that the two economic areas are of very different sizes: for the EU28, Canada is necessarily a minor trade partner since the ratio of the economic mass of the two areas is 1:12<sup>14</sup>. Canada is only the 12th largest export market for EU28 countries, excluding trading within the EU. And though the EU28 is the second largest export market for Canadian exporters, this outlet remains very limited in comparison with the United States (7.5% of Canadian exports, compared with 73% to the United States). Taking the European countries separately, France is the 11th largest importer of Canadian goods (0.7%), after Belgium, Luxembourg and Germany, and its ninth largest supplier with 1.2% of Canadian imports, behind Germany, the United Kingdom and Italy<sup>15</sup>.

Beyond these general principles, it is difficult to evaluate the economic impact of the agreement precisely. The difficulties are: i) the modelling of non-tariff measures' (i.e. regulatory) impact on trade exchanges of goods and services; ii) the highly aggregated sector models (the expected impacts are highly microeconomic in nature); and iii) the potential impact on direct investment. Economic evaluations of the agreement have, in addition, generally been performed in the absence of knowledge of its detailed provisions, even if the principal possible commitments have been envisaged in various scenarios.

In June 2007 Canada and the EU agreed to perform a joint economic impact study, and to examine its conclusions in October 2008 at the following summit. The study examined the impact of the complete abolition of tariffs and a reduction in regulatory barriers on the exchange of goods and services. The abolition of customs tariffs<sup>16</sup> had no significant macroeconomic impact, which makes the potential gains from regulatory co-operation difficult to estimate<sup>17</sup>. The macroeconomic gains in income were negligible<sup>18</sup> for a trade growth of around 20%. Around

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<sup>12</sup> It should however be noted that the committees' decisions, and notably those of the Joint Committee, will be subject to the adoption of a "position" previously adopted by the European Union. Thus, in conformance with the provisions of article 218 § 9 of the Treaty of Rome, when a decision of the Joint Committee is within the jurisdiction of the Member States, the position of the Union and its Member States at the Joint Committee must be unanimously adopted by the Council of the European Union. In consequence, even if the European Member States are not represented on the Joint Committee, each has the right of veto, prior to the decisions taken by this body.

<sup>13</sup> Beyond the trade in goods, the two areas have more than 400 billion USD of direct bilateral investment, and annually exchange 30 billion dollars' worth of services, representing about half the value of their bilateral trade in goods. This deep economic integration is particularly marked in France: Canadian businesses employ around 40,000 people in France, and French businesses twice that in Canada.

<sup>14</sup> Canada has a similar GDP to Spain's (year 2016, US dollars, source OECD, September 2016).

<sup>15</sup> Data source: BACI-CEPII.

<sup>16</sup> Such effects are generally modest, especially when they are aggregated across sectors whose trade flows are themselves determined by trade tariffs, as in this study.

<sup>17</sup> The study is published on the DG Trade site:

[http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_141032.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf)

<sup>18</sup> Being 0.08% of European GNP, ten times greater for Canada (still less than 1%) due to the difference in the size of the two economic spaces

half of the gains in income derive from assumed growth in services, and it is understood that this exercise is poorly informative on the economic impact of the agreement. The second study commissioned by the EU, within the framework of the compulsory evaluation of the economic and environmental impacts suggested that the gains would be around half as much again<sup>19</sup>.

In both cases a computed general equilibrium model was used<sup>20</sup> without taking into account the impact of the agreement on direct investment, for which there was no available data. The social impact of CETA cannot be evaluated with such models: jobs are displaced from one sector to another according to specializations, with, by definition, no impact on overall employment. The only significant impacts were on factor incomes, but in this case the overall impact of the agreement was too weak for significant variations to be observed. In both areas the changes in pay of unqualified and qualified personnel were of a negligible order of magnitude, and in line with the changes to GDP. Only the detail of the non-tariff (regulatory) element of the agreement and its impact on investment might modify this finding, but this begins to strain the limits of interpretation of such systematic quantification.

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<sup>19</sup> This study however undertook to measure the environment effects across sectors, combining an econometric model centered on questions of emissions to a computed general equilibrium model.

<sup>20</sup> Copenhagen Economics performed the first study, GTAP the second.

## CHAPTER 2: LEGAL ANALYSIS OF THE AGREEMENT'S MECHANISMS ON ENVIRONMENT AND HEALTH

A significant part of CETA is dedicated to mechanisms aiming to preserve the collective preferences of the contracting parties. The three chapters entirely dedicated to these non-trade concerns (sustainable development, labour and the environment) are the clearest evidence of this. But beyond this, the text of the agreement also contains numerous provisions which aim to reconcile the health, environmental and social issues with the economic objectives of the contracting parties.

### **I. The provisions of the agreement allow for the collective preferences of the contracting parties to be taken into account**

Four main categories of provisions can be identified.

#### **1. Provisions relating to the general goal of sustainable development**

These provisions enable to recall that the clauses of the agreement relating to trade or investment disciplines must not be implemented in isolation, without taking into account the environmental, health and social concerns which form an integral part of the goal of sustainable development. For example, Article 22.1 of the treaty specifies that:

*"The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations."*

#### **2. Clauses guaranteeing the right of states to determine their own levels of protection of the environment and health**

The CETA text contains several provisions which aim to ensure that the trade disciplines of the agreement—the prohibition of unjustified trade restrictions or the prohibition of discriminatory treatment, for example—may not constitute a brake, or even a barrier, to the right of States to adopt measures to protect the environment or health that they judge necessary. The Joint Interpretative Instrument emphasizes this in these terms:

*"CETA preserves the capacity of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity."*<sup>21</sup>

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<sup>21</sup> Joint Interpretative Instrument, point 2 "Right to regulate". See also point 9 b): "CETA explicitly recognizes the right of Canada and of the European Union and its Member States to set their own environmental priorities, to establish their own level of environmental protection and to adopt or modify their relevant laws and policies accordingly mindful of their international obligations, including those set by multilateral environmental agreements. At the same time in CETA the European Union and its Member States and Canada have agreed not to lower levels of environmental protection in order to encourage trade or investment and, in case of any violation of this commitment, governments can remedy such violations regardless of whether these negatively affect an investment or investor's expectations of profit."



CETA's Article 24.3 - "Right to regulate and levels of protection" affirms that:

*"The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection."*

Several kinds of guarantees appear in this way in the treaty.

Some of these are merely statements of the conventional legal procedures of international trade. This is the case in the provisions relating to general exemptions. CETA Article 28.3 § 1 incorporates article XX of the WTO's GATT (General Agreement on Tariffs and Trade) which reads as follows:

*"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures*

*a) necessary for the protection of public morals;*

*b) to protect human, animal or plant life or health; [...]*

*g) relating to the conservation of finite natural resources, if such measures are applied along with restrictions to national production and consumption [...]."*

Beyond this, CETA contains new guarantees which have recently been introduced in free trade agreements and investment treaties to better preserve the freedom to regulate of the State<sup>22</sup>. Article 8.9 of the treaty – "Investment and regulatory measures" – aims to protect the right of the State to regulate against the ill-considered claims of investors. The article states:

*"For the purpose of [Chapter 8, on Investment], the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection, or the promotion and protection of cultural diversity.*

*For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section."*

Finally, clauses prohibiting the lowering of health and environmental standards are included in the treaty. Their aim is to prevent the contracting parties from sacrificing their levels of protections with the aim of attracting foreign **investors** or to stimulate trade ("the race to

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<sup>22</sup> The European institutions were very prompt to mobilize for the negotiation of investment agreements in which the right of the host country to regulate is protected. See for instance "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions", *Towards a comprehensive European international investment policy*, 7 July 2010, COM(2010)343final; Council of the European Union, *Conclusions on a global European policy on international investment*, 25 October 2010; the 6 April 2011 resolution of the European Parliament on the future European international investment policy (2010/2203(INI)).

the bottom", often feared when new trade or investment agreements are concluded). Article 24.5 addresses this:

- "1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.*
- 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory."*

### **3. Clauses to encourage sustainable trade**

Several provisions within Chapter 24 specifically aim to encourage sustainable trade. For example, article 24.9 § 1 states that *"The Parties are resolved to make efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services"* or article 24.10 § 2 a) which insists that *"The Parties undertake to encourage trade in forest products from sustainably managed forests and harvested in accordance with the law of the country of harvest"*<sup>23</sup>.

### **4. Clauses integrating specific mechanisms of environmental law**

Finally, it must be noted that CETA has several provisions which directly incorporate specific mechanisms and principles of environmental law. Among these are article 24.8 "Scientific and technical information" which quotes almost word for word Principle 15 of the 1992 Rio Declaration on the Environment and Development:

*"The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

This formulation refers to the precautionary principle. But it is regrettable that CETA does not have an explicit reference to this principle (see *below*).

Articles 24.6 "Access to remedies and procedural guarantees" and 24.7 "Public information and awareness" reproduce the principles established by the Aarhus convention on access to information, public participation in decision-making and access to justice in environmental matters, signed on 25<sup>th</sup> June 1998, to which Canada is not a signatory.

## **II. The scope of these provisions**

The CETA provisions and mechanisms which aim to ensure a better coherence between the trade objectives of the agreement and environmental and health concerns of the contracting parties are not new in themselves. Before CETA was finalized, other free trade agreements had incorporated comparable mechanisms (NAFTA, the North American Free Trade Agreement, concluded in 1994 by the US, Canada and Mexico, the new-generation free trade agreements concluded in the mid-2000s by the United States and Canada, and more recent free trade agreements concluded between the EU and Vietnam, South Korea or Singapore).

The scope of these different mechanisms is difficult to evaluate. Their importance in the body of the CETA agreement clearly indicates that the contracting parties consider environmental and social objectives at least as important as the trade objectives of CETA. But

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<sup>23</sup> See also article 24.11 on the trade in fisheries and aquaculture products.

the concrete consequences of these provisions on public policies enacted to protect the environment and health is not always obvious.

### **1. The limited scope of provisions relating to environmental and health issues**

Most of the provisions on the protection of health and the environment in CETA do not impose any supplementary commitments from the contracting parties.

Many of them are only incentives. This is the case of the provisions on the promotion of sustainable trade. These clauses, which aim to encourage the trade of environmental goods and services, or responsible production and management methods of certain resources, are extremely general. Furthermore, they are not accompanied by any parallel provision to restrict polluting production methods. This type of mechanisms, such as those included in the TPP (Trans-pacific Partnership)<sup>24</sup>, seems, however, essential to an agreement as wide-reaching as CETA.

The provisions within chapter 24 on environmental co-operation are also very vague. This co-operation is essential and its scope is extremely vast. It can, for example, include "*trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies*" (article 24.12 § 1 e). But the agreement only adds that this co-operation "*shall take place through actions and instruments that may include technical exchanges, exchanges of information and best practices, research projects, studies, reports, conferences and workshops*" (article 24.12 § 2). These few indications are rather meagre, in comparison to the extremely detailed list of regulatory co-operation instruments established in article 21.4.

It must further be noted that CETA provides no innovative solutions to the question of corporate responsibility. CETA only has a reference, in its preamble, to the "*internationally-recognized guidelines and principles relating to corporate social responsibility*", including the "*the OECD Guidelines for Multinational Enterprises*", and stating that the contracting parties should encourage businesses to adhere to them<sup>25</sup>. CETA does not have a specific CSR (Corporate Social Responsibility) clause, a clause which can be found in other investment or free trade treaties (Canada was among the first to ask for the inclusion of such a clause in its investment treaties). Admittedly, this type of clause does not make these principles binding for companies.

But their presence in the body of the treaty may grant them greater weight, particularly if a case opened on the basis of this treaty leads to the evaluation of the behaviour of an investor. CETA even appears backward on this issue as it has no provisions to remind investors of their duty to comply with the environmental, social and health laws of the host

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<sup>24</sup> TPP's "Environment" chapter, for example, contains very detailed provisions on the actions that must be taken to effectively combat business practices that do not respect the environment (in fisheries policy, for example) and to reach a sustainable management of natural resources (Chapter 20, TPP).

<sup>25</sup> Article 24.12 § 1 c) adds that co-operation on environmental matters may include "the environmental dimension of corporate social responsibility and accountability, including the implementation and follow-up of internationally recognized guidelines".

nation and no provisions for counterclaims in a dispute between an investor and a state, in case of a breach by an investor of the laws of the host state.

## **2. Impacts of clauses seeking to preserve the right of the state to regulate**

The clauses that aim to preserve the right of the state to regulate will solely be used in case a contracting party (within the framework of the procedures for resolving disputes in Chapter 29 for example), or a foreign investor (within the framework of the procedures detailed in section F of Chapter 8), contests an environmental or health measure adopted by Canada, the European Union or its Member States. Essentially, these clauses recall the principle upon which that States cannot be held responsible for the negative economic consequences which may follow from measures taken in the public interest whose legitimacy is unquestionable. But the mention of these provisions is not sufficient in itself to protect environmental or health measures from a dispute. Where the responsibility of one of the Parties is disputed on the grounds of losses resulting from an environmental or health protection measure, the contracting party which enacted the measure will have to prove that the measure disputed meets the legality criteria of the agreement. Thus, for example, if a contracting party adopts a measure banning the import, into its market, of certain consumer products which it considers a risk to health, it will have to prove that this restriction satisfies the conditions of the clause relating to general exceptions, and in particular that it does not constitute a means of arbitrary or unjustifiable discrimination, or a hidden restraint on trade. To put it another way, the limit posed to the ability of the contracting parties to adopt environmental and health regulations of their choice is due to the prohibition of any discriminatory measure or concealed protectionism.

The clauses emphasizing the contracting parties' right to regulate may however play a significant role. Their presence in CETA indicates that the Parties have taken care of putting trade and non-trade objectives on an equal footing, and, above all, that they have tried to reserve a wide margin of discretion in the adoption of non-trade measures. Consequently, they should direct the judges or arbitrators ruling on the basis of the treaty to observe the greatest deference towards the regulatory choices of the contracting parties and only accept to examine the possible responsibility of the State towards an investor if the latter feels prejudiced in the very limited cases outlined above.

### **The case of measures based on the precautionary principle**

The fact that CETA does not expressly mention the precautionary principle does not mean that it is not taken into account in the treaty.

Article 24.8 very clearly refers to it, with respect to the environment. The wording is, however, open to ambiguity. It states that it is the adoption of "cost-effective measures to prevent environmental degradation" that must not be hindered. It therefore noticeably diverges from the formulation of Principle 15 of the Rio Declaration which calls for the adoption of "effective measures to prevent environmental degradation". However, the Joint Interpretative instrument underlines that "*the European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements.*"

These agreements, without precisely defining the precautionary principle, adopt an approach closer to the formulation of Principle 15 of the Rio Declaration.

Chapter Five "Sanitary and Phytosanitary Measures" refers to the Agreement on the application of sanitary and phytosanitary measures of the WTO (the SPS Agreement). Article 5.7 of this agreement adopts a certain approach to precaution:

*"In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time."* The approach to precaution adopted in the SPS agreement is thus closely linked to the scientific demonstration of risk. Furthermore, it only allows the adoption of temporary measures. This presumes that once a measure has been adopted, the State adopting the measure must pursue further scientific assessment to confirm or refute the risk.

Many concerns and criticisms have arisen from CETA's adherence to the approach inherited from the WTO treaties. The European Union has been criticized for not obtaining a firmer reference to the precautionary principle in the agreement, despite the fact that twice, its regulations —over hormone beef, and biotechnology products (GMO)— have been successfully attacked at the WTO. In those cases, article 5.7 of the SPS (sanitary and phytosanitary) agreement have not allowed it to uphold its precautionary policy. This provision leaves a fairly narrow margin for manoeuvre to Parties who use the precautionary principle as the basis of trade restriction measures. It must conduct an evaluation which does not merely establish the possibility of a risk. It also must measure the probability of this risk and establish a link between the available scientific evidence and the SPS measure adopted (in other words, it must be proven how the measure is effective to counter the hypothetical risk). Yet, in both WTO cases, the European Union was unable to establish scientifically the merits of its restrictions. In the beef hormone case, this is essentially because the risk evaluation produced by the EU covered substances which were not in the dispute, while the banned hormones had not been scientifically analyzed.

In the GMO case, it was also because the European moratorium on the approval of biotechnology products was not founded on risk evaluations corresponding to the definition in the SPS agreement that the moratorium was found in breach of the treaty

The rationality of the principle retained in the SPS Agreement, which is incorporated into CETA, is particularly demanding in terms of the level of scientific evidence which must be produced by the Party wishing to adopt precautionary measures. CETA therefore questions, indirectly and implicitly, the future of governance based on precaution across diverse public policy actions in Europe.

It must be recalled that the understanding of the precautionary principle, precisely the consequences in terms of public policy in the face of scientific uncertainties, is different in Europe and Canada. In Canada, the regulations are only enforced where there is evidence of a risk, while remaining subject to a cost/benefit analysis. In this context, the logic of regulatory co-operation, of mutual recognition and of equivalence of regulations between parties, as envisioned in CETA, without clarifying the application of the precautionary principle, may be problematic.

CETA's vagueness means that we cannot exclude the arrival on the European market of products approved under regulations which do not take into account the precautionary principle. Specifically, in terms of sanitary and phytosanitary measures, the practice of equivalence outlined in Chapter Five and article 5.6 of the treaty raises questions. This is based on the importer's acceptance of the exporter's conformity with the SPS measures. This acceptance must be founded on the "*objective demonstration*" by the exporter of an "*appropriate*" degree of protection suited to the importing party and its current regulations. It is silent on the prerequisites and conditions to prove this "appropriateness". More generally, the application of the precautionary principle and the inspection of products entering under equivalent measures, may thus be limited.

### **3. The utility of mechanisms to monitor and control the implementation of the health and environmental provisions of the agreement**

#### ***a) Mechanisms to control the implementation and observance of the agreement***

The CETA text lays down several procedures designed to enable the contracting parties to find a solution to any question relating to the implementation of the environmental and health aspects of the agreement. Some of these procedures resemble mediation procedures and bear reference to the responsibilities of the specialist committees set up by CETA. A contracting party can, for example, request that the Committee on Trade and Sustainable Development consider and rule on a matter arising from Chapter 24 relative to trade and the environment (article 24.14 § 4). The agreement is silent, however, on the manner in which the Committee on Trade and Sustainable Development will reach a solution that satisfies all of the contracting parties.

Beyond the mediation mechanisms, recourse to the litigation procedures set out in Chapter 29 for disputes arising from Chapter 24 matters between the parties is not possible (see below). However, this chapter establishes a specific procedure for ruling on matters arising from its implementation. When a matter has been unable to be resolved between the contracting parties by resort to direct consultations or by the mediation of an agreement committee, a party can "*request that a Panel of Experts be convened to consider the matter*" (article 24.15 § 1). The terms of reference of this Panel of Experts require them "*to examine, in the light of the relevant provisions of Chapter 24 (Trade and Environment), the matter referred to in the request for the establishment of the Panel of Experts, and to deliver a report [...] that makes recommendations for the resolution of the matter*". The implementation of the Panel of Experts' recommendation will be subject to scrutiny by the Committee on Trade and Sustainable Development (article 24.15 § 11). This procedure may for example be invoked if a contracting party judges the other to have engaged in "environmental dumping" to attract foreign investors to its market. This type of procedure evokes the inspection and surveillance mechanisms established in numerous multilateral environmental agreements and in parallel NAFTA agreements concerning work and the environment. The objective is not to sanction a contracting party found in breach, but rather to engage the contracting parties in a co-operative process that permits the party

whose efforts with respect to environmental protection are judged inadequate to strengthen its regulatory regime. Thus, although the report delivered by the Panel of Experts is not of binding character, the impact of invoking an article 24.15 procedure is not neutral. The decisive aspect is that the Panel of Experts' report will be published. This publicity may thus be an important means of pressure on the contracting party found in default of its obligations. It may however be regrettable that only the contracting parties can initiate such a procedure. It may have been more effective if it could also have been made accessible to communications from non-governmental organizations. In the CETA framework, such organizations can only submit observations to the Committee on Trade and Sustainable Development, engaged in its task of oversight of the implementation of the Panel of Experts' recommendations (24.15 § 11).

**b) Mechanisms concerning the evaluation of the impact of CETA on the environment and health**

CETA insists at several points on the necessity of continuously monitoring the environmental and health effects of the agreement's implementation. This is one of the essential points over which the contracting parties must strive to co-operate (for example articles 22.3 § 3 and 24.12 § 1 a). This is also the primary mission of the Civil Society Forum (article 22.5 § 1). It is additionally one of the basic tasks of the Committee on Trade and Sustainable Development which will supervise the implementation of the agreement, and, in particular, examine the effect of the agreement on sustainable development (article 22.4).

All of the parties to the agreement are therefore committed to regular and objective surveillance of the environmental and health effects of CETA. However, it is regrettable that the agreement does not detail the manner in which the evaluations thus produced may be taken into account when, if need be, better adapting the accord to the objective of sustainable development. In particular, it is surprising that the Committee on Trade and Sustainable Development has not been accorded any powers to make recommendations. Granting such powers to the body whose main responsibility is the oversight of the impact of CETA's implementation on sustainable development seems indispensable, in line with the prerogatives granted to other CETA specialized committees.

The contracting parties are clearly seized of the importance of assuring effective monitoring of the agreement. Thus in the Joint Interpretative instrument, they state that:

*“The commitments related to trade and sustainable development, trade and labour, and trade and environment are subject to dedicated and binding assessment and review mechanisms. Canada and the European Union and its Member States are fully committed to make effective use of these mechanisms throughout the life of the agreement. Furthermore, they are committed to initiating an early review of these provisions, including with a view to the effective enforceability of CETA provisions on trade and labour and trade and the environment.*”

Given CETA's lack of precision on the scope and nature of this review, it is essential to rapidly define what the mechanisms of this dedicated and binding assessment and review will be.

### III. Conclusion

The CETA treaty does not prioritize concerns relating to the protection of the environment and health. Article 24.4 concerning the multilateral agreements on the environment contents itself by reaffirming the commitment of the contracting parties to these agreements, once they have ratified them. The agreement has not included any mechanism which will allow energy transition to be effectively initiated, nor any prescription for more sustainable exploitation of natural resources. Subsidies can only be disputed on the grounds that they cause a loss or economic prejudice to a national production sector or the economy of a contracting party. In consequence, fossil fuel subsidies or overfishing, for example, cannot be disputed within the CETA framework on grounds that they constitute a hindrance to energy transition or to effective policymaking in the management of natural resources. The expansion of the interests of subsidy-affected contracting parties to environmental and health matters could have been envisaged by the agreement's negotiators<sup>26</sup>.

More generally, to achieve, in an effective manner, the objective of sustainable development, it seems essential to combine in a single instrument not only the economic obligations but also the obligations—which must be truly binding—concerning the protection of health and the environment. Controlling free trade, combating climate change, and conserving natural resources cannot now be negotiated in isolation. It is therefore desirable that a much more profound reform of the tools of trade and international investment be initiated to enable the swift negotiation of agreements which truly promote sustainable development, "clean" trade, and responsible investment, that will force practices contrary to the objectives of protection of health and the environment on to the retreat. The ambition of the generation of agreements to which CETA belongs clearly does not attain these heights.

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<sup>26</sup> By comparison, and in this context, the TPP agreement forbids fishing subsidies which would entrain a negative effect on fish stocks in situations of overfishing and allows the contracting parties to dispute such aid (article 20.16 § 5 a).



# CHAPTER 3: DISPUTE RESOLUTION AND REGULATORY COOPERATION

## I. Dispute resolution between the contracting parties

Chapter 29 of the agreement establishes a procedure for settling disputes that may arise between the contracting parties. This procedure applies "*to any dispute concerning the interpretation or application of the provisions of this Agreement*", expressly excluding certain chapters (chapter 22 on Sustainable Development, chapter 23 on Labour, chapter 24 on Environment and chapter 17 on Competition Policy). The procedure envisaged in chapter 29 allows, should consultations have proved unsuccessful, an appeal to a special arbitration panel which will be charged with ruling on the dispute. Its decision will be binding on the parties (article 29.10).

One should not be misled by the reference to arbitration. The mechanism envisaged in chapter 29 is much closer to the dispute settlement procedure established by the WTO (in its Memorandum of Understanding on rules and procedures governing the settlement of disputes). The special arbitration panel members will be nominated by the CETA Joint Committee from a list that will be established once the agreement comes into effect. The influence of the WTO dispute resolution procedure on the way in which the special arbitration panels interpret the agreement is evident as article 29.17 specifies that the panel must take into account "*the relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body*". And as in the WTO framework, it is clearly stated that the special arbitration panels shall not add to or diminish the rights and obligations of the parties (article 29.18 stipulated in the agreement).

This procedure is however less sophisticated than that followed by the WTO Dispute Settlement Body. No appeal procedure is available to contest the special arbitration panel's reports. Furthermore, the contracting party claiming damages from a trade measure may adopt retaliatory measures against the party which is found to be in default of its obligations, without needing to request an authorisation to this effect. In the WTO framework, this is only possible under authorization from the WTO Dispute Settlement Body.

With respect to the trade in goods, the main commercial disciplines embodied in CETA essentially follow WTO rules, such as non-discrimination and the prohibition of quantitative restrictions. Beyond this, CETA incorporates the most significant provisions of the SPS and TBT (Technical Barriers to Trade) Agreements. In all, CETA does not fundamentally change the deal with respect to the openness of markets between the European Union and Canada, as they derive from the WTO (with the exception of the pace of dismantling of tariff barriers). It is, however, possible to underline two important points. Firstly, trade disputes which may arise between Canada and Europe on the basis of CETA will not be different from those which may be settled within the WTO framework. Furthermore, it may be asked if the Chapter 29 provisions will actually be called on by the parties, when they will also have recourse to the WTO Dispute Settlement Body by invoking the equivalent rules under GATT, the SPS Agreement or the TBT<sup>27</sup>. In addition, commercial disputes between Europe and Canada that have already been settled within the WTO framework should not be re-opened by a CETA arbitration panel. The *ne bis in idem* doctrine should prevent this. So, if some may be concerned that the hormone controversy

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<sup>27</sup> Note that CETA contains a provision (article 29.3 § 2) forbidding a state from simultaneously initiating actions under both chapter 29 provisions and the WTO framework for the same case.

may resurface within the CETA framework, this seems improbable, unless the European Union adopts new and more restrictive legislation.

The chapter 29 dispute settlement procedure may be more useful with respect to trade in services because CETA commits the contracting parties to much greater liberalization than that established in the WTO General Agreement on Trade in Services (see chapter 4, section 4). But this consideration alone does not mean that the risk of a reduction in the capacity to regulate services will be greater within the CETA framework. Article 28.3 § 2 provides, for chapter 9, some general exceptions, covering notably protection of health and human, animal and plant life, similar to those of the General Agreement on Trade in Services (GATS). The interpretation and implementation reached by the chapter 29 arbitration panels will be decisive in establishing a just equilibrium between the choice of the contracting parties to liberalize services (within the limits of reserves which are formulated in a CETA annexe) and their intention, repeatedly reiterated in the agreement, to avoid losing their right to adopt the environmental and health protection measures of their choosing.

The greatest uncertainties arising from chapter 29 derive from the way in which this procedure may be invoked in the context of the processes of regulatory co-operation. Nothing in the agreement excludes the constitution of a special arbitration panel to rule on matters concerning these processes. A procedure may be, for example, initiated by a contracting party if the other refuses an equivalence request for an SPS measure, when it considers that it has objectively demonstrated that its measure has reached equivalence with the level of protection required by the importing party, in conformance with article 5.6. The analysis of a special panel may be sought to rule on whether or not the evidence furnished by the party requesting equivalence was sufficient. But the special arbitration panel cannot require a party to accept equivalence. However, in the face of these uncertainties, and considering the lack of interest in engagement in litigation to settle a question related to these co-operation processes, based on dialogue and mutual trust, it would have been preferable to exclude the applicability of chapter 29 for all questions related to the processes of regulatory co-operation provided for in the treaty.

## **II. Rules relating to the protection of investments**

### **1. The utility of a chapter dedicated to the protection of investors in CETA**

Chapter 8 of CETA is dedicated to investment and applies to investments made by Canadian companies in the territories of European Member States, or to investments made by European companies in Canadian territory. However, it will not apply to investors from one EU country operating in the territory of another Member State. It offers, on one hand, numerous basic guarantees: treatment which is not less favourable than that accorded to national investors (national treatment of article 8.6) or to investors of another nationality (most favored-nation treatment, article 8.7); just and equitable treatment as well as full protection and security (article 8.10), the right to prompt, adequate and effective compensation payments in the event of nationalization, or direct or indirect expropriation (article 8.12); and to freely transfer investment funds (article 8.13). It also permits foreign investors to resort to a particular justice system—the *Investment Court System*—dedicated exclusively to them, in the case of a dispute in which they allege a loss or damages from a breach by the contracting party of its obligations.

Before evaluating the impact of these mechanisms on the contracting parties' exercise of their right to regulate, it would be reasonable to question the justification for the presence of such a chapter in CETA. Even if the revised text fundamentally reorganizes protection and treatment standards, it follows, in essence, the guarantees established in the bilateral investment treaties (BIT). However, these agreements, whose negotiations began in the

1970s, aimed to protect against certain very specific risks: the risk of arbitrary treatment, the risk of discrimination or the risk of spoliation to which investors may be exposed in certain countries where national laws may be inadequate to ensure effective protection. In the same manner, even though CETA substitutes a completely new mechanism for investment arbitration, which offers reinforced guarantees of independence and impartiality, it continues to allow foreign investors to elude national jurisdictions.

Yet it is clear that from the point of view of the stability of their institutions and the protections offered by their national legal systems, that the European Union, its Member States and Canada, already offer economic operators, whether foreign or not, very considerable and comparable levels of legal security. Beyond this, if no investment protection treaty exists between Canada and a good number of Member States, this is because this kind of treaty has always been judged irrelevant, given the mutual trust that exists between these countries<sup>28</sup>.

However, it seems that the essential justification for the insertion of the investment chapter in CETA, from the European Commission's point of view, relates to the necessity of devising a consistent trade policy with all of the external trade partners of the Union. The modelling of the free trade agreements which preceded CETA will facilitate the negotiation of other agreements of the same kind, within the framework of trade relations where the presence of an investment chapter is more justified, taking into account the fragility of the internal institutions of the other contracting party. This approach, while careful diplomacy, is not however entirely convincing.

For one thing, the negotiation of grand bilateral partnerships of the order of CETA is justified precisely by the possibility of the creation of "made-to-measure" instruments which are adapted to the economic, social and legal needs of both partners. For another, certain countries have had no difficulty in modifying the content of their investment protection instruments depending on their relationship with that treaty partner. Australia, for example, officially takes a case-by-case approach, according to the partner with which it is negotiating an investment treaty<sup>29</sup>.

These various considerations lead to the thought that the insertion of an investment chapter in CETA was not an absolute necessity. Its presence aggravates the concerns and criticisms made of the treaty, even though it does not necessarily provide any supplementary guarantees beyond those which Canadian investors in Europe or European investors in Canada already have at their disposition. There are no guarantees, furthermore, that the conclusion of this agreement will ease negotiations with other countries.

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<sup>28</sup> Numerous European countries have however signed many bilateral investment treaties. France has, for example, concluded around 100 such treaties of which 85 are still in force. The situation is clearly different in the relations between Canada and certain Eastern European countries. In the 1990s, Canada signed bilateral investment treaties with Croatia, the Czech Republic, Hungary, Latvia, Poland, Romania and Slovakia. Questions arising about the institutions and legal systems in these countries were the drivers of these agreements, some of which have been renegotiated very recently. But this does not seem to have been decisive in the CETA negotiations.

<sup>29</sup> See "Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)" question n° 8 on the Australian Department of Foreign Affairs and Trade's website <http://dfat.gov.au/fta/isds-faq.html>. Thus, for example, in the free trade agreement concluded in April 2014 with Korea, there is a classical arbitration mechanism. This is, however, absent in its more recently concluded agreement with Japan. In the same manner, if the United States is strongly in favour of preserving arbitration in investment treaties, it has declined it, since 2004, in its free trade agreement with Australia, given the mutual trust that exists between the two countries.

## 2. The range of protection offered to foreign investors

An analysis of the range of protection which is offered to foreign investors by chapter 8 of CETA is essential to determining whether the concerns which it has provoked are justified.

### ***a) The improvements provided by CETA's investment protection mechanisms***

The central concern of CETA's authors was to better draft the clauses of treatment and protection of investments, in order to avoid the drift which may be feared or observed in other contexts. Two types of major improvements may be noted.

The first has already been underlined (see *above* Legal analysis of the environmental and sanitary provisions of the agreement): the insertion of provisions in the treaty which aim to firmly emphasize the right of contracting parties to determine the level of environmental and sanitary protection in their territory to be unaffected by the treaty. The second source of improvement derives from the much more detailed definition of protection standards which are most often invoked by investors, notably in order to contest an environmental or sanitary measure.

The **just and equitable** treatment clause is one of the treaty's most-criticized clauses, not only because its definition of that which is "just" and "equitable" is extremely vague, but also because some tribunals have interpreted it as a source of extremely restrictive obligations, such as the protection of the legitimate expectations of foreign investors. CETA's article 8.10 enumerates very carefully the circumstances in which it may be considered that a standard has been breached:

*"A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:*

- a) denial of justice in criminal, civil or administrative proceedings;*
- b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
- c) manifest arbitrariness;*
- d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;*
- e) abusive treatment of investors, such as coercion, duress and harassment;*

*f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."*

Consisting of protection against expropriation or measures with equivalent effect, an important Interpretative annexe – Annexe 8-A – limits its scope of application. It states as a principle that: *"except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."*

In the most-favored-nation clause, article 8.7.4 encompasses only the provisions of national or European law concerning international investors, and excludes the advantages uniquely conferred by the treaty, with regard to both dispute regulation procedures and substantive obligations. This reworking of the clause drastically limits its scope, if not entirely depriving it of its usual sense.

Finally, the protection derived from chapter 8 of CETA is far from extravagant in comparison to that offered to nationals. To the contrary, these protections are very largely equivalent.

For example, the controversial protection of legitimate expectations is similarly protected in one form or another, in the majority of national jurisdictions. In Europe, European Union law (the principle of protection of legitimate expectations, the principle of proportionality) and law relating to the European Convention on Human Rights and Fundamental Freedoms, such as the protection of property and the right to a fair trial, equally protect economic operators in an effective manner, to a considerable degree<sup>30</sup>.

### **b) Persistent weaknesses**

The improvements amending chapter 8 of CETA do not allay every uncertainty and ambiguity related to the investment protection mechanisms. If these remain, they may lead to ill-advised application of chapter 8, and have direct implications for the freedom of manoeuvre available to the contracting parties.

Firstly, the scope of article 8.10 concerning just and equitable treatment raises issues. One might fear that on the basis of the "principle of due process", the contracting parties would not impose particularly arduous and restrictive procedural obligations, as are sometimes observed in the framework of investment arbitration. The reference to legitimate investor expectations that could be born of simple "specific declarations" could equally be problematic. To avoid any ambiguity, article 8.10 should adopt a much more restrictive formulation, such as for example that of article 8.9 § 3 concerning the withdrawal of subsidies which reads "*any specific legal or contractual commitment*". To avert difficulties of implementation, the CETA Joint Committee will be able to make binding decisions which will bind the courts to chapter 8 (article 26.1 § 4 e). But it is highly probable that the Joint Committee decisions will be formulated in response to decisions which will have been previously made by the courts and will have been imposed on the contracting parties involved in the procedure<sup>31</sup>. It can only be recommended that the necessary clarifications be made, by means of an article 26.1 procedure or by any other means, before contentious matters arise.

Neither are the provisions concerning expropriation exempt from uncertainty. Annexe 8-A excludes a contracting party from being required to compensate for the consequences of a regulatory measure taken with the goal of protecting the environment or health whose legitimacy is incontestable. A reserve is, however, established: "*except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*". It is extremely difficult to envisage the way in which this formulation might be interpreted by a chapter 8 tribunal. Furthermore, in line with conventions established in bilateral investment treaties, article 8.12 requires that any expropriation be accompanied by "payment of prompt, adequate and effective compensation" (§ 1 d). This formulation refers to the requirement for full compensation, and international tribunals have always considered that no principle of international law would allow an expropriating state to also determine the degree of compensation, taking into

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<sup>30</sup> The *Vattenfall II* case is often cited as emblematic of the threat investment arbitration poses to state policymaking, but the argument is not entirely convincing. The Swedish company Vattenfall, affected by Germany's decision to abandon nuclear energy, brought Germany to arbitration on the basis of the Energy Charter Treaty. This process is still ongoing. Vattenfall and other operators also filed a lawsuit with Germany's Federal Constitutional Court which ruled in 2016. While affirming the right of the state to freely adopt measures of its choosing, with the goal of protecting the environment and the health of its population, the Court judged that the property losses were disproportionate and should give rise to compensation. This example demonstrates very well that national jurisdictions themselves are perfectly able to address the needs of investors.

<sup>31</sup> The experience of NAFTA attests to this. Its parties may issue binding interpretations, by means of the treaty's Free Trade Commission.

account for example the objective that it is pursuing by its measure. Yet it has been observed that the compensation payments granted to foreign investors on the basis of investment treaties, where their actions have succeeded, have reached significant different levels compared to those made by national courts. It seems also essential to envisage, within the CETA framework, the possibility of tempering any compensation due after an expropriation, to better reconcile the various objectives pursued by national governments.

### **3. The mechanism of Investor-Contracting party dispute resolution (Investment Court System)**

#### ***a) The nature of the new system for dispute resolution***

The major innovation introduced by CETA's chapter 8 is its substitution of classic investment arbitration mechanisms by the institution of a permanent dispute resolution system that will comprise a tribunal of first instance (article 8.27) and an appeals tribunal (article 8.28)<sup>32</sup>. The decision to establish such a system, which some have long called for, was strongly pressed for by the European Union, following an initiative of the French government which has taken account of the numerous criticisms made of the investment arbitration system<sup>33</sup>.

Some essential differences distinguish the investment arbitration system:

- the permanent character of the dispute resolution system, when the arbitration is based on the formation of ad hoc tribunals which are dissolved after the definitive ruling on the case for which they have been convened<sup>34</sup>. This permanence and centralization of disputes should assure better coherence in the enforcement of the agreement, through the jurisprudence arising from the proceedings of the tribunal and the appeals tribunal.
- The appointment of tribunal members: both the tribunal of first instance and the appeals tribunal will be nominated by the CETA Joint Committee which will establish a list of at least 15 persons of recognized competence (five members will be Canadian nationals, five will be European nationals, and five from third countries). With this system, the composition of the tribunal established for each case (three members in

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<sup>32</sup> A comparable system is also established in the free trade agreement concluded between the European Union and Vietnam in 2015.

<sup>33</sup> Trade in Services, Investment and E-Commerce, Commission Draft Text TTIP and Reading Guide to the Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP), September 2015. The reflections of the European Commission on the subject were initiated after wide public consultation in 2014 on the ISDS, within the process of the negotiation of the treaty with the United States.

<sup>34</sup> This is the case whether for institutionalized arbitration within the framework of the International Centre for Settlement of Investment Disputes or for other arbitration.

principle) will be determined by the president of the tribunal. The investor will therefore be unable to designate one of the tribunal members.

- The establishment of an appeal mechanism, in which the arbitral awards of tribunals can only, in general, be subject to an annulment procedure, allows only a very limited oversight of the decision.

However, the chapter 8 dispute resolution mechanisms do not entirely break with investment arbitration precedents.

- It is provided that only the investor may submit a claim with the tribunal of first instance (article 8.18). Chapter 8 thus reproduces the *unilateral character* of investment arbitration, and counterclaims are not admitted.
- In establishing the procedures which the Tribunal of first instance must follow, Article 8.23 refers to the arbitration rules which are usually referenced by investment treaties<sup>35</sup>. It is here that claimant investors will choose the arbitration rules of the empire under which they wish the dispute to be decided.
- Members of the Tribunal of first instance will be remunerated with a monthly retainer, allowances and payment of expenses under article 14(1) of the ICSID Administrative and Financial Regulations. Yet it is well known that the cost of investment disputes may be very substantial. Certainly the expenses and allowances of the panel members are not the greatest part of this. But a clear break with this aspect of the arbitration system is essential. This will facilitate smaller companies' access to chapter 8 dispute resolution processes<sup>36</sup>. The double remuneration implicit in the payment of a monthly retainer together with daily honoraria could even elevate costs, compared with investment arbitration.

#### ***b) The scope of guarantees against abusive claims under chapter 8***

CETA's chapter 8 establishes a dispute resolution procedure between investors and contracting parties which aims to limit abusive claims. The dispute settlement process will be concluded within fixed period determined in advance<sup>37</sup>. The effectiveness of the system is enhanced and the initiation of proceedings with the express aim of prolonging them should be avoided. Article 8.18 forbids recourse to the dispute settlement system by investors who may have fraudulently restructured their investment with the sole intention of benefiting from the treaty<sup>38</sup> or who may be guilty of corruption. Article 8.32 allows for an accelerated procedure to dismiss claims that are manifestly without legal merit.

Chapter 8 also contains safeguards to limit the possibility of multiple claims being brought against the contracting parties as part of a vexatious legal strategy. Article 8.22 requires the investor (and any local subsidiaries) to withdraw or discontinue any existing proceeding before a tribunal or court under domestic or international law in order to be able to pursue its claim at the Tribunal of first instance. This provision would not however prevent successive proceedings:

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<sup>35</sup> The ICSID Convention and its arbitration rules, the ICSID Additional Facility Rules, UNCITRAL Arbitration Rules or any other rules to which the parties to the dispute may agree

<sup>36</sup> Article 8.27 § 15 states that the CETA Joint Committee may decide to transform the monthly retainer fees and other fees and expenses into a regular salary, and article 8.39 § 6 charges it with considering complementary rules designed to reduce the financial burden on claimants who are natural persons or small and medium-sized enterprises. It is imperative that consideration of these matters be promptly undertaken.

<sup>37</sup> It is notably provided that the Tribunal of first instance must render its decision within 24 months of a claim being submitted (article 8.39 § 7) and an appeal can only be made up to 90 days after the tribunal makes its award.

<sup>38</sup> Such as the case, for example, of an American company operating in Europe which, certain difficulties having arisen with the host country, decided to restructure its investment into Canada with the sole aim of exploiting CETA, should it decide to initiate a claim against the EU. This kind of abuse is fairly common, and has been vigorously denounced in recent arbitration jurisprudence

an investor may pursue a claim at the Tribunal having first pursued a claim in a domestic court, once the proceedings there have been finally concluded. In this case, this provision allows the pursuit of a claim at the Tribunal, even after having introduced a claim in a domestic court of the jurisdiction hosting the investor's investment, or another international jurisdiction, under the condition however (i) that the investor withdraws any existing outstanding proceedings and (ii) refrains from initiating any other new proceedings. In a case where the investor has exhausted all means of recourse under domestic law, the investor may introduce a claim at a chapter 8 tribunal, but only on the grounds of a denial of justice resulting from legal malfunction in that jurisdiction. Furthermore, the treaty provides that parallel actions by an investor under chapter 8 and between the contracting parties under chapter 29 may be pursued (article 8.42 § 2). It is therefore still possible that CETA contracting parties may in future find themselves in the kind of situation which Australia experienced over its legislation on cigarette packet advertising, called to an investment tribunal by the Philip Morris company, and to the WTO dispute settlement body by several states.

Another mechanism should dissuade systematic and foolhardy recourse to a Chapter 8 tribunal: article 8.39 § 5 provides that the Tribunal may order that the costs of the proceedings be paid by the losing party in the dispute, as well as the legal costs of both parties.

#### **4. The risk of dispute of environmental and sanitary public policies within the framework of the dispute resolution procedures**

It is clear that CETA will offer a new means of recourse to Canadian investors in Europe (and conversely to European investors in Canada), as prior to CETA there was no investment treaty between Canada and the majority of European Union countries.

All of the kinds of measures which a contracting party can adopt with a view to the protection of the environment or of health can be, when they are considered as generators of a prejudice, the subject of a claim: individual measures such as, for example, the refusal of an exploitation licence, or a generally applicable measure such as a law or informal practice. Measures emanating from Member States or the European Union can equally be the subject of a claim.

Two important limitations should, however, be noted. Firstly, a foreign investor can only litigate new measures adopted by the contracting party that came into force after the investor became established in the territory (measures relating to the access to a territory for new investment are beyond the competence of the Tribunal). Secondly, the claims of an investor from one party who seeks compensation for a loss resulting from a breach by the other Party of its CETA obligations (article 8.18), assuming that the breach can be proven. The objective is therefore to obtain financial compensation from the Party found in breach. The Tribunal cannot order the Party in breach to take other actions or to modify its law (with the exception of the restitution of property that has been illegally expropriated, article 8.39). The recourse offered under European or domestic law that allows for the possible annulment of illegal measures may sometimes seem much more effective, and all the more so in that the annulment may be accompanied by a claim for compensation.

That said, chapter 8 would not prevent investors from bringing proceedings before the tribunal comparable to certain other cases whose consideration beyond the domestic jurisdiction has appeared shocking. A dispute such as that between *Philip Morris* and Uruguay and Australia might for example lead to a similar case between a Canadian company and an EU Member State which adopted comparable tobacco control legislation. A case similar to the ongoing dispute between *Vattenfall* and Germany concerning the latter's hasty retreat from nuclear energy could



re-arise under CETA's provisions. But there is no guarantee that such disputes would be resolved in favour of the claimant. Neither is there any reason to affirm that the international guarantees offered to investors are absolute. Experience demonstrates this: in many cases which have been profoundly worrying, the allegations of investors have all been simply rejected outright (the *Methanex v. United States* case, *Philip Morris v. Uruguay*, *Eli Lilly v. Canada*). Finally, when the state is ordered to compensate the consequences of a measure concerning the protection of the environment or health, it is often on the grounds that the facts of the case suggest a protectionist intention, in the guise of protecting the general interest.

Given the guarantees present in the treaty, subject to the necessity of further clarifying certain clauses, it seems reasonable to think that chapter 8 may not be engaged by an investor to oppose a perfectly legitimate public policy concerning health or the environment. A hypothetical recourse by a foreign investor against a new measure of general scope—a European directive, or a domestic law for example—that forbade the use of certain chemicals classed as endocrine disrupting agents might be envisaged. Supposing that such a measure were adopted in the coming years, and that it forbade the production of certain waterproofing products for example, a Canadian enterprise which had arrived in Europe many years ago to manufacture and sell such products could see its investment become totally worthless. This enterprise might therefore be tempted to initiate a dispute on chapter 8 grounds, claiming, in particular, that it was subject to a measure that was effectively equivalent to expropriation. But to obtain satisfaction, the enterprise would have to show that the measure in dispute was not justified with regard to the objectives stated by the contracting party which adopted it, that its restraint on trade was disproportionate to its effectiveness in protecting health, or that its enforcement was incompatible with the rational exercise of the legal powers of this contracting party. It would be not be able to contest this legislation on the grounds of the protection of legitimate expectations. If the investor based its case on this argument, it is probable enough in the current context, the endocrine disrupter chemicals being the subject to great attention in Europe, with proposals for legislation already having been considered by European institutions, that the Tribunal would conclude that the enterprise must expect the adoption of such a ban. In the same manner, in the case of a ban based on the precautionary principle, several elements lead to the belief that the claim would not be more likely to succeed on the basis of chapter 8<sup>39</sup>. This would be on the condition, however, that the scientific evidence that led to the ban respected the elevated CETA requirements (see the analysis of the environmental and sanitary provisions of the agreement above).

A second hypothetical case could also be envisaged: that of a recourse against an individual decision of a Member State which forbade the pursuit of an activity by a Canadian investor, on the grounds that it presented a risk to the environment. An investor might for example argue that the withdrawal of an operating licence contravenes the principle of just and equitable treatment. But the investor would have to show that the conditions in which this withdrawal was decided constituted a breach of the terms delimited in article 8.10. A case based on the manifest arbitrariness addressed by § 2 c) would only seem feasible if it was clearly apparent that the environmental risks on which the authorities based the withdrawal of the licence were baseless (in the case for example where the operator had satisfied all of the environmental requirements

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<sup>39</sup> Even if chapter 8 does not contain any provision on the precautionary approach, one can hardly see the Tribunal ignoring this principle entirely should it be invoked by a contracting party. Beyond this, several precedents arising from investment disputes have shown that the tribunals accept, independently of the applicable treaty's provisions, that a state may adopt a restrictive measure on the basis of precaution (for example *Methanex v. United States* (2005), *Windstream Energy LLC v. Canada* (2016)).

previously imposed upon it). However, a case based on a fundamental breach of the principle of due process addressed in § 2 d) might be more problematic. In arbitration tribunal jurisprudence, this principle implies, essentially, that the investor be in a position to be able to determine their legal rights and obligations before taking any decision in the light of them (the obligation of reasoned judgement, obligations of consultation of the recipient of the decision etc.). The obligations are not fundamentally different from those of French administrative or European law (rights of the defence, right to sound administration). But the arbitration tribunals sometimes tend to apply these principles in a particularly strict manner, in a way that limits the range of manoeuvre open to the public authorities when making a decision. Furthermore, the risk of not satisfying these procedural requirements is amplified by the arbitration tribunals' application of these principles to higher courts as strictly as to local authorities (within the decision-making process of a municipal council for example). Thus, the consideration by a municipality of a new factor in the proper assessment of the environmental risks posed by a project could be ruled unjust and inequitable if the investor has not been previously informed that its activity could be assessed with respect to this factor<sup>40</sup>. Another difficulty could arise if the investor challenged on the grounds of frustration of legitimate expectations supporting an allegation of breach of just and equitable treatment. However, even if the text of article 8.10 is insufficiently clear, since it requires "specific representation", it would in all likelihood be necessary to show that the representations were sufficiently explicit to enable the investor to reasonably believe that he would obtain the operating licence, or that it would not be revoked for the environmental reasons stated.

The foregoing conjecture about possible disputes shows that various uncertainties remain as to the manner in which certain chapter 8 provisions may be interpreted. These uncertainties could give rise to a tightening of the conditions in which the contracting parties could continue to exercise their right to adopt the environmental or health protection measures of their choosing. Despite that, the discussion outlined above also shows that the risks that weigh on the sovereign rights of the CETA contracting parties are limited. There is no question of the treaty becoming an instrument that, in itself, will reverse the environmental and sanitary policies of Europe or Canada.

Finally, this analysis leads to the thought that its *chilling effect*, feared by some, is, in this matter, exaggerated. It is improbable, in fact, that States such as France, Germany, or Canada would put their public health or environmental protection policies into reverse gear, under a single threat of involvement in litigation by an investor<sup>41</sup>.

In order to consolidate the guarantees contained in the agreement in favour of environmental and health protection, the introduction of a "veto" mechanism might be envisaged. This would allow the contracting parties (of a joint agreement), or a treaty monitoring committee, to determine, should an investor make a claim, whether such a measure is or is not in compliance with the treaty. This procedure would enable the arbitration of the ICS to be "short-circuited" and avoid long, costly dispute proceedings. CETA already contains such provisions for fiscal measures (article 28.7). They allow, furthermore, within the framework of financial services, for the CETA Joint Committee or Financial Services Committee to pre-empt the Tribunal's power of judgement, in order to first consider whether a specific exception under the prudential carve-out granted in article 13.16 may apply. If it does, the complainant's claim to the Tribunal is considered as not admissible (article 13.21 § 2). These specific regimes may be explained by the highly sensitive nature of

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<sup>40</sup> In this sense *Bilcon v. Canada*, arbitral award of 15 March 2015.

<sup>41</sup> See the 2011 evaluation of the impact of NAFTA on sustainable development produced by the European Commission. *Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada*, Trade 10/B3/B06, June 2011, p. 387.

the policies adopted by the States in these areas. They create however a multi-tiered regime which can be difficult to justify with respect to other kinds of measures—in the areas of environmental, climate and health protection in particular—which are so tightly bound to the concerns and general public interests of the contracting parties. Widening such provisions to include environmental or sanitary measures and, more specifically, measures to combat climate change, against which urgent action is necessary, would be a major advance, and definitively allay the many concerns that have been expressed on the matter of chapter 8.

### **III. Regulatory cooperation mechanisms and contracting parties' capacity to regulate**

#### **1. The mechanisms**

The objectives of the regulatory co-operation mechanisms, detailed in chapter 21, are firstly to facilitate trade and investment by removing unnecessary regulatory barriers, and secondly to facilitate dialogue between the contracting parties, in order to produce more effective regulation, including environmental and health protection. The necessity for increased regulatory co-operation is justified essentially by the development of global supply chains involving an ever-increasing number of actors, and production methods which are often divided among several countries. In this sense, it aims above all to facilitate the orderly function of these global supply chains. In other cases, it is justified to address global issues, and notably the provision of global public goods (e.g. combatting climate change) which require, by definition, concerted action between governments. In CETA, however, a distinct emphasis on the first objective is to be noted. For example, of the 19 examples of regulatory co-operation activity mentioned in article 21.4, only one is presented as having, among other objectives, the goal of the protection of health, security and the environment. Regulatory co-operation may be applicable on any kind of norm or standard: a legislative act of a State or the EU, regulations and so on, which have general scope.

Systems of regulatory co-operation between the EU and Canada already exist: the TBT and SPS Agreements within the WTO framework, the 1998 Agreement on mutual recognition between the European Community and Canada, and the Agreement between the European Community and the Government of Canada on sanitary measures to protect public and animal health in respect of trade in live animals and animal products, signed in Ottawa on 17 December 1998.

Several tiers of regulatory co-operation are established by CETA:

- Dialogue between the contracting parties in order to envisage joint actions on matters of common interest.

Examples: chapter 23 and chapter 24 on the protection of labour and on the environment.

- Procedures guaranteeing the accessibility and intelligibility of standards.

For example, duty of publication, exchange of information, exchange of experience, setting up information channels to address questions arising from proposed legislation and so on are present in several chapters of the agreement, and mechanisms to assure the compatibility of standards.

- Procedures to assure the equivalence of standards by mutual recognition.

Examples: article 5.6 of chapter 5 and annexe 5-D on sanitary and phytosanitary measures; article 4.4 of chapter 4 on technical barriers to trade; chapter 11 on mutual recognition of professional qualifications through mutual recognition agreements; protocol on the mutual

recognition of the results of the assessment of compliance; protocol on the mutual recognition of the compliance programme with good practice in pharmaceutical manufacture.

These are always of a conditional equivalence: a contracting party has the right to request the equivalence of a standard, but does not have the right to obtain this unconditionally. The other party always has the possibility of refusing equivalence, though the grounds for the decision must be stated. It is not excluded that a contracting party which is refused an equivalence might initiate proceedings at an arbitration panel under chapter 29 provisions, in order to contest that the grounds for the other contracting party's decision were insufficient.

- Mechanisms for harmonisation.

Some of the treaty mechanisms are not new, being derived from the WTO TBT and SPS agreements. For example, in the SPS framework, harmonization of standards may be agreed on the basis of standards, directives, or international recommendations adopted by the *Codex Alimentarius* Commission, the World Organisation for Animal Health (OIE), the Secretariat of the International Plant Protection Convention or by any other recognized competent body, which could include all WTO members. The WTO members are not obliged by the framework to incorporate international standards into their domestic regulations. They are, however, strongly encouraged to do so since the standards benefit from a presumption of compatibility with the commercial disciplines of the WTO.

Should a member decide to go beyond the international recommendations, it must supply scientific evidence that its requirements are appropriate for the risk which it is understood to avert. This could present a difficulty for the precautionary approach, for example when international standards have only been adopted by a slim majority in the competent organisation (see the ractopamine case).

Let us note that CETA innovates towards the path of harmonization in the area of social standards in chapter 23.

- Mechanisms to allow discussion between the parties in advance of proposed legislation (article 21.4 d).

It is probably this kind of activity which is most prejudicial to the autonomy of the contracting parties in the formulation of their laws and regulations. Certainly, this kind of activity can only be implemented on a voluntary basis; at no moment is a contracting party dispossessed of its right to regulate. The final decision is entirely the contracting party's; furthermore, it is expressly stated that each contracting party preserves its right to adopt legislative measures of its own, even if that supposes adopting more restrictive legislation in comparison with that in force in the other contracting party.

But in participating in this kind of activity, the EU or a State exposes itself to various pressures which might lead to a strategy of attrition, recoiling from any such legislation altogether, or considerably softening its scope. Furthermore, the requirement to communicate legislative proposals at an early stage makes them all the easier to oppose effectively and could short-circuit domestic democratic processes such as public consultation procedures. Finally, in certain cases, the scope for manoeuvre of the contracting parties in order to participate in some activities of regulatory co-operation is unclear. Chapter 25 on "Bilateral dialogues and co-operation" raises issues. The bilateral dialogues envisaged within its provisions address matters of joint interest, and in particular, biotechnology, forest products, raw materials, and more generally, science, technology, research and innovation. Such co-operation is essentially based on the exchange of information, but in this framework, the contracting parties must also "*favour the use of effective biotechnology approval*

*procedures, on a basis of scientific evidence" or "engage in regulatory cooperation to minimise adverse trade impacts of regulatory practices related to biotechnology products".* The agreement seems to encourage the opening of negotiations on these issues and in particular the commercialization of biotechnology goods<sup>42</sup>. It is difficult at this stage to evaluate how this approach will articulate with the current European regime on the authorisation of GMO<sup>43</sup>.

With regard to this, in declaration n°30 of the declarations annexed to the minutes of adoption of the Council approving the signing of CETA, the Commission confirmed that CETA did not involve any change to EU legislation concerning the analysis of risks, or the authorization, labelling and traceability of genetically modified foodstuffs or animal feed, as required by current existing legislation. It specifies that for genetically modified products destined for cultivation, Member States retain the possibility of restricting or banning the cultivation of genetically modified organisms (GMOs) in their territory. Yet is uncertain that the Member States can refuse regulatory co-operation in these areas. The formula according to which "*bilateral dialogues shall take place without undue delay at the request of either Party or of the CETA Joint Committee*" (article 25.1 paragraph 2) together with article 25.1 § 4 under which the Joint Committee may decide to change or undertake the task assigned to a dialogue, suggests that a party cannot oppose the opening of a dialogue.

The entities participating in the regulatory co-operation mechanisms are the contracting parties and civil society representatives. Numerous provisions provide for the latter be informed, consulted and their proposals considered. It will be necessary to be attentive to the composition of the committees and any possible imbalance between the resources of the industrial interest groups and the associations defending the environment or consumer interests.

The Regulatory Co-operation Forum is the privileged body for conducting the activities of regulatory co-operation outlined in chapter 21. But it possesses no normative power. It cannot impose binding decisions on the contracting parties. It cannot decide issues concerning a divergence of standards between the contracting parties. It cannot settle issues of equivalence or harmonisation of standards. Finally, it cannot modify or reject standards adopted by the contracting parties.

Other committees may have an equally important influence, such as the Joint Committee, which can, within the framework of chapter 25, take over a task assigned to a bilateral dialogue, or dissolve proceedings. It could therefore discuss the regulations concerning GMOs for example, in the place of the contracting parties. It could equally be pointed out that the Joint Committee on the mutual recognition of professional qualifications can revise the agreements of mutual recognition of professional qualifications agreed by the contracting parties.

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<sup>42</sup> CETA set its objective as the enhancing of bilateral co-operation on issues relating to questions of access to the market of biotechnology, pursuing a dialogue at the biotechnology commission set up in 2009 as a mutually agreed solution to the WTO dispute over biotechnology (article 25.2).

<sup>43</sup> EU Directive 2015/412 of the European Parliament and the Council

## 2. Risks and opportunities

In general, the improvement in compatibility of national regulations is in itself a legitimate objective which merits pursuit. This kind of co-operation, however, brings risks which it would be wise to consider seriously. In practice, it is extremely difficult to appreciate what the impact of the mechanisms of regulatory co-operation might be on the definition of the degree of environmental and health protection in Europe. The principle of non-regression certainly prevents the adoption of provisions which diminish the level of protection. But it does not prevent the possible use of such mechanisms to try to avoid the other party adopting additional protection provisions in the name of legislation harmonisation. Such undertakings—seeking to prevent a trade partner from adopting more protective legislation contrary to its commercial interests—are certainly no novelty; they are rather frequent even. Institutionalising them at the heart of the Regulatory Co-operation Forum could reinforce them. The functioning of the RCF could present a risk of political interference by private interests (Canadian or European industry) in the regulatory processes of the parties, which should be taken into account<sup>44</sup>.

Conversely, the RCF could attenuate the scope of such undertakings provided that its proceedings are completely and obligatorily transparent, including the positions of each party on its proposals for legislation, which would represent major progress. It could also, on this condition, be a vector of enhanced influence for civil society in order that sufficient regulatory decisions be taken to increase the ambition of environmental and sanitary policy and respect the commitments made toward reduction in the emission of greenhouse gases within the Paris Agreement. It could, finally, avoid creating barriers to the emergence of innovative clean technologies.

Everything depends therefore on the operating rules of this forum. No requirement for impartiality nor any rules of representation have been adopted. Its mandate, its proceedings and its work plan will only be defined after the first meeting which will take place after the agreement comes into force. It is therefore essential that France and the European Union consider these rules, and in particular those of transparency, to be a key point. In any event, the assessment of the equivalent character of the various measures adopted with regard to environmental impacts should always only return to the competent authorities on environmental matters. Yet the ways and means of the Forum as currently outlined in the agreement do not currently guarantee such functioning.

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<sup>44</sup> Commissariat général au développement durable (CGDD) « Les relations entre le CETA et le climat », January 2017.

# CHAPTER 4: ANALYSIS OF RISKS

## SECTION 1 - HEALTH IMPACTS

### I. Differing concepts and approaches to public health

There are major differences in the evaluation and management of risks to public health between Canada and the EU.

#### 1. The EU advocates and implements the precautionary principle

The EU applies the precautionary principle in the areas of food and health and takes collective preferences and social expectations (concerning for example biotechnologies, animal protection...) into greater consideration than other regions of the world.

For instance, the EU has banned the non-therapeutic administration of chemical substances to animals in good health. Taking into account in particular doubts about the secondary effects for human health of hormones and ractopamine, the use of these products has been banned in the EU on the basis of a risk/benefit analysis, despite the existence of maximum residual limits from the *Codex Alimentarius*, the most important international standards body referenced by the WTO SPS Agreement.

As we have detailed *above* (see chapter 2) CETA questions, indirectly and implicitly, the governance on the basis of precaution which is currently in force in Europe. A product may be authorized in North America as long as science has not clearly demonstrated its harmfulness. In this context, what can we make of the particular consequences for this situation for the European REACH legislation—integrating what CETA names "*technical regulations*"?

The treaty does not question REACH in a targeted or explicit manner. However, the treaty's vagueness on the precautionary principle discussed above must be taken into account, as it is, among others, a founding principle of REACH. Furthermore chapter 4 of the treaty, relating to "technical barriers to trade" could potentially slow or even contradict the European system for the evaluation and regulation of chemical substances. Its provisions detailing the development and adoption of technical regulations such as conformity assessments are characterized by their sophistication (articles 4.4.1, 4.4.2, 4.6.3, 4.6.7)<sup>45</sup>. They notably commit the parties to engage in a justification process: justification before any adoption of a new regulation; justification should equivalence between regulations be refused. Furthermore, it requires a hold period to allow a party to prepare comments on any proposed regulation provided by the other party, though with the notable exception of "*urgent problems of safety, health, environmental protection or national security*", for which this requirement can be ignored (article 4.6.3). However, the definition and recourse to urgency could be problematic in situations where the health effects are uncertain and/or disputed.

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<sup>45</sup> See also CIEL (2017). EU-Canada Trade and Investment Deal Threatens EU Chemical Policy. 2 February.

## 2. In the EU sanitary obligations apply at every stage in the food chain

Even though the parties both take the HACCP (Hazard Analysis Critical Control Point)<sup>46</sup> methodology as their reference, as recommended by the *Codex Alimentarius*, the determination of CCP (critical control points for the identification of hazards) and the implementation of this methodology will fundamentally differ between the parties.

The EU bases its legislation ("*Hygiene package*", 2004) on the control of health risks throughout the foodchain, from production to consumer purchase. In contrast, the north American "hygienist" approach emphasizes decontamination treatment (heat, physical, or chemical) at given stages of production (such as pasteurization, ionization, use of chemical substances, etc) without requiring particular sanitary conditions before or after the treatment. Performing a decontamination procedure does not encourage producers to control risk as early as possible in the production sequence. They can thus be exonerated from biosecurity rules and good hygiene practices, which notably allows them to reduce costs and attain notably higher slaughter throughput. It can furthermore lead to recontamination of products after they have been treated. Europe considers that this approach does not fully guarantee safety for consumers.

There is thus a real conflict between the two "food safety standards", each being considered to better guarantee safety for the consumer by the countries that follow it.

## II. The CETA agreement acknowledges the SPS Agreement and follows the provision of previous veterinary agreements

The sanitary and phytosanitary chapter of CETA (chapter 5) refers to the rights and obligations defined in the SPS Agreement by which each party has the right to determine its own level of protection, on the basis of recognized international standards and scientific risk assessment. The SPS Agreement notably allows for the adoption of temporary precautionary measures (see inset box, precautionary principle, chapter 2 above, p21).

The provisions of the veterinary agreements previously signed with Canada, notably the agreement of 1998, are reincorporated into the CETA agreement, which is furthermore expanded to include plants. CETA readopts in particular the possibility of "*prelisting*"<sup>47</sup> as well as the principles of equivalence and of regionalisation, and simplifies the models of health certification.

The agreement stipulates that the place of slaughter alone is insufficient to confer origin, which will prevent products from the United States from benefiting unduly from the preferences granted to Canada. It defines the terms of reference of the Joint management Committee for SPS measures, which is in particular charged with identifying the standards which may be considered equivalent between the two parties.

Furthermore, CETA provides for Canada's respect of European sanitary regulations on the banning of hormones and beta-agonists (ractopamine)<sup>48</sup> in livestock farming, requiring dedicated Canadian sectors in order to access the European market.

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<sup>46</sup> A method developed in the United States in 1959 and introduced to the European Union in 1993 by directive 93/43/CE on the hygiene of foodstuffs.

<sup>47</sup> Sanitary approval of establishments by the importing country based on a list guaranteed by the exporting country.

<sup>48</sup> Six hormonal growth promoters have been approved by Canada for administration to beef cattle. Three are natural: progesterone, testosterone, 17 beta-estradiol, and three are synthetic: trenbolone acetate, zeranol and melengestrol. Ractopamine chlorhydrate (ractopamine) is authorized in Canada for cattle and pig raising, except in Quebec.



It should be recalled that the CETA negotiations allowed the BSE embargo to be lifted for several European states including France in October 2015.

Taking into account these elements, the European and French veterinary authorities consider that it is the best free trade agreement with respect to sanitary issues, compared with the other agreements already concluded or currently being negotiated.

It should however be noted that the issue of anabolic substances and beta-agonists is not explicitly mentioned in CETA; the case could be re-opened, ending the compromise adopted in 2009 between the United States, Canada and the EU <sup>49</sup>.

### **III. However this new generation agreement omits other issues which are also relevant to public health and the increasingly strong public expectations thereof**

It appears that there is nothing in the CETA agreement relating to:

- Animal feed (such as the use of animal bone meal and GMO maize and soya, pesticide residues.. )
- the use of veterinary medication (notably antibiotics) in livestock farming,
- animal welfare (rearing, transport, and slaughter).

As several recent studies of public opinion have shown, French and European consumers demand not only safe food, but also that foodstuffs are produced in the most natural way possible in a way that is respectful of animal suffering. The level of trust of European consumers must thus be taken into consideration. Currently very fragile, this trust could be shaken by the knowledge of Canadian production methods which do not respect the high standards in force in the EU, already often considered inadequate by European citizens, on animal feed, animal welfare, and sanitary controls at every stage in the food chain.

Furthermore fattening and slaughter in Canada take place in very large facilities, which will not fail to stimulate the debate on intensive farming practices.

#### **1. The use of animal meat-and-bone meal**

The use of animal meat-and-bone meal in cattle feedstuffs is more an issue of social acceptance than a strictly health-related matter, since effective measures have been implemented to secure and inactivate prions since the mad cow disease crisis. The risk arises essentially from the suspicion generated, which could concern all meat, of whatever origin, with a potential loss of consumer confidence, within the context of a notable decrease in the consumption of beef and pork in Europe.

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<sup>49</sup> The United States has hopes of re-establishing the retaliatory measures authorized by the WTO's hormone panel affecting EU products to 116 million dollars per year in equivalent customs duties. In 2009, both parties concluded an agreement under which the United States suspended its retaliatory measures and the EU opened a tariff-free quota of 20,000 tons of beef, rising to 45,000 tons, then to 48,200 tons when the agreement was extended to Canada, also a party to the hormones panel, for whom 17 million dollars of complementary customs tariffs were also granted. However, the quote being *erga omnes*, Argentina, Australia and Uruguay have benefited it from it to the detriment of the United States which complained of the loss of part of its market. Accordingly, in December 2016, the United States initiated proceedings for the reintroduction of the retaliatory measures. Should these proceedings come to fruition, the EU will cancel the American quota and Canada will then become the only producer of beef with tariff-free access to European markets, compliance with European standards will be compensated, and Canadian beef will be still more competitive in the EU market (to which other suppliers have access with the payment of an *ad valorem* tariff of 20%).

## 2. The use of growth promoters

Two types of these substances should be distinguished:

- growth promoters (anabolic agents) with no therapeutic objective: hormones and beta-agonists
- substances which have both therapeutic and growth-promoting properties, namely antibiotics.

European and Canadian regulations concerning them differ: anabolic agents and the use of antibiotics to enhance growth are banned in the EU but authorized in Canada.

CETA allows Canada to continue to use antibiotics as growth promoters, although restrictions on waiting periods and residues have been tightened.

Both the protection of public health as well as the preservation of the therapeutic arsenal of doctors and veterinaries have led the EU to forbid the use of antibiotics as growth promoters since 1996, and to limit the use of certain antibiotics, considered critical, in order to preserve their effectiveness in human medicine. Ambitious public policies in the struggle against antibiotic resistance in veterinary medicine have been put in place in several EU Member States, in particular France (Ecoantibio Plans 1 and 2). Their positive results have already been documented (a 20% reduction in antibiotic use in livestock farming in four years). The future regulatory framework for veterinary drugs is likely to introduce new restrictions, or the possibility of future restrictions, notably to combat antibiotic resistance, which will only apply in the EU (ban on the preventative usage of antibiotics, definition of a list of critical antibiotics) if corresponding measures are not adopted elsewhere.

Antibiotics that are used in Canada as growth promoters are introduced into food in a systematic manner in order to avoid the development of diseases at low cost and the use of basic biosecurity measures. In particular, they permit the fattening period of cattle to be shortened, reducing costs in winter. This mode of administration substantially increases the risk of antibiotic resistance, which is a major issue of the 21st century, and a priority within the global multidisciplinary "One Health" framework.

Furthermore, there are additional significant risks of growth promoters and antimicrobial agents spreading in ecosystems and modifying their equilibrium, notably in the aquatic milieu. There are no grounds for believing that Canada has any plans to forbid the use of antibiotics to promote growth in the foreseeable future.

To date, the EU imposes on third countries a program of residue control, and forbids anabolic substances. It however does not formally ban their use of substances for which no maximum residue limit (MRL) has been defined in the EU, does not impose the other EU restrictions (MRL and waiting period), or the ban on the use of antibiotics as growth promoters.

Given the WTO hormones case, should a ban be introduced on meat imports derived from animals that have been treated with growth-promoting antibiotics, it will be difficult for the EU to produce a scientific assessment that complies with the requirements of the SPS Agreement.

### 3. Animal welfare

Animal welfare is a major preoccupation of the EU (article 13 of the Treaty of Rome) and represents an increasingly important public expectation, also taken in consideration at the international level by the World Organisation for Animal Health (OIE), which develops standards on this topic since 2003.<sup>50</sup>

In this area, CETA provides only for enhanced co-operation. This will consist only of an exchange of information, expertise and experience in the area of animal welfare, aiming only at promoting collaboration on the issue.

Several specific European texts address animal welfare. Furthermore the EU adopted a strategy for animal welfare in 2012, and in June 2017 launched a platform dedicated to debating possible evolutions in its regulations. France launched its national animal welfare strategy in 2016.

Canada has no specific legislation on animal welfare; the applicable regulations appear in federal laws on animal health and meat inspection, which are considerably less strict than their European counterparts.

The principal differences between the European and Canadian regulations on animal welfare relate to rearing (building standards and animal density), transportation (vehicle conditions and transport duration, including breaks) and slaughtering practices (rates).

### IV. Ensuring inspection quality in the hormone-free and ractopamine-free sectors

Nothing in CETA related to the necessary adaptation of the organization of controls. One can consider that a dedicated sector producing minimal quantities could easily be inspected, but the increase in Canadian beef and pork exports will raise the issue of the inspection capacity of the Canadian authorities and the necessary increase in resources accorded to it.<sup>51</sup>

It also equally poses the question of the inspection workload at EU Approved Border Inspection Posts (BIP) with regard to sampling and analysis.<sup>52</sup>

Furthermore, if a hormone-free sector can be isolated during the fattening phase, this is not the case in the pre-fattening phase. In practice, certain growth promoters are frequently used in Canada for veal calves before they are separated from their mothers in dairy farms. The calves are only identified at the time of their first movement, while they are identified from birth within the EU: the identification and traceability systems are also different.

It should be noted that samples taken from Canadian meat exported to China, and Brazilian and American meat exported to Russia, have recently tested positive for ractopamine.

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<sup>50</sup> Animal welfare is not addressed in the SPS Agreement, nor in the WTO agreement, but is addressed alongside the "protection of public morals" in article XX of GATT.

<sup>51</sup> The Food and Veterinary Office (FVO), the European Commission body responsible for inspection and audit (DG Health), is charged with the verification of the respect for European rules in Member States and third countries, and in recent years has conducted inspection missions in Canada. In 2014 (report 2014-7216) the FVO reported: *"No gaps have been found with respect to the implementation of the ractopamine-free certification program for pigs organised by the Canadian Food Inspection Agency (CFIA). The program for removing growth promoters from bison and cattle is well-documented but insufficiencies in its design and implementation raise issues about its reliability."* It has issued a recommendation on the matter. In 2016 (report 2016-8896) the FVO did not make any recommendations but the mission only addressed the inspection of residues (laboratory analysis) and not the integrity of the Canadian certification program. The FVO's 2018 work program does not include any mission to Canada.

<sup>52</sup> The CETA agreement will reduce the rate of physical inspection of imported livestock and products of animal origin (10% of meat batches, though in general a rate of 20% is applied).

## **V. Concerns about the possible direction of European regulation**

### **1. The issue of decontamination of carcasses**

Chemical decontamination to compensate for possible hygiene errors during slaughter goes against EU health policies. In particular, Canada has used decontamination procedures in an effort to control the risk of *Escherichia coli*, which was the cause of serious crises the country faced in 2010 and 2014. The harmlessness of the chemical substances used (presence of residues, potential modifications of microbial equilibria, and the possible emergence of resistant organisms) has not been shown.

The EU has already authorized, by a simple exchange of letters, the use of lactic acid (December 2013) and recycled hot water (August 2015) to decontaminate carcasses, measures which have been considered by some as an anticipated concession by the EU in negotiations, which could open the way to the authorization of other substances. Canadian regulations authorize the rinsing and chlorine-treatment of both beef and chicken, which are banned in Europe. Very recently, in June 2017, Canada has indicated its wish to make a request for the use of citric acid and peroxyacetic acid. If Europe concedes such requests, this could in time call into question the European food safety model.

### **2. New institutions raising questions**

Sanitary issues are supposed to be dealt with by the Joint Management Committee for SPS measures established in the agreement, but certain observers fear that they might be tackled in the dispute resolution mechanism, or in the Regulatory Co-operation Forum (RCF), even if these are not decision-making bodies (see chapter 3).

It is revealing to note that during the last SPS Committee meeting (13-14 July 2017), Canada and the United States disputed the French regulations banning the introduction, importation and sale of cherries treated with dimethoate. At the same meeting, both countries, along with several south American, African and Oceanic countries, also criticized new EU proposals to legislate on endocrine disrupting chemicals (withdrawal of authorization).

Concerning seeds and intellectual property, there is a fundamental difference of approach between North American countries recommending the use of the patent system, and the EU, which favors the Plant Breeders Rights (PBR) certificate, which therefore introduces a significant risk of counterfeit disputes against farmers using farm-saved seed, numerous in France.

In all these aspects, the issue of imported products' labeling is crucial (see chapter 4 section 2).

Finally, it is not possible to entirely exclude the risk of undermining the EU regulatory framework concerning food, animal health and welfare, plant protection and living intellectual property, but it is also currently impossible to provide an objective assessment of this risk.

## SECTION 2 - THE ENVIRONMENTAL IMPACTS RELATED TO AGRICULTURE

### I. Public policy in the agricultural sector: two very different approaches to the environment on either side of the Atlantic

The principal objective of both the CAP and French agricultural policy was at first to increase production and agricultural productivity. Both have progressively evolved towards the decoupling of subsidies and addressing the increasing concerns about the impact of agricultural development on the environment (water and air pollution, degradation of soil quality, reduction in biodiversity, increasing energy consumption, and contribution to greenhouse gas emissions, etc.), the quality of products, and animal welfare.

In Canada, despite increasing concerns about the environment since the beginning of the new millennium, environmental protection is not at the heart of the Canadian agricultural policy yet and the environmental restrictions remain many fewer than in the EU. A comparative analysis by Boyd<sup>53</sup> shows that Canada is far behind the United States, the European Union, or Australia in regard to environmental policies and laws, whether on air or water quality, pesticides and toxic substances, climate change or biodiversity. On pesticides, Canada still allows 46 active agents which have long been banned in other countries. The maximum residual limits for pesticides authorized in food products are much less restrictive in Canada, even, in some cases, less restrictive than those of the *Codex Alimentarius*. The cultivation of GMO crops has been authorized in Canada since 1995. Canada was also the first country to commercialize transgenic salmon, in July 2017.

In the veterinary public health area, similar differences can be observed (see Chapter 4, section 1). Public subsidies to Canadian farmers are not subject to respect for environmental, sanitary, and they have been in the EU since 2003<sup>54</sup>.

As for environmental and animal welfare legislations, requirements are lower in Canada than in the EU, which could have significant consequences regarding the CETA operating framework.

Because of trade liberalization, European farmers could be penalized by higher production costs, due to European rules that often require technical processes which are more expensive when it comes to equipment and/or labour, non-remunerative investments (such as manure processing or improved livestock buildings) or higher transport costs.

While regulatory co-operation could facilitate harmonization of existing and future standards and rules between the parties, initiate discussions on possible disputes and pave the way to better shared understanding of health and environmental issues, it could also entail a number of risks (see chapter 3).

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<sup>53</sup> David R. Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies*, UBC Press, 2015

<sup>54</sup> Alison J. Eagle, James Rude, Peter C. Boxall, *Agricultural support policy in Canada: What are the environmental consequences ?* Dossiers environnement, 2016, 24(1): 13-24.

## II. CETA and the objectives of sustainable development for agriculture

### 1. Field crops

CETA's goal is the removal of tariffs. Liberalizing trade with a country where phytosanitary requirements are lower than in the EU could have an impact on the acceptance and implementation by European farmers of practices that use farm inputs more economically. However, this process is far from easy, as shown by the difficulties experienced with the implementation of the Écophyto plan in France.

Furthermore, it is a concern that the co-operation procedures towards harmonization of the maximum residue limits (MRL) for pesticides in agricultural food products may lead to downward harmonization.

Biotechnology is also an area which requires vigilance. The EU has committed to no further amendment of its GMO legislation<sup>55</sup>. It has not yet adopted a position on the classification of "new GMOs"<sup>56</sup>, in contrast with Canada which has chosen not to classify them as GMOs. We will have to remain vigilant with respect to the pressures which may be exerted across the various co-operation committees put in place by CETA (RCF and the Biotechnologies committee). This ambition is explicit in the report made to the Canadian House of Commons in 2014: *"One of the most promising aspects of the agreement is the reinforcement of the working group which considers biotechnology issues to assure that it does not interfere with trade"*<sup>57</sup>.

The culture of GMOs resistant to glyphosate is a real problem for the environment, with the development of pesticide-resistant weeds<sup>58</sup>. This development recalls the phenomenon of antibiotic resistance. In the face of this problem, new varieties that are resistant to two different herbicides (including 2,4-D, which is banned in Europe) have been offered to farmers. Canada would like the EU to quickly allow these varieties, among others. This kind of development appears to contradict the objectives of the ecological transition for agriculture, which is notably based on the implementation of long and diverse rotations, and allows for the consumption of pesticides and fertilizers to be reduced, thanks to complementarities between the cultivated species.

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<sup>55</sup> CETA Agreement, Declaration n° 30

<sup>56</sup> The term designates organisms developed with the use of more recent genetic modification techniques (*gene editing*) which are more specific (modification of a gene sequence and not only its deletion or the addition of a foreign gene) and more reliable (the frequency of secondary mutations is reduced and the modification no longer requires the addition of a marker genes, for example of resistance to an antibiotic).

<sup>57</sup> Report of the Standing Committee on Agriculture and Agri-Food.

<sup>58</sup> These consequences of the use of GMOs appear clear in the United States after 20 years of experience with GMOs. The GM varieties offered to farmers are either insect resistant ("Bt" varieties), or resistant to a total herbicide, usually glyphosate. The glyphosate-resistant varieties simplify the farmer's work, and enable larger areas to be cultivated. The development of GMO crops is among the factors responsible for the North American trend toward larger farms, and the simplification of technical sequences and rotations. The selection pressure resulting from the use of varieties that are most often resistant to glyphosate for the various cultivated species (cotton, maize, soya, canola) has however led to the development of herbicide-resistant weeds, some of which have even modified their life cycle to develop earlier than the cultivated crop. Although the adoption of these genetically-modified varieties at first enabled a reduction in pesticide use, this has rapidly increased anew in the face of the problem.

## 2. Beef

The duty-free quota that Canada will eventually benefit from represents about 23% of current EU imports<sup>59</sup>; it concerns only meat and not carcasses. It was calculated before Brexit and has not been recalculated since, although the United Kingdom currently imports a significant share of EU beef. The competitive differential between the beef fattening chain and above all the slaughtering-cutting process of Canada and the EU<sup>60</sup> is such that the opened quotas will certainly be fulfilled, even though this beef must be hormone-free. The European market will offer Canada the advantage of increasing the value of its hindquarter cuts, usually sold for mincing, by being sold as cuts of beef. The smaller the cuts, the more competitive Canadian products become compared with European products. The quota may therefore be almost entirely fulfilled in high quality hindquarter cuts—ribs and sirloin<sup>61</sup>—largely destined for the European restaurant and catering market<sup>62</sup>. Competition will therefore increase for the cuts which constitute the most profitable aspects of the slaughter of cull cows and beef heifers. Yet these are some of the most highly added value products for European dairy farms, which have already been struggling for many years with particularly low incomes. France, whose consumption is essentially derived from cull cows, may be particularly affected.

In total, if the entire quota were fulfilled in sirloin, this would represent 5.8% of the beef production of the EU. If these sirloins were from beef cattle, which would be the case since the suckling cow population is very significant in Canada<sup>63</sup>, this would represent 17% of the European sirloin production from beef cattle. These figures should be considered in the current context of negotiation of new free trade agreements with countries which are among the world's biggest exporters of beef (the United States, Mercosur, Australia). In the case of a crisis a safeguard clause may be activated, but it is not certain that that will be sufficient should the crisis endure.

The characteristics of Canadian modes of production (less restrictive standards; fattening and slaughter in very large structures) could contribute to the erosion of European consumer confidence in beef in general and could add to the difficulties of the sector. Appropriate labeling could be a solution with the necessary precautions (see II.3).

In France, as in the rest of the EU, dairy farms will be most affected. Yet these essentially depend on the use of usually permanent pastures which are mown and grazed, with a herd density which permits a high level of carbon storage<sup>64</sup>. Permanent pastures and cattle-grazing are favoured tools of INRA and ADEME not only to reduce direct emissions agricultural greenhouse gas emissions and N<sub>2</sub>O emissions, but also to favour carbon storage, and reduce indirect emissions from the production fertilizer, feedstuffs, and annual fodder crops. Permanent pastures are also among the richest habitats for biodiversity; they are often surrounded by hedgerows which also play an important role in carbon storage, biodiversity and the creation of attractive countryside<sup>65</sup>.

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<sup>59</sup> In 2015 the EU consumed roughly what it produced: imports at 300,000 carcass-equivalent tons, exports at 200,000 carcass-equivalent tons. The new quota of 50,000 carcass-equivalent tons granted to Canada therefore represents about one-sixth of all current EU beef imports; the total tariff-free quota about one-quarter (23%).

<sup>60</sup> In Canada, although dairy farms are family-run and of a comparable size to those of the EU, cattle fattening takes place in large *feed lots*: 60% of *feed lots* have more than 10,000 head of cattle.

<sup>61</sup> Be that short loin, tenderloin, rump, sirloin, bottom sirloin and rib = 15% of carcass weight in French beef cattle.

<sup>62</sup> AgroParisTech, Idele, IFIP "Analyse de l'accord de libre-échange entre l'Union européenne et le Canada (AECG/CETA) dans le secteur des produits animaux", January 2017.

<sup>63</sup> The suckling herd population in Canada is has more than four times more nursing cows than milking cows.

<sup>64</sup> Doreau & al. (2017) "Aménités et impacts sur l'environnement des exploitations françaises élevant des bovins pour la viande" INRA Productions animales, 30 (2) ; Dollé & al. "Elevage de ruminants et changement climatique" IDELE, 2016.

<sup>65</sup> Doreau & al., op. cit

Diverse measures in the CAP and French agricultural policy aim to maintain permanent pasturage and to augment the place of temporary pasturage in rotations.

Suckling cows are particularly concentrated in certain French regions (Massif central, Cher, Nièvre, etc.) where they form the principal agricultural activity. The disappearance of these farms would have negative consequences on the maintenance of activity in these areas with direct and indirect employment effects.

In other regions, suckling farms enable permanent pasturages located in land that is difficult to cultivate without drainage in farms where the principal activity is the cultivation of field crops. The maintenance of integration crop-livestock farming in this kind of farm, which constitutes a key element of the agricultural ecological transition, would also be threatened the slightest fall in the price of beef.

### **3. Labelling of agricultural products**

Labelling agricultural products is one way of informing the consumer. Such a system already exists by means of the system of derogation used in France, known as "born, raised, slaughtered". This approach must however be examined with great caution, given the risks of a dispute under the principle of non-discrimination<sup>66</sup>.

This is why it is necessary to introduce a system of labelling that informs the consumer about the mode of production (such as the use of antibiotics and growth promoters, animal welfare, environment, transgenic character), by regulation and/or co-ordinated initiatives by actors in the relevant sector.

Particularly for GMOs and GMO-based products (in 2017 Canada became the first country to commercialise transgenic salmon), it is essential that these products, including processed products, should be explicitly labelled pursuant to the CE 1829/2003 regulations. This raises the issue of the traceability of these products, bearing in mind that GMOs are not labelled as such in Canada.

### **4. Public procurement**

The agreement will disrupt the strategy of many local Canadian public institutions, many of whom (in Toronto, for example) have developed a local purchasing policy strategy, which notably includes supplying canteens with local goods. The principle of non-discrimination, which forms the basis of the regulation on public procurement, is not new to the EU. The clause which stipulates that the assessment criteria in the procurement notice or documentation can include criteria other than cost, such as the "environmental characteristics and the mode of delivery", opens the door to policies supporting local supply and quality in catering services, but in a complex way, as shown by the guide to catering services developed by the French agriculture ministry<sup>67</sup>.

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<sup>66</sup> The United States, following the establishment in 2009 of a labelling system for beef indicating its country of origin (the COOL system: "*Country of Origin Labelling*"), were brought by Canada to the WTO Dispute Settlement Body and lost the case. Having reformed their system with a "born, raised, slaughtered" system of labelling in 2013, they again lost a case brought by Canada and Mexico for non-respect of the non-discrimination principle.

<sup>67</sup> "Guide pratique : favoriser l'approvisionnement local et de qualité en restauration collective", Ministère de l'Agriculture, de l'Agroalimentaire et de la Forêt, November 2014, 92 p.



It is regrettable that this new-generation agreement does not meet the objectives of fighting climate change and sustainable development with better consideration by promoting ambitious implementation of local agro-food systems, linking consumers and producers, and limiting the need for processing and transportation of foodstuffs. It could have encouraged many initiatives on both sides of the Atlantic towards a food system that is both sustainable and resilient. For example it could have included provisions in line with the amendment adopted by the Agricultural Commission of the European Parliament in May 2017<sup>68</sup>, which specifies that "the objectives of the Common Agricultural Policy are to take precedence over all Union competition rules."

In the end CETA's agriculture provisions appear disappointing for an agreement that is said to be "new-generation". Clearly the goals of sustainable development have not been specifically taken into account by the negotiators who produced the agricultural part of the agreement. Agriculture has a major role to play in the ecological transition, as it contributes to the restoration of productive and healthy cultivated ecosystems, and the preservation and adaptation of production modes towards lower greenhouse gas emissions. The ambition of a new-generation agreement should have been to align trade and sustainable development. The risk is that CETA will not create favourable conditions for the objectives of the ecological transition in agriculture (particularly the maintenance of the place of pasturage and integrated crop-livestock farming), and in particular for suckling farms that have already been struggling for many years. The prospect of signing new free trade agreements with major beef exporters enhances the risk, as it will undoubtedly be difficult to avoid conceding similar terms to those obtained by Canada.

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<sup>68</sup> Amendment adopted within the framework of the omnibus regulation (253 b).

## SECTION 3 - CETA AND CLIMATE ISSUES

Climate change has become an essential issue, including for the economy. While the financial sector has begun to take the risks associated with climate change into account following COP21, the actors involved in the regulation of international trade are still behindhand on the issue. The Paris agreement contains no provision relating to trade, even though commitments made within the framework of the agreement have important implications for international trade. The WTO has not, up until now, incorporated climate change issues in the multilateral trading system. Air, and above all, maritime transport remains very backward compared to other transportation modes in taking action to reduce carbon emissions. The pricing of these modes of transport does not include the climate costs to society they engender, and associated emissions are not accounted for in national inventories.

### I. CETA's climate content

CETA, which was signed before COP21 and the Paris Agreement, does not make any explicit reference to climate change. It is indirectly acknowledged and the Paris Agreement is mentioned in the Joint Interpretative instrument.

#### 1. The reduction in customs duties on energy

Concerning energy, the majority (92% in 2014) of French imports of petroleum products from Canada (in value, excluding gas and coal) are already duty-free. Among these imports, those of Canadian crude oil, derived in large part from unconventional fossil sources, were already free from duties before the implementation of the agreement. Other hydrocarbon imports being subject to duty of less than 5%, the consequences of liberalization and of reducing tariffs to zero will be limited.

#### 2. Articles of the treaty addressing the climate

Chapter 22 "Trade and sustainable development" does not refer to the climate in detail. It provides however some provisions on sustainable development which are applicable to climate action.

Chapter 24 "Trade and environment" mentions climate change in one paragraph of article 24.12: "*the Parties commit to cooperate on trade-related environmental issues of common interest, in areas such as trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies.*" The remainder of the chapter addresses the environment as a fundamental pillar of sustainable development without making particular reference to the climate.

These chapters have the merit of endorsing the requirement for legislations and policies pursued by the treaty parties to comply with their commitments in multilateral environmental agreements (MEA). The principle of non-regression is furthermore affirmed, forbidding the weakening or transgression of environmental laws to favour trade or attract investment.

The other provisions relating to the environment and to sustainable development constitute useful orientations, but their very general formulation gives them limited scope.

Unlike the chapters relating to the trade provision, these chapters are not subject to the general dispute resolution mechanisms of the agreement. A specific system is provided, which would appear logical to avoid environmental disputes being arbitrated solely by the standards of free trade. But this mechanism assumes agreement between the parties and does not provide for a system of sanctions for non-respect of the treaty, for example by pursuing climate policies which breach the party's international commitments.

Climate change and the Paris Agreement are, finally, cited in a paragraph of the Joint Interpretative instrument, but using a formulation that is off-putting: "*CETA includes commitments [...] to cooperate on trade-related environmental issues of common interest such as climate change where the implementation of the Paris Agreement will be an important shared responsibility for the European Union and its Member States and Canada.*"

### **3. Provisions for dispute resolution, cooperation and arbitration**

There is a risk for a regulatory measure designed to combat climate change to be considered a barrier to trade, and that arbitration procedures result in demands for compensation. But this risk is no greater than that which already exists in the framework of the WTO dispute settlement mechanism.

The regulatory co-operation outlined in chapter 21 explicitly addresses trade, sustainable development and the environment (article 21.1) and therefore the climate. As indicated in chapter 3, everything will therefore depend on the operating rules of this forum: only specific measures for oversight and transparency, notably of policy positions taken by the various public authorities, can ensure that there is no climate risk.

Investment mechanisms allow for the remediation of a prejudice caused by the host state when breaching commitments that it has undertaken in the agreement.

Several important cases relate to energy and climate policy. The Swedish energy company Vattenfall demanded compensation of €4.7 billion from Germany, arguing that the country had breached its obligations under the Energy Charter Treaty when two nuclear power stations the company operated were halted; the Canadian construction company TransCanada demanded compensation of US\$15 billion from the United States following the Obama administration's decision to reject the Keystone XL pipeline project, using NAFTA dispute settlement procedures. It is however difficult to draw final conclusions since neither case has been decided on the merits.

There is nothing in the treaty ensuring that future environmental provisions, required for the pursuit of France's energy transition and sustainable development objectives, will not be challenged in this jurisdiction. There are however several mechanisms to discourage this kind of legal challenge (see chapter 3 above).

## II. An assessment of CETA with respect to climate issues

These assessments must be analyzed in the light of the very ambitious commitments made by the EU and Canada to reduce greenhouse gas emissions within the framework of the Paris agreement (see above).

The commission has not had the resources, within the time available, to make a precise estimate of the impact of the agreement on greenhouse gas emissions. It has therefore developed its view based on existing estimates.

### 1. A review of existing assessments

#### a) *The 2011 Sustainability Impact Assessment (SIA) and the response of the European Commission*

The European Commission commissioned an external consultancy to produce a final study in June 2011<sup>69</sup>, during the negotiation of the agreement. The methodology adopted consisted of comparing four different scenarios of the liberalization of goods and services, and to compare them to a baseline scenario in the absence of CETA.

Considering the climate effects, this study indicated that CETA could lead to a significant increase in methane emissions engendered by cattle. However, the report noted that implementation of sustainable practices could allow these emissions to be reduced. The liberalization of services and investment could furthermore favour those of the polluting industries such as the extractive and energy industries, including the petroleum products derived from tar sands, mining, or hydraulic fracking.

The increase in trade flows will finally necessarily increase transport-associated greenhouse gas emissions, especially from shipping. This might be slightly attenuated by the liberalization of coastal shipping, which would favour maritime transportation between the United States and Canada, which emits less than road or air transportation.

With respect to the mechanism of investor-state dispute settlement involving environmental policy as it was then defined, the risk identified was of inhibiting countries wishing to adopt ambitious environmental policies from doing so, for fear of investor disputes.

In response to this report, the European Commission produced a position paper in April 2017<sup>70</sup>. It developed two arguments: the Joint Interpretative instrument indicated the commitment of the parties to the implementation of the Paris agreement and to the objectives of national contributions they set as targets, and therefore to pursue appropriate environmental policies; the text emphasizes the rights of countries to regulate on diverse issues, among them the environment.

#### b) *The environmental study conducted by Canada and published in 2017*

Canada began to conduct an environmental assessment in 2012, which was updated and finally published in May 2017<sup>71</sup> after the agreement had been signed. It is a short document which reports a quantitative analysis of the environmental impacts based on three indicators, of which two directly relate to climate action, greenhouse gas emissions (GGE) and energy consumption.

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<sup>69</sup> <http://trade.ec.europa.eu/doclib/html/148201.htm>

<sup>70</sup> [http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\\_155471.pdf](http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155471.pdf)

<sup>71</sup> <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ea-ee.aspx?lang=eng>

According to the study, the rise in Canadian GGE emission will be around 0.2% of Canada's total emissions and energy consumption. The petroleum and gas extraction sectors, electricity production, transport services and public services would be responsible for the majority of this increase. The qualitative analysis of the Canadian assessment consists of a general overview of each of the chapters of the agreement looking at the environmental impact in four key sectors: the trade in goods, the exchange of services, public tendering, and investment. It concludes there will be no significant environmental repercussions for Canada. This assessment does not make any recommendations, arriving, as it did, after the negotiations had been concluded.

c) ***The French report on CETA's climate compatibility published in January 2017***<sup>72</sup>

The report reaches conclusions that are relatively similar to the two other assessments with respect to energy consumption and greenhouse gas emissions. Consequences of the reduction in customs tariffs on energy will be limited (see *above*).

The liberalization of exchanges between Canada and the EU will be reflected in an increase in trade flows and therefore of international transportation, in this case shipping. It will entail a limited increase in greenhouse gas emissions. The report indicates nevertheless that renouncing international trade with the goal of reducing them will not however enable us to attain our climate objectives. Putting in place an environmental policy of carbon tariffs also covering international transportation, to regulate the development of exchanges, would be more effective.

On the effect of the investor-state dispute settlement mechanism on the capacity of states to produce their standards and the conservation of their right to regulate, the report asks whether there is a future possibility of environmental policies being challenged by investors, while noting that the exact procedures of the investment court system and their real impact are as yet unknown. The report emphasizes the opportunity represented by regulatory co-operation but it also notes the risk which regulatory co-operation presents of lowering environmental standards (linked to the over-representation of business in the Regulatory Co-operation Forum) or to the capacity to regulate.

## **2. CETA climate assessment: an impact linked to the growth in trade flows**

Each of these studies finds that CETA's climate impact is directly linked on the one hand to the increase in trade and the attendant growth in emissions from international transportation and, on the other, from increased domestic emissions that may be linked to the application of the agreement.

These latter emissions will be counted as part of the national commitments made under the Paris Agreement and multilateral agreements. These will necessarily have to be compensated by a reduction in emissions from other sectors.

For the former, it is otherwise: emissions from international transport are not accounted for in national commitments to reduce emissions.

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<sup>72</sup> [http://www.ecologique-solidaire.gouv.fr/sites/default/files/2017.02.10%20Rapport%20CETA-Climat\\_Janvier.pdf](http://www.ecologique-solidaire.gouv.fr/sites/default/files/2017.02.10%20Rapport%20CETA-Climat_Janvier.pdf)

a) ***A mildly unfavourable impact seems likely but is difficult to measure***

CETA is designed to promote trade flows, with a specialization of each country according to its comparative advantages, and will likely increase them. But quantifying this growth would be a hazardous undertaking, as to do so depends on numerous factors including the respective competitiveness of various economic sectors. This growth in trade will contribute to an increase in the GGE generated by the transportation of goods.

Other factors have effects, but these are difficult to measure. The economic activity generated by trade is itself a source of GGE. But increased living standards also often bring about a stronger awareness of environmental issues, which contributes towards reducing the amount of emissions per inhabitant. Finally, the liberalization of trade enables easier access to "cleaner" goods and technologies, which facilitates its implementation.

In all, the impact should be mildly unfavourable, in particular as a result of the increased in highly polluting international transportation, engendered by greater commercial openness. The maritime sector remains very behindhand in the development of a credible strategy to reduce GGE.

***b) The compatibility of free trade agreements with the fight against climate change***

In theory, liberalization of trade and decarbonization could happen on two relatively separate fronts. But this would suppose binding multilateral agreements on climate, and a very wide extension of carbon-pricing at an appropriate level.

This would probably be an optimal solution, as outlined in the Conseil d'analyse économique (CAE)'s research note "Commerce et climat : pour une réconciliation"<sup>73</sup>. Instruments having the most direct effect on the desired objectives should be used. To act on climate, carbon pricing would be preferable to limiting international trade.

The difficulty is that climate change requires urgent solutions, but despite much thought, many initiatives, and the dynamics of COP21, carbon pricing has in reality advanced very little.

The so-called "new-generation" agreements concluded by the EU must take climate issues into account, either in the treaty itself, or in separately negotiated simultaneous treaties, with the objective of ensuring that their provisions are at least carbon-neutral, or, better, develop a concerted system of mechanisms that reinforce the initiatives to reduce GGE.

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<sup>73</sup> Bureau D., Fontagné L., Schubert K., 2017, "Commerce et climat, pour une réconciliation", note du CAE n°37. (available in English as 'Trade and climate: towards reconciliation' at: <http://www.cae-eco.fr/IMG/pdf/cae-note037-en.pdf>)

### **III. Failure to address major issues concerning the necessary economic partnership for the climate**

CETA must be examined in view of crucial questions for climate action, reviewing whether it can contribute to it or be an impediment.

#### **1. In the event of a breach of the commitments made in the Paris Agreement or of an exit from the Agreement**

Such hypotheses are not merely academic. Canada's conservative Harper administration decided to exit the Kyoto agreement, and a future return to a conservative majority in Canada cannot be excluded. Canada's commitments in the Paris Agreement framework are ambitious for a country which continues to rely on its petroleum resources for its development.

The question is to know whether CETA can make a positive contribution to avoiding this hypothesis, and conversely, if the provisions it puts in place would not constitute handicaps or challenges for its development.

##### **a) Breach of agreed commitments**

A breach of the Paris Agreement by one of the parties, should it be duly validated within the climate negotiation framework, would be contrary to commitments made in CETA (article 24.4 § 2); the agreement indeed provides that legislations and policies introduced by the parties to the treaty must comply with commitments made in multilateral environmental agreements, though it does not specifically make reference to the Paris Agreement. The Joint Interpretative instrument named this agreement, but does not have the same legal value, and the phrase mentioning it remains ambiguous.

The provisions could thus play a dissuasive role. But despite these safeguards, it is not certain that in this case the agreement would allow the introduction of a carbon tax at the borders, or protection mechanisms for sectors handicapped by a higher carbon price in one of the two parties. The arbitration mechanism is based on the rules and case law of the WTO, which does not address climate change. A unilateral decision about a carbon tax at the borders presumes in any event that other country in breach of the agreement are treated in the same way.

##### **b) An exit from the Paris agreement**

Paradoxically, an exit from the Paris Agreement by one of the parties would have no direct consequences for CETA since the problem would no longer be within the remit of an international agreement as it would no longer exist.

It should be emphasized that CETA provides for an amendment procedure (article 30.2) and the possibility of its termination (article 30.9): "*A Party may denounce this Agreement by giving written notice of termination to the General Secretariat of the Council of the European Union and the Department of Foreign Affairs, Trade and Development of Canada, or their respective successors. This Agreement shall be terminated 180 days after the date of that notice.*" The Member States of the European Union would also have to agree to this step.

Overall, CETA could play a part in ensuring that each party respects the Paris Agreement.

On the other hand, it risks failing to facilitate the implementation of borders adjustments in the event of a possible breach or exit from these agreements. Customs tariffs on products that are highly carbon-intensive would be incompatible with CETA. CETA clearly states that a party cannot increase existing customs tariffs from the time it comes into force, nor adopt

any new tariffs applicable to goods originating from one of the parties<sup>74</sup>. If these new tariff restrictions do not cause either arbitrary discrimination or hidden restrictions, the general exceptions in article 28.3 § 1 would however allow them to be justified.

In order to avoid any dispute, an explicit mention of the link between the application of the treaty and respect for the Paris Agreement would be helpful.

## **2. The issue of tar sands**

Canada's major difficulty for action on climate is the abundant crude petroleum resources it harbours in two large regions: in sedimentary basins lying in the west of Canada, and off its east coast. This petroleum is 90% derived from tar sands, whose extraction and use, beyond the various immediate environmental harms, generates 41% more GGE than conventional crude oil<sup>75</sup>.

Its extraction cost is also higher, and its profitability uncertain as long as the world oil prices are relatively low, as they are today. Furthermore, almost all of this crude oil is exported to the United States (99% in 2016). The exportation of oil and gas is in practice limited by the transport capacity to each coast. Pipeline projects could, however, change the situation, particularly the Keystone XL gas pipeline project, refused by B. Obama, then authorized by D. Trump<sup>76</sup>.

Global civil society is currently campaigning against the extraction of fossil fuels, particularly those which are most polluting, namely coal and tar sands. These actions are logical in a context where the Paris Agreement entails to leave a substantial proportion of fossil reserves in the ground.

An EU unilateral ban on coal and tar sand imports would conflict with WTO rules, as long as coal would continue to be extracted in Europe. Restrictions on tar sands could not only concern Canada, and would also risk being considered discriminatory and in contradiction with WTO rules, as long as other products which manufacturing entails high GGE continue to be imported. It would furthermore collide with the impossibility of distinguishing between crude or refined oil and that derived from tar sands.

Other mechanisms could, however, be used, within the framework of the European fuel quality directive (see box).

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<sup>74</sup> The only exceptions are for the case of a good which has no tariff preference under the treaty, of an increase after a unilateral reduction, or in compliance with the treaty or of any agreement concluded within the framework of the agreement on the WTO (article 2).

<sup>75</sup> Compared to petrol (+38% compared with diesel), life cycle greenhouse gas intensity, following figures supplied by the European Commission in 2014 (<http://data.consilium.europa.eu/doc/document/ST-14009-2014-ADD-1/fr/pdf>, page 6)

<sup>76</sup> The current Keystone pipeline, operated by TransCanada, is 3,461 km long, and has been in operation since 2011. It leaves the province of Alberta in Canada to reach several destinations in the United States. The Keystone XL project is composed of two new segments. One, which is already partly operational, connects the coast of Texas and the Gulf of Mexico. The other will greatly increase transport capacity over a shorter distance.



## The European Fuel Quality Directive

The Fuel Quality Directive has been regularly revised since the 1980s and has two objectives: to bring uniformity to Member State regulations, and protect health and the environment by limiting and banning the most dangerous fuels. The most recent version of the directive, 2009/30/EC which revises 98/70/EC, introduces a new element: an obligation on suppliers "to reduce as gradually as possible life cycle greenhouse gas emissions per unit of energy *from fuel and energy supplied*" by 6% <sup>77</sup> by 31/12/2020, compared to a 2010 baseline.

The initial method for calculating GGE proposed in 2011 by the Commission distinguished raw materials (including tar sands) among production sources for petrol or diesel. The Commission revised this in 2014, likely to take into account the hostility of oil companies, of some Member States, and of countries producing oil from non-conventional sources, including Canada. It then proposed to base its calculation on a weighted average for the overall final consumption products, classified only by petrol or diesel. This method, which does not take into account differences concerning GGE based on the nature of the originating crude petroleum, was approved by a thin majority at the European parliament.

The commission justified this change on the grounds of the administrative costs of the initial methodology (which would add about €0.0001/litre to the pump price) compared with the limited differentiation obtained. A working document produced by the Commission to evaluate the different strategic options, however, affirmed<sup>78</sup> that the methodology finally adopted protected the environment less. This choice is particularly a paradoxical since biofuels have been given values based on their base material for more than ten years (over 20 categories exist). The Commission has moreover itself noted that making the same choice for fossil fuels would have been more coherent.

This is for the time being a symbolic turnaround with regard to petroleum products derived from tar sands, in view of their uncertain competitiveness given the current world oil prices and Europe's very limited importation volume. The revival of the Keystone XL pipeline and future changes in oil prices may, however, change the situation.

For the future, the Commission affirmed in 2015 that it no longer wished to specifically regulate fuels and the carbon-intensity in the transport sector. Nothing in the first draft of the new climate-energy package makes reference to the current directives which expire in 2020 <sup>79</sup>. This piece of legislation was in reality initially conceived for the development of biofuels <sup>80</sup>, which are no longer a priority. The European Commission seems to have, however, recently changed its position: Energy Vice-President Maroš Šefčovič announced a new directive on fuel quality in the next decade<sup>81</sup>.

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<sup>77</sup> In reality 10%, of which 2% may be purchased in emission permits and 2% may be attained *via* the transport sector or by carbon capture technologies.

<sup>78</sup> <http://data.consilium.europa.eu/doc/document/ST-14009-2014-ADD-2/en/pdf> See tables p4-5, as well as §7 "Conclusion" pages 9-10.

<sup>79</sup> <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52014DC0015&from=EN> and the following analysis, much discussed online e.g. <https://blogs.mediapart.fr/maxime-combes/blog/230114/la-contre-évolution-energetique-de-lunion-europeenne-decryptage>

<sup>80</sup> [http://abonnes.lemonde.fr/planete/article/2012/09/14/l-ue-prend-ses-distances-avec-les-\\$\\$\\$-agrocarburants\\_1760384\\_3244.html](http://abonnes.lemonde.fr/planete/article/2012/09/14/l-ue-prend-ses-distances-avec-les-$$$-agrocarburants_1760384_3244.html)

<sup>81</sup> <https://www.theguardian.com/environment/2015/feb/19/new-hopes-that-tar-sands-could-be-banned-from-europe>

The reintroduction of a differentiation according to real GGE would not, a priori, breach WTO rules and therefore those of CETA. These exist for biofuels, and the legal services of the Commission have likely validated it in the first proposed directive. It will force producers of highly greenhouse gas-emitting energy products to make additional efforts to reduce them.

### **3. Carbon pricing and the carbon market**

The goal of making CETA carbon-neutral implies better co-ordination of carbon markets.

The objective could be a common price for carbon, at the borders and within the zone, providing notably for the interconnection of some European carbon markets and those of certain Canadian provinces.

The option of taxing maritime transportation also merits consideration. Depending on the pollution emitted by vessels, a royalty would be charged at the port of arrival, no matter under which flag they sail. Such measures are being actively debated at the International Maritime Organisation (IMO) but these are likely to take a long time (of the order of 20 years) to arrive at a final price for a ton of CO<sub>2</sub>, which will probably be too low (as an example, the ICAO arrived at an implicit price for carbon of only €4.)

CETA claims to be a new kind of trade agreement binding parties which share similar values, and aiming not only to reduce tariff barriers but also non-tariff barriers to trade, while respecting sustainable development issues. On the climate, these objectives are far from being met. If closing borders in the name of the climate is to be avoided, it is essential to pursue a much more active and coordinated carbon policies.

## SECTION 4 – SERVICES

### I. A description of the CETA provisions

Trade in services is covered in Chapter 9 of CETA, which defines disciplines and liberalization commitments applicable to both parties. In contrast to the WTO General Agreement on Trade in Services (GATS) or the previous free trade agreements concluded by the European Union, CETA has adopted a "**negative list**" approach. This differs significantly from previous agreements made by the European Union. They were built around a positive list system, under which the parties specify explicitly sectors and sub-sectors they commit to opening to competition, and specify the application and extent of this openness. CETA, in contrast, is based on a negative approach by which the parties explicitly specify which sectors and sub-sectors will be excluded from the disciplines of the agreement or will be subject to particular exceptions. All of the unlisted sectors will be by default covered by the agreement and open to competition. The essence of this approach therefore rests in the drafting of these lists of exclusions and exceptions.

Annexe I contains, for each party, a list of measures (laws, regulations or existing practices) which are judged to be non-compliant with the fundamental obligations within the agreement. Any future modification of these measures is excluded, should the modifications prove more restrictive to trade. Annexe II excludes more broadly certain sectors or sub-sectors from the effects of the chapter and allows for any future modification<sup>82</sup>. For private operators, this approach significantly increases visibility and legal security. For the authorities, this excludes the possibility of the introduction of new restrictions on existing sectors or any new sector or sub-sector in the future.

### II. Analysis of the provisions

#### 1. The general impact on services

From the point of view of health and the environment, the approach adopted appears to present more risk than an approach based on a positive list. However, to estimate, even if only in an approximate manner, the impact of these commitments to liberalization on the environment or health remains a delicate matter.

Unlike for trade in goods, where barriers—at least tariff barriers—are easily quantifiable, barriers to trade in services are essentially of regulatory nature (for example, the granting of licenses, requirements for specific qualifications, etc) and therefore by definition hard to quantify and measure. Furthermore, commitments to liberalization very rarely go beyond existing regulation in Member States of the European Union, or beyond the degree of liberalization already existing at intra-community level. Commitments made within the context of free trade agreements tend above all to consolidate existing commitments in an international agreement, without however modifying the regime that is applied in practice. Even when liberalization has been effectively achieved in a sector, the effect on the environment remains very uncertain. Though certain sectors such as tourism or transportation may have a real impact on the environment in the absence of appropriate regulation, such impacts remain difficult to measure for other sectors such as information technology, business services or the financial sector. An increase in competition can furthermore have positive effects if, for example, the opening of health services

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<sup>82</sup> Additionally to these specific annexes for each party (including each European Member State), CETA excludes services supplied within the framework of government authority, audiovisual services (in the EU) and cultural industries (in Canada), financial services, (which are the subject of a separate chapter), the aviation sector, public tendering (which is subject to a separate agreement) and subsidies.

allows more highly-qualified foreign doctors to be employed, or if liberalization of the construction sector allows solar energy installations to be installed and maintained at a lower cost.

Finally, it should be noted that the sole aim of the liberalization commitments is to eliminate quantitative restrictions and discriminations that foreign service providers may face. Beyond this, each country will retain its capacity to regulate and to establish its own quality requirements, as well as environment and health protection measures, which all domestic or foreign service providers will be obliged to respect. To determine the degree to which this right to regulate may be affected by other aspects of the agreement, notably within the framework of the regulatory co-operation system, remains however an open question (see the analysis below on the Regulatory Co-operation Forum).

## **2. The issue of public services**

The principle concern expressed with regard to the chapter on services concerns public services. Will CETA, and notably its negative list approach, oblige states to open their public services to private service providers, with the risk of seeing the access to essential services such as the supply of water, the health system, or education challenged by a market-based approach? More specifically, will public authorities be obliged to renounce their monopoly on public services or to abolish privileges accorded to public bodies compared to private providers?

Generally speaking, it should be emphasized that no consensus exists as to the definition of a public service beyond a narrowly-drawn list of "services supplied within the framework of government authority" which is usually taken to mean sovereign functions of the state (such as policing, justice, and currency). These services are explicitly excluded from the scope of the agreement. For the rest, each country, including in the European Union, maintains its own notion of what constitutes a public service. If in certain countries, health or education are considered to be public services, in others these sectors are largely served by strictly private operators.

To cover these different instances, the European Union introduced a provision that reads: "In all Member States of the EU, services recognized to be of public utility at national or local level can be the object of public monopolies or exclusive rights be granted to private operators. [...] As public service enterprises often exist at lower echelons than central level, the establishment of a detailed and complete list by sector is impractical."

This reservation seeks to cover in a relatively broad manner the concept of public service and attempts to palliate the absence of a universal definition by making reference to those of each Member State, or even those of regional, local or municipal bodies. For greater clarity, the Joint Interpretative instrument of Canada and the EU details furthermore that:

*"a) The European Union and its Member States and Canada affirm and recognize the right of governments, at all levels, to provide and support the provision of services that they consider public services including in areas such as public health and education, social services and housing and the collection, purification and distribution of water. b) CETA does not prevent governments from defining and regulating the provision of these services in the public interest. CETA will not require governments to privatize any service nor prevent governments from expanding the range of services they supply to the public.*

*c) CETA will not prevent governments from providing public services previously supplied by private service suppliers or from bringing back under public control services that governments had chosen to privatize. CETA does not mean that contracting a public service to private providers makes it irreversibly part of the commercial sector."*

With regards to the above analysis, it can be considered that the approach seeking to liberalize services on the basis of a negative list implies by essence a greater risk for the environment and health than an approach based on a positive list. It remains, however, impossible to assess this risk, even in an approximate manner. On reading the other provisions of the agreement, it appears nevertheless that the intention of the contracting parties is to preserve the capacity of States to regulate services in the public interest, including those in areas such as health and the environment as well as maintaining exclusive state monopolies for services considered to be of public interest, as well as the capacity to bring back under public control services which they previously chose to privatize.

# ANNEXES

## I. CETA changes affecting agriculture

### 1. Dismantlement of agricultural tariff barriers

The agricultural sector will be particularly concerned by the liberalization of trade between Canada and the European Union because the customs tariffs for agricultural products are currently higher than those in other economic sectors (see chapter 1).

Most duties for agricultural products will be abolished when the agreement comes into effect (90.9% of tariff lines for Canada and 92.2% for the EU). For other products (cereals for example) the abolition will be progressive, over a period of 3, 5, or 7 years according to the product. After 7 years, the tariffs for 91.7% of tariff lines will have been abolished for Canada and 93.8% for the EU. The agreement contains a *status quo* clause ("*standstill*", article 2.7) which in principle renders it impossible to re-establish customs tariffs after the agreement comes into force on products subjected to liberalization.

A certain number of products judged sensitive escape this dismantlement:

- Chicken and turkey meat, eggs and egg products: excluded from liberalization commitments.
- Dairy products: quota open by Canada of 17,700 tons of cheese (16,000 tons of superior quality cheese and 1,700 tons of industrial cheese) to which 800 tons of superior quality cheese (the existing WTO quota) must be added, for a total of 18,500 tons. Canada will eliminate its tariffs on milk protein concentrates, while the EU will eliminate its customs tariffs on dairy products as soon as the agreement comes into force.
- Beef: the EU will grant Canada a new access free of duty for a total of 45,838 tons of beef expressed as the carcass equivalent weight<sup>83, 84</sup>. Its implementation will be progressive, with a linear increase in volumes over 5 years. To this newly granted quota must be added the duty-free quota of 4,162 tons of fresh high-quality beef obtained by Canada within the framework of the beef hormones dispute<sup>85</sup>, which is preserved by CETA. Additionally, the Canadian share of the WTO "Hilton beef" quota with duty of 20%<sup>86</sup> (14,950 carcass equivalent tons, shared between Canada and the United States) will be preserved, with the tariff reduced to zero for Canada. The quota does not only concern carcasses but also quarters and boned meat, which makes the assessment of the significance of the quota assessed against European consumption because everything will depend on the type of product which will be exported by the Canadians.

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<sup>83</sup> Meat quantities are expressed in carcass equivalent weights, unless otherwise specified.

<sup>84</sup> Beef is protected by high most-favoured-nation customs tariffs, of 12.8%, to which is added a unit amount (per kilogram of product) of greater or lesser significance depending on the quality of the piece: €1.768/kg for fresh or refrigerated carcasses or half-carcasses, €3.034/kg (of product) for refrigerated boneless cuts and 12.8% + €3.041/kg for frozen boned hindquarters

<sup>85</sup> In 1996 Canada disputed the EU ban on imports of meat from animals treated with growth promoter hormones at the WTO Dispute Settlement Body. The WTO ruled in 1998 that the European embargo was an illegal non-tariff barrier to trade and Canada and the United States were authorized to apply retaliatory tariffs.

<sup>86</sup> The beef import quota a preferential tariffs in comparison with the most-favoured-nation tariff accorded to Argentina, Brazil, Paraguay, the United States, Canada, Australia and New Zealand at a GATT round in 1979.

**Table 1: Beef import quotas granted to Canada by the EU: trend in volumes in carcass-equivalent tons (CET)**

	Current	Year 1	Year 2	...	Year 6 et seq
Fresh beef: "hormone panel" quota	4,160	4,160	4,160		4,160
Fresh beef: new CETA quota	0	5,140	10,280	...	30,840
<b>Total fresh beef</b>	4,160	9,300	14,440	...	35,000
Frozen beef	0	2,500	5,000	...	15,000
Bison meat	0	3,000	3,000	...	3,000
Hilton at zero	0	14,950	14,950	...	14,950
<b>Total access to zero tariff</b>	4,160	29,750	37,390	...	67,950
Hilton at 20% tariff	14,950	0	0	...	0
<b>Total access to 20% tariff</b>	14,950	0	0	...	0

- Pork: the EU will grant Canada tariff-free access for 75,000 carcass-equivalent tons (CET) of pork, a quota which will be progressively introduced over 5 years, to which is added Canada's existing WTO tariff quota of a little over 5,500 CET, yielding a little over 80,000 tons from the sixth year.

- Sweetcorn: the EU has granted a tariff-free quota of 8,000 tons of preserved sweetcorn, applicable as soon as the agreement comes into force.

The EU and Canada also reached agreement on the management of implementation of the quotas.

## 2. Designations of origin (DO)

This is an important advance for the EU, even if it only concerns a small proportion of existing DOs. The 145 DOs listed in CETA are in addition to the 200 European DOs for alcoholic beverages (wines and spirits) listed in the agreement concluded in 2003 between Brussels and Ottawa (21 DOs for wines and 5 for spirits). These concern various products such as cheese, wine, meat preparations, oils, and fruit products. The treaty recognises some products but not their DOs. In the case of France, 42 products have been so-recognized, corresponding to 30 DOs, essentially certain varieties of cheese, fruit products, some charcuterie, and other meat specialities.

Additional designations may be added in future. Where a Canadian trademark homonymous with a European DO has been registered for at least between 3 and 10 years, for example feta, gorgonzola, munster, Jambon de Bayonne, the trademark may continue to be used in Canada, accompanied by an expression such as "-style" or "-type". Common names such as camembert, parmesan or mozzarella may still continue to be used in Canada.

## 3. Pork

The agreement does not address antibiotics, animal welfare or environmental concerns despite them resulting in increased costs for European producers.

In the current context of falling pork consumption, the sector risks reputational damage linked to the size of Canadian pig-rearing farms, and the systematic usage of antibiotics as growth promoters. Labelling may be one way of informing the consumer of the origin of the product and its quality (antibiotic-free for example).

Pork is considered a sensitive product: tariff protection has been maintained and the quota for tariff-free importation has been set at 80,000 CET for a transition period of 5 years has been granted to Canada by the EU.

The quota granted by the EU to Canada represents something less than 7% of their current exports. The meat must not come from any pig treated with ractopamine, which will currently block all Canadian exports. The size of the quota will make the establishment of a ractopamine-free sector economically viable, and it has every chance of being fulfilled, all the more so given that unprocessed ham and its derivatives are available at a significantly lower price on North American markets. At a difficult economic conjuncture for the pork sector, with prices that exhibit marked cyclical variation, these low-cost imports could flood the European market with resultant price decreases just at a moment when both farmers and processors need to reap better results to compensate for previous losses. France is self-sufficient in pork, but imports a lot of ham, and may be considerably affected. This risk endangering smaller producers and could have negative effects on employment<sup>87</sup>.

#### 4. Cheese

The EU will benefit from an import quota of 18,500 tons. The EU is a huge exporter of cheese, exporting more than 700,000 tons in 2015. This quota represents 4% of Canadian cheese consumption, but 32% of the consumption of high quality cheese<sup>88</sup>: these tariff-free imports will strongly affect Canadian producers, and in particular those in Quebec who produce the majority of Canadian high-quality cheese. The Canadian government has promised some budgetary compensations. The Canadian dairy sector is subject to tight supply restrictions, which rest on three pillars: management of production, import controls, and farm gate price controls based on production costs. The additional market access for European cheese and the progressive elimination of customs tariffs on milk protein isolates could have negative effects on the Canadian dairy sector and undermine the pillar of farm gate price controls<sup>89</sup>. Canada will thus attempt to minimize the impact of this measure with intervention mechanisms based on quota management published in August 2017: 50% of the 16,000 tons quota for high quality cheese will be granted to local producers, with the remainder allocated to distributors. 60% is furthermore reserved for small and medium enterprises. The quota for 1,700 tons of industrial cheese will be reserved for processors<sup>90</sup>. "The granting of 50% of import licences to local producers risks an under-fulfilment of the quota obtained by the European Union"<sup>91</sup>. These latter have not, by nature, any import activity nor any interest in doing so. It is to be feared that in the framework, Canadian imports risk to affect above all the needs not covered by domestic production<sup>92</sup>. Furthermore, the Canadian authorities have announced a 5% increase in milk production quotas from 1 July 2017 in five provinces: Prince Edward Island (1.3% of Canadian production), New Brunswick (1.7%), Nova Scotia (2.2%), and most notably Ontario (33.2%) and Quebec (36.6%)<sup>93</sup>.

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<sup>87</sup> In the west of France, the smaller pig farms (smaller than 150 sows in Brittany, slightly less than half of farms) may be endangered: their disappearance could put the sector in peril. The larger farms will not necessarily be capable of compensating for the lost production from smaller farms. Yet pig rearing generates considerable employment: the production of 100 CET requires 4.5 WTE jobs, with 6 jobs out of 7 beyond the farms themselves.

<sup>88</sup> "L'agriculture canadienne et l'Accord Economique et Commercial Global entre le Canada et l'Union européenne", Rapport du Comité permanent de l'agriculture et de l'agroalimentaire, 2014

<sup>89</sup> Ibid.

<sup>90</sup> "Note pour la représentation permanente de la France auprès de l'Union européenne" » Paris: Secrétariat Générale des Affaires Européennes, 23 August 2017.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.



## II. List of persons giving evidence to the commission

- **M. François Alabrune**, director of legal affairs at the French Ministry of Foreign and European Affairs
- **M. Rolando Alcalá**, economist, WTO agricultural division
- **M. Richard Baron**, former adviser to the sustainable development working group of the OECD
- **M. Thomas Borrell**, campaign director, Les Amis de la Terre (Friends of the Earth)
- **M. Édouard Bourcieu**, representative in France of the DG Commerce (European Commission) for trade issues
- **Mme Anne-Marie Boyer**, director of European relations to the Comité Pauvreté et Politique (Poverty and Policy Committee)
- **M. Dominique Bureau**, general delegate of the Conseil Economique pour le Développement Durable (Economic Council for Sustainable Development)
- **M. Alain Chabrolle**, vice-president of France Nature Environnement (France Nature Environment)
- **Mme Claire Cheremetinski**, assistant director for trade policy, investment and combatting financial crime at Direction générale du Trésor (Treasury General Directorate)
- **M. Philippe Chotteau**, department director “Économie des filières et de l’exploitation” à l’Institut de l’Élevage (“Sector and farm economy” Livestock Institute)
- **M. Diego Colas**, deputy director of legal affairs, Ministère de l’Europe et des Affaires étrangères (French Ministry of Foreign and European Affairs)
- **Mme Caroline Collin**, Director responsible for “accords de libre-échange” (Free trade agreements) at the Confédération Paysanne (Peasant Confederation)
- **M. Thomas Courbe**, deputy general director of the Direction générale du Trésor (French treasury)
- **M. Michel Dubromel**, president, France Nature Environnement
- **Mme Mathilde Dupré**, campaign director for responsible trade agreements at the Institut Veblen
- **Mme Monique Eloit**, director general at the World Organisation for Animal Health (OIE)
- **M. Loïc Évain**, deputy general director for food at the Ministère de l’Agriculture et de l’Alimentation (Food and Agriculture Ministry)
- **M. Emmanuel Gaillard**, judge and advocate, Cabinet Shearman et Sterling
- **Mme Claude Girod**, national committee member with responsibility for free trade agreements, Confédération Paysanne (Peasant Confederation)
- **M. Daniel-Mercier Guoin**, professor, Université Laval (Québec)
- **Mme Karine Jacquemart**, general director, Foodwatch France
- **M. Thierry Jacquot**, national secretary with responsibility for free trade agreements , Confédération Paysanne
- **M. Bertrand De Kermel**, president, Comité Pauvreté et Politique (Poverty and Policy Committee)
- **M. Pierre Kohler**, Tufts University
- **M. Robin Lagarrigue**, chargé de mission for international negotiations, Ministère de l’Agriculture et de l’Alimentation (Food and Agriculture Ministry)
- **M. Frédéric Lambert**, head of service, Europe and International at Ministère de l’Agriculture et de l’Alimentation (Ministry of Agriculture and Food)
- **M. Dominique Langlois**, president, Interbev
- **M. Samuel Leré**, project director, Climat-Énergie, Fondation pour la Nature et l’Homme (FNH)
- **Mme Valérie Liang-Champrenault**, Bureau chief, investissements et des règles dans le commerce international (investments, regulation, and international trade) at the Direction générale du Trésor (Treasury General Directorate)

- **Mme Stéphanie Lux**, former adviser to Ségolène Royal responsible for relations with NGOs (cabinet du Ministère de l'Environnement, de l'Énergie et de la Mer) (Environment Minister's Cabinet)
- **Mme Gabrielle Marceau**, chief adviser to the WTO legal service
- **M. Devin McDaniels**, economist, WTO Trade and Environment Division
- **M. Marc Pagès**, directeur général, Interbev
- **M. Thierry Pouch**, chef du service des études économiques à l'Assemblée Permanente des Chambres d'Agriculture (Head of economic research, Standing Assembly of Chambers of Agriculture)
- **M. Arnold Puech d'Alissac**, member of the Conseil d'administration (representing Normandy and Paris) of the FNSEA (Fédération Nationale des Syndicats d'Exploitants Agricoles, the main French farmer's union)
- **M. Michel Rieu**, directeur, economic department l'Institut du Porc (IFIP)
- **M. Guillaume Roué**, président, NAPORC
- **Mme Clarisse Senaya**, deputy responsible for CETA in the Bureau for trade policy, strategy and co-ordination, Direction générale du Trésor (Treasury General Directorate)
- **M. Antoine Suau**, directeur, department for Economie et Développement durable, FNSEA
- **Mme Cécile Toubeau**, directeur, Transport and Environment
- **Mme Aurélie Trouvé**, maître de conférences (senior lecturer) at AgroParisTech
- **Mme Lora Verheecke**, directeur of research and campaigns at the Corporate Europe Observatory

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### **III. List of abbreviations**

*ADEME : Agence de l'environnement et de la maîtrise de l'énergie*

*(French Environment and Energy Agency)*

*AECG : Accord économique et commercial global (CETA)*

*BIP: EU-approved border inspection posts*

*BIT Bilateral investment treaty*

*CAP: Common Agricultural Policy*

*CETA : Comprehensive Economic and Trade Agreement*

*CET: Carcass-equivalent ton*

*CFIA: Canadian Food Inspection Agency*

*COP : Conference Of the Parties*

*DO: designation(s) of origin*

*DSB: Dispute Settlement Body (of the WTO)*

*EU: European Union*

*GATS: General Agreement on Trade in Services*

*GATT : General Agreement on Tariffs and Trade*

*GGE : Greenhouse Gas Emissions*

*GMO: genetically modified organisms*

*HACCP : Hazard Analysis Critical Control Point*

*ICAO: International Civil Aviation Organisation*

*ICS : Investment Court System*

*ICSID: International Centre for the Settlement of Investment Disputes*

*INRA : Institut national de la recherche agronomique*

*(French national agricultural research body)*

*MEA Multilateral environmental agreement*

*NAFTA North American Free Trade Agreement*

*PBR: Plant Breeders Rights certificate*

*RCF: Regulatory Co-operation Forum*

*MRL: maximum residue limit*

*MFN: most-favoured-nation status*

*NGO Non-governmental organisation*

*OAV : Office alimentaire et vétérinaire (EU Food and*

*Veterinary Office)*

*OECD: Organisation for Economic Co-operation and Development*

*OIE: World Organisation for Animal Health*

*REACH : Registration, Evaluation and Authorisation of Chemicals*

*SPS : sanitary and phytosanitary measures*

*TBT: Technical Barriers to Trade*

*TFUE : Traité sur le fonctionnement de l'Union européenne*

*(Treaty of Rome)*

*TTIP : Transatlantic Trade and Investment Partnership*

*UNCITRAL: United Nations Commission on International Trade Law*

*WHO: World Health Organisation*

*WTO: World Trade Organisation*