

# Comprehensive Economic and Trade Agreement (CETA) and the environment

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A gold standard for the planet or for big business?

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## Executive Summary

Starting in 2008, CETA was negotiated in total secrecy. The negotiating mandate, text offers, consolidated texts and meetings were conducted under a veil of undemocratic practices. This has fundamentally undermined the legitimacy of the agreement in the minds of both the European and Canadian citizens.

In this context, it is surprising to see that CETA is presented as one of the most progressive trade agreements ever negotiated. Our study demonstrates that CETA has not put the people and the planet first, nor even given it equal consideration to business interests, but treated public interests as an afterthought.

Should Europe and Canada wish to deliver a free trade agreement that is to be considered 'gold standard' it must be renegotiated in a transparent manner taking into account the concerns not only expressed by the Walloon Parliament, but also the 3 million citizens who signed the European Citizens Initiatives, and the 145,000 citizens who rejected the use of investment arbitration in the Commission public consultation on Investor-State Dispute Settlement (ISDS). As Paul Krugman once expressed "International economic agreements are, inevitably, complex, and you do not want to find out at the last minute — just before an up-or-down, all-or-nothing vote — that a lot of bad stuff has been incorporated into the text."<sup>1</sup> CETA needs to be a deal that addresses people's concerns and that serves the European and Canadian citizens interests rather than the interest of well-connected corporations.

Our report looks into a number of key areas in CETA with likely implications for environmental protection. We find that these provisions do not meet our assessment as being the 'gold standard' for the people and the planet. We find that the following seven improvements are warranted for CETA to deliver for the environment:

1. The Investment Court System should be removed, as it should from any international agreement between two Parties with developed legal systems. There is no need for a parallel justice system only open to foreign investors that undermines regular courts and the rule of law.
2. The environment chapter should have meaningful enforcement provisions and access to justice mechanism and ambitions that go beyond already existing commitments.
3. Regulatory Cooperation should serve to promote and improve social and environmental policy, not focus on trade irritants alone. Additionally it should be truly voluntary and not subject to state to state dispute mechanism.
4. The Domestic Regulation Chapter should be more cognizant of environmental licensing and permitting procedures and allow for broader exceptions for environmental decision making.
5. A Clean Hands Clause to strengthen the parties' rights to regulate through consumption and export rules, where such interventions protect environmental and social conditions abroad.
6. Reflecting both Parties commitment to the Paris climate agreement, dedicated overarching and sectoral provisions should be made, such as fostering a sustainable green economy transition by decarbonising both the energy and transport sector.
7. Tariff reduction should be differentiated according to environmental characteristics e.g. through an immediate phase out on electric motors to create an incentive for a fast shift to electric vehicles. A longer phase out for traditional vehicles would help this dynamic shift.

<sup>1</sup>Paul Krugman. New York Times. Trade and Trust. Available at <http://www.nytimes.com/2015/05/22/opinion/paul-krugman-trade-and-trust.html> (retrieved 4 November 2016)

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# Introduction

Negotiated between the European Commission under Trade Commissioner Karel De Gucht and three different Trade Ministers of the Stephen Harper administration<sup>2</sup> the Comprehensive Economic and Trade Agreement (CETA) is one of the broadest bilateral trade initiatives ever negotiated by the EU. It is intended to go beyond traditional trade liberalisation measures such as cutting tariffs, and include, areas such as investment protection and regulatory cooperation.

Starting in 2008, CETA was negotiated in total secrecy. The negotiating mandate, text offers, consolidated texts and meetings were conducted under a veil of undemocratic practices conducted by the previous Trade Commissioner Karel De Gucht. This has fundamentally undermined the legitimacy of the agreement in the minds of both European and Canadian citizens. In part, this is also due to the Harper government's terrible environmental credentials, responsible for cutting billions in federal spending on climate change and energy efficiency, and withdrawing from the Kyoto Protocol.

In this context, it is surprising to see that CETA is presented as one of the most progressive trade agreements ever negotiated. Our study demonstrates that CETA has not put people and planet first, nor even given it equal consideration to business interests, but treated public interests as an afterthought. This is a direct reflection of the political ambition of the trading parties at the time, and only under enormous public pressure has the Commission sought to reform investor-state dispute settlement procedures in the final agreement.

The inclusion of a Joint Interpretative Instrument to CETA at the very last minute confirms the lack of a serious engagement from the start to put people and planet first. Even more worrying is that this last minute addition offers very little additional commitments from both Parties and appears to be no more than redrafting already existing text and placing that text out of context. The rushed addition of the Joint Interpretative Instrument therefore further underlines the need for a proper debate on how trade agreements should be drafted and negotiated.

Our report seeks to find the answer to some key questions about the impact that CETA will have on Europe. The report is divided into two chapters with six sub sections:

## **Environment & Energy**

- Section 1 - Tariffs
- Section 2 - Environment
- Section 3 - Energy

## **Democracy and decision making**

- Section 4 - Investment
- Section 5 - Domestic Regulation
- Section 6 - Regulatory Cooperation

Our report concludes that while CETA has gone some way to improving some troublesome aspects of investment protection in particular, it is not fit for purpose in its current form and should be renegotiated, in a transparent manner, to ensure that it truly does deliver a new international 'gold standard'.

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<sup>2</sup> Stockwell Day (from October 30, 2008 - January 19, 2010), Peter van Loan (from January 19, 2010 - May 18, 2011) and Ed Fast (from May 18, 2011 - November 4, 2015). Wikipedia: Minister of International Trade (Canada) Retrieved November 01, 2016 from [https://en.wikipedia.org/wiki/Minister\\_of\\_International\\_Trade\\_\(Canada\)](https://en.wikipedia.org/wiki/Minister_of_International_Trade_(Canada))

## Section 1: How will tariff reductions impact transport?

The traditional aim of free trade agreements is tariff reduction or elimination. The objective is to reduce the costs for exporters, increase competitiveness on the new markets, and lower costs for consumers. While these positives are generally well-recognised, the negatives of tariff reduction are less frequently mentioned.

The first is that it significantly reduces revenues collected from tariffs, revenue that will have to be found elsewhere. In CETA's case, the EU budget will miss out on an annual €311<sup>3</sup> million that will have to be made up through other contributions e.g. VAT.

The second is that tariff-free trade takes away a 'penalty' to produce from overseas, which ultimately results in a shift of power away from governments towards corporations. For instance, if the car industry can serve Europe just as well from within as from outside, it can credibly threaten to relocate if a European government considers, for instance, an increase in the corporate tax rate. Payment of a tariff after relocation would make such a threat less credible.<sup>4</sup>

In CETA, the tariff reduction package on transport vehicles is comprehensive. Tariffs will be brought to zero either on entry into force of the agreement or with a phase out period of three to seven years depending on the product. It is worth noting that simply because tariffs are removed, prices will not necessarily go down. The tariff/price relationship is far more complex as competition, consumer expectation, brand, etc. also have to be taken into account.<sup>5</sup> Moreover, the predicted long-term real GDP increase for the EU and Canada is only 0.02% to 0.03% and 0.18% to 0.36% respectively.<sup>6</sup> An overview of the tariff liberalisation on both the EU and Canadian side can be found below.

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<sup>3</sup> Proposal for a COUNCIL DECISION on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part. Retrieved November 9, 2016 from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0470>, p. 6

<sup>4</sup> Joseph E. Stiglitz 'Rewriting the Rules of the American Economy' available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-stiglitz.pdf> (retrieved 3. November 2016) p. 59ff; Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy (W.W. Norton & Company, 2012)

<sup>5</sup> Joseph E. Stiglitz 'Rewriting the Rules of the American Economy' available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-stiglitz.pdf> (retrieved 3. November 2016) p. 59ff; Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy (W.W. Norton & Company, 2012)










<sup>6</sup> EU-Canada SIA Final Report Retrieved November 3, 2016 from [http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc\\_148201.pdf](http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf), p. 14

## EU Import Duties

Mode of transport	HS code	Current	CETA	Phase out period
 Passenger vehicles	8703	10%	0%	7 years 5 years (electric motors or other)
 Automotive parts	8708	4.5%	0%	Immediate on entry into force
 Buses and vans (more than 10 persons incl. driver)	8702	16% (Cylinder capacity exceeding 2500cm <sup>3</sup> or 2800cm <sup>3</sup> ) 10% (Cylinder capacity below 2500cm <sup>3</sup> or 2800cm <sup>3</sup> )	0%	5 years
 Trucks	8704	22% 10% (only for trucks under 5 tonnes and a cylinder capacity below 2500cm <sup>3</sup> or 2800 cm <sup>3</sup> )	0%	3 years
 Trains	8601 – 8606	1.7%	0%	Immediate on entry into force
 Ships	8901 – 8906	0% for all sea-going vessels - Varying tariffs of 1,7% or 2,7% for "others"	-	-
 Planes	8802	0%	-	-
 Bikes (not motorised)	8712	15%	0%	Immediate on entry into force
 E-bikes (not exceeding 250 Watts)	87119010	6%	0%	Immediate on entry into force

Source: Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 285, 30.10.2015

## Canada Import Duties

Mode of transport	HS code	Current	CETA	Phase out period
 Passenger vehicles	8703	6.1%	0%	7 years 5 years (electric motors or other)
 Automotive parts	8708	6%	0%	Immediate on entry into force
 Buses and vans (more than 10 persons incl. driver)	8702	6.1%	0%	5 years
 Trucks	8704	6.1%	0%	3 years
 Trains	8601 – 8606	9.5% 11%	0%	Immediate on entry into force
 Ships	8901 – 8906	25% Cruise ships, excursion boats, ferry-boats of all kinds, tugs and pusher craft 25% Tankers 25% Vessels for transport 15% Open vessels	0%	7 years Immediate on entry into force 3 years 3 years
 Planes	8802	0%	-	-
 Bikes (not motorised)	8712	13%	0%	Immediate on entry into force
 E-bikes (not exceeding 250 Watts)	87119010	0%	-	-

Source: Departmental Consolidation of the Customs Tariff 2016 available at <http://www.cbsa-asfc.gc.ca/trade-commerce/tarif/tarif/2016/01-99/01-99-42016-3-eng.pdf> (retrieved 21.10.2016)

In order to fully understand the impact of what the liberalisation will mean for the Parties, we analysed their respective trade flows. The 2014 numbers show that the EU was exporting significantly more transport vehicles than Canada.<sup>7</sup> The European car industry is massive in comparison to the Canadian. In 2014 alone, the EU exported 129,850 passenger vehicles to Canada, whereas Canada only exported 11,486 units.<sup>8</sup> This tremendous difference is the reason why CETA has a special derogation for Canada's automotive industry<sup>9</sup>. Also in the truck sector, the EU exported almost 200 times more than Canada.<sup>10</sup>

In contrast, Canada is exporting more large airplanes to the EU. This established trading relationship is mainly due to the fact that airplanes are already zero rated and make a significant part of the Canadian economy.<sup>11</sup> Bicycle trade is very low.<sup>12</sup> The end of the 13% tariff might have a positive effect on future bike exports to Canada.

## Conclusions

- Differentiating the phase-out of tariffs for regular and electric and other ultra-low carbon vehicles. The phase out period should have been shorter than the five years in order to create an incentive for a fast shift to electric vehicles.
- The recognition of European car standards will be the big money saver for European manufacturers. It is not possible to predict if these cost reductions will translate into price reduction.
- Truck tariff reduction is a massive step forward for EU truck makers. As Canada has hardly any truck industry, the reduction is unlikely to increase Canadian exports to the EU. In contrast, EU manufacturers will be able to increase their exports and offer their trucks at a potentially lower price.
- Canadian consumers may then benefit from cheaper bikes.<sup>13</sup> This can lead to an increase of bicycle use, although trade volumes today are very low.

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<sup>7</sup> All the data is retrieved from the UN Comtrade Database. <http://comtrade.un.org/> (retrieved October 28, 2016)

<sup>8</sup> This is equivalent to a trade value of \$4,049,453,877 for the EU and \$190,033,996 for Canada. Data retrieved October 28, 2016 from UN Comtrade Database.

<sup>9</sup> CETA will allow passenger vehicles that meet a minimum of 50% domestic content to qualify for duty-free status. This will move up to 55% after 7 years (Annex 5, p. 657 CETA). However, since there are hardly any Canadian-made vehicles with more than 50% domestic content, special arrangements for Canada were made in CETA. The first 100,000 vehicles can be shipped either way with only 30% domestic content measured by value or 20% measured by net cost (Annex 5-A: Section D – Vehicles, p. 690 CETA). Given that Canada does not have a big share of car exports to the EU (only 10,000 a year on average), this measure is not likely to change the trade dynamics a lot. Moreover, CETA also contains provisions addressing the integrated North American automotive market. CETA allows for cumulation of Canadian and US content if both Canada and the EU have an FTA with the US (Annex 5A: Section D, Note 1 CETA). Thus, automotive parts originating in the US can count as “originating” for the production of a vehicle produced in Canada or the EU. The annual quotas will cease to exist one year after the cumulation enters into force and the domestic content requirements raises to 60%. (Annex 5, p. 657 CETA).

<sup>10</sup> The EU exported 6619 trucks to Canada while Canada only exported 34 trucks to the EU. This is equivalent of a trade value of \$267,953,635 for the EU and \$849,396 for Canada. Data retrieved October 28, 2016 from UN Comtrade Database.

<sup>11</sup> Canada exported 42 large airplanes while the EU exported 18. This is equivalent of a trade value of \$1,290,476,110 for Canada and \$281,388,640 for the EU. Data retrieved October 28, 2016 from UN Comtrade Database.

<sup>12</sup> The EU exported 7835 bikes to Canada, while Canada exported 1283. This is equivalent of a trade value of \$3,807,565 for the EU and \$1,123,036 for Canada. Data retrieved October 28, 2016 from UN Comtrade Database.

<sup>13</sup> Canada has virtually no own bike industry. The import tariffs were raised from 8 to 13% in 2013. Why you will soon be paying more for bikes in Canada. Retrieved October 25, 2016 from <http://calgaryherald.com/news/local-news/bikes-in-canada-could-get-more-expensive-under-new-federal-budget>



## Section 2: Is sustainable development given equal consideration?

The Commission prides itself on conducting its trade policy ‘based on values’.<sup>14</sup> This is not surprising considering the EU’s constitutional mandate to integrate its trade policy with environmental considerations.<sup>15</sup> Including a dedicated chapter on trade and environment is a positive and necessary step, addressing trade-related environmental impacts requires going beyond rhetoric and into concrete action to address ambitious environmental goals.

In addition, CETA should not impair any of the Parties to take environmental protection measures and therefore needs broad and openly formulated exception clauses. We need to recall that Canada, a country with strong fishing and extractive industries, has instigated environmental legislation challenges against Europe before the World Trade Organisation (WTO) on multiple occasions in the past, challenging the EU’s rules on hormone treated beef, rules on genetically modified organisms (GMOs), the EU’s ban on seal products, and a French ban on asbestos products.<sup>16</sup> Particularly in light of the Paris Agreement, trade agreements like CETA therefore need to include meaningful and ambitious environmental provisions ensuring that trade and investment commitments will neither negatively impact the climate nor hinder any past and future environmental legislation.

Below, we outline three key concerns regarding enforcement, ambition and exceptions in or relating to the chapter on environment and explain why they are not met.

### Enforcement of environmental commitments in the trade and environment

A key prerequisite for meaningful commitments in the field of environment is to give the specific chapter equal consideration to other chapters in the agreement. This requires subjecting its provisions to the same state-to-state dispute settlement as the other parts of the agreement, so that both Parties can pressure and *effectively* hold each other accountable for violations of environmental commitments. In its TTIP resolution, the European Parliament has underlined the importance of enhancing the credibility of environmental commitments by recommending to ‘ensure that the sustainable development chapter is binding and enforceable’.<sup>17</sup>

This is not the case in CETA.<sup>18</sup> Instead, the environment chapter contains a weak mechanism based on dialogue to resolve disputes and explicitly excludes recourse to normal dispute settlement. The report of the Panel of Experts is neither binding on Parties, nor can it result in any form of penalty for breaches of the environment chapter, such as tariff sanctions.<sup>19</sup>

Moreover, CETA does not give directly affected natural persons or civil society an effective tool to address potential breaches of the relevant chapter by governments or industry. In the context of the EU-South Korea Agreement, the European Commission has taken no effective action against South Korea despite sustained and recurring breaches of labour rights.<sup>20</sup>

This stands in stark contrast to the rights and remedies available to business. Not only can foreign investors use the Investment Court System (ICS, see below). EU companies can also file

<sup>14</sup> Commission, ‘Trade for All: Towards a more responsible trade and investment policy’ (Communication) COM(2015) 497 final

<sup>15</sup> Art. 21 (3) TEU, Arts. 11 and 207 (1) TFEU

<sup>16</sup> EC — Seal Products (2014) WT/DS400/AB/R; EC — Asbestos (2001) WT/DS135/AB/R; EC — Approval and Marketing of Biotech Products (2006) WT/DS291/R; EC — Hormones (Canada) (1998) WT/DS21/R

<sup>17</sup> European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) at 2. (d) (ii-iv).

<sup>18</sup> Art. 24.16 CETA

<sup>19</sup> Art. 24.15 (11) CETA

<sup>20</sup> Members of the EU’s Domestic Advisory Group have repeatedly asked the Commission to take action since 2014 on the basis of numerous reports of labour rights violations in Korea. The latest of such reports is the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea of 16 June 2016 ([A/HRC/32/36/Add.2](http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/CountryVisits.aspx)), available at <http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/CountryVisits.aspx> (retrieved 28 October 2016)

complaints under the Trade Barriers Regulation, the Anti-Dumping Regulation, and the Anti-Subsidies Regulation to trigger Commission action<sup>21</sup>

This asymmetrical access to justice should be addressed through provisions enabling persons to submit observations relating to violations or imminent threats thereof. A substantiated request should be considered by the Parties. Annex I sets out an example of how an access to justice provision that could be included in the CETA text.

## Meaningful environmental commitments in the trade and environment chapter

Enforcement of environmental provisions alone is insufficient if they do not add any value to pre-existing commitments. CETA could have prohibited subsidies for fishing of overfished and endangered stock and required Parties to commit to support the adoption of a universal catch certificate and mandatory global record of vessels.<sup>22</sup> Similarly, it could have, for example, committed the Parties to negotiate and adopt a legally binding agreement on the conservation and sustainability of marine biodiversity in areas beyond national jurisdiction. Equally, CETA could have addressed ending fossil fuel subsidies, since Canadian tar sands are a major recipient of subsidies<sup>23</sup> and contributor global greenhouse gas emissions.<sup>24</sup>

However, CETA does not go beyond already existing commitments. The inclusion of a weak provision on upholding levels of protection<sup>25</sup> and a provision on civil society involvement are insufficient in this regard.<sup>26</sup> In relation to the provision requiring Parties to uphold their levels of environmental protection, CETA sets a higher hurdle to prove that a Party has breached those provisions compared to other areas, where even an incidental occurrence can result in a claim before a tribunal. Not only is it difficult to establish a direct link between weakening of standards and encouragement of trade and investment, the provisions also requires a sustained breach by one of the Parties.<sup>27</sup> Lastly, animal welfare considerations relating to Canadian seal hunt are explicitly excluded from the environment chapter.<sup>28</sup>

## 'Exceptions' chapter that reflects the comprehensive nature of the agreement

As mentioned above, Canada has a history of challenging European environmental legislation at the WTO (hormone treated beef, rules on GMOs, seal product ban, asbestos product ban).<sup>29</sup> It is essential therefore that CETA does not contain the outdated GATT Article XX exceptions clause from 1948, which only allows Parties to invoke a limited list of public interest exceptions under strict conditions.<sup>30</sup> CETA may suggest that the Parties' right to regulate is protected,<sup>31</sup> but there is no

<sup>21</sup> This requires the Commission to take a decision on whether or not to pursue a commercial policy measure in response; the complainant may appeal to the decision. See Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation [1994] OJ L 349/71. Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L 343/51; Council Regulation 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [2009] OJ L 188/93.

<sup>22</sup> In the Food and Agriculture Organisation (FAO) of the United Nations.

<sup>23</sup> Enviroeconomics' Fossil Fuels – At What Cost?' (2010)report available at [https://www.iisd.org/gsi/sites/default/files/ffs\\_awc\\_3canprovinces.pdf](https://www.iisd.org/gsi/sites/default/files/ffs_awc_3canprovinces.pdf) (retrieved 29 October 2016)

<sup>24</sup> Tar Sands and Climate Change available at [http://www.greenpeace.org/canada/Global/canada/report/2010/4/ClimateChange\\_FS\\_Footnotes\\_rev\\_4.pdf](http://www.greenpeace.org/canada/Global/canada/report/2010/4/ClimateChange_FS_Footnotes_rev_4.pdf) (retrieved 29 October 2016)

<sup>25</sup> Art. 24.5 CETA

<sup>26</sup> Art. 24.6 CETA

<sup>27</sup> See Art. 24.5 (2-3) CETA: "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. [...] A Party shall not, **through a sustained or recurring course of action or inaction**, fail to effectively enforce its environmental law to encourage trade or investment."

<sup>28</sup> Art. 24.1 CETA

<sup>29</sup> EC — Seal Products (2014) WT/DS400/AB/R; EC — Asbestos (2001) WT/DS135/AB/R; EC — Approval and Marketing of Biotech Products (2006) WT/DS291/R; EC — Hormones (Canada) (1998) WT/DS21/R Seals and Asbestos

<sup>30</sup> CETA duplicates the 'chapeau' of Article XX GATT in article 28.3 (1) CETA, which states that 'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

strongly-enough worded provision to protect or carve out public policy measures in such a way that would prevent them from suffering the same fate as past measures have at the WTO.<sup>32</sup>

CETA currently only contains a closed list of public interest exemptions—excluding, for example, the possibility of taking measures to protect consumers. The parties should, instead, have reformed the GATT exceptions clauses to match the ‘deep and comprehensive’ nature of CETA.<sup>33</sup> This would imply an open-ended list of exceptions, language that is unequivocally supportive of the Parties’ discretion to use environmental language,<sup>34</sup> and including a clause that enables Parties to restrict the marketing of products that have been made in environmentally degrading ways such as a clean hands clause, see below.<sup>35</sup>

## Clean Hands Clause

The text of a clean hands clause might resemble the following:

*Nothing in this agreement shall be construed as preventing a Party from taking any measure to ensure that the Party is not economically implicated in environmentally or socially harmful behaviour or morally unacceptable behaviour, including when that behaviour takes place outside the territory of that Party.*

A non-exhaustive list of environmental issues that would benefit from the addition of a CHC to the CETA text includes:

**The Biofuels sustainability criteria based on the Renewable Energy Directive (2009/28/EC)**

**Directive 2008/101/EC on the inclusion of aviation activities in the EU ETS scheme**

**Potential measures undertaken against carbon leakage adopted pursuant article 10 b (1) (b) of the EU ETS Directive 2003/87/EC**

**EU organic products regulation (Council Regulation (EC) No. 834/2007)**

**Regulation (EC) No. 66/2010 on the EU Ecolabel**

## Conclusions

- The environment chapter should have included stronger commitments in the field of environment, in particular in the area of fisheries and fossil fuels.

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international trade’. This additional hurdle gives tribunals the interpretative room to take a second look at public interest legislation and to find measures that serve public interest in compatible with the GATT.

<sup>31</sup> See for instance the preamble and CETA Joint Interpretative Instrument

<sup>32</sup> US — Gasoline (1996) WT/DS2/AB/R; US — Shrimp (1999) WT/DS58/AB/R; EC — seal products (2014) WT/DS400/AB/R and WT/DS401/AB/R; EC — Tariff Preferences (2004) WT/DS246/AB/R, Brazil — Retreaded Tyres (2007) WT/DS332/AB/R

<sup>33</sup> See Article XX of GATT 1994 of Annex 1A of the WTO Agreement

<sup>34</sup> By removing the ‘chapeau’ of the current Article XX GATT. This provision states that Parties only have the right to invoke the limited list of public interest exceptions on the condition that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

<sup>35</sup> For example, this would enable the EU to take measures against imports of petrochemical products derived from Canadian tar sands and protect EU rules on organic labelling and sustainability criteria for biofuels.

- CETA would have been a wonderful opportunity to create a positive precedent in the form of a modern exceptions chapter that moves away from outdated WTO language, or at least extended the scope of the exceptions clause.
- The lack of a clean hands clause: Such an innovative clause would strengthen the parties' rights to regulate through consumption and export rules, where such interventions protect environmental and social conditions. It would ensure that a number of current EU rules are less likely to be challenged through the agreement's dispute settlement mechanisms, that no ceiling is imposed on similar and advanced rules in the future and would have set an important precedent in regard to other EU-FTAs.



## Section 3: Will CETA help decarbonise energy?

Due to its vast resources, Canada was the world's second largest exporter of oil in 2014.<sup>36</sup> The European Union, on the other hand, relies on foreign companies to supply 80% of its oil imports.<sup>37</sup> While Member States anxiously seek to reduce dependency on Russia, Canada is gearing up to export its vast reserves derived from Alberta tar sands. In light of global efforts to reduce emissions and reach the Paris Agreement climate targets, global dependency should be addressed by decarbonising transport and cutting oil demand, not by continuing to extract and utilise dirty tar sands.

Given the Canadian historic economic dependency on oil exports and powerful oil and gas industry,<sup>38</sup> it is important to examine the way energy is addressed in CETA with potential environmental effects in mind. It must be noted that the new Alberta government is taking important steps to curb the region's carbon emissions, with the Climate Leadership Plan.<sup>39</sup> Member States, with few exceptions, are dependent on imports to satisfy energy needs, of which oil makes up the lion share.<sup>40</sup>

CETA does not contain a dedicated energy chapter to address trade in energy goods, services or investment, let alone their environmental impacts. Instead, those issues fall under the respective chapters on trade in goods, trade in services and the investment chapter. We argue that there are a lot of missed opportunities to address this sector in a progressive manner that would further the Parties' climate targets.

### Provisions relating to Energy Trade in Goods

Lowering tariffs on trade in goods is the traditional aim of free trade agreements. For energy products, most tariffs of the EU on third-country imports are already at a zero rate. This includes products such as coal and lignite, crude oil from tar sands and natural gas.<sup>41</sup> Canadian energy imports into the EU have been relatively low for structural reasons, despite the low tariffs. As such, whether Canada will be able to export more crude oil and refined petroleum products to Europe will depend on infrastructure and transport capacity. The only significant tariff reductions are in the area of mineral fuels, where current tariffs are at 4.7%.<sup>42</sup>

### Petroleum Products from Tar Sands

Canada ranks third in global crude oil reserves, after Venezuela and Saudi Arabia.<sup>43</sup> Its vast reserves consist of 90% Alberta tar sands bitumen, and only 10% conventional crude oil.<sup>44</sup> As a

<sup>36</sup> Its oil exports amounted to a value of \$ 88,112,080,944. Retrieved November 4, 2016 from <http://www.gsmlondon.ac.uk/global-oil-map/#2014-exporters-124>

<sup>37</sup> See Just two of EU's top 10 oil suppliers are European Retrieved November 4, 2016 from <https://www.transportenvironment.org/news/just-two-eu%E2%80%99s-top-10-oil-suppliers-are-european>

<sup>38</sup> For an overview of GDP at domestic prices per in industry, see: Statistics Canada, retrieved November 4, 2016 from: <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/gdps04a-eng.htm>

<sup>39</sup> Natural Resources Defense Council. Alberta's Climate Leadership Plan is a strong step forward in addressing province's emissions. Retrieved November 4, 2016 from: <https://www.nrdc.org/experts/anthony-swift/albertas-climate-leadership-plan-strong-step-forward-addressing-provinces>

<sup>40</sup> Eurostat (2016). Digital Publication. Shedding light on energy in the EU - A guided tour of energy statistics. ISBN 978-92-79-59528-8. Retrieved November 4, 2016 from <http://ec.europa.eu/eurostat/cache/infographs/energy/index.html>

<sup>41</sup> Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 285, 30.10.2015

<sup>42</sup> The majority of Canadian mineral fuels (HS Code 271012) is exported to the US. However, the Netherlands have consistently been the second largest importer in the period from 2012-2015. In 2015, Canada exported a total value of \$4,807,927,041.00 to the world, of which \$4,753,436,545.00 to the US and \$32,920,396.00 to the Netherlands. Numbers derived from UN Comtrade via: <http://comtrade.un.org/data/>

<sup>43</sup> CIA World Factbook. Retrieved November 4, 2016 from: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2244rank.html#ca>

result, it was the second biggest oil exporter worldwide in 2014, with Italy and the United Kingdom being the main European importers.<sup>45</sup> Producing oil from tar sands is three to four times more emission-intensive, due to the extraction and complex water- and energy-intensive upgrading process required to produce a crude oil fluid enough for pipeline transport.<sup>46</sup> While production seemed attractive when the oil price was around \$100 per barrel and producers broke even at around \$44, the low oil price in recent years has operators selling tar sands crude oil at a deficit.<sup>47</sup> Yet, because of the long-term and capital intensive nature of the industry, producers have to keep operating through slumps and production was even predicted to increase by 9% in 2016.<sup>48</sup>

The EU's Fuel Quality Directive, which requires fuel suppliers to reduce the carbon footprint of their fuels, would have discouraged the entry of products derived from oil sands in the EU, but the legislation was watered down by Canadian and American lobbying efforts and the final legislation fails to halt dirty oil.<sup>49</sup>

The recovery of tar sands has a massive negative impact on the environment. Open pit mining, mass water consumption and pollution have led to water shortages and toxic waste-water ponds,<sup>50</sup> while in-situ steam recovery requires large amounts of gas from fracking.<sup>51</sup> Yet, TransCanada Corp. actively promotes the "Energy East" pipeline project, which could carry 1.1 million barrels of crude oil per day towards the Atlantic coast, enable increased exports to Europe.<sup>52</sup> The Paris Agreement is spurring global efforts to decarbonise economies, notably by keeping the dirtiest sources of oil in the ground,<sup>53</sup> efforts that could potentially be undermined by CETA.

The conditions for an increase in tar sands oil and products are dependent on certain factors:

- The Energy East pipeline project is completed; crude oil from tar sands can be transported to the East coast and shipped to European refineries more readily, most of which are prepared to handle this type of crude oil.<sup>54</sup>
- Through Energy East, tar sands crude oil could be refined in Canadian refineries on the East coast, which are currently still dependent on foreign imports to fulfill their capacity, and subsequently exported to Europe, benefiting from zero percent tariffs post-CETA.
- The oil price is above the break-even point for tar sands producers.

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<sup>44</sup> National Energy Board. Canada's Energy Future 2013 - Energy Supply and Demand Projections to 2035 - An Energy Market Assessment. Retrieved October 2016 from: <https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2013/index-eng.html#s5>

<sup>45</sup> With a trade value of \$1,356,345,994 (to Italy) and \$ 683,578,633 (to the UK) in 2014 respectively. Numbers derived from UN Comtrade, 4 November 2016: <http://comtrade.un.org/data/>

<sup>46</sup> Tar sands consist of sand, clay, water and bitumen. It takes about two tons of tar sands to produce one barrel of oil. Only about 20% can be extracted through open pit mining. The remaining 80% are 'in situ' and require extraction through other means, mainly through steam assisted gravity drainage, more information: Skone, <https://www.aer.ca/about-aer/spotlight-on/oil-sands>, T., Gerdes, K. (2008). Development of Baseline Data and Analysis of Life Cycle Greenhouse Gas Emissions of Petroleum-Based Fuels. Retrieved 4 November 2016 from: <http://www.netl.doe.gov/energy-analyses/pubs/NETL%20LCA%20Petroleum-based%20Fuels%20Nov%202008.pdf> More information on tar sands recovery: <http://www.ramp-alberta.org/resources/development/history/insitu.aspx> and <http://www.oilsandsmagazine.com/oil-sands-in-situ/>

<sup>47</sup> Austen, I. (2015, 12 October). Oil Sands Boom Dries Up in Alberta, Taking Thousands of Jobs With It. New York Times. Retrieved 4 November 2016 from: [http://www.nytimes.com/2015/10/13/business/international/oil-sands-boom-dries-up-in-alberta-taking-thousands-of-jobs-with-it.html?\\_r=0](http://www.nytimes.com/2015/10/13/business/international/oil-sands-boom-dries-up-in-alberta-taking-thousands-of-jobs-with-it.html?_r=0)

<sup>48</sup> See also Williams, N. (2015, 19 August). Even losing \$6 per barrel, top Canada oil sands project unlikely to close. Reuters Canada. Retrieved 4 November 2016 from: <http://ca.reuters.com/article/businessNews/idCAKCN0QO25120150819> and McKenna, P. (2016, 23 February). With Some Tar Sands Oil Selling at a Loss, Why Is Production Still Rising? Retrieved November 4, 2016 from: <https://insideclimatenews.org/news/23022016/tar-sands-becoming-worthless-production-rises-even-prices-plummet>

<sup>49</sup> Long-awaited fuel quality rules will 'fail to halt dirty oil'. Retrieved November 4, 2016 from <https://www.transportenvironment.org/news/long-awaited-fuel-quality-rules-will-%E2%80%98fail-halt-dirty-oil%E2%80%99>

<sup>50</sup> For more information, see Council of Canadians. Tar Sands. Retrieved November 4, 2016 from <http://canadians.org/tarsands>

<sup>51</sup> For more information, see: The Huffington Post. Alberta Fracking. Retrieved November 4, 2016 from <http://www.huffingtonpost.ca/news/alberta-fracking/>

<sup>52</sup> For more information, see: Council of Canadians. Energy East. Retrieved November 4, 2016 <http://canadians.org/energyeast>

<sup>53</sup> For more information, see: Transport & Environment. Dirty Oil. Retrieved November 4, 2016 <https://www.transportenvironment.org/what-we-do/dirty-oil>

<sup>54</sup> MathPro Inc. (2015). Assessment of the European Refining Sector's Capability to process unconventional, heavy crude Oils. Prepared for Friends of the Earth Europe and European Federation for Transport and Environment. Retrieved November 4, 2016 [https://www.transportenvironment.org/sites/te/files/FoEE\\_TE\\_03\\_Final\\_Project\\_Report\\_091015.pdf](https://www.transportenvironment.org/sites/te/files/FoEE_TE_03_Final_Project_Report_091015.pdf)

## Biofuels

Canada has a federal biofuels blend mandate of 5% ethanol (renewable content) in gasoline and 2% in diesel. Provinces set their own mandates, which range from 5-8.5% ethanol and 2-4% renewable content for diesel, with little ambition to go any further.<sup>55</sup> Canada currently does not cover its domestic demand for bioethanol, which makes exports to Europe unlikely. Canada does not export bioethanol to any European Member State in significant quantities.

The EU currently has an anti-dumping duty of 172.20 EUR per ton on biodiesel imported from Canada, in addition to a countervailing duty of 237.00 EUR per ton.<sup>56</sup> These measures were used following an anti-dumping investigation that found that biodiesel from the US was imported into the EU through Canada in order to circumvent existing anti-dumping measures against US biodiesel.<sup>57</sup> At the time of the investigation in 2008, the biodiesel industry in Canada was still nascent. As long as these measures concern American products, they are not threatened by CETA.

## Services and Investment Schedules

CETA is the first agreement in which the EU used a negative list approach. This means that all sectors will be liberalised as laid out in the CETA text, unless they are listed as 'reservations' in the CETA Annexes.<sup>58</sup> In Annex I CETA, Canada, the EU and all its Member States list existing laws and regulations which are not in conformity with the agreement and which they negotiated to maintain. In Annex II CETA, they have listed sectors for which they retain the right to adopt such measures in the future.

Increased competition in national energy markets could, ideally, lead to lower prices for consumers and increased diversification of sources. However, this must be accompanied by a solid regulatory framework to ensure these outcomes. It can take years before the consequences from energy liberalisation can be assessed. The mere act of opening up the energy market is not in itself negative for the environment. The real threat, however, lies in the combination of these commitments with ICS as outlined below. For more information, please consult Annex II on page 27.

We would like to point out the vast differences in the numbers of reservations as well as their coverage between Member States that did not make any reservations, have listed insufficient reservations and have made sufficient to good reservations. This uncoordinated approach makes a comprehensive evaluation difficult - for analysis and scrutiny by oversight bodies or civil society, for Member States curious to see what their neighbours covered or not and, last but not least, for foreign investors. An overview can be found in the table below. For a more detailed overview of our methodology and analysis, please consult Annex II on page 27.

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<sup>55</sup> USDA Foreign Agricultural Service (2015). Canada Biofuels Annual 2015. GAIN Report Number CA15076

<sup>56</sup> On a price per ton of average \$1000/ton, around €909. Council Implementing Regulation (EU) No 444/2011 of 5 May 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 on imports of biodiesel originating in the United States of America to imports of biodiesel consigned from Canada, whether declared as originating in Canada or not, and extending the definitive anti-dumping duty imposed by Regulation (EC) No 599/2009 to imports of biodiesel in a blend containing by weight 20 % or less of biodiesel originating in the United States of America, and terminating the investigation in respect of imports consigned from Singapore *OJ L122, 11.5.2011*

<sup>57</sup> Because of NAFTA, there are no customs duties or other import restrictions in place between the US and Canada.

<sup>58</sup> With the express exception of the audiovisual sectors for the EU and the cultural industries for Canada.

# Member States' Energy Reservations

## 9 Member States have not made any reservations



Spain



Czech Republic



Greece



Romania



Luxembourg



Croatia



Estonia



Ireland



Latvia

## 12 Member States have listed insufficient reservations



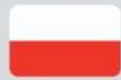
Slovenia



Italy



UK



Poland



The Netherlands



Hungary



Denmark



Cyprus



Sweden



Austria



Germany



Malta

## 7 Member States have made sufficient to good reservations



Portugal



Bulgaria



Finland



Slovakia



Lithuania



France



Belgium

Source: CETA Annex II Schedule of European Union

## Conclusions

The way in which energy is addressed – or not – in CETA is a missed opportunity in several respects.

- Given the importance of the sector for both parties, a chapter on energy should have been included, with reference to the Paris Agreement, the promotion of renewables, and to fostering the green economy.
- CETA addresses energy in the 'old style': the only energy products that are realistically traded across the Atlantic are the carbon-intensives ones: oil, coal and gas, as well as biomass/fuel.
- CETA could have addressed fossil fuel subsidies: Instead, with the watered down Fuel Quality Directive, it opens the door to imports of oil derived from tar sands.
- The incoherent sector coverage in the negative list creates uncertainties for all parties. We therefore advise a coordinated approach, designed to secure high levels of protection of the right to regulate in the energy sector, which is in the long-term interest of the environment, governments and investors alike. Instead, CETA is a win for big energy and the extractive industry, because a majority of Member States failed to make crucial reservations in their energy sectors.



## Section 4: Has the Investment Court System reform gone far enough?

Perhaps the most contentious issue in CETA is the inclusion of a dispute settlement mechanism for foreign investors, the Investment Court System (ICS). The system enables foreign investors to sue the Canadian government, Member States or the EU over any decision that is perceived to limit their rights as investors, ranging from indirect expropriation, contractual issues, licensing or unfulfilled legitimate expectations.

The ICS is the Commission's response to the heavily criticised Investor-State Dispute Settlement (ISDS) mechanism.<sup>59</sup> CETA is the first trade agreement that will include the ISDS/ ICS mechanism, as this was previously a Member State responsibility.<sup>60</sup> The CETA Sustainable Impact Assessment, published in June 2011, concludes that including the mechanism will have doubtful "net/overall (economic, social and environmental) sustainability benefit for the EU and/or Canada" and that state to state could serve as a suitable dispute settlement enforcement mechanism.<sup>61</sup>

Despite claims by the Commission that ICS will not affect environmental decision-making, ICS in CETA constitutes a powerful tool for investors to exercise pressure on governments or sue them over any governmental action affecting their investor rights.<sup>62</sup> ICS thus empowers investors against governments and therefore poses a challenge to democratic decision-making. It also creates a parallel justice system that sidelines domestic courts. The modest improvements in shielding environmental decision-making from claims do not address the fundamental flaws of the system.

### Respect for domestic courts and the EU legal order

In the European Parliament's TTIP resolution, the Commission was requested to ensure that the 'jurisdiction of courts of the EU and of the Member States is respected'.<sup>63</sup> However, the CETA ICS fails to protect the powers of the courts of the Member States and of the EU. Investors are not required to exhaust domestic remedies, and are empowered to bypass European and Canadian public courts. The Commission has failed to provide substantial justification for introducing such a system between countries with highly developed legal systems, let alone a justification not to require exhaustion of domestic remedies first.

Moreover, ICS risks disrupting the EU legal order guarded by the European Court of Justice (ECJ). Under the Treaties, the ECJ is required to make sure that EU law operates the same way throughout the EU.<sup>64</sup> ICS upsets this fundamental aspect of EU law by establishing a parallel system for business only - without the involvement of the ECJ.<sup>65</sup> As a result, EU law may be given meaning without proper judicial oversight by the ECJ.

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<sup>59</sup> See the Commission's press release 'CETA: EU and Canada agree on new approach on investment in trade agreement' of 29 February 2016, IP/16/399

<sup>60</sup> The Energy Charter, a specialized agreement on energy liberalisation, being the only agreement containing ISDS to which the EU is a Party.

<sup>61</sup> Development Solution. European Commission Report. A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Final report June 2011. Retrieved November 4, 2016 from [http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc\\_148201.pdf](http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf)

<sup>62</sup> Not only by winning cases, but also using it as a pressure tool. See Corporate Europe Observatory, 'The zombie ISDS', in particular p. 24-25, available at [https://corporateeurope.org/sites/default/files/attachments/the\\_zombie\\_isds\\_0.pdf](https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf) (retrieved 4 November 2016)

<sup>63</sup> European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) at 2 (d) (xv)

<sup>64</sup> Article 19 TEU requires the Court of Justice of the EU to ensure that in the interpretation and application of the Treaties the law is observed. Article 267 TFEU gives the Court of Justice of the EU the exclusive jurisdiction to give a definitive interpretation of EU law through the preliminary reference procedure. See Opinion 2/13 ECLI:EU: C: 2014:2454, paras. 244-248

<sup>65</sup> ClientEarth, 'Legality of investor-state dispute settlement (ISDS) under EU law' 22 October 2015 available at <http://documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf> (retrieved 4 November 2016)

A requirement to exhaust domestic remedies and oversight by the ECJ would also ensure that those courts that are most competent to deal with environmental issues remain in the driving seat when it comes to making an assessment of EU environmental legislation.

## Right to regulate

CETA includes provisions that are intended to strengthen the 'right to regulate'. This right to regulate is generally understood as the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. However, CETA merely 'reaffirms' this already existing balance.<sup>66</sup> While CETA does give tribunals more guidance on how to deal with legislative change, it is still not an effective carve-out for public interest decision-making.<sup>67</sup> Contrary to public statements by the Parties, these provisions fail to effectively limit claims that challenge public policy measures. To protect the right to regulate a public policy carve out clause should be included, thereby limiting the bases on which investors can bring a case to non-public policy issues.

## Fair and equitable treatment (FET)

Provisions on FET are the "catch- all" in investment law, as it is often ill-defined. As such, it gives arbitrators ample room to scrutinise public interest decision-making.<sup>68</sup>

The Commission's approach to curbing the FET standard is to list what constitutes a breach of the FET standard, such as 'denial of justice', 'fundamental breach of due process' and 'manifest arbitrariness'. However, the list is not exhaustive and can be amended by the CETA Joint Committee, a process over which the European Parliament will have no control.<sup>69</sup> In addition, the list merely codifies already existing practice and therefore does not significantly limit the standard.<sup>70</sup>

Lastly, frustration of 'legitimate expectations' is codified as an element that may constitute a breach of FET. Democratic decision-making contrary to earlier statements or commitments made by public officials affecting investments could therefore still be subject to a claim under CETA. If a Party wants to enact measures protecting the environment or mitigating climate change, it might still need to take the investor's' legitimate expectations into account.

## Indirect expropriation

CETA contains an annex that defines the concept of 'indirect expropriation'. Compensation for indirect expropriation has been a source of controversy in the past, because tribunals have construed indirect expropriation as covering measures which erode rights associated with ownership even if this was done with a public purpose in mind, such as the protection of the environment.<sup>71</sup> CETA limits such use of the 'indirect expropriation' standard by stating that non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.<sup>72</sup> Unfortunately, the Annex further states that non-discriminatory measures that protect public welfare objectives which 'appear manifestly excessive' may constitute 'indirect expropriation'. As such, the clause is an explicit limitation to the right to regulate as even non-discriminatory measures pursuing legitimate public welfare objectives can constitute indirect expropriation where they appear to

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<sup>66</sup> Art. 8.9 (1)

<sup>67</sup> Art.8.9 (2)

<sup>68</sup> Fiona Marshall, 'Fair and Equitable Treatment in International Investment Agreements' Issues in International Investment Law Background Paper available at [https://www.iisd.org/pdf/2007/inv\\_fair\\_treatment.pdf](https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf) (retrieved 4 November 2016)

<sup>69</sup> Art. 8.10 (3) CETA and art. 218 (9) TFEU

<sup>70</sup> Marc Jacob and Stephan W. Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in: M. Bungenberg, J. Griebel, S. Hobe (eds.), *International Investment Law*, 2015, pp. 700-763

<sup>71</sup> See for instance the awards in *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1 and *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2

<sup>72</sup> See Annex 8-A CETA

the tribunal as ‘manifestly excessive’. This wording is therefore a regrettable addition to an otherwise valuable clarification of what constitutes indirect expropriation.

## The Investment Court System and Energy

The ICS in CETA does not remedy the fundamental flaws of ISDS. ICS still gives foreign investors a powerful judicial tool to sue governments for significant amounts of damages.<sup>(1)</sup> Energy is an investment-intensive sector and has therefore seen a number of highly controversial cases. These include a \$4.7 billion claim for compensation following Germany’s decision to phase-out its nuclear policy after Fukushima,<sup>(2)</sup> a \$1.4 billion claim over permits for a coal-fired plant in Germany,<sup>(3)</sup> a \$118.9 million claim over a moratorium on fracking beneath Quebec’s St. Lawrence River,<sup>(4)</sup> a yet unknown amount over Romania’s refusal to host Europe’s largest gold mine operated by a Canadian explorer,<sup>(5)</sup> and a \$15 billion claim over the rejection of the Keystone XL Pipeline.<sup>(6)</sup>

The pertaining question therefore is whether a (local) government’s decision to, e.g., refuse a permit, would be so easily made if such a decision could unleash a multi-million euro lawsuit brought by the aggrieved company.<sup>(7)</sup> The mechanisms of ISDS - and ICS - enable companies to pressure governments into short time-frames that may make it impossible to consider all scientific evidence,<sup>(8)</sup> or into lifting moratoriums altogether. The legitimate fear of such claims, or even just the millions of legal costs involved, create a regulatory chill, a potential inaction by regulators, which is not in the public interest.

The problem with ICS in CETA becomes apparent when looking at the sum of things: A trading partner with a strong oil, gas and mining lobby, full or near full market opening in the majority of Member States, and an investment arbitration system that privileges foreign investors. In combination, this is a recipe for disaster to attract investors looking to exploit this system through claims for compensation.

(1) Joint Report (2016), *The zombie ISDS. Rebranded as ICS, rights for corporations to sue states refuse to die*, Retrieved October 2016 from [https://corporateeurope.org/sites/default/files/attachments/the\\_zombie\\_isds\\_0.pdf](https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf)  
(2) *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12)  
(3) *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (I) (ICSID Case No. ARB/09/06)  
(4) *Lone Pine Resources Inc. v. Canada* (ICSID Case No. UNCT/15/2). The applicant claimed CDN\$250 in relief in its original application: <http://www.tolaw.com/sites/default/files/case-documents/tlalw1596.pdf>  
(5) *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* (ICSID Case No. ARB/13/31), more information: <https://www.euractiv.com/section/central-europe/opinion/rosia-montana-an-omen-for-http/>  
(6) *TransCanada Corporation and TransCanada PipeLines Limited v. United States of America* (ICSID Case No. ARB/16/21)  
(7) Perry, J. (2014). *When Mining Firms Sue*. London Review of Books Blog, Retrieved November 4, 2016 from <http://www.lrb.co.uk/blog/2014/09/15/john-perry/when-mining-firms-sue/>  
(8) “If a government is not even allowed to take a time out to study the impact without having to compensate a corporation, it puts a tremendous chill on a government’s ability to regulate in the public interest.” said Ilana Solomon, director of the Sierra Club’s trade program in Washington, D.C. in respect to *Lone Pine Resources Inc. v. Government of Canada*. Retrieved November 4, 2016 from: [http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit\\_n\\_4038173.html](http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit_n_4038173.html)

### Third-party rights and transparency

Investment arbitration cases have in the past required investment tribunals to make complex assessments over environmental decision-making, such as phasing-out of nuclear power.<sup>73</sup> Projects under attack often have significant implications for local population and the environment, yet these voices are often not heard in investment arbitration proceedings.

CETA is no exception and only allows for the submission of *amicus* briefs under the conditions set out by the United Nations Commission on International Trade Law (UNCITRAL) transparency rules. The rules fall short on a number of counts. For instance, they still give the tribunals’ ample

<sup>73</sup> See for instance the submissions in the public hearing in the *Vattenfall v Germany* case on the phasing out of nuclear power *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, streaming of the hearings available at <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/12/12&tab=DOC> (retrieved 28 October 2016)

discretion not to accept such submissions. Moreover, the UNCITRAL rules do not attempt to give precise and narrow definitions of what constitutes confidential or protected information, nor is there any judicial redress to challenge the tribunal's decisions to not disclose information.

Most importantly, CETA does not contain any provisions to launch counter-claims on the basis of investor *responsibilities* towards the local population or the environment, in particular the respect for domestic rules on environmental protection. This aspect highlights the unbalanced and one-sided nature of the system contrary to the UN Guiding Principles on Business and Human Rights.<sup>74</sup>

## Conclusions

The reforms on investment protection introduced in CETA fall short in a number of respects.

- Fundamental doubts remain over the compatibility of ICS with the EU Treaties. The rule of law should be the first and foremost consideration of the Commission, and it is disappointing to see only cosmetic changes being introduced in this sense, and no request for an Opinion made by the Commission to at least get a preliminary check by the European Court of Justice on the legality of the system.
- CETA's investment chapter does not have a sufficiently strong carve-out for measures aimed at or contributing to protecting public interests, such as environmental protection.
- CETA still contains the investor rights that enable foreign investors to sue governments over public interest measures, such as the newly worded 'fair and equitable treatment' and 'indirect expropriation' standards. While the wording of these provisions is an improvement, they fall short of no longer posing a threat to legitimate public interest measures.
- CETA does not give third-parties any actionable rights that could counterbalance the powerful rights granted to foreign investors.
- The only course of action therefore is to remove ICS from CETA.

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<sup>74</sup> Greenpeace, 'Investor Protection in CETA: Gold Standard or Missed Opportunity?' (2016) see <http://www.greenpeace.org/eu-unit/en/Publications/2016/Investor-protection-in-CETA/> (retrieved 4 November 2016)



## Section 5: Is CETA regulatory cooperation really voluntary?

With few tariffs left, the focus of ‘new style’ trade agreements has shifted towards non-tariff barriers and behind-the-border issues. Regulatory cooperation is a regulatory mechanism to facilitate the approximation of regulations that impact trade between the parties, such as different standards.<sup>75</sup>

However, sometimes legitimate public policy measures are perceived trade irritants. Developed countries, democracies with well-established legislative and regulatory systems, as the EU and Canada, may have entrenched and prevalent differences. Regulatory cooperation in CETA can address existing differences, but also establishes a framework to deal with future divergence.<sup>76</sup> As such, the scope of regulatory cooperation is broad and the chapter sets out general provisions for all areas covered.<sup>77</sup> These provisions are supplemented for individual subject areas such as Technical Barriers to Trade (TBT) and Sanitary and phytosanitary (SPS) chapters.<sup>78</sup>

Despite assurances from both Parties, it is very difficult to predict how regulatory cooperation will impact future legislation, as many parameters remain unknown. Will it lead to legislative slowdown, where one Party tries to limit upcoming legislation in another region? Could it lead to a race to the bottom as Parties align each others’ standards to the lowest common denominator? Or could it lead to ambitious new laws as parties try to push ambitious environmental standards and increased competition? On the basis of the text, one can only speculate.

While we welcome that regulatory cooperation in CETA is voluntary,<sup>79</sup> there are still concerns that have not been adequately addressed.

### Disproportionate consideration of trade concerns

Developing coordinated procedures via a trade agreement may result in disproportionate consideration of trade concerns to the detriment of legitimate concerns such as environmental standards or other public interest measures. Regulatory cooperation is not a bad concept *per se*. The exchange of best practices and successful approaches is valuable, but should be guided by public policy and environmental concerns and not trade facilitation.<sup>80</sup>

### Slowing down of domestic regulatory process

CETA provides for a detailed list of regulatory cooperation activities. These include consulting and sharing information with the other party throughout the entire regulatory process, having joint risk and impact assessments and providing the text of proposed regulation to the other Party to allow interested parties to provide comments.<sup>81</sup> Also, Parties are encouraged to inform each other of contemplated regulatory actions “at the earliest stage possible”.<sup>82</sup> All of this introduces possible additional steps to the regulatory process, increasing the pressure on regulators and having the effect of slowing down the whole regulatory process. This is especially worrying in areas where urgent action is needed. Climate change and air pollution just being two examples.

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<sup>75</sup> This could be conducting joint risk assessments, achieving harmonised solutions or consider mutual recognition. See Art. 21.4 (g) CETA

<sup>76</sup> See Art. 21.1 CETA

<sup>77</sup> Art. 21.1 CETA

<sup>78</sup> See for example Chapter 4 and 5 CETA

<sup>79</sup> Art. 21.2 (6) CETA: This way regulators can decide if they go ahead with cooperation and share planned regulatory acts.

<sup>80</sup> The high levels of protection in this chapter can only be pursued in accordance with WTO regulations. See Art. 21.2 (2) CETA

<sup>81</sup> Art. 21.2 (4), 21.3 (d) 21.4 (c), 21.4 (g) and 21.4 (r) CETA

<sup>82</sup> Art. 21.4 (f) CETA

## Lobbying and political pressure

Regulatory cooperation may give Canada a more advanced lobbying tool to influence the EU legislative process. We already have experience with heavy Canadian lobbying watering down the EU Fuel Quality Directive (FQD) outlined in the Section 3: Energy (see page 13). Moreover, the obligation to justify a refusal to cooperate or withdrawal from the process may create political pressure.<sup>83</sup> Whether or not a Party has carried out its duty towards the other Party in good faith can be assessed in state-to-state proceedings,<sup>84</sup> and an arbitration panel could find a Party in breach of its obligations.<sup>85</sup> This also exemplifies that regulatory cooperation is not totally voluntary under CETA.

## Conclusions

- Although it acknowledges the parties' commitment to high environmental standards, the precautionary principle as a core EU principle<sup>86</sup> is not endorsed as a general regulatory principle in the regulatory cooperation chapter. Therefore, Parties will have to fall back on WTO-inspired rules, especially in the SPS context.<sup>87</sup> As opposed to the EU approach, WTO law here allows trade-restricting measures only if based on scientific risk assessment.<sup>88</sup> The EU should have committed itself firmly to the precautionary principle, as enshrined in EU law, by clearly spelling it out in the agreement.<sup>89</sup>

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<sup>83</sup> Art. 21.2(6) CETA

<sup>84</sup> The chapter on dispute settlement refers to customary rules of international law, including the *Vienna Convention on the Law of Treaties* (Art. 29.17 CETA).

<sup>85</sup> Rulings of the arbitration panel are binding (Art. 29.10 CETA) and Parties have to comply with the final report (Art. 29.12 CETA)

<sup>86</sup> Art. 191(2) TFEU

<sup>87</sup> Art. 21.2 (2) CETA “The parties are committed to ensure high levels of protection for human, animal and plant life and health, and environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS and this Agreement.” One such exception that is close to the EU understanding of the precautionary principle can be found in Chapter 24 on Trade and Environment. Article 24.8 (2) CETA :“The Parties acknowledge that where there are threats or 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.”

<sup>88</sup> The WTO SPS only allows for provisional measures, without mentioning the precautionary principle, subject to obligation of rapid clarification and must be reviewed within reasonable time (Art. 5.7 SPS). The EU failed in successfully invoking precautionary principle in WTO dispute regarding bans on hormone beef. See *EC Meat and Meat Products (Hormones)* (1997) WT/DS26/R/US and (1998) WT/DS26/AB/R

<sup>89</sup> The Joint Interpretative Instrument states that the EU and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements. This does, however, not cover pure EU commitments.

## Section 6: Will domestic regulation limit environmental licensing?

The Domestic Regulation chapter will, amongst other things, discipline how local and central governments address and issue environmental permits for activities such as fracking, electricity production, and open-pit mining.<sup>90</sup> Initially too controversial to be covered at WTO level,<sup>91</sup> rules on domestic regulation typically lay down criteria to address these ‘trade-restrictive effects’ of domestic rules.<sup>92</sup>

These rules are designed to serve business interests and not the environment. The aim is not to lay down inclusive and elaborate procedures to safeguard or increase the level of protection, but rather to ensure that business can obtain permits as quickly and with as much regulatory predictability as possible. This chapter is a key example of CETA tackling ‘behind the border issues’ with everyday non-discriminatory domestic rules that foreign companies find burdensome or unreasonable when doing business abroad. Often, these perceived ‘trade irritants’ are public policies responding to specific needs such as clean air and water.

Firstly, CETA’s Domestic Regulation chapter is broad in scope and application. The chapter addresses licensing and qualification requirements and procedures that affect ‘the pursuit of any other economic activity’ through commercial presence in the other Party.<sup>93</sup>

Secondly, the chapter addresses both the permitting procedures as well as their substantive evaluation by authorities in broad and ill-defined terms. Government authorities are prohibited from adopting criteria that allow exercising ‘power of assessment in an arbitrary manner’.<sup>94</sup> Moreover, permitting criteria must be ‘clear and transparent’, ‘objective’, ‘established in advance and made publically accessible’.<sup>95</sup> While these requirements are not necessarily unreasonable as part of a coherent environmental legal framework, the narrow focus on imposing business-friendly behaviour in combination with broad and ill-defined terms gives ample room to challenge environmental decision-making under CETA’s state-to-state dispute settlement procedures.

In terms of procedure, the focus is on speed of authorisation, simple and uncomplicated decision-making, and must not hamper economic activities.<sup>96</sup> While efficient decision-making is certainly a laudable goal, it must not come at the expense of the quality and inclusiveness of decision-making in Europe. It is important to keep in mind that these terms will be interpreted by arbitrators who are trade specialists and not familiar or preoccupied with the intricate legal environmental procedures in various countries in Europe or in Canada.<sup>97</sup> Nor do they have an explicit legal mandate to take this legal framework into account. Obtaining environmental permits in energy, infrastructure, and extractive industries is often a long and intricate process where authorities need to take multiple steps and take into account various interests, including that of the environment and citizens, over a prolonged period of time.

Germany, for instance, was sued by Vattenfall over an environmental permit for a coal-fired electricity plant near Hamburg. The case has been ongoing since 2006 and grew ever more complicated, involving Commission infringement proceedings against Germany for failure to respect EU environmental legislation and a change of heart by the Hamburg authorities after municipal elections brought the Green party into power.<sup>98</sup>

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<sup>90</sup> Chapter 12 CETA

<sup>91</sup> More specifically in the General Agreement on Trade in Services (GATS).

<sup>92</sup> They are currently part of both the Trade in Services Agreement (TiSA) and the Transatlantic Trade and Investment Partnership (TTIP) negotiations.

<sup>93</sup> Art. 12.2 (1) (b) CETA

<sup>94</sup> Art. 12.3 (1) CETA

<sup>95</sup> Art. 12.3 (2) CETA

<sup>96</sup> Art. 12.3 (5-7) CETA

<sup>97</sup> Art. 28.9 (2) CETA

<sup>98</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6)

## Conclusion

Parties could pressure each other or even initiate state-to-state disputes on the following examples:

- Decisions and procedures to revoke or not issue environmental permits for fracking activities;
- Conditions imposed on water-use permits for coal-fired power plants;
- Decisions and procedures delaying and denying environmental permits for open pit mining projects.
- If a breach was established by the Panel in a state-to-state dispute, the Party would only have recourse to the general exceptions clause<sup>99</sup> which contains a limited list of public interest exceptions. Not only does this fail to comprehensively list environmental protection as a legitimate public interest ground,<sup>100</sup> it also fails to specifically recognize importance of consultative and thorough permitting requirements on environmental protection grounds.
- CETA's Domestic Regulation chapter therefore poses a risk to environmental protection, exposing environmental decision-making to international legal challenge, without adequately safeguarding and recognizing the nature and importance of the EU's domestic environmental permitting procedures.

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<sup>99</sup> Art. 28.3 (2) CETA

<sup>100</sup> Art.28.3 (2) CETA only lists the environmental measures necessary to protect human, animal or plant life or health, implicitly excluding environmental measures relating to the conservation of living and non-living exhaustible natural resources.



## Conclusion

The CETA agreement was negotiated and concluded in total secrecy. Only very recently was the European negotiating mandate published for public scrutiny.<sup>101</sup> This agreement represents the 'old way' of negotiating agreements completed entirely behind closed doors. In part due to public pressure, in part due to personal conviction, the new Trade Commissioner Cecilia Malmström has implemented many new transparency measures and civil society dialogue. These measures are welcomed by many. However, if CETA is to be the 'gold standard' then it must also meet the gold standard of transparency and civil society input. As CETA is so comprehensive, an inclusive approach is all the more important, since the EU is tackling issues that relate directly to our rule-making ability.

The CETA negotiations, started eight years ago, reflect a very different political time. On the one hand, a conservative Canadian government that pulled out of the Kyoto protocol on climate change and that focused its economic activity on carbon intensive tar sand extraction. On the other hand, Europe has ratified the Lisbon Treaty and has committed itself to the Paris agreement which has changed how trade and investment policy should be addressed. Environmental considerations should be at the forefront of the EU's trade policy, especially if the EU institutions want to brand an agreement as CETA as the most progressive trade agreement ever negotiated.

CETA does not reflect how Europe and Canada have changed in the last couple of years, notably both signatories to the Paris Climate agreement. CETA must be renegotiated to reflect the changes in priority for both regions.

With regards to trade in goods, the most environmentally sound alternative are not given priority thus prioritising energy efficiency. Europe does face some great challenges with regards to energy security, however the best way to address this is to continue to decarbonise Europe transport, reduce shipping and aviation emissions and shift towards renewable energy leading to a decrease of oil demand. In the meantime, worst offenders such as oil from tar sands, should be avoided. Provisions made for sustainable development must include international agreements like the Paris Climate Agreement, and 21st century provisions that protect environmental measures from legal challenge, for instance by including a Clean Hands Clause.

In the energy sector, it is not possible to reliably estimate the impact of CETA, and will not be for another decade. A coordinated approach, designed to secure high levels of protection of the right to regulate in the energy sector should be implemented, to ensure the long-term interest of the environment, governments and investors alike.

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<sup>101</sup> The negotiating mandate was made public on 15. December 2015. EU-Canada trade negotiating mandate made public Retrieved November 2, 2016 from <http://www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/>

# ANNEX I: ACCESS TO JUSTICE PROVISION

1. Natural or legal persons:
  - a) Affected or likely to be affected by a violation of a provision in the sustainable development chapter or
  - b) having a sufficient interest in environmental decision making or labour protection, shall be entitled to submit to the competent authority of each Party any observations relating to violations of the sustainable development chapter or a potential violation by the other Party of which they are aware and shall be entitled to request the competent authority to take action under [the dispute settlement provisions].

To this end, the interest of any non-governmental organisation promoting environmental or labour protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the violation in question.
3. Where the request for action and the accompanying observations show in a plausible manner that a violation has occurred or is likely to occur, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the other Party an opportunity to make his views known with respect to the request for action and the accompanying observations.
4. The competent authority shall, as soon as possible inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.
5. The persons referred to in paragraph (1) shall have access to a domestic court competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Agreement.

# ANNEX II: SERVICES AND INVESTMENT

## Methodology

For the interested reader we outline our methodology below, starting with an explanation of how to read the CETA Annexes. In terms of structure, the Annexes list EU reservations first, then the Member States alphabetically. Member States' reservations are grouped into sectors and subsectors. The Industry Classification below lists the codes for these sub-sectors according to an international system of classification for industries. It is comparable to the Harmonized System that is used for customs. The analysis section below outlines the types of reservation: Market access, national treatment, performance requirements and senior management and board of directors. For example, they may relate to 'Investment'. That means these types of reservations apply to the articles on market access, national treatment, performance requirements and senior management and board of directors in the CETA Investment Chapter. For example, on p. 1320 Belgium excludes its ambulance services and residential health services from the obligations in these articles in the investment chapter.

When looking at other reservations, the reader will notice that the reservations often cover both investment and cross-border trade in services. That means that the reservations taken are carve-outs from both respective chapters of CETA. Below, there is usually a more detailed description starting e.g. with "Belgium reserves the right to adopt or maintain any measure..." and last, there is a list of measures that already exist in the field. In order to fully comprehend what is covered, it is necessary to read the description. A word search cannot be relied upon fully, because Member States do not use uniform names for sectors.

As the scope of our analysis is limited to energy, we have focused on reservations made by the EU and its Member States in this sector or, more significantly, to the fact that a Member State has not made any reservations in that sector. To this end, we have created a map listing reservations in sectors and subsectors by the EU and Member States. This map allows for a rapid comparison as to which Member State made reservations.

## Analysis

In the country overview on page 16 we have listed Member States without any reservations, with insufficient and with sufficient reservations, the latter two according to our analysis. However, it is crucial to understand what it means if a Member State has not made any reservation in the area of energy. Broadly speaking, it means that it will be subject to all rules and requirements in the chapters on investment and services of CETA. More specifically, commitments can relate to articles which mostly translate into the following categories:<sup>102</sup>

Most-favoured-nation treatment (Articles 8.7, 9.5, 13.4 CETA for the EU)

Investment and services: Obligation to treat investors/service suppliers/services of the other party not less favourably than other third country investors and investments/service suppliers/services in comparable (like) situations.

National Treatment (Articles 8.6, 9.3, 13.3 CETA for the EU)

Investment and services: An obligation to treat an investor/investment/service supplier/service of the other party no different (in like situations) and not less favourably from domestic investors/service suppliers/services.

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<sup>102</sup> See headnote on p.728 CETA for mention of the articles, further explanation and descriptions. Articles that do not occur in either the energy or transport analysis are not included.

#### Market Access (Articles 8.4, 9.6, 13.6 CETA for the EU)

On Article 8.4 (Investment): Prohibition to impose limitations on establishment of an investor of the other party. Examples include: limiting the number of enterprises that may carry out a specific economic activity (i), a numerical quota or economic needs test (ii), a requirement to produce a given quota or run a given number of operations (iii), limit foreign capital in shareholding or the in total value of an investment (iv), regulate the number of employees in a sector or for an activity (v) or requirements on incorporation such as a specific type of legal entity or joint venture (b).

#### Performance Requirements (Article 8.5 CETA)

Investment: Performance requirements are already prohibited through the WTO's TRIMS Agreement, however CETA goes further than the WTO commitments. The Article prevents parties from imposing performance requirements<sup>103</sup> (listed) or the receipt of an advantage (e.g. a subsidy) in connection with establishment, acquisition, expansion, conduct, operation, and management of any investments in its territory.

#### Senior Management and Board of Directors (Article 8.8, Article 13.8 CETA)

Investment: A prohibition on parties to impose nationality requirements on senior management or board of director positions on its enterprises and financial institutions. This is particularly relevant in the energy and transport sectors, as countries traditionally tend to try to limit foreign influence over important infrastructure.

In the table on page 16, we have found that nine Member States have not made any reservations in the area of energy (Croatia, Czech Republic, Estonia, Greece, Ireland, Latvia, Luxembourg, Romania, and Spain).

As to the exact motivations are behind this decision, one can only speculate. A country might be desperate to appear attractive to foreign investors as the sector is investment-intensive and funds are sparse. However, we would like to emphasize that a complete and unconditional liberalization of the energy market could have negative effects on the environment and potentially be detrimental to reaching Europe's energy efficiency targets if it results in or fossil-fuel extraction activities and shifts the focus away from Europe's transition towards renewable energy.

We found that twelve Member States have listed insufficient reservations (Austria, Cyprus, Denmark, Germany, Hungary, Italy, Malta, the Netherlands, Poland, Slovenia, Sweden, and United Kingdom). Europe's main energy consumer, Germany, only included two reservations in its nuclear sector, but nothing else. We argue that these reservations are insufficient because they do not adequately protect existing branches and that wide market-opening could be detrimental to the environment, as argued above.

The following Member States have undertaken more systematic reservations of their different energy branches (Belgium, Bulgaria, Finland, France, Lithuania, Portugal, and Slovakia). Their reservations reflect their energy mix and provide enough leeway for future decisions to make changes to the composition of that mix. Therefore, we consider these countries' reservations as a working basis for future negative-list agreements.

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<sup>103</sup> Such as requirements to export a certain share of products or serviced or to favour domestically produced goods or services.