



Summary

Analysis of the free trade agreement between the EU, its member states and Canada (CETA) – an assignment by the Swedish government



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1 The assignment

The Swedish Government has assigned the National Board of Trade to carry out an in-depth analysis of certain parts of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada.¹ The analysis covers the provisions on investment protection including the ICS (Investment Court System), public procurement, environmental and health related issues, trade in services and the Regulatory Cooperation Forum. The assignment is a follow-up to an earlier government assignment to the Board in July 2016 to analyse possible effects of CETA on the environment, human and animal health as well as democratic decision-making.²

The Board has been asked to illustrate and define the risks associated with the provisions on investment protection and the ICS on Swedish legislation, policy space and levels of protection. Moreover, the Board was asked to investigate the possibility of introducing legislation on renewable energy, environmental protection related to mining and chemicals, integrity issues and animal protection, without running the risk of claims for compensation from investors. The Board was also asked to analyse the possibility of introducing or maintaining public monopolies or public utility companies.

The analysis also illustrates how a dispute between an investor and a state could be handled in specific cases and describes conditions under which the measures could be considered as indirect expropriation:

¹ Government decision 22/12/2016 UD2016/22542/HI, received by the National Board of Trade Sweden on 04/01/2017, serial no. 2016/02150.

² Serial no. 2016/01059-2.

- How would a dispute between an investor and a state be judged in a situation where Sweden would introduce environmental requirements for energy that are stricter than in the rest of the EU, for example increases in the electricity certificate system, higher quota on renewable fuel or local requirements in public procurement regarding increased levels of renewable energy in buildings?
- How would a dispute between an investor and a state be judged in a situation in which Sweden would introduce a prohibition on commercial activities in a protected geographical area, if such activities were considered to be negative for the natural or cultural environment in that specific area, or where Sweden would introduce rules in order to increase protection for reindeer herding and the Sami culture?
- How would a dispute between an investor and a state be judged in a situation in which Sweden would introduce a ban on specific chemicals, or requirements within the public administration that exclude certain chemicals, whose potential risk is established but whose hazardous nature has not been scientifically determined?

Furthermore, the Board was requested to analyse the effects of CETA on the possibility of using public procurement to promote animal protection and the use of organic, environmentally friendly and fair trade labelled products.

Within the scope of the Assignment, the Board was also asked to analyse the agreement's potential effects on Swedish agriculture and Swedish food production as a result of the elimination of custom duties on Canadian meat.

The Board was also requested to analyse how the so-called *ratchet* and *standstill* clauses will affect Sweden's ability to re-regulate privatised markets and maintain or reintroduce monopolies or other public utility companies. The Assignment also included a request to analyse what sectors are exempted from service liberalisation according to the exemption on services that are provided in connection with the exercise of government authority.

Finally, the Board was asked to analyse whether the Regulatory Cooperation Forum and its activities could potentially delay or hinder future Swedish legislation. The Board was asked to present proposals for how conditions can be created for civil society to influence the Regulatory Cooperation Forum, and how stakeholders other than businesses can be guaranteed insight and opportunities to exercise influence.

2 Method

In the preparation of this report, the Board has consulted nine public agencies selected by the government.³ A further nine agencies were given the opportunity to comment on the provisions of regulatory cooperation.⁴ Moreover, the office of the Chancellor of Justice and the universities of Gothenburg, Lund, Stockholm and Uppsala were given the opportunity to comment on the provisions on investment protection.

In order to present proposals for civil society influence in the Regulatory Cooperation Forum, the Board has also held a dialogue meeting with representatives of civil society organisations and social partners where free trade agreements in general, as well as the consultation processes within the framework of CETA, were discussed.⁵

³ The Swedish Environmental Protection Agency, the Swedish Chemicals Agency, the Swedish Energy Agency, the Swedish Board of Agriculture, the National Board of Health and Welfare, the Medical Products Agency, the National Agency for Public Procurement, the Swedish Competition Authority and the National Food Agency.

⁴ The National Electrical Safety Board, Swedac, the Swedish Consumer Agency, the Public Health Agency of Sweden, the Work Environment Authority, the National Board of Housing, Building and Planning, the Radiation Safety Authority, the Health and Social Care Inspectorate and the Swedish Transport Agency.

⁵ The organisations were also given the opportunity to provide written opinions, but only one organisation chose to do so. The invitation was sent to 60 organisations and the organisations that participated in the meeting were: The Confederation of Swedish Enterprise, World Animal Protection, Save the Children, The International Council of Swedish Industry (NIR), Animal Rights, Friends of the Earth, the Swedish Trade Union Confederation (LO), the Swedish Association of graduate Engineers (SACO), the Swedish Confederation of Professional Employees (TCO), the Federation of Swedish Farmers (LRF), Jernkontoret, Företagarna, the Swedish Association of Local Authorities and Regions (SKL), Almega, Skiftet, the Swedish Society for Nature Conservation. In addition to these, representatives of the Ministry for Foreign Affairs and the European Commission's representation in Sweden also participated.

3 Background to CETA

3.1 A modern free trade agreement

CETA is one of the most comprehensive free trade agreements negotiated so far by the EU and is part of the new generation of free trade agreements. Traditionally, free trade agreements have primarily dealt with reducing customs duties and other goods-related aspects. However, since the early 2000's, a new generation of more ambitious free trade agreements has been negotiated; these are broader and also involve other areas of trade policy. In CETA, the EU and Canada have agreed not only to abolish duties, but also to reduce non-tariff barriers to trade, promote regulatory cooperation, improve market access in the service sector, facilitate participation by companies in public procurement, and promote mobility of persons. In addition to these sections, CETA contains provisions regarding geographical indications, a dispute resolution mechanism and three chapters on sustainable development, labour and the environment. CETA should be considered as an ambitious free trade agreement of the new generation.

3.2 The ratification process

Negotiations between the EU and Canada began in February 2009, and were concluded in connection with the EU-Canada Summit in Ottawa on 26 September 2014. Negotiations on the investment section continued, and the final and legally reviewed text of CETA was published on 29 February 2016. On 5 July 2016, the European Commission tabled a proposal for a Council decision to sign and adopt CETA as a so-called mixed agreement.⁶

The decision to sign the agreement was taken by the Council of the European Union on 28 October and the agreement was finally signed by the EU and Canada on 30 October 2016.

⁶ When the EU negotiates and concludes an agreement, either the union has exclusive authority or the authority is shared with the member states. Where the authority is exclusive, only the EU negotiates and concludes the agreement. In cases where authority is shared with the member states, the agreement is concluded both by the EU and by the member states, a so-called mixed agreement. The consequence of this is that all member countries must approve the agreement in a national ratification process before the agreement can enter into full force. However parts of the agreement are applied provisionally before this.

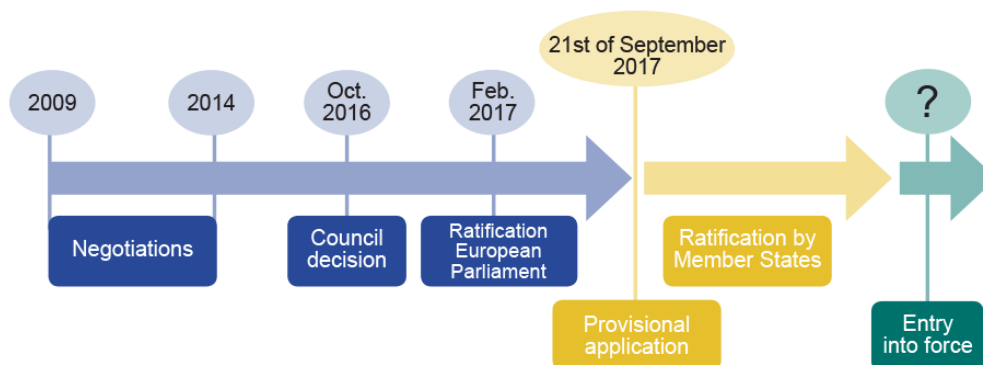


Figure: The CETA ratification process

In connection with the decision, a legally binding and clarifying interpretation instrument and a number of unilateral declarations were adopted. The European Parliament approved CETA on 15 February 2017.

As CETA is a mixed agreement, it must be ratified by all EU Member States in order to enter into force. In Sweden, the *Riksdag* decides, upon presentation of a Government bill, whether the agreement shall be ratified. In some Member States, the agreement must additionally be ratified by regional parliaments. Since the national ratification could be a lengthy process, parts of the agreement that are covered by the Commission's exclusive competence will come into force after approval by the European Parliament, so-called provisional application. The parts that are covered by national competence, in this case including the section on investment protection, do not however come into force provisionally. It has been decided that CETA will be applied provisionally from 21 September 2017.

4 Conclusions

4.1 Investment protection

The National Board of Trade finds that the right in CETA to compensation for indirect expropriation does not provide any protection beyond what is already today granted to investors under domestic law, the ECHR⁷ and EU law. In the areas of CETA that were analysed, the Board has not identified any effects on Sweden's right to regulate.

CETA is to be interpreted with respect to customary international law, which means that the government has the right to introduce stricter legislation without being liable to compensate if measures are taken in the public interest, as long as the measure is in proportion to its purpose and is non-discriminatory. This reasoning applies irrespectively of sector.

In the assessment of whether a government measure is to be considered as indirect expropriation, a CETA tribunal will need to ask a number of questions. In the Board's opinion, the answers to these questions lead to the following indicative conclusions in the specific cases mentioned in the Assignment:

- For an increased quota in the Swedish electricity certificate system to be considered an indirect expropriation, it would be required that the value of the investment has been largely erased as a result of the increase.
- Whether Sweden would be liable to pay compensation when prohibiting any commercial activity in protected areas is not only dependant on CETA, since similar protection is granted by domestic law, the ECHR as well as EU law.
- A chemical that is found to be a potential threat, but for which the hazardous nature has not been finally scientifically determined, may be prohibited without risk of the government being liable to pay compensation.
- The Board has not found that a requirement in a public procurement could become subject of an investment dispute.

Moreover, the outcome of a dispute depends on a number of external factors that have not been specified in the Assignment and that a tribunal would have to consider from case to case.

⁷ European convention for the protection of human rights and fundamental freedoms.

The Board also finds that the CETA provisions on investment protection do not affect Sweden's policy space to keep public monopolies or public utility companies. On the other hand, Sweden can be liable to pay compensation in a case where a monopoly is introduced or re-introduced. The outcome of any dispute partly depends on the motive and the legislative process that led to the government's decision.

In cases where CETA tribunals make interpretations of the articles in the investment chapter that would deviate from the intentions of the parties, the CETA Committee on Services and Investment can adopt interpretations of the agreement, which will subsequently be adopted by the Joint CETA Committee. This provision acts as a "safety valve" since the Committee can decide that an interpretation will be binding, taking effect from a certain date. This can also have an impact for an ongoing dispute as the parties in a dispute can refer to this interpretation.

The Investment Court System (ICS) arbitration proceedings

The Board finds that the ICS contains certain weaknesses. Since the agreement opens up for amending and supplementing the procedural rules at a later stage via the Joint Committee, Sweden should actively follow its developments and maintain the opportunity to correct the weaknesses that the Board identifies below.

The Board finds that the ICS risks becoming even more expensive and time-consuming than the Investor State Dispute Settlement (ISDS), the previously proposed dispute resolution system in CETA. A possible disadvantage with the ICS is that experienced arbitrators may not be available in the first instance. Since there will be no complete assessment of the dispute in the second instance, there is also a risk of incorrect judgements, which in turn could undermine confidence in the system. It is also unclear where the seat would be physically located and what consequences this might have for the process. Since the Joint Investment Committee has been given the right to appoint arbitrators, interpret the agreement and make amendments to article 8.10, Sweden has *de facto* handed over certain decision making power compared to its other investment protection agreements.

4.2 Public procurement

The Board finds that no provisions in CETA will limit the possibility of using public procurement in order to promote animal protection or to request environmentally friendly, ecological or fair trade labelled products compared with today. The requirement still has to be non-discriminatory, may not imply unnecessary obstacles to international trade and must otherwise fulfil the procedural requirements.

4.3 Effects on Swedish agriculture and food production

The Board's answer to this question is based on the analysis received from the Swedish Board of Agriculture. The Swedish Board of Agriculture assesses that neither Swedish agriculture nor Swedish food production will be affected to any significant extent by the opening of the market to Canadian meat under CETA. There is a significant consumer preference for Swedish meat on the Swedish market. This means that any increase in meat imports from Canada will primarily compete with imports from other countries.

4.4 Trade in services

The standstill and ratchet clauses

The standstill clause in CETA means in principle that the parties may keep any existing limitations on openness, but that it is not possible to introduce new limitations.

The ratchet clause in CETA means in principle that if, after the agreement has entered into force, a party makes a change in the law leading to a market opening, the new level of openness will automatically become binding. This means that it is not possible to reintroduce the previous limitation on openness.

However, for most of the sectors that the Board has identified as “sensitive”, the standstill and ratchet clauses have no significance for Sweden’s possibility of maintaining or reintroducing a public monopoly or other exclusive rights. This is because Sweden has made, either itself or through the EU, reservations against the principle of openness for these sectors in Annex II. Reservations in this annex are not affected by the standstill and ratchet clauses. For example, the EU Member States have made a reservation for public utilities, which gives the right to maintain or reintroduce monopolies and other exclusive rights. Sweden has made reservations for retail sales of pharmaceutical goods to the general public. In addition to limiting market access in various ways, Sweden also has the possibility of introducing national discriminatory measures in this sector.

Neither are the standstill and ratchet clauses applicable to those service sectors where Sweden has made commitments to full openness, i.e. for sectors where Sweden has not listed any reservations in Annex I or II. One example is privately financed health care services outside of the public system.

On the other hand, the standstill and ratchet clauses do apply to the reservations listed in Annex I. In this annex, Sweden, either itself or through the EU, has made reservations concerning some type of existing limitation of openness. Thus, if Sweden has made a reservation in a sector or part of a sector in Annex I, the clauses could in the future affect Sweden’s possibility of reintroducing public monopolies or other forms of exclusive rights in this sector. One example is *Systembolaget*, which currently has a monopoly on retail sale of alcoholic beverages. Should Sweden repeal the state monopoly and open the market for foreign competition, the government would not be able to reintroduce the monopoly at a later stage without renegotiating the commitments in the agreement.

Sweden will retain the option to change or withdraw a commitment to openness, regardless of whether the standstill or ratchet clauses are applicable. Sweden would however, through the EU, need to renegotiate its commitments to Canada and would probably need to compensate Canada in the form of commitments to openness in other sectors.

Public sector carve-out

Services and activities that are neither provided on commercial grounds, nor in competition with one or more service providers, are outside of CETA's area of application. This exemption - sometimes called the "public sector carve-out" - is also found in the General Agreement of Trade in Services (GATS) in the WTO, and in every EU bilateral free trade agreement. Since there are no legal cases relating to the interpretation of "public sector carve-out" in GATS or any bilateral FTA, it is not entirely clear how "commercial grounds", "competition" and other relevant terms are to be interpreted. Therefore, the Board cannot give a precise list of services and activities covered or not covered by this exemption. However, based on an assessment of the two conditions, it is our understanding that activities in Sweden that are covered by the agreement include the police, the public courts, the prison and probation service, fire brigade, border security and mandatory systems for social protection.

4.5 Regulatory Cooperation Forum

Effects on Swedish legislative work

The Board finds that no provisions in CETA indicate that the discussions in the Regulatory Cooperation Forum could delay or obstruct future Swedish legislation. According to the European Commission, the regulatory cooperation activities within CETA are intended to cover EU legislation and not legislation at Member State level. Therefore, the restrictions that exist for Swedish legislative procedures follow directly from Sweden's obligations as an EU Member State rather than from the free trade agreements negotiated by the EU.

The regulatory cooperation that might arise through CETA is voluntary. The forum has been created as a specialist committee to facilitate regulatory cooperation between the EU and Canada. It is up to the parties to decide whether and how they will cooperate and exchange information within various areas. The Board primarily sees the Regulatory Cooperation Forum as a catalyst for finding cooperating partners or allies in issues where there is a common understanding.

Regulatory cooperation provides a platform for the EU and Canada to facilitate the work between the regulatory authorities of the parties with the aim of achieving better quality in legislation and more effective use of administrative resources.

Opportunities for civil society and other stakeholders to use consultative functions

The Board's analysis shows that there are two ways for civil society to influence the application of CETA: the Regulatory Cooperation Forum and the Civil Society Forum including the National Advisory Groups. According to the Commission, the existing consultation mechanisms for free trade agreements at EU level, together with the two fora introduced through the agreement, will be the starting point in giving civil society the opportunity for insight and influence in the application of the agreement.

As free trade agreements are evolving and now cover a number of areas, the Board proposes that the ways for civil society to gain insight and exercise influence should be strengthened. The Commission's ordinary mechanisms for consultation *before* negotiations, including open consultations, dialogue meetings and sustainability impact assessments (SIA's), should to be updated and developed so that they can be used also in the *application* of the free trade agreement.

The mechanisms for influence created in the chapter on sustainability in new free trade agreements should, in the Board's opinion, also be used to offer opportunities for participation of civil society in areas other than those covered by the agreements.

The Board proposes that the European Commission provides a simple and accessible guide to CETA, in order to facilitate interpretation of the agreement by a wider group of stakeholders, including civil society.