

Transatlantic Trade Cooperation and Friction:
Comparing CETA and TTIP Negotiations

by

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Submitted to

Central European University

Department of International Relations

In partial fulfilment of the requirements for the degree of Master of Arts in International Relations

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Word Count: 15 863

Budapest, Hungary
2018

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Abstract

The Comprehensive and Economic Trade Agreement between Canada and the European Union (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US are often presented as very similar 21st century free trade agreements. Both transatlantic partnerships incorporate regulatory convergence within a variety of goods and services sectors, and go beyond traditional tariff reductions as to reduce trade barriers and increase market access. This dissertation attempts to analyze why CETA has succeeded in provisionally entering into force, whereas TTIP's progress has plateaued in recent years. By comparing the key issues during negotiations, based on the perceptions of government entities, academic researchers, and civil society actors, it is clear that the famous Investor-State Dispute System remains a core component and a site of contestation with international trade. What is actually different between both agreements is the ability of each party to compromise. CETA's other top negotiation issues – consisting of intellectual property rights, agricultural protection and public procurement – were met with notable trade-offs from both sides. On the other hand, TTIP's issue of data protection remains heavily contested, with no sign from either party signalling that they are willing to let go of traditional laws and values in order to find common ground.

Acknowledgements

To my parents who have supported me every step of the way – this thesis would not exist without you. To Yara, George, Connor, Demir, Mackenzie, Olena and Gabe – thank you for being the ultimate study companions, and for enduring my constant stress. Thank you to my supervisor, László Csaba, for being as excited as I was about this project, and for providing exceptional insight and expertise every step of the way. Finally, a special thank you to the many buzzing Budapest cafés – productivity is always at its peak when a warm latte is around.

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List of Abbreviations

BRICS: Brazil, Russia, India, China and South Africa
CCP: Common Commercial Policy
CETA: Canada-European Union Comprehensive and Economic Trade Agreement
CGE: Computable General Equilibrium
DDA: Doha Development Agenda
DSB: Dispute Settlement Body
DSM: Dispute Settlement Mechanism
DSU: Dispute Settlement Understanding
FDI: Foreign Direct Investment
FTA: Free Trade Agreement
GATT: General Agreement on Tariffs and Trade
GDP: Gross Domestic Product
G.I.: Geographical Indicator
GMO: Genetically Modified Organism
GPM: United Nations Global Policy Model
GVC: Global Value Chain
ICS: Investment Court System
ICT: Information and Communications Technology
ILO: International Labour Organization
IMF: International Monetary Fund
IP: Investment Protection
IPR: Intellectual Property Right
ISDS: Investor-State Dispute Settlement
ITO: International Trade Organization
MFN: Most Favoured Nation
NAFTA: North American Free Trade Agreement
NGO: Non-Governmental Organization
NTBs: Non-Tariff Barriers
OECD: Organization for Economic Cooperation and Development
PTA: Preferential Trade Agreement
ROO: Rules of Origin
RTA: Regional Trade Agreement
R&D: Research and Development
SME: Small and Medium-Sized Enterprise
S&D: Special and Differential (Treatment)
TPP: Trans-Pacific Partnership
TRIM: The Agreement on Trade-Related Investment Measures
TRIPS: The Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP: Transatlantic Trade and Investment Partnership
UNESCO: United Nations Educational, Scientific and Cultural Organization
WIPO: World Intellectual Property Organization
WTO: World Trade Organization

Introduction

Regional free trade agreements (FTAs) have sprouted in all corners of the world and gained popularity in the 21st century. The Canada-European Union Comprehensive and Economic Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnerships (TTIP) between the European Union and the United States are no exception. The ongoing deadlock within the World Trade Organization (WTO) and the enticing rationale of regional integration has led countries to form exclusive regional trade blocs to satisfy a variety of domestic interests. CETA entered into force provisionally in 2017, after ten years of extensive joint studies and negotiations on both sides of the Atlantic. Contrarily, TTIP has not been signed, ratified or entered into force, since the beginning of its talks in 2013 – and progress on its negotiations seem faint. These two multilateral agreements are composed of similar elements, such as tariff reductions for goods and services in various sectors, and the protection of other industries such as agriculture. However, factoring in the time difference in which negotiations began, many fundamental disparities exist between both preferential trade agreements (PTAs) that can offer some explanation as to why one agreement has been successful and why the other has not.

Whereas many cost-benefit studies have been conducted on the economic impacts of both agreements, little has been said on the importance of elements such as diplomacy, pacifism and identity politics during trade talks, along with the role of outside influences throughout negotiations. This thesis will explore whether such political tactics are present in both case studies, and if so to what extent history, domestic values and nationalist sentiments matter in highly technical commercial settings. By researching and comparing the particular pressure points consistent throughout the trade discussions of both agreements, a general analysis will help explain why one

agreement has entered into force whereas the other has not by analyzing the perspectives of government representatives, academic researchers and civil society actors. This thesis is highly relevant to develop an understanding of contemporary international trade, especially in an increasingly bipolarized world composed of heightened sentiments of pro-globalization and open markets on one side of the spectrum, and closed-border economic nationalism on the other.

The dissertation is divided as follows. The first chapter will provide an overview of trade institutions such as the World Trade Organization and its role within the rising trend of PTA creation. It will also discuss the theoretical backbone of regional integration in the devising of trade agreements. The second chapter will discuss the two case studies of CETA and TTIP – in particular their background, rationale and expected benefits. The third chapter will present the methodology used to compare both agreements, the results of the research, and an in-depth discussion of the top negotiation issues at play in both agreements.

Chapter 1: The Existing Framework of International Trade

“The propensity to truck, barter and exchange one thing for another is common to all men.”

-Adam Smith (1776)

Why do nations trade – and why are they increasingly opting to conduct trade through free trade agreements instead of using already-established international norms and regulations carefully drafted by the World Trade Organization? Donald Trump’s tumultuous relationship with open trade borders and the WTO itself, exemplified by his rejection of the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), has resurfaced the longstanding and controversial question surrounding the political and economic benefits of free trade agreements. The rise of populism and closed borders in Europe has also placed trade at the forefront of foreign policy concerns worldwide. It is crucial to understand the various theories and historical accounts providing insight as to why nations trade using preferential trade agreements (PTAs) in order to comprehend transatlantic trade and its recent mixed practices through the examples of CETA and TTIP. The creation of the WTO has markedly played an important role, albeit somewhat indirectly, in the formation of these regional trading regions.

This chapter will explore the dynamics at work and the logic of PTAs by providing a theoretical background on the reasoning behind free trade, a historical account of the establishment of the GATT and the WTO, a contemporary view on the WTO’s perceived role in international trade, and an examination of the overall framework of exclusive trade agreements.

1.1. The Case for Free Trade

Adam Smith and David Ricardo are usually depicted as the original theorists of classical international trade. Whereas Smith's *Wealth of Nations* recognized that states could generate bilateral growth by trading with each other, based on differences in allocation of resources, Ricardo set this theory in motion by describing the concept of comparative advantage. Smith argued that states should trade due to absolute differences in costs of factors of production, whether natural or acquired.¹ Ricardo instead observed that it is possible for countries to be more efficient than others in the production of a wide variety (and possibly even all) goods, however they will import the products in which they have the least absolute advantage in producing. This allows nations to narrow down the production of goods and services based solely on their respective efficiency. In practice, this yields greater economic potential and benefits for states that trade, compared to countries that produce all types of goods while disregarding comparative advantage.² Even if a country has no absolute advantage over other nations in any sector, it can still benefit from comparative advantage by producing the goods that others are not, based on the latter's own advantages. The case for free trade, broadly speaking, is therefore entrenched in comparative advantage.

The 1933 Heckscher-Ohlin model made significant improvements to Ricardo's theory, by identifying how comparative advantage is a result of domestic abundance of either labour or capital. They explained that nations should concentrate on producing goods or services that are either

¹ Factors can include natural resources or other human capacities influencing trade such as education, colonial history and geographic location. More: H. Myint, "Adam Smith's Theory of International Trade in the Perspective of Economic Development," *Economica* 44, no. 175 (1977): 233, <https://doi.org/10.2307/2553648>.

² Brad McDonald, "International Trade: Commerce among Nations," International Monetary Fund, accessed May 1, 2018, <http://www.imf.org/external/pubs/ft/fandd/basics/trade.htm>.

capital-intensive or labour-intensive, based on its quantity of inherent and existing resources. This theory can help explain why a nation such as Canada exports products rich in natural resources (a capital-intensive nation), whereas China exports many final goods (a labour-intensive nation).

Nations also trade due to the efficiency in streamlining production. In turn, this increases cross-border competition and diminishes the price of goods and services for consumers worldwide. Trade also allows nations, corporations and consumers alike to enjoy a wider variety of products. More than ever, trade is highly integrated through global value chains (GVCs), which allow goods to be manufactured in multiple places rather than simply in one factory. Corporations opt to produce items wherever the cost of labour and materials are cheapest – leading to contemporary issues such as offshoring and dumping. Criticism of international trade often originates from such phenomena, but also from industries that struggle to compete internationally, such as infant industries. They often seek protection for their product or service from open trade by lobbying governments and intergovernmental organizations, usually by demanding the implementation of tariffs or regulatory barriers. This has the effect of reducing imports for that particular product, and encourages consumers to buy locally sourced goods. Today, agriculture tends to be the most protected sector, especially in developing nations.³ Developed countries, in comparison, tend to welcome competition as to increase domestic innovation, and overall commercial efficiency. For these reasons, most nations agree that a supranational referee is necessary to promote fairness and non-discriminatory practices in global trade, as to meet the demands of open trade and protectionism halfway.

³ Brad McDonald, “International Trade: Commerce among Nations”.

1.2. The Establishment of the GATT

Although trade itself is almost as old as humankind, the international institutionalization and substantiation of trade law had its decisive roots during the twentieth century, and especially after the Second World War. Following several long debates and eight extensive negotiation rounds, the General Agreement on Tariffs and Trade (GATT) was established in Geneva in 1947 as a regulatory base to complement the envisioned formation of the International Trade Organization (ITO). The ITO was to be the third leg of the Bretton Woods institutions, complementing the International Monetary Fund and the World Bank.⁴ It was originally conceived as a global regulator of commercial practices. Using the GATT as a framework, the ITO's specific mission was to impose rules to reduce tariffs and non-tariff barriers (NTBs) between contracting parties, and to eliminate discriminatory trade practices.⁵ Furthermore, the logic behind the creation of the GATT was attributed to geostrategic concerns during the Cold War, when world trade integration was used as a channel to foster cross-border cooperation and commercial ties.⁶ Although the ITO was never established, mainly due to the United States' failure to ratify its Charter, the GATT did continue existing as a non-binding and provisional agreement.

The main achievements of the GATT included the creation of the initial versions of the non-discriminatory Most Favoured Nation principle (MFN), the restriction on contracting parties to introduce new trade barriers, the dispute settlement mechanism (DSM) and the "GATT à la carte". The MFN principle initially decreased the role of political motives in trade by prohibiting countries from granting concessions to specific countries (such as a tariff reduction) without granting them for

⁴ Knut Brünjes and Milena Weidenfeller, "Multilateral Trade Policy Is Back," in *Trade Policy between Law, Diplomacy and Scholarship*, European Yearbook of International Economic Law (Springer, 2015).

⁵ Michael Unger, "GATT Rounds: Who, What, When," TradeVistas, December 7, 2017, <https://tradevistas.csis.org/gatt-rounds-who-what-when/>.

⁶ Richard Baldwin, "The World Trade Organization and the Future of Multilateralism," *Journal of Economic Perspectives* 30, no. 1 (February 2016): 95–116, <https://doi.org/10.1257/jep.30.1.95>.

all other GATT parties.⁷ This ensured reciprocity and fairness, and also allowed other nations to retaliate and reciprocate an unjust treatment if a specific country did not comply with GATT rules. Notably, certain trade arrangements such as PTAs were an important exception to this rule. Secondly, the GATT ensured that countries did not introduce new tariffs or NTBs. Nevertheless, the GATT founders were aware that at times, nations would want to protect certain infant industries and so the agreement included exceptions to this rule, however with certain consequential repayment requirements thereafter.

The original DSM model, designed as a mediator for members who suspected that another member was violating GATT commitments, followed that member states had to resolve disputes between themselves before an ultimate ruling by the Chairman of the GATT Council. Later on, this changed to a consensus-based mechanism based on independent working parties that drafted reports and gradually formed a consensus.⁸ Due to complications arising from the fact that members of these working parties often represented the members in the actual disputes, the GATT's DSM was replaced with 3 to 5 independent panels. They wrote recommendations to the GATT Council on how to proceed with the dispute resolution, the latter having the final say in the binding decision. In turn, the GATT panels built jurisprudence in international trade dispute settlement.⁹ Whereas this system was far from perfect, it provided accountability for actors involved, as disputers were obliged to comply with the Council's decisions. As time went on, several GATT rounds reshaped and tweaked the DSM rules.

⁷ World Trade Organization, "Understanding the WTO - Principles of the Trading System," accessed April 15, 2018, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

⁸ World Trade Organization, "Historic Development of the WTO Dispute Settlement System," accessed April 17, 2018, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm.

⁹ Ibid.

The “GATT à la carte” was the internal decision-making model for members prior to the Uruguay Round. This allowed contracting parties to pick and choose which provisions to implement domestically. It was during the Uruguay Round that this was modified. Instead, all parties were obliged to accept the negotiated multilateral agreements in order for them to enter into force.¹⁰ This new approach, christened the single undertaking, is the system used in WTO decision-making today.

The early version of the GATT set the tone for 21st century international trade governance and demonstrated the potential and ability for regulatory convergence amongst a large number of stakeholders. Furthermore, the GATT led to further developments in international trade regulation, such as the creation of the WTO.

1.3. The Establishment of the WTO

The WTO was established and entered into force in 1995, following the conclusions of the Uruguay Round conducted between 1986 and 1994. During this round, the original GATT was modified, expanded and partially integrated into the WTO, along with supplementary agreements on specific sectors such as agriculture, sanitary and phytosanitary measures, and rules of origin.¹¹ Furthermore, the WTO expanded the scope of the GATT by establishing rules for trade in services (the General Agreement on Trade in Services), intellectual property rights (the Agreement on Trade-Related Aspects of Intellectual Property Rights), and further modifications to the DSM to include the ability to impose binding sanctions (the Dispute Settlement Understanding and the Dispute

¹⁰ World Trade Organization E-Campus, “The World Trade Organization,” accessed April 16, 2018, https://ecampus.wto.org/admin/files/Course_392/Module_1434/ModuleDocuments/TR-M1-R3-E.pdf.

¹¹ Brünjes and Weidenfeller, “Multilateral Trade Policy Is Back.”

Settlement Body). It also included the Trade Policy Review Mechanism (TPRM) as a disciplinary and transparency body of the WTO. Table 1 provides a visual overview of the WTO's structure.

Table 1: The basic structure of WTO agreements¹²

| The Basic Structure of WTO Agreements | | | | | |
|--|-------------------------------------|--|-----------------------|---------------------------|----------------------|
| | Goods | Services | Intellectual Property | Disputes | Trade Policy Reviews |
| <i>Basic principles</i> | GATT | GATS | TRIPS | Dispute Settlement | TPRM |
| <i>Additional details</i> | Other goods agreements and annexes | Services annexes | | | |
| <i>Market access commitments</i> | Countries' schedules of commitments | Countries' schedules of commitments (and MFN exemptions) | | | |

Just like the GATT, non-discrimination is an important aspect of WTO-regulated trade through the MFN treatment, and also through national treatment rules, in which each country must apply the same taxes and regulations across each sector on all domestic and imported goods.¹³ The WTO's DSM included the newly formed Appellate Body, designed to review case decisions. As mentioned, the GATT "à la carte" shifted to a WTO consensus-based decision-making body. This led to an increase in informal meetings between Members, as to avoid lengthy formal meetings or to persuade other nations to follow suit with one's own domestic interests. There are certain instances, such as when amendments are made to multilateral agreements, where majority voting is permitted when no consensus is achieved among Members.¹⁴

¹² World Trade Organization, "Understanding the WTO - Principles of the Trading System," accessed April 15, 2018, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

¹³ Baldwin, "The World Trade Organization and the Future of Multilateralism."

¹⁴ World Trade Organization E-Campus, "The World Trade Organization."

1.4. Global Trends in Trade and the Contemporary Challenges of the WTO

“During the last 15 years, most WTO members have massively lowered barriers to trade, investment, and services bilaterally, regionally, and unilaterally – indeed, everywhere except through the WTO.”¹⁵

-Richard Baldwin (2016)

The complexity and integration of the global economy in the 21st century has led to evolving trends in international trade, laden with successes and challenges to the WTO’s role as a multilateral trade ruling system. Today’s 164 WTO members generally accept its norms, and tariffs worldwide are now below 5% in the majority of sectors.¹⁶ However, the sheer increase in the volume of trade and the gradual liberalization of markets are a concern for the organization’s ability to maintain a strong international presence. Capitalism, globalization and privatization paired with revolutionary technology have transformed the world, and led to a 27-fold increase in global trade between the years 1950 and 2008, and a record US\$22 trillion in world trade in goods and services value in 2013.¹⁷

The integration of GVCs and the rise in cross-border investment has posed challenges for the WTO. The rise of trade in services, often close to 50% of export value in developed nations, consists of unfamiliar territory for the organization. Technological innovation and higher levels of competition in international markets raise further concerns over specific issues such as intellectual property rights and rules of origin. The 2001 Doha Round sought to address some of these 21st century trade problems via an ambitious, 21-item agenda that is still being negotiated today. The topics of market access, trade facilitation, agriculture, anti-dumping rules and subsidies are subject

¹⁵ Richard Baldwin, “The World Trade Organization and the Future of Multilateralism,” 95.

¹⁶ Ibid.

¹⁷ Arancha González, “Trade in the XXI Century,” in *Trade Policy between Law, Diplomacy and Scholarship*, ed. Christoph Herrmann, Bruno Simma, and Rudolf Streinz (Cham: Springer International Publishing, 2015), 75–86, https://doi.org/10.1007/978-3-319-15690-3_8.

to ongoing heated debates within specific Doha Development Agenda (DDA) committees. Members are struggling to reach a consensus on other matters as well such as services regulations, geographical indicators, and whether or not the WTO should introduce environmental regulations.

Of perhaps greater importance, considerable emphasis is being placed on the issue of special and differential treatment for developing countries (S&D), a critical part of the Doha Round.¹⁸ Developing Members have pressured the WTO to develop and implement all-inclusive norms that alleviate trade discrimination and level the trading playing field. The statuses of these complex negotiation topics differ widely, with no overarching sign of an upcoming consensus in sight. The 1996 Singapore Ministerial Conference issues of investment protection, competition policy, transparency in public procurement and agriculture, and trade in services that resurfaced during the 2003 Cancun conference have overburdened the WTO.¹⁹ What further complicates these specific concerns is the consensus principle, in which 164 nations are unreasonably expected to set aside national preferences in order to reach compromises on particular agreements. Often, this is an impossible task, or regulations wind up being watered-down to a point of achieving very little.

It is important to recall that the WTO was not formed as a results-based organization, but one that sets the rules for trade. It is not an environmental regulator or a bank, but a rule maker and an institution for fair and efficient international trade under liberal values. It can only mandate what nations agree for it to mandate. It was created due to overwhelming demand for an independent and supranational regulator of trade. While it is true that it is facing difficulties in adapting, many of the concerns raised by critics are outside of the scope of the organization's work

¹⁸ World Trade Organization E-Campus, "The World Trade Organization."

¹⁹ World Trade Organization, "Understanding the WTO - The Doha Agenda," accessed April 20, 2018, https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.

and irrelevant to its original mandate. The increasing number of Members, constant changes in sizes of economies, general economic development and methods of negotiations are also factors that make the WTO's day-to-day work more difficult. It is therefore unjustified to say that the WTO is dead, but rather in a long transformation.

1.5. Implications of the WTO on the Rise of PTAs

Within the discipline of international relations, trade governance can be examined using a variety of theoretical backgrounds. When it comes to why nations trade using PTAs, Petersmann (2017) offers useful theoretical insight on economic regulation in transnational contexts. Using the theory of functional integration, he rationalizes that nations prefer to discuss and consolidate within smaller clusters, using the tactic of “low politics” instead of formal “high politics”.²⁰ Moravesik (1998) and Laursen (2008) reaffirm integration theory, based on underlying domestic economic and geopolitical preferences.²¹ Le Roux (2017) adds that FTAs are a way for like-minded actors to converge policies between their political jurisdictions, as to facilitate bilateral movement of goods and services.²² Prominent examples of such integration include the European Economic Area and the North American Free Trade Agreement (NAFTA). These regional clusters create both private and public protection, overseen by independent institutions such as courts and other authorities that regulate a broad range of trade issues. Smaller circles also allow nations to organize efficient trade, establish exclusive standards, and establish new rules and regulations quicker by bypassing lengthy WTO procedures.

²⁰ Ernst-Ulrich Petersmann, *CETA, TTIP, and TISA: New Trends in International Economic Law*, 2017, <https://doi.org/10.1093/oso/9780198808893.003.0002>.

²¹ Finn Laursen, “Theory and Practice of Regional Integration,” 2008, 6.

²² Gaël Le Roux, “TTIP Negotiations, Policy Convergence, and the Transatlantic Digital Economy,” *Business and Politics* 19, no. 04 (December 2017): 710, <https://doi.org/10.1017/bap.2017.24>.

With the rise of South-South trade and the growing number of WTO members, developed nations such as Canada, the US and EU Member States are opting to trade between themselves in exclusive agreements. Keohane and Morse (2015) call this shift counter-multilateralism, as these countries are shifting their focus to arrange “an alternative multilateral institution to compete with existing ones”.²³ This phenomenon is largely owed to the fact that trade is no longer about tariffs, but about NTBs and the strategic implications of international commerce. Baldwin (2016) argues that the WTO is unprepared and unfit to regulate international production networks, and instead these rules are being shaped by mega-regional agreements.²⁴ Understanding why countries are using PTAs is thus imperative to understand the broad future of international trade law and regulation.

Regional trading zones can be useful to exert external influence in global trade governance forums.²⁵ For example, when Europe liberalized its trade in the late 1950s, and when the European customs union was enlarged in the 1970s, this created a trade diversion from other regions. In turn, the United States along with Japan and Canada lowered their tariffs to compete with the European bloc.²⁶ Today, countries can also initiate first-mover advantages in the form of added revenue by arranging PTAs, due to lower tariffs and regulation convergence. The initial impact entices local businesses to export, in turn boosting domestic GDP for those countries within the agreement. PTAs shape, mould and change the scope of trade rules. They determine the pace of trade liberalization, and become the new arena in which countries compete for leadership in trade regulation. This is important within international commerce, as leadership can affect power dynamics and generate beneficial spillover effects in other political and economic areas.

²³ Robert Keohane and Julia Morse, “Counter-Multilateralism,” in *The Politics of Transatlantic Trade Negotiations*, Jean-Frédéric Morin, Tereza Novotná, Frederik Ponjaert and Mario Telò, The Globalisation, Europe, Multilateralism Series (Surrey: Ashgate, 2015), 17.

²⁴ Ibid.

²⁵ Pooja Sharma, “International Trade Governance: Re-Considering the Alternatives,” April 2010.

²⁶ Baldwin, “The World Trade Organization and the Future of Multilateralism.”

PTAs also set a framework in which developed nations can conclude arrangements that go “deeper” than the WTO rules. These are often called “WTO-Plus” agreements, as they go beyond the existing scope of the organization.²⁷ They also allow nations to set their own rules, without worrying about potential loopholes in WTO rules.²⁸ Ironically, PTAs allow nations to return to a kind of “GATT à la carte” model, in which they can pick and choose which sectors to open to international markets and which to protect. By tailoring an agreement based on specific regional interests, contracting parties can be reassured by custom enforcement mechanisms and long-term sustainability of the arrangement.

The Doha Round seeks to lower bound tariff rates across all member states, however the actual applied rates are usually lower than bound rates. This renders the WTO’s intentions somewhat superfluous, as the organization only wishes to close this gap between bound and applied tariff rates.²⁹ Regulatory convergence is also largely pursued unilaterally, without governance of the WTO. It is rather evident that the organization today need not play a large role besides facilitating and overseeing these PTAs.

Conversely, regionalism could perhaps be an outcome of the shift in WTO interests in catering to emerging economies such as Brazil, India and China. Gao (2011) supports that within the WTO, China has transformed from a rule-taker to a rule-maker. Narlikar (2010) argues that the WTO has actually adapted to emerging external powers. As these big economies dominate in

²⁷ Brünjes and Weidenfeller, “Multilateral Trade Policy Is Back.”

²⁸ I Gusti Ngurah Parikesit and I Gusti Ngurah Wairocana, “The Rise of the Spirit of National Interest and the Existence of World Trade Organization Agreement: A Case Study of Indonesia,” *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 4 (October 23, 2017): 319–40, <https://doi.org/10.22304/pjih.v4n2.a6>.

²⁹ Richard Baldwin, “The World Trade Organization and the Future of Multilateralism.”

global exports, their voices resonate with more strength in the WTO.³⁰ In turn, the former leaders of the WTO such as the US and Canada have distanced themselves – either intentionally or not – from the WTO and developed their own trade arrangements outside the organization’s context. Furthermore, another reason why nations have shifted to regionalism is due to China’s mixed track record within the WTO. As China implements both WTO rules and unwarranted trade protectionism, other nations may avoid trading with China in anticipation of future disputes, and may wish to create diversions away from the country’s strong export culture.

Overall, regional trade agreements can facilitate cooperation in targeted zones, in ways that are possibly unavailable at the global level.³¹ The future of trade governance, therefore, lies potentially in a multipolar system with various regional arrangements dictating the outcome of trade policy. Nowadays, countries have choices in engaging in unilateral, bilateral, regional, sub-regional or multilateral trade.³² Whereas several pros and cons can be listed when debating whether to grant all trade governance powers strictly to the WTO, this is ultimately a futile exercise. In reality, actors within global trade understand the coexistence of governance through both the WTO and PTAs. In fact, over one-third of world trade is conducted via PTA frameworks.³³ The reasons behind the formation of regional trading blocs are multifaceted, and engrained in deep socio-political, historic and economic roots. While the future of the WTO remains uncertain, many are convinced that it will retain a role in global economic regulation, especially with reforms consisting of developing an issue-based mandate and dropping the single undertaking.

³⁰ Amrita Narlikar, “New Powers in the Club: The Challenges of Global Trade Governance,” *International Affairs* 86, no. 3 (May 1, 2010): 717–28, <https://doi.org/10.1111/j.1468-2346.2010.00907.x>.

³¹ Pooja Sharma, “International Trade Governance: Re-Considering the Alternatives,” April 2010.

³² Ibid.

³³ Ibid.

Chapter 2: Case Studies: Overview and Rationale of CETA and TTIP

“The European Parliament has noted that while CETA is the most comprehensive and ambitious agreement negotiated by the EU, its value pales in comparison to that of the potential EU-US TTIP.”³⁴

-Edward Yencken (n.d.)

As international trade has been framed and argued to be highly efficient, if not necessary for the economic survival of every nation, the present chapter will discuss the specific case studies of CETA and TTIP. A deep dive is indispensable as to fully analyze the theoretical backdrop and the regulatory “meat and bones” of the two agreements, in order to compare them thereafter.

2.1. CETA: Rationale

The Canada-European Union Comprehensive and Economic Trade Agreement is the first agreement between two G8 countries. It was originally devised in 2002, over ten years before the start of TTIP negotiations. However, formal negotiations and official statements by then-Prime Minister Stephen Harper and the EU Commission did not start until May of 2009. On October 18th 2013, both parties reached an agreement in principle on CETA. The consolidated text was published in September of 2014. Prime Minister Justin Trudeau, European Commission President Jean-Claude Juncker and European Council President Donald Tusk signed the final text in 2016, and it was applied provisionally as of September 2017.³⁵ It will only enter into force definitely once all EU Member States have ratified the agreement, and after the Court of Justice of the EU declares its

³⁴ Bierbrauer (2014) in Edward Yencken, “Lessons from CETA: Its Implications for Future EU Free Trade Agreements,” n.d., 3.

³⁵ Dominic Webb, “CETA: The EU-Canada Free Trade Agreement,” September 12, 2017, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7492>.

opinion regarding Belgium's concern that CETA is not fully compatible with EU law.³⁶ This could take up to two years, and could potentially affect the future of CETA should the Court have serious concerns over its provisions.

As its tenth most important trading partner and investor, Canada is an important ally both politically and economically for the EU.³⁷ Despite only having 35 million customers in Canada, the EU is predominantly interested in accessing the country's public procurement contracts, intellectual property rights, and flexibility on investment rules.³⁸ Canada is a medium-scale economy, advanced in its innovation and markets, and is also a resource-rich country. This makes it an attractive market for the EU, and one that is rather easy to establish relations with due to historical ties. CETA also aligns with the EU Commission's trade strategy to explore and facilitate further negotiations for PTAs.³⁹

From the other perspective, the EU presents an important and evident economic partnership for Canada, as the former boasts over 500 million consumers and over 40 years of experience in international trade deal negotiations. The EU has extensive insight on trade, from its own internal trade integration and also from its numerous external partnerships with other nations.⁴⁰

³⁶ Roderick Harte, "CETA Ratification Process: Latest Developments" (European Parliamentary Research Service, October 2017),

[http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608726/EPRS_ATA\(2017\)608726_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608726/EPRS_ATA(2017)608726_EN.pdf).

³⁷ Panagiotis Delimatsis, "TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 7, 2016), <https://papers.ssrn.com/abstract=2835956>.

³⁸ Johnson, Muzzi, and Bastien, "The Voice of Quebec in the CETA Negotiations," 562.

³⁹ Finn Laursen, *The EU and the Eurozone Crisis: Policy Challenges and Strategic Choices* (Routledge, 2016), 112.

For more on the Canada-EU trade relationship see Selen Sarisoy Guerin and Chris Napoli, "Canada and the European Union: Prospects for a Free Trade Agreement," *CEPS Working Documents* 2008, <https://doi.org/10.2139/ssrn.1337507>.

⁴⁰ Sophie Meunier and Kalypso Nicolaidis, "The European Union as a Conflicted Trade Power," *Journal of European Public Policy* 13, no. 6 (September 2006): 906, <https://doi.org/10.1080/13501760600838623>.

It is also Canada's second biggest trading partner, after the United States, and accounts for 10% of Canada's trade.⁴¹

Stephens (2013) describes Canada as a nation trying to “establish a foothold in both Atlantic and Pacific camps while consolidating its North American base”.⁴² As uncertainty regarding NAFTA surfaced at the tail end of CETA negotiations, Canada was even more attracted to partnering with the EU. Furthermore, as TTIP talks began in 2013, the Canadian government at the time was eager to conclude something in fear that the EU would become distracted by a deal with its neighbouring bigger and stronger economy.⁴³ By committing to CETA, Canada can also demonstrate to potential trading partners such as China and other ASEAN countries that it is capable and committed to entering into free trade agreements without an implicit permission from the United States.

Moreover, CETA was also the first trade agreement in which provinces and territories of Canada were able to fully participate in negotiations.⁴⁴ Despite this largely being due to the EU's request to have them present to sway them over public procurement market access, this also diversified negotiations and fostered sentiments of inclusion. Healy (2014) relays that “it was clear early on that provincial and territorial governments would be expected to commit to unprecedented international trade and investment disciplines under the CETA”.⁴⁵ Even Quebec, which tends to demonstrate initial hesitation and at times inflexibility towards policy goals set by the Federal government, was surprisingly enthusiastic about CETA. Johnson et al. (2013) describe this optimism

⁴¹ European Commission, “In Figures The EU-Canada Trade Relationship,” 2017, 1.

⁴² Hugh Stephens, “The Tectonic Trade Plates Are Moving: CETA, TTIP and the TPP,” *China-US Focus*, November 15, 2013, <https://www.chinausfocus.com/finance-economy/the-tectonic-trade-plates-are-moving-ceta-ttip-and-the-tpp>.

⁴³ Ibid.

⁴⁴ Pierre Marc Johnson, Patrick Muzzi, and Véronique Bastien, “The Voice of Quebec in the CETA Negotiations,” *International Journal: Canada's Journal of Global Policy Analysis* 68, no. 4 (December 2013): 560, <https://doi.org/10.1177/0020702013509320>.

⁴⁵ Teresa Healy, “Canadian and European Unions and the Canada—EU CETA Negotiations,” *Globalizations* 11, no. 1 (January 2, 2014): 60, <https://doi.org/10.1080/14747731.2014.860798>.

as “natural, given Quebec’s deep-rooted and historical commonalities with Europe, not to mention the economic circumstances, to reach out to the EU”.⁴⁶ Despite provincial and territorial engagement in negotiations, CETA has been critiqued of sidelining civil society actors. However, CETA was devised in a new fashion, as briefings on negotiations and progress to civil society entities and private entities were conducted separately.⁴⁷ Furthermore, civil society groups such as labour unions, environmental activists and cultural advocates were encouraged to meet with their respective municipal or provincial governments instead of including them in federal discussions. Provinces were entrusted with bringing forth relevant concerns to the federal negotiating table.⁴⁸ Despite confidentiality agreements between provincial and federal governments on CETA’s specific negotiations, Trew (2013) notes that “Canadian and provincial CETA negotiators were for the most part pleased to meet civil society groups on the sidelines,” and that municipal engagement was effective in raising concerns about CETA.⁴⁹

The estimated economic gains from CETA are widely disputed; however most researchers argue that the financial gains for exporters and consumers alike will be modest. A joint study by the European Commission and the Government of Canada yielded results of a potential 20% increase in trade, a \$12 billion increase in GDP for Canada, and a \$20 billion increase in GDP for the EU.⁵⁰ Kohler and Storm (2016) conduct a review of the cost-benefit analyses of CETA, and also use their own calculations using the UN Global Policy Model to derive estimated gains and losses. These results are presented in Table 2.

⁴⁶ Johnson, Muzzi, and Bastien, “The Voice of Quebec in the CETA Negotiations,” 561.

⁴⁷ Stuart Trew, “Correcting the Democratic Deficit in the CETA Negotiations: Civil Society Engagement in the Provinces, Municipalities, and Europe,” *International Journal* 68, no. 4 (December 1, 2013): 569, <https://doi.org/10.1177/0020702013509313>.

⁴⁸ Ibid, 571.

⁴⁹ Ibid, 574.

⁵⁰ Salme Heilimo, “Analysis of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)” (University of Wolverhampton, 2010), <https://www.theseus.fi/bitstream/handle/10024/21334/Canada-European%20Union%20CETA%20Marika%20Heilimo%20.pdf?sequence=1>.

Table 2: Estimated Gains and Losses from CETA⁵¹

| Estimated Gains/Losses from CETA | | | | | |
|---|-------------------------------------|-------------------------------------|---------------------------------------|----------------------------------|----------------------------------|
| <i>Author</i> | <i>Cameron & Loukine (2001)</i> | <i>Hejazi & Francois (2008)</i> | <i>Kitou & Philippidis (2011)</i> | <i>Kirkpatrick et al. (2011)</i> | <i>Kobler & Storm (2016)</i> |
| <i>Econometric Model</i> | CGE | CGE | CGE | CGE | GPM |
| <i>EU GDP (% change)</i> | 0.003-0.009 | 0.008 | 0.04 – 0.05 | 0.02 – 0.0 | -0.06 |
| <i>Canada GDP (% change)</i> | 0.03 – 0.04 | 0.76 | 0.36 – 0.45 | 0.18 – 0.36 | -0.12 |

The GDP gains from CETA, as presented above, are likely small. CETA therefore re-establishes the importance of trade for extra-economic purposes, such as partnership diversification for Canada, transatlantic cooperation, and geopolitical motivations. Furthermore, the non-measurable gains from regulatory convergence in a variety of sectors is omitted from such calculations, and could in fact greatly increase benefits in the transatlantic region without reflecting directly in GDP growth. This is also the case for TTIP.

2.2. CETA: Technical Overview

The main aim of CETA is to facilitate market access on both sides of the Atlantic. For goods specifically, approximately 98% of all tariff lines between Canada and the EU will be eliminated, with the exception of certain products such as dairy and apparel.⁵² CETA includes many provisions similar to those in other Canadian or EU free trade agreements, such as NAFTA. These include rules on agriculture, geographical indicators, and rules of origin. However, it also includes many novelties unprecedented in other trade agreements worldwide, such as the mutual recognition

⁵¹ Adapted from Pierre Kohler and Servaas Storm, “CETA without Blinders: How Cutting ‘Trade Costs and More’ Will Cause Unemployment, Inequality, and Welfare Losses.”

⁵² Johnson, Muzzi, and Bastien, “The Voice of Quebec in the CETA Negotiations,” 563.

of professional qualifications, investment protection, capital movement, environmental conservation, and labour rights. CETA also includes rules to incite foreign investment and cooperation in areas such as innovation and science.⁵³

Another non-traditional inclusion in CETA is the dispute settlement mechanism, in which private investors can bring forth legal action against a specific party. Investment protection is guided by existing PTA regulations, which are normally fairly basic and leaves investment disputes to the interpretation of courts. However, CETA (and TTIP, should it enter into force) adds a clause on fair and equitable treatment of investment, as to limit court interpretation and set clearer rules for dispute settlement.⁵⁴ Furthermore, a modernized version of NAFTA's cultural exemption was included in CETA as to protect cultural values in each party, even going as far to refer to the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions.⁵⁵ Overall, CETA is a new version of PTAs that is more precise, comprehensive and all encompassing. This is why the consolidated text itself and its annexes are over two thousand pages and consists of 30 chapters. Table 3 provides a breakdown of the main chapters of CETA.

⁵³ Johnson, Muzzi, and Bastien, "The Voice of Quebec in the CETA Negotiations," 562.

⁵⁴ Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP," *Journal of International Economic Law* 19, no. 1 (March 2016): 36, <https://doi.org/10.1093/jiel/jgw001>.

⁵⁵ Johnson, Muzzi, and Bastien, "The Voice of Quebec in the CETA Negotiations," 566.

Table 3: CETA Overview⁵⁶

| CETA Overview | | |
|--------------------------------|---|---|
| Main Parts of Agreement | Specific provisions | Overall Goal |
| Trade in Goods | <ul style="list-style-type: none"> • Abolish 98% customs duties • Targeted industries: Machinery, chemicals, food/drink, manufacturing • Exceptions via G.I.s and rules of origin | <ul style="list-style-type: none"> • Enhance transatlantic competitiveness and R&D • Protect sensitive products/industries |
| Trade in Services | <ul style="list-style-type: none"> • Targeted sectors: financial services, telecommunications, postal and courier, transport • Recognition of qualifications • Exclusions (health, education, water, social services and audiovisual sector) | <ul style="list-style-type: none"> • Increase quality of services offered • Facilitate cross-border working exchanges and migration of high-skilled workers |
| Public Procurement | <ul style="list-style-type: none"> • Access to public procurement markets • Change local content requirements to local value requirements • Protection of some markets (energy) | <ul style="list-style-type: none"> • New investment opportunities for international suppliers to bid for national, provincial and municipal contracts |
| Investment | <ul style="list-style-type: none"> • Increase threshold for review of acquisitions of Canadian companies • New investment court system (ICS) – streamlining existing bilateral investment agreements into one CETA chapter | <ul style="list-style-type: none"> • Encourage cross-border investment and FDI • Fairer and more transparent system for resolution of investment disputes |
| Intellectual Property | <ul style="list-style-type: none"> • Alignment with WIPO internet treaties • Plant variety protection • Strengthened measures against counterfeited trademarks, pirated copyright goods and counterfeit G.I.s • Pharmaceutical IPRs | <ul style="list-style-type: none"> • Improve protection of IPRs • Incentivize R&D and distinctiveness |
| Sustainable Development | <ul style="list-style-type: none"> • Binding commitments on environmental protection and respect for labour rights based on ILO conventions • Right of each party to regulate in areas of environment and labour • Conservation clauses (fisheries) • Channels for civil society concerns | <ul style="list-style-type: none"> • Transparency in environmental and labour standards in trade • Sustainable transatlantic trade • Preserve sovereign rights |
| SMEs | <ul style="list-style-type: none"> • Simplified customs procedures • Compatible technical requirements | <ul style="list-style-type: none"> • Facilitated access to international markets |

⁵⁶ Author's own, based on European Commission and Government of Canada websites.

| | | |
|---------------------------|---|--|
| Transparency | <ul style="list-style-type: none"> • Details of fees/charges related to imports/exports much be published • Replacing mutual recognition agreement with more ambitious protocol for NTBs (CETA Protocol on Conformity Assessment) | <ul style="list-style-type: none"> • Enhanced cooperation and information exchanges |
| Competition Policy | <ul style="list-style-type: none"> • Rules for cartels, unilateral conduct, mergers and subsidies • Disciplines on state-owned enterprises in competition with private sector | <ul style="list-style-type: none"> • Promote fair competition and level the playing field • Avoid export subsidies and dumping |

2.3. TTIP: Rationale

“TTIP is the first show of the new world of trade.”

- Pascal Lamy, former Director-General of the WTO⁵⁷

The Transatlantic Trade and Investment Partnership (TTIP) is a regional agreement in line with the global trading trends of the twenty-first century mentioned in the previous chapter. For Europe, the U.S. is its most important trading partner with 15% of extra-EU trade destined for the U.S. annually. For the U.S., the EU is its second most important trading partner after Canada. Together, the two parties form the largest and wealthiest market in the world, accounting for over 35% of world GDP in purchasing power.⁵⁸ However, this significant trading importance has diminished in recent years, as China’s percentage of exports to the US has doubled in the last few years at the same time as the share of EU exports to the US has decreased from 27% to 20%.⁵⁹ It is predicted that transatlantic trade value will continue to decrease, enticing these economies to engage in trade together to remain relevant internationally.⁶⁰

⁵⁷ Pascal Lamy in Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership* (London: Rowman & Littlefield International, 2015), 8.

⁵⁸ Hamilton and Quinlan (2015) in Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*.

⁵⁹ Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*, 2.

⁶⁰ Ibid, 2.

Due to the sheer size and scale of both economies, Delimatsis (2016) named TTIP the “most ambitious and strategic trade agreement ever undertaken”.⁶¹ Burghardt (2015) depicts this comprehensive importance of TTIP: “there is scarcely an issue that does not involve the transatlantic relationship – from Afghanistan to Ukraine; from WTO to counter-terrorism; from aircraft to data privacy; from bananas to GMOs – the EU and the US are involved bilaterally, regionally or globally”.⁶² TTIP is argued to lead to greater bilateral trade, investment, and confidence in bilateral regulatory cooperation. It is also perceived as an opportunity for greater global strategic and diplomatic positioning, and enhanced competitiveness for firms in GVCs.⁶³ It could translate to thousands, if not millions, of new jobs in both the EU and US.⁶⁴ Furthermore, TTIP could allow consumers in both economies to enjoy an increased availability of foreign products, new products, or greater varieties of products, along with lower trading costs and a potential for lower prices due to added competition.⁶⁵

In the midst of negotiations on various other agreements such as the Trans-Pacific Partnership, former President Obama and the former EU Commissioner José Manuel Barroso launched TTIP negotiations in 2013, following the submission of the *Final Report on Jobs and Growth* in 2013 by the High Level Working Group on Jobs and Growth – a group composed of various experts from both sides of the Atlantic. The report concluded that the two parties would launch negotiations on a “comprehensive, ambitious agreement that addresses a broad range of bilateral

⁶¹ Panagiotis Delimatsis, “TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy.”

⁶² Günter Burghardt, “The EU/US Transatlantic Relationship: The Indispensable Partnership,” in *Trade Policy between Law, Diplomacy and Scholarship*, ed. Christoph Herrmann, Bruno Simma, and Rudolf Streinz (Cham: Springer International Publishing, 2015), 196, https://doi.org/10.1007/978-3-319-15690-3_12.

⁶³ Jacques Pelkmans et al., “TTIP: Political and Economic Rationale and Implications,” *Intereconomics* 50, no. 6 (November 2015): 312–43, <https://doi.org/10.1007/s10272-015-0557-8>.

⁶⁴ Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*, 8.

⁶⁵ Gabriel J Felbermayr and Mario Larch, “The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives,” *CEifo Forum* 2 (2013): 55.

trade and investment issues, including regulatory issues, and contributes to the development of global rules”.⁶⁶ The agreement is therefore not only presented as beneficial for bilateral trade between the EU and US, but also for these nations to shape international trade rules, and to remain relevant within global trade governance. De Ville and Sites-Brügge (2016), in turn, reinforce that TTIP was devised as a “WTO-Plus” agreement, as it attempts to address issues unprecedented in global trade regulation and exemplify them internationally, such as environmental concerns, climate change, labour protection, food scarcity and animal welfare.⁶⁷

Both TTIP parties can attempt to transfer bilateralism to international standard setting through newfound cooperation in international standardization organizations, by using international standards as a basis for action on regulatory reform, and by unilateral declarations by third countries to adopt TTIP regulations.⁶⁸ More precisely, TTIP’s negotiations were marked by three important steps towards achieving international normative standardization: cooperation of TTIP bodies within international settings such as the WTO, the use of international standards as a basis for their own free trade agreement, and the expectations of third countries to either unilaterally or multilaterally adopt the same standards, which in turn would likely be brought forth for adoption within supranational regulatory bodies.⁶⁹ The Doha Round could theoretically be unblocked with TTIP negotiations and standards setting, similarly to how NAFTA helped unblock the Uruguay Round’s standstill years ago.⁷⁰

⁶⁶ Günter Burghardt, “The EU/US Transatlantic Relationship: The Indispensable Partnership,” 225.

⁶⁷ Ferdi De Ville and Gabriel Sites-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Cambridge: Polity Press, 2016), <https://books.google.com/books/about/TTIP.html?id=xzpcCwAAQBAJ>.

⁶⁸ Christian Pitschas, “Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards,” in *European Yearbook of International Economic Law 2015*, ed. Christoph Herrmann, Markus Krajewski, and Jörg Philipp Terhechte, vol. 6 (Berlin, Heidelberg: Springer Berlin Heidelberg, 2015), 170-171, https://doi.org/10.1007/978-3-662-46748-0_7.

⁶⁹ *Ibid*, 184.

⁷⁰ Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*, 4.

Moreover, TTIP was originally justified as a potential cushion for future economic crashes after the 2008 crisis. Felbermayr and Larch (2013) explain the logic of TTIP, exclaiming “both regions have experienced anemic growth since the financial crisis”.⁷¹ Gamble (2015) affirms that an integrated partnership between the EU and US could be beneficial as they suffered most from the crisis, and are also threatened by the BRICS countries’ smooth economic recovery from the 2008 events.⁷² As many other nations at the time were involved in various levels of PTA, TTIP was identified as a EU attempt to “prevent being sidelined, in political and economic terms, by those other plurilateral trade negotiations”.⁷³ The agreement was also elucidated as a European response to Obama’s pivot to China, when Europe sought to deepen economic ties with the U.S. and remain relevant internationally. For the EU, TTIP is a way to stabilize trade and politics amidst diverging interests between Member States, the Brexit fiasco, and the lingering effects of the Syrian refugee crisis.⁷⁴

For the US, the agreement was formulated as a means to strengthen its economic and security alliances with the EU, reinvigorate its regional networks across the Atlantic, and marginalize key players such as Russia throughout ongoing tensions over Ukraine.⁷⁵ At the same time, the US’s logic behind starting a discussion on TTIP was defensive and contingent upon decreasing reliance on trade with China. It sought to diversify its networks by rekindling its trade relationship with

⁷¹ Gabriel J Felbermayr and Mario Larch, “The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives,” *CEISifo Forum* 2 (2013): 49.

⁷² Andrew Gamble, “Multipolarity and the Transatlantic Trade and Investment Partnership,” in *The Politics of Transatlantic Trade Negotiations*, Jean-Frédéric Morin, Tereza Novotná, Frederik Ponjaert and Mario Telò, The Globalisation, Europe, Multilateralism Series (Surrey: Ashgate, 2015), 12.

⁷³ Christian Pitschas, “Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards,” 162.

⁷⁴ Delimatsis, “TTIP, CETA, TiSA Behind Closed Doors.”

⁷⁵ Andrew Gamble, “Multipolarity and the Transatlantic Trade and Investment Partnership,” 15.

Europe.⁷⁶ In turn, this could lead to greater competitiveness in the transatlantic region to compete with China and other rising economic powers.⁷⁷

Subsequently, the predictions that other nations may level and eventually overtake global governance in trade a threat to both economies – especially the EU. They are thus pressured to ensure the survival of Western rules in global trade, at a time when rising multipolarity will potentially shape the future rules of international commerce. Drawing on the previous chapter, TTIP could present a case of counter-multilateralism, in which the US and the EU will challenge existing institutions that govern transatlantic financial and commercial relationships.⁷⁸ As the WTO is increasingly disposed to non-traditional leading nations such as BRICS, the EU and US are unsatisfied and in turn trying to devise their own agreements to favour transatlantic business.

Those who oppose TTIP argue that an exclusion of third parties would actually hinder business competitiveness internationally. Furthermore, some authors have expressed doubt that China or the other BRICS nations would follow suit and modify its own rules and regulations to match those devised by the US and the EU – leading to a balkanization of trade regulation. In fact, they may even be more enticed to develop different rules and try to encourage developing nations to follow their lead – potentially leading to a global trade war on power and influence.⁷⁹

⁷⁶ Heribert Dieter, “The Return of Geopolitics : Trade Policy in the Era of TTIP and TPP,” *International Policy Analysis*, Dialogue on Globalization, December 2014, 8.

⁷⁷ Ibid, 8. For more on the impacts of TTIP on China and the latter’s response see Zhang Xiaotong in Jean-Frédéric Morin et al., *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Routledge, 2016).

⁷⁸ Robert Keohane and Julia Morse, “Counter-Multilateralism,” in *The Politics of Transatlantic Trade Negotiations*, Jean-Frédéric Morin, Tereza Novotná, Frederik Ponjaert and Mario Telò, The Globalisation, Europe, Multilateralism Series (Surrey: Ashgate, 2015), 26.

⁷⁹ Heribert Dieter, “The Return of Geopolitics : Trade Policy in the Era of TTIP and TPP,” 8.

TTIP, similarly to CETA, has been subject to a variety of studies examining its potential economic benefits. The European Commission originally estimated that TTIP would increase the EU GDP by 0.4%, whereas it would increase the US GDP by 0.5%, mainly due to reducing or eliminating NTBs.⁸⁰ Econometric analyses on the estimated gains or losses of TTIP by other academics and think tanks convey wide-ranging results. Mustilli (2015) lists various models that attempted to estimate the agreement's gains and losses within the first year of the implementation of the agreement. These are listed in Table 4.

Table 4: Economic Gains from TTIP⁸¹

| <i>Author</i> | <i>CEPR (2013)</i> | <i>CEPII (2013)</i> | <i>Egger et al. (2015)</i> | <i>Bertelsmann (2013)</i> | <i>Felbermayr et al. (2015)</i> | <i>Capaldo (2014)</i> |
|--------------------------|------------------------|------------------------|----------------------------|---|--|---|
| <i>Econometric Model</i> | Multi-sector CGE model | Multi-sector CGE model | Multi-sector CGE model | Augmented gravity model (single-sector) | Structural general equilibrium model (single-sector) | GPM |
| <i>EU GDP (% change)</i> | 0.48 | 0.3 | 2.27 | 0.52 – 1.31 | 3.94 | North EU: -0.5 France: -0.48 Germany: -0.29 |
| <i>US GDP (% change)</i> | 0.39 | 0.3 | 0.97 | 0.35 – 4.82 | 4.89 | 0.36 |

Without delving too deep into the precise calculations and characteristics of each model, it can be observed that TTIP will likely cause a GDP increase for the EU between -0.5% and 3.94%, although losses are predicted solely for the Northern EU region. For the US, gains are estimated as a GDP increase between 0.3% and 4.89%. Aichele et al. (2015) admit that EU-US trade value, in gross

⁸⁰ Christian Pitschas, “Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards,” 163.

⁸¹ Adapted from Frederica Mustilli in Jacques Pelkmans et al., “TTIP: Political and Economic Rationale and Implications,” *Intereconomics* 50, no. 6 (November 2015): 312–43, <https://doi.org/10.1007/s10272-015-0557-8>.

terms, could indeed triple, however calculates that value added would grow substantially less.⁸² This could lead to stagnancy in long-term growth, and less impact via trade diversion than the two parties ideally anticipated. Felbermayr and Larch (2013) argue that TTIP would likely be most beneficial only for certain nations within the EU such as Germany, which already trades extensively with the United States.⁸³

These estimations are extremely difficult to measure and calculate, and predicting the future remains an almost impossible task even for the most skilled and experienced economists. Streinz (2015) states that “the alleged boosting effect of TTIP on the [economies] is highly disputed – and probably not really predictable”.⁸⁴ However, these percentages are useful as they present an approximate scheme of future gains should TTIP be fully implemented. In this case, the calculations seem positive. Therefore, even as pure economic calculations tend to converge and agree that TTIP will produce gains on both sides of the Atlantic, many critiques and sceptics still remain firmly against the agreement. It is evident that there is much more at play and at stake than econometrics when deliberating whether or not to implement free trade agreements.

2.4. TTIP: Technical Overview

The main elements of TTIP, as characterized by Pitschas (2015), are composed of the following regulatory provisions: sanitary and phytosanitary measures, technical barriers to trade, annexes for specific goods and services sectors, regulatory coherence and transparency regarding the

⁸² Rahel Aichele, Gabriel Felbermayr, and Inga Heiland, “Going Deep: The Trade and Welfare Effects of TTIP,” CESifo Working Paper Series (CESifo Group Munich, 2014), https://ideas.repec.org/p/ces/ceswps/_5150.html.

⁸³ Gabriel J Felbermayr and Mario Larch, “The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives,” *CESifo Forum* 2 (2013): 51.

⁸⁴ Rudolf Streinz, “Disputes on TTIP: Does the Agreement Need the Consent of the German Parliament?,” in *Trade Policy between Law, Diplomacy and Scholarship*, ed. Christoph Herrmann, Bruno Simma, and Rudolf Streinz (Cham: Springer International Publishing, 2015), 275, https://doi.org/10.1007/978-3-319-15690-3_15.

trade of goods and services, and finally the overall framework for regulatory cooperation, namely the ISDS.⁸⁵ A visual representation of TTIP's negotiation structure and such regulatory provisions is presented in Table 5.

Table 5: The Structure of TTIP Negotiations⁸⁶

| What is TTIP? | | Principles/Objectives of TTIP |
|------------------------------|---|---|
| <i>Market Access</i> | <i>Regulatory Cooperation</i> | <i>Rules (facilitating imports/exports, FDI)</i> |
| Goods trade & customs duties | Regulatory coherence | Sustainable development |
| Services trade | Technical barriers to trade | Energy and raw materials |
| Public procurement | Food safety, animal and plant health | Customs and trade facilitation |
| Rules of origin | Specific sectors: <ul style="list-style-type: none"> • Chemical • Engineering • Medical devices • Vehicles • ICT • Medicines • Textiles and clothing • Phytosanitary barriers | SMEs |
| | | Investment protection and ISDS |
| | | Competition rules |
| | | IPRs and G.I. |
| | | Overall dispute settlement (government-to-government) |
| | | Transparency |

The main intention of the TTIP is to develop a comprehensive free trade agreement between the EU and the US as to lower costs of market access and bilateral trade within the two parties, and to develop special regulatory characteristics as to address certain costly burdens such as phytosanitary barriers.

⁸⁵ Pitschas, "Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards," 167.

⁸⁶ Modified from Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*.

2.5. The Role of NTBs in CETA and TTIP

What is certain about both CETA and TTIP is that they are both agreements focused on reducing regulatory barriers. Tariffs are already low in most sectors, averaging at about 3-4% across the board between all three economies.⁸⁷ NTBs, or the “measures that amount to discriminatory regulatory barriers to market access” for transatlantic trade, are prominent in many sectors and were at the heart of CETA and TTIP negotiations.⁸⁸ These policies, usually determined through national legislation for the protection of consumer, health, environmental or social causes, often prevent foreigners from interfering in domestic economic activities such as public procurement. However, NTBs ranging from intellectual property rights, phytosanitary barriers, border procedures and rules of origin are now being integrated within international regulations. On the producer side, NTBs present an added fixed cost of production when deciding whether or not to export abroad, and place firms at a disadvantage compared to domestic companies.⁸⁹ Trade liberalization conducted through a multi-sector lowering of NTBs can therefore generate significant increases in exports bilaterally or multilaterally, and can also increase wages in all economies involved.⁹⁰ This is the common logic between both CETA and TTIP.

CETA and TTIP attempt to reduce the divergent avenues and specificities of certain regulations. Politically, reducing NTBs is usually welcomed between high-income and democratic countries, as voter preferences tend to converge between these types of economies. Reducing trade barriers is more cost-efficient for exporting companies and GVCs, and helps SMEs broaden their market reach. Overall, responsible governments such as the US and the EU should, in principle,

⁸⁷ Daniel S. Hamilton et al., eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*, 8.

⁸⁸ Gabriel J Felbermayr and Mario Larch, “The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives,” *CE.Sifo Forum* 2 (2013): 50.

⁸⁹ Ibid.

⁹⁰ Ibid.

reflect the overall risk and protective tendencies of its majority.⁹¹ However, regulatory coherence is dealt with differently in CETA compared to TTIP's proposal. Whereas CETA simply upgrades the existing *Canada-EU Framework on Regulatory Cooperation and Transparency* from the early 2000s by incorporating it into the new trade agreement, the US and the EU have no such previous arrangement, and would have to draft something completely new and unprecedented.

In this sense, TTIP and CETA are not novel agreements, as their provisions are modelled after WTO law, but what marks these agreements instead is the integration of a plethora of NTB reductions, and the sheer scope and size of the economies at stake.⁹² These agreements combine a variety of regulations never before integrated into one legal document, such as ISDS, public procurement provisions, and procedures for dialogue between regulators.⁹³ Furthermore, with the services sector being an integral part of developed nations' economies, TTIP and CETA present themselves as enhanced agreements with a greater focus on trade in services.

2.6. The Structure of Negotiations

An overarching similarity between CETA and TTIP is the structure of negotiations. While this will not be discussed in length, it is worth mentioning to set a framework for understanding the agreements' procedural underpinnings.

⁹¹ Chase and Pelkmans, "This time it's different: Turbo-charging regulatory cooperation in TTIP," 29.

⁹² Verena Madner, "A New Generation of Trade Agreements: An Opportunity Not to Be Missed?" in *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford Scholarship, 2017), 308, <http://www.oxfordscholarship.com/view/10.1093/oso/9780198808893.001.0001/oso-9780198808893-chapter-15>.

⁹³ *Ibid*, 308.

First, extensive joint studies are usually concluded between the potential bilateral parties prior to beginning formal negotiations. These are usually followed by public consultations, in varying degrees of transparency. Broad position papers are exchanged, which specify the aims and ambitions of each party.⁹⁴ Increasingly, countries are opting to hold such consultations online. Once these have been completed, all parties usually conduct assessment impacts. Should the higher levels of government still support the agreement thereafter, negotiations are formally approved and initiated. Parties decide on the frequency of formal negotiation meetings, which are usually two to three times a year. Draft texts are only publicized once negotiation rounds have completed.⁹⁵ Parties can choose who is present during negotiations. CETA was novel on the Canadian side as it allowed provinces to be present during all negotiations, under the direction of Chief Trade Negotiator Steve Verheul and by request of the EU. However, the EU Member States, under Chief Trade Negotiator Mauro Petriccio for CETA and Ignacio Garcia Bercero for TTIP, were not included. The American side, under Chief Negotiator Dan Mullaney, tended to only include two or three trade representatives at negotiation rounds.

The consolidated texts themselves go through rigorous legal review (“legal scrubbing”) before being approved. Furthermore, in the case of CETA and likely in the case of TTIP should it enter into force, all 28 EU Members States must ratify the agreement before it enters into force. This is called a mixed agreement. This increases the complexity and impact of the ratification process, and also draws more public attention to it.⁹⁶ Furthermore, the EU adopted the Canadian ‘negative list’ approach during CETA’s trade negotiations. This standardized method allowed parties

⁹⁴ Culture Action Europe, “A Little Guide through TTIP Negotiations,” 2016, https://cultureactioneurope.org/files/2016/09/CAE_A-little-guide-through-TTIP-negotiations.pdf.

⁹⁵ Kurt Hübner, Anne-Sophie Deman, and Tugce Balik, “EU and Trade Policy-Making: The Contentious Case of CETA,” *Journal of European Integration* 39, no. 7 (November 10, 2017): 843–57, <https://doi.org/10.1080/07036337.2017.1371708>.

⁹⁶ Ibid.

to exempt certain sectors from liberalization.⁹⁷ Some of these exemptions include electricity, gambling and public education. This may have also led to greater transparency during negotiations, as both parties were obliged to know each other's reservations and the rationale behind such requests.

While President Trump has put a halt to the conclusions of TTIP, consultations in respect to the agreement are still ongoing between the EU, Member States and civil society actors. There is no current public access to negotiation documents, however the European Commission has published several factsheets, textual proposals and position papers on its vision for the agreement.

⁹⁷ Johnson, Muzzi, and Bastien, "The Voice of Quebec in the CETA Negotiations," 564.

Chapter 3: Methodology, Results and Discussion

The case studies of CETA and TTIP are not novel on their own, however they have not been compared side by side solely based upon their respective most controversial points throughout negotiations. The following sections discuss the methodology, results, and discussion based on the comparison of the two agreements. Ultimately, this will lead to some insight and reasoning as to why one agreement has entered into force and why the other remains at a standstill.

3.1. Methodology

The methodology used to conduct the comparative analysis on CETA and TTIP consisted of a quantitative discourse analysis based on documentary sources and semi-structured interviews. In turn, they were carefully scrutinized as to uncover the most relevant issues throughout the negotiation process of each trade agreement, from the perspective of various actors. In order to determine whether these issues were controversial and highly debated within negotiations, the documented data had to have explicitly mentioned in its respective contexts that these were the main and most contested issues present during CETA and TTIP trade talks. The following subsections reflect upon the chosen sources for the study.

3.1.1. Government Actors

First, primary sources (i.e. original negotiation documents and files from various rounds of negotiations available through the EU Commission, Member States, the Government of Canada and its provinces and territories, and the Government of the United States) were used to gather a governmental perspective on main concerns during negotiations. These sources included

government-funded research centres, and interviews from high-ranking government officials – some who wish to remain anonymous. Among these include interviews from state representatives to the WTO, an interview with CETA lawyer Christophe Bondy, and officials from embassies, federal ministries and bureaus. In addition, debates in the European Parliament, the House of Commons and in Congress were consulted. Altogether, these sources present an overarching and generalized perspective on the two agreements.

3.1.2. Academic Sources

Secondary sources were used mainly from academic journals and interviews with professors, as to present a perspective on CETA and TTIP from individuals with a strong expertise and knowledge of the subject. These sources were useful as they added detailed and meticulous observations of both agreements' negotiations, from a non-propagandistic standpoint. Chosen articles had direct relevance and mention of CETA or TTIP negotiations. Interviews were conducted with professors from the Copenhagen Business School, the Graduate Institute in Geneva, and Central European University.

It is worth noting that most sources used in this study were academic, by nature of availability, insight and general un-biasedness. Academics and scholars tend to be divorced from the process of negotiations, and therefore tend to present a more global perspective. They are also frequently consulted by government representatives, providing them with inklings as to what was being debated within closed doors.

3.1.3. Civil Society Actors

As to present the perspective of top negotiation issues in CETA and TTIP from a generalized public view, data was gathered from civil society and public sources. These included front-page newspaper clippings and publications from non-governmental organizations. Furthermore, this included interviews with the International Centre for Trade and Sustainable Development and the Canadian Chamber of Commerce in Hungary – the latter representing a consumer viewpoint. These sources often present specific issues that are of importance for the welfare of a particular group in society. However, as Strange (2016) puts it: “disagreements [regarding FTAs] range across the spectrum, starting with ‘radicals’ who demand abolition of the multilateral trade regime up to ‘reformists’ who seek a more selective amelioration of the regime’s perceived deficiencies”.⁹⁸ Civil society actors are wide-ranging in their intentions, and tend to focus on narrow and particular issues. No civil society actors were present during negotiations, either. Therefore, these sources were carefully chosen to adequately represent the broader population, instead of a narrow and unrepresentative group within society.

In turn, the data gathered from government actors, academic sources, and civil society actors was coded by identification of the main “pressure points” during negotiations for each separate trade agreements. By examining the frequency of mention of these topics, an overall analysis (using all sources) of the top three negotiation issues for each CETA and TTIP was possible in a comparative manner. Further and additional analysis was conducted by delving into the perspectives of each societal actor towards the two agreements, in order to identify if there were large

⁹⁸ Michael Strange in Jean-Frédéric Morin et al., *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Routledge, 2016), 86.

discrepancies between each grouping. This contributed to examining the role of perceptions within trade agreements and their relation with the success of CETA and failure of TTIP.

3.1.4. Time Frame and Other Specifications

The data was limited to the time frame between the start and end date of negotiations – or 2018 in the case of TTIP, as its talks are still ongoing. Articles and newspaper clippings from sources that are not reliable were avoided, such as unverified documents or blogs from incredible sources. This ensured that the data used was relevant, trustworthy, non-predictive, and in tune with the timing of negotiations.

In total, 77 total sources were consulted, with 33 pertaining to CETA, and 44 of relevance to TTIP. The sources used have direct specificity in regard to a core issue that is being contested throughout negotiations between the parties involved. Within these sources, there were 99 mentions of a specific key issue during negotiations of CETA, and 101 issues within TTIP. These sources compose an exhaustive list of references mentioning negotiations. Naturally, there are more sources and reviews of TTIP than CETA due to the size and population of both economies. For illustrative purposes, a simple Google search of “CETA negotiation issues” yields 6,150 results, whereas “TTIP negotiation issues” yields over 10,000 results. What is more is that many online public consultations relating to CETA were largely responded with queries about TTIP.⁹⁹

⁹⁹ Delimatsis, “TTIP, CETA, TiSA Behind Closed Doors.”

3.1.5. Possible Shortcomings of Methodology

The universal problem for all researchers using similar data sets is the issue of transparency. Deciphering what happened behind closed doors of negotiations remains a difficult feat even for the most qualified academics. This is especially true for TTIP, as this agreement remains within its negotiation phase, whereas CETA has consolidated and published its full agreement. However, by adding an extensive amount of literature from other academics, international and domestic media, it was possible to gather a well-rounded and comprehensive data collection. In addition, because TTIP does not have a final and legally binding text, it was more difficult to analyze the issues that were brought forth in negotiations without having reference to a finalized version. Another shortcoming was the unavailability of US representatives available for interviews. Whereas interviews were conducted with Canadian and European academics and government sources, pertinent US sources refused any solicitation. This is also why more documental sources were consulted on the TTIP side, as to make up for this gap.

3.2. Results

3.2.1. Main Issues throughout Negotiations

The following tables list the overall issues that have been mentioned as key topics during trade negotiations for both CETA and TTIP.

Table 6: CETA's Negotiation Topics¹⁰⁰

| CETA: Issues during Negotiations | | |
|---|--|--|
| <i>Issue</i> | <i>Description/Envisaged Provisions (during negotiations)</i> | <i>Reason for Controversy</i> |
| Agriculture | Access to agricultural markets abroad, trade protectionism of agricultural products and farm conditions including GMOs and ROO, and standards of foods such as beef, pork, dairy and seafood | Concerns over watered down regulations and lower standards of products; possibility of a greater allowance of GMOs in EU |
| Automobiles | Access for automobiles in the opposing party's market | Concerns over lower standards of automobile safety; competition for domestic automakers |
| Consumer Protection | Ensuring that products sold abroad respect consumer rights and add to the diversity of choices available | Concerns that CETA will lead to lack of transparency and consumer-friendly markets; fear that regulatory cooperation will; fear that consumer protection chapter will not be added in final text |
| Culture Protection | Definition and exclusion of cultural services from the agreement (i.e. preserving cultural diversity), especially in regard to audiovisual industries | Concerns that culture will cease to be unique if foreign investors can compete in cultural services |
| Digital Trade and Data Protection | Provide safeguards and exceptions on privacy and personal data in cross-border trade; creation of Regulatory Cooperation Forum | Concerns over data transfer between both parties and domestic management of foreign data; concerns over private lobbying power to access data within Forum |
| Energy | Facilitate and promote trade in energy goods, services and technologies | Concerns over environmental standards of foreign energy projects and investment |
| Environment | Discourage investment and projects abroad that are not environmentally friendly; inclusion of dispute resolution for environment disputes | Concerns over level of standards of environmental regulations |
| GVCs | Allow both parties to integrate into GVCs, while also implementing strict ROO to protect certain industries | Concerns over outsourcing of products and amount of ROO regulations, concerns from third parties integrated in GVCs |

¹⁰⁰ See Europarl factsheets regarding CETA: www.europarl.europa.eu and House of Commons briefings on CETA: www.ourcommons.ca.

| | | |
|--------------------------------------|---|---|
| Investment Protection | Promoting foreign direct investment between the two regions and addressing current barriers to investment; providing adequate protection and rights to investors (discrimination, expropriation, unfair/unequitable treatment and transfer capital) | Concerns over competition with domestic companies and investors; concerns over too little or too many rights given to investor protection |
| IPRs | Strengthening copyright protection, recognizing a system of G.I.s, amendment of intellectual property legislation with regard to patents awarded to pharmaceutical products and extension of protection by two years | Concerns over inability to continue producing certain items, fear from EU that G.I.s will not be respected, concerns that stronger patent protection for pharmaceuticals will delay competition and increase cost of drugs and healthcare |
| ISDS | Investment protection on the behalf of investors – such as investor-state arbitration provisions, ability of foreign investors to challenge states; setting up of new Investment Court System | Concerns over investor rights to bypass domestic courts; no possibility for citizens or organizations to challenge states; fear of biased arbitration judges |
| Labour Standards and Public Services | Facilitating service delivery and the movement of business people and workers between Canada and the EU, recognition of professional qualifications | Concerns over job loss through cross-border competition; possibility of watered down standards of domestic services such as waste management |
| Market Access | Promote market access for both parties by improving supply and consolidation of information for business activities abroad; reduce NTBs overall | Concerns over competition from abroad for SME survival, and concerns over domestic business and employment |
| Public Procurement | Opening up government procurement markets (government contracts) to foreign companies | Resistance towards foreign companies accessing domestic procurement, uncertainty in bilateral reciprocity if implemented |
| Transparency | Provide transparent negotiations and clear outcomes through a consolidated CETA text | Concerns over closed door negotiations and lack of consultations of civil society actors |

Table 7: TTIP's Negotiation Topics¹⁰¹

| TTIP: Issues during Negotiations | | |
|---|---|---|
| <i>Issue</i> | <i>Description/ Envisaged Provisions</i> | <i>Reason for Controversy</i> |
| Agriculture | Access to agricultural markets abroad and protectionism of certain products, rules on GMOs and ROO | Concerns over watered down regulations and lower standards of products; possibility of a greater allowance of GMOs in EU |
| Automotive Standards | Harmonize and develop global regulations regarding technical standards | Concerns over difficulties in adaptability for domestic auto manufacturers and competition from abroad |
| Consumer Protection | Protect consumers from higher prices and lower standards of products, ensure variety of goods and services | Regulatory harmonization as a threat to consumers (i.e. regulations being watered down and potentially harming consumers) |
| Digital/Data Protection | Provide safeguards and exceptions on privacy and personal data in cross-border trade | Concerns over major differences between EU <i>acquis</i> and US regulations with regard to data protection |
| Energy and Raw Materials | Promote access to energy and raw materials based on open, rules-based, competitive and sustainable trade; eliminate existing limits and promote green energy innovation | Concerns over fracking by foreign enterprises, carbon emissions (through activities such as imports of natural gas), sovereignty of natural resources exploitation and lack of provisions on renewable energy |
| Environment | Set standards on cross-border environmental protection, include sustainable development provisions | Concerns over provisions in TTIP which may prioritize the safety of corporations over environmental protection |
| GVCs | Reduce costs and improve logistics along production chain | Impact of TTIP on third parties and expenses in adapting to new regulations |
| Investment Protection | Provide new opportunities for cross-border investment, encourage FDI, ensure level playing field among both parties' investors | Concerns over governments' right to regulate investments in the interest of the public |
| IPRs | Agree joint principles, encourage investment in innovation and research, facilitate growth and job creation | Concerns over prior secrecy in EU Parliament over the Anti-Counterfeiting Trade Agreement, potential higher prices for pharmaceuticals, concerns from EU over misleading labels |

¹⁰¹ See Europarl factsheets regarding TTIP: www.europarl.europa.eu.

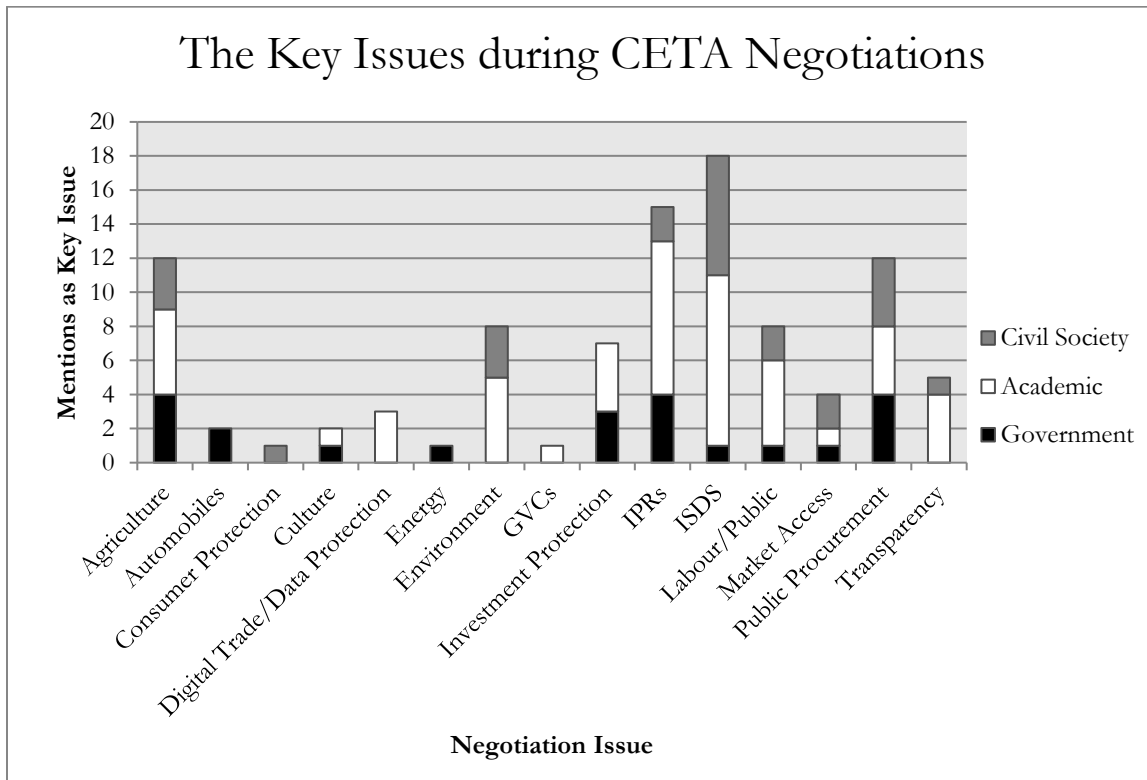
| | | |
|-------------------------|---|---|
| ISDS | Set up new Investment Court System to replace existing ISDS | Concerns over lack of transparency and legitimacy over ISDS and ICS, concerns over lack of consistency in ISDS tribunals (and biased decisions) |
| Labour Standards | Integrate EU and US labour standards based on ILO Conventions at highest common denominator | Concerns that TTIP will jeopardize labour standards such as wages and job qualifications |
| Public Procurement | Opening up government procurement markets (government contracts) to foreign companies | Resistance towards foreign companies accessing domestic procurement (i.e. domestic employment); uncertainty in bilateral reciprocity if implemented |
| Public Services | Facilitate competition by setting same terms of employment in each party; safeguard domestic legislation | Concern over foreign access to health, education, social services and water services |
| ROO | Create rules that guarantee that products benefitting from TTIP are produced in Europe or USA | Concerns over costs to adapt to new standards |
| SMEs | Market access (import/export) for firms with <250 staff | Concerns over foreign competition from larger SMEs |
| State-Owned Enterprises | Develop joint platform of rules on state ownership; create level playing field between public and private market participants | General concerns over advantages provided to SOEs |
| Trade Balance | Create a mutually beneficial agreement | Concerns over winners/losers of the agreement |
| Transparency | Ensure negotiations are transparent | Concerns over lack of available documents and information about negotiations |

Some of the issues mentioned above do tend to overlap, for instance energy and environment. However, for the sake of determining which precise key issue was of utmost importance and contestation during negotiations, they have been separated.

3.2.2. Results: Key Negotiation Issues

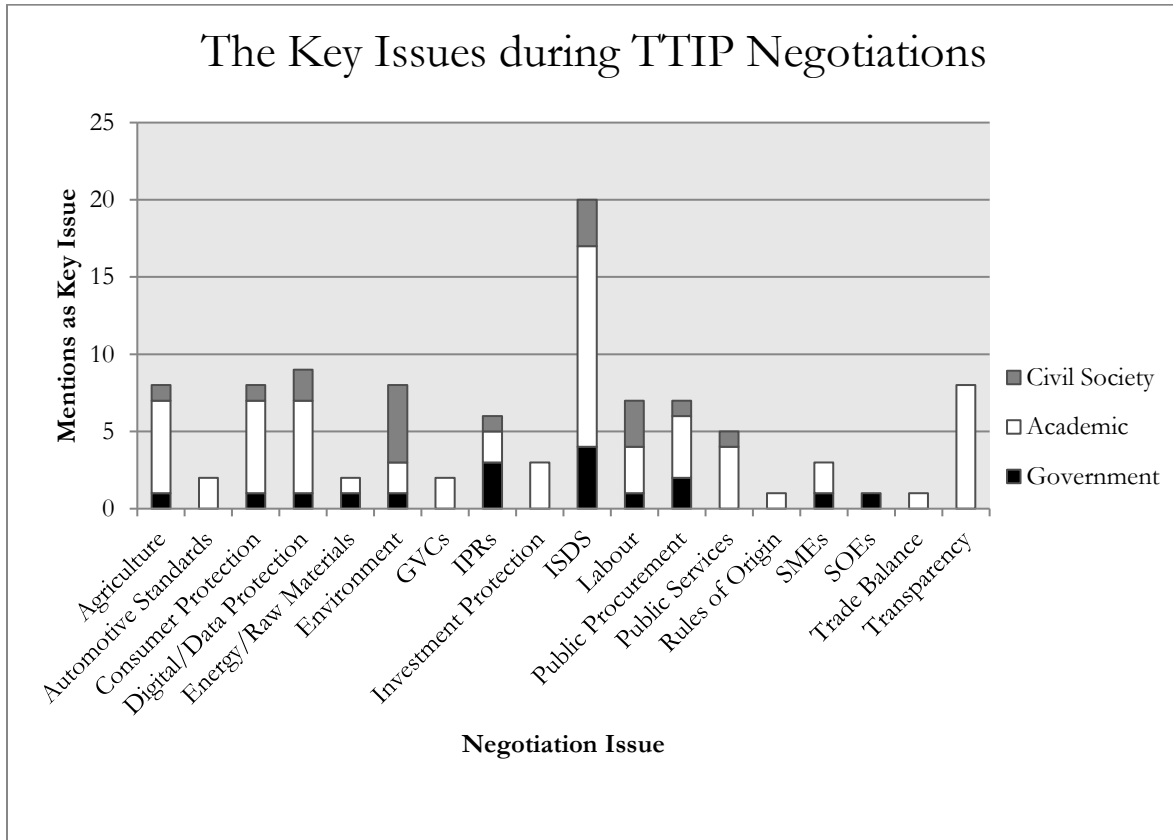
The following two tables present a visual summary of the key issues that were present during CETA and TTIP negotiations for all researched groups.

Figure 1: Key CETA Issues



There is a clear indication that the ISDS was the most contested topic of negotiations in CETA, with IRPs a close second. Government sources tended to lean towards agriculture, IPRs and public procurement with civil society sources reinforcing the importance of public procurement as well.

Figure 2: Key TTIP Issues



For TTIP, the ISDS is also perceived as the most contested issue throughout negotiations for both governmental and academic sources. The second overall important issue was digital standards and data protection. For civil society, the issue of the environment was most important in the context of ISDS disputes. Therefore, only the issues of ISDS and data protection will be analyzed.

3.3. Discussion

“The power of a negotiator often rests on a manifest inability to make concessions and to meet demands”.¹⁰²
- Schelling (1960)

3.3.1. CETA Controversies: ISDS, IPRs, Agriculture and Public Procurement

The ISDS within CETA was a contested topic from the very beginning of talks, but was heightened in 2013 when TTIP began its negotiations. In essence, the ISDS within trade agreements allows investors from one party state to seek financial compensation from the other if it has breached compliance with investment protection provisions of the agreement. The system is similar to private commercial arbitration, and it is designed to promote FDI flows with an added safety cushion for investors. Canada has faced more international claims pertaining to investment rights than any other developed nation in the world – most under the investment provisions under NAFTA.¹⁰³ This is partially the reason why CETA’s ISDS is controversial, because the Canadian government does not want a repeat of NAFTA-like lawsuits, and also because the general public is critical of ISDS decisions, especially after having witnessed several cases involving the environment and other sensitive issues.

Opponents of the ISDS system argue that Canada and the EU’s domestic court systems are accountable enough to handle disputes on their own. Many think that a separate legal system infringes upon domestic sovereignty by entrusting outside officials to rule on public issues such as environment, health, labour and safety. Furthermore, commercial investment interests often clash with domestic protection of such issues. In turn, national or local legislators may refrain from

¹⁰² Schelling (1960) in Sophie Meunier and Kalypso Nicolaïdis, “The European Union as a Conflicted Trade Power,” *Journal of European Public Policy* 13, no. 6 (September 2006): 909, <https://doi.org/10.1080/13501760600838623>.

¹⁰³ J. Anthony VanDuzer, “Investor-State Dispute Settlement in CETA: Is It the Gold Standard?,” *C.D. Howe Institute, Ottawa Faculty of Law Working Paper*, 459 (October 4, 2016): 28, <https://doi.org/10.2139/ssrn.2860319>.

implementing laws that they foresee as problematic for international investors.¹⁰⁴ Private corporations can therefore seek compensation from domestic taxpayers' dollars – a provision that strikes a cord with many civil society organizations. ISDS has been particularly controversial in the EU's Member States, due to the changes that arose from the entry into force of the Treaty of Lisbon. Some states such as Belgium are worrisome of the ISDS's compatibility with EU law.

Advocates of investor-state provisions argue that it is unreasonable and inefficient for Canadian and European businesses to petition their own respective governments when a problem arises related to foreign investment.¹⁰⁵ Moreover, the ISDS lowers the risk of biased domestic courts ruling against international investors. The record of disputes brought forth to ISDS also tend to pertain to a specific administrative decision, not a regulation per se.¹⁰⁶ The main considerations of both sides of the controversial ISDS were negotiated extensively, and CETA's new system is presented below. The process is overall clearer, more efficient, and gives states more authority in procedures.

Canada and the EU managed to find common ground in its ISDS system, renamed the Investment Court System (ICS) – leading to a success in the agreement's entry into force. This modification was actually completed after the final version of the consolidated text was released in 2014, and was categorized as legal scrubbing to avoid reopening negotiations. The ICS is also out of the scope of the provisional application of CETA, meaning that Member States must ratify it for it to enter into force. This allows for greater accountability and transparency on the EU side. The ICS is a more complex system compared to existing investment provisions in other bilateral investment

¹⁰⁴ Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?," n.d., 4.

¹⁰⁵ Jason Langrish in Hon. Rob Merrifield, "Negotiations Toward A Comprehensive Economic And Trade Agreement (CETA) Between Canada And The European Union" (House of Commons Canada, March 2012).

¹⁰⁶ Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?," 5.

treaties, by incorporating and building upon NAFTA provisions and directives from the Centre for Settlement of Investment Disputes.

The ICS enforces rules such as how an investor must wait 180 days before submitting its claim, to provide time for the investor to reflect upon the worth and necessity of the claim.¹⁰⁷ If an investor receives any third party funding, this also must be disclosed at the time of the filing of the claim. CETA, much like NAFTA, also allows states to respond to multiple claims of a similar nature at once, as to avoid costs of repeated procedures. CETA makes it mandatory for a tribunal to decide on preliminary objections in regard to jurisdiction of the case before considering a trial – also to avoid costs and lengthy processes before declaring that a case was actually subject to a different jurisdiction.¹⁰⁸

When it comes to legitimacy, CETA expands on previous EU and Canada agreements by extending disclosure obligations to enhance transparency. CETA allows states to intervene in rulings by ICS tribunals if they deem the interpretation incorrect, and the tribunals are not allowed to reverse domestic laws or regulations.¹⁰⁹ What is perhaps most important of the new system is that there are detailed exceptions where states have the right to regulate on the grounds of public health, environment, public order and morality.¹¹⁰ The public had a strong influence within negotiations, as demonstrated by the modifications to the ISDS system from the typical, NAFTA-like provisions to a more accountable and transparent ICS system.

¹⁰⁷ J. Anthony VanDuzer, “Investor-State Dispute Settlement in CETA: Is It the Gold Standard?,” 6.

¹⁰⁸ *Ibid*, 7.

¹⁰⁹ Elfriede Bierbrauer, “Negotiations on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) Concluded,” *Directorate-General for External Policies: European Parliament*, October 2014, 9.

¹¹⁰ Wolfgang Koeth, “Can the Investment Court System (ICS) Save TTIP and CETA?,” 9.

What is also novel for the ICS system within CETA is the creation of a standing tribunal and appellate body designed to hear investor-to-state claims. The tribunal will be composed of 15 competent members: 5 from the EU, 5 from Canada and 5 from other nations. These will be publically appointed judges, rather than the traditional ISDS ad-hoc appointment of private business lawyers. CETA is also stricter on rules regarding possible conflicts of interests for appointed judges. The appellate tribunal can review decisions – expanding the scope of the WTO Appellate Body. Further powers are given to the CETA appellate body by allowing it to deal with abuse of process, and the agreement also seeks to discourage certain frivolous claims by holding the loser responsible of the entire costs of the procedure, whereas traditional appellate bodies make the parties split the costs. All in all, it is clear that CETA’s negotiators discussed at great length what kinds of compromises could be made not only between the parties involved, but with respect to the general public’s concerns and safety and the preferences of investors.

IPRs, or Chapter 20 of CETA, were the second most perceived area of contestation among CETA negotiations. Concerns came from all groups of society – from Greek feta cheese producers to health care users in Ontario. On one hand, certain exporters desired heavy protections on IPRs. On the other hand, many individuals were concerned about higher consumer costs, due to stricter patent laws and the ensuing potential costs for firms if they accidentally mislabel a product. Between governments, there were conflicts throughout negotiations as EU Member States are fundamentally against the Anti-Counterfeiting Trade Agreement and the European Parliament has rejected it, whereas Canada was in favour of its implementation and integration into CETA. Instead, they implemented something in between. This involves strict copyright, G.I.s, and pharmaceuticals provisions.

The issue of pharmaceuticals was extremely important for Canada, especially as it influences the costs of its health care system. During negotiations, Europe desired changes to Canada's intellectual property regime by extending patent protection length for pharmaceutical products. This benefits pharmaceutical companies in Europe with branches in Canada, disincentivizes Canadian companies from obtaining permission for patent use, and likely raises the prices of drugs for Canadian consumers.¹¹¹ This *sui generis* protection clause, also known as a patent term restoration, provides an additional two years patent protection for pharmaceuticals after the 20 years protection ensured by the TRIPS agreement. This is meant to supplement the time it takes to file a patent, and generate added protection for companies who suffer from delayed patent processing. Canada tends to approve patents much slower than the EU, creating shorter patent lives and allowing generic brands to enter the market more quickly.¹¹² Therefore, Canada conceded on the issue of pharmaceutical patents, with the federal government even ensuring provinces that it would offset some of the added costs by paying a greater share of health costs related to the issue.¹¹³ The compromises made by the Canadian government during negotiations were also likely offset by the potential for its own pharmaceutical companies to invest in R&D as to incentivize them to patent their products as much as the Europeans do.

The top perceived issues for government and civil society actors during CETA negotiations – agriculture and public procurement – are also worth mentioning as these too involved heavy concessions. On the EU side, the ban of export subsidies in agriculture led to a win for Canadian interests. In the EU, the integrated rules on G.I.s. and GMOs within CETA help protect domestic

¹¹¹ Patrick Fafard and Patrick Leblond, "Why Did It Take So Long to (Sort of) Finalize the CETA?," *International Journal* 68, no. 4 (2013): 555, <https://doi.org/10.1177/0020702013509319>.

¹¹² See debate between EU and Canada patent lives: Joel Lexchin and Marc-André Gagnon, "CETA and Pharmaceuticals: Impact of the Trade Agreement between Europe and Canada on the Costs of Prescription Drugs," *Globalization and Health* 10 (May 6, 2014): 30, <https://doi.org/10.1186/1744-8603-10-30>.

¹¹³ Joel Lexchin and Marc-André Gagnon, "CETA and Pharmaceuticals: Impact of the Trade Agreement between Europe and Canada on the Costs of Prescription Drugs."

environment and businesses – ensuring satisfaction from producers in Europe. SMEs and large companies will also benefit from lower tariffs and market access for agricultural products, with important exceptions placed on both sides of the Atlantic. Further protections are guaranteed for fisheries such as monitoring and surveillance of illegal, unreported and unregulated fishing. Sensitive products such as beef, pork and dairy will be subject to export quotas to protect local farmers. Therefore, it is clear that negotiations on agriculture were handled as early as possible and farmers had a clear picture of a future under CETA. No changes were made after the release of the 2014 text to agricultural provisions, signalling that negotiations were definitely finalized.

As for public procurement, civil society actors within Canada saw this as a contested issue because it would allow foreign firms to receive government contracts, especially at the municipal level. However, this issue was not perceived with as much importance for all actors, mainly because governments and academics are aware that public procurement markets are largely already open.¹¹⁴ The involvement from the Canadian provinces also allowed any frictions on the topic to be smoothed out early on. All in all, the public procurement provisions may provide a better side of the deal for European investors, but the Canadian side figured that other benefits would balance this compromise, such as market access in other sectors.¹¹⁵

¹¹⁴ Steve Verheul in Hon. Rob Merrifield, “Negotiations Toward A Comprehensive Economic And Trade Agreement (CETA) Between Canada And The European Union” (House of Commons Canada, March 2012), 18.

¹¹⁵ For more see D’Erman (2018) on the EU’s realist power in public procurement:
<https://link.springer.com/article/10.1057%2Fs41268-018-0135-3>.

3.3.2. TTIP Controversies: ISDS and Digital/Data Protection

The ISDS was the most critical negotiation point within TTIP's discussions. Many of the points raised in the CETA concerns over ISDS are repeated, if not intensified, in TTIP talks. This was clear within the EU's ranks, when Trade Commissioner Cecilia Malmström posted her dissatisfaction with ISDS online, and argued for the establishment of a public international investment court system.¹¹⁶ The EU desires a similar system to the ICS, but the US prefers a traditional approach to ISDS, as it tends to win every case sent to these tribunals. There were, however, wide-ranging sentiments towards the mechanism within the US itself, causing a destabilization in a unified front during negotiations, much in contrast to CETA's parties.¹¹⁷ The EU's 150,000 online consultations on ISDS were met with a 97% negativity rate, namely because there was no mention by the US of a possibility to introduce provisions such as the appellate body within TTIP investment dispute settlement. To ensure fair regional trade integration, the EU does not want to be the loser of NAFTA-like suits, and the US wishes to remain powerful both publicly and privately in ISDS rulings. This exemplifies the many intricacies at play in ISDS negotiations, and both parties do not wish to position themselves in a disadvantageous political situation. This is largely why TTIP has not managed to come to a final conclusion – and may in fact have to omit ISDS completely for the agreement to come to fruition. The 2016 Greenpeace leaks of 13 chapters of agreement certainly did not help criticism and concerns of TTIP from the general public, further complicating negotiations and eliminating all chances of smooth negotiation processes.¹¹⁸

¹¹⁶ Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" 10.

¹¹⁷ See Elizabeth Warren's blog on ISDS: <https://www.warren.senate.gov/newsroom/press-releases/warren-urges-us-trade-rep-to-remove-isds-provisions-during-next-round-of-nafta-negotiations>.

¹¹⁸ See leaks and further controversy over ISDS/data protection: <http://www.greenpeace.org/eu-unit/en/News/2016/Leaked-TTIP-documents-released/>.

The issue of data and privacy was also perceived as a core component of negotiations, and reflects upon the importance of digital trade in the 21st century. There is no specific chapter within CETA on data protection, allowing domestic laws to remain intact. This fails to provide a model for TTIP provisions on data protection. Following the Edward Snowden revelations, EU Member States and citizens did not want to be subject to US regulations on data protection. Further complicating the matter, the European Court of Justice had also ruled in 2015 that the US does not have adequate data protection comparable to that of the EU's. This rendered the EU's 1995 Data Protection Directive ineffective, which originally had the aim of requiring that a third party have standards adequate to the European *acquis* for it to access the latter's data. The EU-US Privacy Shield is the Directive's 2016 replacement, but is argued to also have several loopholes in data protection – causing more rifts in the TTIP negotiations.¹¹⁹

Criticism of data protection within TTIP comes from all areas of society, mainly based upon claims that foreign companies will gain access to personal and sensitive data. Furthermore, data protection under TTIP would also open the doors to international jurisdiction on a sensitive topic, instead of keeping it within European borders. The EU is therefore facing difficulties in negotiations, as data privacy is a fundamental right and highly regulated within its Member States. In comparison, the US views data protection as an individual consumer right within the realm of e-commerce and free from government interference. The recent entry into force of the General Data Protection Regulation (GDPR) in the EU also complicates negotiations, as the US and its tech giants have criticized this law and do not wish to incorporate it into TTIP. Moreover, the EU is concerned that adding data protection at all to TTIP could drive US corporations to sue the EU on its GDPR

¹¹⁹ Walter Berka, "CETA, TTIP, TiSA, and Data Protection," in *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press, 2017), <http://www.oxfordscholarship.com/view/10.1093/oso/9780198808893.001.0001/oso-9780198808893-chapter-7>.

within ISDS courts. Talks on “interoperability” are ongoing – which would be a kind of dual system of access to European data while also respecting domestic and EU laws.¹²⁰ This would greatly benefit US tech companies such as Google and Facebook.

For the US and the EU, both the ISDS and data protection issues within TTIP negotiations have no end in sight. With less transparency in negotiations than CETA, this adds to existing tensions and anxiety concerning such provisions from the general public. The existing regulations between both parties seem too different to ever yield a transatlantic standard on regulations. Furthermore, both entities are economic powerhouses that do not wish to concede to the other. Identity and tradition politics therefore have a large role to play even in extremely technical settings such as data protection and disputes over investment. In CETA’s case, Canada did give up some of its negotiation stances on IPRs and public procurement as to gain market access in Europe. This makes sense, as Canada is attempting to diversify its trade, strengthen partnerships, set certain regulatory standards internationally, and build up its economy. On the TTIP side, regulations are governed stubbornly with feverish protectionism. Increased economic populist and protectionist tendencies in Europe and within the Trump administration have led to further crumbling of TTIP negotiations.

The results among government officials, academics and civil society actors from both agreements were largely similar. Perceptions of the most important negotiation issues consisted mainly of the ISDS system. On some levels, this is evident as the ISDS and the new ICS involve private and public groups, and reaches every sector and every market in the transatlantic region. Despite all parties disclosing that an ISDS mechanism was a non-negotiable, they were also obliged

¹²⁰ Keno Franke, “TTIP and the Right to Protect Personal Data,” openDemocracy, November 30, 2015, <https://www.opendemocracy.net/can-europe-make-it/keno-franke/ttip-and-right-to-protect-personal-data>.

to listen to the pushback from civil society, academic actors and even local governments.¹²¹ A negotiation on the ISDS matter also intensifies as both parties seek to retain voter bases. This is why CETA changed its mechanism between 2014 and 2016, and why TTIP has come to a potential pitfall. The issue of data protection within TTIP is a reflection of modern-day concerns in international trade, and perhaps regulating data internationally is simply too ambitious for the moment. In CETA, the other important negotiation issues of IPRs, agriculture, and public procurement simply present cleavages in transatlantic regulatory convergence. As was mentioned above, both parties were willing to work together and compromise on certain issues because the gains from reducing NTBs were too great to pass up. Canada's ties to the UK likely also helped, as its core legal system is similar to the British version – therefore facilitating convergence. In contrast, the US's longstanding history as an independent and leading nation clashed with the idea of regulatory standardization within international trade. The cloud of secrecy among TTIP negotiations also led to increased speculation about the agreement, instead of a somewhat transparent process as was attempted in CETA negotiations.

Perhaps CETA was a case of good timing. It was consolidated prior to the election of Donald Trump and prior to some of the protectionist waves in Europe. The only highly publicized protests against CETA happened after its negotiations were complete, and only within the relatively small area of Wallonia in Belgium.¹²² The success of the signing of the agreement demonstrates terrific cooperation and willingness to compromise. TTIP, on the other hand, is unlikely to materialize due to the sheer size of the economies, a high number of novel provisions to be

¹²¹ German magistrates heavily criticized the ISDS in 2016, after Vattenfall filed for 5 billion euros in compensation from the German government. As a strong member of the EU, this majorly disrupted TTIP negotiations. See: <https://euobserver.com/economic/132295>.

¹²² The Wallonian issue remains outside of the scope of this paper, as it was initiated after negotiations ended, in 2016.

introduced, and the deeply rooted traditional trade values of Europe and America that neither party is willing to let go.

Conclusion

CETA and TTIP are similar 21st-century trade agreements, insofar as both are WTO-Plus arrangements that incorporate new, comprehensive, and all-inclusive provisions touching upon all areas of trade. Whereas their anticipated economic benefits are difficult to measure, it is certain that regulatory convergence and an overall reduction of NTBs will likely prove beneficial for both sides of each agreement. This is largely based upon theories of regional integration, in which countries tend to form trading clusters for various sensible arguments. Furthermore, states are using PTAs due to a WTO standstill since the beginning of the Doha Round.

On the surface, the negotiations of both agreements appear to have operated in a comparable fashion. However, from the perspectives of government, academic and civil society actors, there is a clear distinction between the concessions granted during CETA negotiations versus TTIP negotiations. For CETA, varying standpoints within ISDS, IPRs, agriculture and public procurement negotiations were often met halfway. In several instances, the EU won the battle for regulatory preferences, with Canada acceding to international standards in exchange for market access and lower tariffs. Whether these compromises are beneficial or justified is outside of the scope of this paper – however they represent the willingness of the negotiators to cooperate. The exclusions of certain sectors in CETA also represent the influence of public voices and civil society within government.

For TTIP, key negotiation issues were met with intransigence from both parties. An unwillingness to coordinate efforts on ISDS and data protection, combined with more frequent and

numerous instances of public pushback of the agreement itself, has led to its standstill. Both parties are highly traditional and rely on their prized domestic regulations within negotiations and in turn try to persuade the other side to compromise. However, this has been largely unsuccessful.

Negotiations themselves were also conducted differently in both cases, with Canada allowing its provinces to attend negotiations for the first time in history, whereas US state representatives were not allowed in meetings for TTIP. Furthermore, transparency in CETA was much greater than in TTIP talks – expediting public acceptance of the agreement.

The discrepancies between CETA and TTIP are proof that it is not only the size of economies that can make or break a trade agreement. Emphasizing proper and all-inclusive negotiations, public involvement, and the willingness to make concessions is an important aspect of trade. Economics and cost-benefit analyses are only one part of the story; the political ability to achieve economic success is another. Enabling both requires impressive teamwork internationally.

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