

Interpretive Declaration Placates but Clarifies Nothing

Statement of Concern regarding the CETA Interpretive Declaration by the Health and Trade Network and Supporting Organisations*

Summary

We would like to highlight eight areas where there are outstanding causes for concern within the CETA Interpretive Declaration with a plea to EU Member State, the Canadian Government and European Parliament not to ratify the EU-Canada Trade Agreement over existing and serious health concerns.

In summary, our key concerns cover 8 points:

1. The Investment Court System poses a threat to health
2. It is doubtful if the Declaration is the best way to tackle CETA's problems
3. The Interpretive Declaration is at best irrelevant and at worst deceitful
4. The Declaration could put Member States in a political straightjacket
5. CETA has never doubted the right to regulate, the real issue is that CETA will affect how this can be done and on what basis
6. The negative listing approach remains problematic, despite reassurances in the Declaration that public services are protected
7. Trade and sustainable development, labour and environmental protection, water and stakeholder consultation
8. Government procurement protections are weak and unsubstantiated

Detailed analysis of the Interpretive Declaration from a Health Perspective

The [leaked draft joint declaration](#) aimed at placating concerns over CETA fails to respond to health policy concerns. We would like to highlight eight areas where there are outstanding causes for concern within the CETA Interpretive Declaration with a plea to EU Member State, the Canadian Government and European Parliament not to ratify the EU-Canada Trade Agreement over existing and serious health concerns.

1. The Investment Court System poses a threat to health

First and foremost health policy concerns continue to be threatened by the investment protection provisions of the agreement. Although there are several further concerns in terms of public health, medicines and health services, the introduction of ISDS/ICS is the most problematic aspect of the agreement for health. The declaration does nothing to limit or restrict the scope for claims for compensation as part of ISDS/ICS. It is thus not a sufficient measure to respond to concerns presented by CETA's doubters.

The investment and investment protection chapter in CETA is better than what EU proposed for TTIP as it does exclude health and social services from liberalisation of investment and does not feature

the umbrella clause or feature a “necessity” test for provisions on the right to regulate. These have particular relevance to social and health services. However, it still allows claims for compensation. The proposal on ICS is an improvement with regard to most of the problematic aspects of arbitration biases, but the crucial issue with respect to health and social policy relates to the scope of undermining public policy decisions with a threat of very high compensation claims.

The emphasis on “modern rules” which preserve right to regulate” is misleading as the right to regulate has not been at the core of investment protection, but rather the **obligation to compensate**. The key to the balance of power between policy-makers and investors is based on compensation claims and threats of compensation claims rather than direct implications to governments’ more general right to regulate as such.

The declaration also makes unsubstantiated claims as if these were spells that could change the text of the agreement. We have absolutely no guarantees that CETA could not result in foreign investors being treated more favourably than domestic investors in a situation, where only foreign investors have access to investment protection.

2. It is doubtful if the Declaration is the best way to tackle CETA’s problems

It is important to emphasise that as CETA is not yet signed there could have been an easy option to include stronger precautions in the agreement, restrict or remove investment protection more explicitly or improve clarity as part of further legal scrubbing, which has proved rather efficient in making substantive changes to the investment protection chapter.

If the issues are of real importance for both parties and there is a high degree of agreement on these issues, then these should be written into the agreement itself in a sufficiently clear manner so that interpretative statements are not required.

Instead, public interest issues and democratic accountability have been given goodwill in the form of ‘calm down dear declaration’, while international investors and corporations have legal rights to claim for compensation.

3. The Interpretative Declaration is at best irrelevant and at worst deceitful

If interpretative declarations are to have relevance they need to have relevance to decisions made or imply conditionality to the context in which they have been applied. The joint declaration does not fulfil these criteria. In contrast it raises some further concerns with respect to understanding it and the nature of the declaration.

Despite its progressive language, in terms of legal relevance the Declaration is at best irrelevant and at worst deceitful in seeking to give support to particular interpretations of the nature of CETA and how it relates to government abilities and policy space in future.

4. The Declaration could put Member States in a political straightjacket

CETA brings in ISDS/ICS, which can be seen as a threat to the sustainability of organisation and financing of national health and social services. It could allow any European Member State and government to raise Lisbon Treaty Article 207(4) which states that:

The Council shall also act **unanimously for the negotiation and conclusion of agreements**:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.”

However, the Declaration reads:

“Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, and the promotion and protection of cultural diversity”.

If Member States hastily sign the Declaration, it will be politically more difficult to decline from ratifying the CETA agreement or using Lisbon Treaty 207(4) as they have just declared that CETA does not affect their ability to achieve legitimate public policy objectives. There is of course no proof that this would be the case either way, but Member States would be politically tied to the stances of declaration as they had already agreed, that there is not going to be any problem.

5. CETA has never doubted the right to regulate, the real issue is that CETA will affect how this can be done and on what basis

The issue of CETA is not and has not been the right to regulate as such or ability of Member States and Canada to adopt and apply their own laws, but in essence **how this is done and on what basis this is done**. The point is not whether governments will be able to regulate themselves, but that their own laws and their application need to be compliant with the agreement.

Regulatory cooperation under CETA is voluntary, but from a public health perspective it is not clear how regulatory cooperation under a trade platform would enhance better regulatory quality in terms of public health, health protection or health promotion policies.

6. The negative listing approach remains problematic, despite reassurances in the Declaration that public services are protected

It is important to note the wording in public services as in CETA some essential public services were explicitly excluded, **but not all public services**. The last paragraph on public services, for example, may not fully hold for those public services, which have not been explicitly excluded as part of national schedules from investment. Furthermore, what is not written out is that CETA strengthens the case of private providers and rights of commercial providers to claim for compensation, should the government wish to return to public provision from outsourced public services, including health, social and education services, if this frustrates the legitimate expectations of investors.

7. Trade and sustainable development, labour and environmental protection, water and stakeholder consultation

The Declaration does not realise any of the promises regarding the strengthening labour and environmental protection chapters. The promises need to be read in alignment with the background

that Canada has always not been that progressive in all these areas and common aims may be more complicated than is implied. Canada has taken EU to WTO on the basis of [asbestos regulation](#) directly affecting occupational health and safety regulations. Canada has also substantial mining interests in Europe and globally. Currently a Canadian company is already using [investment protection clause against Romania](#).

8. Government procurement protections are weak and unsubstantiated

The Declaration merely states that governments can apply environmental, social and labour-related criteria in government procurement as long as they do not discriminate or constitute unnecessary obstacles to international trade. It is thus not an explicit priority. Thus only such labour, environmental and social criteria, which do not restrict international trade or discriminate against foreign companies, may be applied and these can only be applied in ways which do not restrict international trade. This, some might say, would explicitly restrict how governments can achieve their legitimate policy aims.

It also fails to fully secure the request by the [Canadian Trade Minister and German Vice Chancellor](#) that CETA provisions should “respect the parties rights to include social and labour criteria in the procurement procedures”. The Declaration merely clarifies that this would be possible only if it would not constitute an unnecessary obstacle to international trade.

***Statement endorsements**

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