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**From:** Gianluca.MONTE@ec.europa.eu <Gianluca.MONTE@ec.europa.eu>

**Sent:** 20 November 2020 19:17

**To:** Suzy Sumner | foodwatch <suzy.sumner@foodwatch.eu>



**Subject:** RE: CETA implementation and SPS committee

Dear Ms Sumner,

Thank you for your messages.

As discussed during our meeting on 20 October, we strive to maintain a high level of transparency concerning the implementation of CETA, through the publication, for all the 20 CETA committees and bilateral dialogues, of the relevant agendas (before the committee/dialogue meeting takes place) and reports (within a reasonable timeframe after the date of the committee/dialogue meeting). All the agendas and reports are joint documents, i.e. they are agreed between the EU and Canada. This is in line with similar transparency arrangements for the implementation of the other EU FTAs. Any other type of exchanges or written communications between the EU and Canada relate to what is expected in a standard working relationship so as to prepare and ensure the proper functioning of the committees. We therefore consider that the publication of the agendas and reports of the committee meetings allows for a satisfactory overview of the work of the different committees and bilateral dialogues established under CETA.

During our meeting, we also discussed the decision-making process of CETA committees, explaining their limited powers (as shown by the very reduced number of decisions adopted by such committees up to date) which do not include the power to amend the Agreement itself. We also explained the procedure for adopting formal decisions in the framework of CETA committees, essentially based on specific decisions adopted by the Council in accordance with Article 218(9) TFEU: “The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement”. We take note of your remarks about the democratic accountability of such procedure. We observe that this mechanism reflects the balance of power and institutional arrangements laid down in the EU Treaties. We also confirm that formal decisions adopted by the CETA committees are made public.

Concerning the document attached to your message dated 29 October, we understand that such document has been obtained through an access to document request made before the Canadian authorities. It is clearly not an EU nor a joint document; we therefore suggest inviting the Canadian authorities to provide clarifications on the issues raised by you.

As regards your question about the reporting practice, for reasons of transparency it was agreed that after the first meeting of the CETA Joint Committee only one single joint report per committee meeting would be produced and made public. This practice has been followed since then by both the EU and Canada.

I remain at your disposal for any further clarification.

Kind regards,

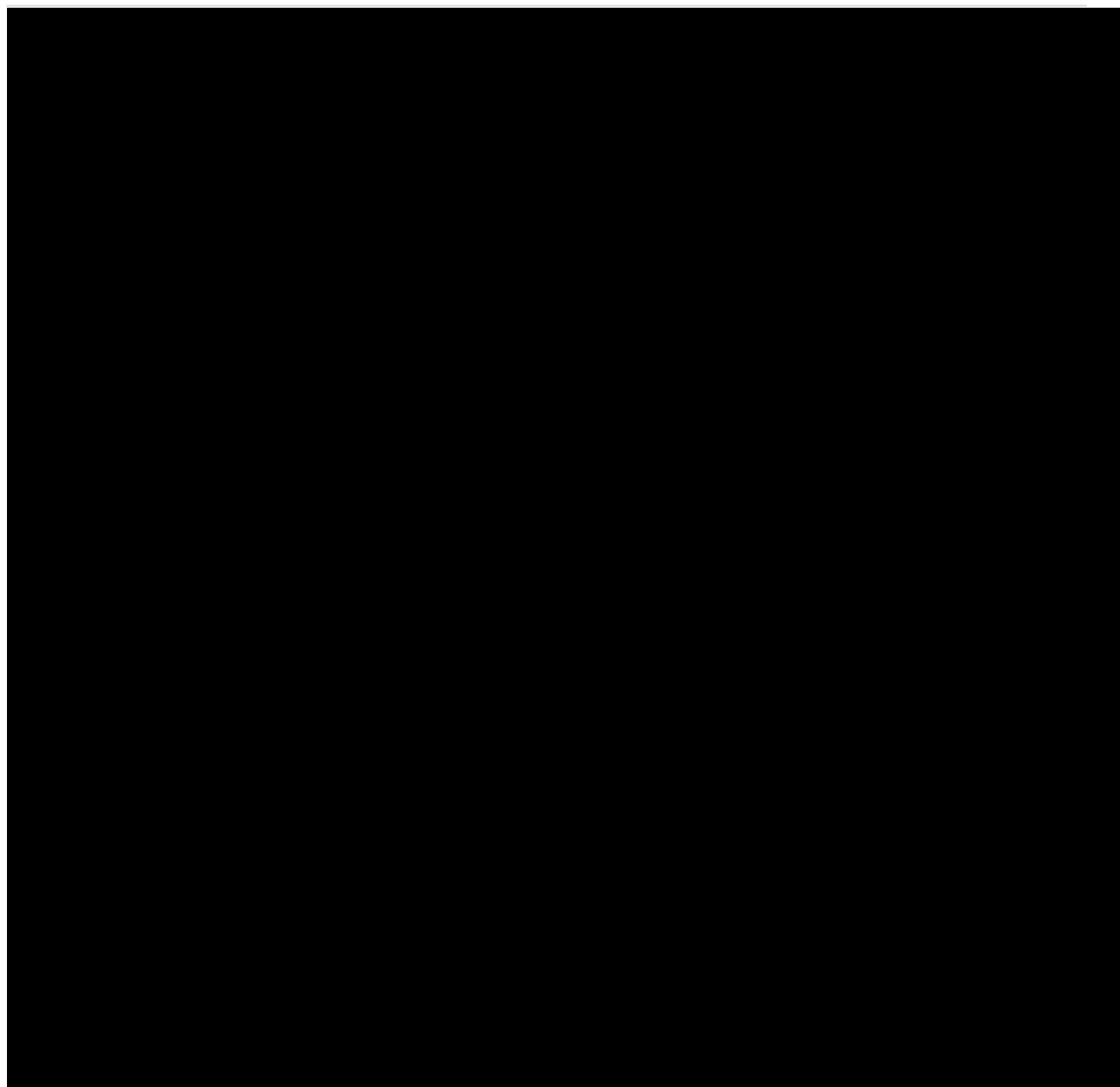
Gianluca Monte

**GIANLUCA MONTE**  
Policy coordinator



**European Commission**  
DG Trade  
Unit D.1 – USA & Canada

CHAR 06/234  
B-1049 Brussels/Belgium  
+32 2 295 34 82



Mr. Gianluca MONTE  
Policy coordinator  
European Commission  
DG Trade - Unit D.1 – USA & Canada  
B-1049 Brussels  
Belgium

Brussels, 8<sup>th</sup> February 2021

Dear Mr. Monte,

Following our meeting on 20 October 2020, and the email exchange which followed with my colleague, we have taken some time to seek legal advice on a number of the key points that have been raised and I therefore take this moment to reply to you more fully on the issues we are discussing.

Our legal advice and the main content of this letter has been provided to us by Professor Weiss who is representing foodwatch in our case against CETA at the German Federal Constitutional Court.

For simplification we will respond to three separate points:

- 1) Transparency of the implementation of CETA, including the issue of meeting reports or minutes
- 2) The 'limited powers' of the CETA committees which you say "do not include the power to amend the agreement itself", and
- 3) The democratic accountability of the processes.

### **1) Transparency of CETA Committee decision-making**

With regard to the transparency of the work of the CETA Committees, the Commission refers to the publication of the agenda (i.e. the agenda of the individual meetings) and the subsequent publication of summary reports of the Committee meetings instead of minutes. This is considered sufficient to get an overview of the work of the committees and the dialogues. Formal decisions of the committees are promised to be published.

Indeed, the CETA Joint Committee's decision on its Rules of Procedure (Decision 1/2018)<sup>i</sup> provides in Rule 8 (3) for the publication of provisional agendas and in Rule 9 (5) for the publication of "summary of the minutes". According to Rule 9 (2) and (3), quite detailed minutes are taken of the meetings, but these are not published. The "reports" published on the website of the European Commission on the individual meetings of the CETA Committees may therefore be taken to represent these "summaries of the minutes".

However, blackening in the reports or agendas are not foreseen under the above rules of procedure, except in the case of confidential information under Art. 26.4 CETA. Confidential information is information that is classified as confidential under national law.

In this respect, the Commission's practice is probably in line with the existing regulations, although the practice of blackening raises concerns. It is not clear whether this really pertains merely to confidential information worthy of protection, which must not be disclosed to the public, or whether the blackening is made for other reasons.

Nevertheless, the summaries do not provide a satisfactory insight into the activities of the committees. This is particularly regrettable when it comes to the adoption of binding decisions in the CETA committees. Any kind of rulemaking or adoption of legal acts should be done in a transparent manner that allows the underlying positions and assumptions to be identified. This requires greater transparency in binding decision-making in treaty bodies than just the publication of agendas and of short meeting reports. The considerations made by the parties for the adoption of binding decisions by CETA committees can thus not be understood.

The transparency of binding decisions and their preparation must therefore go beyond the rules mentioned above. For, the EU has committed itself to transparency and closeness to the citizen, especially in the area of decision-making, see Article 1 (2) TEU ("decisions are taken as openly as possible and as closely as possible to the citizen") and Article 11 (1) and (2) TEU. The Commission promised to increase transparency, especially in the area of trade policy, in its 2015 Communication "Trade for All". This also includes transparency after the conclusion of negotiations in the implementation phase of an agreement.<sup>ii</sup>

This is stated in the Communication "Trade for All" on page 18:

*"Policymaking needs to be transparent and the debate needs to be based on facts." ... "The Commission will also step up its efforts to promote an informed debate in Member States and a deeper dialogue with civil society at large. This is an opportunity to raise people's awareness about ongoing and planned trade and investment negotiations, and to get feedback on issues from stakeholders concerned."*

The Commission does not do justice to this goal of increasing "people's awareness" when it comes to preparing and adopting binding decisions in FTA committees and other treaty bodies with its attitude described above. Decisions in committees also contribute to policymaking in bilateral trade policy with Canada and represent - at the level of concrete issues - negotiations on these issues.

On page 19 of the Communication "Trade for All", the Commission promises a "more open policymaking process". In doing so, the Commission recognises the importance of transparency, especially when it comes to regulatory impacts of trade policy:

*"Transparency is fundamental to better regulation. Lack of transparency undermines the legitimacy of EU trade policy and public trust. There is demand for more transparency in trade negotiations, particularly when they deal with domestic policy issues like regulation. .... Transparency should apply at all stages of the negotiating cycle from the setting of objectives to the negotiations themselves and during the post-negotiation phase. "*

Of importance for domestic regulation are not only the negotiations on the agreements themselves, but also the subsequent implementation, in particular the drafting of binding decisions. As shown in more detail under point 2 below, the CETA Committees have significant decision-making powers.

## **2) The scope of the decision-making mandates of the CETA Committees**

Contrary to what is claimed in in your email of 20 November 2020, the decision-making powers of the CETA committees are not minor, but considerable. In particular, the committees *do* have the power to amend parts of CETA, as will be shown below.

Already the sheer number of decision-making mandates for the numerous committees in CETA is different from what we were used to so far under other Trade or Association Agreements. The committees in CETA are very active, as can be seen from the Commission's listing of relevant activities.<sup>iii</sup>

The fact that not many decisions have been taken so far also says nothing about the scope and intensity of the mandates: Chapter 8 of CETA on investment protection, an essential part, is not yet in application.

The statement that the committees cannot amend the CETA agreement is simply wrong, as a brief analysis of the decision-making competences of the CETA committees shows. With their decisions, the Treaty Committees are able to further develop, supplement, implement or even amend the content of CETA.

The mandate of the **CETA Joint Committee** is very broad: "The CETA Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement" (Art. 26.1 para. 3 CETA).

The mandate goes beyond application and implementation (see Art. 26.1 para. 4 CETA). The Treaty Committees in CETA have approximately 30 different decision-making powers. The central CETA Joint Committee oversees the special Committees and has the most extensive powers:

- It can effectively amend the institutional structure of CETA beyond the current situation established in the CETA. For, the CETA Joint Committee may terminate special committees, set up new ones and assign tasks to them (Art. 26.1 para. 5 lit. g, h CETA).<sup>iv</sup>
- It can also amend the CETA on specific points (see Art. 26.1 para. 5 lit. c) in conjunction with Art. 4.7 para. 1 f), Art. 8.1, Art. 8.10 para. 3, Art. 20.22), i.e. the CETA Joint Committee can decide on the extension of the concept of intellectual property, Art. 8.1 CETA, or on the meaning of fair and equitable treatment of investors, Art. 8.10.3 CETA. It may amend or supplement CETA provisions with respect to the Harmonized System, Art. 2.13.1 b) CETA, and consider amendments to Chapter 4 of the CETA, Art. 4.7.1 f read in conjunction with Art. 26.1.5 c) CETA, or make amendments to Chapter 23, Art. 23.11.5 CETA. Under Art. 20.22.1 read in conjunction with Article 26.1.5 c), the CETA Joint Committee may, by amending Annex 20-A, add or remove protected geographical indications of origin. The Joint Management Committee shall amend the Annexes to Chapter 5, Art. 5.14.2 (d) CETA (the latter, admittedly, is subject to approval by the parties, whereas all the other above-mentioned decision-making powers do not need subsequent approval by the parties).
- The CETA Joint Committee can prescribe a binding interpretation (Art. 26.1 e) which is another form of amending CETA.
- It may decide to amend the annexes and protocols of the CETA (Art. 30.2 para. 2 CETA) which are integral parts of CETA (Art. 30.1 CETA).
- Among the special committees, the competence of the Committee on Trade in Goods to decide on measures to implement the exchange of product warnings between the EU and Canada (Art. 21.7 para. 5), or the competence of the Committee on Services and Investment to amend the code of conduct of the judges of the Investment Court and the applicable procedural rules (Art. 8.44 para. 2 and 3 b) CETA) should also be considered in this context of changing or amending CETA rules.

These Treaty Committees thus represent a new and far-reaching level of exercising comprehensive public powers by executive institutions, all the more if compared to pre-existing EU trade agreements and the comparatively limited competences of the treaty bodies established therein (e.g. the FTA with

South Korea or the Customs Union with Turkey). This comprehensive extent of delegation of public powers to treaty bodies calls for greater transparency of their decision-making activities than hitherto.

The following examples illustrate the potentially far-reaching impact Committee decision-making has on rules in the EU:

#### **a) Lowering EU public health control standards**

Effective import checks on food products are essential for protecting the health of consumers.

According to the current CETA text, import checks must be carried out on 100 per cent of all live animal imports (see Annex 5-J to CETA). However, the SPS Joint Management Committee (a specific committee provided for in Article 5.14 CETA read in conjunction with Article 26.2 para. 1 lit. d CETA) can recognise the equivalence of differing standards or change the frequency of import checks.

Technically this is done by adopting a decision which amends Annex 5-J to Chapter 5, as mandated in Article 5.14 para. 2 lit. d CETA; alternatively, the SPS Joint Committee may recommend to the CETA Joint Committee that changes be made with respect to the frequency of checks in Annex 5-J.

This means that the control standards could be lowered at any time in the future by committee decisions. This could undermine the sanitary and phytosanitary standards applied in the context of import checks, resulting in unsatisfactory health protection for consumers in the EU.

Apparently, the contracting parties have discussed the management of import checks at great length. The minutes from the CETA SPS Committee's discussions about the provisions on import checks in the text of the treaty and their possible amendment are roughly 30 pages long. However, the fact that these 30 pages are almost entirely blacked out is unsettling, particularly because the health of the imported animals and the confirmation that they are free of infectious diseases are not only of commercial importance for the importing market players, but also of pivotal importance for the health of consumers in the EU.

#### **b) Freezing of EU Standards of Protection**

Pursuant to Art. 5.6 para. 3 CETA, Annex 5-E CETA stipulates in which areas SPS measures<sup>v</sup> by Canada are to be regarded as equivalent to EU requirements, for which further conditions can be stipulated there. In CETA Annex 5-E, equivalence is already established in a binding manner under international law, in accordance with the conditions set out therein, and factually limited to what is explicitly mentioned there. Thus, equivalence currently applies to the measures explicitly listed in Annex 5-E. Annex 5-E contains in its section A certain sanitary measures for certain animal products. Section B for phytosanitary measures is currently empty. However, this Annex may be filled by a decision of the SPS Committee under Article 5.14 para. 2 lit. d) CETA or by a decision of the CETA Joint Committee.

Thus, both the CETA Joint Committee and the SPS Joint Management Committee can each make decisions on the recognition of SPS standards as equivalent.

The special significance of such decisions lies in their international legal nature. Once standards of protection are recognised as equivalent in the context of CETA, these standards are subject to a binding commitment for the EU under international law. Accordingly, CETA, as an international treaty, stipulates what must be later implemented by way of EU secondary legislation or national legislation with respect to imports from Canada. This means that, if the EU or its Member States adopt rules or apply regulations that conflict with the CETA obligations, these rules would automatically be a violation of international law.

This situation would have serious consequences for a multitude of areas that directly affect the daily lives of citizens, consumers and workers, as well as companies. Additionally, it allows CETA to weaken the parliaments. Through the mutual recognition of product and process standards as equivalent in the context of the CETA agreement, standards of protection are being effectively frozen owing to the fact that it is subsequently much more difficult to raise any standards related to imports.

Although a contracting party can later raise the standards for its own internal market, it cannot demand that imports from its trading partner also comply with such new standards after a recognition of equivalence has been made.

Therefore, in practice, a standard that has been recognised as equivalent will remain unchanged due to the requirement of giving equal treatment to all providers in a market. Changes effectively can only be made through negotiations between the contracting parties. This means that, once the responsible SPS Committee recognises Canada's lower standards for sanitary and phytosanitary measures in the context of import checks as equivalent to those of the EU, these standards can no longer be raised by one of the parties without breaking international law.

### **3) The democratic accountability and thus legitimacy of the decisions of the CETA Committees**

The decision-making of the CETA committees takes place on the basis of Council decisions pursuant to Article 218 (9) TFEU in a so-called simplified procedure to produce binding decisions under international law in the CETA committees. In its decisions pursuant to Article 218 (9) TFEU, the Council prepares the positions to be taken by the EU in the committees; this also prepares the decisions of the treaty committees. Even if this corresponds to the institutional rules currently found in EU law, concerns remain about the democratic legitimacy of this procedure.

This is because the procedure under Article 218 (9) TFEU is deficient from a democratic point of view. In this procedure, only the Council decides on the decisions of the CETA committees. The European Parliament cannot co-decide; it is only informed. There are also no other mechanisms of parliamentary or public accountability of the CETA committees for their decisions. Scholars soon complained about this deficit of democratic control. Taking the procedure the way it is written does not correspond to the equal rights of the Council and the European Parliament in shaping trade relations, as established by the CJEU in relation to Article 218 (6) TFEU. The Council and the EP have symmetrical powers in terms of legislating and treaty-making; they "enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties".<sup>vi</sup>

It is therefore precisely in line with the institutional balance to observe this equality of the Council and the European Parliament also after the conclusion of trade agreements in the further development of bilateral trade relations through binding decisions of CETA committees; Art. 218 (9) TFEU does not prevent the application of more intensive legitimization structures for committee decisions, nor does it explicitly exclude the European Parliament from being asked to consent. In established constitutional practice, the European Parliament is involved in the Council's decision-making on the provisional application of trade agreements pursuant to Art 218 (5) TFEU, without this being explicitly provided for in the TFEU. So, consequently, under Article 218 (9) one should apply the same level of Parliament involvement.

In terms of constitutional law, the democratic deficit of the simplified procedure under Article 218 (9) TFEU has also been addressed by the German Federal Constitutional Court - from the perspective of national constitutional law, which in this respect must also be respected by the EU by virtue of Article 4 (2) TEU - even though the Court has not yet made its final decision. In the CETA ruling of the Federal Constitutional Court of 13.10.2016, in para. 59, 65 the Court clearly identified the democratic problem:

*"Moreover, it cannot be ruled out completely that the set-up of the committee system as provided for in CETA encroaches on the principle of democracy, which forms part of the constitutional identity of the Basic Law. .. Democratic legitimization and oversight of such decisions appears uncertain and will likely only be guaranteed if decisions affecting the competences of the Member States or the scope of the European integration agenda are only taken with Germany's approval."*<sup>vii</sup>

The Commission's lack of sensitivity to ensure the democratic accountability and responsibility of any exercise of sovereign power in CETA committees established by the EU is at odds with its commitments to the need for stronger and broader legitimacy of trade policy as outlined above in reference to the Communication "Trade for All".

As you can see the concerns of foodwatch are serious and legitimate. Looking only at what CETA has done to date is not an assurance of what will happen in the future. Indeed the structures that are in place, the lack of real transparency and democratic legitimacy not only move away from the Commission's own aspirations but are a real threat to the public health of EU citizens.

We look forward to hearing a full response to the concerns we have raised.

Yours sincerely,



Thilo Bode

Executive Director foodwatch international

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<sup>i</sup> [https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc\\_157677.pdf](https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157677.pdf)

<sup>ii</sup> Trade for All. Towards a more responsible trade and investment policy. COM (2015).

<sup>iii</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>

<sup>iv</sup> Also the German Constitutional Court assesses these powers to be amendment powers, see its decision of 13 October 2016, at para. 60

([https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013\\_2bvr136816en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html)): "The significant powers of the CETA Joint Committee include, insofar as provided in CETA, the power to decide on amendments to the Agreement (Art. 26.1(5) letter c of the CETA draft) and to amend its protocols and annexes (Art. 30.2(2) first sentence of the CETA draft). Yet in quantitative terms, protocols and annexes make up the largest part of the Agreement in question. Moreover, the CETA Joint Committee may, by decision, add other categories of intellectual property to the definition of "intellectual property rights" (Art. 8.1 "intellectual property rights", second sentence of the CETA draft)."

<sup>v</sup> According to Art. 5.1 para. 1 lit a) CETA, the notion of the term is identical to the relevant definition in the SPS Agreement of the WTO, Annex A.

<sup>vi</sup> CJEU, Case C-658/11 ECLI:EU:C:2014:2025, para 56.

<sup>vii</sup> Reference as in endnote iv





EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR TRADE

Directorate D - The Americas, Agriculture and Food Safety  
**USA and Canada**

Brussels  
TRADE.D.1/GM/ib(ARES)3062496

Dear Mr Bode,

Thank you for your letter of 8 February 2021, to which I would like to provide the following clarifications.

**1. Transparency of CETA Committee decision-making**

We confirm our commitment to ensure a transparent implementation of our trade policy, in line with the pledges included in the *Trade for All* Communication and in the recently adopted *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy* Communication (COM(2021) 66 final). As mentioned during our meeting, we confirm that the Commission publishes all joint reports of the CETA committees' meetings on its website.

We would also like to stress that the joint public agendas and reports of CETA committees meetings are never redacted. Redactions may be made in other documents related to such meetings, when these documents are disclosed in accordance with the provisions laid down in Regulation 1049/2001. If this is the case, redactions are made to comply with the relevant exceptions set out in the Regulation.

**2. The scope of the decision-making mandates of the CETA Committees**

You refer in your letter to two different situations that have to be clearly distinguished:

*Amendment of the Agreement*

As stated earlier, the CETA Joint Committee and the CETA specialised committees cannot amend the text of the Agreement. Any amendment to the CETA text would require the same procedure for the ratification of CETA itself, i.e. at a minimum a Commission proposal, Council decision on signature, Parliament's consent and the final Council decision on conclusion.

Article 30.2 of CETA clearly stipulates that:

*"The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have*

Mr Thilo Bode  
Executive Director  
Foodwatch International

*completed their respective applicable internal requirements and procedures necessary for the entry into force of the amendment, or on the date agreed by the Parties".*

For the EU, this means that the Commission would, after the Joint Committee agreed on the desirability of the amendment, submit a proposal for a Council Decision on the signature and the conclusion of the amendment. The Parliament would be asked to give its consent after the Council would have approved the amendment. Absent the Parliament's consent, the amendment would not enter into force. It would only become legally binding after its entry into force.

#### *Exercise of the powers conferred under the Agreement*

The Agreement itself foresees in certain places a possibility for the CETA Joint Committee or specialised committees to take certain decisions concerning its implementation. The power of the Committees in this respect is strictly confined to the decisions concerning these exhaustively listed issues and very often the text of the Agreement describes precisely the scope of this decision making power and the applicable procedure. CETA Article 26.1(5)(c) clearly stipulates that the Joint Committee can consider or agree on amendments as provided in this Agreement. The Joint Committee cannot therefore take the liberty to modify any other part of the agreement as the ones clearly listed. In most cases, this concerns more technical, detailed provisions of the agreement (such as annexes).

You rightly point out to some instances of these conferred powers such as the power of the CETA Joint Committee to change the tasks of the specialised committees and set up new ones as well as the power to amend some of the annexes and protocols to the Agreement. In these specific cases, the CETA Joint Committee will only be able to amend an annex based on consensus, while for the purposes of forming the position to be taken on behalf of the Union, EU law is strictly observed and the Union position is formed in accordance with Article 218(9) TFEU: "The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision (...) establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement".

With reference to the specific issues mentioned in your letter concerning the scope of the decision-making mandates of the CETA Committees as regards (a) lowering of EU public health control standards and (b) freezing of EU standards of protection, you will find hereafter some clarifications.

Please note that the minutes and joint reports of the meetings of the CETA Joint Management Committee on Sanitary and Phytosanitary Measures (the SPS Committee) are all published [online](#). No redactions have been made to such documents.

Concerning the important questions you raise on the lowering of the EU public health control standards and on the principle of equivalence, we would like to underline that the EU, and the EU alone, will determine what level of protection its citizens should receive as regards risks posed by food products. CETA will not change this, either in its current form or through a Joint Committee decision.

Equivalence is a well-known concept under EU law. It is widely used and pursued, either on the basis of unilateral EU determinations or through bilateral agreements and

arrangements of various kinds. While recognising equivalence is always a choice, not an obligation (including under CETA), a determination of equivalence is not a discretionary process: it can only be done through an objective, factual and science-based examination.

Equivalence in CETA concerns the process whereby it is determined that the measures taken by the exporting Party (here Canada) to meet its own sanitary and phytosanitary standards are also adequate to meet the level of protection required by the EU's standards. Article 5.6 of CETA is very explicit:

*"The importing Party shall accept the SPS measure of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of SPS protection".*

This means that imported products into the EU from Canada on the basis of equivalence cannot have lower food safety, or animal/plant health protection than in the EU. The onus is on Canada as the exporting Party to objectively prove that its measures achieve equivalence with those of the EU. The principles and guidelines will establish how Canada can do this. Evidently, the position that the EU will take on these principles and guidelines can only and will be based on the relevant EU legislation, where the Parliament and Council have set the appropriate level of protection and the relevant controls that they wish to see applied in the EU (or have granted the Commission implementing powers in this respect, subject to appropriate conditions they have set). This is equally valid for any changes to the frequency of import checks mentioned under Annex 5-J. When SPS legislation changes in the EU (affecting the EU level of protection), an evaluation is foreseen in CETA (under maintenance of equivalence) to guarantee that the recognised equivalence measures still meet the new SPS level of protection. We can therefore reassure you that the provisions set out in CETA Annexes 5-D, 5-E and 5-J cannot dilute the effectiveness of the EU's SPS legislation, including in cases where this legislation evolves over time.

### **3. The democratic accountability and legitimacy of the decisions of the CETA Committees**

I take note of your remarks about the democratic accountability of the procedure by which CETA Committees can take certain decisions. Let me first clarify that the EU participates in numerous bodies established under international -multilateral and bilateral- agreements, which are empowered within the strict limits delineated by the Parties to those agreements, to take certain decisions that relate to the functioning and effective implementation of the agreements. The EU is represented in those bodies in accordance with the institutional arrangements laid down by the EU treaties. Article 218(9) TFEU establishes a procedure that is to be followed in order to form the position to be taken on behalf of the EU, when those bodies take decisions that have legal effects. Specifically, in accordance with Article 218(9) the EU position is formed through a decision of the Council, following a proposal by the Commission.

I hope this has helped address and clarify the matters that you wanted to raise.

Yours sincerely,

*e-signed*  
Matthias JORGENSEN  
Head of Unit

Mr. Matthias Jorgensen  
Head of Unit  
European Commission  
DG Trade - Unit D.1 – USA & Canada  
B-1049 Brussels  
Belgium

Brussels, 1st July 2021

Dear Mr. Jorgensen,

Thank you for your reply dated 26th April 2021 to our letter of 8th February 2021. Unfortunately, this does nothing to allay the concerns we have raised. Many of the issues have not been adequately addressed and the responses remain unclear. We are therefore coming back to you again to outline the points where your response falls far short of our expectations.

## **1. Transparency of CETA Committee decision-making**

In your reply you simply refer to various “pledges” to implement a transparent trade policy. Your reference to the fact that the “joint public agendas” and “reports” from committee meetings are not redacted does not add anything either.

We clearly explained that your transparency practice, while it may be in line with the applicable rules, is not sufficient to provide EU citizens with a satisfactory insight into the work of the CETA committees. The summary “reports” and “agendas” published online, along with a few other documents, are ultimately the only way for the public to know what the subject of a committee meeting was. Exactly what was discussed in the meeting, what views were expressed and who was present is not clear from this. This is serious because extensive decisions are being made which affect the daily lives of citizens in the European Union (cf. the comments under 2. a) on health protection). Committee decisions often have a rule-making function. Therefore - in order to comply with democratic principles - a high degree of transparency must be assured. Detailed minutes of meetings therefore need to be compiled and published. The taking of minutes of meetings is even provided for under rule 9 of the CETA Joint Committee's decision on its own rules of procedure (Decision 1/2018). Abandoning this practice is thus contrary to its own rules of procedure. Unfortunately, your response does not address this criticism.

## **2. The scope of the decision-making mandates of the CETA Committees**

Furthermore, you do not address any of the concerns raised with regards to the scope of the decision-making mandates of the CETA committees. In your letter, you claim - with no justification - that the committees cannot change the agreement themselves. There is no regard to the points made in our letter from 8th February 2021, on page 3, 2nd bullet point where we list the cases, in which the committees have the power to amend the agreement.

a. Lowering EU public health control standards

Using the example of the frequency of import controls, we had demonstrated that the CETA trade agreement allows for health protection standards to be softened or lowered. You state, without going into the concrete scenarios we mentioned, that "the EU and the EU alone" determines the standards of health protection for products. CETA would not change anything about that. However, as explained in our letter with the example of the frequency of import controls, the committees can very easily change the inspection standards, i.e. also lower them, by amending Appendix 5-J, which relates to sanitary and phytosanitary standards. As the Commission is represented in the committee and the decision requires unanimity, the Commission cannot act on its own and define inspection standards unilaterally.

Health inspection standards such as the frequency of import controls can thus be lowered at any time by committee decisions. This can undermine sanitary and phytosanitary standards applied in the context of import controls. This would result in insufficient health protection for consumers in the EU. What is more, this is particularly problematic because such decisions can be taken without parliamentary accountability (see section 2 a) and 3) of our letter dated 8th February 2021).

b. Freezing of EU standards of protection

With regard to our warning that once equivalence is recognised, it "freezes" the protection standards, you note that equivalence is assessed against legislative requirements. Should the SPS-relevant legislation in the EU change, a once-recognised standard would be subject to an evaluation as to whether the recognised standard complies with the new protection standard. You consequently conclude that the provisions in Appendices 5-D to 5-J would not result in a "freezing" of EU standards.

Admittedly, it is true that the EU sets its own standards internally. However, once equivalence of a Canadian standard is recognised, the recognition remains as such until further notice. The amendment of a new, more demanding SPS standard by the EU does not alter the equivalence once it has been recognised. It therefore continues to apply - as you emphasise yourself ("under maintenance of equivalence").

It is correct that paragraph 2 of Appendix 5-D provides for an evaluation and consultation process. Contrary to what you say, however, Canada does have a seat at the table when, after equivalence has been recognised, the EU has tightened protection standards. Canada has to be consulted regarding the additional conditions that imports from Canada must meet in order for equivalence recognition to be adjusted.

The EU's freedom of discretion is not unlimited. The EU must inform the Canadian government if, and if so, which additional conditions must be achieved for Canadian products to comply with the new requirements. To determine the new conditions, consultations with the Canadian government will be necessary. It is unclear, however, whether the EU can then hold unilaterally modified standards against Canada after unsuccessful consultations. The EU runs the risk of violating international law if after unsuccessful consultations, it unilaterally sets the conditions for adjusting a recognition of equivalence that has already been granted. It is obvious that this provision in Annex 5-D favours the freezing of standards and restricts the EU's regulatory freedom. Your allusion to the evaluation and consultation process therefore does not detract from our criticism. The EU's regulatory independence is also fundamentally curtailed by CETA. This is due to the nature of the Committee's decisions under international law. Once protection standards are recognised as equivalent under CETA, this is legally binding for the EU under international law. Accordingly, CETA, as a treaty under international law, stipulates what must later be implemented in the EU with regard to imports from Canada. This means that regulations and practices that contradict CETA commitments would automatically constitute a violation of international law.

### **3. The democratic accountability and legitimacy of the decisions of the CETA Committees**

You do not address the issue of lack of democratic legitimacy of the committees that we have raised. Your allusion to the process under Art. 218 (9) TFEU fails to clarify our concerns insofar as you do not address our criticism of this process's democratic deficits.

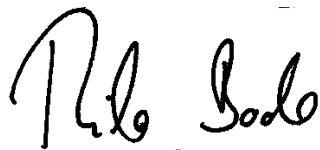
In conclusion, we have to say that your response cannot refute the following assumptions:

- The work of the committees is non-transparent because detailed minutes from meetings are not published.
- CETA committees can substantially amend the agreement.
- Committees can soften, lower or freeze protection standards.
- Decisions are not subject to sufficient parliamentary control.

Your reply confirms our view that EU trade policy is not being made with and for citizens, as actually promised in the Commission papers "Trade for All" – to which "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy" also refers – but that the interests of EU citizens are not being given the respect they deserve. This is not a good basis for the EU's much-needed acceptance by its citizens.

In the interest of maximum transparency and to ensure that this issue is addressed at the highest level, we will publish parts of the correspondence with you and send this letter to Commissioner Dombrovskis for his information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thilo Bode', with a stylized, cursive script.

Thilo Bode  
Executive Director foodwatch international



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR TRADE

Directorate D - The Americas, Agriculture and Food Safety  
**USA and Canada**

Brussels  
TRADE.D.1/GM/MC/ib (ARES) 5487059

Dear Mr Bode,

EVP Dombrovskis has asked me to write to you with reference to your letter dated 1 July 2021, sent in reply to my previous letter of 26 April 2021.

I would like to provide the following clarifications to the points raised in your letter.

**1. Transparency of CETA Committee decision-making**

As stated before in our correspondence, all the agendas and reports of the meetings of the CETA Joint Committee and specialised committees are published online. This represents an unprecedented effort in transparency in the implementation of a Free Trade Agreement. Agendas and reports are joint, that is, they have to be agreed upon by the EU and Canada. Their length and level of detail vary depending on the matter discussed by the relevant committee. In any case, reports are sufficiently detailed to provide an overview of the issues discussed during the meeting and to give an indication of the positions taken by the participants. By way of example, the [joint report](#) of the last meeting of the CETA Joint Management Committee on Sanitary and Phytosanitary Measures held on 16-19 November 2020 is 24 pages long and provides a detailed description of the exchanges that took place during the meeting. The reports also include the list of participants in the relevant meetings, except for the publication of personal data protected under EU law. This level of transparency meets the highest standards of transparency in the implementation of FTAs, in the EU and beyond.

**2. The scope of the decision-making mandates of the CETA Committees**

I already provided in my letter of 26 April 2021 detailed arguments about the powers of the CETA Joint Committee and specialised committees to amend the Agreement, which in my view very comprehensively addresses the issues and examples listed in your letter of 8 February 2021. Concerning the two specific issues of (a) lowering EU public health control standards and (b) freezing of EU standards of protection, I would like to reiterate the points made in my letter of 26 April 2021. The EU alone sets the level of its public health standards and this is not affected by either the WTO rules or the provisions in CETA or in any other FTA. The WTO SPS Agreement guarantees the WTO members'

Mr Thilo Bode  
Executive Director  
Foodwatch International

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111  
Office: CHAR 06/214 - Tel. direct line +32 229-88567

Matthias.JORGENSEN@ec.europa.eu

right to set their own level of protection<sup>1</sup> that can be higher than the existing international standards<sup>2</sup>.

Allow me therefore to spell out again the consequences of this. CETA is based on the WTO core SPS principles and does not restrict the EU regulatory autonomy to set its standards of health and consumer protection. Canadian products imported into the EU on the basis of equivalence cannot have lower health and safety standards than those applicable in the EU. The CETA provisions on equivalency do not “freeze” or “lock-in” in any way the EU SPS measures. When the SPS legislation changes in the EU or in Canada, a mechanism is foreseen in CETA to guarantee that the recognised equivalence measures still meet the new SPS level of protection. The relevant provision in Annex 5.D reads as follows:

*(2) If a Party adopts, modifies, or repeals an SPS measure in an area for which it has made a recognition, the importing Party should continue to accept the recognition of equivalence as set out in Article 5.6.3(a) or the recognition described in Article 5.6.3(b), as the case may be, in that area until it has communicated to the exporting Party whether special conditions must be met, and if so, provided the special conditions to the exporting Party. The importing Party should consult with the exporting Party to develop these special conditions.*

This provision means that the EU has the right to unilaterally adopt, modify or repeal SPS measures in areas where a pre-existing recognition of equivalence exists. If the EU decides to do so, it has to communicate to Canada whether, based on new rules, “*special conditions must be met, and if so, provide[...] the special conditions to the exporting Party*”. In this scenario, the EU has to consult with Canada to develop these special conditions, but it is important to note that an obligation to consult is not the same as an obligation to seek consent or agreement. Therefore, after consultation, the EU can proceed with the new SPS measure and apply it in full.

It is also important to stress that the EU rigorously implements the SPS provisions in practice, including those covered by equivalency. To ensure that food imports from third countries meet European food safety and health standards, the Commission and Member States have put in place an adequate control system. Member States carry out regular official controls to verify that imported products meet EU requirements. In addition to controls carried out at the border by Member States on third country imports, the Commission also regularly carries out audits in third countries to check compliance with EU import rules. The reports of these audits together with the response of the audited authority are published on the Commission website.

I would also like to point out that the EU position in a CETA committee can only be based on the relevant EU legislation, where the Parliament and Council set the appropriate level of protection and the relevant controls that they wish to see applied in the EU (or have granted the Commission implementing powers in this respect, subject to appropriate conditions they have set).

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<sup>1</sup> Sixth paragraph of the Preamble of the SPS Agreement

<sup>2</sup> Article 3.3 of the SPS Agreement. Should the standards be higher (i.e. more cautious) than that those implied in existing international standards, guidelines and recommendations, the WTO member needs to provide a risk assessment supporting its view and ensure that the SPS measure is not more trade restrictive than necessary to achieve the appropriate level of protection.



We can therefore reassure you that the provisions set out in CETA Annexes 5-D, 5-E and 5-J cannot in any way dilute the effectiveness of the EU's SPS legislation, including in cases where this legislation evolves over time.

It should also be noted that the EU could take at any time, in addition to the EU general rules governing food safety, animal and plant health, whenever needed, emergency safeguard measures on the imported agri-food products from Canada (or any other trading partner). CETA does not undermine the right of the EU to take such emergency measures.

### **3. The democratic accountability and legitimacy of the decisions of the CETA Committees**

I would like to restate here that the Commission, in the implementation of CETA, fully respects the relevant provisions of the EU Treaty of which it is the guardian.

Yours sincerely,

*e-signed*  
Matthias JORGENSEN  
Head of Unit

Mr. Matthias Jorgensen  
Head of Unit  
European Commission  
DG Trade - Unit D.1 – USA & Canada  
B-1049 Brussels  
Belgium

Brussels, 14<sup>th</sup> September 2021

Dear Mr. Jorgensen,

Thank you for your reply, dated 2nd August 2021, to our letter of 1<sup>st</sup> July 2021. However, I would like to draw your attention to a number of questions which remain open. These questions arise from your explanations regarding the consultation process pursuant to Annex 5-D. We would be grateful if you would clarify the following points:

1. How long does the consultation process take?
2. At what point do the parties know, during consultations, that they will not come to an agreement?
3. At what point exactly during the consultation process can one party decide to unilaterally implement its changed standards and apply them in full, also with regard to imports from the other party to CETA?
4. What does it mean when you say that the EU can "apply the new measures in full"? Does it mean that one partner (i.e. EU) can unilaterally change its own product standards and require the other party (i.e. Canada) to conform to the new standards? In doing so will the EU unilaterally determine the new conditions under which the goods from the other party (i.e. Canada) will be allowed entry on the EU market, and will the EU no longer apply a previously granted recognition of equivalency to the Canadian goods?
5. If the parties do not come to an agreement, and the unilateral change of conditions e.g. by the EU is perceived by Canada as a breach of the treaty obligations, will that be a case for

the system of dispute settlements according to chapter 29 of CETA?

6. Can the unilateral formulation of new conditions by the EU be held against Canada, thus be binding for Canada?
7. Will the new conditions under which the continuation of equivalence should apply be listed in Annex 5-E?
8. If so, what is the process for including the new conditions in Annex 5-E? Can the EU change the annex unilaterally or does that require a committee decision?
9. If a committee decision is required, what will be the solution to the problem that the previous equalisation in Annex 5-E codifies special conditions, which do not reflect the new conditions?
10. How are e.g. affected exporters or importers supposed to know what conditions apply?

We are looking forward to your reply by 30<sup>th</sup> September 2021.

Yours sincerely,



Thilo Bode  
Executive Director foodwatch international



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR TRADE

Directorate D - The Americas, Agriculture and Food Safety  
**USA and Canada**

Brussels  
TRADE.D.1/MC/(ARES) 7193274

Dear Mr Bode,

Thank you for your letter of 14 September relating to certain provisions of the SPS Chapter of the EU-Canada Comprehensive Economic and Trade Agreement.

In reply to your questions 4-10, I wish to reiterate once again what I communicated in my correspondence of 24 April and 2 August 2021: CETA does not in any way restrict the EU autonomy to lay down its SPS standards. In the framework of the provisions on equivalence, this autonomy manifests itself in two ways. Firstly, the EU can autonomously decide not to recognise new equivalencies of Canadian SPS measures if the EU considers that Canada has not sufficiently demonstrated that “its measure achieves the [EU’s] appropriate level of SPS protection” (Article 5.6.1 of CETA). Secondly, the EU can autonomously update its SPS standards. Any trading partner (including Canada) must respect and conform with such new standards.

Allow me also to draw your attention to the fact that I have already explained the procedure applied when new SPS measures relate to an area for which a recognition of equivalence has previously been made. The recognition of new equivalencies should be listed in Annex 5-E and, in accordance with Article 5.14.2(d) of CETA, a Decision of the Joint Management Committee for SPS Measures is necessary to amend Annex 5-E. As you have been previously informed about, any decision of a CETA Committee with legal effects must be based on the EU position formulated in a Council decision adopted in accordance with Article 218(9) TFEU. The way in which the new EU SPS measure is “translated” into Annex 5-E of CETA depends on 1) whether the new EU measure updates a measure already listed in Annex 5-E (e.g. a modification of existing EU legislation); or 2) whether it constitutes a new measure which relates to an area covered by Annex 5-E (e.g. public health under fish and fishery products for human consumption). In the first scenario, Article 5.6.4 and Annex 5-E (1) provide a dynamic reference, which grants legal force to the updated EU measures. In the second scenario, the EU measures will be added to Annex 5-E in accordance with the procedure under Article 5.14.2(d) of CETA discussed above. The new import conditions will be published by the EU and made available on the relevant website<sup>1</sup>.

As regards your questions concerning the consultations referred to in Annex 5-D (questions 1-3), it follows from this provision that there is no time limit to conduct these

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<sup>1</sup> Access2Markets website is the relevant reference for EU exporters and importers.

Mr Thilo Bode  
Executive Director  
Foodwatch International

consultations and the process will continue as long as necessary. One Party can decide to unilaterally implement its changed standards with regard to imports from the other Party when it considers that it has sufficiently consulted the other Party. The SPS Chapter of CETA is subject to dispute settlement. However, it is important to note that the obligations included in Annex 5-D are of a procedural nature (i.e. notification, continued application of equivalence, communication of special conditions, and consultations). If a Party meets these obligations, whether it be the EU towards Canada or vice versa, a substantive case has no merit.

Yours sincerely,

*[e-signed]*  
Matthias JORGENSEN  
Head of Unit