Editorial Comment

Ratification Risks in Mixed Agreements – The Case of CETA

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The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States is a new generation trade agreement in which the parties facilitate deep trade integration. Its corollary is a Strategic Partnership Agreement (SPA), in which the parties vow to cooperate in the furtherance of their joint values, both between them and on the international scene.

While CETA is in the process of ratification, it is already being applied provisionally for 90% of its provisions – excluding notably investment protection, market access for portfolio investment and the investment court system. Thus, a new chapter in trade relations has started, thanks to a great extent to Canada.

For the EU, this agreement was not easy to achieve because it is a composite actor, and this is a mixed agreement. CETA is a prime example of the difficulties of concluding mixed agreements, even after the continued advancement of European integration in recent times. On the one hand, changes in the Lisbon Treaty and the CJEU's case law have allowed the Union to better tackle modern transnational problems, such as climate change and sustainable development. On the other hand, the Union cannot do this without the support of national and regional parliaments, EU citizens and its trade partners. The EU's external policy is legally disaggregated: many areas of foreign policy competence are shared between the EU and the Member States. This situation, combined with the principle of subsidiarity, allows Member States to pursue policies of their own, resulting in inconsistencies in external action of the EU.

The Treaty of Lisbon and the Court of Justice of the EU (CJEU) have somewhat clarified the division of powers. New explicit EU powers have been added (climate change, energy, sustainable development) and the exclusive external competence of the Union has been enlarged (investments, services etc.), allowing the EU in principle to better tackle modern-day transnational problems.

However, decision-making and related procedures follow the internal division of powers of the European Union. This means that, in matters where the implementation of policies still depends on national parliaments, they have a real power

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of decision, which they will exercise before or after the adoption of measures by the Union, witness the Walloon incident after the signature of CETA.

This may put the EU between a rock and a hard place, because the flexibility of the EU's partners (or the lack thereof) also has an impact on the success of the EU's propositions. Canada has accepted the exclusion of the part on Investor/State Dispute Settlement (ISDS) from the provisional application of CETA, but would other States be as accommodating?

1 THE BELGIAN REFERRAL TO THE CJEU CONCERNING ISDS

As part of the solution to the Walloon incident, the Belgian Government had promised to address the Court of Justice of the European Union (CJEU) with a question about the compatibility of the part of CETA on ISDS with the Treaties, including human rights. The Court will deliver its *Opinion 1/17* on this matter in due time. If it goes out negatively, CETA cannot be ratified in its present form.

It is to be expected that the opinion will centre to a large extent on the question of the autonomy of the Union's legal order, just as in *Opinion 2/13* on accession to the European Convention on Human Rights ECHR. However, it can be argued that accession to the ECHR must be distinguished from the CETA case. Why? *Opinion 2/13* was of constitutional value. The main purpose of the agreement was to create new legal remedies in the Union. By contrast, the main purpose of CETA is to establish commercial relationships, new and ambitious, but mainly trade issues. It is possible that in such a context the legislator has a real discretionary power to determine whether or not it is appropriate to conclude an agreement that brings substantial benefits to the EU despite less than perfect provisions on the settlement of disputes. This concept might be acceptable, especially, if measures can be put in place to protect the EUs interests in the international dispute settlement context, and to ensure the necessary cooperation between the EU institutions and the Member States.

In *Opinion 1/17* the Court may also deal for the first time with the question whether it is legal for a bilateral agreement to exclude the direct effect of all or part of its provisions (CETA, Article 30.6). The ancient *Kupferberg* case does not provide an answer to this, since the agreement with Portugal did not exclude the direct effect of its provisions. By excluding direct effect in CETA, not only the possibility of applying the agreement in national courts is affected, but also the power of the CJEU to interpret EU law. And if the investor/state arbitration tribunal interprets EU law and the CJEU is not involved, this could affect the autonomy of the EU legal order. It therefore seems important to ensure, if this has not yet been done, that the arbitral tribunal does not interpret EU law and that its powers are limited.

2 THE PUBLIC PERCEPTION OF TRANSATLANTIC REGULATORY COOPERATION

The new generation of bilateral agreements has been presented by the media and NGOs as yet another interference in national or regional sovereignty – even further away from the local interest than the EU –, especially through the impact of its international 'regulatory cooperation'.

However, as some of the authors in this issue of the Review underline, regulatory cooperation is neither new nor unique to the new generation of economic agreements. It has been practiced for decades in the context of the WTO, in the context of bilateral agreements or even without any formal agreement. For Garcia Bercero *et. al.,* even the chill of the Transatlantic Trade and Investment Partnership TTIP negotiations does not diminish the interest on both sides of the Atlantic in regulatory cooperation.

This suggests that the added value of the new generation agreements as compared to other regulatory cooperation practices resides in the fact that they provide the framework for institutionalizing and improving communications, increasing transparency, and determining regulatory priorities. In these agreements this framework is firmly established and can be changed only with the agreement of all parties involved, including parliaments.

As the authors point out, the focus is on removing barriers to trade that are caused purely by a possible lack of interest of the parties for the impact of the measures on other states. Removing barriers to trade that are caused by policy choices that are justified and in the public interest is not the intention. Areas where there is a political sensitivity of one of the transatlantic partners (as in the case of genetically modified organisms) are better left aside, or treated in full knowledge of all the parliaments concerned. There is certainly a preference here for technical and depoliticized cooperation.

Understanding these issues is essential, and the role of the media is obviously very important, as is the role of academics.

3 OTHER ASPECTS THAT MAY AFFECT RATIFICATION

Apart from *Opinion 1/17* mentioned above, there have been a number of challenges of CETA in the EU, including jurisdictional ones before the French *Conseil d'État* and the German *Bundesverfassungsgericht*. The latter court still has to pronounce on a citizen's claim that CETA was discriminatory and infringed human rights.

Also, an informal European Citizen's initiative that the Commission wrongly refused to register collected more than 3 million negative votes, and this may have an impact on the parliamentary debates in several Member States.

Other referenda may still be organized. It is therefore not entirely excluded that a Member State will withhold ratification.

In the context of Brexit, there are grounds for wondering whether the UK will ratify the agreement, although it is clearly in its economic interest to do so. Not only would Brexit put an end to the application of the agreement in the UK. Also, the transition arrangements being negotiated between the UK and the EU for the period between 29 March 2019 and 31 December 2020 should, in the views of the EU-27, entail the inclusion of the UK in FTAs but without any right of representation in the organs established by such agreements. In the period between now and September the UK should be in the process of deciding whether it wants to ratify CETA under those conditions.

In the case of mixed agreements there is a duty of cooperation between the Member States and the EU, but it does not go as far as denying a real decision-making power of parliaments regarding the ratification of the parts of the agreement that come under shared competence.

4 EFFECT OF NON-RATIFICATION (BEWARE OF BREXIT)

Non-ratification by one or more national parliaments would result in partial application of the agreement, which is not the end of the world because the bulk of CETA remains in the exclusive competence of the Union. Should a Member State fail to ratify CETA, the EU can continue to apply it provisionally for 90% of its content.

On the other hand, if it has concerns, Canada may indicate that it will put a stop to the provisional application of the agreement unless it is renegotiated. It is more likely to do so if the UK fails to ratify the treaty than in any other case. Arguably, UK participation is for Canada an essential element of its approval. The UK may wish to draw maximum profit from the agreement especially in its early stages. Yet, the question of ISDS, may cause the UK to hesitate because, according to CETA's Article 30.9.3 the chapter on investments and ISDS will remain effective for twenty years after the UK will have left the agreement (which would mean, still dealing with the EU for all that time). Should there be such issues, renegotiation to exclude certain clauses and/or to formalize partial participation – if deemed expedient – would allow for the definitive entry into force of all the provisions.