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CETA and Global Governance Law: What Kind of Model Agreement Is It Really in Law?

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- I. Introduction*
- II. Background to the CETA negotiations*
- III. Overview of the CETA Agreement Legal Provisions*
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Abstract: The EU-Canada Economic and Trade Agreement (CETA) provides for the free movement of goods, persons and capital to various degrees and its depth and breadth remain to be seen, as a high profile next generation WTO plus Agreement. CETA may well become a model for future mega regionals, for reasons of its new model and scope. It is quite significant that CETA and the Transatlantic Trade and Investment Partnership (TTIP) are treated as related agreements. TTIP and TPP signified a shift towards the regulatory structures of the so-called mega regionals. The evolution of CETA as a survivor of a new form of second generation free trade agreement achieves all the more prominence for its efforts. As a result, while modest enough in relative terms in contrast with TTIP or CETA it is still an important effort to integrate developed legal orders and construct new configurations of global governance. This account thus considers the nature and substance of CETA. Section I the background to the CETA negotiations, ratification challenges, the aims and benefits of the text, followed by in Section II, detailed consideration of its legal provisions and Conclusions.

6 keywords: Global Governance, Mega regionals, Integration, EU law, International Relations

Introduction

The EU-Canada Economic and Trade Agreement (CETA) has been heralded as the best, most ambitious and the most progressive form of trade agreement by leading European Union actors that the EU has ever concluded, the so-called ‘gold-plated’ trade deal.¹ It is high praise indeed for a legal agreement given the broad range of EU agreements under negotiation or concluded in the post-Lisbon period with, *inter alia*, Singapore, South Korea, Columbia Peru, Georgia, India, Malaysia, Japan, Thailand and Vietnam, covering a diverse range of areas and fields, including controversial ones such as investment. Given that it is such a vast country from the perspective of its territory, but with such a small population and in the shadow of its giant land-bordered neighbour, Canada represents an interesting choice of partner for the EU obtaining its most ambitious agreement yet. The EU is Canada’s second biggest trading partner after the US. CETA has been signed by the Council on 30 October 2016 after a dramatic stand-off with the Wallonia Parliament in Belgium on the inclusion of *inter alia* an

¹ See http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm. See such descriptions in many press releases and EU official briefings on CETA: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1570> (e.g. EU Council president, or from EU Commissioner for Trade).

Investment Court System therein, delaying the signing of the Agreement intended to have been signed off at the EU-Canada summit of 2016.² A Strategic Partnership Agreement between the EU and Canada has also been signed in the same term period as CETA as the basis for deeper ties in areas from justice, sustainability, the rule of law, the environment and human rights.³ It is essentially a WTO plus Agreement, which features provisions on science, education, justice, the environment. It notably contains a standard positive human rights clause and its inclusion in the Canadian agreement, with a country having a tremendous history and record of innovative rights protections and yet constituting a clause demanded by the Member States, demonstrates the delicate act of collaborating with a highly developed partner.

The CETA negotiations have been criticised for their entire evolution in secret, contrary to the stated goals and aims of the Treaty of Lisbon as regards openness and good conduct by the EU as an international actor, albeit by no so many voices.⁴ The late in the day application of transparency to CETA e.g. to declassify the negotiation directives 6 years after the negotiations and after their conclusion maybe regarded somewhat unimpressive to say the least and thereby ‘piggybacking’ upon TTIP’s innovative practices. CETA has of course not been subjected to the same level of transparency as TTIP and yet is treated as an entirely similar legal exercise.⁵ It is thus difficult to discern the true nature of CETA and its evolution.

CETA provides for the free movement of goods, persons and capital to various degrees and its depth and breadth remain to be seen, as a high profile next generation ‘WTO plus’ Agreement. CETA may well become a model for future ‘mega regionals’, for reasons of its new model and scope. CETA is frequently now even mooted as a possible model within the arduous Brexit negotiations. It is quite significant that CETA and the Transatlantic Trade and Investment Partnership (TTIP) are treated as related agreements within the mega regionals.⁶ Since CETA was intended as *its* forerunner post-Trump this comparator may need further calibration.

² <http://data.consilium.europa.eu/doc/document/ST-10972-2016-REV-1/en/pdf> (signature)
<http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf> (provisional application)
<http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> (joint interpretative instrument). See L. Ankersmit, *CETA Investment Court to be investigated by the ECJ*, in *European Law Blog*, 31 October 2016, www.europeanlawblog.eu in <http://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj/>

³ Strategic Partnership Agreement between the EU and Canada (Council doc. 5368/2/2016) (5 August 2016) <http://data.consilium.europa.eu/doc/document/ST-5368-2016-REV-2/en/pdf>. The EU and Canada have operated under a 1976 Framework Agreement for Commercial and Economic Cooperation and many declarations and action plans e.g. 1996 Joint Action Plan and the 1998 EU-Canada Trade Initiative and sectoral bilateral agreements in science, an agreement on mutual recognition, veterinary, wine, air safety and air transport. The legal effect of CETA was to terminate in particular the 1998 Agreement on Mutual Recognition.

⁴ Ernst-Ulrich Petersmann ‘*Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*’ *J Int Economic Law* (2015) p. 579.

⁵ Petersmann, *ibid*; Gallo, Daniele and Nicola, Fernanda, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication* (June 8, 2016). *Fordham International Law Journal*, Forthcoming; American University, WCL Research Paper No. 2016-23; Fahey, E. & Bartl, M. *A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*. In: E. Fahey & D. Curtin (Eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders*. (pp. 210-234). Cambridge: Cambridge University Press, 2014

⁶ E Fahey, ‘*On The Benefits Of The TTIP Negotiations For The EU Legal Order: A Legal Perspective*’ *Legal Issues of Economic Integration*, 2016, p. 327.

One of the most challenging questions of the post-Brexit and new Trump era are to understand what its consequences are for global governance. TTIP and TPP signified a shift towards an era of ‘mega regionals’, an era where its subjects and objects became more challenging.⁷ They signified highly specific forms of global governance across regions and are now perhaps already history at the outset of the Trump presidency. A world of liberalised cooperation through transnational regulatory integration structures is thus much further from sight. Certain parts of the world e.g. African countries may be leaving ICC jurisdiction and the UK may well leave the ECHR but this is not yet the full picture of the new era of global governance. In particular, the evolution of CETA as a survivor of a new form of second generation free trade agreement achieves all the more prominence for its efforts. As a result, while modest in contrast with TTIP, it is still an important effort to integrate developed legal orders and construct new configurations of global governance. CETA also stands out within the EU’s Global Strategy launched in June 2016, where it is labelled as a desirable form of international regulatory cooperation, similar to TTIP.⁸

This account thus considers the nature and substance of CETA. Section I the background to the CETA negotiations, ratification challenges, the aims and benefits of the text, followed by in Section II, detailed consideration of its legal provisions and Conclusions.

I.1. Background to the CETA Negotiations

The CETA Negotiations began in 2006 initially in 12 areas, before the Treaty of Lisbon and after many pivots in EU trade policy, reputedly after Canada was unhappy to be left off the list in 2006 for new preferential trade agreements. The French Presidency in 2007 was also seen as significant to push along the negotiations.⁹ The agreement now reached with Canada was predicated on the inclusion of provincial level purchasing has been described as a turning point, without which the deal would not have been done and also coloured the EU’s approach to the negotiation of the agreement.¹⁰ It now appears to offer billions of euros of revenue on procurement for the EU and consensus appears to emerge as to the role of the EU as a hegemonic power in the realm of trade liberalisation, showing its dominance over the Canadians negotiators. The CETA negotiations were completed in 2014 and a legally reviewed or ‘scrubbed’ text was published in 2016.

⁷ See E Benvenisti, ‘*Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*’ *GlobalTrust Working Paper Series* 08/2015; See J Larik, *Critiquing the Transatlantic Trade and Investment Partnership (TTIP): Systemic Consequences for Global Governance and the Rule of Law, Legal Issues of Economic Integration*, 2016, p. 423.

⁸ Shared vision, Common action: A Stronger Europe: A Global Strategy for the European Union’s Foreign and Security Policy (June 2016), <http://europa.eu/globalstrategy/en/global-strategy-foreign-and-security-policy-european-union>, p. 41.

⁹ Woolcock, Stephen (2011) *European Union trade policy: the Canada – EU closer economic relations and trade agreement (CETA) towards a new generation of FTAs?* In: Huebner, Kurt, (ed.) *Europe, Canada and the Comprehensive Economic Partnership*. Routledge studies in governance and change in the global era. Routledge, London, UK, 21-40.

¹⁰ The demand by the EU that provisional representatives be included in the Canadian negotiation team was seen as a surprise. The provinces are not obliged since the 1937 Labour Conventions decision to implement accords concluded by the federal government in provincial fields of jurisdiction.

I.2. Ratification challenges

CETA became mired in challenges since the move in Summer 2016 to sign the Agreement on the EU side as a mixed not an exclusive agreement, allowing a vast range of EU Parliaments the opportunity to vote and possibly upset the long negotiated deal (e.g. UK House of Lords but most audibly in Wallonia). The European Commission has been reportedly ‘waiting on the side-lines’ for the outcome of Opinion 2/15 EU- Singapore Agreement EU Free Trade Agreement with Singapore (EUSFTA) as to whether the Union has exclusive competence to conclude EUSFTA alone before the CJEU on this specific point.¹¹ The Commission nonetheless proposed to the Council to sign CETA as a mixed agreement in 2016 after considerable pressures from the Council and Member States. The European Commission has won several cases before the Court of Justice in recent times post-Lisbon on the questions of exclusive competence.¹² Member States have argued that certain forms of investment under CETA do not fall within exclusive competence because it is not mentioned by Article 207 TFEU.¹³ Additionally, a number of national parliaments stand opposed to the agreement, particularly as to the investment chapters and a longstanding row between Canada and Romania and Bulgaria concerning visa free access which has been denied to them alone unlike all other EU Member States, causing them to allege discriminatory treatment.¹⁴ In the end, concessions made to Wallonia in the form of the interpretative instruments have sufficiently appeased the Wallonian Parliament subject to an agreement to send controversial provisions to the Court of Justice which now appears to be faltering, discussed below in greater detail. Advocate General Sharpston handed down her Opinion on EUSFTA on December 21 2016 finding that the EU-Singapore Agreement could only be concluded by the EU and the Member States acting jointly, in a broad reading of shared competence.¹⁵ Much hangs now on the Court’s view thereof.

II.1. Overview of the CETA Agreement Legal provisions

Ch. 13 provides for a chapter on financial services including the cross-border supply of financial services, Ch. 14 on International Maritime Transport Services, Ch. 15 on Telecommunications, a very short chapter on electronic commerce in Ch. 16, Ch. 17 on Competition Policy limited to the Agreement between the EC and Canada from 1999 on the application of their competition law. Ch. 19 contains a lengthy and detailed text on government procurement, regarded as a considerable new market for the EU, Ch. 20 on Intellectual Property. CETA is defined in its definitions chapter as a free trade area which is compatible with GATT Article XXIV (Article 1.4). A limited set of provisions on e-

¹¹ Kleimann, David and Kübek, Gesa, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15* (November 2016). Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2016/58
http://cadmus.eui.eu/bitstream/handle/1814/43948/RSCAS_2016_58.pdf?sequence=1

¹² E Fahey *The Global Reach of EU Law* Abingdon: Routledge, 2016, Ch 2.

¹³ Many member states argue that the broad scope of the new FTAS (including investment, professional qualifications, intellectual property, labour rights, environmental protections etc) requires their ratification as a mixed agreement.

¹⁴ ‘Visa dispute to haunt EU-Canada trade pact’ EUObserver.com (24 August 2016).

¹⁵ Opinion Procedure 2/15 initiated following a request made by the European Commission, Court of Justice, opinion of Advocate General Sharpston (21 December 2016) paras 570 onwards (Conclusion). See <http://eulawanalysis.blogspot.co.uk/2016/12/the-eus-future-trade-policy-starts-to.html>.

commerce looks especially vulnerable after the Advocate General struck down the EU-Canada Passenger Name Record Agreement in 2016 for reason of its inadequacy data protection and provisions as to onwards processing with respect to third parties, even with Canada.¹⁶

II. 2. Regulatory Cooperation

The EU is perceived to have pushed regulatory cooperation to the limit within CETA in its joint committee procedures albeit that it is still within the confines of an Free Trade Agreement. The CETA Agreement is arguably first and foremost heavily predicated upon elements of experimentalist governance so as to reduce the trade effects of differences in regulatory policies. As Hoekman states, the main area where CETA will make a contribution is as a learning or discovery device whereby specific policy areas can be identified for further multi-lateral cooperation.¹⁷ Effective regulatory cooperation requires going beyond legally binding treaties between states and towards experimentalist governance. The final text must be said especially in the area of regulatory cooperation to be heavily guided by voluntary cooperation (e.g. 21.2.6) and further possible cooperation (21.7) and positive affirmations for each other's right to regulate. It remains to be seen whether such principles actually guide the final EU text. Nevertheless, the objectives of the cooperation are far-reaching in 21.3.b, including to improve transparency and predictability in the development of regulations, enhance the efficacy of regulations, identify alternative instruments, avoid unnecessarily regulatory differences and improve regulatory implementation. The EU has been highly explicit- even triumphalist- that all Canadian imports will have to satisfy EU rules and regulations on technical rules, product safety, food and safety, health and safety, GMOs and this puts the future of its regulatory cooperation chapter (in Ch 21) into sharp perspective.

The Agreement makes provision for regulatory cooperation in Ch. 21 of the Agreement and applies laterally to Chs. 4 (Technical Barriers to Trade), 5 (Sanitary and Phytosanitary Measures), 9 Cross Border Trade in Services, 22 (Trade and Sustainable Development) 23 (trade and labour) and 24 (trade and environment). Ch. 28 provides for exceptions (e.g. taxation and national security). CETA is perceived to be a difficult model for UK firms seeking to sell financial services to the EU, by not precluding regulatory and licencing requirement e.g. as for so-called 'passporting' rights. Article 21.3 identifies a broad range of regulatory cooperation objectives of a particular high standard, including as to the protection of human life, health and safety. Article 21.4 on regulatory cooperation activities is couched heavily in the language of experimentalist learning and provides for a relationship where the parties will discuss regulatory reform, identify lessons learned, explore alternative approaches and exchange experiences. In particular, Article 21.4 makes provision that the parties would compare methods and assumptions. Article 21.6 provides for a regulatory cooperation forum to be co-chaired by the senior representatives of the Canadian Government and a senior representative of the European Commission where the parties discuss regulatory issues and generally encourage bilateral cooperation (21.6.2(d)). In particular CETA envisages further

¹⁶ See opinion 1/15 Advocate General Mengozzi (8 September 2015)

¹⁷ See Hoekman, above.

voluntary cooperation in non-food product safety areas. The RCF is only obligated to meet at least annually.

21.4.h provides for a loose form of cooperation as to the development, adoption, implementation and maintenance of international standards, guides and recommendations. This differs significantly from proposed texts within TTIP as to international cooperation.¹⁸ Sophisticated principles as to methodologies and research agendas are also provided for within 21.4. One might question whether the engagement with stakeholders appears more modest than initially predicted. The nature of the expectations that the text creates is a mish-mash of power being devolved to the regulatory cooperation forum and Joint Committee without necessarily water-tight parameters. One issue as to the regulatory cooperation and joint committee powers is the question of sequencing and first mover obligations. One might remark overall that the provisions are considerably less sophisticated than the latest draft of the EU's proposals for Regulation Cooperation after 15 rounds of TTIP negotiations, as released in 2016.

III. 3. Absence of direct effect

The CETA text denies private party enforcement in domestic courts, and in particular direct effect, in common with an EU approach to this effect post Lisbon. It aligns EU law more closely with NAFTA as a result.¹⁹ Article 30.6 thus provides that:

‘ nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties’

Some have criticised the CETA text for going significantly beyond other FTAs e.g. EU-Singapore.²⁰ Moreover, the European Commission has never publicly explained this shift which appears legally inconsistent with the provisions of the EU treaties as to a diverse of provisions as to rights, EU action in the world. This state of affairs creates a highly undesirable enforcement gap and as a result, renders the place of judicial review and judicial redress all the more important. It thus puts the desirability of investment protection redress provisions and judicial enforcement of CETA centre-stage because of its capacity to radically alter the place of private parties within the EU legal order and their ability to invoke public international law before domestic courts.²¹

¹⁸ A Alemanno ‘*The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*’ *J Int Economic Law*, 2015, p. 625.

¹⁹ Semertzi, “*The Preclusion of direct effect in the recently concluded EU Free Trade Agreements*” (2014) *CML Rev.* p. 1125.

²⁰ See Petersmann, above.

²¹ M Bronckers ‘*Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?: An EU View on Bilateral Trade Agreements*’ *J Int Economic Law*; Joseph Weiler, ‘*European Hypocrisy: TTIP and ISDS*’, www.ejiltalk.org (21 January 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>. See also Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, (2015) *Journal of International Economic Law*.

II. 4. Investment Protection and Dispute Settlement

In February 2016, the European Commission agreed with the Canadian Government to amend the controversial investment protection clause so as to take on board the EU's new approach to investment and dispute settlement, making provision for a permanent institutionalised dispute settlement tribunal. The CETA and TTIP texts specify far more precisely the normative content of the obligations on fair and equitable treatment. By contrast, the comparable TPP provision is highly indeterminate.²² Although further comment is outside the scope of this, its inclusion within CETA was trialled as a forerunner to the TTIP negotiations and its acceptance by Canada as a highly developed was intended as a means to legitimise its inclusion. In order to appease the Wallonians and disquiet in certain Member States, the interpretative instrument agreed by the Member States in late 2016 is of interest, as are post-signing developments. For example, the European Parliament rejected a request by 89 MEPs to refer the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to the European Court of Justice (ECJ) for an opinion in November 2016. The European Parliament's Legal Service found no contradiction between CETA's investment chapter and the EU Treaties when it assessed this issue in June this year.²³ Nevertheless, its inclusion in CETA in whatever format epitomises the challenges of integrating highly developed legal orders and opening up the EU to accusations of privileging private actors.²⁴ An even greater challenge is whether the concerns of the CJEU in its landmark opinion on EU accession to the ECHR, Opinion 2/13 are now reflected in the 'legally scrubbed' version of the CETA text and its additional interpretative provisions as regards ICS.²⁵

5. The Exceptions

As de Mestral states, CETA is in all probability the most lengthy and complex free trade agreement ever drafted amongst the new generation mega regionals, grounded in WTO law and following NAFTA. A vast range of key for example agricultural products are excluded from the scope of the agreement whilst others will only receive limited duty free access.

²² Hoekman, above.

²³ https://polcms.secure.europarl.europa.eu/cmsdata/upload/49daf369-5480-40d7-aa8d-df745c4ff98c/SJ-0259-16_legal_opinion.pdf

²⁴ See Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?', LSE Paper (17 March 2014): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188; Ingolf Pernice, 'International Investment Protection Agreements and EU Law', in *Studies on Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements commissioned by the European Parliament's Directorate-General for External Policies* in September 2014, at pp. 137–138 (EP Doc. Expo/B/INTA/2014/08-09-10): [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU\(2014\)534979\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979(ANN01)_EN.pdf).

²⁵ See <http://rf.llb.be/file/6f/5811e50fcd70fdb1a589e6f.pdf> (the so-called Wallonia deal); Opinion 2/13 Opinion of the Court (Full Court) of 18 December 2014 ECLI:EU:C:2014:2454. See Lenk, Hannes; (2016): An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada; European Papers (www.europeanpapers.eu). <https://doi.org/10.15166/2499-8249/64>; J Hepburn 'CETA's New Domestic Law Clause' www.ejiltalk.org (17 March 2016) <http://www.ejiltalk.org/cetas-new-domestic-law-clause/>. Latest CETA legal text at time of writing: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

However, its content is considerably expanded e.g. with provisions on sustainable development, environmental and labour standards and e commerce. There are a considerable range of exceptions in the text- described as unprecedented, as to taxation, national security, cultural industries and the environment. There are exceptions to general principles, exceptions to an exception, declarations of application, limitations, clarifications, caveats, carve outs, exclusions, grandfathering.²⁶ As a result, the objectives of the provisions appear to be to reach a very high level of bilateral cooperation whilst also preserving regulatory space, using the rigid model of a free trade area rather than a customs union.

V. Conclusions: Is CETA the best model for global governance?

CETA in its final text has done much to place high levels of health and safety, the environment and sustainability at the heart of the Agreement and to repeatedly emphasise the need for Canadian products to comply with EU law and governance standards. The place of civil society also within the text may well operate to mitigate concerns about the intentions of the text. The disenfranchisement of citizens is a common complaint as to the CETA text as much as TTIP and EU law, where market citizens, investors, companies and economic actors receive a privileged place within the text. Public opposition to CETA has piggybacked upon TTIP opposition. In this regards, some unfairness is palpable in so far as the EU has placed nearly of its position papers in negotiation online for TTIP, which have a weak down load rate in contrast to the millions signing up to oppose TTIP. In the case of CETA, these transparency practices have not been adopted and yet the same opposition emerges.²⁷ CETA surely represents a looser more modest form of new-generation agreement, which aspires to high ideals albeit with a lesser geographical span envisaged and with much modesty in how it approaches integration between legal orders. As a result, perhaps it is not necessarily a replicable model of best practice integration between legal orders. Nevertheless, it may yet contain important triggers for further developments in next generation integration between legal orders and prove to be quite a significant starting point, as a sort of phoenix amongst the wreckage of the ‘mega regionals’.

²⁶Armand de Mestral ‘When Does the Exception Become the Rule? Conserving Regulatory Space under CETA’ *J Int Economic Law* (2015) p. 641, 647.

²⁷ See Petersmann, above, 597