UCL
Université catholique de Louvain

Faculté de droit et de criminologie
Institut pour la recherche interdisciplinaire en sciences juridiques
Centre de recherche interdisciplinaire "Droit, entreprise et société" - Jean Renauld
CRIDES

Innovating at the International Level - CETA, BREXIT, NAFTA
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Provisional application of CETA and EU competence over foreign investment

H. CULOT

CRIDES
Centre de recherche interdisciplinaire
Droit, Entreprise et Société

Content of CETA

1. General definitions and initial provisions
2. National treatment and market access for goods
3. Trade remedies
4. Technical barriers to trade
5. Sanitary and phytosanitary measures
6. Customs and trade facilitation
7. Subsidies
8. **Investment**
9. Cross-border trade in services
10. Temporary entry and stay of natural persons for business purposes
11. Mutual recognition of professional qualifications
12. Domestic regulation
13. Financial services
14. International maritime transport services
15. Telecommunications
16. Electronic commerce
17. Competition policy
18. State enterprises, monopolies, and enterprises granted special rights or privileges
19. Government procurement
20. Intellectual property
21. Regulatory cooperation
22. Trade and sustainable development
23. Trade and labour
24. Trade and environment
25. Bilateral dialogues and cooperation
26. Administrative and institutional provisions
27. Transparency
28. Exceptions
29. Dispute settlement
30. Final provisions

EU competence on CCP TFEU

- **Art. 3 TFEU**

"1. The Union shall have exclusive competence in the following areas: [...]

(e) **common commercial policy**.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, **or in so far as its conclusion may affect common rules** or alter their scope."

- **Art. 207 TFEU**

"1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the **conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment,** the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the **principles and objectives** of the Union's external action."

EU competence on CCP
Centre of gravity (legal basis)

"According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest **on objective factors** amenable to judicial review, which include the **aim and content** of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as **the main or predominant purpose or component**, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases." (C-377/12, *Commission v. Council*, EU:C:2014:1903 (2014), para. 34)

EU competence on CCP Opinion 2/15

- Relates to competence and not to compatibility
- General criterium for CCP: ”an EU act falls within [the CCP] if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it” (para 36)
- market access: part of CCP (exclusive competence), except for transport services (exclusive competence on the basis of 3(2))
- investment protection : FDI is part of CCP (exclusive competence), non-direct investment is not
- intellectual property protection : part of CCP (exclusive competence)
- Competition: part of CCP (exclusive competence)
- Sustainable development: part of CCP (exclusive competence) – reference to “principles and objectives” of the EU’s external action
- Institutional and transparency provisions: ancillary to the substantive provisions
- ISDS: “removes disputes [involving MS] from the jurisdiction of the courts of the Member States” -> not ancillary -> shared competence (para 292)

Focus on investment Direct vs non-direct

"*direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain **lasting and direct links** between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to **participate effectively in the management of that company or in its control***" (Opinion 2/15, para 80, referring to C-446/04, *Test Claimants*, para 181–182)

Focus on investment Opinion 2/15

- FDI as part of CCP:
  - see art. 207 TFEU
  - Control and management of company has direct and immediate effects on trade (para 84)
  - Legal certainty of investors promotes and facilitates trade (para 94)
  - Derogations (public order and safety, etc.) are not commitments of the Member States (para 101)
- Non-direct investment
  - *Expressio unius*: « 83. The use [...] of the words 'foreign direct investment' in Article 207(1) TFEU is an unequivocal expression of [the] intention not to include other foreign investment in the common commercial policy."
  - Affects the movement of capital (art. 63 TFEU), but article 3.2 (ERTA case law) supposes that the affected rules are secondary law (para 230)
  - Hierarchy of norms: international agreements concluded by the EU cannot « affect » primary law (para 235)
- Termination of previous BITs:
  - competence based on *International Fruit* (EU takes the place of its member states) (para 248)
  - This competence is exclusive

CETA applies to non-direct investment

Art. 8.1: "**investment** means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stocks and other forms of equity participation in an enterprise;

(c) bonds, debentures and other debt instruments of an enterprise; […]"

CETA contains an ISDS

Art. 8.18: “1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation […]”

Provisional application of CETA

Art. 30.7 (3) CETA

(a) **The Parties may provisionally apply this Agreement** […].

(b) If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply and shall offer to enter into consultations promptly. Within 30 days of the notification, the other Party may either object, in which case this Agreement shall not be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall not be provisionally applied.

The provisions that are not subject to a notification by a Party shall be provisionally applied by that Party from the first day of the month following the later notification, or on such other date as the Parties may agree, provided the Parties have exchanged notifications under subparagraph (a).

(c) A Party may terminate the provisional application of this Agreement by written notice to the other Party […].

Art. 218(5) TFEU

The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

Provisional application of CETA

(a) only the following provisions of Chapter Eight of the Agreement (Investment) shall be provisionally applied, and **only in so far as foreign direct investment is concerned**:
– Articles 8.1 to 8.8;
– Article 8.13;
– Article 8.15, with the exception of paragraph 3 thereof; and
– Article 8.16;

(b) the following provisions of Chapter Thirteen of the Agreement (Financial Services) shall not be provisionally applied in so far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and States:
– Paragraphs 3 and 4 of Article 13.2;
– Article 13.3 and Article 13.4;
– Article 13.9; and
– Article 13.21;

-> not most of "section D - investment protection"
-> not ISDS (section F)

Provisional application of CETA

(c) the following provisions of the Agreement shall not be provisionally applied:

– Article 20.12 [incrimination of camcording];

– Article 27.3 and Article 27.4, to the extent that those Articles apply to administrative proceedings, review and appeal at Member State level;

– Paragraph 7 of Article 28.7; [ISDS related to a tax measure]

(d) the provisional application of Chapters 22, 23 and 24 of the Agreement shall respect the allocation of competences between the Union and the Member States.

(COUNCIL DECISION (EU) on the provisional application of the Comprehensive Economic and Trade Agreement (CETA))

Belgium’s request for opinion of the ECJ

Opinion 1/17 (request of 7 Sept. 2017): **compatibility** of Chap. 8, section F (ISDS) with the treaties, including fundamental rights

- Exclusive competence of the ECJ to interpret EU law
- Principle of equality and effectiveness (*effet utile*) of EU law
- Right of access to court
- Right to independent and impartial justice
  - Remuneration of the tribunal’s members
  - Appointment and revocation of the tribunal’s members
  - International Bar Association Guidelines on Conflicts of Interest in International Arbitration
  - Tribunal members’ other professional activities linked to investment disputes

Problems

- Should the goal be the conclusion of more trade agreements as the Commission likes them?
- Trade agreements can be used by the EU (Commission) to extend its powers
- Majority (of MS) vs unanimity (of MS)
- Procedure and timing
- Efficient and coherent representation of European commercial interests
- Legitimacy

Solutions

- Revise EU treaties
- Revise case-law
- Choose the safe side
- Divide trade agreements
  - Ex ante
  - Ex post

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