ARTICLE: THE OBSTACLES TO CONCLUDING CETA AND LESSONS FOR THE FUTURE

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1. Introduction

The EU-Canada Comprehensive Economic and Trade Agreement ("CETA") is claimed to set the new "global standard" for future Free Trade Agreements ("FTAs") to be negotiated by the European Union ("EU", the "Union") and indeed the rest of the world.[1] It has however become controversial in the EU and it is by no means clear that it will be finally ratified.

This article will examine how this situation has arisen in order to draw some lessons as to how the EU could be more successful with future FTAs.

2. Historical Background

Canada and the EU have long been leading proponents of free trade. Each has its own extensive network of FTAs and was an important participant in the creation of the WTO in 1994. Both Canada and the EU were believers in and supporters of the multilateral approach to trade liberalisation,[2] which is more transparent and should be more efficient than a tangled network of interlocking FTAs between all WTO Members. They were therefore keen to prioritise future trade liberalisation through the WTO and, after the launch of the Doha Development Agenda ("DDA") in 2001, refrained from initiating further negotiations for bilateral FTAs. In order not to distract from – or undermine – the ongoing DDA negotiations in the WTO, Canada and the EU instead pursued negotiations on WTO-plus issues and sought to achieve a "Trade and Investment Enhancement Agreement".[3]

The DDA, however, failed to make progress despite many attempts to re-energise the negotiations, and other countries, notably the United States, started to seize the initiative in negotiating bilateral FTAs, thereby creating trade advantages for themselves. Eventually, Canada and the EU reverted to the negotiation of bilateral FTAs and in 2007, commissioned a joint study[4] on the costs and benefits of a closer economic partnership, which included a study of the benefits of eliminating tariffs between them.

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[1] http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm.

[2] Article 2 of the WTO Agreement states that the WTO is to "constitute the common institutional framework for the conduct of trade relations among its Members".

[3] Announced on 19 May 2005 - http://europa.eu/rapid/press-release_IP-05-578_en.htm. There was a long history of technical cooperation and mutual recognition agreements between the EU and Canada including a voluntary Framework on Regulatory Cooperation and Convergence concluded in in 2004.

[4] http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf .

This led to the launching of formal negotiations in 2009 for what was said to be an "Economic Integration Agreement". The negotiating guidelines stated that "the Doha Round remains the priority of the EU" provided that its objective should be "progressively and reciprocally liberalising substantially all trade in goods and services and establishment, in full compliance with WTO rules".[5] The guidelines were revised and broadened in 2011 to cover investment protection – a new EU competence inserted into Article 207 of the Treaty on the Functioning of the European Union ("TFEU") by the Lisbon Treaty.[6]

These negotiations were declared to be completed in “early 2014” and indeed a text was published on the occasion of the EU-Canada summit on 26 September of that year.[7]

Around this time, there was a dramatic change of public attitudes towards FTAs in the EU. The negotiations with Canada had been launched and indeed extended without controversy. Civil Society was however becoming concerned at the prospect of the Transatlantic Trade and Investment Partnership with the United States ("TTIP"). These negotiations had been launched in 2013[8] and, although the precise intended content was not known (since negotiating documents were considered confidential), opposition arose in the ranks of civil society.[9] The secrecy of the negotiating mandate and the negotiations themselves fuelled the suspicion. There was even a citizen's initiative launched under Article 11 of the Treaty on European Union ("TEU") to "Stop TTIP" (which the Commission refused to register).[10] When it was realised that CETA was already far advanced and could be considered a model for TTIP, opposition started to grow to CETA itself.

Much of this opposition focused on (but was by no means limited to) the Investor State Dispute Settlement (“ISDS”) provisions. It was feared by civil society that this would allow wealthy international corporations to contest the decisions and regulatory measures of governments; in particular those designed to protect the environment and consumers. It was argued that the arbitrators appointed to adjudicate the complaints of investors under other agreements had adopted exceptionally wide interpretations of concepts such as "fair and equitable treatment" and "constructive expropriation" and awarded generous compensation.[11]

In an attempt to deflect this criticism, the Commission sought to revise the ISDS provisions and replace them with something more resembling a court. The history of this transformation and the characteristics of the new Investment Court System ("ICS") are described in an earlier article in this journal.[12] The problems that remain are discussed in Section 5.3 below.

The result was a long delay in the "legal revision" or finalisation of the text, which was published in English only on 29 February 2016.

3. A Summary of CETA

The final text of CETA comprises more than 1500 pages. [13]

CETA is said to be the most ambitious and advanced FTA and to be a model for the future. It is said to be a "new generation" trade agreement.

It does all the things that "first generation" FTAs do, including:

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[5] The EU considered negotiating guidelines to be confidential at this time but the Commission recommendation was subsequently partially declassified (in 2015) and can be found at http://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf.

[6] The subsequently partially declassified recommendation can be found at http://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf.

[7] See the Commission’s publication “CETA – Summary of the final negotiating results” at http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf. The published text of CETA is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[8] See announcement at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137485.pdf

[9] See, e.g. http://www.waronwant.org/what-ceta

[10] See: ec.europa.eu/citizens-initiative/public/documents/2552. This refusal subsequently appealed to the General Court and then to the Court of Justice, so far without success (Cases T-754/14 and C 400/16 P).

[11] See, e.g. OECD (2004) "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435; United Nations Conference on Trade and Development, (2012). Fair and Equitable Treatment. New York and Geneva: United Nations.

[12] Ian Laird and Flip Petillion, CETA, ISDS, and the Belgian Veto – a warning of failure for future trade agreements with the EU? Global Trade and Customs Journal, Volume 12 (2017)' pp […] At https://www.crowell.com/NewsEvents/AlertsNewsletters/all/PODCAST-CETA-ISDS-and-the-Belgian-Veto-A-Warning-of-Failure-for-Future-Trade-Agreements-with-the-EU

[13] http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

- The immediate or phased abolition of tariffs (except for certain sensitive agricultural products on both sides.)
- The prohibition of discrimination and the requirement that non-tariff barriers be justified and proportionate, and that phytosanitary measures be scientifically justified (confirming and building on similar WTO provisions).
- Customs cooperation and trade facilitation, including provisions on rules of origin.
- Obligations of fairness and transparency in the application of competition policy and obligations to ensure non-discrimination in relation to State enterprises, monopolies and enterprises granted special rights or privileges.
- The opening up public procurement even at provincial level (going beyond the WTO Agreement on Government Procurement).
- Liberalisation of trade in services (although this is mostly a confirmation of GATS obligations) and some commitments not to introduce new restrictions (standstill).
- Obligations to ensure enforcement of intellectual property rights.
- State to State dispute settlement, through consultations and binding arbitration.

However CETA is supposed to go further (and that is why it is called a "new generation" trade agreement). It seeks to avoid even justified barriers to trade arising in the future by promoting regulatory cooperation and regulatory convergence. This is to be done through work on the harmonisation of technical regulations and standards, the development of joint technical regulations and standards and the mutual recognition of technical regulations standards and qualifications.

CETA also goes further than most FTAs by incorporating provisions normally found in bilateral investment treaties ("BITs").

Finally CETA completes its progressive image by including provisions trade and sustainable development,[14] trade and labour[15] and trade and environment.[16] However these provisions mostly refer to obligations in other agreements and are subject to "dedicated" dispute settlement systems which exclude the general dispute settlement provision[17] thus rendering the provisions unenforceable by retaliation through the use of trade measures which are available for disputes where normal State-to-State dispute resolution is applicable.[18] The main value added here is the transparency and dialogue provided for through the creation of committees.

4. The Opposition to CETA

The story of how the signing of CETA was nearly blocked by tiny Wallonia is well-known.[19] Less well-known are some of the reasons.

The Commission proposal for a Council decision on the signature and provisional application of CETA sets out its view that conclusion of the agreement is a matter of exclusive EU competence.[20] In view of the fact however that the Member States did not share this view and wanted the agreement to be "mixed" and the fact that the issue of EU competence to sign a similar agreement with Singapore was before the Court of Justice, the Commission proposal envisaged conclusion as a mixed agreement.[21]

As a result, Member States submitted the agreement to their parliaments and most parliaments did as they were told and approved the agreement. However, since Belgium had delegated many matters, including trade, to

[14] Chapter 22 of CETA.
[15] Chapter 23 of CETA.
[16] Chapter 24 of CETA.
[17] See Articles 23.11.1 and 24.16.1 of CETA.
[18] As in the WTO, enforcement of dispute settlement findings that have not been complied with within a reasonable period of time is by means of suspension of obligations under CETA (Article 29.14 CETA). This will typically be re-imposition of duties removed by CETA.
[19] See, e.g. http://www.bbc.co.uk/news/world-europe-37749236.
[20] See subsection 2 of the proposal at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-470-EN-F1-1.PDF.
[21] According to Ms Malmström, "From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature." (http://europa.eu/rapid/press-release_IP-16-2371_en.htm).

regional parliaments, Belgium could only sign the agreement with the agreement of those regional parliaments. Wallonia took the matter seriously and held extensive hearings on the merits of the whole agreement (not just the part that arguably came under national or even its regional competence). While there were objections to some of the trade liberalisation measures, its most serious objection was to the fact that it could be made liable to pay compensation to private companies as a result of its future legislative actions, for example in the fields of the environment and consumer protection.

The matter was resolved with a few fudges, allowing the agreement to be signed and provisionally applied. First there were non-binding interpretative declarations on various issues, including a reaffirmation of the "right to regulate".[22] But most importantly there was an undertaking that Belgium would request the opinion of the European Court of Justice on whether the provisions on ISDS were compatible with the Treaty (see below). Accordingly, ratification of CETA by the EU is now dependent on the European Court of Justice holding the ISDS provisions compatible with the Treaties.

To justify the opposition, the Minister-President of Wallonia, Paul Magnette, the face behind the opposition of Wallonia and the man who became famous for making Canada weep, along with others signed the "Namur Declaration"[23] setting out the rationale for their stance. The Namur Declaration details objections both to the process by which trade agreements are negotiated (secretively without the involvement of civil society) and to the substance (on the one hand, it states these agreements impinge on the powers of democratic institutions and on the other they give precedence to trade and pay too little attention to sustainable development, environmental protection, the fight against climate change, workers' rights and tax evasion). In response, 60 academics signed a counter-declaration "Trading Together"[24] insisting on the need for the established procedures in the Union Treaties to be applied.

5. Some of the Problems with CETA

The main purpose of this article is to discuss three inter-related problems with CETA and suggest ways in which problems might be avoided in future.

5.1 The issue of competence

Non-anarchist societies all have rules about how decisions are taken. The EU is no exception. When concluding the Union's founding Treaties (the current versions being the TEU and the TFEU resulting from the Treaty of Lisbon), the Member States provided that "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" shall be an exclusive Union competence (Article 207 in conjunction with Article 3(1) TFEU).

Article 3(2) TFEU also provides that:

> 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.

Needless to say the Treaties and these provisions were approved by all Member States in accordance with their respective constitutions.

Article 207 was specifically designed so as to ensure that all modern trade agreements (including provisions on services and investment) are concluded by the Union alone. Article 3(2) TFEU allows such Union-only agreements to include provisions on other matters where the EU has already established common rules.

This should, and indeed does, provide ample room for the negotiation of trade agreements by the Union without the need for ratification by every single Member State. There are good reasons for this. Trade agreements between modern economies are difficult to negotiate. A negotiation with 29 or more governments on one side and one third country on the other would disadvantage the Union enormously by allowing the other party to divide and rule.

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[22] http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf.
[23] http://declarationdenamur.eu/en/index.php/namur-declaration/.
[24] https://www.trading-together-declaration.org/.

Member State governments have however always found it difficult to accept that this aspect of international relations is taken away from them. Indeed, Member States have often pushed for other issues to be included in trade agreements precisely so as to ensure "mixity".[25]

The result is the endless discussions about competence and now also the phenomenon of a single regional parliament blocking the signature of an agreement that has taken 7 years to negotiate.

It may be hoped that the failure, or near failure, of CETA will demonstrate the need to stick to the rules laid down in the Treaty. This will require discipline on the part of the Member States but also for the Commission to refrain from being over ambitious in its negotiations. Agreements that are limited to issues that are indisputably of Union competence will not only be easier to negotiate – they will also be concluded more rapidly and efficiently.

As Advocate General Sharpston has pointed out[26] in her opinion to the Court in connection with the request for an opinion of the Court on the issue of competence to conclude the EU-Singapore FTA, there is no reason in principle why agreements should not be separated into exclusive EU and mixed components so as to avoid delay in conclusion. The main reason why this is not done is not because the other party would oppose. One might expect that the other party would welcome more rapid conclusion and greater certainty as to responsibilities. The real problem is, as noted above, that the EU Member States do not want to allow the Union to exercise alone not only its non-exclusive competence but even if its exclusive competence.

5.2 Regulatory convergence

Tariffs in the EU and Canada are low (4.8% on average for the EU and 6.8% on average for Canada).[27] Therefore, it is argued, tariff elimination by itself is not worthwhile (especially since complete elimination of tariffs including on certain sensitive agricultural products would be painful).

The WTO already prohibits discriminatory and unjustified non-tariff barriers - and even in the case of the TBT and SPS Agreements non-discriminatory but unjustified ones. To go further in trade liberalisation and facilitating it is argued that action needs to be taken to avoid non-tariff barriers from arising in the first place.

The idea is therefore to facilitate trade by working towards harmonisation of domestic (and especially technical) regulations – that is, to aim for regulatory convergence.

It is also reflected in the institutional structure of the agreement. Innumerable committees are created to allow for the coordination of policies.

Apart from the governing CETA Joint Committee:

- The Committee on Trade in Goods
- The Committee on Agriculture
- The Committee on Wines and Spirits
- The Joint Sectoral Group on Pharmaceuticals
- The Committee on Services and Investment
- The Joint Customs Cooperation Committee
- The Joint Management Committee on Sanitary and Phytosanitary Measures
- The Committee on Government Procurement
- The Financial Services Committee
- The Committee on Trade and Sustainable Development
- The Regulatory Cooperation Forum
- The CETA Committee on Geographical Indications

[25] See Rosas, A. (2010) 'The Future of Mixity', in Hillion, C., and Koutrakos, P. (ed.) Mixed agreements revisited : the EU and its member states in the world.. Oxford England and Portland, Oregon: Hart, pp. 367-374.
[26] See para 567 of the opinion of Advocate General Sharpston in case A-2/15 (delivered on 21 December 2016 – Court Opinion due on 15 May 2017).
[27] See https://www.wto.org/english/res_e/statis_e/statis_maps_e.htm.

In addition, standardisation bodies are supposed to work together, and contact points have to be established for numerous purposes. It is even often stated in which Canadian ministry or in which Commission Directorate-General each contact point is to be located.[28]

First generation trade agreements abolish certain barriers and then provide for ongoing consultation and dispute settlement between governments. This new generation agreement provides obligations of continuing liberalisation and of avoiding obstacles to trade from arising.

Even if regulatory convergence is "voluntary" (as stated in the joint declaration),[29] that is these are obligations of cooperation and of best endeavours and not of result, the system still raises concerns that the powers of democratic institutions are being reduced in favour of the administrations of the EU and Canada.[30]

However, in addition, one is entitled to wonder how realistic regulatory convergence is between countries as far apart as the EU and Canada. The required regulatory cooperation will be time consuming and will involve regular meetings of the many committees duplicating the harmonisation work already performed in the EU. Is this not disproportionate for the trade interest involved?

Also, regulatory convergence is needed throughout the world – not just between the EU and Canada. Should this envisaged regulatory cooperation be repeated for every major trade partner?

Trade negotiators are used to argue that multilateral reduction of tariffs in the WTO is superior to bilateral FTAs because for bilateral agreements to achieve the same tariff reductions as bilateral agreements some 25 000 would need to be concluded (between each pair of the 160 parties to the WTO). And the precise conditions (such as rules of origin) would be likely to differ creating a veritable "Spaghetti bowl" of rules. Bilateral regulatory cooperation arguably presents an even worse dilemma. For convergence to be achieved, compatible agreements would have to be reached within each of the 25 000 bilateral agreements. Regulatory convergence is obviously best achieved in a multilateral setting.

Since the WTO is a consensus-driven organisation, new WTO agreements on regulatory cooperation and investment protection, for example, are impossible since the diverse members have their different levels of development, traditions and interests. The DDA is still ongoing after 16 years and has so far only yielded a modest customs facilitation agreement. Expanding the WTO to include developing countries has brought these countries into the rules-based system but has also brought further progress in the WTO to a halt, at least for the moment.

If the WTO is at a halt and FTAs have reached their limit, is there another way forward?

One avenue that could be pursued further is mutual recognition systems whereby regulatory bodies cooperate to recognise each other as reliable certifiers and supervisors. They may even recognise regulations as equivalent. This is another exception to MFN independent of Article XXIV GATT and Article V GATS. Mutual recognition requires cooperation and institutions and if they are not present, there are no "equivalent conditions" for MFN to apply. There are a number of provisions especially in the GATS that allow them even outside of an FTA. These provisions merely impose an obligation on parties to give other countries an opportunity to negotiate their accession or to negotiate similar agreements – an obligation of equal negotiating opportunity, not an obligation of equal treatment, or a kind of weak MFN clause.

Moreover, there seem to be many mutual recognition agreements in existence, even for goods, and these are not contested.[31]

It may well be that the WTO Membership is not yet ready to engage in such cooperation, and that regulatory convergence is therefore a good idea whose time has not yet come. Those countries that are eager to do this earlier can join the EU (or create a similar organisation). The EU can achieve regulatory convergence internally because it is closely integrated (as well as working towards 'ever closer union') and has democratic institutions to control it.

5.3 Investor-State dispute resolution

The other way that CETA goes further than most previous EU FTAs is with investment protection.

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[28] See, e.g. Annex 10-A CETA.
[29] See paragraph "Regulatory Co-operation" in the joint declaration.
[30] See reaffirmation of the "the right to regulate" in the joint declaration.
[31] See http://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements_en.

It has become a feature of BITs not only to promote and protect investments but also to provide for ISDS through binding arbitration. The first such provisions were included in BITs with developing countries but they are now also common in agreements between developed countries. It seems that most companies and even governments do not trust foreign courts. They also want disputes to be resolved quickly and confidentially. EU Member States have many BITs, including with Canada. They also have pre-enlargement BITs between themselves which cause particular issues of incompatibility with EU law.[32] The inclusion of investment protection in CETA represents an attempt to rationalise and harmonise some of these agreements. Accordingly, CETA would terminate BITs of Member States with Canada.[33]

An international structure has evolved to service ISDS in BITs.[34] The system has strong support from the investment community (and from arbitrators).

NGOs see investment protection provisions and especially ISDS as a means to allow wealthy corporations to frighten governments away from adopting environmental and consumer protection measures. In this respect NGOs often refer to the arbitration brought against the plain packaging legislation for tobacco products in Australia.[35]

There are a number of legal problems created by such provisions, particularly in the EU as many authors have pointed out.[36] For the purpose of this article the difficulties can be summarised as follows.

First, it is argued that such provisions are contrary to Article 344 TFUE and the "principle of the autonomy of the EU legal system" by allowing determinations of inconsistency with EU law to be made without the involvement of the Court of Justice of the European Union. Defenders of ISDS protest that the arbitrators are applying the law of the agreement not of the Union, and EU law is treated at most as an issue of fact. But of course FTAs of the Union are also a source of Union law and deeming EU law to be a fact for the purposes of the arbitration can be considered to be simply a device.

It is also argued that the EU has already agreed to the resolution of disputes under agreements to which it is party in many agreements, the most notable of which is the WTO dispute settlement system. Some respond that the traditional State-to-State dispute settlement procedures are acceptable because they involve disputes between the Union (or a Member State) and a third State over which the ECJ has no jurisdiction. The ISDS is problematic because it involves disputes between private parties and States over which the ECJ does have jurisdiction.[37]

In any event, there is clearly an issue of compatibility of ISDS with the EU Treaties. There are already two cases in which the ECJ has declared envisaged agreements incompatible with the EU Treaties for such reasons - the opinion on the original EFTA Court under the EEA[38] and the opinion on the Accession of the Union to the European Convention on Human Rights.[39]

As noted above, Wallonia has only agreed to allow Belgium to sign CETA on condition that the legality of ISDS be referred to the Court of Justice for an opinion. It would seem that Wallonia at least is confident that the answer that will be given will send CETA back to the negotiators.[40]

Second, these provisions conflict with the EU's State aid rules in a number of ways. Most obviously they are sometimes used in an attempt to reverse a State aid ruling and the consequent need to repay the aid. This is well illustrated by the *Micula* case where an investor argued successfully before an arbitral panel that being deprived of the aid which it had been granted constituted a denial of "fair and equitable treatment" under a BIT between

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[32] See http://europa.eu/rapid/press-release_IP-15-5198_en.htm.
[33] See Article 30.8.1 CETA. The terminated agreements are listed in Annex 30.7.
[34] See the Convention on the settlement of investment disputes between States and nationals of other States (1966 sponsored by the World Bank). The website https://icsid.worldbank.org/en/ provides information about its rules and activities. UNCITRAL (http://www.uncitral.org/) also hosts investor-State arbitrations.
[35] See description of the case by Australia at: https://www.ag.gov.au/tobaccoplainpackaging.
[36] See for example the article by Laurens Ankersmit in the IISD's Investment Treaty News on 29 February, 2017: Is ISDS in EU Trade Agreements Legal under EU Law? (to be found at: https://www.iisd.org/itn/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/).
[37] See e.g. Laurens Ankersmit *supra*.
[38] Opinion 1/91 on the compatibility with the provisions of the EEC Treaty of a draft agreement relating to the creation of the European Economic Area.
[39] Opinion 2/13 of the Court of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (EU:C:2014:2454).
[40] Note that the Commission had declined to include this issue in its still pending request for an opinion of the Court on the compatibility of the proposed FTA with Singapore to the ECJ. (http://www.euractiv.com/section/trade-society/news/commission-won-t-ask-eu-judges-to-decide-on-legality-of-isds/).

Sweden and Romania.[41] But there may be a more fundamental conflict with the State aid rules. If compensation for the loss of the benefit is State aid, then it would seem to follow that the grant of that benefit is also State aid. So could the grant of a guarantee of protection against certain types of government action to some operators but not to others also be considered incompatible with the EU State aid rules?

Third, and rather related to the second issue, ISDS provisions conflict with a basic principle of justice –equality before the law. There may well be other persons who are just as adversely affected by a failure of a party to a BIT to comply with its obligations under the BIT. To take a rather common example, suppose that a State that has concluded a BIT with a neighbouring State decides to promote low carbon dioxide electricity production through subsidies to electricity produced with no or low carbon dioxide emissions. Many operators will be encouraged to invest or take other action in reliance on this policy. Suppose then that the State changes its mind and withdraws part of the subsidy. This may be because it is too expensive or because certain forms of electricity production are potentially dangerous (atomic energy) or noisy (wind turbines) or just too profitable (solar).[42] An investor in the State that has the nationality of the other party to a BIT may be able to recover very substantial damages. Investors from the State taking the measures will not. Nor indeed will persons who do not qualify as "investors" but only as exporters (for example a company that has invested its home (neighbouring) State in order to produce low carbon dioxide emission electricity for export to the subsiding State). All these operators relied on applicable law in making their investments but only one receives compensation. Also, civil society does not see why it should also not be able to enforce obligations in FTAs (for example the obligation not to lower environmental standards or consumer protection rights).

An obvious solution to these problems is to give direct effect to the BIT and allow all persons in an equivalent position to take action before national courts (which would also more credibly be able to weigh public interest defences). However, the EU is currently following the bad example of other countries and excludes direct effect from its FTAs. Another would be to allow broader access to private party to State dispute settlement. After all, the fact that it is limited to investors is something of a historical accident.

In order to mitigate some of the objections raised against ISDS, the EU and Canada have improved the transparency and reliability of the ISDS provisions and have provided for the creation of an Investment Court with judges drawn from a panel and with the possibility of appeals.[43]

This solves the issue of what might be called the arbitrariness of arbitration. But not the more legal problems described above. Indeed, it has arguably made the prejudice to the autonomy of the EU legal system worse. While it is conceivable that the ECJ would accept *ad hoc* arbitration awarding compensation but making no authoritative finding as to the legality of Member State action, it is less likely to accept a rival permanent court making authoritative findings of legality.

The solution, it is suggested, is either to abandon ISDS for countries with democratically accountable governments and well-functioning judicial systems or else to turn it into a system of international trade courts accessible to all who are adversely affected by the failure of States to comply with their obligations under applicable trade agreements.

6. Conclusion

CETA may or may not be declared by the Court of Justice to be compatible with the EU Treaties and be ratified by all those bodies that will need to do so. If it is not, the EU and Canada are unlikely to abandon the work done and the negotiations will reopen. It should be hoped that the result will be an agreement that is more acceptable to the public and thus more likely to be successful over the long term. The following sets out some suggestions for improvement both for CETA and for other future FTAs:

The EU should aim to conclude alone agreements that cover issues (i) for which it exclusively competent and (ii) in respect of which the Member States are content for it to exercise its non-exclusive competence. Other issues should be left to separate mixed (but perhaps linked) agreements if necessary.

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[41] *Micula et al v Romania* ICSID Case No. ARB/05/20. Available at: http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.
[42] The example is not entirely fanciful since there are numerous such cases pending including a large case involving the decision to cease nuclear energy production brought against Germany (Vattenfall).
[43] See Article 13.21 CETA.

It should be accepted that serious regulatory convergence between the EU and distant third countries is unrealistic and should be left out of the EU's future bilateral agreements. The "permissive consensus" that has prevailed on trade since the end of the second world war is weakening and trade liberalisation is no longer universally considered desirable. Some are arguing that ambitious trade agreements undermine democracy and "the right to regulate". Still others are arguing for "fair" and "balanced" trade and criticising multilateralism and the WTO. A lot can still no doubt be done to liberalise and facilitate trade but excessive ambition can provoke needless opposition..

Finally, the whole issue of enforcement of the provisions of FTAs and BITs needs rethinking. It is not sustainable to maintain on the one hand that there should be no private enforcement, through direct effect (or even through binding arbitration) where environmental measures are concerned, and on the other that the rights of investors under the agreement are so important that they need a specially-designed court system to protect them. Either international relations are considered a matter that should be left to diplomats to resolve between themselves or they are considered to be also of concern to citizens and to be justiciable. In any event coherent criteria are needed to determine which paradigm applies.

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