# The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?

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*This Article focuses on the frustrating, time-consuming, and difficult legal and political process through which the Comprehensive Economic and Trade Agreement ("CETA") between the European Union and Canada is being approved in the EU. The CETA approach includes approval of the agreements initially by the EU Commission, EU Council, and EU Parliament, but also unanimously by the approximately thirty-eight national and regional EU Member State Parliaments. That unanimity requirement has raised doubts as to whether any future controversial trade agreement—and if the CETA is controversial, so much more so are all others—could effectively be put into force by the EU, whether or not it contains ISDS mechanisms. Fortunately, the EU Court of Justice decision on similar issues arising from the EU-Singapore FTA promises a more streamlined approval process within the EU alone for future trade agreements. However, the experience suggests two caveats: (a) any ISDS and related investment provisions should be treated in a distinct agreement for separate EU and Member State approval; and (b) notwithstanding the EU's legal powers post-Court of Justice decision to conclude FTAs based on the EU's exclusive authority, EU politics may make it difficult or impossible for the EU to do so.*

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## INTRODUCTION

At the outset, I wish to clarify that this Article is *not* primarily about the substantive content of the Comprehensive Economic and Trade Agreement ("CETA")[1] concluded between the European Union and Canada. Nor does it focus on the many other complexities of investor-state dispute settlement ("ISDS") thoughtfully and exhaustively discussed in the other articles in this issue of the *Loyola University Chicago Law Journal*. Instead, as the title suggests, the discussion centers on the frustrating, time-consuming, and difficult legal and political process through which the CETA is being approved in the European Union. The CETA approach includes approval of the agreements initially by the EU Commission, EU Council, and EU Parliament, but also unanimously by the approximately thirty-eight national and regional EU Member State Parliaments.[2] That unanimity requirement, in particular, has raised doubts as to whether any future controversial trade agreement—and if the CETA is controversial, so much more so are all others—could effectively be put into force by the EU, whether or not it contains ISDS mechanisms.

Fortunately, in my view, the May 2017 Court of Justice of the European Union ("CJEU") decision on similar issues arising from the EU-Singapore Free Trade Agreement ("FTA")[3] promises a more streamlined approach to bilateral trade agreements in the future.

1. Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016, O.J. (L 11) 23 [hereinafter CETA].

2. European Commission Press Release IP/17/3121, EU-Canada Trade Agreement Enters into Force (Sept. 20, 2017), http://europa.eu/rapid/press-release_IP-17-3121_en.htm.

3. Case C-2/15, EU-Singapore Free Trade Agreement, Opinion of the Court of Justice of the European Union (Full Court) (May 16, 2017), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CV0002(01) [hereinafter CJEU Opinion 2/15].

However, the overall experience suggests two caveats: (1) any ISDS and related investment provisions should be treated in a side agreement to the FTA or, better yet, in a fully separate agreement such as a bilateral investment treaty ("BIT") for separate EU approval; and (2) notwithstanding the EU's legal power post-decision to conclude "wide and deep" FTAs without national parliament ratification, the politics of such legal authority may make it difficult or impossible for the EU to exercise those powers despite the apparent affirmation of authority by the CJEU.

The difficulties for the EU in securing even "provisional" approval of the CETA, an admittedly far-reaching FTA but made with a high-wage country featuring strong courts and other legal institutions that have for many decades exhibited a high degree of respect for the rule of law, suggest an even more serious ratification challenge for new or revised agreements with low-wage nations such as Vietnam[4] or Mexico.[5] For example, although the now-stalled Trans-Atlantic Trade and Investment Partnership ("TTIP")[6] negotiations are with another high-wage cost country, the United States, for many in Europe the CETA is seen as a potentially adverse precedent for the TTIP, an agreement which would have far more significant economic implications for the EU Member States.[7] (The total volume of EU-Canada trade and investment in 2015 was less than €90 billion,[8] while U.S.-EU trade was almost USD $700 billion (€623 billion).[9] Current negotiations to renegotiate a 2001 FTA with Mexico,[10] to complete a new trade agreement with Japan,[11] and to

4. European Commission, EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016 (Jan. 20, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 [hereinafter EU-Vietnam FTA].

5. *See* Bengt Ljung, *EU, Mexico Aim for Modern Deal Like Canada Pact*, INT'L TRADE DAILY (BBNA) (Apr. 11, 2017), https://www.bloomberglaw.com/product/blaw/document/XBKQGC0G000000 (discussing the planned modernization of the earlier EU-Mexico Free Trade Agreement).

6. *See Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/ttip (noting the Obama administration's description of TTIP as an "ambitious, comprehensive and high-standard trade and investment agreement").

7. *See* Nick Dearden, *Think TTIP is a threat to democracy? There's another trade deal that's already signed*, THE GUARDIAN (May 30, 2016), https://www.theguardian.com/commentisfree/2016/may/30/ttip-trade-deal-agreements-ceta-eu-canada (critiquing the ISDS provisions contemplated in both agreements).

8. Jonathan Sterns, *EU Parliament Votes in Favour of Landmark Trade Deal with Canada*, FIN. POST (Feb. 15, 2017), http://business.financialpost.com/news/economy/eu-parliament-votes-in-favour-of-landmark-trade-deal-with-canada.

9. *See generally* United States Census, *Foreign Trade: Trade in Goods with European Union* (Aug. 2017), https://www.census.gov/foreign-trade/balance/c0003.html (showing approximately $270 billion in exports and $430 billion in imports adding up to $700 billion total in U.S.-EU trade).

10. *See* Ljung, *supra* note 5 (discussing a potential Free Trade Agreement between the European Union and Mexico).

resuscitate long-stalled negotiations with MERCOSUR[12] are likely to prove more controversial than the CETA for the EU. The concerns relate not only to the investment provisions, but also to increased agricultural imports and potential job losses, among others.[13]

Significantly, the negotiations between the EU and the United Kingdom regarding the withdrawal of the UK from the EU—Brexit—were formally initiated on March 29, 2017.[14] The parallel efforts to negotiate a free trade agreement that avoids the constraints for the UK of the Single Market and the Customs Union[15] may well be the most difficult and lengthy of all, in terms of negotiation, conclusion, and ratification of any FTA in the forty-four years since the UK became a member of the EU.

Part I of this Article provides a brief description of the CETA, focusing on the investment chapter with the EU's new investment "court" and appellate body, initially designed by the EU Commission for the TTIP negotiations. Part II discusses the political context of ECETA, the legal considerations for concluding "mixed" agreements, and the EU's difficulties in figuring out how to put the CETA into force as it has evolved to date. This discussion also analyzes the Commission's and the CJEU's understanding of the shared competences of the EU (Commission, Council of Ministers and EU

11. *See* Jones Hayden, *EU Sees "Renewed Urgency" in Trade Talks with Japan*, INT'L TRADE DAILY (BBNA) (Apr. 12, 2017), http://www.bloomberglaw.com/product/blaw/document/109235401 (reporting on a promising round of negotiations conducted April 3-5, 2017).

12. *See EU and Mercosur Agree to Advance Trade Talks*, EU COMMISSION (Apr. 8, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1478 (reporting on trade negotiations that initially began in 1999 but were suspended from 2004-2010, with nine negotiating rounds taking place between 2010 and the present, and considering whether these on-again off-again negotiations can be completed in the foreseeable future).

13. For example, Walloons' concerns included increased dairy import competition from Canada, as well as adverse impacts for environmental standards and labor laws and broader concerns over the new investment court. *See Wallonia is Adamantly Blocking the EU's Trade Deal With Canada*, THE ECONOMIST (Oct. 23, 2016), https://www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia (discussing various Wallonia and other EU citizens' concerns with the CETA).

14. *See* Letter from Theresa May, Prime Minster of the United Kingdom, to Donald Tusk, President of the European Union (Mar. 29, 2017), https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50 (stating that the UK notified the European Council of its intention to withdraw from the European Union).

15. *See* Frederik Erixon, *Britain and the EU Probably Will Reach a Trade Deal. Here's Why*, THE SPECTATOR (Apr. 1, 2017), https://www.spectator.co.uk/2017/04/britain-and-the-eu-probably-will-reach-a-trade-deal-heres-why/# (discussing the UK withdrawal from the Single Market and Customs Union and concluding that "a free-trade deal between the UK and the EU can be expected for a simple reason: neither side can afford to throw away huge volumes of trade").

Parliament) and of the twenty-eight (soon to be twenty-seven) Member States. Part III, the author's observations and conclusions, considers the implications of the difficult, time-consuming, and uncertain Member State ratification process for new EU trade agreements, unless the investment provisions are treated separately from now on.

## I. THE CETA AND ITS ISDS PROVISIONS

As summarized by the EU Commission, the CETA will:

- Remove customs duties;
- Help make European firms more competitive in Canada;
- Make it easier for EU firms to bid for Canadian public contracts;
- Open up the Canadian services market to EU companies;
- Open up markets for European food and drink exports;
- Protect traditional European food and drink products (known as Geographical Indications) from being copied;
- Cut EU exporters' costs without cutting standards;
- Benefit small- and medium-sized EU firms;
- Benefit EU consumers;
- Make it easier for European professionals to work in Canada;
- Allow for the mutual recognition of some qualifications;
- Create predictable conditions for both EU and Canadian investors;
- Make it easier for European firms to invest in Canada;
- Help Europe's creative industries, innovators, and artists; and
- Support people's rights at work and the environment.[16]

With the CETA, the EU and Canada pledge to ensure that economic growth, social issues, and environmental protection go hand-in-hand.[17]

While other aspects of the CETA are controversial, at least in some EU Member States,[18] investment protection and dispute resolution have been by far the most sensitive. This is reflected in the way the EU and Canada describe that section of the CETA:

> CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent

16. CETA EXPLAINED: CREATING NEW OPPORTUNITIES FOR YOUR BUSINESS (2017), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/ (last visited Nov. 8, 2017).

17. *Id.*

18. For example, Slovenia has expressed concerns about the use and labeling of GMOs and maintaining of sovereignty over any measures relating to the use of water. *CETA: Statements to the Council Minutes*, para. 23 (Oct. 27, 2016), http://data.consilium.europa.eu/doc/document/ST-13463-2016-INIT/en/pdf [hereinafter Council Minutes].

> dispute resolution. CETA will not result in foreign investors being treated more favourably than domestic investors. . . . CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems in the European Union and its Member States and Canada, as well as international courts. . . . Accordingly, the members of these Tribunals will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada for a fixed term. . . .[19]

Chapter Eight of the CETA indeed represents a departure from the more traditional *ad hoc* arbitration, typically under the rules of the International Centre for the Settlement of Investment Disputes ("ICSID")[20] or under those of the United Nations Commission on International Trade Law ("UNCITRAL"),[21] as provided under Chapter Eleven of the North American Free Trade Agreement ("NAFTA")[22] or Chapter Nine of the Trans-Pacific Partnership ("TPP").[23] While the stated rights of the investor in the CETA are not dissimilar from those in NAFTA, the TPP, and several thousand other bilateral investment treaties,[24] the ISDS provisions contained therein are a major departure from all prior investment protection provisions.

The CETA provides for the creation of a fifteen-member tribunal, five appointed by both the EU and Canada, and five appointed by third-party countries. The tribunal members are to be persons with "demonstrated expertise in public international law" and are appointed for a five-year term, renewable once.[25] In other words, unlike the traditional arbitral tribunal, where one arbitrator is chosen by the investor, another by the respondent state, and the chairperson by agreement of the two,[26] under the CETA the tribunal members are

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19. Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, at 5–6 (Oct. 27, 2016), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0114(01)&from=EN.

20. International Centre for Settlement of Investment Disputes (ICSID) Convention, Regulations and Rules (Apr. 2006) [hereinafter ICSID Arbitral Rules].

21. G.A. Res. 68/109, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Dec. 16, 2013) [hereinafter UNCITRAL Arbitration Rules].

22. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 15, 1992, 32 I.L.M. 289 and 605 (1993) [hereinafter NAFTA].

23. Trans-Pacific Partnership, Austl.-Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru-Sing.-U.S.-Viet., Feb. 4, 2016 (not in force).

24. See ICSID, Database of Bilateral Investment Treaties, https://icsid.worldbank.org/en/Pages/Resources/Bilateral-Investment-Treaties-Database.aspx (last visited Nov. 7, 2017) (providing a collection of bilateral investment treaties).

25. CETA, supra note 1, at art. 8.27 (outlining the constitution of the tribunal).

26. See, e.g., NAFTA, supra note 22, at art. 1123 (describing the number of arbitrators and the method of appointing arbitrators).

appointed solely by the governments, and it is the governments that decide if individual tribunal members are reappointed. The latter feature has predictably raised concerns among investors and their lawyers over losing the right to appoint one of the tribunal members and the shared right to appoint the chairperson, along with concerns that a tribunal member whose reappointment is in the hands of the government might consciously or unconsciously favor host governments over foreign investors in specific cases.[27] Not surprisingly, investors and their attorneys have opposed the concept of an investment court, as for example, when it was proposed by the Commission in the course of Transatlantic Trade and Investment Partnership negotiations.[28]

In another major innovation, the CETA provides for an appellate tribunal comprised of an as-yet undetermined number of members.[29] This departs from the practice under ICSID rules, which are subject only to very narrow review by the ICSID Annulment Committee,[30] or similarly narrow review of ICSID Additional Facility and UNCITRAL awards by courts at the "seat" of the arbitration.[31] The jurisdiction of the appellate tribunal is broad as compared to the model after which it is fashioned, the Appellate Body of the World Trade Organization ("WTO"),[32] as the CETA Appellate Body has jurisdiction not only over "errors in the application or interpretation of applicable law," but also "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law. . . ."[33] The ability of the appellate body to review facts as well as applicable law is troubling to some

27. For a discussion of the differences between traditional ISDS and the investment court and appellate body, see Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, *in* SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 59, 62–69 (Armand de Mestral ed., Centre for International Governance Innovation, 2017).

28. *See* James Roberts, Theodore Bromund & Riddhi Dasgupta, *The U.S. Should Reject the European Commission's Proposed Investment Court*, THE HERITAGE FOUNDATION (Nov. 13, 2015), http://www.heritage.org/trade/report/the-us-should-reject-the-european-commissions-proposed-investment-court (suggesting that under the investment court system "[i]f the signatory governments select the judges, the investor is the only party in a dispute who will remain on a lower playing field" because "party autonomy is an indispensable feature of ISDS").

29. CETA, *supra* note 1, at art. 8.28.1, 8.28.7 (describing the appellate tribunal and the CETA Joint Committee).

30. ICSID Arbitral Rules, *supra* note 20, at art. 52 (discussing the ability to seek an annulment of the award and the process for annulling a tribunal award).

31. *See* UNCITRAL Arbitration Rules, *supra* note 21, at art. 34 (application for setting aside as exclusive recourse against an arbitral award).

32. *See* Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

33. CETA, *supra* note 1, at art. 8.28.2 (describing the reasons the appellate tribunal may uphold, modify, or reverse an award of the tribunal).

because this authorization could effectively provide the basis for *de novo* review of investment court awards (unlike most other appellate courts and the WTO's Appellate Body), and in any event could add time and expense to resolution of investment disputes submitted to the investment court rather than to traditional investment arbitration.

While the CETA is the first trade agreement to be signed by the EU containing the investment court/appellate body mechanism, the idea first jelled in the context of the TTIP negotiations between January 2014 and June 2015.[34] Because of broad opposition within the EU to traditional *ad hoc* arbitration of investor-state disputes, the Commission apparently believed (erroneously as it turns out) that the new approach would mollify opponents of ISDS among Member governments and NGOs. In part, reduced opposition was hoped for because, as discussed above, the governments would have greater control over the adjudicatory process, fully qualified judges would be appointed, the process would be more transparent, an appellate body would review the initial decisions, and the new system would include the elements "that make citizens trust domestic or international courts."[35] Yet, despite the investment court innovation, the CETA had to be put into force provisionally without the ISDS/investment court chapter.

## II. LEGAL AND POLITICAL CHALLENGES TO THE CETA RATIFICATION

### *A. Political Opposition to Freer Trade*

As a recent IMF/WTO/World Bank study observed:

> [T]rade is leaving too many individuals and communities behind, notably also in advanced economies. To be sure, job losses in certain sectors or regions in advanced economies have resulted to a large extent from technological changes rather than from trade. But adjustment to trade can bring a human and economic downside that is frequently concentrated, sometimes harsh, and has too often become prolonged.[36]

Arguably, this is a principal reason why populist, anti-trade, anti-globalization views have become increasingly common (and strident) both in the EU and the United States in recent years, as is evident from

34. *See* Roberts et al., *supra* note 28 (explaining the history of the investment court proposal).

35. *See* European Commission Press Release IP/15/5651, EU Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015) (quoting EU Trade Commissioner Cecilia Malmström).

36. IMF, WBG, & WTO, MAKING TRADE AN ENGINE OF GROWTH FOR ALL: THE CASE FOR TRADE AND FOR POLICIES TO FACILITATE ADJUSTMENT 4 (Apr. 4, 2017) https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf [hereinafter WTO Report].

the pro-Brexit vote in the United Kingdom on June 23, 2016,[37] and the election of Donald Trump as U.S. president in November 2016.[38] This is also manifested in anti-ISDS sentiments. The unhappiness of many working people with their deteriorating economic situations, and the feeling that they have been harmed by rather than benefitted from globalization, is the driving force of these sentiments. All are aware that globalization has created "winners and losers." While the loss of manufacturing jobs in the EU has probably not been as severe as in the United States,[39] and the protections for workers displaced by the transfer of manufacturing operations to lower wage cost countries are in general more extensive in the EU than in the United States, the losers—whether in Sunderland, UK,[40] or elsewhere—are no longer willing to accept their reduced standard of living through high unemployment without objection. Much of this discontent can be traced to the fact that the developed world has not done very well in retraining displaced workers or providing an adequate safety net.[41] In any event, as discussed more fully in this Section, many workers and the politicians who represent them are no longer willing to support trade agreements that result in more imports, nor perceived benefits afforded to foreign investors that exceed those provided to domestic enterprises or their workers in the host country.

In my view, other unrelated factors also may have some impact on the reluctance of some Member States and many citizens to embrace new trade agreements. Ongoing problems within the EU concerning control of immigration (particularly from the Middle East and North Africa), the elusive resolution of the multi-year Greek financial crisis,

37. Steven Earlanger, *Britain Votes to Leave EU; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html?mcubz=1.

38. *See* Laurence Chandy & Brina Seidel, *Donald Trump and the Future of Globalization*, BROOKINGS (Nov. 18, 2016), https://www.brookings.edu/blog/up-front/2016/11/18/donald-trump-and-the-future-of-globalization/ (noting that "a resistance to globalization was arguably the foremost policy theme in Trump's election campaign").

39. *See* Heather Long, *U.S. Has Lost 5 Million Manufacturing Jobs since 2000*, CNN MONEY (Mar. 29, 2016, 3:47 PM), http://money.cnn.com/2016/03/29/news/economy/us-manufacturing-jobs/ (discussing causes of U.S. job loss in manufacturing).

40. *See generally* Andy Sharman & Chris Tighe, *Record Exports for U.K. Carmakers as Demand from Europe Grows*, FIN. TIMES (Jan. 20, 2016), https://www.ft.com/content/b2445b02-bec9-11e5-846f-79b0e3d20eaf (discussing the home of the EU's largest Nissan factory as an otherwise economically depressed area).

41. *See* WTO Report, *supra* note 36, at 4–5 (discussing the fact that many have suffered from the impact of "import competition" and recommending that WTO Members pursue a variety of "active" and "passive labor market policies" to remedy the situation). Many nations, including the United States, have failed to provide adequate levels of adjustment assistance and retraining for workers that have lost their manufacturing jobs through competition from lower wage cost countries or automation.

and uncertainties over the impact of Brexit on the economies of the EU-27, may also play a role. Moreover, some observers believe that the stalemate in Belgium over CETA approval, discussed *infra*, was less about substance than about politics, with the Socialist Party in Wallonia seeking to embarrass the Flemish National Party that currently governs Belgium.[42]

### *B. Exclusive EU Competence and "Mixed" Agreements*

For many decades, EU competence has included common commercial policy[43] and common agricultural policy,[44] but excluded such other areas as defense. The Treaty on the Functioning of the European Union ("TFEU") gives the EU exclusive competence, *inter alia*, of the customs union and common commercial policy.[45] However, the Treaty also provides *inter alia* for shared competence between the EU and Member States regarding social policy, agriculture and fisheries, environment, consumer protection, transport, and common safety concerns in public health matters.[46] Whether this division of competences remains intact after the May 16, 2017, CJEU opinion is, however, by no means certain, as discussed below.

As is obvious from the earlier description of the content of the CETA, the "wide and deep" modern FTAs, according to the EU Parliament, "contain elements of both exclusive EU and Member States' competences jointly, as 'mixed' agreements. Consequently, they need to be signed and ratified by both the EU and the Member States to enter into force."[47] The EU Commission initially took the position that the CETA could be concluded as an EU-exclusive agreement, and planned its signing for July 2016,[48] with Commission Chief Jean-Claude Juncker reportedly saying he "personally couldn't care less" whether national lawmakers could vote on the deal.[49] However, many

42. E-mail from Official of the Belgian Government, to David A. Gantz, Samuel M. Fegtly Professor of Law, Univ. of Ariz. James E. Rogers College of Law (Apr. 13, 2017, 2:57AM MST) (on file with author).

43. *See generally* Consolidated Version of The Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

44. *Id.*, arts. 38–44.

45. *Id.*, arts. 1(a), 1(e).

46. *Id.*, arts. 4(b), 4(d), 4(e), 4(g) and 4(k).

47. Wilhelm Schöllmann, *Is CETA a Mixed Agreement?*, EUROPEAN PARLIAMENT THINK TANK: AT A GLANCE (July 1, 2016), http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf.

48. *Id.*

49. *EU Commission: CETA Should be Approved by National Parliaments*, DW (July 5, 2016), http://www.dw.com/en/eu-commission-ceta-should-be-approved-by-national-parliaments/a-19379263 ("Last week [Juncker] was reported saying he 'personally couldn't care less' whether

Member States, including Germany, vehemently argued otherwise.[50] Accordingly, and largely to avoid the strong opposition of some Members and citizen groups to the CETA, and to facilitate its prompt entry into force, in July 2016 the Commission gave in:

> To allow for a swift signature and provisional application, so that the expected benefits are reaped without unnecessary delay, the Commission has decided to propose CETA as "mixed" agreement. This is without prejudice to its legal view, as expressed in a case currently being examined by the European Court of Justice concerning the trade deal reached between the EU and Singapore. With this step, the Commission makes its contribution for the deal to be signed during the next EU-Canada Summit, in October.[51]

Notwithstanding its attempt to preserve the argument that such agreements come within the EU's sole competence, it is unclear whether even with the weight of the CJEU's Singapore opinion the Member States will permit a different procedure to be used with pending and future agreements between the EU and Singapore, Vietnam, Japan, the United Kingdom, Mexico, the United States, and of course, a post-Brexit agreement with the United Kingdom.

### *C. Opinions of the Advocate General and the CJEU*

It was believed by many, including this author, that guidance as to how the CJEU would decide the Singapore case could be found in the December 2016 opinion of EU Advocate General Eleanor Sharpston, since the CJEU often follows such expressions of AG recommendations.[52] Because the Advocate General opinion remains relevant due to its popularity with some EU Members who favor greater influence for the Member States in concluding "mixed" trade agreements, the opinion is discussed herein. The AG concluded that the EU enjoys exclusive competence in the following areas:

- Objectives and general definitions;
- Trade in goods;
- Trade and investment in renewable energy generation;

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lawmakers get to vote on the deal.").

50. *See id.* (noting German Chancellor Angela Merkel's view "that the German parliament should be consulted" on CETA).

51. European Commission Press Release IP/16/2371, European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal (July 5, 2016).

52. *See* James Killick, Sara Nordin, Genevra Forwood, Fabienne Vermeeren and Charlotte Van Haute, *EU Court's Advocate General Delivers Opinion on EU-Singapore FTA,* WHITE & CASE PUBLICATIONS AND EVENTS (Jan. 10, 2017), https://www.whitecase.com/publications/alert/eu-courts-advocate-general-delivers-opinion-eu-singapore-fta (noting that "AG opinions do not bind the Court but are considered influential and are followed in the majority of cases").

- Trade in services and government procurement, under exclusion of those parts of the EUSFTA applying to transport services and services inherently linked to transport services;
- Foreign direct investment ("FDI");
- The commercial aspects of intellectual property rights;
- Competition and related matters;
- Trade and sustainable development in so far as the provisions in question primarily relate to commercial policy instruments;
- The conservation of marine and biological resources;
- Trade in rail and road transport services; and
- Dispute settlement, mediation, and transparency mechanisms in so far as those provisions apply to (and are therefore ancillary to) the parts of the agreement for which the EU enjoys exclusive external competence.[53]

However—and in direct contrast to the CJEU opinion—the AG also concluded that the EU's external competence is shared with the Member States with respect to a significant number of matters:

- Provisions on trade in-air transport services, maritime transport services, and transport by inland waterway, including services inherently linked to those transport services;
- Types of investment other than FDI;
- Provisions on government procurement in so far as they apply to transport services and services inherently linked to transport services;
- Provisions relating to the non-commercial aspects of intellectual property rights;
- Provisions laying down fundamental labor and environmental standards and falling within the scope of either social policy or environmental policy; and
- Dispute settlement, mediation, and transparency mechanisms in so far as those provisions apply to (and are therefore ancillary to) the parts of the agreement for which the EU enjoys shared external competence.[54]

Several aspects of this determination bear emphasis given the contrasting CJEU opinion. First, for the Advocate General, the FDI protection provisions remain within the EU's exclusive competence (even if politically it was impossible for the Commission to maintain that such provisions would be excluded from approval by the Member

53. Court of Justice of the European Union Press Release No. 147/16, Advocate General Sharpston considers that the Singapore Free Trade Agreement can only be concluded by the European Union and the Member States acting jointly (Dec. 21, 2016).

54. Id.

State parliament in the CETA context). Secondly, several essential elements of EU trade agreements, including labor and environmental standards, are in the Advocate General's view within the shared competence of the Member States.

Because the Advocate General's opinion was not binding on the Commission, it did not mean that the areas of shared competence were precluded from entering into provisional force. Rather, the Commission decided to provisionally apply "most" parts of the CETA. Those sections excluded from provisional application include only:

- Investment protection;
- Investment market access for portfolio investment (but market access for FDI is an exclusive EU competence); and
- The Investment Court System.[55]

The decision on whether to apply an agreement provisionally is subject to the vote of the EU Council.[56] In October 2016, it was proposed that the Council exclude from provisional application the investment chapter (investment protection) and financial services chapter (portfolio investment), along with certain others.[57] Provisional application is effective from the first of the month after the Parties have notified each other that they have completed the domestic procedures that are required for provisional application.[58] Provisional application ends only when all of the relevant parliaments have given their approval.

The Court of Justice of the European Union disagreed in many significant respects with Advocate General Sharpston, finding a much broader range of legal authorities within the exclusive competence of the EU. According to the CJEU, the EU has exclusive competence with regard to provisions of the agreements concerning access to EU (and Singapore) markets for goods and services, including: transport services; public procurement; non-fossil fuel energy generation; protection of foreign direct investment; intellectual property rights; anti-competitive activities, monopolies, and subsidies; sustainable development (as an integral part of the EU's common commercial policy); social protection of workers and environmental protection,

55. *CETA Explained: Which parts of CETA will the EU provisionally apply?*, EU COMMISSION (Sept. 21, 2017), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/.

56. TFEU, *supra* note 43, at art. 218(5).

57. Council Decision 2016/38 of 28 October 2016, on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017 O.J. (L11) 1080, 1081.

58. Laura Puccio, *A Guide to EU Procedures for the Conclusion of International Trade Agreements*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE 1, 6 (Oct. 25, 2016) http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593489/EPRS_BRI(2016)593489_EN.pdf.

again because of their relationship to liberalization of bilateral trade between the EU and Singapore; and obligations relating to Member State exchange of information, notification, verification, cooperation, mediation, transparency, and dispute settlement between the parties (except with regard to portfolio investment).[59]

For the CJEU, the list of exceptions, where authority is shared with the national and sub-national parliaments, is mercifully short:

- The provisions of Section A (Investment Protection) of Chapter Eight (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;
- The provisions of Section B (Investor-State Dispute Settlement) of Chapter Eight; and
- The provisions of Chapter One (Objectives and General Definitions), Chapter Fourteen (Transparency), Chapter Fifteen (Dispute Settlement Between the Parties), Chapter Sixteen (Mediation Mechanism), and Chapter Seventeen (Institutional, General, and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter Nine and to the extent that the latter fall within a competence shared between the European Union and the Member States.[60]

In other words, other than ISDS and portfolio investment, and where other chapters relate to these matters, the law as established by the CJEU gives a much higher level of exclusive competence to the EU than most observers thought would be likely—particularly in light of Advocate General Sharpston's opinion incorporating not only explicit aspects of the common commercial policy but also related aspects such as transportation, sustainable development, and labor and environmental rights.

It is in the context of the CJEU opinion that this Article reviews the actual CETA controversy and speculates as to how the process might have differed had the CJEU opinion been available to the Commission a year earlier.

### *D. The CETA Approval Controversy*

The initial negotiations between the EU and Canada, beginning in October 2009 and concluding in September 2014 with the public release of the negotiated text,[61] gave little indication of the political

59. Court of Justice of the European Union Press Release 52/17, The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone (May 16, 2017).

60. CJEU Opinion 2/15, *supra* note 3, para. 305.

61. *See Chronology of Events and Key Milestones*, GOV'T OF CANADA,

controversies that arose later and delayed the signing by another two years. As indicated in Part I, above, the included provisions were bold by NAFTA standards, but did not, for example, break extensive new ground beyond the TPP negotiations, in which Canada was participating at the same time. The draft released to the public in September 2014 included the standard investment provisions that featured *ad hoc* arbitration before three-person tribunals appointed and managed under the rules of ICSID, the ICSID Additional Facility, UNCITRAL, or any other arbitration rules agreed upon by the investor and the host state.[62] While these rules had evolved significantly since NAFTA was concluded in 1992, as has been discussed elsewhere in the literature, with a movement, *inter alia*, toward greater regulatory flexibility for the host country,[63] they were in no way a major departure, except perhaps for the inclusion of a mechanism for non-binding mediation prior to arbitration.[64]

The complications arose after September 2014, during the "scrubbing" or legal review of the draft required to produce the final draft of the Agreement.[65] As noted earlier, this was a period during which the EU Commission was considering major changes in the EU approach to ISDS—the changes that ultimately resulted in the investment court/appellate body approach. Because of growing criticisms among Member State governments, members of the EU Parliament, NGOs, and other stakeholders, the Commission began in May 2014 what would become an eighteen-month project to devise an

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http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng&wbdisable=true (last visited Nov. 8, 2017) (indicating Canada began negotiations with the EU in October 2009 and concluded them in September 2014).

62. *See* Consolidated CETA Text, ch. 10, sec. 6, art. X.22 (Sept. 29, 2014), https://www.bmwfw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/CETA-Text.pdf [hereinafter 2014 CETA Text] (Article X.22 itself, "Submission of a Claim to Arbitration," is virtually unchanged from dozens of earlier agreements concluded by the Parties).

63. *See, e.g.*, David A. Gantz, *Investor-State Dispute Settlement in U.S. Law, Politics and Practice*, *in* SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES 217, 228–47 (Armand de Mestral ed., 2017) [hereinafter ISDS in U.S. Law] (reviewing post-NAFTA innovations in ISDS from 2003 until the conclusion of the TPP in 2016).

64. 2014 CETA Text, *supra* note 62, ch. 10, sec. 6, art. X.19 (discussing "Mediation" and how the disputing parties may at any time agree to have recourse to mediation).

65. *See, e.g.*, Wolfgang Alschner & Dmitriy Skougarevskiy, *Legal Scrubbing or Renegotiation? A Text-as-Data Analysis of how the EU Smuggled an Investment Court into its Trade Agreement with Canada*, THE PLOT (Mar. 24, 2016); http://www.the-plot.org/2016/03/24/legal-scrubbing-or-renegotiation/ (the "scrubbing" process is normally devoted primarily to assuring that different chapters negotiated by different groups are consistent with each other, numbering of chapters and articles is logical and consistent, and that grammar and word usage are consistent with the high standards used by lawyers in the Commission and in the Canadian Government).

ISDS methodology that would be less objectionable.[66] In May 2015, the Commission released what it termed a "concept paper" that included the investment court concept.[67]

In July 2015, the Parliament endorsed, again regarding TTIP, a more court-like system, having previously made it clear that the newer FTA investment provisions providing host governments with greater regulatory flexibility (but still with more traditional *ad hoc* arbitration embodied in the initial public version of the CETA) were by themselves unacceptable.[68] This new court-based system would also have provided for increased transparency, "independent professional judges" nominated by governments, and an appellate mechanism.[69] The pertinent language called for rules:

> To ensure that foreign investors are treated in a non-discriminatory fashion**,** while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured**,** the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.[70]

The Commission responded by issuing a draft proposal for an investment court/appellate body in September 2015,[71] followed by a virtually unchanged formal proposal communicated to the United States

66. *See* Lévesque, *supra* note 27, at 59–60 (discussing the historical development of the EU Commission proposal).

67. European Commission Concept Paper, *Investment in the TTIP and Beyond—the Path for Reform* (May 6, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [hereinafter EC Concept Paper].

68. *Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, para. 2(d)(xvi) (July 8, 2015), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0252&format=XML&language=EN [hereinafter European Parliament Recommendations].

69. *See* EC Concept Paper, *supra* note 67, at 2 (discussing the introduction of "mandatory transparency of the arbitration process" by incorporating the UNCITRAL transparency rules); *see also* European Parliament Recommendations, *supra* note 68, para. 2(d)(xv) (discussing the goals of negotiations for the TTIP).

70. European Parliament Recommendations, *supra* note 68, para. 2(d)(xv).

71. European Commission, *Proposal on Investment Protection and Resolution of Investment Disputes and Investment Court System in TTIP* (Sept. 16, 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf; *see also* European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015) (highlighting key points made in the Commission's proposal).

during the TTIP negotiations in November 2015.[72]

As far as the CETA (as distinct from TTIP) is concerned, there was no public discussion of a modification of the completed text with the traditional investment provisions, which apparently took place during the extended period of legal scrubbing.[73] The extensively revised investment chapter in the final CETA text was closely held until the revised CETA was released to the public in February 2016.[74] It is thus not entirely clear when the traditional ISDS *ad hoc* arbitration provisions were replaced by the EU investment court/appellate body, but it undoubtedly was at some point during the fall of 2015. Those discussions, whether properly characterized as a renegotiation or part of the legal review, were conducted in secret between the Commission and the new Justin Trudeau administration, apparently without any significant consultations with stakeholders. Presumably, this occurred to avoid lobbying pressure from Canadian stakeholders and perhaps even from the U.S. government.

Several commentators characterized the updated ISDS mechanism as "intended to soothe European concerns that the original ISDS provisions constituted a threat to the state's 'right to regulate.'"[75] The EU Commissioner for Trade Cecilia Malmström and the Canadian Minister of International Trade Chrystia Freeland formally described the revised investment provisions in an agreed statement:

> As part of the legal review, modifications were made to the Investment Chapter, further to discussions between EU and Canadian officials. With these modifications, Canada and the EU will strengthen the provisions on governments' right to regulate; move to a permanent, transparent, and institutionalised dispute settlement tribunal; revise the process for the selection of tribunal members, who will adjudicate investor claims; set out more detailed commitments on ethics for all tribunal members; and agree to an appeal system.[76]

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72. European Commission, Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf.

73. See Dominic Webb & Marianne O'Neill, CETA: The EU-Canada Free Trade Agreement, House of Commons Library 9 (Mar. 2, 2016), http://www.s2bnetwork.org/wp-content/uploads/2015/09/CBP-7492.compressed.pdf (noting EU Trade Commissioner Cecelia Malmström's response to concerns about ISDS "that the Commission wished to make improvements to CETA in the area of investment protection during the process of legal scrubbing").

74. Comprehensive Economic and Trade Agreement (CETA), Draft (Feb. 16, 2016) http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.

75. Greg Kanargelidis & Zachary Silver, The CETA Saga: Can Final Negotiations Save the Agreement?, Blakes BusinessClass (Oct. 25, 2016), http://www.blakesbusinessclass.com/the-ceta-saga-can-final-negotiations-save-the-agreement/.

76. European Commission Press Release, STATEMENT/16/446, Joint Statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA) (Feb. 29, 2016),

The two principals also stated that the revised agreement "responded to Canadians, EU citizens, and businesses with a fairer, more transparent system,"[77] but did not suggest that consultations with such stakeholders had taken place at the time of the modifications to the CETA text. In any event, it presumably would have been difficult or impossible as a political matter for the Commission to make the investment court/appellate body proposal formally to the United States during the TTIP negotiations while at the same time keeping the more traditional ISDS provisions of the draft CETA intact.

As noted above, by July 2016 the Commission had accepted that for political reasons the CETA could only be approved in the EU as a mixed agreement. However, over the ensuing three months it became increasingly clear that the substitution of the investment court/appellate body ISDS provisions for the more traditional mechanisms would not be sufficient to eliminate all Member State opposition to ISDS or to various other aspects of the CETA. The most vociferous opposition came from the 3.5-million-person French-speaking Wallonia region of Belgium, when that regional government refused to accept the negotiated CETA text[78] Some members of the Wallonia parliament cited concerns with increased Canadian agricultural exports and the impact of the ISDS provisions on the governments' ability to regulate, among others.[79]

The opposition by Wallonia was sufficiently strong that some observers simply assumed it meant that "globalization's latest chapter is history."[80] If, the commentators suggested, "a deal negotiated at the highest level between two large and advanced economies like Canada and Europe can be upended by narrow interest groups—like the dairy industry in a relatively minor participating nation—forget about every other large and complex deal under discussion."[81] A signing ceremony scheduled for October 27, 2016, between Canadian Prime Minister Justin Trudeau and Commission Chairman Jean-Claude Juncker (along with EU Council President Donald Tusk) was canceled as Trudeau decided (rather wisely so, as to avoid having to share directly in the

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http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm.

77. *Id.*

78. Kanargelidis & Silver, *supra* note 75 (exploring the "rough ride" of CETA negotiations).

79. *Id.* (stating Wallonia in Belgium refused to accept the current version of the CETA in October 2016).

80. Peter S. Goodman & James Kanter, *With Europe-Canada Deal Near Collapse, Globalization's Latest Chapter Is History*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/business/international/european-union-canada-trade-agreement-ceta.html.

81. *Id.* (discussing the role of narrow interest groups in negotiations between "large and advanced economies").

Commission's embarrassment) not to make the trip.[82] Canadian frustration, albeit typically understated, was reflected in the Canadian government statement after postponement of the signing, noting that "Canada has done its job. Canada remains ready to sign this important agreement when Europe is ready."[83] The frustration was also shared by some EU leaders; Commission President Jean-Claude Junker observed that "[t]he difficulties that we had are interior Belgian difficulties that had to be set aside."[84]

Fortunately for the CETA, and for any future regional trade agreements negotiated by the EU, the other Members of the EU were able to convince (or pressure) Belgium and Wallonia to go along with the CETA, at least as far as provisional application is concerned, so that the CETA was ultimately signed only a few days late, on October 30, 2016.[85] The so-called "Belgian Compromise" eliminating Belgian/Wallonian opposition to the CETA (at least for the time being) included the right of Belgium to seek an opinion from the Court of Justice of the European Union on whether the trade court/appellate body is consistent with EU law and a commitment by Belgium to assess the socio-economic and environmental impact of the CETA.[86] Other related assurances include the exclusion of ISDS from provisional application of the CETA and Belgian reservations of the right to impose agricultural safeguards.[87] Earlier articulated concerns regarding increased imports of Canadian agricultural products were not further discussed, and may not have been a significant issue despite earlier mention.[88]

For the time being, the compromise has resolved most issues relating to the CETA. On October 31, 2016, legislation to implement the CETA was introduced into the Canadian Parliament and Senate.[89] Another major milestone, the approval of the CETA by the EU Parliament,

82. Jennifer Rankin, *Belgian Politicians Drop Opposition to EU-Canada Trade Deal*, THE GUARDIAN (Oct. 27, 2016), https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement.

83. *EU-Canada Trade Deal on Home Stretch After Belgium Resolves Impasse*, EBL NEWS (Oct. 27, 2016), https://eblnews.com/news/europe/belgium-breaks-impasse-over-eu-canada-trade-deal-42018 (quoting Alex Lawrence, spokesman for Canadian Trade Minister Chrystia Freeland).

84. *Id.* (reporting that political rivalries between the Wallonian socialist leaders and the Belgian federal center-right governing coalition were "also at play").

85. *See* Peter Menyasz, *Canada Moves Toward Implementing Trade Deal with EU*, 33 INT'L TRADE RPTR. 1586 (Nov. 11, 2016) (noting the postponement until October 30, 2016).

86. Rankin, *supra* note 82 (discussing the impact of the CETA).

87. *See* Council Minutes, *supra* note 18, at para. 27 ("The Commission confirms the ability of procuring entities from both parties to apply environmental, social or employment-related criteria and conditions in their procurement procedures.").

88. *Id.*, para. 32.

89. Menyasz, *supra* note 85 (reporting the legislation's introduction to the House of Commons and the Senate before becoming law).

occurred on February 15, 2017.[90] The agreement finally entered into force provisionally on September 21, 2017.[91]

## III. OBSERVATIONS AND CONCLUSIONS

Given that the immediate problems relating to provincial application of the CETA appear to have been resolved, should observers be worried that the CETA, and all future trade agreements concluded by the EU on behalf of its Member States, are in peril? After all, the EU-CARIFORUM Economic Partnership Agreement,[92] signed in 2008, remains in provisional application. It is obvious that the economic importance of the EPA, and the potential impact of Caribbean source imports into the EU, pale in comparison with actual or future EU free trade agreements with Canada, the post-Brexit UK, the United States, Vietnam, Japan, Mexico, and even MERCOSUR, among others.

No one can predict accurately whether the embarrassment of the CETA for the EU Member nations will act as a wake-up call for those concerned about any future agreements or embolden other EU Member States to take advantage of the unanimity rule to block more economically important trade agreements in the future. In this respect, the CJEU may have saved the EU from as serious a threat to the future of the EU, such as the Greek crisis or Brexit.[93] If it had become clear that the EU is incapable of concluding trade agreements in the future without unanimous EU Member parliamentary consent, some potential FTA partners might have reconsidered initiating or pursuing negotiations. This includes Japan (where negotiations are moving forward) and Vietnam (where negotiations were concluded in January 2016, but the text is undergoing another extended legal scrubbing process).

As far as the CETA is concerned, it is too late for the EU to turn back. Thus, it is in my view incumbent on the Members to move as quickly as possible to ratify the CETA at national and, where necessary,

90. *See* European Commission Press Release IP/17/270, European Commission Welcomes Parliament's Support of Trade Deal with Canada (Feb. 15, 2017) (quoting Commissioner Malmström as suggesting the vote would be "the start of a new era in EU-Canada relations").

91. CETA, *supra* note 1 (generally describing the CETA agreement and when it went into effect).

92. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 2008 O.J. (L 289) 3.

93. *See* John Peet, *Creaking at 60: The Future of the European Union,* THE ECONOMIST (May 25, 2017), https://www.economist.com/news/special-report/21719188-it-marks-its-60th-birthday-european-union-poor-shape-it-needs-more (listing among the threats to the EU's future the fact that "Greece remains a basket case" and that "Brexit may be more painful for Britain than for its 27 partners, but it is still a threat to the future of a union that has previously only ever expanded").

regional levels—most probably with approval by some of the EU national or sub-national parliaments—conditional on permanent removal of the investment court/appellate body version of ISDS. This would leave the EU free to incorporate those provisions in a separate agreement, which after authorization at the EU level could be submitted to all of the parliaments, with the awareness among many observers that full, unanimous parliamentary approval could require five to ten years, or perhaps never occur.

Approval by the EU of future trade agreements seems likely to take one of the following approaches:

1. Include ISDS provisions in the main text of the trade agreement (as with the CETA) and hope that thirty-eight national and regional parliaments will eventually ratify the agreements (which with the CETA appears to be very doubtful, in my opinion);
2. With those agreements that have not been completed (Singapore and Vietnam) or those that may be negotiated in the next three to five years (EU-Japan, EU-UK, and EU-Mexico, among others), treat the ISDS provisions as a separate side agreement (or as a bilateral investment treaty) that is subject to EU Member parliamentary ratification, with the EU itself concluding the main trade agreement without seeking national and regional parliamentary approval (acceptable legally but controversial politically, particularly with the future EU-UK trade arrangements);
3. Conclude future FTAs (particularly those with developed nations) without ISDS provisions, relying instead on the competence and lack of prejudice of the national courts of the EU Member states, the UK, Canada, the United States, and Japan, while advocating ISDS provisions for agreements such as the FTA with Vietnam (sensible but likely to be opposed by EU investors in foreign enterprises); or
4. Given the broadening political opposition in Europe to trade agreements generally, follow the CETA process even though the CJEU decision means that national and subnational parliamentary ratification is no longer legally required, with the significant risk that such agreements will never progress beyond the provisional entry into force stage (undesirable because of the consequences of failure of approval).

One caveat is that all approaches except No. 3 assume that the other Parties to the agreement are prepared to accept the EU's investment court/appellate body mechanism in place of the traditional *ad hoc* arbitration. While Canada and Vietnam have done so, there is no

assurance that Singapore, Japan, or the United States would concur.

Several immediate and medium-range challenges also arise. For Singapore, the situation is different and in some ways less complex than with the CETA, if and only if the EU Council and Parliament (and the Member states) are content to follow the CJEU's decision rather than continuing to insist as a political matter that national and subnational Parliament give their approval for a wide range of provisions. Presumably, the Commission is no more satisfied with the earlier negotiated traditional *ad hoc* arbitration provisions in the original text of the Singapore Agreement[94] than with the original ISDS provisions in the September 2014 CETA, and will wish to substitute language very similar to the CETA court/appellate body mechanism.

In my view, the most sensible option to revive the FTA that was concluded, except for ISDS, in December 2012 and for ISDS in June 2015, would be to remove the investment chapter and approve the remaining FTA as promptly as possible. The investment chapter (Chapter Nine) would be treated as a separate agreement for a distinct ratification process by the various Member parliaments. (Whether to include the guaranties for foreign investors, which the CJEU indicated were within the EU's exclusive competence in the FTA, is an open question. Given the controversy surrounding investor protection in general it seems more appropriate to incorporate those provisions in the separate investment agreement.)

The Singapore FTA sans investment provisions would then be submitted by the Commission for approval to the Council (for approval by a qualified majority) and to the EU Parliament (for approval by majority).[95] It is unclear whether treating ISDS and portfolio investment in a separate agreement would require additional legal steps within the EU system, or whether the need for unanimous parliamentary approval means that such investment agreements are no longer feasible for the EU. Given the likely mutual confidence of Singapore's stakeholders in the court systems of most if not all of the EU Member States, and of the EU stakeholders in Singapore's court system, if a separate investment agreement took years to ratify most investors are not likely to be overly concerned, particularly because eleven of the twenty-eight current EU Member States have existing BITs with Singapore.[96]

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94. Free Trade Agreement Between the European Union and the Republic of Singapore, EU-Sing., ch. 9, arts. 9.11-9.29 (unsigned; May 2015 text), http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf.

95. E-mail from a Belgian government lawyer, to David Gantz, Samuel M. Fegtly Professor of Law, Univ. of Ariz. James E. Rogers College of Law (May 18, 2018, 3:01 AM) (on file with author).

96. *See* International Investment Agreements Navigator: Singapore, U.N. Conference on

The EU-Vietnam FTA[97] ("EVFTA") as of November 2017 is awaiting the completion of its legal review. The text that was made public in January 2016 contains a variation of the EU investment court/appellate court proposal, rather inelegantly incorporated in a chapter that also covers trade in services and e-commerce.[98] An approach similar to that to be used with Singapore could likely be used in this instance as well, separating out the investment provisions including ISDS and incorporating them in a separate agreement, with the remaining provisions subject to approval by the EU alone. Here also, investor concerns are likely to be largely mitigated by the fact that Vietnam currently has in force BITs with twenty of the EU Member States.[99]

It is also obvious that it would make good economic sense for the EU Member States to finalize the text of these two agreements and put them promptly into force, given that Singapore and Vietnam's anticipated benefits from the TPP have been delayed and perhaps eliminated as a result of U.S. President Donald Trump's decision to withdraw from the Agreement.[100] The ongoing renegotiation of the 2001 FTA between the EU and Mexico[101] is subject to similar considerations given the uncertainties surrounding the NAFTA renegotiation.

The potential effect of the CETA saga and the CJEU decision on the future relationship between the EU-27 and the UK after the UK withdrawal becomes effective—most likely by the end of March 2019[102]—is also enormously significant, even if the timing and content of a new trade agreement are impossible to predict at present. UK Prime Minister Theresa May, in her TEU Article Fifty notice, proposed a

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Trade and Development, http://investmentpolicyhub.unctad.org/IIA/CountryBits/190 (last visited Nov. 8, 2017) (noting that Bulgaria, Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia, and the United Kingdom all have BITs with Singapore).

97. *See generally* EU-Vietnam FTA, *supra* note 4.

98. *Id.*, ch. 8 (outlining the Agreement's "necessary arrangements for the progressive liberalization of trade in services and investment and for cooperation on e-commerce").

99. *See International Investment Agreements Navigator: Vietnam*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/229 (last visited May 23, 2017) (noting that Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Slovakia, Spain, Sweden, and the United Kingdom all have BITs with Vietnam).

100. Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017).

101. *See* European Commission, Trade: Countries and Regions: Mexico, http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/ (last visited Nov. 8, 2017) (stating that these negotiations were launched in May 2016).

102. *See* George Parker, Alex Barker & Martin Stabe, *Theresa May's Article 50 Letter Decoded*, FIN. TIMES (Mar. 30, 2017), https://ig.ft.com/article-50-annotated/ (discussing the letter and providing the full text).

"bold and ambitious free trade agreement."[103] Some, such as David Davis, the UK's Brexit Minister, have suggested that the CETA is "the perfect starting point for our discussions with the Commission," but others have warned that the CETA's ratification challenges bode ill for a UK-EU trade agreement.[104]

Will the CETA experience encourage one or more of the EU-27 nations that wish to punish the UK for withdrawing from the EU feel empowered to do so? Or will the sheer complexities, and the economic and political risks of failing to work out a post-Brexit EU-UK trade arrangement, and the forty-four years of experience of living with the UK as the second largest economic power in the EU, convince the entire EU membership to act responsibly? This, in my view, means, *inter alia*, leaving ISDS for a separate, subsequent agreement or ignoring it entirely. The ability of the EU to conclude a necessarily complex trade agreement with the UK will be significantly increased if unanimity is not legally required at the EU level and national and sub-national parliament ratification is not required at all,[105] assuming this legally feasible approach is acceptable politically.

Here, as with Singapore and Vietnam, the UK has BITs currently in force with eleven Eastern European EU Member States,[106] suggesting that for the UK the risks of not having ISDS provisions in a future FTA with the EU are minimal. Few EU Member States are likely to be concerned regarding the independence and general competence of British courts, generally regarded as part of one of the best legal systems in the world,[107] to treat foreign investors fairly. Thus, a strong argument could be made that ISDS provisions for a trade agreement between the EU and the UK are superfluous, as perhaps they are for the EU-Canada FTA as well.[108] Realistically, it may make sense for all as

103. *Id.*

104. *See* Ashifa Kassam, *Canada's Trade Deal with EU a Model for Brexit? Not Quite, Insiders Say*, THE GUARDIAN (Aug. 15, 2016, 5:00 EDT) https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps (quoting Davis but pointing out the years it took to conclude the CETA and the much greater significance of EU-UK trade).

105. *See id.* (discussing positives and negatives of the CETA).

106. *See* International Investment Agreements Navigator: Singapore, United Kingdom, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu (noting that Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia having BITs with the UK; of the EU Member states in transition, only Cyprus and Malta are eliminated from the list).

107. *See* Rule of Law Index 2016, WORLD JUSTICE PROJECT, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (ranking the UK 10th on the World Justice Project, Rule of Law Index 2016; Denmark is first; all of the other top nine are EU Member or associated states—Norway, Finland, Sweden, Netherlands, Germany and Austria—except for New Zealand and Singapore).

108. *Id.* (ranking Canada 12th on the World Justice Project, Rule of Law Index 2016).

yet unratified EU FTAs to jettison ISDS provisions entirely, and rely instead on national courts and existing BITs.

ABBREVIATIONS

AG: Advocate General
BIT: Bilateral Investment Treaty
CETA: Comprehensive Economic and Trade Agreement
CJEU: Court of Justice of the European Union
EU: European Union
EVFTA: European Union-Vietnam Free Trade Agreement
FDI: Foreign direct investment
ICSID: International Centre for the Settlement of Investment Disputes
ISDS: Investor-state dispute settlement
MERCOSUR: Southern Cone Common Market
NAFTA: North American Free Trade Agreement
TEU: Treaty on European Union
TFEU: Treaty on the Functioning of the European Union
TPP: Trans-Pacific Partnership
TTIP: Transatlantic Trade and Investment Partnership
UK: United Kingdom
UNCITRAL: United Nations Commission on International Trade Law
WTO: World Trade Organization