

Considerations on the judgement of the *BVerfG* on the conclusion of CETA *

Susanna Villani ¹

Table of Content

1. Introduction. 2. Subject-matter of the action. 3. The decision of the German Constitutional Court. 4. Subsequent developments: a focus on the provisional application of CETA. 5. Conclusions

1. Introduction

After about five years of rounds of negotiations concluded in September 2014, the EU-Canada Comprehensive Economic and Trade Agreement (CETA)² provisionally came into force on 21 September 2017³ as a result of the signature on 30 October 2016 by the President of Canada and of the Presidents of the EU institutions involved – European Commission, Council

* How to quote this article: S. VILLANI, *Considerations on the judgement of the BVerfG on the conclusion of CETA*, in *Studi Tributari Europei*, n. 1/2017 (ste.unibo.it), pp 231-250, DOI: 10.6092/issn.2036-3583/8778.

¹ Susanna Villani, Postdoctoral research fellow in EU Law, University of Bologna.

² See, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ L 11* of 14.1.2017. In the same edition of the Official Journal there are also the following acts: Decision 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; Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States; Council Decision (EU) 2017/38 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.

³ See, European Commission, *The CETA Agreement comes into force*, 20 September 2017, available at http://europa.eu/rapid/press-release_IP-17-3121_en.htm.

and European Council – and the approval by the European Parliament on 15 February 2017⁴.

CETA is an example of the so-called 'new generation' free trade agreements (FTAs) concluded by the European Union. In particular, it intends to abolish 99% of all the customs duties and many other obstacles for the commercial operators by providing for specific provisions on the access to the market for goods, services, investments and public procurement as well as on intellectual property, sanitary and phytosanitary measures, sustainable development, regulatory cooperation, mutual recognition and removal of technical barriers. Moreover, it contains provisions on the establishment of an independent Investment Court System (ICS), composed by a permanent Tribunal and an Appellate Tribunal, constituted by judges appointed by States for resolving disputes between governments and investors known as investor-state dispute settlement (ISDS). Hence, this structure, to be activated just according to certain conditions, should replace the current ISDS system wherein the disputes are settled by *ad hoc* arbitration panels appointed by the parties⁵, thereby making the settlement faster and less costly⁶. Moreover, CETA underlines the commitment of the parties to collaborate for the creation of an International Multilateral Court that the

⁴ See, European Parliament legislative resolution of 15 February 2017 on the draft Council decision on the conclusion 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 (10975/2016 – C8-0438/2016 – 2016/0205(NLE)) (Consent).

⁵ In this regard, it is particularly relevant the recent judgement of the EU Court of Justice in *Achmea* where it has declared that the arbitration clauses contained in the bilateral agreements on investments do not comply with the EU legal order because, *inter alia*, they jeopardise the principle of autonomy. See, ECJ, *Slovak Republic v. Achmea*, judgement of 6 March 2018, ECLI:EU:C:2018:158. Testament to the fact that the mechanism for dispute settlement in the field of investments represents one of the more controversial issues of the common commercial policy, Belgium requested to the ECJ an Opinion on the compatibility of the jurisdictional system for the protection of investments set by the CETA with the Treaties. See, Opinion 1/17, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU, OJ C 369 of 30.10.2017. For a complete reference to the Belgian request, see *Belgian request for an opinion from the European Court of Justice*, available at https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf.

⁶ See, D. Gallo, "Portata, estensione e limiti del nuovo sistema di risoluzione delle controversie in materia d'investimenti nei recenti accordi sul libero scambio dell'Unione Europea", in *Diritto del Commercio Internazionale*, 2016, pp. 846-852.

European Commission has been recently authorized to negotiate by the Council⁷. With regard to regulatory cooperation, the agreement provides for the set-up of specialised committees that act under the auspices of the CETA Joint Committee, co-chaired by the Minister for International Trade of Canada and the Commissioner responsible for trade. The CETA Joint Committee, that operates according to Chapter 26 of the agreement, is responsible for all the issues concerning trade and investments as well as for any question relating to its implementation and interpretation.

In the light of this, CETA represents an agreement of significance for the common commercial policy that, according to Article 207 TFEU, falls in the exclusive competence of the Union. This notwithstanding, it is also an example of 'mixed agreement', that is an agreement covering areas of shared competence or of Member States' competences and that, therefore, has to be ratified also by all the Member States to definitely come into force⁸. Actually, at first the European Commission had hoped that it could be classified as a 'EU-only agreement'⁹, but it encountered the opposition of

⁷ See, Council of the European Union, *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, 20 March 2018, available at <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

⁸ At the time of writing, nine Member States have ratified the agreement, that are Lithuania, Denmark, Malta, Spain, Estonia, Croatia, Czech Republic, Portugal and Latvia. The so-called "mixity" in relation to the agreements of new generation is still debated. For a first doctrinal reconstruction on this topic, A. Rosas, "Mixed Union – Mixed Agreements", in M. Koskeniemi, *International Law Aspects of the European Union*, Brill, 1997; E. Neframi, "Mixed Agreements as a Source of European Union Law", in *International Law as Law of the European Union*, Brill, 2011, pp. 325-349. Moreover, for more recent insights, see M. Gatti, "La politica commerciale dopo il Parere 2/15: verso accordi 'EU-only' senza ISDS/ICS?", in *Quaderni di SIDIBlog*, June 2017, available at <http://www.sidiblog.org/2017/06/19/la-politica-commerciale-dopo-il-parere-215-verso-accordi-eu-only-senza-isdsics/>; H. Lenk, "Mixity in EU Foreign Trade Policy Is Here to Stay: Advocate General Sharpston on the Allocation of Competence for the Conclusion of the EU-Singapore Free Trade Agreement", in *European Papers*, Vol. 2, n. 1, 2017, pp. 357-382, available at <http://www.europeanpapers.eu/en/europeanforum/mixity-in-eu-foreign-trade-policy-is-here-to-stay-ag-sharpston-on-the-allocation-of-competence>; G. Van Der Loo, *The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity?*, CEPS Publications 2017, available at <https://www.ceps.eu/publications/court's-opinion-eu-singapore-fta-throwing-shackles-mixity>.

⁹ See, *EU Commission to opt for simple approval for Canada deal: EU official*, Reuters, 28 June 2016, available at <https://www.reuters.com/article/us-eu-canada-trade-idUSKCN0ZE2BG>.

some Member States¹⁰. To enable the agreement was rapidly signed, the Commission thus accepted the mixed nature of the treaty and in July 2016 it drafted the proposals for a Council decision on the signature, conclusion and provisional application of the agreement as of the provisions falling under the exclusive competence of the Union¹¹.

The Council, that has a significant role both in the phase of authorisation and in that of conclusion of international agreements according to Article 218 TFEU, was to adopt a position on CETA within 18 October 2016, but the decision was postponed to 28 October. In effect, the procedure of conclusion of this agreement as well as its provisional application were object of a deep debate within the national political and judicial bodies. Notably, it deserves to be recalled that, on 10 October 2016, the Parliament of Wallonia had voted against CETA, vetoing the signature of the agreement by Belgium¹². The judgement of the German Constitutional Court (*BVerfG*), released on 13 October 2016¹³, fitted exactly in this phase of apprehension. Contrary to

¹⁰ See, European Commission, European Commission proposes signature and conclusion of EU-Canada trade deal (5 July 2016), http://europa.eu/rapid/press-release_IP-16-2371_en.htm. In relations to this point, it is worth to recall that France had already raised doubts on the "EU-only" nature of the agreement. See, Assemblée Nationale, *Résolution Européenne sur le projet d'accord économique et commercial entre l'Union européenne et le Canada*, 23 November 2014, available at <http://www.assemblee-nationale.fr/14/ta/ta0428.asp>.

¹¹ See, Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (COM/2016/0444 final - 2016/0206 (NLE)); Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (COM/2016/0443 final - 2016/0205 (NLE)); Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (COM/2016/0470 final - 2016/0220 (NLE)).

¹² See, Walloon Parliament, *Motion déposée en conclusion du débat sur les projets de Traité CETA et de Déclaration interprétative du traité*, Doc. 606 (2016-2017) - N° 2, 14 October 2016. For a comment, see F. Couveinhes Matsumoto, "L'épopée de la Wallonie et la signature de l'AECG / CETA", in *Revue Generale de Droit International Public*, Vol. 121, n. 1, 2017, pp. 69-85.

¹³ See, Federal Constitutional Court, Judgement of 13 October 2016, ECLI:DE:BVerfG:2016:rs20161013.2bvr136816 available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html.

what expected, it dismissed the action brought by those who intended to obtain a preliminary injunction preventing the German Government's representative to consent the Council decision on CETA. The Court's ruling has, however, impacted on the German Government's position within the Council, by subjecting its green light to some *caveats*, and partially conditioned the next developments in this area.

2. Subject-matter of the action

In August 2016, the German Constitutional Court received two collective complaints (issued respectively by 125,000 and 68,000 citizens) and an action brought by the Parliament group *Die Link* for granting a preliminary injunction directed against the approval of the signature, the conclusion and the provisional application of CETA by the German representative sitting in the Council. The arguments were based on alleged violations of their rights *ex Article 38, sec. 1* (provisions on the election of the Bundestag) in conjunction with *Articles 79, sec. 3 and Article 20, secs. 1 and 2 of the Basic Law (Grundgesetz)*.

First of all, some applicants claimed that the approval by the Council of the signing, conclusion and provisional application of CETA exceeded the EU's competences as set out in *Articles 207 and 218 TFEU (§21 of the BVerfG judgement)* with particular reference to the maritime transport (Chapter 14 of CETA), labour protection (Chapter 23 of CETA), mutual recognition of professional qualifications (Chapter 11 of CETA) and, above all, to the establishment of the Investment Court System (Chapters 8 and 13 of CETA). The latter would have, indeed, 'authoritative powers' to adopt binding and enforceable decisions thus taking the judicial monopoly in investment matters at the expense of the national Courts¹⁴. According to

¹⁴ In fact, as for the traditional ISDS, the system of dispute settlement set in the CETA allows investors to resolve their disputes with a State by referring to a Tribunal established by the agreement. In this way, as already supported by the ECJ, national jurisdictions could be deprived "of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned". See, ECJ, Opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, point 80; ECJ, Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454. On this point, see, *inter alia*, I.

this orientation, the misuse of Union's powers would have significantly affected Member States' competences.

Secondly, the set-up of the committee system as provided for in CETA encroached on the principle of democracy, which forms part of the constitutional identity of the Basic Law, as well as the autonomy of the Bundestag because the CETA Joint Committee could adopt decisions on the content of the agreement without the support of the national parliaments, by precluding any following modification. The risk was thus to violate the Bundestag's legislative powers and the whole democratic proceeding with regard to those issues that do not fall within the exclusive competences of the Union (§22 of the *BVerfG* judgement).

For its part, the Federal Government considered the applications for a preliminary injunction to be unfounded for a number of reasons. First of all, it could not be supported the attribution of new powers to the Union since its competence to conclude such an agreement had been attributed to the Union and approved by the *BVerfG* itself at the time (§26 of the *BVerfG* judgement). Furthermore, being a mixed agreement, any shortcoming within the system of competences of the Union could be filled in by Member States as contracting parties. Consequently, the national parliaments, and therefore also the German one, would not have been deprived from their constitutive powers, by also considering that they have a plenty of room for implementing the agreement whenever it came definitely into force.

As for the composition of the CETA Joint Committee and the decisions to be adopted, the Federal Government underlined that Articles 26(3) and 30(2) of the CETA establish that the decisions made by such a committee shall be binding on the parties that have to implement them, subject to the completion of any necessary internal requirements and procedures. Aware of that, the Government's representative invoked the principle of loyal cooperation by recalling that the obligations arising therefrom, even though they do not affect the single prerogatives, are binding for all the subjects

Govaere, *TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order*, College of Europe Research Paper 1/2016.

that contribute to the development of the EU policies. Otherwise, the achievement of the objectives of the Union, that include the strengthening of commercial exchange, could be jeopardised. Hence, it was warned about the serious consequences and prejudices of a negative vote in the Council not only with regard to the EU's international trade capacity but also to the German industry and reputation.

3. The decision of the German Constitutional Court

Following the oral hearing in the presence of the Minister of Foreign Affairs Sigmar Gabriel, on 13 October 2016 the Federal Constitutional Court dismissed the actions brought against the German vote within the Council in favour of the provisional application of CETA. In adopting its position on the matter, the German Court evaluated a number of points by combining considerations of political and legal nature.

First of all, the *BVerfG* recalled the need to protect, on the one hand, the breadth of discretion of the Federal Government in foreign affairs as established by the very Basic Law, and on the other one to avoid negative effects on EU external trade policy and the international *status* of the European Union in general (§47-48 of the *BVerfG* judgement). In fact, a negative vote in the Council would have represented a signal of potential (and maybe irreversible) failure of the agreement in its entirety even before its definitive entry into force, with serious implications not only at economic but also political level in terms of reliability (§46 of the *BVerfG* judgement). Compared with this, the disadvantages arising from the non-issuance of a preliminary injunction and the subsequent finding that the Federal Government's participation in the passing of the decision by the Council was impermissible would have been less severe (§ 50 of the *BVerfG* judgement). The judges thus took a very prudent position with regard to the doubts brought by the applicants on the potential prejudices to the rights and principles protected by the German Basic Law as well as to the 'common good'. In any case, the Court stated that a proper assessment on the violation of the national laws and, even more, a constitutional review could

not be made until Germany was definitely bound on the international stage by means of its ratification of CETA.

This notwithstanding, the *BVerfG* did not refrain from ruling on the points risen by the applicants and, in particular, on the nature of the Council decision on the provisional application of the agreement and the potential violation of the constitutional identity protected under Article 79, sec. 3, of the *Grundgesetz*.

By starting from the first issue, it admitted that, being a mixed agreement that also regulates issues that do not properly fall within the exclusive competences of the Union (such as portfolio investment, investment protection, international maritime transport, the mutual recognition of professional qualifications and labour protection), it could not be ruled out that the decision of the Council regarding the provisional application of CETA qualified as an *ultra vires* act (§51 of the *BVerfG* judgement). Similarly, it could not be excluded that the Council decision on the provisional application of CETA also qualified as an *ultra vires* act to the extent that CETA is designed to transfer sovereign powers to the investment court and committee system by going beyond what covered by Articles 207, 216(1) and 218 TFEU (§58). On this point, according to the Court it was indeed evident a breakdown between the content of Article 23 of the Basic Law (that binds Germany to cooperate for the development of the EU) and the principle of national identity as guaranteed in Article 79, sec. 3 of the Basic Law (§59 of the *BVerfG* judgement). In fact, by considering the structure of the CETA Joint Committee and of the specialised committees, Member States would be excluded from any kind of intervention even where these bodies deal with issues that fall within national competences and that envisage a sort of political responsibility towards their citizens. Not being represented within the committees, Member States could thus influence the procedures and decisions to be adopted just in an indirect way by resorting to the procedure set in Article 218(9) TFEU that empowers the Council to take a decision imposing the representative of the EU to defend a common position in a body set up by an agreement (§64 of the *BVerfG* judgement). However, the legitimacy and the democratic control of these decisions were

not fully guaranteed whereby, according to the Federal Court, it was appropriate to take various safeguards to avoid severe prejudices to the 'common good' (§65-66 of the *BVerfG* judgement).

In the light of these considerations, the *BVerfG* welcomed the efforts made by the Federal Government in indicating some reservations to the provisional application of CETA and indicated other three different conditions that had to be respected so that the German Representative could vote in favour within the Council. First of all, the Council decision had to relate just to those parts of the agreement evidently falling within the exclusive competence of the EU (§70 of the *BVerfG* judgement). Secondly, some preventive instruments of protection against a potential violation of the national identity had to be detected. For example, an inter-institutional agreement could ensure that decisions taken ex Article 30(2) of the CETA may only be passed on the basis of a common position unanimously adopted by the Council pursuant to Article 218(9) TFEU (§71 of the *BVerfG* judgement). Finally, the German judges suggested that a proper interpretation of Article 30(7), sec. 3, letter c) of the CETA should guarantee the possibility for a Member State of unilaterally terminating the provisional application of the agreement by means of written notification in case of violation of the constitutional identity (§72 of the *BVerfG* judgement).

4. Subsequent developments: a focus on the provisional application of CETA

Over the last years, as well-known, the *BVerfG* has often sought an equilibrium between the interests of the Union and those of Germany, by referring to the respect for the law and the balance of power, warning about potential *ultra vires* practices and defending the prerogatives of national sovereignty. The decision under examination, confirmed on occasion of a subsequent decision of 7 December 2016¹⁵, fits in that group of judgements

¹⁵ See, Federal Constitutional Court, Judgement of 7 December 2016, ECLI:DE:BVerfG:2016:rs20161013.2bvr136816, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html.

inaugurated with *Solange I* case-law¹⁶ and that still influence the German constitutional jurisprudence with reference to the relationship with the European Union. Nearly two years after this decision, it is thus needed to assess to what extent it has influenced the subsequent developments in the field of the common commercial policy and what are the main still debated points.

The first and most immediate consequence of the judgement of 13 October 2016 surely was the debate in the Council on the provisional application of CETA. As already anticipated, the meeting of the Foreign Affairs Council – Trade (FAC-Trade) of 18 October 2016 effectively ended in stalemate because of, on the one hand, the resolute position of the Belgian Government and, on the other one, the German Government's demands reflecting some of the *caveats* imposed by the Constitutional Court in the decision under examination. It was thus necessary to negotiate until the very end in order to combine the different national sensibilities and minimise the pending reservations. Hence, the Council could adopt its decision on the proposals issued by the European Commission just on 28 October 2016, together with that to forward the draft decision on the conclusion of CETA to the European Parliament¹⁷.

On this occasion, in order to make clearer the positions of the Commission, of the Council and of the Member States, it was decided to adopt 38 Statements¹⁸ that, alongside the Joint Interpretative Instrument¹⁹, are

¹⁶ See, Federal Constitutional Court, judgement of 29 May 1974, 2 BvL 52/71. A version of the judgement is available at <http://www.servat.unibe.ch/dfr/bv037271.html>.

¹⁷ See, Decision of the Council (EU) 2017/37 on the signing on behalf of the European Union 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, 28 October 2016, Doc. 10972/1/16 REV 1; Council Decision (EU) 2017/38 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, 28 October 2016, Doc. 10974/16.

¹⁸ See, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part - Statements to be entered in the Council minutes, 28 October 2016, Doc. 13463/1/16 REV 1.

¹⁹ See, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 28

integral part of the agreement²⁰. Besides clarifying some of the multiple points under discussion, these Statements commit the different actors to protect the respective competences and identities even in the field of the common commercial policy as designed in the CETA.

First of all, as for the committee system and the set-up of the ICS, the clarifications reported in the Statements largely reflect the weight of the *BVerfG*'s decision. With respect to the jurisdictional system for the protection of investments, the Commission has undertaken to further review, without delay, of the dispute settlement mechanism (ICS) and to involve Member States in the selection process of the judges (Statement n. 36)²¹. The CETA Joint Committee has also been positively affected as demonstrated, first of all, by Statement n. 18 wherein the Commission keeps open the option to make a proposal of modification or interpretation of this part of the agreement in the light of a potential constitutional review of the German Constitutional Court. Moreover, Statement n. 19 sets that, whenever a decision of the CETA Joint Committee falls within Member State's competences, the position to be taken by the Union and its Member

October 2016, Doc. 13541/16. According to Article 31 of the Vienna Convention on the Law of the Treaties, it represents a binding interpretative instrument. In particular, such an instrument tackles the impact of CETA on the national governments' capacity to legislate in defence of the public interest and helps interpret the provisions on the protection of investments and the dispute settlement, sustainable development, labour rights, environmental protection, precautionary principle, public services, public procurement and management of water.

²⁰ The Declarations as well as the Joint Interpretative Instrument, in comparison to the Protocols, are not aimed at changing the legal framework of the agreement but at providing a binding orientation on its interpretation as set in Article 31 of the Vienna Convention on the Law of the Treaties.

²¹ In this regard, it is possible to draw a parallel with the content of ECJ's Opinion 2/15. The ECJ has indeed recognized that a mechanism of dispute settlement depriving national jurisdictions of their powers cannot be established without the consent of Member States and, therefore, cannot be regulated by an exclusive competence of the EU. See, ECJ, Opinion 2/15 on the Free Trade Agreement between the EU and Singapore, 16 May 2017, ECLI:EU:C:2017:376, point 292. For a comment on this, see G. Sangiulo, "A Comment on Opinion 2/15 and Investor State Dispute Resolution. The Price of Preserving the Division of Powers", in *KSLR Commercial and Financial Law Blog*, August 2017, available at <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2017/08/25/acoment-on-opinion-215-and-investor-state-dispute-resolution-the-price-of-preserving-the-division-of-powers/>

States within the CETA Joint Committee shall be adopted by common accord. However, there is to say that, according to this statement, it does not seem that the German Constitutional Court's interpretation on the voting procedure within the Council ex Article 218(9) has been embraced. Indeed, the reference to the adoption of a common position does not necessarily imposes a unanimous vote, bearing also in mind that both practice and the ECJ's case-law – notably in *United Kingdom v. Council*²² – explicitly reveal that according to Article 218(9) TFEU the Council takes decisions by a qualified majority²³.

By broadening the reasoning, it is worth highlighting the content of the Declarations on the provisional application of the CETA, as partially inspired by the German Constitutional Court's decision. Indeed, on the Germany's request, it has been included a statement that confirms what has been established in the decision on the provisional application of the agreement, which is that the latter will cover just those issues falling within the exclusive competence of the EU, without prejudice to the distribution of competences between the EU and Member States (Statement n. 15)²⁴. Notwithstanding this could be perceived as an appropriate clarification for preserving some Member States' prerogatives, it is necessary to underline that, in the meanwhile, important developments in the field have occurred. The recent position of the ECJ with regard to the EU-Singapore Free Trade Agreement²⁵ has, indeed, allowed to further broaden the scope of the

²² See, ECJ, Case C-81/13, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, judgement of 18 December 2014, ECLI:EU:C:2014:2449.

²³ *Ibid.*, point 66.

²⁴ In this regard, the ECJ had already made clear that for the negotiation and conclusion of a mixed agreement, "each of those parties must act within the framework of the competences which it has while respecting the competences of any other contracting party". See, ECJ, Case C-28/12, *Commission v. Council*, judgement of 28 April 2015, ECLI:EU:C:2015:282, point 47.

²⁵ See, ECJ, Opinion 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore, 16 May 2017, ECLI:EU:C:2017:376. For deeper insights on the Opinion, see the articles cited in note 7 and, moreover, D. Geraets, "Changes in EU Trade Policy After Opinion 2/15", in *Global Trade and Customs Journal*, Vol. 13, n. 1, 2018, pp. 13–18; M. Cremona, "Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017", in *European Constitutional Law Review*, n. 1, 2018, pp. 231-259; P.-Y. Monjal, "L'accord de

common commercial policy. In particular, the Commission's request was intended to establish whether such an agreement was fully covered by the exclusive competence of the Union or whether there were some sectors of shared competence with the Member States. On the one hand, the judges in Luxemburg recognized the existence of some fields that cannot be exclusively governed by the Union – such as that on the indirect foreign investments or the ISDS system – as explicitly excluded by the Treaties and not falling within the concept of 'common rules' within the meaning of Article 3(2) TFEU, thereby confirming the mixed nature of the agreement. On the other side, by overcoming the more restrictive approach of the Advocate general Sharpston²⁶, the Court has actually further broadened the original scope of application of the common commercial policy, by including also the provisions on sustainable development, intellectual property rights, maritime transport and access to the market²⁷. In the light of this, it is thus clear the reason why the provisional application of the CETA has actually interested the large part of the agreement – including those sectors excluded by the German Constitutional Court – apart from the portfolio investments and the investor-State dispute settlement system²⁸.

libre-échange avec la République de Singapour devant la Cour de justice (avis 2/15) ", in *Revue du droit de l'Union Européenne*, Vol. 1, 2017, pp. 147-165 ; C. Cellierino, "Il Parere 2/15 della Corte di giustizia sull'accordo di libero scambio UE-Singapore: luci e ombre", in *Eurojus.it*, July 2017, available at <http://rivista.eurojus.it/il-parere-215-della-corte-di-giustizia-sullaccordo-di-libero-scambio-ue-singapore-luci-e-ombre/>; D. Kleimann, G. Kübek, "The Singapore Opinion or the End of Mixity as We Know It", in *Verfassungsblog*, May 2017, available at <https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>.

²⁶ See, Conclusions of the Advocate general Eleanor Sharpston of 21 December 2016, Opinion 2/15, ECLI:EU:C:2016:992, point 566.

²⁷ On the basis of the previous jurisprudence and of Article 3(2) TFEU, the ECJ has recognized also the exclusivity of the transport policy as well as the competence of the Union to terminate agreements previously concluded by the Member States now falling within the exclusive competence of the Union, such as the so-called BITs (Bilateral Investment Treaties).

²⁸ See, Notice concerning 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, *OJ L 238* of 16.9.2017.

Since the provisional application intervenes in relation to a broad number of provisions of the CETA because falling within the exclusive competence of the Union, it is of particular interest what set in some statements concerning the opportunity to terminate the provisional application of the agreement. By recalling the BVerfG's position, both Germany and Austria have put in writing that, as contracting parties, they may exercise their rights which derive from Article 30.7(3)(c) of CETA. Such a statement is confirmed also by the Polish²⁹ and Belgian³⁰ ones, as well as by that of the Council affirming that if the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court or following the completion of other constitutional processes and formal notification by the government of the concerned State, provisional application must be and will be terminated (Statement n. 20). This would mean that an *actus contrarius* even of a single Member State, besides impeding the definitive entry into force of the agreement³¹, could imply the termination of the provisional application of the agreement. Since it would affect the regulation of issues falling in the exclusive competence of the Union, such statements clearly generated some confusion and it is therefore necessary to provide for some clarifications.

First of all, it is appropriate to distinguish two different issues: on the one hand, the possibility that a Member State unilaterally terminates the provisional application of the agreement; on the other one, the fact that the inability to ratify the agreements may influence its provisional application.

With regard to the first point, doubts have been raised because, disregarding what touched upon by the German Constitutional Court, is it unlikely that the provisions on the termination of the provisional application can be interpreted as to justify the unilateral disapplication of the

²⁹ See, Statements to be entered in the Council minutes, Statement n. 22.

³⁰ See, Statements to be entered in the Council minutes, Statement n. 37.

³¹ As recalled at the beginning of the present contribution, the entry into force of a mixed agreement needs the ratification of all the contracting parties, including the Member States.

agreement by a Member State³². It is indeed worth to recall that Article 30(7) of the CETA refers to the fact that 'a party' may terminate the provisional application by written notice to the 'other part', thereby suggesting the existence of just two contracting parts in this phase. Hence, the provisional entry into force of the agreement should intervene just with regard to Canada and the EU as a whole for the fields of competence of the Union, without any involvement of Member States. This stance, confirmed by the fact that all the statements under examination make reference to the respect of the EU procedural rules, has been taken up by the Deputy Director of the DG for Trade on occasion of a hearing before the INTA Committee of the European Parliament³³.

As for the second point, the question is cumbersome. In fact, on the one hand the termination of the provisional application of an agreement shall technically occur after a proposal of the Commission subsequently adopted by the Council by qualified majority and thus it must be an act of the Union as a whole³⁴. This means that the opposition of a Member State cannot automatically imply the termination of the provisional application, considering also that the statement n. 20 sets that the necessary steps shall be taken in accordance with the EU procedural rules. On the other side, it is evident that, as underscored by some scholars³⁵, if an agreement cannot definitely enter into force for the opposition of one or more States, thus it

³² See, G. Van Der Loo, R. A. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions", in *Common Market Law Review*, Vol. 54, n. 3, 2017, pp. 758-759 e 761-762; A. Suse, J. Wouters, *The provisional application of the EU's mixed trade and investment agreements*, KU Leuven Working Paper n. 201, 2018, p. 21.

³³ See, Mauro Petriccione, Deputy Director, DG Trade, European Commission, Declaration before the INTA Committee of the European Parliament, 10 November 2016. Audiovisual registration is available at <http://web.ep.streamovations.be/index.php/event/stream/161110-0900-committee-inta>.

³⁴ See, A. Suse, J. Wouters, *The provisional application of the EU's mixed trade and investment agreements*, p. 20; C. Hillion, "Mixity and coherence in EU external relations", in C. Hillion, P. Koutrakos, *Mixed Agreements Revisited. The EU and its Member States in the World*, Hart Publishing, 2010, p. 101; M. Klamert, "Loyalty and Mixed Agreements", in *The Principle of Loyalty in EU law*, p. 202.

³⁵ See, G. Van Der Loo, R. A. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions", pp- 760-761.

might not make sense to continue the provisional application that – by definition – is a transitional instrument³⁶.

In any case, within a context where national governments may expose the Union's prerogatives to uncertainty, it is not possible to ignore the principle of loyal cooperation (Article 4(3) TEU)³⁷, whose relevance in relation to the mixed agreements has been more than once stressed by the ECJ³⁸. Indeed, it has established an obligation of coordination between the interests of the Union and the Member States during the whole procedure of negotiation, conclusion and ratification especially when the respective competences are strictly linked³⁹. This is to guarantee that the EU legal order acts in a unitary way at external level⁴⁰.

In this perspective, it is necessary to underline that Statement n. 20 establishes just two situations where it is possible to terminate the provisional application of the CETA in case of non-ratification, that are when it depends either on the incompatibility of the agreement with the national Constitution or on the inability to conclude the internal procedure. In comparison to the first and more objective situation, the permanent and

³⁶The temporary character of the provisional application is clear both from the agreement (see, Article 1 of the Council Decision 2017/38 on the provisional application of the CETA) as well as the content of Article 218(5) TFEU wherein it is stated that the "provisional application applies before entry into force of the agreement".

³⁷ For deeper insights on the principle of loyal cooperation, see, *inter alia*, F. Casolari, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled?", in L. S. Rossi, F. Casolari (ed.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Springer, 2014, pp. 93-133.

³⁸ See, above all, ECJ, Opinion 2/91 delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, 19 March 1993, ECLI:EU:C:1993:106, point 38.

³⁹ See, ECJ, Case C-459/03, *Commission of the European Communities v. Ireland*, judgement of 30 May 2006, ECLI:EU:C:2006:345, points 174-176.

⁴⁰ See, Conclusions of the Advocate general Giuseppe Tesauro, Case C-53/96, *Hermés International*, 13 November 1997, ECLI:EU:C:1997:539, point 21. This is in line with another tendency of the Court, that is to evocate the principle of loyal cooperation to guarantee the interpretative unity of the provisions contained in the mixed agreements. See, ECJ, Case C-53/96, *Hermés International*, judgement of 16 June 1998, ECLI:EU:C:1998:292, point 32; ECJ, Joint cases C-300/98 and C-392/98, *Christian Dior e Assco Gerüste*, judgement of 14 December 2000, ECLI:EU:C:2000:688, points 36-37.

definitive character of the second one is surely more difficult to be met also because it is maybe strictly linked to the political context. It is therefore clear that, when the Member State has been left with the discretion to establish its ability or inability to ratify the agreement, it must act in good faith by recognizing that its inability is permanent and separated from political reasons⁴¹. Testament to this is the fact that, in her Conclusions on the EU-Singapore agreement, the Advocate general Sharpston has recalled that, despite any party is free to choose between either consenting to or rejecting the entire agreement, where a Member State to refuse to conclude an international agreement for reasons relating to aspects of that agreement for which the European Union enjoys exclusive external competence, that Member State would be acting in breach of those Treaty rules⁴².

Albeit the opportunity that a single Member State remains an open question⁴³, it is evident that a non-ratification scenario may jeopardize the definitive entry into force of this kind of agreements. Having said that, the principle of loyal cooperation operates also in this phase, by imposing that the Member State at stake closely works with the Commission to resolve the situation⁴⁴. In particular, it would be desirable to remove the element or the elements constituting the main obstacles to the ratification. Notwithstanding the best moment to raise potential doubts over the agreement is that of negotiation, it is likely that some States had accept the decision of the majority within the Council. As already occurred in other occasions⁴⁵, it

⁴¹ The Deputy Director Petriccione himself has underlined this aspect in his intervention before the INTA Committee of the European Parliament.

⁴² See, Conclusions of the Advocate general Eleanor Sharpston, Opinion 2/15, point 568.

⁴³ See, G. Van Der Loo, R. A. Wessel, "The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions", p. 762.

⁴⁴ For an analysis of the potential solutions to this contingency, see, G. Kübek, "The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States", in *European Foreign Affairs Review*, Vol. 23, n. 1, 2018, pp. 21–40.

⁴⁵ For instance, in the case of the Association Agreement with Ukraine, it has been adopted a decision clarifying specific points of the agreement in order to meet the requests of The Netherlands. See, G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and*

could be appropriate to renegotiate some parts of the agreement in order to meet the incertitude of the Member State without compromising the Union's position *vis-à-vis* the third country. However, the ratification process remains an issue of major tension at national level, as demonstrated by the recent statements of the Italian government and the Austrian President⁴⁶. It cannot be excluded that, in this specific case, the CETA may meet serious difficulties in definitely entering into force⁴⁷. Hence, the necessity to promote the splitting of agreements governing sectors of shared competence from those that fall within the exclusive competence of the Union is cumbersome in order to avoid that a Member State may prevent the Union from exercising its competences.

5. Conclusions

The decision of the *BVerfG*, although it was not about the compatibility of CETA with the German Constitution, clearly illustrates how it is extremely demanding for the Constitutional Courts to establish an equilibrium between the duty to protect the Constitution of their countries and to respect the commitments made in joining the process of European integration, by taking into consideration the international political reality.

After almost two years, the position adopted by the German Constitutional Court – despite some controversial points – has certainly influenced that of the Federal Government and has had repercussions much broader, by paving the way to other actions not only at national but also at supranational level. On 31 July 2017, on request of a group of

Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without membership, Brill/Nijhoff, 2016.

⁴⁶ In June 2018, the Italian Minister for Agriculture made clear the intention to ask the national Parliament not to approve the CETA because it would not sufficiently protect the national products (see <http://www.eunews.it/2018/06/14/italia-ratifica-accordo-commerciale-ue-canada-ceta/106350>). As for Austria, despite the Parliament has positively voted the ratification of CETA, the President Alexander Van der Bellen decided to take time to sign the agreement and to wait for the ECJ's Opinion 1/17 (see <http://www.bundespraesident.at/newsdetail/artikel/bundespraesident-alexander-van-der-bellen-wartet-mit-ceta-unterschrift-auf-eugh-entscheid/>).

⁴⁷ For a deeper insight, see Rapoport C., "La négociation de l'Accord économique et commercial global euro-canadien, une négociation sous contrainte", in *Revue des Affaires européennes*, Vol. 34, n. 2, 2017, pp. 201-210.

representatives of the French National Assembly, the *Conseil Constitutionnel* adopted its decision confirming – with an articulated reasoning – the compatibility of the CETA with the French Constitution⁴⁸. Moreover, on 6 September 2017, just before the provisional entry into force of the agreement, Belgium – as envisaged in Statement n. 37 – requested to the ECJ an opinion on the compatibility of the dispute settlement in the field of investments as established by the treaty at stake with EU law. ECJ's Opinion 1/17 (not yet released) will represent the next step in this evolving saga and it will be interesting to observe to what extent it will take into account the perspective of the national tribunals with a view to the judicial multi-level dialogue⁴⁹. It goes without saying that the position taken by the ECJ will deeply influence the Member States' willingness to ratify the CETA⁵⁰. Starting from the experience of this free trade agreement with Canada and the uncertainty that characterizes the ratification process of so complex treaties, an assessment of the EU commercial policy and the decision-making process has been meanwhile conducted. Regardless the considerable broadening of the notion of common commercial policy ex Article 207 TFEU⁵¹, Member State are proving to be increasingly interested

⁴⁸ See, French Constitutional Court, Decision n. 2017-749 DC of 31 July 2017, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, ECLI:FR:CC:2017:2017.749.DC. For deeper insights, see J. Larik, "Prêt-à-ratifier: The CETA Decision of the French Conseil constitutionnel of 31 July 2017", *European Constitutional Law Review*, Vol. 13, n. 4, 2017, pp. 759-777; M.-C. Cadilhac, C. Rapoport, "In Between Seats"... The Conseil constitutionnel and the CETA", in *European Papers - European Forum*, 25 August 2018, pp. 1-22, available at <http://europeanpapers.eu/it/europeanforum/in-between-seats-french-conseil-constitutionnel-and-ceta>.

⁴⁹ See, Kübek G., "CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion 1/17", in *VerfBlog*, 4 July 2018, available at <https://verfassungsblog.de/cetas-investment-court-system-and-the-autonomy-of-eu-law-insights-from-the-hearing-in-opinion-1-17/>.

⁵⁰ In this regard, see C. Eckes, "Don't Lead with Your Chin! If Member States continue with the ratification of CETA, they violate European Union law", in *European Law Blog*, 13 March 2018, available at <http://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law>.

⁵¹ See, *inter alia*, M. Bungenberg, C. Herrmann (ed.), *Common Commercial Policy after Lisbon*, Springer, 2013.

in monitoring the Union's action also in this field and in avoiding their prerogatives are diverted. It is thus evident that 'mixity', with its consequences in procedural terms, will be even more of a practice to be taken into account by the EU institutions in the elaboration of the so-called 'new generation' agreements. To confirm this, on occasion of the recent meeting of the Council on 22 May 2018⁵², new indications on the negotiation and conclusion of trade agreements have been adopted by including the necessity to reach, to the maximum extent possible, consensual decisions that guarantee the appropriate respect of all the States' interests. In this perspective, the elaboration of a solid and respectable commercial policy should be based on the principle of loyal cooperation in order to efficiently meet the future challenges of globalisation.

© Copyright Seast – Tutti i diritti riservati

⁵² See, Council of the European Union, *The negotiation and conclusion of EU trade agreements - Council conclusions*, 22 May 2018, Doc. 9120/18.