The Ratification of CETA and other Trade Policy Challenges After Opinion 2/15*

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A. Introduction

In 1995, the WTO started to work on the basis that it would engage its members to further trade liberalization and rule-making either as a permanent negotiating forum or within multilateral rounds of trade negotiations. After the abysmal performance of the Doha Development Agenda (DDA), the EU moved its emphasis from multilateral to bilateral trade liberalization. Under the leadership of Commissioners Mandelson, de Gucht, and Malmström the European Commission presented proposals on how the EU should engage bilaterally.[1] It proposed a new generation of free trade agreements (FTAs) encompassing traditional market access subjects, services, government

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1 *European Commission*, 'Global Europe. Competing in the World. A Contribution to the EU's Growth and Jobs Strategy (Communication)', 2006; *European Commission*, 'Trade, Growth and World Affairs. Trade Policy as a core Component of the EU's 2020 Strategy', COM (2010) 612 final; *European Commission*, 'Trade for All. Towards a More Responsible Trade and Investment Policy (Communication)', 2015; *European Commission*, 'A Balanced and Progressive Trade Policy to Harness Globalisation (Communication)', COM (2017) 492 final.

procurement, and intellectual property, as well as regulatory cooperation, sustainable development, and investment. At the beginning, the EU sought FTAs with emerging trading partners in Asia and Latin America (South Korea, India, Singapore, Vietnam, and Mercosur), later traditional trading partners were added (Canada, USA, Japan, Australia, and New Zealand). These developments reached their peak with the negotiations of TTIP, the Transatlantic Trade and Investment Partnership. Whilst TTIP was put on ice in 2017, the EU successfully concluded FTAs with Korea, Singapore, Vietnam, Canada, and Japan.

In 2007, the Lisbon Treaty extended the Union's common commercial policy competence by adding trade in services, the commercial aspects of intellectual property rights and foreign direct investment[2] to the Union's existing trade competences. Moreover, trade policy was embedded in the European Union's overall objectives for external actions.[3] Following these changes, one would have expected a smooth working process between the Member States and the Commission concerning trade agreements; yet competence issues remained high on the political agenda. The Member States wanted to retain some power regarding FTAs, probably also as a reaction to the public's critical perceptions and discussions of CETA and TTIP. They did not agree with the position of the European Commission, i.e., that these agreements were 'EU-only' agreements requiring an EU signature and ratification.[4] To obtain clarity, the Commission in 2014 asked the Court of Justice of the European Union (CJEU, hereafter called the Court) for an Opinion on the competence to sign and ratify the trade agreement which it had negotiated with Singapore.[5] In June 2016, President Juncker tried to sell CETA as an 'EU-only' agreement yet had to backtrack after a storm of protest from Member States.[6] CETA was declared "mixed" requiring not only the EU's signature and ratification but also those of the 28 Member States.[7]

The Court rendered its Opinion on 16 May 2017.[8] It held that the EU Singapore FTA (EUSFTA) "*cannot, in its current form, be concluded by the EU alone*".[9] The Court considered that the provisions on non-direct foreign investment (portfolio investments) and on the dispute settlement regime between investors and the Member

2 The transfer of competence for foreign direct investment from the Member States to the EU represented a long and arduous process which already started in 1972. Some Member States, like Germany, United Kingdom and France had voiced serious criticism to this transfer in the context of the Convention for a constitutional treaty in 2003/2004 but then they no longer raised objections in the context of the Lisbon Treaty.

3 See generally *Cremona*, SIEPS 2017/32 (2).

4 See e.g. *Greive/Tauber*, Die Welt, 29 June 2016, available at: https://www.welt.de/wirtschaft/article156690315/Schnurzegal-Juncker-erzuernt-deutsche-Politiker.html (11/10/2019).

5 *European Commission*, 'Singapore: The Commission to Request a Court of Justice Opinion on the trade deal (Press Release)', (2014) IP/14/1235.

6 *Kuijper*, Post-CETA; *Kuijper* points out that the Commission made this proposal to avoid a unanimous decision of the Council overturning the Commission's position.

7 *European Commission*, 'European Commission proposes signature and conclusion of EU-Canada trade deal (Press Release)', (2016) IP/16/2371.

8 CJEU, case A-2/15, *Opinion of the Court*, ECLI:EU:C:2017:376.

9 *CJEU*, 'The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone (Press Release)', (2017) No/52/17.

States (ISDS) fell into the category of "shared competences" between the European Union and the Member States. With respect to all other substantive issues of the agreement, the Court held that the European Union had exclusive competence.

Opinion 2/15 triggered a debate on how the European Union should, in the future, ratify broad and comprehensive free trade agreements. Following the Court's Opinion, the Commission, in April 2018, split the original EUSFTA into two agreements and proposed the 'EU-Singapore Free Trade Agreement' as an 'EU-only' agreement[10] and the 'EU-Singapore Investment Protection Agreement' as a 'mixed' agreement.[11] The Council has accepted to proceed in this way for the Singapore agreements,[12] yet it also made clear that it will "*(to) decide whether to open negotiations on this basis*"[13] and therefore confirmed its decision-making power on this issue.

In the following we will analyze the impact of Opinion 2/15 on the CETA ratification process. Will CETA be ratified by the Member States notwithstanding the outspoken opposition of some of them or will the Commission eventually also have to split CETA into two agreements? Thereafter, we will consider the EU's trade relationship with the U.S. and China and discuss the challenges for EU trade policy posed by these 'heavy-weight' trading partners.

B. CETA Ratification: Rough Ride on a Rollercoaster or Plan B?

I. Will CETA be ratified?

Originally the European Commission considered that "CETA has identical objectives and essentially the same contents as the Free Trade Agreement with Singapore (EUSFTA); therefore, the Union's competence is the same in both cases"[14] and had the intention to propose CETA as an 'EU-only' agreement. However, in reaction to Member States' protests, it presented CETA as a mixed agreement in July 2016.[15] With the benefit of hindsight, one can say that it acted correctly. In fact, Opinion 2/15 confirms

10 *European Commission*, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of a Free Trade Agreement between the European Union and the Republic of Singapore', COM (2018) 196 final and 'Proposal for a Council Decision on the Conclusion of a Free Trade Agreement between the European Union and the Republic of Singapore', COM (2018) 196 final.

11 Ibid., 'Key elements of the EU-Singapore trade and investment agreements (MEMO)', (2018) 18/3327.

12 In October 2018 the Council adopted the decision to sign the two agreements. See *Council of the EU*, 'EU-Singapore: Council adopts decisions to sign trade and investment agreements (Press Release)', (2017) 563/18.

13 Ibid., 'Draft Council conclusions on the negotiations and conclusions of EU trade agreements', (2018) 8622/18. Adopted by the Foreign Affairs Council on 22 May 2018.

14 *European Commission*, '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) 443, p. 4.

15 Ibid.; *European Commission*, '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) 444 final.

that some provisions of CETA fall into the category of 'shared' competence. Notwithstanding the 'satisfaction' given to the Member States, the signature of CETA[16] was preceded by some tumultuous events: most notably the rebellion of Wallonia[17] but also considerable opposition against CETA and TTIP in many Member States, particularly in Germany,[18] France,[19] Austria[20] and Belgium.[21] The NGO movement against TTIP[22] and CETA was no longer the isolated campaign of a few but had evolved into a mass mobilization of 'Joe Public'. Some Member States' governments and deputies of national Parliaments and the European Parliament joined in the criticism of both agreements. The Council's decision to sign CETA became possible only after the adoption by Canada, the EU and the Member States of a Joint Interpretative Instrument[23] and 38 statements or declarations[24] added to the decision.[25] The Joint Interpretative Instrument was considered necessary to overcome the opposition to CETA and to ease the tensions. The Instrument interprets in a legally binding way specific CETA concepts such as the much-disputed Investment Court System (ICS) or the right to regulate to achieve legitimate public policy objectives in the areas of public health, social services, education or environment as well as the concept that CETA will not lower food safety-, consumer protection-, health-, environment- and labor protection-standards.[26] Upon the proposal of the Commission[27] the Council also opened the way for the provisional application of CETA.[28] In February 2017, the

16 *Council of the EU*, 'Council decision 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', (2016) 10972/1/16 REV 1.
17 *Van der Loo/Pelkmans*.
18 In Germany the opponents of CETA launched a constitutional challenge to CETA. The Bundesverfassungsgericht rejected the applications for a preliminary injunction on 13 October 2016, yet the case is still pending regarding the constitutional challenge. See *Tietje/Nowrot*, EuR 2017, p. 137.
19 *Orosz et al.*, Le Monde, 07/11/2016.
20 *Nasralla/Baczynska*, Reuters, 01/09/2016.
21 *Crespy*.
22 One of the main arguments of NGOs against TTIP was the lack of transparency of the negotiations and the supposedly unwillingness of then Trade Commissioner Karel De Gucht while in fact the attempt of De Gucht to push for the declassification of the TTIP negotiations directives failed because of the resistance of Member States in the Council. See *Hoffmeister*, in: Czuczai/Naert (eds.), p. 323.
23 *Council of the EU*, 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Council', (2016) 13541/16.
24 *Council of the EU*, 'Statement to the Council Minutes, Council', (2016) 13463/1/16 Rev 1.
25 See *Van der Loo*, CETA's signature, CEPS Commentary 2016.
26 Ibid., p. 2.
27 *European Commission*, '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) 470 final.
28 *Council of the EU*, 'Council decision 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', (2016) 10974/16.

European Parliament gave its consent to CETA[29] and after the Canadian ratification parts of the agreement are provisionally applied.[30] According to the Council "only matters within the scope of EU competence will be subject to provisional application."[31]

Three years after the heated CETA debates, the situation in Europe has considerably changed. Of course, CETA will only come into force after all the national ratifications have been deposited (Article 30 CETA), and this will take time, as the example of the FTA with South Korea shows.[32] At the time of writing, thirteen out of 28 Member States have ratified CETA.[33] More importantly Brexit, the U.S. trade policy under President Trump and government changes in some of the Member States or regions allow a more positive outlook for a CETA ratification by the Member States notwithstanding the continuing NGO opposition.[34] Germany,[35] Austria[36] and France[37] have declared that they will ratify CETA, and Wallonia has a new government[38] which is more in line with the Belgian federal government than its predecessor. Nevertheless, the case of CETA shows that the process of ratification of mixed agreements remains unpredictable. It cannot be said whether all EU Member States will eventually ratify CETA or whether one will reject it for specific reasons[39] and will, therefore, hold the EU and its trading partner hostage, just as the region of Wallonia

29 *European Parliament*, 'MEPs back EU-Canada Trade agreement (Press Release)', 17/02/2017, available at: http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement (18/08/2018).

30 '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 16/09/2017, p. 9.

31 See Statement 15 of the above-mentioned 38 statements and declarations, (fn. 24). With reference to past practice *Kleimann* and *Kübeck* argue that provisional application of other agreements do not necessarily concern only those provisions which fell under 'EU-only' competence; see *Kleimann/Kübeck*, The Case of CETA and Opinion 2/15, p. 17.

32 After the provisional application in July 2011 it took the Member States until October 2015 to fully ratify the Agreement with South Korea. See *Council of the EU*, 'EU-South Korea free trade agreement concluded (Press Release)', (2015) 691/15.

33 *Council of the EU*, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Ratification Details, available at: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017 (18/04/2018).

34 *Bode*, Politico, 12/02/2018.

35 *CDU/CSU and SPD*, 'Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land – Koalitionsvertrag zwischen CDU, CSU und SPD', 19. Legislaturperiode, pp. 65 f., available at: https://www.cdu.de/koalitionsvertrag-2018 (18/04/2018).

36 Zusammen. Für Unser Österreich, Regierungsprogramm 2017-2022, p. 141, available at: https://www.bundeskanzleramt.gv.at/ (18/04/2018).

37 *Vey/Love*, Reuters, 25/10/2017.

38 *Brussels Express*, 'New government in Wallonia: the Right Way', 2017, available at: https://brussels-express.eu/new-government-wallonia-right-way (31/07/2017).

39 In an interview with *La Stampa* the Italian Agriculture Minister, *Gian Marco Centinaio* stated on 14 June 2018 that Italy would not ratify CETA given the lack of intellectual property protection for Italian agricultural goods. See *Tropeano*, La Stampa, 14/06/2018.

did in 2016. Potential haphazardness is the political and legal consequence of 'mixity'.

Obliviously mixed agreements do have their *raison d'etre* in that Member States as parties to the agreement fulfill a role which the EU cannot (exclusive competence = 'obligatory mixity') or should not fulfill (shared competence = 'facultative mixity'). The distinction between 'obligatory' and 'facultative' mixity[40] is important for the ratification of the agreement. In the former case, national ratification is 'obligatory' whilst in the latter, the Council has political discretion to decide whether ratification by the EU is enough or whether a national ratification process is also necessary.[41] Given the Court's reference to 'shared competences' in Opinion 2/15, a discussion has emerged on whether the Court implicitly ruled that national ratification is always required.[42] In our view, and along the lines of AG Sharpston's reasoning,[43] as the Court's opinion does not relate to the Council's discretionary powers, the Council could still decide that in cases of 'shared competences' an 'EU-only' ratification would be sufficient.

Before Opinion 2/15, there was a strong rationale that new FTAs fell into the category of 'obligatory' mixed agreements. Opinion 2/15 has changed this rationale: in fact, the Court found that none of the provisions of EUSFTA were covered by exclusive Member States' competence. It, therefore, departed from the position held by AG Sharpston[44] and even more so from some legal opinions written in the context of CETA.[45] Given the political sensitivity of FTAs, the European Commission's initiative to split the original EUSFTA into two agreements reflects political reality: with two agreements the Commission "throws-off the shackles of mixity"[46] for the part of the agreement for which the EU has exclusive competence and accepts Member States' ratification for the other agreement thus avoiding a complicated political discussion in Council on a discretionary 'EU-only' ratification. In our view, the Commission's initiative constitutes an opportunity to strengthen the credibility and effectiveness of a common EU trade policy. It is a clear sign that the democratic control of new 'trade

40 *Rosas*, in: Dashwood/Hillion (eds.), p. 206.

41 As far as ratification is concerned, AG Sharpston's clearly distinguishes between 'shared' and 'EU-exclusive'-competences': "*In the former case, the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act or to insist that they will continue to exercise individual external competence. In the latter case, they have no such choice, because exclusive external competence already belongs to the European Union.*" See *AG Sharpston*, Opinion procedure 2/15, ECLI:EU:C:2016:992, paras 72, 75; *Kleimann/Kübek* cite the Stabilization and Association Agreement with Kosovo as an example of the Council's discretion in favor of EU-ratification only. See *Kleimann/Kübeck*, VerfBlog, 23/05/2017.

42 *Bungenberg*, in: Kadelbach (ed.), p. 146. See also *Kleimann/Kübeck*, pp. 3-4.

43 *AG Sharpston*, (fn. 41).

44 *AG Sharpston* considered the EUSFTA's provisions on the termination of Member States' bilateral investment treaties to fall under the Member States' exclusive competence. See *CJEU*, 'Advocate General Sharpston considers that the Singapore Free Trade Agreement can only be concluded by the European Union and the Member States acting jointly (Press Release)', (2016) 147/16.

45 *Mayer*; *Weiss*.

46 *Van der Loo*, CEPS Policy Insights, 2017.

agreements' lies first and foremost with the European Parliament. The role of national Parliaments is not diminished though- rather it is redefined alongside their competences. For 'EU-only' agreements, their role consists in controlling the position of their national government before, during, and at the end of the negotiations.[47]

For the time being, the solution found for the Singapore Agreements is not feasible for CETA. The CETA national ratification processes have started, and the European institutions will have to await their outcome. The Council has indicated, though, that CETA will only fail if the ratification fails **permanently** and **definitively, and** if the Member State in question formally notifies that it is unable to ratify the agreement (emphasis added).[48] The definition of what exactly 'permanently and definitively' means will depend on the political situation in the country concerned and leaves the respective Member State with a certain degree of flexibility. Would a negative vote by a national or regional Parliament on CETA be immediately considered as 'permanent or definitive' or would the Member State wait with the formal notification of that decision while trying to rescue the situation? In Document 37 of the above-mentioned statements and declarations,[49] the Kingdom of Belgium states that it has little flexibility in such a situation. Nevertheless, even this declaration reaffirms the notion of a 'permanent and definitive decision not to ratify CETA' and allows for a notification period of one year during which a compromise could nevertheless be sought even after a negative vote of a regional Parliament. Another interesting example in this context is the negative Dutch Referendum on the EU-Ukraine Association Agreement.[50] It is true that the referendum was not binding. On the other hand, it could not be ignored by the Dutch Government either. The way-out of this impasse was found in an explanatory declaration adopted by the EU Summit in December 2016.[51] The declaration helped the Dutch Government to argue that the criticism had been considered and therefore opened the way for the ratification of the agreement by both chambers of Parliament.[52] The national decision, i.e., the referendum, did not qualify as a permanent and definitive rejection of the agreement. Taking the various declarations and today's political mood into account and applying it to the CETA ratification process,

47 On the role of national Parliaments in respect of 'EU-only' FTAs see 'Trading Together Declaration', available at: https://www.trading-together-declaration.org/ (16/04/2018). The Declaration signed by more than 60 academics from 15 countries distinguishes, inter alia, between 'EU-only' and 'mixed' agreements and elaborates on the role of national Parliaments in case of 'EU-only' agreements. The Declaration is a reply to the 'Namur Declaration' launched by the former Walloon Prime Minister *Paul Magnette*, available at: http://declarationdenamur.eu/en/index.php/namur-declaration/ (16/04/2018).

48 *Council of the EU*, (fn. 24).

49 Ibid.; see also: Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA.

50 See *Van der Loo*, CEPS Commentary, 2016.

51 *European Council*, 'Conclusions', 34/16, paras 22-25.

52 The second chamber adopted the legislation on 23 February 2017. See *Back*, NRC, 23/02/2017. The first chamber adopted it on 30 May 2017. See 'Discussie Oekraine-verdrag nu definitief beslecht', NOS, 30/05/2015, available at: https://nos.nl/artikel/2175769-discussie-oekraine-verdrag-nu-definitief-beslecht-eerste-kamer-stemt-voor.html (22/04/2018).

we conclude that a full CETA ratification seems more possible today than it was two years ago notwithstanding the recent opposition to CETA by the Italian government.[53]

II. Plan B: An EU-only Agreement?

If one Member State were unable to ratify CETA and notified the Council of its permanent and definitive decision, CETA would not enter into force lacking ratification by all parties (Article 30.7.2 CETA).[54] CETA, as such, would then be buried, yet not the idea of a comprehensive trade agreement with Canada. In Opinion 2/15, the Court confirmed the European Union's exclusive competence for almost all aspects of the new generation of free trade agreements. One can therefore reasonably assume that the Commission would work on a 'Singapore-type' solution in such a situation, i.e., a proposal for a 'Comprehensive EU-Canada Trade Agreement' covering all those provisions of CETA for which the EU has exclusive competence.

The definitive and permanent decision by a Member State not to ratify CETA raises numerous issues. The first issue relates to the national rejection of CETA. Such a decision could, in principle, only be based on grounds for which the Member State has an 'exclusive' or a 'shared' competence. One of the problems with mixed agreements is the lack of demarcation between EU and national competences. Both sides seem to consider that they are one hundred percent competent for the full agreement. Neither side has an interest in spelling out which provision of the agreement falls under 'exclusive EU', 'shared' or eventually 'exclusive Member States' competence. The Union's non-willingness to be more specific could be justified with the dynamic character of its competences in the area of external relations since, arguably, every time the Council adopts an internal regulation it broadens the Union's competence in relation to that specific issue.[55] It would, therefore, be counterproductive to specify the exact European competences in such an agreement. On the other hand, by proposing provisional application, the Commission specifies, to a certain extent, the areas of EU-competence.[56]

53 *Tropeano*, La Stampa, 14/06/2018.

54 This provision puts an end to the discussion on whether in case of a negative vote of a single Member State the agreement's EU-only provisions could nevertheless continue to be applied. *Hoffmeister* argues that the subsequent refusal of a Member State to ratify could then be linked to only the national provisions previously identified with the consequence that in such a situation the EU's provisional application for the remaining part of the treaty falling under EU competence remains unaffected. See *Hoffmeister*, in: Dörr/Schmalenbach (eds.), p. 240.

55 *Van der Loo/Wessel*, CMLR, 2017, p. 753.

56 The Commission's proposal can only be seen as an indication though since it is the Council's prerogative to decide on provisional application. *Van der Loo* and *Wessel*, (fn. 55), p. 755 point out that for political reasons parts of the agreement which fall under exclusive EU competence might not be applied provisionally. Critical also *Kleimann/Kübeck*, The Case of CETA and Opinion 2/15, p. 17.

The practice of national Parliaments not to specify the areas of their national competences is more difficult to justify.[57] National Parliaments pretend to have the right to accept or reject the agreement as such.[58] This pretentiousness raises numerous constitutional issues.[59] A national Parliament could not vote against a provision of an FTA for which the EU has exclusive competence without violating both national constitutional law and European law.[60] The recent criticism by Italy on CETA's insufficient protection of Italian Geographical Indications is a case in point.[61] The EU alone is competent on IP issues in CETA. Nevertheless, Italy pretends to have the right not to ratify CETA based on a perceived lack of IP protection.[62] Although it is convenient for national parliaments not to clarify the demarcation of competences, we suggest that the national ratification act limits itself to areas of specific national competence.[63] Such an exercise would "*improve transparency and legal certainty in Member States' domestic ratification procedures*"[64] and it would help European citizens to better understand the allocation of competences between the EU and the Member States with the useful political consequence that citizens would be better empowered to al-

57 See *Kuijper*, Post-CETA, p. 3. Quite typically, the German ratification of the EU FTA with South Korea does not refer to those areas of the FTA for which Germany is competent. The 'Gesetz zum Freihandelsabkommen vom 6. Oktober 2010 zwischen der Europäischen Union und ihren Mitgliedstaaten einerseits und der Republik Korea andererseits vom 5. Dezember 2012' states in one paragraph that the Bundestag with the consent of the Bundesrat accepts the FTA, BGBl 2012, Teil II Nr. 39 vom 12. Dezember 2012, pp. 1482 f.

58 This position is re-enforced by the so-called Pastis-theory introduced by *AG Kokott* in her Opinion in case C-13/07 where she stated: *'Individual aspects of an agreement for which the Community has no competence internally 'infect' the agreement as a whole and make it dependent on the common accord of the Member States. The picture created by the Commission itself in another context is also absolutely true in relation to Article 133(6) EC. Just as a little drop of pastis can turn a glass of water milky, individual provisions, however secondary, in an international agreement based on the first subparagraph of Article 133(5) EC can make it necessary to conclude a shared agreement'*. See *AG Kokott*, case C-13/07, Commission v. Council, ECLI:EU:C:2009:190, para. 121.

59 *Tietje*, VerfBlog, 09/02/2016.

60 At the end of her Opinion *AG Sharpston* says: *'The Court has held that, when an agreement requiring the participation of both the European Union and its constituent Member States is negotiated and concluded, both the European Union and the Member States must act within the framework of the competences which they have while respecting the competences of any other contracting party'*. See Case C-28/12, *Commission v. Council*, [2015] ECLI:EU:C:2015:282, para. 47 (citation added). *'It is true that, in principle, each party (including the Member States) must — as matters stand — choose between either consenting to or rejecting the entire agreement. However, that choice must be made in accordance with the Treaty rules on the allocation of competences. Were 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 rules'*. See fn. 41, para. 568.

61 *Tropeano*, La Stampa, 14/06/2018.

62 In the meantime, the Italian Agricultural Minister corrected his earlier statement by saying that *'nobody is in a hurry to bring CETA to the chamber'*. See *Guarascio/Blenkinsop*, Reuters, 16/07/2018.

63 *Kuijper*, Post-CETA, p. 4.

64 *Van der Loo/Wessel*, CMLR, 2017, p. 757.

locate democratic responsibility in their votes for national parliaments and the European Parliament.

Secondly, there is the question of the necessity of a new negotiating mandate. Normally, the Council would have to agree on a negotiating mandate for a Comprehensive EU-Canada Trade Agreement (Article 218 TFEU). Yet, it could be argued that such a mandate already exists, i.e., the original CETA mandates.[65] If we take the case of the EU-Japan agreement,[66] we note that the mandate was broader than the proposal made by the European Commission. It could then be argued that also in the case of a Comprehensive EU-Canada Trade Agreement, a new mandate is not necessary. However, the Japan case is different from the situation discussed here as Plan B. The original CETA mandates have been adopted for an agreement which can no longer be concluded. It would, therefore, seem necessary for the Council to agree on a new negotiating mandate for the 'Comprehensive EU-Canada Trade Agreement'. Of course, the contents of the mandate could be quite similar to that of the original CETA mandate of 2011 (which did not contain any reference to 'investment').[67]

Thirdly, Canada would have to accept a 'Comprehensive EU-Canada Trade Agreement'. Whether or not the two sides are able to conclude such an agreement rapidly depends on their political will and on the concessions made in respect of CETA. The concessions made by Canada and the EU on the investment part of CETA might, in fact, create some difficulties in the negotiations.

The fourth issue relates to how the provisional application of CETA would end after the non-ratification of the agreement by one Member State. The impossibility to conclude the agreement would also require the termination of the provisional application. Council Declaration No. 20[68] confirms this view by reiterating that in this case '*provisional application must be and will be terminated'.* It adds that *'the necessary steps will be taken in accordance with EU procedures'.* The statements made by Germany, Poland, Belgium, and Austria indicate[69] that these countries believe that they can unilaterally terminate the provisional application of CETA and have triggered a debate[70] on how the provisional application of CETA should be ended in case of non-ratification. Since the Member States of the European Union are parties to CETA,

65 *Council of the EU*, 'Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment', (2011) 12838/11; *Council of the EU*, 'Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada', (2009) 9036/09 (both documents declassified 15 December 2015).

66 *Council of the EU*, 'Directive for the negotiation of a free trade agreement with Japan', (2012) 15864/12 (declassified 14 September 2017).

67 With respect to the recent EU-U.S. preliminary discussions on EU-U.S. negotiations it could be argued that the Commission can rely on the existing TTIP mandate and does not need to restart the process of a Council agreement on a negotiating directive. This case is comparable to the EU-Japan situation where the Council adopted a broad mandate, the Commission however proposed a trade agreement only.

68 *Council of the EU*, (fn. 24).

69 See *Council of the EU*, (fn. 24), statements 21, 22, 37.

70 See *Van der Loo/Wessel*, CMLR, 2017, pp. 759 f.

they can, in principle, terminate the provisional application.[71] Yet at European Union level the decision to adopt provisional application must be taken by the Council (Article 218 (5) TFEU) and consequently also the decision to revoke the provisional application. The Council's above-mentioned Declaration that the necessary steps will be taken in accordance with EU procedures seems to confirm this view. If a Member State were to terminate the provisional application unilaterally, this could have profound consequences for the functioning of the EU's internal market. Would the Member State impose tariffs on Canadian products imported from the other EU-Member States? Not awaiting the Council decision to terminate the provisional application the Member State would probably violate the duty of sincere cooperation contained in Article 4 (3) TEU. Such a violation could however also be assumed for the other Member States if they prevented a decision in Council not to terminate the provisional application. One could imagine, for example, that those Member States which had ratified CETA would not be inclined to adopt such a decision given the benefit they receive from the provisional application.

Lastly, the Council would have to sign and conclude the 'Comprehensive EU-Canada Trade Agreement' and the European Parliament would have to give its consent. Since both institutions have already ratified CETA, it would be politically difficult for them to reject a 'pure' trade agreement.

C. EU Trade Policy vis-à-vis the United States and China

The European Union, the United States, and China are heavyweights in international trade. In 2017, the U.S. and China were the most important extra-EU trading partners[72] with the U.S. being the EU's most important export destination and China being the EU's major importing country.[73] Both countries pose challenges to the EU's trade strategy since they are not candidates for a new generation FTA.

I. The United States – Managed Trade instead of Further Trade Liberalization

"The international regulation of international trade has its genesis in the belief of national leaders that some international mechanism is essential to prevent the pursuit of self-interested national regulation of international trade in a manner that harms other nations and in a manner that, when combined with retaliatory actions, results in a sharp and chaotic restriction in the overall level of international trade."[74]

71 Article 30.7.3 c CETA. *Kuijper* supports this view citing Article 25 (2) Vienna Convention on the Law of Treaties. See *Kuijper*, Inaugural Lecture University of Amsterdam 2008, p. 12.

72 *European Commission*, 'International trade in goods in 2017 – A third of EU trade is with the United States and China – At Member State level, trade within the EU largely prevails (Press Release)', (2018) STAT/18/2584, available at: http://europa.eu/rapid/press-release_STAT-18-2584_en.htm (08/05/2018).

73 See https://madb.europa.eu/madb/statistical_form.htm (08/05/2018).

74 *Jackson*, p. 9.

During the economic crisis of the 1920s, many countries adopted protectionist policies in the form of high tariffs and quantitative restrictions. The U.S. Smoot Hawley Tariff Act of 1930 and other protectionist measures taken in response to the crisis brought international trade virtually to a halt.[75] Recognizing the serious impact of these policies on the economy, the U.S. then became an ardent supporter of global trade liberalization. The U.S. pushed for and achieved trade liberalization in eight GATT rounds and the WTO but also bilaterally.[76] In the aftermath of the economic crisis of 2008, protectionist measures are again on the rise.

Donald Trump's 'America First'-policy reflects the much-feared 'self-interested national regulations' and 'retaliatory actions'. The President considers the trade deals concluded by previous administrations as disadvantageous, 'unfair' and responsible for the U.S. trade deficits and job losses in the manufacturing industries.[77] He is critical towards the WTO[78] and its dispute settlement system.[79] The U.S. has withdrawn from the negotiations of the Transpacific Partnership Agreement, has re-negotiated the NAFTA and KORUS agreements, and has put the TTIP negotiations on hold. Its trade policy strategy has become clear: the U.S. threatens trading partners with retaliatory actions (e.g. car tariffs),[80] imposes new tariffs against them,[81] and then engages in power-oriented bilateral negotiations to re-establish a favorable balance of concessions. These actions have brought the world to the brink of a trade war[82] since many U.S. trading partners (e.g. Canada, China, and the EU) have reacted with countermeasures while at the same time initiating WTO dispute settlement cases against the U.S. So far, the U.S. power politics have paid off in case of KORUS, albeit with a WTO-questionable outcome[83] and in the case of Canada and Mexico with a renewed 'NAFTA' agreement, called USMCA which contains some trade liberalization (e.g. US exports of dairy to Canada), but, overall, is more an agreement on industrial than

75 *Senti*, p. 4.
76 *Mavroidis*, IELP Blog, 13/09/2018.
77 See generally Chapter I of the President's 2018 Trade Policy Agenda in: *Office of the United States Trade Representative*, '2018 Trade Policy Agenda and 2017 Trade Annual Report' (2018), pp. 1-33, available at: https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017 (06/05/2018).
78 '*Single worst trade deal ever*', see *Micklethwait et al.*, Bloomberg, 30/08/2018.
79 See fn. 77, p. 22.
80 *U.S. Department of Commerce*, 'U.S. Department of Commerce initiates section 232 investigation into auto imports', 23 May 2018, available at: https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports (31/08/2018).
81 Tariffs against China under Section 301 of the Trade Act of 1974. See *Office of the U.S. Trade Representative*, 'USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China's Unfair Trade Practices', 2018, available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche (06/05/2018). Tariffs on steel and aluminium imports under Section 232 of the 1962 Trade Expansion Act. See *White House*, 'President Trump Approves Section 232 Tariff modifications', 22 March 2018, available at: https://www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/ (06/05/2018).
82 *Krugman*, New York Times, 17/06/2018.
83 It seems that South Korea has accepted, WTO illegal, voluntary export restraints on steel. See *Lester*, KORUS steel quotas, IELP Blog, 28/03/2018.

trade policy, as demonstrated by the agreed minimum wages for Mexican autoworkers, and the higher than the original NAFTA local content requirements in order to benefit from zero tariffs under the new rules of origin. USMCA does not abolish the U.S. tariffs on steel and aluminum against Canada and Mexico and seems to accept voluntary export restraints in case the U.S. adopts punitive tariffs on cars.[84]

The European Union has reacted to the U.S. tariffs on steel and aluminum[85] by initiating a WTO dispute settlement proceeding[86] challenging the national security justification of the measures and by imposing 'rebalancing' tariffs on certain U.S. products.[87] The EU/U.S. conflict came to a head when the U.S., in May 2018, announced a Section 232 investigation on cars[88] but was partially settled at a meeting between President Trump and President Juncker on 25 July 2018.[89] The agreed joint agenda contains the following main actions:

- Work towards zero tariffs, zero non-tariff barriers, and zero subsidies tariffs on **non-auto** industrial goods (*emphasis added*). Both sides intend to increase trade in services, chemicals, pharmaceuticals, medical products, and soybeans.
- Strategic cooperation on energy with the EU intending to import more liquified natural gas from the U.S.
- Dialogue on standards to ease trade, reduce bureaucratic obstacles, and slash costs.
- Promotion of WTO reform to address unfair trading practices, theft of intellectual property, forced technology transfer, industrial subsidies, and distortions created by state-owned enterprises and overcapacity.

The U.S. and the EU are not negotiating yet. They rather explore the scope of the agreement to be negotiated. The joint agenda puts Europe into a difficult position conceptually though. After the disastrous failure of TTIP, both sides can no longer negotiate a far-reaching and comprehensive FTA. Yet is a '*more limited trade agree-*

84 The text of USMCA can be found at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico (06/05/2018); See also *Lanz*, NZZ, 01/10/2018; *Behsudi et al.*, Politico, 01/10/2018.

85 *European Commission*, 'European Commission responds to the US restrictions on steel and aluminium affecting EU (Press Release)', 2018, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1805 (06/05/2018).

86 Request for Consultation by the European Union, United States-Certain Measure on Steel and Aluminium Products, WTO Doc. WT/DS548 (01/06/2018).

87 *European Commission*, 'EU adopts rebalancing measures in reaction to US steel and aluminium tariffs (Press Release)', 2018, IP/18/4220. See also Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of proposed suspension of concessions and other obligations referred to in para. 2 of Article 8 of the Agreement on Safeguards, WTO Doc. G/L 1237 (18/05/2018). Whilst the EU 'rebalancing' tariffs are politically appealing they raise some very interesting WTO legal issues which cannot be dealt with in this paper. See for further details *Tietje/Sacher*, PPTEL 2018/48, p. 6; *Jung/Hazarika*, ZeuS 2018/1, pp. 1-24, 1 f.; *Lester*, Litigating GATT Article XXI, 2018, IELP Blog, 19/03/2018, available at: http://worldtradelaw.typepad.com/ielpblog/2018/03/litigating-gatt-article-xxi-the-us-view-of-the-scope-of-the-exception.html (06/05/2018).

88 See fn. 80.

89 *European Commission*, 'Joint EU-U.S. Statement following President Juncker's visit to the White House (Press Release)', 2018, STATEMENT/18/4687.

ment"[90] with the U.S. compatible with Europe's strategy for a trade policy to 'harness' globalization? Europe asks its trading partners to sign the new generation of comprehensive FTAs which require a substantial amount of trade and non-trade concessions. The non-trade concessions but also other subjects, such as government procurement, are absent in the discussions with the U.S. and hence put Europe into a credibility-crisis. Moreover, Europe is bound by the rules-based international trading system and cannot take decisions which would jeopardize this allegiance. A zero-tariff agreement on non-auto industrial goods poses the immediate question of whether it would satisfy the requirements of GATT Article XXIV according to which an FTA should liberalize 'substantially all trade'.[91] Europe therefore rightly suggested to the U.S. to have all tariffs on industrial goods including car tariffs eliminated.[92] Zero tariffs for other industrial or agricultural products might help to increase trade, provided that the tariffs are not already at zero (as is the case for pharmaceuticals), yet as the TTIP discussions have shown, the far bigger trade obstacles lie in the domestic regulatory issues, hence the call for regulatory cooperation.[93] A dialogue on 'standards' could be the right approach, yet again as the TTIP negotiations have illustrated, meaningful regulatory cooperation is quite burdensome if the level of protection in the specifically regulated areas differs as much as it does between the EU and the U.S.: REACH, GMOs or 'glyphosate' are telling examples. Since neither side will lower or increase its protective standard, regulatory cooperation can only result in technical improvements (e.g., testing requirements and criteria) not questioning the respective standard. The intention to strive for zero non-tariff barriers and zero subsidies is laudable in view of the many past EU/U.S. WTO dispute settlement cases (e.g., Airbus, GMOs, Chlorinated Chicken, and Hormone-treated beef) but the solutions to be included in a 'more limited trade agreement' require quite some imagination and might eventually be rejected.[94]

More importantly, if the U.S. continues to oppose the appointment of new members of the WTO Appellate Body, the WTO will be unable to perform its 'judicial' function. Europe cannot allow that the international trading community returns to the 'dark ages of the GATT 1947' when, at least in critical cases, GATT panel recommendations could be blocked by the losing contracting party. WTO-reform is on the joint agenda, but unfortunately, the reform of the dispute settlement system is not

90 Statement of commissioner Malmström before the INTA Committee of the European Parliament on 30 August 2018. See von der *Burchard*, Politico, 30/08/2018.

91 While there is a lot of discretion for WTO members and not much case law on GATT Article XXIV any weak EU-U.S. agreement could nevertheless be open to a WTO attack. On GATT Article XXIV see generally *Mavroidis*, pp. 225 f.

92 See fn. 90.

93 *European Commission*, 'Transatlantic Trade and Investment Partnership – The Regulatory Part', 2013, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf (03/09/2018).

94 Note that the French President stated on 25 September 2018 that France would no longer accept 'commercial agreements' with countries that do not respect the Paris Climate Agreement. See *United Nations*, 'General Debate France', available at: https://news.un.org/en/story/2018/09/1020642 (26/09/2018). If the Council confirmed this view a more limited EU-U.S. trade agreement would no longer be possible.

mentioned specifically. It will be difficult for the EU to promote WTO reforms if the U.S. continues to sabotage the WTO dispute settlement system. The international trading system is not sacrosanct, it allows for adjustments, adaptations, and re-balancing through negotiations and legal proceedings, it is, however, adamant against power-based protectionism as the late John H. Jackson reminds us so forcefully.

Europe's answer to the joint agenda can therefore not lie in damage limitation to avoid a trade war, rather Europe must insist on WTO-reform and stand up for a rules-based international trading system. In parallel, Europe must pursue its FTA strategy by implementing the agreements with Canada, Japan, Mexico, Singapore, Vietnam, and by concluding agreements with Mercosur, Australia, New Zealand, and other ASEAN countries.

II. China – Not so liberal after all?

The development of the Chinese chemical industry may be taken as an example to explain the rise of China to the manufacturing powerhouse of the world. At the time of China's accession to the WTO in 2001, the U.S. was the largest chemical producing nation followed by Japan and Germany. Recent developments have drastically changed this situation. In 2016 the Chinese chemical industry closed in on EUR 1.7 trillion annual turnover, and today it is even larger than the EU and the U.S. chemical industry combined. The U.S. takes second place, followed by Japan and Germany. Between 2011 and 2016 the production average annual growth rate increased by 10.5 percent. China not only produces commodity chemicals but is also increasing its market share in fine and specialty chemicals as well as in pharmaceuticals. China's chemical industry currently shows the highest growth potential at international level.[95] These figures might help to understand why the mood in Europe towards China has changed considerably since its accession to the WTO. Originally, China was considered a partner with significant economic opportunities.[96] Today, China is seen more as a threat than an opportunity. Europe is afraid of Chinese overcapacities, in particular in the steel sector, of cheap imports of industrial goods, of its appetite for taking over European technology companies, of its 'one-belt, one-road'- and 'China Manufacturing 2025'- Initiatives, of the continuing discrimination of foreign investors in China, of forced technology transfer, insufficient lack of intellectual property protection and of its subsidized state-owned enterprises with which the European industries seem unable to compete. Europe's new strategy towards China is one of assertiveness and

95 *Verband der Chemischen Industrie e.V.*, 'Länderbericht China. Daten und Fakten zur Chemieindustrie', 2017, p. 1, available at: https://www.vci.de/ergaenzende-downloads/laenderbericht-china-chemie-kurz.pdf (26/09/2018); *Verband der Chemischen Industrie e.V. and Prognos AG*, 'The German Chemical Industry 2030. VCI-Prognos study – Update 2015/2016', 2017, p. 20, available at: https://www.vci.de/vci-online/services/publikationen/broschueren-faltblaetter/vci-prognos-study-the-german-chemical-industry-2030-update-2015-2016.jsp (06/09/2018).

96 *European Commission*, 'The EU's fundamental approach to China must remain one of engagement and partnership'. See *European Commission*, 'EU – China, Closer Partners, Growing Responsibilities', COM (2006) 631 final, p. 1.

defense insisting on '*reciprocity, a level playing field and fair competition across all areas of cooperation*'. [97]

China is not a candidate country for a new generation free trade agreement, but in 2013, the EU and China already started negotiations on a bilateral investment agreement. These negotiations are difficult to conclude since the agreement would provide for the governance structure of future bilateral economic relations and, even without a tariff component, would have to address many controversial issues, such as freedom of investment, reciprocity, and eventually subsidies (those to state-owned enterprises, in particular) and intellectual property protection.

The European actions and reactions to Chinese trade and investment issues further complicate the negotiations and demonstrate the new European assertiveness:

Firstly, Europe has not given China Market Economy Status (MES) in anti-dumping cases but has tightened its Anti-dumping Regulation instead:[98] the amended Regulation applies a new method of assessing market distortions in third countries when calculating anti-dumping duties; it allows Europe to continue its current practice not to use Chinese domestic prices in anti-dumping investigations with the consequence of high anti-dumping duties.[99] China considers that it is entitled to MES-treatment because of Article 15 of its WTO Accession Protocol and has initiated a WTO dispute settlement case against the EU.[100]

Secondly, the Regulation for a framework on investment screening.[101] The Regulation is the result of intensive political discussions at national[102] and European level[103] on how to curtail the Chinese appetite for acquiring European technology companies (e.g. KUKA, OSRAM, and Aixtron). It does not provide for a European investment screening mechanism but leaves the final decision to the Member States who have such legislation in place (12 Member States in total). It introduces a coop-

97 *European Commission*, 'Joint Communication to the European Parliament and the Council. Elements for a new EU Strategy on China', JOIN, 2016, 30 final, p. 2.

98 European Parliament and Council Regulation (EU) amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338 of 19/12/2017, p. 1, Art. 11(4).

99 For an analysis of the EU anti-dumping activities against China see *Petter/Quick*, in: Bungenberg/Hahn/Herrmann/Müller-Ibold (eds.), pp. 17-42.

100 Request for Consultation by China, EU-Price Comparison Methodologies, WTO Doc. WT/DS516, 12/12/2016. See *Tietje/Sacher*, Essays on Transnational Economic Law 2018/153.

101 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I of 21/03/2019, p. 1. The Regulation entered into force on 10 April 2019. See http://europa.eu/rapid/press-release_IP-19-2088_en.htm (06/09/2018).

102 Letter of the Economics Ministers of Germany, Brigitte Zypries, France, Michel Sapin, and Italy, Carlo Calenda to Commissioner Malmström in February 2017. See https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5 (07/09/2018).

103 European Parliament Debate on Foreign Investments in Strategic Sectors, Strasbourg, 14/06/2017, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20170614+ITEM-018+DOC+XML+V0//EN&language=EN (07/09/2018).

eration mechanism for the other Member States and the Commission to comment on the domestic proceedings. When deciding on the investment the Member State should take the Commission's recommendations and other Member States' comments into account.[104] The Member States which do not have an investment screening are not required to introduce one. It remains to be seen whether the framework regulation will be adopted and if so, how actual cases will be dealt with. The proposal does, however, reflect the new European strategy: Europe flexes its muscles and insists on reciprocal treatment in China notwithstanding some industry criticism.[105] Europe signals frustration with the lack of domestic reform in China despite the many announcements by the Chinese leadership to adopt such reforms. The European Chamber of Commerce in China criticizes this difference between claim and reality complaining that regulatory obstacles are on the rise instead of being abolished. It openly supports the Commission's call for reciprocity in bilateral trade and investment relations and publishes case studies where China continues to restrict foreign investment together with a long list of Chinese discriminatory treatments against European companies.[106]

Thirdly, Europe has launched a WTO case against China's unfair technology transfers[107] and cooperates closely with Japan and the U.S. *'to find effective means to address trade-distorting policies of third countries'*. [108] Their statement on industrial subsidies, technology transfer policies and practices, and market-oriented conditions targets China and shows dissatisfaction with China's unwillingness to address these points in WTO negotiations. Japan, the U.S., and the EU consider that the WTO Agreement on Subsidies needs renegotiation since it is ill-equipped to control subsidies given to state-owned enterprises.[109]

In his key-note speech on economic globalization, further trade liberalization and multilateral approaches at the World Economic Forum in January 2017, Chinese President Xi Jinping[110] left no doubt that the world's second-largest economy would take over America's traditional role as the champion of free trade and open markets which has become vacant since the election of President Trump. China's quest for a

104 For an analysis of the proposal see *Günther*, Essays on Transnational Economic Law 2018/157.

105 *Bundesverband der Deutschen Industrie e.V.*, 'Investment Screening in Germany and Europe', 2018, available at: https://english.bdi.eu/article/news/investment-screening-in-germany-and-europe/ (08/09/2018).

106 *European Union Chamber of Commerce in China*, 'European Business in China – Position Paper 2018/2019', 2018, available at: http://www.europeanchamber.com.cn/en/publications-position-paper (25/09/2018).

107 Request for Consultation by the European Union, China – Certain Measures on the Transfer of Technology, WTO Doc. WT/DS/549 (1 June 2018). See also *European Commission*, 'EU launches WTO case against China's unfair technology transfers (Press Release)', 2018, IP/18/4027.

108 Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union, Paris, 31/03/2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156906.pdf (06/09/2018).

109 Critical *Goa*, IELP Blog, 29/07/2018.

110 *Jinping*, World Economic Forum Davos, 2017.

bigger role at the global level was announced long before the present trade conflict with the U.S. started. In theory, for the EU, China could be a natural ally to oppose U.S. isolationist policies and to defend the rules-based international trading system. In practice, however, it is unlikely that the EU and China can overcome their considerable differences on the issues mentioned above. On Chinese trade and investment issues the EU prefers to seek alliances with the U.S. and Japan. Therefore, it is doubtful that the current U.S. – China 'trade war' could serve as a catalyst to enhance closer EU-China trade relations.

D. Conclusions

After Opinion 2/15, the future for EU trade agreements looks bright. The Commission can pursue its trade strategy, negotiate broad and comprehensive EU trade agreements with partner countries, and have them ratified at EU level only. This clear allocation of competence allows the EU to remain a reliable trading partner and strengthens the credibility and effectiveness of the common commercial policy. The practice of provisional application of some aspects of mixed agreements becomes superfluous as well as the decision on which parts to apply provisionally. In fact, it is the whole agreement which enters into force. Criticism of, and opposition to these agreements will continue to exist, yet Europe only will be able to block them and not a single Member State. The role of national parliaments is limited to controlling the actions of the national governments in Council. National lawmakers can no longer pretend to have a competence which they themselves or their predecessors have transferred to the European level. European citizens can allocate democratic responsibility both at national and European level holding the European Parliament and the national governments accountable through their votes in national and European elections.

On the other hand, Opinion 2/15 has rendered the future of European BITs considerably difficult. As mixed agreements, these BITs will be ratified both at European and national level with all the uncertainty that this process entails. According to Opinion 2/15, some investment issues fall under 'shared competences'. This means that the Council could opt in favor of EU ratification only, although this is unlikely because the subject of investor-state dispute settlement is politically too important for the Council to make such a concession towards Europe. The practice of national parliaments adopting or rejecting these agreements as such without indicating which part of the agreement falls under their competence is regrettable but will not change. Apparently, national Parliaments consider that admitting to their constituencies that they no longer are competent on specific European trade policy issues is equal to a defeat.

In 2016, at the height of the heated and emotional debate on TTIP and CETA, the fate of CETA seemed doomed; today, mainly due to Brexit and to President Trump's aggressive trade policy, EU-internal opposition to trade agreements is fading. Compared to TTIP and CETA, the EU-Japan Trade Agreement, which the Commission has recently proposed for adoption, hardly gave rise to public debate, let alone to huge demonstrations. These developments allow for a rather positive outlook on the CETA national ratification processes. Moreover, the Commission can demonstrate with data

on EU-Canada trade[111] that many European companies have benefitted from improved market access since the provisional application of CETA. National ratification of mixed agreements remains unpredictable, however, as the remarks by the Italian Minister shows. In the case of a permanent and definitive rejection of CETA by a Member State, its provisional application would end, and the Commission would have to try again and propose an EU-only 'Comprehensive EU-Canada Trade Agreement'.

External challenges to EU trade policy coming from China and the U.S. are manifold. Both countries' trade and investment policies mean that the U.S. is no longer a candidate for a new generation FTA, and China has never been one.[112]

Europe's original intention for future transatlantic relations was a strong, modern and comprehensive FTA, called TTIP. TTIP was supposed to further liberalize transatlantic trade and be a role model for new trading rules bilaterally and multilaterally.[113] However, in 2016 TTIP came under considerable attack in the EU so that it was doubtful whether Europe would be able to deliver, and then, in 2017 it was put on ice by the U.S. President. In fact, the new U.S. trade policy consists of tariff increases, FTA re-negotiations and shutting down the WTO Appellate Body. Can Europe agree with the U.S. on a 'TTIP-light' or will it have to insist on a broader outcome, thereby risking failure? Can Europe risk failure at all and face punitive tariffs which the WTO will not rule upon because of the U.S. sabotage of the Appellate Body? So far, the EU has avoided an outright trade war with the U.S., and discussions are taking place to avoid further escalation. The EU countermeasures as a reaction to the U.S. steel and aluminum tariffs can be seen as a targeted response to increase the pressure of Congress on the White House to change course. In case of further U.S. protectionist measures, the EU will react but at the same time should intensify its dialogue with Congress on trade policy in general but especially on WTO reform. It is of paramount importance for the EU to have a functioning WTO dispute settlement system in order to counter U.S. protectionist measures.

As for China, since entering the WTO in 2001, the country has shown an unprecedented development and has become the world's second-largest economy. The list of EU-China contentious trade issues reflects the divergences on China's state capitalism and its quest to become a world leader on new technologies. This political reality will make it difficult for the EU to conclude the investment negotiations with China. Yet

111 *European Commission*, 'CETA in your town (statistical data)', 2018, available at: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-in-your-town/ (10/09/2018); *European Commission*, 'One year on EU-Canada trade agreement delivers promising results (Press Release)', 2018, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1907 (03/10/2018).

112 China believes that it could become a candidate country for a new generation FTA with the EU, but only after a successful conclusion of the EU – China BIT. See *The People's Republic of China-Information Office of the State Council*, 'The Facts and China's Position on China – US Trade Friction' Information Office of the State Council, 2018, p. 70, available at: http://english.gov.cn/archive/white_paper/2018/09/26/content_281476319220196.htm (11/10/2018).

113 *European Commission*, 'What is TTIP about?', 2015, available at: http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/ (10/10/2018).

without such an agreement, it will not be easy to find common ground at the multilateral level on the indispensable WTO reform to redress the balance between market economy approaches and state capitalism. A first step has already been made by the Commission which, upon request of the European Council,[114] has prepared a concept paper on "WTO reform"[115] to be discussed within the EU and with other WTO members. The proposals are structured under the three headings rulemaking, regular work, and transparency, and dispute settlement. They address the U.S. criticism on dispute settlement and the specific lacunae of WTO rules concerning China's economic structure. In sum, we believe that the concept paper should serve as a starting point for WTO negotiations. The EU has a particular interest to convince both the U.S. and China to join these reform efforts since the alternative will be an outright trade war.

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