The Comprehensive Economic and Trade Agreement between the European Union and Canada applies provisionally as of 21 September 2017

26 September 2017

As of 21 September 2017, most provisions of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States ("CETA") apply on a provisional basis, pending the completion of the necessary ratification procedures. That partial provisional application is foreseen in Article 30.7.3 of CETA and was announced on 18 September 2017 through the 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 (the “Notice”) published in the Official Journal of the European Union.

Through this provisional application, Canada and the European Union have decided to give effect to the rights and obligations under certain parts of CETA whilst awaiting ratification by all parties to the agreement.

Background to the provisional application of CETA

Since the European Union and Canada concluded the negotiations of CETA on 1 August 2014, the signature, conclusion and provisional application of that agreement has caused considerable legal and political controversies in the Member States and with the public at large.

First, the EU Member States insisted that the European Union lacked the necessary competence to conclude CETA as an ‘EU-only’ agreement. They argued that all EU Member States also had to sign and ratify the agreement.

Faced with that opposition, the Commission abandoned its initial position that the European Union enjoyed exclusive competence to sign and conclude all parts of CETA. It agreed that CETA should be a mixed agreement, meaning an agreement to which both the European Union and the Member States are parties. This also meant that both the European Union and each of the 28 EU Member States (including at
least 38 national parliaments) must take the necessary steps in order to become a party to CETA in accordance with their respective constitutional requirements.

Second, the fact that CETA would be a mixed agreement immediately gave rise to another controversy. As a result of the allocation of competences between the federal and regional levels of government in Belgium, the Walloon regional government refused to give its required consent to Belgium’s signature of CETA. Eventually, through the negotiation of a Joint Interpretative Statement and an interpretative statement to CETA made by Belgium accommodating some of the concerns of the Walloon government, the final obstacle disappeared and, on 30 October 2016, the European Union and Canada finally signed CETA.

Since that signature and prior to the provisional application of CETA, the Court of Justice of the European Union (“CJEU”) issued a long-awaited opinion (“Opinion 2/15”), on 16 May 2017, on the allocation of competences between the European Union and the EU Member States with respect to the Free Trade Agreement between the European Union and the Republic of Singapore (“EUSFTA”). The CJEU concluded that, in essence, the European Union enjoys exclusive competence as regards all “trade” matters covered by the EUSFTA as well as foreign direct investment. It also recognised that competences remain shared between the European Union and its Member States with respect to types of investment other than foreign direct investment (“non-FDI”), investor-state dispute resolution covering all types of investment, and ancillary provisions regarding non-FDI. In so doing, the CJEU decided that the European Union enjoys very extensive exclusive competence to negotiate and conclude trade agreements with third countries, which might soon include the United Kingdom. At the same time, the implication of Opinion 2/15 is that the European Union should no longer pursue the policy of combining trade and investment in a single treaty. This is also the approach taken by the Commission in its recent announcement to negotiate trade agreements with Australia and New Zealand.

The scope of CETA’s provisional application

In agreeing to the partial provisional application of CETA, the Council decided, on 28 October 2016, that “only matters within the scope of EU competence will be subject to provisional application”. It thus disagreed with the Commission which, on 5 July 2016, had proposed full provisional application.

Its decision of 28 October 2016 identified the parts of CETA that are to be applied provisionally. Pending ratification of CETA by the EU Member States, the Council considered that the European Union could agree to provisional application only as regards those parts of CETA within the exclusive competence of the European Union.
Taking into the account the disputed areas of competence in the context of the proceedings pending before the CJEU regarding the EUSFTA, the Council excluded from provisional application:

- all investment protection provisions in Chapter Eight on Investment, including provisions on fair and equitable treatment and full protection and security of investors and covered investments, and expropriation. In addition, the Council confined the provisional application of provisions concerning investment liberalisation to foreign direct investment by excluding portfolio investment;
- the provisions on the Investment Court System ("ICS") in Chapters Eight and Twenty-Eight;
- certain provisions in Chapter Thirteen on Financial Services “only in so far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and States”;
- certain provisions regarding criminal enforcement of intellectual property rights in Chapter Twenty and administrative proceedings at the Member State level in Chapter Twenty-Seven.

Finally, as regards the chapters on sustainable development, labour and the environment (Chapters Twenty-Two to Twenty-Four), the Council provides that their provisional application “shall respect the allocation of competences between the Union and the Member States”.

However, at the time of the Council’s decision of 28 October 2016, the CJEU had not yet issued Opinion 2/15. That opinion has at least two implications for the scope of CETA’s provisional application.

First, when the Council’s decision is read together with Opinion 2/15, it becomes clear that the provisional application of CETA excludes matters that nonetheless, in the light of Opinion 2/15, fall within the European Union’s exclusive competences. Indeed, according to the CJEU, the European Union may agree to the provisional application of the commitments relating to post-admission protection of foreign direct investment.

Second, the CJEU held that the objective of sustainable development, of which labour and environmental protection are mutually reinforcing components, and the conduct of trade in accordance with that objective form an integral part of the common commercial policy. Having found also that the parties to the EUSFTA did not intend to harmonise labour and environmental standards, the CJEU concluded that the European Union enjoyed exclusive competence as regards the chapter of the EUSFTA on sustainable development. As a result, provided that Chapters Twenty-Two to Twenty-Four of CETA have no harmonising effect, Opinion 2/15
suggests that those chapters fall within the exclusive competence of the European Union.

**Next steps**

So far, only six EU Member States (Croatia, the Czech Republic, Denmark, Lithuania, Malta and Portugal) have ratified CETA.

The parts of CETA identified in the Council’s decision and the Notice of 18 September 2017 will thus continue to apply on a provisional basis until all EU Member States have completed their national ratification processes. As a matter of international law, provisional application is not limited in time. However, an interpretative statement to CETA adopted by the Council provides that “[i]f 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”. The Council has thus accepted a (soft) commitment to end the provisional application of CETA if it becomes certain that not all Member States will ratify that agreement.

That possibility appears to depend, at least for some Member States, on the CJEU’s response to the request for an Opinion, made by Belgium on 6 September 2017, regarding the compatibility of the investor-state dispute settlement chapter of CETA with “(i) the exclusive competence of the CJEU to provide the definitive interpretation of European Union law, (ii) the general principle of equality and the ‘practical effect’ requirement of European Union law, (iii) the right of access to the courts and (iv) the right to an independent and impartial judiciary”. These questions were not addressed in Opinion 2/15 in the context of the EUSFTA. Pursuant to Article 218(11) of the Treaty on the Functioning of the European Union, each Member State as well as the EU institutions may ask for such an opinion. In this case, asking that opinion was part of the political compromise between the Belgian federal and regional governments that had to be reached in order to secure the Walloon government’s support of CETA. Should the CJEU decide (unlikely before the end of 2018) that CETA is not compatible with EU law that would considerably complicate the ratification process.

Finally, after leaving the European Union, the United Kingdom will no longer be eligible to be a party to CETA. Article 1.3(b) of CETA provides that it applies “for the European Union, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties”. The United Kingdom will therefore need to either seek membership to CETA as a third party or negotiate a separate free trade agreement (“FTA”) with Canada. Following a meeting between British Prime Minister Theresa May and Canadian Prime Minister Justin Trudeau on 18 September 2017, it would appear that the UK is opting for a separate FTA with Canada.
Lawyers to contact

<table>
<thead>
<tr>
<th>Name</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philippe De Baere</td>
<td><a href="mailto:phdebaere@vbb.com">phdebaere@vbb.com</a></td>
</tr>
<tr>
<td>Pablo Muñiz</td>
<td><a href="mailto:pmuniz@vbb.com">pmuniz@vbb.com</a></td>
</tr>
<tr>
<td>Isabelle Van Damme</td>
<td><a href="mailto:ivandamme@vbb.com">ivandamme@vbb.com</a></td>
</tr>
</tbody>
</table>