

Dynamisation of international trade cooperation. Powers and limits of Joint Committees in CETA

*René Repasi**

1. *Introduction*

On 30 October 2016, the Canadian Prime Minister Justin Trudeau and the Presidents of the European Council, Donald Tusk, and of the European Commission, Jean-Claude Juncker, signed the ‘Comprehensive Economic and Trade Agreement’ (CETA) between the EU and Canada.¹ After the signature of the Trans Pacific Partnership (TPP) Agreement² on 4 February 2016 CETA is the second of the so-called ‘mega-regionals’ that cleared the first hurdle on the way to its entry into force. Whereas the ratification process for both is not yet finished,³ parts of CETA are already provisionally applicable.⁴

CETA represents a new kind of trade agreement, which is called ‘WTO plus’⁵ because its commitments go beyond what is already agreed

* Scientific Coordinator of the European Research Centre for Economic and Financial Governance (EURO-CEFG) of the Universities of Leiden, Delft and Rotterdam and Researcher at the Department of International and European Union law at Erasmus School of Law Rotterdam. I would like to thank Federica Violi, Alessandra Arcuri and the editors of the journal for insightful comments. The usual disclaimer applies.

¹ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23; Joint Interpretative Instrument on CETA [2017] OJ L 11/3; Council Decision (EU) 2017/37 on the signing of CETA [2017] OJ L 11/1.

² Participating states are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (until 23 January 2017) and Vietnam. For the text of the TPP Agreement see <www.tpp.mfat.govt.nz/text>.

³ TPP was ratified by Japan on 20 January 2017 and by New Zealand on 11 May 2017. CETA is not yet ratified by any of the signatory parties.

⁴ Council Decision (EU) 2017/38 on the provisional application of CETA [2017] OJ L 11/1080.

⁵ PT Stoll, ‘Mega-Regionals: Challenges, Opportunities and Research Questions’ in T Rensmann (ed), *Mega-Regional Trade Agreements* (Springer 2017) 3, 5.

on in areas that are also covered by WTO agreements, and ‘WTO more’⁶ because it covers fields that are not yet regulated by the WTO such as investment protection, competition policy, labour standards, environment and sustainable development. It focuses on non-tariff barriers, investment flows, value chains and regulatory cooperation rather than on tariffs and quantitative restrictions for goods and services. At a very abstract level, comprehensive trade agreements such as CETA embody a shift of focus from barriers that materialise in a (indirectly) discriminatory manner at the border to barriers that occur in a (mostly) non-discriminatory manner behind the border.⁷ Being a fully-fledged representative of the new kind of comprehensive trade agreements between major economic regions, CETA merits special attention in order to assess the direction into which international trade law is currently evolving.

The present contribution wants to dedicate a part of this special attention to the governance structure of CETA. Another important feature of the new kind of trade agreements CETA is representing is namely the intention of the contracting parties to make it ‘living agreement’.⁸ In order to achieve this goal, a governance structure has to be established and to be equipped with decision-making powers in relation to issues that are either very dynamic on the global markets or very sensitive for the contracting parties. After a description of the CETA governance (section 2) and an interim legal assessment of proposed structure and its decision-making rights (section 3), CETA governance will be reflected against a broader background, which is defined by the very purpose of the creation of treaty bodies (section 4) and the need to regulate economic globalisation (section 6). Embedding the assessment of CETA into this broader picture (section 5) will reveal the main challenge ‘mega-regionals’ will have to meet and that is only little addressed by CETA, which is to ensure democratic legitimacy of a dynamised regulation of international trade relations (section 7).

⁶ *ibid* 5.

⁷ See in more detail *infra* section 6.

⁸ Stoll (n 5) 9.



2. Governance of CETA

The governance of CETA is built on the CETA Joint Committee (Article 26.1). This committee is composed of representatives of the EU and of Canada and co-chaired by the Minister for International Trade of Canada and the EU Trade Commissioner ‘or their respective designees’. It ‘is responsible for all questions concerning trade and investment between the parties and the implementation and application of [CETA]’. Under the auspices of the CETA Joint Committee there will be the following eleven specialised committees dealing with specific detailed issues in relation to the Treaty chapter for which they will be responsible:

- the Committee on Trade in Goods,
- the Committee on Services and Investment,
- the Joint Committee on Mutual Recognition of Professional Qualifications,
- the Joint Customs Cooperation Committee,
- the Joint Management Committee on Sanitary and Phytosanitary Measures,
- the Committee on Government Procurement,
- the Financial Services Committee,
- the Committee on Trade and Sustainable Development,
- the Regulatory Cooperation Forum,
- the CETA Committee on Geographical Indications,
- the Joint Sectoral Group (concerning good manufacturing practices for pharmaceutical products).

The technocratic nature of these specialised committees is reflected by the rules on their composition, according to which ‘all the competent authorities for each issue on the agenda are represented, as each party deems appropriate, and [...] each issue can be discussed at the adequate level of expertise’ (Article 26.2(5)). Remarkably, CETA confers upon these bodies the power to adopt decisions that are binding upon the contracting parties (Articles 26.1(4)(e), 26.3 for the CETA Joint Committee, Article 26.2(4) for specialised committees) and to amend the Treaty (Article 26.1(5)(c)). Particular attention will be given in the following to these powers.

Regarding the Treaty amendments, CETA provides for a general power for the CETA Joint Committee to amend the Treaty protocols and annexes (Article 30.2). This power is, however, not available for

amendments to Annex I, which contains ‘grandfathering clauses’ excluding the application of the market access, the most-favoured nations- and non-discrimination rules under CETA to the enlisted non-conforming measures, to Annex II, which excludes also the future introduction of or changes to existing non-conforming measures within the enlisted fields from the application of the just mentioned CETA rules, and to Annex III, which specifies non-conforming measures excluded from the financial services chapter (chapter 13). It does also not include amendments to the annexes concerning investment (chapter 8), cross-border trade in services (chapter 9), temporary entry and stay of natural persons for business purposes (chapter 10) and financial services (chapter 13). All other annexes and protocols can be amended by the CETA Joint Committee. More specifically, in the field of customs duties on imports, a committee’s decision to accelerate or broaden the scope of the elimination of custom duties supersedes what was agreed on in the respective annex (Article 2.4(4)). Furthermore, the CETA Joint Committee can extend the scope of certain rules in CETA. Notably, in the field of investment protection (chapter 8), it can add other categories than the one mentioned in the definition in Article 8.1 to the intellectual property rights covered by the investment chapter or it can add new categories of measures that are considered a breach of the ‘fair and equitable treatment’ obligation in Article 8.10(2). This is remarkable since, as mentioned, Article 30.2(2) excluded the annexes of the investment chapter from the general power conferred upon the CETA Joint Committee to amend the protocols and annexes of CETA.⁹

Amongst the specialised committees, the Joint Management Committee for Sanitary and Phytosanitary Measures is allowed to amend the annexes to the SPS chapter (chapter 5) of CETA (Article 5.14(2)(d)) following a yearly review of the annexes, which is to be made ‘in the light of progress made under the consultations provided for under this

⁹ Difficult to understand, against this background, is the special rule in art 20.22, according to which the CETA Joint Committee may amend Annex 20-A by adding or removing geographical indications. This possibility would already be covered by the general power under art 30.2 since Annex 20-A is, in contrast to the annexes to ch 8, not excluded from it. This raises the concern that, by mentioning this particular amendment right explicitly, the amendment procedure diverges from the general procedure, which provides for an approval by the parties so that amendments to Annex 20-A could be adopted by the CETA Joint Committee without subsequent approval by the parties.



Agreement'. The other specialised committees may 'only' propose amendments to the CETA Joint Committee.

Regarding decision-making powers, the main area, in which the CETA Joint Committee can take decisions, is dispute resolution. The committee appoints the members of the investment tribunal as well as of the appellate mechanism and establishes a list of arbitrators where necessary, it determines the fees and whether members should receive a salary, it decides on administrative and organisational issues when setting up the appellate mechanism. Most notably, it adopts 'interpretations of the provisions of this Agreement, which shall be binding on tribunals established under [this Treaty]' (Articles 8.31(3), 26.1(5)(c)). Furthermore, the committee can initiate non-binding 'bilateral dialogues' of the parties on sensitive policy issues (Article 25.1(2)) and 'change or undertake the task assigned to a dialogue or dissolve a dialogue' (Article 25.1(4)).

Amongst the specialised committees, the SPS Joint Management Committee decides whether the notification and information obligations of the parties in relation to SPS measures were fulfilled (Article 5.11(3)), the Committee on Services and Investment adopts a code of conduct for the members of the investment tribunal (Article 8.44(2)) and the Joint Committee on Mutual Recognition of Professional Qualifications adopts a mutual recognition agreement in relation to specific professional qualifications (Article 11.3(6)). It is worth mentioning that the Regulatory Cooperation Forum has no decision-making powers. Regulatory cooperation is based on a voluntary participation of the contracting parties (Article 21.2(6)). If a party refuses to cooperate or withdraws from a regulatory cooperation it is only subject to an explanation obligation of its decision.

In procedural terms, amendments to the Treaty adopted by the CETA Joint Committee are, under the general rule of Article 30.2(2), subject to an approval by the parties 'in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment'.¹⁰ The same applies to the specific powers to amend the

¹⁰ It is worth mentioning that the wording of art 30.2(2) contains some ambiguity as to whether the approval by the parties is obligatory since it provides that 'Parties *may* approve the CETA Joint Committee's decision [emphasis added]'. The use of the word 'may' could imply that parties' approval is only facultative. Yet, the use of the word 'may' has rather to be understood as referring to a party's discretion not to approve a decision of the CETA Joint Committee (in contrast to 'shall approve'). This understanding is

Treaty text foreseen by CETA for both the CETA Joint Committee and the specialised committees with the notable exception of Article 8.1 (extending the scope of intellectual property rights covered by the investment chapter) and Article 20.22 (modifying geographical indications). Whereas with regard to the latter, it could be argued that modifying geographical indications remains an amendment to an annex so that the general rule of Article 30.2(2) applies, the former is an amendment to the Treaty text, which is, according to Article 30.2(1) an exclusive right of the parties, so that it seems to be an explicit exception to the rule empowering the CETA Joint Committee to amend the Treaty without subsequent approval. In any event, it should be noted that the CETA Joint Committee only adopts decisions ‘by mutual consent’ (Article 26.3(3)). Therefore, representatives of the parties can always veto committee decisions at the committee level.¹¹

With a view to the exercise of decision-making rights, Article 26.3(2) sets the general procedural rule, according to which decisions by the CETA Joint Committee are binding upon the parties ‘*subject to the completion of any necessary internal requirements and procedures*’.

supported by the third sentence of art 30.2(2), which requires a parties’ agreement on the date of the entry into force of the amendment (see K Groh, ‘Verfassungswidrige Einzelaspekte im Comprehensive Economic and Trade Agreement zwischen der EU und Kanada (CETA)’ (July 2016) 24). The present understanding is further supported by the fact that the EU did not adopt a decision based on art 218(7) TFEU when signing CETA (as it did in relation to the association agreement with Ukraine, Council Decision (EU) 2017/1247 [2017] OJ L 181/1). This would have been necessary if art 30.2(2) had provided for a simplified treaty amendment procedure, in which a treaty body could decide on the modification. According to this provision the Council has to authorise the European Commission to ‘approve on the Union’s behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement’. In the absence of a decision under art 218(7) TFEU, an international agreement may only be modified with the procedure that governed its conclusion (see P Koutrakos, *EU International Relations Law* (Hart 2015) 154-155).

¹¹ Since CETA is a so-called mixed agreement that also affects policy fields covered by Member States’ competences, it should be noted that the Council stated in the statements entered in the Council minutes on the decision authorising the signature of CETA ([2017] OJ L 11/9) regarding decisions of the CETA Joint Committee that ‘where a decision of the CETA Joint Committee falls within the competence of the Member States the position to be taken by the Union and its Member States within the CETA Joint Committee shall be adopted by common accord’ (No 19). The legal base for such a common accord can be found in art 218(9) TFEU extended by a political declaration to only adopt a decision under this article by unanimity (although it allows for a qualified majority voting).



Comparable formulations can be found with regard to the adoption of mutual recognition agreements by the competent specialised committee (Article 11.3(6)), with regard to decisions and recommendations adopted by the Committee Services and Investment in relation to the binding interpretation of CETA provisions and with regard to the extension of the ‘fair and equitable treatment’ obligation and modifications of the rules of procedure of the dispute settlement rules (Article 8.44(3)).¹² Furthermore, the specialised committees adopt their decisions by consensus.

The decision-making rights of CETA bodies are hence legitimised by the contracting parties in two ways: *ex ante* through the delegation of powers in the Treaty text, which is to be ratified by the contracting parties, and *ex post* through an approval of decisions adopted by the Treaty bodies. This approval is given in accordance with the respective internal rules of the contracting parties. Looking at the EU, the concrete implementation of the approval is still unclear. In the proposal for a Council Decision on signing CETA on behalf of the EU the European Commission simply refers to ‘the EU’s internal legal process’ when commenting on the control of the CETA Joint Committee by the EU as a ‘contracting party’.¹³ Yet, an indication on how the EU intends to proceed when it has to approve decisions of the CETA committees can be found in Article 2 of Council Decision on the provisional application of CETA, according to which ‘[f]or the purposes of Article 20.22 of the Agreement, modifications to Annex 20-A of the Agreement through decisions of the CETA Joint

¹² Especially, the procedure for the adopting the extension of the scope of the ‘fair and equitable treatment’ obligation is a ‘good’ example that shows how complicated the decision-making in CETA is and how hidden the procedural protection of the parties is. Under art 8.10(3) the CETA Joint Committee adopts any extension of the ‘fair and equitable treatment’ obligation. The limitations of art 26.3(2) do not clearly indicate whether this decision is subject to an approval by the parties (which depends on whether there are any internal requirements of the parties in relation to this extension that are to be respected). Yet, the CETA Joint Committee can only adopt this decision upon a recommendation of the Committee Services and Investment (art 8.10(3)), which may only issue this recommendation, according to art 8.44(3)(d), ‘on agreement of the parties’. This clarifies that any changes of the ‘fair and equitable treatment’ obligation are subject to the agreement of the parties. But this requirement is quite hidden in the procedural rules of the ch 8.

¹³ ‘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 (5 July 2016) 7.

Committee shall be approved by the Commission on behalf of the Union'.¹⁴ This provision seemingly insinuates that the approval on behalf of the EU will be given by the Commission without any further procedural requirements involving the Council or the European Parliament. The same ambiguity can be found in relation to the voting of the representatives of the EU in the committees when taking decisions 'by mutual consent'.

3. *Interim assessment of the CETA governance structure and its decision-making powers*

At first sight, it seems indeed remarkable that the CETA Treaty bodies have the power to amend the Treaty and to adopt decisions that are legally binding upon the contracting parties. Yet, a comparable governance structure with comparable powers can already be found in other trade agreements that the EU has concluded with third countries. For example, in the Economic Partnership Agreement with Mexico¹⁵ the Joint Council has the power to take binding decisions (Article 47) and to set up specialised committees (Article 49). The same holds true for other agreements such as the Association Agreement with Chile¹⁶ and its Association Council (Article 5), the Trade Agreement with Colombia and Peru¹⁷ and its Trade Committee (Article 14(2)) or the Agreement with Central America¹⁸ and its Association Council (Article 6(2)), as well as for the Association Agreement with Ukraine¹⁹ and its Association Council (Article 463 including the right to amend the annexes of the

¹⁴ Council Decision (EU) 2017/38 on the provisional application of CETA [2017] OJ L 11/1080.

¹⁵ Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L 276/45.

¹⁶ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ L 352/3.

¹⁷ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L 354/3.

¹⁸ Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other [2012] OJ L 346/3.

¹⁹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3.



Treaty), the Free Trade Agreement with the Republic of Korea²⁰ and its Trade Committee (Article 15.4(2) including the right to amend the annexes, appendices, protocols and notes to this Treaty, Article 15.5(2)) or the envisaged Free Trade Agreement with Singapore²¹ and its Trade Committee (Article 17.4 including the right to amend the Treaty, Article 17.5(2)), which are all quite similar to the governance structure and the kind of powers conferred upon it under CETA.

From the perspective of EU law, the Union is allowed to conclude international treaties that provide for own bodies with a delegated decision-making power. In the Opinion 1/76 of 26 April 1977 on the 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', the European Court of Justice ruled that the EU 'has the power, while observing the provisions of the [EU] Treaty, to cooperate with [a third] country in setting up an appropriate organism [... and] may also, in this connexion, cooperate with a third country for the purpose of giving the organs of such an institution appropriate powers of decision'.²² Article 218(9) TFEU provides in relation to association agreements with third countries that the Council shall adopt a decision 'establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement', which is obviously based on the assumption that the creation of such bodies is legal under EU law. The decisions of treaty bodies form, furthermore, 'in the same way as the Agreement itself, [...] an integral part, as from their entry into force, of the Community legal system'.²³

Also from the perspective of public international law, the legal possibility to establish treaty bodies and a delegation of decision-making powers to them is commonly recognised.²⁴ In principle, treaty bodies are

²⁰ Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/6.

²¹ Free Trade Agreement between the European Union and the Republic of Singapore <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

²² ECJ, Opinion 1/76 [1977] ECR 754 para 5.

²³ ECJ, Case C-192/89 *SZ Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461 para 9.

²⁴ See G Ulfstein, 'Treaty Bodies and Regimes' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 428, 435-437.

established in order to ensure the proper implementation of the treaty by the contracting parties. Yet, some treaties also provide for secondary law-making by treaty bodies and grants them a right to amend the treaties. The law of the treaties does not pose an obstacle to the conferral of such powers. Article 39 VCLT refers to an ‘agreement’ by the parties as the condition for amending a treaty and does not require an equal act (an ‘acte contraire’). Amendment procedures can therefore differ from the procedures necessary to the conclusion of the original treaty. Furthermore, the VCLT rules are of residual nature with regard to the amendment procedures. Article 39 VCLT allows contracting parties to provide for specific rules concerning the amendment of the treaty.²⁵ The same applies to the amendments of multilateral treaties under Article 40 VCLT. Limits for the law-making powers of treaty bodies and conditions for their exercise have hence to be found elsewhere. In defining both it seems appropriate to refer to the established principles of international institutional law.²⁶ Although these principles were developed in view of international organisations, when exercising law-making powers treaty bodies and international organisations are not that different to each other that the use of a different legal technique (concluding a treaty or establishing an international organisation) would rule out the applicability of international institutional law to the activities of treaty bodies.²⁷

The principles of international institutional law in relation to law-making are based on the assumption that the contracting parties delegated powers of theirs to the body entrusted with the task to adopt legally binding decisions. On this basis the most important principle to be looked at when assessing the law-making activities of treaty bodies is the principle of attribution, according to which treaty bodies may only act within the boundaries of the powers conferred upon them by the contracting parties and within the limits set by the objectives of treaty

²⁵ ME Villiger, Article 39 in ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) paras 9-11; A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013), 233-234.

²⁶ Villiger (n 25) 428-429. On international institutional law: HG Schermers, NM Blokker, *International Institutional Law* (5th edn, Martinus Nijhoff 2011); J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009).

²⁷ Villiger (n 25) 429.



that established these bodies.²⁸ In other words, the adoption of a decision must not only be based on a legal base in a treaty but also be necessary to realise the purpose of the treaty as it is defined by its objectives.²⁹ Inherent to the idea of powers for treaty bodies being delegated by the contracting parties is the obligation to respect state sovereignty, which means that decisions must limit their interference with the contracting parties' sovereignty to the absolute minimum.³⁰ Finally, decisions adopted by treaty bodies may not violate *ius cogens*.³¹

Applying these criteria to the governance structure of CETA as described in section 2 seems not to lead to any particular legal problems. CETA apparently only carries forward what is already well-established in the EU's practice in concluding trade agreements. Before discussing this finding in section 5, we have first to take a step back and look, in more general terms, at the purpose for creating bodies such as the CETA Joint Committee in international treaties. At a more abstract level, treaty bodies take over tasks that would otherwise be exercised by the contracting parties on an *ad hoc* basis. It appears therefore useful to identify the purpose for creating treaty bodies and to re-assess the responsibilities conferred upon them in CETA as compared to the past practice against the background of this purpose.

4. Purpose for creating treaty bodies

As mentioned in the previous section, creating treaty bodies endowed with decision-making powers is not unknown in EU law and in international law. Reasons for states to create treaty bodies were found in balancing the need for centralised implementation of treaty obligations, on

²⁸ Schermers, Blokker (n 26) paras 206, 209-210; Klabbers (n 26) 56; PCIJ, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion [1926] Series B, no 14, 64.

²⁹ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, [1996] ICJ Reports 66.

³⁰ This could also be called the 'principle of subsidiarity', see M Benzing, 'International Organizations or Institutions, Secondary Law', in R Wolfrum (ed.), *Max Planck Encyclopaedia of Public Intl L* (OUP, March 2007) <opil.ouplaw.com/home/EPIL>.

³¹ In analogy to art 53 VCLT.

the one hand, and to keep the interference in states' sovereignty to a minimum, on the other.³² Creating treaty bodies reflects some form of 'legalization'³³ of the international relationship between states. By concluding a treaty, the contracting parties express their intention to be legally bound by the rules of the treaty. In order to amplify their commitments in a legal way, contracting parties chose to delegate the 'authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules'³⁴ to a designated third party, a treaty body. To achieve this goal, states could also establish an international organisation. This might, however, appear to the contracting parties as more costly and less effective so that they opt for treaty bodies.³⁵

The main reason for creating treaty bodies seems hence to be found in the domain of implementation of treaty obligations. Further reasons beyond implementation can be found when looking at the extensive use of committees composed of representatives of the Member States in the EU, the so-called 'comitology'.³⁶ The creation of 'comitology' was originally based on the intent to include national bureaucracies in the process of 'fine-tuning' EU secondary law.³⁷ On the one hand, when delegating such powers to the Commission, being a supranational institution independent from the national governments, the Member States wanted to get their bureaucracies involved into this process in order to restrain the use of these powers by the Commission. On the other hand, involving national bureaucrats instead of national governments in solving specific issues 'de-politicized' decision-making and allowed for taking decisions at the level of the detail that were difficult to reach at the abstract political level in the Council.³⁸

³² Ulfstein (n 24) 429.

³³ KW Abbot, RO Keohane, A Moravcsik, AM Slaughter, D Snidal, 'The Concept of Legalization' (2000) 54 *Intl Organization* 401-419.

³⁴ *ibid* 401.

³⁵ G Ulfstein, 'Institutions and Competences' in J Klabbers, A Peters, G Ulfstein (eds), *Constitutionalization of International Law* (OUP 2009) 49.

³⁶ P Craig, *EU Administrative Law* (OUP 2012) ch 5, Comitology, 109-139; C Joerges, E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart 1999).

³⁷ Craig (n 36) 113-115.

³⁸ C Joerges, J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 *Eur L J* 273-299 call this phenomenon 'deliberative supranationalism', in which 'national regulators are exposed to transnational arenas scrutinising the validity of their arguments' (at 297).



The latter point is also relevant when finding the purpose for creating treaty bodies in general. Delegating decisions to committees that need to be approved but not to be ratified by the contracting parties takes the respective issue off the political agenda and brings it into an arena of bureaucratic experts. The transnational embedding of this arena leads furthermore to a change of perspective. The concrete issue at stake is then less discussed around the national interests represented by governments but around the transnational interest reunited in the treaty body.³⁹ Joerges and Neyer have shown with regard to the EU ‘comitology’ that national representatives in the specialised committees at EU level tend to call their originally national policy preferences into question in searching for an EU solution.⁴⁰ Generalising this finding in relation to treaty bodies shows that another reason for creating those bodies can be found in the easing of international decision-making processes. Delegating powers to treaty bodies can lead to a higher likelihood of finding compromises detached from national interests.

In sum, one can conclude that two main reasons form the purpose for creating treaty bodies. They, first, serve to improve the implementation of treaty commitments as a form of ‘legalization’ of the international relationship between the contracting parties. Second, by creating a transnational forum of bureaucracies underneath the political level, complicated policy-making processes at governments’ level are eased through a relativisation of national interests.

5. *CETA: Nothing new under the sun?*

Taking up on CETA again and having the interim assessment of its governance structure and the decision-making powers conferred upon it in section 3 in mind, can we conclude that with CETA there is actually nothing new under the sun? At first sight, the answer seems to be in the affirmative.

Yet, although when simply looking at the form both the governance

³⁹ *ibid.*

⁴⁰ *ibid.* 297-298; C Joerges, ‘Good Governance through Comitology’, in C Joerges, E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart 1999) 318.

structure and the law-making powers in CETA are in line with requirements set by EU and international law, one should not isolate form from substance. What makes CETA different from previous contractual trade arrangements concluded by the EU is its scope, being a so-called ‘mega-regional agreement’. The scope of CETA is comprehensive in the sense that it covers not only tariff barriers but also non-tariff barriers to trade in goods and services. It contains rules on subsidies, investments, movement and professional qualifications of natural persons, telecommunications, intellectual property, labour rights and environmental protection. CETA employs furthermore for the first time in an EU trade agreement a ‘negative list’ approach, according to which all non-conforming measures of the contracting parties that are not enlisted in one of the annexes are subject to the CETA liberalisation requirements. Committees created by previous EU trade agreements had, indeed, already decision-making powers but with a very limited scope. The conferral of powers upon these ‘old generation’ committees⁴¹ appears against the background of the scope of these arrangements to be rather selective and narrow. In CETA, the CETA Joint Committee and the eleven specialised committees cover much more subject-matters than in any other previous EU trade agreement. This brings up the question whether the extended scope affects to the assessment of the CETA governance structure and its decision-making powers.

For the reply to this question, the purpose for creating treaty bodies, as set out in section 4, has to be taken into account. As shown above, treaty bodies are supposed to, first, intensify the ‘legalization’ of the international relationship between the contracting parties and to, second, depoliticise the international decision-making in relation to single issues. Especially having regard to the latter element, there is a trade-off between the efficiency of international decision-making through depoliticisation and the legitimacy of the decisions taken by treaty bodies. Decisions by treaty bodies are legitimised by the delegation of powers as a part of the ratification of the treaty and by the subsequent approval of the contracting parties (provided that there is such an approval requirement) in accordance with their respective internal rules.

If there are only some very few decisions, the legitimacy provided for

⁴¹ It should be recalled, as mentioned in section 3, that sometimes previous trade agreements even created only one committee.



these decisions by delegation and approval might seem to be sufficient. Yet, if the total amount of treaty body decisions increases significantly, it becomes questionable whether delegation and approval provide for sufficient legitimacy and additional measures are needed in order to ensure sufficient legitimacy of the treaty governance system. This trade-off derives from the impact of treaty body decisions on the domestic legal order of the contracting parties. Being a part of public international law, treaty body decisions rank above ordinary domestic law (in the EU law context: underneath primary law but above secondary law). Hence, in the event of a conflict of rules, treaty obligations trump domestic rules. Although CETA rules have no direct effect (Article 30.6), non-compliance with treaty obligations (as specified or further developed by treaty body decisions) can still give rise to claims of the other contracting party under the chapter on dispute settlement (suspension of treaty obligations or compensation, Article 29.14(1)). The more there are treaty obligations, whose content is unknown *ex ante* at the time of the ratification of the treaty text because of a delegation of powers, the more there is a need for an effective *ex post* control of these decisions by the legislative organs of the contracting parties. Applying this line of reasoning to CETA reveals that the comprehensive scope of this Agreement and the amount of twelve treaty bodies that are empowered to adopt legally binding decisions or to amend the annexes of the Agreement give rise to serious doubts as to the legitimacy of the governance structure and the delegation of decision-making upon it.⁴²

The identified serious doubts imply two possible consequences. Either the scope of delegated decision-making powers on bodies in comprehensive trade agreements should be limited or mechanisms that ensure an enhanced legitimacy of the decisions taken by these treaty bodies

⁴² See also PT Stoll, TP Holterhus, H Gött, 'Die geplante Regulierungszusammenarbeit zwischen der Europäischen Union und Kanada sowie den USA nach den Entwürfen von CETA und TTIP' Rechtsgutachten erstellt im Auftrag der Arbeiterkammer Wien (June 2016) 24 referring to the fact that CETA is supposed to be a 'living instrument', which requires a higher degree of democratic legitimisation than standard international Treaties; see as well EU Petersmann, 'Democratic Legitimacy of the CETA and TTIP Agreements?' in T Rensmann (ed), *Mega-Regional Trade Agreements* (Springer 2017) 37-60; E Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2016) 23 *Constellations* 58-70.

should be established. Both consequences will be addressed in the following sections starting with a discussion of the need for a broad range of decision-making powers conferred upon treaty bodies in order to dynamise trade agreements with a view to effectively regulate economic globalisation followed by some reflections on ensuring democratic legitimacy when dynamising comprehensive trade agreements.

6. *Looking at the broader picture: Regulating globalisation needs dynamisation*

After having concluded the previous section with a critical assessment of CETA's governance structure and of the broad range of decision-making powers delegated to it, it has to be discussed whether there is not a need for concluding comprehensive trade agreements such as CETA and for creating an extensive governance structure with own decision-making rights. This discussion has to be embedded into the broader picture of the regulation of economic globalisation by means of trade agreements between the world's leading trade nations, the so-called 'mega-regionals'.

Mega-regionals can be defined as 'deep integration partnerships in the form of [regional trade agreements] between countries or regions with a major share of world trade and [foreign direct investments] and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains'.⁴³ They emerged as a reaction to three developments, which are interlinked with each other. The first one is the shift in international trade law from opening markets for goods (reducing trade barriers that occur when crossing borders such as tariffs and rules of origin) to reducing non-tariff barriers for goods and services located behind the borders: '20th century trade is about "made-here-sold-there" goods. [...] Twenty-first century trade is about "made-everywhere-sold-there" goods'.⁴⁴ The second one is a shift from reducing discriminations based on the origin of a product to reducing regulatory costs

⁴³ R Meléndez-Ortiz, 'Mega-regionals: What is Going On?' in World Economic Forum, *Mega-regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?* (Report 2014) 13.

⁴⁴ R Baldwin, 'Multilateralising 21st Century Regionalism, Global Forum on Trade: Reconciling Regionalism and Multilateralism in a Post-Bali World, Organisation for Economic Cooperation and Development' (OECD 2014) 3.



linked to differences in legal orders that are equally applicable to domestic and foreign products.⁴⁵ The third one is the failure of the Doha Round and, by that, of WTO multilateralism to address the first two strands of development in a multilateral forum.⁴⁶ As a consequence, significant trade countries and regions decided to address the challenges of globalisation bilaterally with other countries (such as CETA or TTIP) or multilaterally with a group of countries (such as TPP) but outside the WTO framework. Against this background the comprehensive scope of this new generation of regional free trade agreements is explainable as they intend to address the challenges of the first two strands of developments in international trade.

Addressing non-discriminatory regulation behind the borders aims, as shortly mentioned above, at minimising regulatory costs for market operators. The necessity to take regulation ‘behind the borders’ into consideration when concluding trade agreements derives from the dynamics of economic globalisation. These dynamics can be very briefly and, by that, very superficially illustrated by comparing the world economy in the 20th century with the one in the 21st century.⁴⁷ In the 20th century world economy production factors were mainly immobile and, by that, national so that trade focussed on the exchange of products. Comparative advantages were national and trade surplus was generated when a national economy concentrated on producing goods and services in the domain where its comparative advantage is located. Hence trade agreements focussed on the costs that emerged when crossing the border. In the 21st century world economy production factors are mobile in such a way that a product is produced in a production chain that combines through ‘offshoring’ and the use of new technologies comparative advantages of a multitude of national economies (production unbundling). Products don’t re-

⁴⁵ B Hoekman, ‘Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization’ (2015) 18 *Journal of International Economic Law*, 609, 612.

⁴⁶ W Yong, ‘The Political Economy of the Rise of Mega-regionals’ in World Economic Forum, *Mega-regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?* (Report 2014) 20; LA Winters, ‘The WTO and Regional Trading Agreements – Is It All Over for Multilateralism?’ in M Elsig, B Hoekman, J Pauwelyn (eds), *Assessing the World Trade Organization: Fit for Purpose?* (CUP 2017) 344, 359.

⁴⁷ This follows the analysis made by Baldwin (n 44) 17-24.

flect anymore single national economies but an array of national economies. In other words, a product already crossed a couple of borders in the process of its creation. Producers make therefore, in the context of the 21st century globalisation, use of diverging regulatory regimes behind the borders and trigger a regulatory competition between national regulators.

Trade agreements that in such an environment remain focussed on trade barriers that emerge when crossing the border fail to address the challenges of economic globalisation, which are to be found behind the borders. Including regulation behind the borders into the scope of trade agreements embodies significant risks. Once subject to liberalisation requirements understood as ‘mutual recognition of standards’ domestic regulation runs the risk of a race to the bottom.⁴⁸ In order to avoid such harmful race to the bottom, an international coordination of regulatory standards is key. It is worth to mention at this point that reducing regulatory costs because of diverging regulatory regimes does not, by definition, entail a lowering of all regulatory standards to the lowest common denominator. It does only require that there is a level playing field, which can also be at a high standard. In order to achieve such a level playing field in a dynamic globalised world, targeted and quick decision-making of major trading partners is needed. This task can only be assumed by treaty bodies with delegated decision-making powers.

This quick reflection shows that the comprehensive scope of CETA, its governance structure and the broad range of decision-making powers delegated to CETA bodies by the contracting parties is, from a governance point of view, an appropriate answer to the challenges posed by 21st century economic globalisation to regulation behind the borders. It should be noted that none of the decision-making powers conferred upon CETA bodies entails any kind of harmonisation of the regulatory standards of the contracting parties. Both Canada and the EU remain legally free to adopt and to modify their own regulation behind the borders. Therefore the CETA governance structure represents only what could be considered as an embryo of how an effective trade governance in response to globalisation could look like.

⁴⁸ It should be noted that CETA does not contain any mutual recognition of standards provision except for the recognition of the United Nations Regulations in the field of motor vehicle safety (cf. art 4 of Annex 4-A) and for professional qualifications subject to the future conclusion of mutual recognition agreements (ch 11).



This tour d’horizon through the challenges of economic globalisation has shown that the more economic interdependencies there are across regulatory orders, the more a comprehensive and dynamised international cooperation between the affected countries and regions is needed. An extensive treaty governance structure including decision-making rights is a necessary element of such an international cooperation. CETA represents a first idea for a dynamised international cooperation. Having established that there is a need for comprehensive and dynamised international cooperation between trading partners in order to address the challenges of economic globalisation, the discussion must consequently focus on how democratic legitimacy of such an international cooperation could be achieved.

7. *Ensuring democratic legitimacy in dynamising ‘Mega-Regionals’*

Admittedly, finding a convincing reply to the challenge of ensuring democratic legitimacy in dynamised ‘mega-regionals’ is complicated. It is embedded into the broader discussion on the democratic deficit of international law, which has been called – for a good reason – ‘one of the central questions – perhaps the central question – in contemporary world politics’.⁴⁹ The Harvard economist Dani Rodrik considered it even impossible to ‘simultaneously pursue democracy, national determination, and economic globalization’.⁵⁰ National determination must in this context be understood as the ability to set costly protection standards. This derives from the fact that Rodrik dismisses what he calls ‘the global governance option’, which combines the benefits of economic globalisation with democracy at the expense of national sovereignty.⁵¹ The argument for his dismissal is the diversity of opinions as to the desired level of protection at the global level:

⁴⁹ A Moravcsik, ‘Is there a “Democratic Deficit” in World Politics? A Framework for Analysis’ (2004) 39 *Government and Opposition* 336–363.

⁵⁰ D Rodrik, *The Globalization Paradox: Why Global Markets, States and Democracy can’t coexist* (OUP 2012) xviii; see in particular ch 9 of the book on the ‘Political Trilemma of World Economy’ 184–206.

⁵¹ *ibid* 203.

‘Global standards and regulations are not just impractical; they are undesirable. The democratic legitimacy constraint virtually ensures that global governance will result in the lowest common denominator, a regime of weak and ineffective rules’.⁵²

In other words, ‘formal’ democracy (understood as the implementation of democratic, viz. voting, procedures) disconnected from national sovereignty won’t be able to adopt regulation that is comparably hard as in a national context and hence not be able to effectively legitimise decisions taken by a governance structure beyond the nation-state.

Rigorously applied to the ‘mega-regionals’, this reasoning would mean that democratic legitimacy of a dynamised international cooperation aiming at regulating globalisation is not feasible. A rigorous application of this reasoning to ‘mega-regionals’ would, however, ignore the distinctive feature of ‘mega-regionals’ from global trade cooperation, which is that it only covers a group of states and not the global community. This distinctive feature is important when we look at the reason why Rodrik dismisses the global governance option: The diversity of opinions as to the desired level of protection vis-à-vis economic transactions. The less diverse the opinions are amongst the states joining a ‘mega-regional’, the more a democratic legitimacy of a governance structure beyond national sovereignty becomes imaginable. Considering at hand a mega-regional involving Canada and the EU, the diversity in relation to protection standards is, by and large, minimal enough that CETA could serve as a basis for an attempt to ensure democratic legitimacy beyond the nation state.⁵³

This leads to the follow-up reflection as to how democratic legitimacy could be ensured. This reflection is to be made in view of the particular legal context of ‘mega-regionals’, which is public international law. As Anne Peters pointed out when addressing the issue of the democratic deficit in international law:

‘domestic democratic procedures cannot simply be zoned up. The type, shape, and procedures of democracy cannot and need not be identical

⁵² *ibid* 204.

⁵³ Furthermore, it should be recalled that, when it comes to market regulation, the EU is a good example that market governance beyond the nation-state is possible when the basic convictions of the participating states as to the desired level of protection are not too much divergent.



on both levels of governance [state and supra-state; note from the author]. Moreover, the complementarity and interaction of various levels of governance inevitably transforms the domestic ways of democracy as well'.⁵⁴

The discussion on the improvement of the democratic legitimacy of international law can here only briefly be reconstructed. Basically two strands of opinions can be distinguished: Those that seek to increase the democratic quality of international decision-making in informal ways and those that favour the establishment of formal democratic procedures. The first strand includes the model of 'deliberative democracy'⁵⁵, of 'participatory democracy'⁵⁶ and of 'contestatory democracy'.⁵⁷ Common to all three models is the absence of formal voting at international level, which is to be substituted either by the mere presence of deliberations, by the inclusion of citizens and non-governmental organisations in the deliberations or by the possibility for the people to contest decisions taken in deliberations at international level. The second strand criticises the lack of formal democracy in the proposals of the first strand and considers this lack as the core issue of the democratic deficit.⁵⁸ Proponents of a formal democratisation of international governance suggest a two-track model of 'dual democracy'.⁵⁹ International action is here legitimised, first, via the participating states to citizens and, second, through direct democratic action on the international level. The two-track model is based on the assumption that even if all states participating in an international relationship act like perfect democracies, the international relationship itself must still be democratically legitimate. The first track requires the respect of domestic democratic procedures by involving national Parliaments at an earlier stage of international negotiations⁶⁰ and

⁵⁴ A Peters, 'Dual Democracy' in J Klabbbers, A Peters, G Ulfstein (eds), *Constitutionalization of International Law* (OUP 2009) 263.

⁵⁵ J Dryzek, *Deliberative Democracy* (OUP 2000).

⁵⁶ C Petman, *Participation and Democratic Theory* (CUP 1970).

⁵⁷ L Quill, *Liberty after Liberalism: Civic Republicanism in a Global Age* (Palgrave 2006).

⁵⁸ See notably Peters (n 54) 270-271.

⁵⁹ *ibid* 265; D Archibugi, D Held, 'Editors' Introduction' in D Archibugi, D Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press Cambridge 1995) 1-16.

⁶⁰ Peters (n 54) 291.

of renewing Parliamentary consent when ‘blanket permissions’ are given to International Organisations or Treaty bodies.⁶¹ The second track would involve transnational (as a first step consultative) referenda,⁶² the establishment of Parliamentary assemblies⁶³ and more transparency.⁶⁴

Public contestation of the CETA negotiations and of the draft Treaty text and the unaltered public opposition to CETA after its formal signature show that public support for (and linked to that the democratic legitimacy of) ‘mega-regionals’ won’t increase by the inclusion of forms of democracy into ‘mega-regionals’ that focus on ‘voice’ (as suggested by the first strand of ideas) and not on ‘vote’. The ‘CETA case’ has shown that ‘mega-regionals’ must include formal democracy following the lines of the two-track model in order to increase their democratic legitimacy. Admittedly, for the time being, it seems quite ambitious to create a CETA Parliamentary Assembly and to introduce a ‘second track’ of dual democracy into CETA. It also appears not to be strictly necessary against the fact that the CETA Treaty bodies have currently only limited decision-making powers. Yet, an improved involvement of domestic Parliaments in the approval of decisions adopted by CETA Treaty bodies in a sense that they can veto the entry into force of these decisions and, by that, a strengthening of the ‘first track’ of the dual democracy in international law seems highly recommendable in order to tackle the democratic legitimacy gap identified in section 5.

If, however, in the future ‘mega-regionals’ are supposed to be further developed into effective and dynamic tools to regulate economic globalisation, as described in section 6, the introduction of a second track of dual democracy is indispensable.

8. *Conclusions*

Mega-regional trade agreements represent the latest attempt of states to shape and to impact economic globalisation through international cooperation. They pursue a threefold goal: Increasing economic benefits

⁶¹ *ibid* 294.

⁶² *ibid* 318-319.

⁶³ *ibid* 322-326.

⁶⁴ *ibid* 326-330.



for the participating countries through the reduction of non-tariff barriers to trade and investments ‘behind the borders’; consolidating regional cooperation for geopolitical purposes and strengthening the regulatory capacity of the participating countries through elevating the setting of regulatory standards at the international level.⁶⁵ In realising this goal, mega-regionals have to be able to react to market developments at the global level and to regulatory developments within the participating states. In order to serve their purpose, these agreements have to be dynamic. Such dynamisation can be achieved by joint committees of the participating countries equipped with decision-making rights. The CETA committee system represents an embryo of how a well-functioning governance structure of mega-regionals could look like. Yet, the more decision-making rights are delegated from national lawmakers to transnational treaty bodies, the more there is a need to ensure the democratic legitimacy when making use of delegated powers. This requires, at the national level of the participating states, a better inclusion of national Parliaments in the *ex post* control of such decisions. But also at the level of the international cooperation the delegation of extensive powers calls for an own mechanism to ensure the democratic legitimacy of the treaty bodies’ actions. The establishment of a Parliamentary Assembly would be recommendable.

As regards CETA and its governance, an enhanced inclusion in the *ex post* control of CETA committee decisions of the Parliaments of the contracting parties appears to be sufficient to close the detected democratic deficit because of its comprehensive scope. The powers currently conferred upon CETA bodies are more extensive than in any previous EU trade agreement but not so extensive it would require democratic control at CETA level.

In brief, mega-regionals such as CETA are instruments that can enhance the protection of citizens in times of globalisation when used accordingly. But they can also lead to the opposite policy result. To avoid the latter and to hold actors to account in the event the latter should materialise, effective democratic control is essential.

⁶⁵ RB Stewart, ‘State Regulatory Capacity and Administrative Law and Governance Under Globalization’ in NR Parillo (ed), *Administrative Law from the Inside Out* (CUP 2017) 451, 478-481.