Analysis of the similarities and market access between ceta and eujepa

Business, Industries

The EC has over the course of the last couple of years opened a series of negotiations with third countries. The goal of theses was to sign trade agreements that would encompass very big facets of the commercial policy in hands of the EC. Free Trade Agreements are broad agreements that included chapters concerning trade of goods, tariffs, trade in services, financial services, government procurement but also chapters on investment. The objective being always to promote free trade and abolish trade barriers. The name for those big agreements has been picked out quite well and the name says it all. The EC has not provided a model for its pursue of such international agreements. Forasmuch as the competence of FDI has become an exclusive competence with the Lisbon treaty, the exercise of said competence by the EC is limited but to a few agreements.

Comprehensive Economic Trade Agreement

The most talked trade agreement concerning the EU. The most comprehensive agreement signed by the EU. It is also an agreement that has a few new competences to it and is based on a CCP. The EC received a clear mandate to negotiate on behalf of the whole EU, it did so extensively, the end result was CETA. A mixed-agreement, that encompasses goods, services and investments. A specific chapter has been dedicated to investment. A novelty that the EC wishes to use as a standard in the negotiations of future FTAs. The constant liberalization of its markets and the opening of new markets for its own enterprises as one of the main objectives. CETA has been promoted as a “ gold standard agreement”. As the most comprehensive agreement negotiated until now, the standards set in CETA will be a good indicator for future clauses regarding the same subject. This first case study

will be the focus of an in-depth analysis and present the first implementation of the CCP. This will provide for a basis to compare the other FTAs to.

Scope FDI differentiates itself from portfolio investments as it establishes direct and lasting links with an entrepreneur or a company in order to develop or carry on an economic activity. To be able to talk about FDI, it is necessary that foreign investors may actually establish themselves in a to them foreign market. This clause provides the access for foreign investors of the EU and Canada, to access each other’s markets. It opens up certain market. The language is very interesting to see the approach of the Union in working together to achieve its objectives. First of all, the scope of the market access is very broad. Certain markets are explicitly being left out, such as the audio-visual sector, air services and activities carried out of the exercise of governmental authority. Secondly, a NT as well as an MFN are included in the agreement.

The language in the clauses provides for an equivalent treatment to the treatment applied to an internal enterprise. This in order to ensure the same treatment of foreign investors and the developing of the foreign enterprises in the respective markets. The conferred treatment applies to the establishment as well as the operations pursued by the enterprise. Yet, the language used is restrictive as it excludes certain interpretation that could be used by claimants, as such it prevents treaty shopping and enlarging the protections offered in the agreement. A notable exception is the exclusion of recognition of services and service suppliers. This entails that recognition of

services or service suppliers must be pursued in compliance with the applicable legislation of the party.

Market Access

The language is very broad and is very encompassing. As such the list of markets prohibited is rather small and exhaustive. Parties bind themselves in opening markets as much as possible and commit to not impose limitations that could hinder operations of a foreign investor or limit market access to a fixed number of enterprises. No limitations will be imposed on the total number of enterprises carrying a specific economic activity, quantity of output, nor any quota. This is subject to an important exception, namely the production of agricultural goods. This area is a very sensitive subject in the Union and is one of the most protected sectors. It should not surprise that this forms an exception to the prohibition of limitations.

The agreement list certain measures that are consistent with the language used prior describing the restrictions on limitations. Certain limitations are permitted, the objectives of the limitations are clear by the reading of the allowed limitations. Those serve an ecological, economic or ensuring the qualifications of certain members. This discrimination based on qualification is of objective nature to ensure a higher standard if needed be. Parties will not put limits on either the participation of foreign capital in percentage or the total value of foreign investment. This is particularly important as this will most likely fall under the Merger regulation as well as the EUFISF, pending legislation. Even if the FDI would pass the screening mechanisms put in place, it could very well be subject to concentration analysis. The

agreement leaves it clear that measures to ensure fair competition are allowed and consistent with the market access granted.

Performance requirements

The parties to the agreement commit themselves to refrain from imposing certain performance requirements that would affect the establishing or the working of an enterprise, that is designed to impede foreign investors. As such, requirements on the use of domestic content, the use of products from a specific country or region, the percentage that must be devoted to export or the restriction of sales is therefore prohibited under the agreement. Although the list of prohibited performance requirements only seems to copy what already had been prohibited under TRIM. It helps clarifying this, so that imposition of such requirements is forbidden. It also enhances the view that parties intend to fight protectionist tendencies and prevent any future measures solely based on a protectionist ideology. Restrictions on such requirements, enhances the trust of foreign investors and makes it possible for expansions in new foreign markets without making the entrance of the enterprise more difficult than it already is. Doing so, is intended to make foreign investors flock to the new markets, which under the free market theory would just enhance the quality and strengthen the market.

EU-Singapore Free Trade Agreement

The EUSFTA is a mixed-agreement that was the subject of an opinion of the ECJ, discussed above. It is also the first concluded FTA since the Lisbon treaty with a non-Western country. A first analysis can be made of the implementation of the CCP in an agreement with a country that doesn’t have

the same cultural resemblance as Canada. Scope As in CETA, the scope of the agreement has described in ways as to keep certain areas out of the agreement. As such the same markets are being left out, air and audio-visual services. The first difference being the exclusion of maritime cabotage, as well as defense related sectors and sectors that may pertain to matters of security, i. e. nuclear material.

Market access

All markets not being excluded by the limitations of the scope are being liberalized by both parties, under reservations. A separate annex containing a schedule of specific commitments is there to provide the reservations to the market access of each Member state and the Union. Relating to Investment, reservations have been made by Denmark, Spain, Bulgaria, France, Finland, Hungary and Italy. This Schedule of specific commitments is not the only major difference to CETA. The rest of the market clause diverging on the access of the total number of natural persons occupying key roles or graduate trainees, the rest does not differ from the prohibitions on limitations in CETA. The language used in the NT clause and the absence of an MFN clause, is where EUSFTA takes a different course from CETA. The NT clause in EUSFTA exempts the parties from any compensation that be may result from the inherent disadvantage emanating from the foreign character of the enterprise. The exemption of an MFN clause indicates that Parties are allowed to treat foreign investors from other territories, then the EU or Singapore, differently than they would treat an investor coming from a country with better ties. This is signifying to investors, that they may be

subjected to a lesser treatment then an investor, in the same situation, from a different country would.

Performance requirements

No prohibitions or restrictions on performance requirements have been included in the agreement. The foreign investors being subjected to the legislation of the Party that imposes restrictions, other than the prohibited performance requirements as set out by TRIM. Singapore as well as the EU being members of the WTO.

EU-Japan Economic Partnership Agreement The EUJEPA

Scope The scope of this agreement is in broad lines very similar to the scope of the previous agreements. This has become a pattern and will most likely, with little to no variations, appear in future agreements. The position of the Union being the protection of its markets relating to air and audio-visual services. The agreement does also allow measures designed to limit the production of agricultural goods. The variations being the exclusion of cabotage in maritime transport services, and the clarification of the exclusion of air services of related services in support of said services. This excluding a list of services related to the aerial market and explicitly denoting the exclusion of aerial services that do not have the transportation of goods or passengers as primary purpose.

Market access

We can denote big similarities between CETA and the EUJEPA. The clause on market access is word for word exactly the same in both agreements. The analysis of CETA is therefore mutatis mutandis applicable to the EUJEPA. A

first analysis leads us to deduce the willingness of both parties to open its market and attract FDI. The underlining thought may be the weight of the EU in the negotiations as an economic behemoth. It can therefore allow itself to push certain aspects, such as market access, on other countries. The agreement does differ in certain aspects. CETA included language regarding the clarification concerning certain measures parties could decide to implement, without breaching the agreement. The EUJEPA does not contain such provisions. Instead, the agreement has a general exceptions clause. This clause replicates the clauses of article XX GATT and article XIV GATS.

Ensuring the application of the agreement with the commitments of the parties under the WTO agreement. This leads to believe that decisions made by the WTO arbitration bodies, regarding the lecture of the previously stated articles, should be applied in order to define the scope of the general exceptions clause. Another aspect in which the EUJEPA differs from CETA, is the scope of the MFN clause. While the both the NT and the MFN clause have the same application and provides for pre-establishment protection in both agreements. MFN clause is very similar as it excludes recognition, referring to GATS, but it differentiates itself from CETA by excluding the area of taxation.

Performance requirements EUJEPA goes further than CETA, by prohibiting requirements relating to a percentage of the hiring of workers belonging to the nationality of the Party. This being the only difference, the rest of the analysis can mutatis mutandis be applied. The EUJEPA refers to IP its clause of performance requirements. CETA has a special dedicated chapter to IP

that goes further into detail and does not provide any notable difference relating to this analysis.