Finding a ratification solution in the EU-Mercosur trade deal

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On Dec. 6, 2024, following more than 25 years of negotiations, the European Union (EU) and Mercosur (comprising Argentina, Brazil, Paraguay, and Uruguay) finalized their trade agreement. The two massive common markets aim to create one of the world's largest free trade areas, encompassing over 700 million people and nearly 25 per cent of the global GDP. (If you haven't already, take a look at our earlier publication summarizing the key points of the agreement.) The next step is ratification. And because we're talking about a multi/supranational entity, it's complicated.

Paradoxically, the reason why ratification of new generation trade agreement is complicated is actually fairly simple: the more ambitious the agreement, the more it risks intruding into areas reserved to individual Member States. Which means that ratification at the supranational level would not be enough to cover the entirety of the agreement's coverage. But ratification at the *national* level carries its own risks.

Ask Canada.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU was concluded, in 2014, as a mixed agreement; the agreement was signed by both parties in 2016. Pending ratification by all EU Member States, the parties have applied it provisionally since 2017. Despite extensive efforts and close engagement by Canadian and EU officials, Member State ratification has proven challenging.

What is to be done?

Assuming the EU – and its trading partners – are still interested in ambitious agreements that require Member State ratification, what you do is look for creative solutions. For example, through "splitting the agreement."

Mixed competences and provisional application

Canadians following trade negotiations and implementation of trade agreements are used to the concept of division of powers between Parliament and provincial legislatures, and all that entails in respect of the *implementation* of a trade agreement – or any treaty, for that matter – in Canada. The federal Crown has the prerogative to negotiate and ratify treaties, but when it comes to *implementation*, Parliament is competent *only* in respect of matters over which it has jurisdiction.

The ratification situation in the EU is somewhat more complex – because the EU comprises *sovereign* states – but at its core, the situation is not different. The distribution of competences between the EU and its Member States is principally governed by the Treaty on the Functioning of the European Union (TFEU). Depending on the policy area, competencies may be exclusive to the EU, shared, or supporting, where the EU's role is limited to coordination.

Accordingly, where an international agreement–such as the EU-Mercosur deal–covers both exclusive EU competences and areas of shared or Member State competence, it must be concluded as a "mixed" agreement. This requires not only the consent of the European Parliament and the Council of the EU but also ratification by all 27 Member States in accordance with their constitutional procedures.

The CETA, as we've already observed, is a mixed agreement. This is because it encompasses subject matters within both the exclusive competence of the EU and the shared competences of the EU and its Member States. Specifically, provisions relating to trade in goods and services fall within the EU's exclusive competence, whereas areas such as investment protection remain within the jurisdiction of Member States. And so CETA required ratification by all EU Member States.

All 27.

Of course, both Canada and EU officials knew full well the potential length and complexity of the Member State ratification process. That's why they agreed that the *trade* aspects of the agreement could be implemented early through provisional application. After all, "provisional application" has excellent pedigree in trade policy: the General Agreement on Tariffs and Trade (GATT) was applied provisionally from its creation in 1948 until it was incorporated into the WTO framework in 1995.

The downside of a mixed agreement is that the remaining parts will only take effect once all Member States have ratified it, and – as Canada found out – this can take a while.

What if as an EU official you look for an ambitious agreement but don't want the hassle of provisional application?

An alternative is to split the agreement into two distinct treaties: one covering matters within the EU's exclusive competence, which can be ratified solely by EU institutions, and another addressing areas requiring national approval by Member States. There are two ways to structure a split agreement.

The first involves an interim EU-only agreement that enters into force initially and governs areas within the EU's exclusive competence; this interim agreement would remain effective only until the full mixed agreement is ratified by all Member States, at which point the interim agreement would cease to exist. Such an example is the EU-Chile agreement which was split into an EU-only interim free trade agreement (ITA) and a separate mixed agreement. Once the separate mixed agreement is ratified by all Member States, the ITA will cease to apply, leaving only the mixed agreement.

The second approach contemplates two legally distinct agreements: one exclusively addressing matters under the EU's sole competence and the other covering mixed competencies. In this case, the end result is the co-existence of two distinct agreements operating simultaneously. An example of this is the EU-Singapore free trade agreement which was split into a free trade agreement (FTA) and into an investment protection agreement (IPA). The FTA entered into force while the ITA continues its process of ratification by EU Member States. The EU-Vietnam FTA is another example of an agreement that underwent a split into two distinct agreements.

To split or not to split, not an easy question

Splitting the EU-Mercosur agreement presents an attractive option from a practical standpoint, as it enables the expedited ratification and entry into force of the trade-related components falling within the EU's exclusive competence. By decoupling these elements from the more politically sensitive provisions–such as investment protection or regulatory cooperation, which require ratification by all Member States–the EU can deliver immediate economic benefits to its citizens.

There are, however, no free lunches in life or easy solutions to complex legal, political, and jurisdictional issues. Splitting the EU-Mercosur trade agreement into separate instruments could give rise to several challenges.

From an institutional perspective, having two agreements means more negotiations, ratifications and administrative work, which could slow down the process.

Legally, splitting the agreement could generate uncertainty, particularly where provisions in the two agreements overlap or require coordinated implementation.

Politically, while splitting the deal might allow the EU-only parts to be implemented sooner, it risks undermining the perception of the EU as a cohesive and unified trade partner. In addition, some Member States might view the split as a bypass of their national democratic processes, especially where the political sensitivity is high, like farming regulation.

Finally, splitting the EU-Mercosur agreement could signal to potential trade partners that the EU lacks internal cohesion and struggles to present a united front, which will ultimately undermine its negotiating power.

Splitting the EU-Mercosur deal could speed up the implementation of the trade benefits, but it also comes with legal and political challenges. It's a delicate balance between moving fast and keeping the EU united and accountable. How the EU handles this could set the tone for future trade deals.

Lessons to be learned?

Trade agreements that are worth entering into take a long time to negotiate in any context. For federal entities such as Canada or supranational frameworks such as the EU, domestic implementation and acceptance requirements add complexities on multiple planes that require determination, skill, and patience to overcome.

The EU-Mercosur example – not entirely different from the CETA in some respects – serves as a reminder that for all the official and political good will in the world, global trade and economic problems are not susceptible of resolution by simple – or simplistic – populist sloganeering; concrete and workable solutions require careful consideration, political attention, and expert diplomatic engagement.

We will continue to monitor developments.

By

Rambod Behboodi

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749