TTIP: 'Provisional Implementation' Overrides National Veto

The EU's ambassador to Canada, Marie-Anne Coninsx says the massive free trade pact between Canada and the European Union will, for the most part, be a done deal in one year even if it is not fully ratified.

Readers of one of Montreal's main dailies, the *Montreal Gazette*, were surprised on 21 January this year when they read of an interview with the EU ambassador to Canada, Marie-Anne Coninsx. The topic was CETA, the big free-trade deal between Canada and the EU which has been signed by Canada and the EU but not yet approved by the European Parliament or ratified by Canada or any of the EU member states. According to the ambassador, "If the [European] parliament says yes, at that moment, the agreement can start its provisional implementation." Provisional implementation means that the vast majority of the sweeping deal on goods and services will apply to all areas that are the "exclusive competence of the European Union, which means more than 90 per cent," she said. In short, CETA will be implemented even before it has been ratified by any government.

This indeed is common practice in international trade deals. The EU's free-trade treaty with Columbia was signed in June 2012 and was implemented on 1 August 2013. The free-trade agreement between the EU and South Korea, signed in Brussels on 6 October 2010, was provisionally implemented on 1 July 2011.

Provisional implementation was established as a convention in international law by the Vienna Convention on the Law of Treaties in 1980 and was established as an EU practice by the Treaty of Lisbon (article 218.5). But it's something governments are not keen to emphasise. When Francis Maude, Britain's trade minister, was questioned by the European Scrutiny Committee about whether 'Parliament, and indeed the British public, will have a say in the final decision', Maude replied that there could be a vote in the House of Commons after the relevant scrutinising committees had gone through it. Parliament would have 21 days in which it could 'scrutinise' the agreement and could even veto it. What Maude omitted was that the trade deal could already be in place long before Parliament debated it.

What applies to CETA applies also to TTIP. Once the European Parliament gives its approval, the Commission begins immediately to implement the treaty even though it has not yet been ratified by any member state. This makes the European Parliament crucial in any strategy to stop TTIP.

What if a member state refused to ratify CETA or TTIP? Would the treaty rules still apply? This is uncertain territory. We do have one example where something similar happened. This was the Energy Charter Treaty (ECT) signed by the European Union and 52 other countries in 1994 and expanded since then. Russia initially signed the treaty but then did not ratify it. Then in 2005 a dispute arose between the Russian government and a number of companies that had owned shares in the Yukos Oil Company, a powerful Russian oil company which was seized by the Russian government in 2003. These companies made their claim under the terms of the Energy Charter Treaty. In 2009 an arbitration panel in The Hague ruled that the Russian Federation was bound by the Energy Charter Treaty, as a result of its provisional implementation, in spite of the fact that it was never ratified by the Duma. It awarded damages to Yukos investors of $50 billion for lost assets. The tribunal also decided that 'any investment made in Russia prior to 19 October 2009 will continue to benefit from the Treaty's protections for a period of 20 years, i.e, until 19 October 2029'. In other words, Russia is bound for over 20 years by a treaty it has never ratified.

The text of the treaty with Canada contains a section on provisional implementation which says that the treaty 'shall enter into force on the first day of the second month' after it has been agreed by the EU and Canada (chap. 34, X.06.3). But this is before the ratification process begins. The proposed EU text on investment in TTIP specifies that, in the event that either party terminates the treaty, the investment chapter (containing ISDS) 'shall continue to be effective for a further period of 20 years' ('Trade in Services, Investment and E-commerce', 2 July 2013, chap 2, section 2, 17).

It is important for MPs and MEPs to be aware of these measures which begin to implement the treaty even before it has been ratified and, in the event of a government deciding to opt out of the treaty, assuming it could, would continue one of the worst and most objectionable features of this treaty, some version of ISDS, for another 20 years. For this reason, as well as for the threat they pose to public services and environmental regulation, these treaties should be rejected.

Gus Fagan
Oxford KONP, February 2016