The question:

Hammer and Nail. Megaregionals, CETA and the Law of Treaties

Introduced by Jan Klabbers[*]

To a man with a hammer, as David Kennedy often reminds us, everything looks like a nail: the lawyer who has found her instrument of choice will insist on using it time and again.[1] Kennedy's reflection is, in a sense, a reflection on a very American position, viewing the law predominantly as an instrument, as a hammer to utilize whenever a nail comes in sight. What is surprising in all this legal instrumentalism, however, is that the instrumental value of the law of treaties often goes unrecognized: the law of treaties is generally seen as boring, technical, unsexy. International lawyers look at trade law, or investment law, or environmental law or human rights law; they look at broader theories about regulation, or constitutionalization, or technocracy or even governmentality. But they often disregard the precise techniques used on the international level – the techniques that are found, to a large extent, in the law of treaties.

So too with the (pending) arrival of the 'megaregionals': the huge, sprawling international agreements bringing major economic actors together in deals covering most aspects of life, from environment to labour, from intellectual property to transportation. These present issues of major political significance, as indeed many have realized: the amount of writings on the investment protection clauses alone is voluminous. Typically, though, the attention goes to the obvious, the visible, the superficial if you will. The attention goes to the pros and contras of the investor-state dispute settlement systems, or to whether market ac-

[*] Martti Ahtisaari Academy Professor, University of Helsinki, Visiting Research Professor at the Erasmus School of Law, Rotterdam.

[1] D Kennedy, *A World of Struggle. How Power, Law and Expertise Shape Global Political Economy* (Princeton UP 2016) 135.

cess for undesirable products will be required, and to what extent faraway regulators will influence our lives. But attention rarely goes to the underlying treaty mechanisms that make all this possible, or the legal effects of these treaties on third parties, or how treaty institutions can be used to influence proceedings.[2]

One of these pending 'megaregionals' is the huge agreement negotiated between Canada and the EU and known as CETA (Comprehensive and Economic Trade Agreement). This has already attracted some attention due to the reluctance of the parliament of Wallonia (part of Belgium's curious constitutional mosaic) to approve it. This directs the spotlight to one of the salient aspects of some megaregionals: some, though not all, envisage the EU as a partner, and this entails that complex legal questions relating to the conclusion of treaties become even more complex – where the law of treaties meets EU external relations law, complexity is ensured.

Some of the law of treaties issues that may arise are fairly obvious: any treaty these days will be accompanied by debates on how to interpret it, and while the Vienna Convention on the Law of Treaties offers some guidance, a cacophony is nonetheless bound to ensue. Less obvious though is whether CETA can already be amended prior to its entry into force, and whether amendment is the proper term to use, and whether the Vienna Convention's clauses on amendment govern the matter.

And even more complicated matters involve the provisional application of treaties. This is difficult in its own right: the infamous *Yukos* saga suggests there is ample opportunity for confusion. But CETA makes it more complicated still: in order to avoid the risk of fragmented provisional application, it provides that for purposes of provisional application, CETA will have only two parties: Canada and the EU. But this, needless to say, runs the risk of circumventing pertinent constitutional provisions in some of the EU's member states.

The law of treaties is that branch of international law that facilitates (or complicates) cooperation between states. It insists on formalities in order to ensure that agreements between actors is real rather than imaginary or coerced, yet leaves quite a bit of flexibility to arrange deals in

[2] An exception is the *MegaReg* project at NYU Law School, which has thus far generated some papers addressing law of treaties aspects. See <www.iilj.org/megareg/>.

ways that can be beneficial to whoever utilizes the law of treaties intelligently. Its techniques are well-known to government lawyers, but less so to others. As the following essays suggest, treaty techniques often serve to channel political concord and discord, and are thus useful to global political activists. Should you spot a nail, make sure you have a hammer ready.