

Does Wallonia's veto of CETA spell the beginning of the end of EU trade policy?

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Last Friday, Paul Magnette, the Minister-President of the francophone region of Belgium (Wallonia), declined to give the consent of his government to the federal Belgian government to sign the landmark Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. As a consequence, the Trade Council, meeting on October 18th, was not able to adopt the decision to sign and provisionally apply the agreement, which in turn will prevent the EU from signing the agreement next week at the EU-Canada Summit in Brussels. This veto evoked the image of Wallonia as the provincial village where Asterix, the titular hero of the French comic book series, fiercely resisted the entire Roman Empire.

While the opponents of CETA praised Mr Magnette's stubborn 'non', the European Commission and all the member states, including the federal Belgian and Flemish governments, expressed deep frustration with this move. But the veto not only illustrates the complex – and sometimes surreal – federal system in Belgium, it also reveals a much more fundamental problem at EU level, calling into question the EU's ability to conclude any ambitious trade deal. After first dispelling the concerns and objections of the Walloon government (and other opponents) to CETA, we discuss the wider context and the future of EU free trade agreements (FTAs).

'Non'!

Under Belgium's constitutional system, all five regional governments must give their consent to the federal government to sign a trade agreement. In addition to fearing increased competition for Walloon farmers, the socialist minister-president also cited the well-known concerns of the anti-CETA camp, such as the investor-state dispute settlement (ISDS) mechanism and the potential negative impact on EU food safety, social and environmental standards. Domestic political factors also played an important role. For example, it was actually the centre-left francophone opposition parties at federal level, which are in charge of

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the two regional governments in Wallonia, that prevented the centre-right federal government from signing CETA. It is still hoped that a last-minute deal can be struck before Friday's European Council by further tweaking the so-called joint interpretative declaration, a document proposed earlier this month by the European Commission and Canada, with the aim of satisfying the remaining critics of the trade deal. This declaration offers a diplomatic solution that would obviate the need to reopen the Treaty itself, but Mr Magnette has already indicated that this will not be enough, insisting that his government and the Walloon parliament will need more time to properly discuss and address their remaining concerns.

Dispelling anti-CETA arguments

The motives of the Walloon government and parliament to block CETA are mainly derived from a groundswell movement against TTIP by NGOs and other civil society organisations, many of which have partly transferred their attention to the CETA debate. Whereas it is a positive development that these trade agreements have sparked such an intensive debate, many of the objections, accusations or assertions against CETA are plainly incorrect. The present Commentary cannot go into a detailed analysis of these various objections. Instead, it will briefly focus on two key arguments of the anti-CETA camp, namely those related to the ISDS system and the risk of lowering EU food, health, environmental and social norms. But it is already noteworthy that these two principal objections against CETA are not levelled against other on-going EU FTA negotiations, such as those with Japan, and were not used against the EU-Korea FTA or the negotiated FTAs with Singapore and Vietnam.¹

With regard to ISDS, CETA has introduced a new, far more acceptable and restrictive model of ISDS than the earlier (so-called NAFTA) model, which in turn was better than the first generation of ISDS in bilateral investment agreements (BITs) which were, no doubt, biased towards investor interests. This new system was included after the CETA negotiations were officially finalised, mainly as a reaction to the fierce opposition against the negotiations on the ISDS system in TTIP by various civil society groups and the European Parliament. This new system has stronger language on the right to regulate, breaks away from the current ad hoc arbitration system to a permanent and institutionalised dispute settlement tribunal and includes strict ethical codes and an appeal system. Moreover, this new investment protection system will replace the eight 'old generation' BITs in force between individual Member States and Canada. If the opponents against CETA's investment protection system are consistent, they should also call for the termination of the existing BITs, which do not include such protective measures. Moreover, the EU and Canada also made a commitment to the establishment of a permanent multilateral investment court, although the realisation of such a court seems unlikely in the near future.

Moreover, there are no objective grounds for the fear that the level of protection of environmental, social and food safety norms would be at risk. It is at best assertive. Nowhere in CETA is there a duty or implication that the EU's 'right-to-regulate' might be undermined or negatively affected. The parties' right-to-regulate is protected generally (in the preamble)

¹ It should be noted that unlike the Vietnam and Singapore FTAs, the EU-Korea FTA does not include an investment protection chapter with an ISDS mechanism.

but also explicitly in ISDS (Art. 8.9), financial services (Art. 13.16), regulatory cooperation (Art. 21.2), labour and trade (Art. 23.2) and environment and trade (24.3), not to mention several annexes. Regulatory cooperation is clearly voluntary for the parties (again Art. 21.2). A high level of (health, safety, etc.) protection is explicitly the starting point of regulatory cooperation and Parties commit to guarantee it. The Regulatory Forum cannot itself regulate or impose rules. Also the claim, for example by Minister-President Magnette, that public services would not be sufficiently protected under CETA is manifestly incorrect as the EU routinely excludes public services from trade agreements.

The exclusive Common Commercial Policy

But the CETA saga also reveals a much more fundamental problem, namely that a single region (or member state) can torpedo a trade agreement for the entire EU. The recent decade has witnessed a creeping but crucial shift in EU trade policy. Whereas EU FTAs used to be concluded as 'EU-only' agreements, a practice has now developed in which FTAs are concluded as 'mixed' agreements. The latter are concluded between third parties, on the one hand, and the EU and its member states, on the other, because these agreements encompass elements of both exclusively EU and member state competence. This is a remarkable evolution because the Common Commercial Policy (CCP) has always been an exclusive EU competence, precluding member states from concluding bilateral trade agreements with third countries on their own.

But for the conclusion of EU FTAs member states are represented in the Council, which authorises the Commission to start trade negotiations, monitors the Commission during the trade talks and decides on the signature and conclusion of trade agreements. For trade agreements, the Council decides under qualified majority voting (QMV),² which means that a single member state cannot block a trade agreement. In practice, however, the Council always tries to find consensus among all the member states.

An increasingly ambitious EU trade agenda

Most FTAs have been concluded as EU-only agreements, without the involvement of individual member states per se. This was especially the case for the first generation of trade agreements, which were concluded mainly with neighbouring EU countries and in principle focused on tariff-elimination for industrial goods.³ These agreements fell squarely in the realm of the exclusive CCP, so the member states did not contest the EU's exclusive competence to conclude them.

Over last decade, however, the EU has been drawn into the conclusion of more ambitious and comprehensive free trade agreements with its key trading partners and emerging economies,

² For several trade agreements, however, such as those in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council still decides with unanimity (Article 207(4) TFEU).

³ It has to be noted that numerous FTAs concluded by the EU are included in broader Association Agreements, which are traditionally concluded as mixed agreements (e.g. the FTAs with Central America, the Western-Balkan countries and the ENP countries, both in the east and the south).

mainly in reaction to the stalled multilateral Doha round of trade talks at the level of the WTO. This new generation of FTAs – such as those concluded in 2011 with Korea and negotiated with Canada (CETA), Vietnam, Singapore and underway with the US (TTIP) and Japan – has a much broader coverage, going beyond mere tariff-reduction for goods. These FTAs contain ambitious chapters on all relevant trade-related areas that rank high on the global trade agenda, e.g. trade in services, investment, public procurement, intellectual property rights, sustainable development, etc. To facilitate the realisation of these new agreements, the member states reinforced the EU's exclusive trade competences in the Lisbon Treaty by broadening the scope of the CCP in the area of services, IPRs and foreign direct investment.

'Mixed' feelings about the Common Commercial Policy

Despite the broadened scope of the CCP, all of these ambitious FTAs that have been concluded or negotiated since the Lisbon Treaty have nevertheless been categorised as 'mixed', which implies that they must be signed and ratified by the EU and all 28 member states according to their own constitutional requirements. The legal argument is that these ambitious FTAs include provisions that still fall under the competences of the member states, and not of the Union. The political reason is that the mixity of these FTAs leads to a de facto veto right for the Member States, since they can refuse to sign or ratify the agreement.

The European Commission and the Council are increasingly at odds with one another on this point. For example, in order not to further delay the signature of CETA and under pressure from the Council, the Commission proposed in July this year to conclude CETA as a mixed agreement, although it believes it should be an EU-only agreement.⁴ Moreover, the Commission recently required the Court of Justice to clarify this complex and sensitive delineation of competences by asking whether the negotiated EU-Singapore FTA falls entirely under the EU's exclusive competences, or whether the member states still have to be involved.⁵ Contrary to the Council's position, the Commission takes a broad reading of the EU's exclusive competences, such as the CCP. For example, the Council disputes the EU's exclusive competences in the EU-Singapore FTA in the areas of transport services, investment and elements of the chapters on sustainable development and IPRs.

One of the political reasons why the Commission prefers to conclude FTAs as EU-only agreements is to prevent one (or a few) member states from blocking a trade deal for domestic reasons unrelated to trade, or because a member state may want to use its veto as a bargaining chip in other negotiations. Several EU international agreements have faced such a scenario in recent months. The Dutch Government cannot ratify the landmark EU-Ukraine Association Agreement because a minority of Dutch citizens voted against the agreement in a consultative referendum, mainly inspired by broader anti-EU or migration feelings.⁶ And Romania and

⁴ European Commission, 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, 5 July 2016.

⁵ Opinion 2/15: Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (pending).

⁶ G. Van der Loo, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation", CEPS Commentary, 8 April 2016.

Bulgaria are threatening to stall CETA as long as Canada does not lift its visa requirements for their citizens. The EU can partly circumvent these complications by provisionally applying parts of the agreement that fall under the exclusive EU competences, but this is not a sustainable solution in case a member state refuses to ratify an agreement.

By employing these tactics, the member states are undermining one of the key achievements of the EU: a true *common* commercial policy that enables the EU to protect and promote its trade interests and pursue a strategic agenda in the globalised economy. The future does not look bright. Considering the rise of populist parties and increasing Euroscepticism in several member states it is very likely that future EU (trade) agreements will face similar hurdles in the ratification stage, often caused by domestic issues in a member state not related to trade.

Solutions?

Unfortunately there are no easy solutions to this problem. It could be argued that the EU should go 'back to basics' and be content to once again conclude the more limited FTAs that undoubtedly fall within the exclusive CCP, thereby avoiding mixity. But such modest agreements would not tackle the crucial challenges on the current global trade agenda and they would frustrate the EU's desire to promote its broader trade agenda, including sustainable development goals. Hopefully the Court will back the Commission in its Opinion on the Singapore FTA, but even if so, member states can still insist on including member states' competences in future FTAs, triggering mixity. The European Parliament, which largely follows the European Commission on this point, could then refuse to give its consent to future FTAs when it disagrees with the mixed nature of these agreements, but this would also not offer a solution.

Another option would be to replace the QMV rule in the Council (Article 207(4) TFEU) in the area of the CCP with unanimity, thereby dampening the member states' eagerness to insist on mixity because they would maintain their veto right in the Council. This could mitigate the risk that a member state will hold an FTA hostage for domestic (non-trade related) reasons. Parliamentary control over the CCP in this scenario is still assured by the European Parliament's full involvement in the CCP since the Lisbon Treaty and the national parliaments' control over their respective governments in the Council. But this option would require a treaty change, which is not expected to appear on the table any time soon.

In any event, a 'common' commercial policy that is steered from the 28 capitals is not a workable solution to tackle the global economic challenges of the 21st century.