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Controverses sur les traités de libre-échange

Post-CETA: How we got there and how to go on [1]

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The Canadian Minister of International Trade, Christya Freeland, made a classical dramatic exit from the CETA negotiations on Friday 21 october 2016 [2]. Many international trade negotiators have made such kind of staged exits over the years in order to bring the opposite side to its senses. However, she motivated her departure in a way that has made students of the common commercial policy (CCP) of the Union pay a lot of attention, and rightly so. She pointed out that this had been a long negotiation, but nevertheless one between two trading nations that had a lot in common. Moreover, she noted that the Canadian delegation had been very forthcoming in many ways. This was entirely true, particularly in respect of the rewriting over the summer of the arbitration procedures in the investment field (ISDS), largely in accordance with the draft presented by the European side to the US in the framework of the TTIP negotiations [3]. She also noted that Canada had bent over backwards to accommodate last-minute requests from several Member States (which was also true in respect of the interpretative declarations that were demanded by various Member States, sometimes at the instigation of their national parliaments or national

(1) This note is an elaborate version of an article that can be found at https://acelg.blogactiv.eu/ of 28 October 2016.
(2) See "EU-Canada trade deal in crisis as Canadian Minister walks out", *The Guardian*, 22 October 2016, at https://www.theguardian.com/world/2016/oct/21/eu-canada-ceta-trade-deal-meltdown-canadian-minister-walks-out.
(3) The Commission ISDS draft for TTIP of 16 September 2015 is available through the press release "EU finalizes proposal for investment protection and Court System for TTIP of 12 November 2015, http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

supreme courts, and the Romanian and Bulgarian blackmail on visa matters) [4].

However, she had come to the conclusion that the EU had become fundamentally incapable of delivering a comprehensive economic and trade agreement (hence CETA) [5]. Her assessment seems to have been widely shared, also amongst European media. It is a very damning conclusion for an organization that was always held in awe by third States and other international organizations for its prowess in the field of trade negotiations and trade law. An organization, moreover, that, with the Lisbon Treaty, hoped to have equipped itself with new powers in the area of trade and international relations generally in order to be able to project a more efficacious and more unified external presence in the world. Even if CETA is still snatched away from the jaws of oblivion, as the Belgian government seems to have achieved, it remains important to ask the following questions: "What happened to bring about this demise?" and "what can be done to stop a repetition?" [6].

How did the EU get to this point?

On 28 June 2016, during the post-Brexit European Council, the President of the Commission, Jean-Claude Juncker, advised the other members of the Council, the Heads of State and Government, that CETA would be submitted to the approval of the Council as a Union only agreement, falling within the EU's exclusive competence. He also said that national parliaments were welcome to discuss the agreement, but could have no decisive say in the matter, given the Union's exclusive competence in the field of trade (and presumably also exclusive power under Article 3(2) TFEU, insofar as aviation, maritime transport services and some smaller subjects were concerned) [7].

In the following days, many Member States, some of them egged on by their parliaments' wish to have a say in the agreement, developed strong objections against this approach. In the post-Brexit panic, these Member States ostensibly believed that they could only convince Euro-skeptic public opinion by turning the agreement into a mixed one and let their parliaments decide the fate of CETA [8]. No matter that this might constitute a breach of the European constitutional order that had been newly minted in Lisbon, notably with a right of approval of the European Parliament for trade agreements. A press campaign was waged against the Commission and, especially in Germany, personal attacks were launched against the President of the Commission. In such situations, the Commission is always depicted as arrogant, high-handed and tone-deaf because it wants to apply the Treaty as it now is [9]. And Mr. Juncker had allegedly wholly fallen out of favour with Berlin and Paris and would soon be on his way out [10]. Rumours, which were then copiously denied in the respective capitals in order to make them all the more effective [11].

(4) See Guillaume Van der Loo, 'CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future', *CEPS Commentary*, 31 October 2016, available at www.ceps.eu.
(5) See fn. 2.
(6) For an early reaction to broadly the same questions, see Guillaume Van der Loo and Jacques Pelkmans, "Does Wallonia's *veto* of CETA spell the beginning of the end of EU trade policy?", *CEPS Commentary*, 20 October 2016, available at www.ceps.eu.
(7) See the proposal of the Commission in Doc. COM(2016) 444, 5 July 2016.
(8) "Schnurzegal-Juncker erzuernt deutsche Politiker" ("Couldn't care less-Juncker" angers German politicians), *Welt*, 29 June 2016, www.welt.de. "Couldn't care less" (Es ist mir schnurzegal) was Juncker's reaction to the first wave of criticism, especially from the German side.
(9) On the large number of Court cases that have developed over the years since 2012 on the application of the new and reinforced powers of the Union in the field of external relations since the entry into force of Lisbon, see PJK, 'From the Board, Litigation on External Relations Powers: The Member States Reject their own Treaty', *Legal Issues of Economic Integration* Vol. 43(2015), pp, 1-14.
(10) "Erste Ruecktrittsforderung gegen Juncker" (A first call for Juncker to resign), *Bild*, 30 June 2016, www.bild.de.
(11) "Merkel will Bundestag im CETA Prozess einbinden" (Merkel wants to implicate the German Parliament in the CETA process), *Merkur*, 30 June 2016, www.merkur.de. Merkel actually also showed some comprehension that the President of the Commission could not just ignore the opinion of the Commission Legal Service.

Under this pressure – wisely or unfortunately, history will judge –, the Commission, on 5 July, went so far as to propose *itself* that CETA should be concluded as a mixed agreement[12]. In this way, it obviated the need for the Council to over-rule a Commission proposal for the conclusion of CETA by the Union alone, for which unanimity would have been required. Although the Council has achieved such unanimity in the past in the field of external relations, it was far from certain that it would have worked this time. There were quite some Members States that saw the risks in this procedure and/or were convinced by the Commission's arguments[13].

Since the Commission, the Member States and Canada hung on to the date of the yearly EU-Canada summit on 27 October for the signature and provisional entry into force of the agreement, the unsatisfactory nature of the national approval procedures was foreordained. Three months and a half (minus one month in most of the Member States for summer recess) for the parliamentary approval of an agreement of over 200 pages of text and many annexes could only lead to rubber stamp proceedings in the national parliaments. Hence, the complaints of Walloon Prime Minister Magnette about this aspect of the procedure and about his Parliament being put under too much pressure sounded quite credible.

On the other hand, this action by the Member States, and *in particular* by the big ones, reluctantly condoned by the Commission, should be seen for what it really is. It is a frontal attack by the Member States and their parliaments on the newly acquired powers of the European Parliament in the field of trade, and thereby a frontal attack on the constitutional order of the Union and its autonomy vis-à-vis the Member States. Whatever one may say about CETA, when one reads it, there is no doubt that this is overwhelmingly a trade agreement, a broad one, but a trade agreement. There are two somewhat serious reasons why it might not fall entirely within the exclusive power of the EU over trade agreements: one is the well-known special status of transport in the TFEU; the other one is the long-standing controversy over whether portfolio investment is included under the words "foreign direct investment". The Council could in principle simply decide to utilize the shared powers that cover these two subjects in the framework of CETA and conclude the agreement as an agreement of the Union, but the Member States have never let the Council do that (unless the ERTA doctrine and later Article 3(2) TFEU forced them to) and did not now.

The present situation and its implications

It is interesting to note that neither the Council's decision on the signing on behalf of the European Union of CETA of 28 October 2016[14] nor several Member States' draft parliamentary acts of approval (insofar as the author has seen them) limit the scope of their signature or approval of CETA to what falls within the competence of the EU or of the Member State in question[15]. Both the Union and the Member States thus pretend (in law) that they have the power to sign and conclude all of the agreement; this has been the traditional approach to

(12) "Sous pression, Juncker fait volte-face sur l'accord avec le Canada" (Under pressure, Juncker makes a 180 degree turn on the agreement with Canada), https://www.mediapart.fr, 5 July 2016. This feature began with "C'est une victoire pour Paris et Berlin" (It is a victory for Paris and Berlin).

(13) This was, for instance, the position of Italy. See the declaration of the Deputy Minister of Economic Development, Carlo Calenda, at the end of the negotiations, http://www.sviluppoeconomico.gov.it/images/stories/documenti/CETA.pdf.

(14) Council Document 10972/1/16 Rev 1 of 26 October 2016. It is implicit in Article 1 that the signature of the Union covers all of CETA.

(15) However, the Council's decision on the provisional application of CETA (Council Document 10974/16 of 5 October 2016) is clearly limited to those provisions which in the eyes of the Council are of exclusive competence of the Union by listing those provisions that are not to be provisionally applied in Article1(a), (b), (c), and (d).

approval of mixed agreements for a long time [16]. Thus, the national parliaments and governments pretend that they can approve the 95 % (let me be charitable) of the agreement that falls incontestably within exclusive Union powers and the Union's institutions pretend that they can approve the 5 % within Member State powers. How can this be justified?

This approach is based on what Pascal Lamy, the former Trade Commissioner, once felicitously called the "pastis approach" to mixed agreements. Just like one drop of pastis makes the water with which it is being mixed completely milky, one sliver of national or shared competence makes a whole Union agreement mixed in such a way that the two components of the agreement can no longer be distinguished. The question is whether that theory was ever fully justified. However, before Lisbon it was at least a genuine compromise between Commission and Council, in which the Council gave away its own exclusive power to conclude a "mixed" trade agreement in part to the Member States (which compose the Council). After Lisbon, the Commission and the Council, in agreeing by way of compromise that a trade agreement contains elements that make it mixed and by applying the traditional "pastis approach" to that mixed agreement, implicitly bargain away the Parliament's right to grant consent on its own to the incontestable trade aspects of that agreement. Even if an agreement were presented as a mixed agreement to Parliament, it is questionable whether the Parliament can implicitly give away part of its power to the national parliaments [17]. As we all know, even one national or regional parliament can nullify the approval of the European Parliament over the incontestable trade aspects of an international agreement. That may well be contrary to the standing case law of the Court that says that trade policy powers can only be exercised by national authorities, if there is an explicit authorization or delegation back to the Member State(s) in question [18]. And it was certainly not what the drafters of the Lisbon Treaty intended, when they decided to follow the trend of "democratization" in foreign affairs, which had been palpable in the Member States for quite some time already, and to give to the EP the right of consent to trade agreements [19].

After Lisbon, therefore, mixity in relation to what are essentially trade agreements is no longer what it once was, in particular "sloppy mixity" of the "pastis" kind. There are real risks here. If an individual or company were to be directly negatively affected by an implementing measure that is based on CETA, it could well attack that measure, while raising the plea of illegality against the Council Decision concluding the agreement (Art. 277 TFEU), arguing that the whole agreement was null and void because of the way in which it had been adopted by the Union and the Member States, in breach of the autonomy of the EU legal order, notably through the abridgment of the powers of the European Parliament. The chance that the Court might accept such an exception is not negligible and the embarrassment in the relations with Canada might be even worse than it is already now.

What can be done about it?

The Commission can immediately take the simple precaution that in its proposals for the act of approval of mixed agreements it is made clear that the EU institutions approve the agreement only

(16) This is what in old German doctrine was called the double "*ultra vires*" character of mixed agreements. I am indebted to Lothar Ehring for pointing this out to me.

(17) In US constitutional law, for instance, this would be seen as an illegal delegation of legislative powers to an organ or organs outside the US constitutional system. There it is opposed in particular, if law-making powers are delegated to international organizations. See Curtis A. Bradley & Judith G. Kelley, The Concept of International Delegation, 71 *Law and Contemporary Problems* 1-36 (2008).

(18) Case 41/76 *Donckerwolcke*, EU:C:1976:182, para. 32.

(19) This power is derived from Art. 218(6)(a)(v) jo. 207(2).

insofar as it falls within EU powers. In doing so, it can point out to the Council and the Parliament that this was the formula used by the Council, at the instigation of its Legal Service, in the act of approval of the WTO Agreement and its Annexes, taking into account the Court's Opinion 1/94 on the mixed character of that Agreement [20]. As a counterpart, the Commission should urge the Member States to use the same formula, when they submit mixed agreements to their Parliaments and in the somewhat longer run it should not hesitate to start infringement procedures against Member States that are not inclined to do so.

What is the use of such a vague phrase? Precisely that it leaves room for some difference of judgment about where the frontier between exclusive EU trade policy power and Member State power exactly lies, while nevertheless indicating to other EU institutions (notably the Court), to the Member States and to Union citizens that the intention to respect this border is there. There was a good reason for adopting this formula after the high-running differences of opinion and hard-fought Court battle of 1994. Moreover, the Commission's precise questions in its request for Opinion 2/15 (on the division of competences in the FTA with Singapore) has inspired the Court to give the political institutions somewhat more precise indications on which matters fall within the common commercial policy and hence within exclusive EU competence or not. [21] On the external side, the consequences of an abiding failure of one or two Members to ratify would be much less dramatic, since the partner State would know that nearly all of the agreement would have to be implemented by all of the Union, as long as the Union had concluded the agreement. It could choose to ignore the formal gap in the agreement for quite some time and thus a solution to the problem would probably grow easier [22].

In principle, it would be much better to avoid mixed competence altogether, especially in the field of trade policy [23]. It would avoid a regional parliament or national referendum or a construed case before a national supreme court torpedoing Union trade agreements [24], thus undercutting the constitutional decision-making procedures of the Union, delegitimizing the European Parliament and thereby undermining the good standing of the Union in international rela-

(20) See 94/800/EC: Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994 L336/1, Art. 1(1) speaks of the approval of the WTO Agreements and selected annexes "with regard to that portion of them
which falls within the competence of the European Community."

(21) Advocate-General Sharpston has submitted her conclusions on 21 December 2016, EU:C:2016:992 and the Court its Opinion on 16 May 2017, EU:C:2017:376. It is clear that indirect foreign investment, i.e. principally portfolio investment, and investor-state dispute settlement are in the Court's view not part of the common commercial policy as it is presently defined in Art. 207 TFEU. For early bog comments see Laurens Ankersmit, 'Opinion 2/15 and the Future of Mixity and ISDS', in: europeanlawblog.eu, May 18 2017 and Anthea Roberts, 'A Turning of the Tide against ISDS', in www.ejiltalk.org, May 19, 2017.

(22) It should be noted that there is an increasing number of what in reality are broad trade agreements that are being concluded as mixed association agreements, for instance the Agreement with Ukraine, which was almost derailed by a Dutch referendum instigated by groups which had an anti-EU objective. However, there is no inherent reason why such agreements should be mixed, while they do give each Member State a *veto.* Art. 218(8) jo. Art. 217 TFEU. If there are good reasons to conclude such association agreements, the Commission can use the same means as suggested in the text to cut off mixity.

(23) It is suggested that the EU can do without protecting its portfolio investors; given that they receive a risk premium in higher than normal dividends on their shares and extra interest on their obligations, if they make risky investments, they can make do without further protection. On this and more generally on the merits of protecting portfolio investment in the framework of ICSID, see Georges Abi-Saab's dissent in *Abaclat v Argentina.* As to ISDS, requiring investors to subject to national jurisdictions up to a certain maximum period is a provision that is already found in several investment protection agreements and it would not be outlandish for the Union to include such a clause, which could pass muster with the Court, or to leave ISDS to Member States, if they really care for their own powers in this area.

(24) It should be recalled that CETA also narrowly escaped rejection by the German Constitutional Court, Judgment of the *Bundesverfassungsgericht* of 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16.

tions. It would force the opposition to trade agreements to organize itself at the European level and to convince the Council or the European Parliament that a proposed agreement should not be concluded by the EU. As we have seen, the Parliament is quite capable of reacting positively to such campaigns (Swift; ACTA) [25]. That would be the royal road to defeat a proposed agreement.

The recommendations that the Commission addresses to the Council asking the latter to authorize it to open negotiations and to equip it with guidelines for such negotiations, are not formal proposals. Therefore, they do not benefit from the protection that the Council needs unanimity if it wants to amend them (Art. 293(1) TFEU). They can be changed by qualified majority (Art. 218(8) TFEU). The Council has often used this possibility to force the Commission to include matters of shared or national competence in treaty negotiations, which the Commission intended to base on the Union's exclusive trade powers.

It may well be difficult for the Commission to change anything to this practice, especially as the Council has great autonomy, once negotiations have been formally opened, in addressing (or modifying) directives for negotiation under Article 218(4) TFEU to the Commission, even without the latter's prompting. On the other hand, the Council cannot authorize the opening of negotiations without a recommendation from the Commission. Therefore, the Commission may have recourse to the weapon of the withdrawal of the recommendation to open negotiations, just as this right was recognized by the Court for a Commission proposal to the Council [26]. The Commission would need to motivate strongly in its recommendation to the Council as to why the prospective agreement needed to be based on exclusive Union powers alone, why this was in the best interest of the Union's constitutional system, and restrict the scope of the agreement accordingly. If then the Council were to stand the Commission's motivated intentions on their head by introducing elements of mixed competence in the negotiation directives, the Commission could withdraw its recommendation altogether and defend itself in Court, if necessary. It successfully did so in the case concerning the withdrawal of its proposal for a Framework Regulation on macro-financial assistance (balance of payments support) to third States, in which the Council and the Parliament wanted to replace the implementing powers for granting such assistance to specific countries, as advanced in the Commission proposal, by recourse to the normal legislative procedure. The Court of Justice considered this a sufficiently fundamental change of the proposal to justify a withdrawal [27].

This may seem a rather confrontational approach, so early in the EU procedure leading up to a negotiation of an agreement. However, the alternative is even more unattractive. The Commission would have to accept initially the elements of mixity favoured by the Council. Later, using its room for maneuver during treaty negotiations recently reconfirmed by the Court [28], the Commission would come to the conclusion that mixity was not in the best interests of the Union. Its formal proposal for the conclusion of an agreement would be based only on exclu-

(25) The Swift agreement between the EU and its Member States of the one part and the US of the other part was voted down by the EP on 10 February 2010, see the EP Press Release of 11 February 2010, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20100209IPR68674+0+DOC+PDF+V0//EN&language=EN. The multilateral Anti-Counterfeiting Trade Agreement (ACTA) was rejected by the EP on 7 April 2012; this was the first occasion on which the EP did not give its consent to a trade agreement, a power which it acquired under the Lisbon Treaty. See the press release of the same date, http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120703IPR48247/20120703IPR48247_en.pdf.

(26) Case C-409/13, *Council v. Commission*, EU:C:2015:217, paras 82-95.

(27) See Case C-409/13 *Commission v. Council*, fn. 26 above.

(28) Case C-425/13 *Commission v. Council*, EU:C:2015:174, paras 85-93.

sive powers of the Union. If the Council then unanimously overruled such proposed agreement, the Commission would be forced to withdraw its proposal. Thus, it would have engaged a third country "needlessly" in negotiations, which would be extremely damaging to the reputation of the Union on the international scene.

Conclusion

May these few lines contribute to a better understanding of an EU constitutional view of the present CETA crisis and help discard the facile feeling, even among the informed public, that national parliaments are somehow naturally bestowed with authority and legitimacy to approve EU international agreements, even if these latter fall largely within exclusive Union competence. In such a situation, the national parliaments need to channel their influence through their governments represented in the Council. [29] The tragic aspect of the situation is that actions by a national or regional parliament, a national referendum or the recourse to a national supreme court seem totally natural and legitimate from those who are within the national legal system (even if there are pranksters and mischief makers among those taking such actions), but are not perceived as such by others outside and inside the Union, and can be seen as fundamentally flawed from the point of view of the EU constitutional system.

(29) See in the same vein the declaration "Trading Together" at www.trading-together-declaration.org. *Contra* : *Déclaration de Namur* (www.declarationdenamur.eu), which propagates giving a direct say to national parliaments in the conclusion of EU trade agreements. These two competing declarations have been inspired by the difficulties surrounding the signature and conclusion of CETA.