

CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future

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31 October 2016

Yesterday, Sunday October 30th, the EU and Canada finally signed the long-awaited Comprehensive and Economic and Trade Agreement (CETA), which had been in limbo for almost two weeks because the Belgian region of Wallonia refused to give its consent to the federal Belgian government to sign the deal. As explained in our previous [CEPS Commentary](#) last week,¹ CETA was classified as a mixed agreement (a decision whose wisdom we dispute) and therefore requires not only the EU's signature and ratification, but also those of the 28 member states. After a week full of political suspense and profiling, late-night negotiations at intra-Belgium level and informal contacts with and diplomatic pressure from the different EU institutions, Belgium's prime minister Charles Michel could finally announce on Thursday that an agreement was reached with the Walloon government and that Belgium was able to sign CETA. In order to get the Walloons on board, an intra-Belgium Statement and a Joint Interpretive Instrument was negotiated. These documents were approved at the last-minute by COREPER on Thursday night and on Friday the Council approved, by fast-track writing procedure, the Council Decisions for signature and provisional application of CETA. This paved the way for the agreement's signature yesterday at the EU-Canada Summit, referred to by President of the European Council Donald Tusk as "the most highly anticipated summit in recent memory".²

In addition to the Joint Interpretative Declaration (which has been agreed with the Canadian authorities), no less than 38 (!) statements or declarations (including the intra-Belgium Statement) have been made by EU member states or institutions.³ This Commentary highlights the key elements of these documents and their legal and political implications for CETA's ratification process.

¹ G. Van der Loo and J. Pelkmans, "Does Wallonia's veto of CETA spell the beginning of the end of EU trade policy?", CEPS Commentary, 20 October 2016.

² Remarks by President Donald Tusk at the 16th EU-Canada summit, 30 October 2016 (www.consilium.europa.eu/en/press/press-releases/2016/10/30-tusk-remarks-eu-canada-summit/).

³ The Joint Interpretative Instrument and the 38 declarations and statement have been made public by the Council at: www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/

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The Joint Interpretative Instrument

The Joint Interpretative Instrument was already drafted earlier this month, together with the Canadian authorities, to accommodate some of the concerns of the CETA opponents. It was further tweaked over the last two weeks in the light of the Walloon 'non'-vote on CETA. The instrument specifies how several provisions of CETA should be interpreted, but it does not alter the text of the agreement. Nevertheless, it is a legally binding document according to Article 31 Vienna Convention on the Law of Treaties (as confirmed in the Instrument and several Statements of the Council) and will need to be taken into account by the Parties and members of the agreement's Investment Tribunals during dispute-settlement procedures.

This 12-page long text essentially addresses the concerns of the CETA opponents, mainly those related to the Investment Court System (ICS) and the potentially negative effects of the agreement on the government's right to regulate public policy spheres.

It stresses that the EU and Canada will "continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, environment, [etc.]" and that CETA "will also not lower our respective standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection". It further emphasises that the EU member states and Canada preserve the right to regulate their economy in the public interest and to provide public services (such as public health and education and social security) and that CETA's regulatory cooperation remains voluntary. It also confirms the agreements' provisions on sustainable development, environmental protection and labour rights and recalls that under CETA the parties can maintain environmental, social and labour-related criteria in their procurement tenders. It also repeats the key innovative elements of the Investment Court system (one of the main concerns of the CETA opponents) and stresses that this system will not result in foreign investors being treated more favourably than domestic investors, that governments may change their laws even if this may negatively affect an investment and that 'mail box' companies established in the EU or Canada cannot use this system. It underlines that the ICS establishes independent, impartial and permanent investment Tribunals and stresses the strict qualification requirements and ethical rules for the members of these Tribunals.

None of these elements is revolutionary and they were already quite clear from a reading of CETA's text. The only innovative element is that the EU and Canada have now agreed "to begin immediately further work on a code of conduct to further ensure the impartiality of the members of the Tribunals", including on the method and level of their remuneration and the process for their selection. This task should be concluded before the entry into force of CETA.

38 statements and declarations

In addition to the Joint Interpretative Instrument, EU member states and institutions unilaterally adopted 38 statements and declarations on CETA, which will be entered into the Council minutes. These statements or declarations do not give a binding interpretation on CETA, as is done in the Joint Interpretative Instrument, nor do they constitute binding EU acts. Rather, they explain the position of several EU institutions and member states on the conclusion of this agreement. Several statements and declarations of the Council and the Commission relate to competence issues for the

[?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU-Canada+trade+agreement%3a+Council+adopts+decision+to+sign+CETA](https://www.cepss.eu/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU-Canada+trade+agreement%3a+Council+adopts+decision+to+sign+CETA)

conclusion of CETA by the EU. But several member states adopted declarations to protect their specific interests. For example, the UK and Ireland stressed their respective opt-outs for CETA's provisions relating to the EU's area of freedom, security and justice. Greece refers to the geographical indications of its Feta cheese and Bulgaria and Romania refer to Canada's lifting of visa requirements for its citizens (and even link this with their ratification of the agreement). The Commission also confirms that CETA will not affect the EU's legislation on GMOs and hormone-treated beef. Moreover, some important statements have been made with regard to the agreement's provisional application (see below).

However, the two most important statements were the one on the ICS issued by the Council and the Commission and the intra-Belgian Declaration.

The former repeats the wording on the ICS in the Joint Interpretative Instrument, but adds several elements. It states that the Commission will further review the ICS in order to improve the selection criteria and ethical codes of the ICS judges. For example, there will be a rigorous process for selecting all judges with the aim of guaranteeing the judges' independence and impartiality, as well as the highest degree of competence. Candidates to become European judges must be nominated by the member states, which will also participate in the assessment of candidates. A strict obligatory and binding code of conduct (which is already provided in CETA) will be set out in detail "soon", before the agreement is ratified. This commitment is also mentioned in the Interpretative Instrument (see above), which means that Canada has agreed with this measure. The code of conduct will need to include detailed rules applicable to the members of the tribunal during and after their term of office and even a sanction mechanism in the event of non-compliance with these rules.

The document that was negotiated last week at intra-Belgium level (but in consultation with the Commission and Council) - entitled "Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA" - was essential to get the Walloon government to drop its veto. The two most important elements in this document are the following:

1. The regional parliaments in Belgium can refuse to give their consent to the federal Government to ratify CETA, implying that the ratification process of CETA has "permanently and definitely failed". This element is nothing new as this is the constitutional procedure in Belgium (and the reason why Wallonia could veto Belgium's signature of CETA in the first place). Further along in the text, however, all regional governments, with the exception of the Flemish government,⁴ declare that they "do not intend to ratify CETA" on the basis of its ICS "as it stands on the day on which CETA is signed", unless their respective parliaments decide otherwise. Thus, although the regional entities have now given their consent to the federal government to sign CETA, they may again wield their veto rights over the ratification of the agreement. Whether or not they will ratify CETA mainly depends on their evaluation of the ICS review, mentioned in the Joint Interpretative Instrument and the Statement of the Council and the Commission, explained above. Moreover, by stating that CETA's ratification process would be "permanently and definitely failed", any creative legal option to circumvent Belgium's veto and conclude the agreement without Belgium is precluded. Such options are currently being considered for the

⁴ These are the Government of the Walloon Region, Government of the French Community, Government of the German-speaking Community and the Government of the Brussels-Capital Region.

EU-Ukraine Association Agreement if the Dutch Government repeals this week its approval act that concluded the agreement (in response to the consultative referendum earlier this year).⁵

2. Belgium will ask the Court of Justice of the European Union to rule on the compatibility of the ICS with EU law, pursuant to Article 218(11) TFEU. Also this is not revolutionary because the European Parliament was already preparing to take the same action. This procedure was also recently used by the European Commission for the EU-Singapore FTA. In this pending case, the Court must rule on whether the negotiated EU-Singapore FTA falls entirely under the EU's exclusive competences, or whether the agreement is mixed (and thus also needs to be ratified by the member states). In the case of CETA, the Court will only rule on the compatibility of the Investment Court System with the EU Treaties, and not on the question whether this ICS gives too many rights to foreign investors or on other political concerns related to this system. In particular, the Court will analyse if the ICS will adversely affect the autonomy of the EU's legal order (i.e. if it will bind the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of EU law).⁶ This issue cannot be discussed in the context of this brief commentary, but it should be noted that the legal service of the European Parliament concluded that CETA's ICS is compatible with EU law.⁷

What's next for CETA?

CETA is now finally signed, but it still has to overcome several procedural and political hurdles before it will fully enter into force. On the EU's side, all 28 member states (involving 38 parliaments) and the Council will need to ratify the agreement. Moreover, the European Parliament will need to give its consent. It takes usually several years before an EU mixed agreement is ratified. It is likely that several member states will wait to ratify the agreement until the Court of Justice has delivered its Opinion on the ICS.

In order to circumvent this long ratification procedure, a large part of CETA will be provisionally applied as foreseen in the agreement (Article 30.7). The coverage of the provisional application is specified in a Council Decision⁸ and can only cover CETA's provisions that fall within the competences of the Union. The entire agreement will be provisionally applied with the exception of some provisions related to investment protection, such as the ICS. This was a specific request of the Walloon region (and several member states) in the Interpretative Declaration and the Intra-Belgium Statement. In addition, a few specific provisions will not be provisionally applied because these do not fall under EU competences according to the Council (namely provisions in the Financial Services

⁵ On this point, see 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 (<https://www.ceps.eu/publications/dutch-referendum-eu-ukraine-association-agreement-legal-options-navigating-tricky-and>).

⁶ See for example Opinion 1/91, paragraphs 30-35; Opinion 1/00, paragraph 13; Opinion 2/13, paragraph 184 of the Court of Justice.

⁷ For the opinion of the legal service of the European Parliament (1 July 2016), see https://polcms.secure.europarl.europa.eu/cmsdata/upload/49daf369-5480-40d7-aa8d-df745c4ff98c/SJ-0259-16_legal_opinion.pdf. On this point, see also I. Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order", College of Europe, Research Paper in Law, 1/2016.

⁸ See the text of the Council Decision at <http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf>

chapter related to portfolio investment and provisions related to the implementation of IPRs; administrative proceedings at member state level and taxation).⁹

It is still not decided when the provisional application will start. The agreement states that this will be the first day of the month following the date on which the EU and Canada notify each other that their relevant internal procedures have been concluded. On the EU's side the European Parliament first needs to give its consent. Because the Council has decided that it will only notify Canada on 17 February 2017, the provisional application will not start before 1 March 2017.

The provisional application will continue until all member states and the EU have ratified the agreement and CETA enters into force. There is no 'deadline' on the provisional application. However, CETA states that "a Party" to the agreement may terminate the provisional application (Article 30.7(3)c). Whether "a Party" also refers to individual member states (who are contracting parties together *with* the EU) is unclear. Although there is no precedent for this situation, I argue that, in the EU this would require a Council Decision taken by QMV because the provisional application covers only exclusive issues falling under the Common Commercial Policy. Thus, one member state could not decide to halt the provisional application. That said, however, the Council adopted an important statement on this point (i.e. one of the 38 statements mentioned above) which states:

If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures.

Moreover, statements by Germany, Poland, Belgium and Austria declare that these countries can exercise their right to terminate the provisional application as provided in Article 30.7(3) of CETA. This means that if one member state refuses to ratify CETA, the provisional application will need to be terminated. This is remarkable because this implies that a member state can block issues falling under exclusive EU competences, which are decided under the EU's Common Commercial Policy with QMV. In any case, the refusal of a member state to ratify CETA would not only mean that the conclusion of the agreement has "permanently and definitely" failed, but it would also terminate the provisional application of the agreement. It is interesting to note that the EU institutions will most likely try to avoid such a scenario for the EU-Ukraine Association Agreement should the Dutch parliament reject a creative legal solution for the Dutch ratification of this agreement this week, forcing prime minister Mark Rutte to repeal the approval act.

Conclusion

At the signing ceremony yesterday, Donald Tusk quoted from a Canadian proverb: "Patience is a tree whose root is bitter, but its fruit is very sweet". Indeed, the EU was finally able to prove to the world that it is still capable of concluding ambitious trade agreements. As argued in our previous [Commentary](#), however, the structural problems caused by the reality that the Common Commercial Policy is steered by 28 member states remain intact. And future EU trade agreements will most likely face similar complications.

⁹ The Commission argues in the Opinion on the EU-Singapore FTA that these issues do fall under the EU exclusive competences.

Moreover, the fact that 38 statements and a Joint Interpretative Instrument were required in which member states, or different regions in a single member state, are still threatening to exercise their veto rights at the time of concluding the agreement (and possibly even earlier, to terminate its provisional application) does not bode well for a swift ratification process. CETA is now signed, but it must still travel a long and winding road before it reaches full ratification.