CEPOB
College of Europe POlicy Brief

9.18

MAY 2018

Overcoming 'Frankenfoods' and 'secret courts': the resilience of EU trade policy

Dirk De Bièvre, Sieglinde Gstöhl and Emile Van Ommeren

Executive Summary

> Despite vocal contestation and fears of domestic institutional deadlock over its trade negotiations, the European Union has proven resilient in its trade policy, notably by concluding bilateral trade and investment agreements with important partners, including two across the North Atlantic, Canada and Mexico.

> A professionally orchestrated NGO campaign against TTIP and CETA that fed scepticism in several EU member states was crowned with mixed success. Whereas TTIP negotiations were put on hold, CETA finally proceeded. The lack of a broad pan-European opposition and the strong consensual decision-making processes in the EU incentivised policy-makers to accommodate objections, tread carefully and craft compromise.

> This process has been further facilitated by the May 2017 Singapore ruling of the Court of Justice of the EU which created room for trade agreements to be split according to exclusive and shared competences. As a result, new agreements such as those with Singapore or Japan now typically embrace three agreements in order to expedite ratification: trade, investment protection and political cooperation.

> Separating trade and investment agreements makes it more difficult for special interests to hold free trade agreements hostage and locates parliamentary scrutiny at the European level, while investment agreements face additional ratification by member state parliaments – and a pending Court Opinion.

On 18 April 2018 the European Commission proposed to the Council of the European Union (EU) to sign and conclude the trade and investment agreements between the European Union and Singapore, with the bilateral Partnership and Cooperation Agreement to follow suit. Since 2017, the Comprehensive Economic and Trade Agreement (CETA) and the Strategic Partnership Agreement with Canada have already been provisionally applied, and they will fully enter into force after ratification by all member states. Unlike the Singaporean agreements, CETA includes trade and investment protection in one mixed agreement. The conclusion of three agreements in parallel with the same partner is a new phenomenon closely linked to the politicisation of the negotiations on CETA and on the Transatlantic Trade and Investment Partnership (TTIP) as well as to the Singapore Opinion 2/15 of the Court of Justice of the EU (CJEU). This testifies to the EU's resilience in trade policy-making. Neither the sizeable mobilisation of non-governmental organisations (NGOs) nor the complex national ratification processes in some EU member states have stopped the conclusion of modern trade and investment agreements. This policy brief addresses the question as to why the EU's trade policy proved resilient in the face of considerable contestation. It argues that the absence of a general pan-European opposition and the consensus-based decision-making in the EU fostered compromise, which was further facilitated by the CJEU.

The 'paradox of weakness' in EU trade policy

With the creation of a customs union, the six founding members of the European Economic Community delegated trade policy to the European level. Now comprising 28 members, the EU is one of the largest traders in the world, endowed with basically the same capacities and competences in the area of trade as any country (see Gstöhl & De Bièvre 2018). However, since the

EU is not a country, its role in global trade politics is sometimes misperceived or underestimated. For instance, the newly elected US President Trump wanted to 'do a trade deal' with Germany to reduce the 'massive' trade deficit of the US with Germany. Chancellor Merkel and other officials repeatedly explained that German trade is in the hands of Brussels, not Berlin. In the end, President Trump exclaimed he would then do a deal with the EU.

Dealing with the EU can be quite excruciating. On the one hand, consensual EU politics may ultimately lead to deadlock if agreement among its member states cannot be reached. On the other hand, the EU may come out strong *because of* consensual politics. The permanent scrutiny by member state representatives and their domestic constituencies can reduce the EU negotiator's autonomy, yet strengthen her bargaining power, giving rise to Schelling's famous 'paradox of weakness' (see Meunier 2005; Dür 2007 for an application to EU trade policy).

Historically, the EU's trading partners have often sighed at the toughness of its bargaining stances, experiencing that it is almost impossible to outwit a European chief negotiator (Paemen & Bensch 1995). The strong position of the EU is reflected in its successful attempt to get the Doha Development Round off the ground after the Seattle impasse in 1999, notably by offering least developed countries tariff-free access to its internal market (Poletti 2010). In addition, the EU has been able to negotiate and conclude free trade agreements (FTAs) with large trading partners such as South Korea, Canada, Japan and Mexico.

The contrast between the recent failure of TTIP and the successful conclusion of CETA offers an interesting opportunity to analyse the EU's resilience, given the similarities in partners, ambition, scope and mobilisation patterns for and against these treaties. Of course, it could simply be argued that the neo-mercantilist US administration under Trump froze the negotiations, while the centrist Trudeau government in Canada wanted to settle the details. Yet, in the EU it looked very much as if at least a minority of member states was going to block both the CETA and TTIP negotiations. In the end, CETA was concluded, is already under provisional application, and looks set to obtain national parliamentary approval.

How did the EU manage to cope with public contestation and internal resistance in transatlantic trade? The policy brief discusses the role of politicisation of civil society and the question of who is in control institutionally, including the effects of the CJEU's Opinion 2/15, before outlining relevant policy implications.

NGOs: fuelling fears of 'Frankenfoods' and 'secret courts'

Both TTIP and CETA were characterised by an abolishment of almost all tariffs on goods, the liberalisation of a number of services, foreign direct investment (FDI), public procurement and intellectual property rights, a large regulatory trade agenda, and the intention to include investor-state dispute settlement (ISDS). The EU has been a prominent advocate of regulatory cooperation and 'behind-the-border' issues ever since the 1994 Uruguay Round Agreement.

Business support for both TTIP and CETA was strong and almost unanimous in the EU, ranging from manufacturing and services sectors to a remarkable degree of consensus in the agricultural sector. It no longer pitted those sectors competing with imports, like agriculture, against those eager to acquire foreign market access, such as exporters of pharmaceuticals. This new interest constellation has often been explained by the already low average tariff levels, a common desire to tackle regulatory issues, and the increased political power of sectors highly integrated in global value chains (Baccini, Pinto & Weymouth 2017).

However, public resistance increased in the course of professionally run contestation campaigns by NGOs, especially from Germany and Austria (such as Attac, Campact, Foodwatch, Global 2000 and Mehr Demokratie). By contrast, public opposition in Southern and Eastern EU member states was much less pronounced. As shown by Dür and De Bièvre (2007), civil society organisations need to espouse extreme positions and 'flash campaigns' on trade to mobilise public opinion, in an effort to impact policy and foster their own survival by attracting supporters. The NGOs successfully created the image of a pan-European civil society uprising against the new trade politics of regulatory cooperation and investment rules. Their campaign relied on four 'work horses', among which fuelling fears of unhealthy 'Frankenfoods' and 'secret courts' in order to grasp public attention.

First, NGOs took aim at allegedly lower food safety standards across the Atlantic. They pointed to chlorinated chicken as typical examples of more limited US health and safety standards, while remaining silent about the questionable practice of treating chicken meat with antibiotics or washing pre-packed salad with chlorine in Europe. Certain traditional European cheeses (e.g. unpasteurised ones) are prohibited in the US because they are considered a health hazard.

Second, and similarly, NGOs warned that TTIP (and potentially CETA) would open the door for the unlimited and unchecked importation of genetically modified

organisms (GMOs), despite the fact that the authorisation of the use and sale of GMOs is regulated by EU internal legislation. Also hormone-treated beef currently is, and will remain, banned by EU legislation. No treaty with the US would change these EU rules, and political resistance against GMOs in Europe has been extraordinarily stable over time.

However, NGOs were able to generate fears that the US would use the transatlantic trade agreements to pry open the EU market to 'Frankenfoods' like hormone-treated beef, chlorinated chicken and GMOs. The different societal preferences and the allegedly different risk assessment approaches were furthermore suspected to lead to a risk of regulatory chill, inhibiting governments from regulating in the public interest for the sake of promoting transatlantic convergence and trade.

Third, NGO campaigners took aim at the form of negotiations by accusing the European Commission of not being transparent. The Commission had actually repeatedly proposed to make the negotiation mandate publicly available and even wanted to publish draft negotiation texts. A minority of EU member states blocked the former until October 2014 (although the mandate text had already been made public via Swedish transparency legislation), and the American side resisted the latter. Still, for public effect, NGOs framed this as a result of the Commission's unwillingness to be open and transparent. In addition, there were concerns that making TTIP a so-called 'living agreement' would allow a newly created joint regulatory cooperation body to take decisions beyond democratic control. Yet, although regulators can identify new areas for convergence, they cannot circumvent parliamentary oversight.

Fourth, for the first time, NGOs took aim at ISDS, depicting its inclusion in trade agreements as 'secret courts' and a 'Trojan horse', in which multinationals would undermine state sovereignty to an unprecedented degree. When the European Commission, after a broad public consultation, proposed a reformed, more transparent and more independent Investor Court System (ICS), NGO campaigners did not see this as a victory but stuck to outright rejection. They did so despite the fact that non-inclusion of the ICS would leave the old ISDS system in the members states' Bilateral Investment Treaties (BITs) in place. The anti-ISDS movement gained a lot of support, especially when American multinationals were portrayed as the new rule-makers in the world economy. This also helped the anti-CETA campaign, picturing ISDS in the EU-Canada agreement as a 'back door' for US multinationals to sue the EU trough their Canadian affiliates.

NGO campaigners thus professionally and strategically sharpened their stances in order to catch the larger public's attention. Much of the campaign was organised, financed and coordinated by well-endowed German NGOs, and to a lesser extent in Austria, Belgium and the Netherlands. Other countries, especially in Southern Europe, were rather annoyed about the endangerment of potential market access and regulatory convergence and battled quietly to keep TTIP and CETA negotiations on track. As NGOs had spread uncertainty among trade union members and social-democratic voters in several North-Western European countries, business representatives that had to some extent supported the inclusion of a more transparent form of investment arbitration, started advocating to ditch investment from the transatlantic trade agreements in order to save them.

Nonetheless, public opinion moved from indifference or diffuse consent to outright opposition, mainly in the abovementioned core campaign countries. Many policy-makers also believed that the backlash against trade agreements was part of a broader societal trend towards populism, euro-scepticism and anti-globalisation sentiment in a world of complex crises.

In the case of TTIP, the EU was for the first time negotiating bilaterally (and not multilaterally) with a partner of equal market size, which had consequences for its bargaining leverage. Yet, why was domestic resistance stronger in parts of Europe than in North America when it comes to NGO campaigns? Whereas in Europe thousands of protestors demonstrated in the streets, the STOP TTIP campaign of American NGOs took mainly place online and was then picked up in the US presidential campaigns as well. Buonanno (2017) argues that the bigger opposition to TTIP can be traced to the European Commission's employment of myths about a – more – social and green Europe in a process of 'othering' the US. Anti-Americanism was fuelled, especially in Germany, by the erosion of trust resulting from US foreign policy decisions such as the Iraq war, spying operations by the National Security Agency, mistrust of the market dominance of US internet giants, and the 2008 financial crisis that was perceived to have its origins in the US (Mayer 2015). This helps explain why the negotiation of similar agreements with other big trade partners have faced little public attention and criticism in the EU. Japan is today – unlike in the 1980s – not perceived as a threat in Europe and its negotiations with the EU have gone almost completely unnoticed (Suzuki 2017).

Member states: controlling EU trade negotiations

The European Commission's 2015 'Trade for All' strategy had to some extent taken criticism on board (European

Commission 2015). First, in order to increase transparency, the Commission has been publishing virtually all EU positions, starting with breaking the opposition by a minority of member states against the declassification of the TTIP negotiation mandate. Second, it proposed to replace the ISDS mechanism by a new permanent Investment Court System that works with publicly appointed judges, an appeal instance and clear rules. Third, with regard to regulatory cooperation, the strategy states that no trade agreement will ever lower levels of regulatory protection and that the right to regulate will always be protected.

A more pressing need to accommodate contestation came from the extraordinarily consensual decision-making procedure of the EU, which *de facto* requires all members to be on board. Indeed, despite a negotiation mandate agreed unanimously by all member states, parliamentary majorities in some countries, like those in Germany and France, demanded to categorise CETA as a mixed agreement. An agreement becomes mixed when it contains elements that fall under the exclusive competence of the EU as well as elements for which also member states hold competences. Such agreements then necessitate ratification by the relevant EU institutions – the Council of the EU and the European Parliament – *and* by the parliaments of the member states.

This move was necessary to secure support of, among others, the German governmental coalition, whose representative in the Council of the EU often holds a pivotal vote tipping the balance in favour or against. The German Minister of Economic Affairs and then president of the SPD, Sigmar Gabriel, saw his own party members at loggerheads over CETA and TTIP. By involving their parliaments, the German and other governments imposed executive discipline on their parliamentary majorities, kept TTIP and CETA negotiations on track, and limited the room for manoeuvre for the Commission negotiator.

This also strengthened the bargaining power of the European Commission, as it had to ask Canada for changes to CETA even when that treaty had already been initialled. As the Canadian side was keen enough to retain the benefits of the agreement, it agreed to the alteration. Given the lower eagerness to conclude a TTIP in American politics, which already emerged during the presidential election campaign, such concessions were not forthcoming in the US, even before the TTIP negotiations were interrupted.

Little did EU negotiators realise that asking for national parliamentary approval would also give regional Belgian parliaments a veto power under the country's constitutional laws. The minister-president of the Walloon government, Paul Magnette from the Socialist Party, seized the political opportunity by threatening to block CETA as long as ICS remained part of the agreement and as long as a number of further reassurances were not included. EU trade policy-makers and observers feared stalemate. Yet after a week of suspense, the red light turned green (Magnette 2017). As part of the compromise reached in October 2016, the EU and Canada issued an interpretative declaration stressing the continued right to regulate in the public interest, the impartiality and fairness of the ICS and their commitment to sustainable development and high labour and environmental standards. Furthermore, the Belgian federal government agreed to request a CJEU Opinion on the compatibility of the ICS with EU law. It did so in September 2017 and Opinion 1/17 is currently pending.

Commission: splitting trade and investment agreements

When interpreting the application of the Lisbon Treaty with respect to the Singapore FTA, the CJEU in May 2017 clarified in its Opinion 2/15 that the EU holds exclusive competence regarding all matters of trade (CJEU 2017). This includes trade in goods and services (including all transport services), public procurement and energy generation from sustainable non-fossil sources, provisions concerning intellectual property rights, competition policy, FDI, dispute settlement other than non-direct foreign investment, and sustainable development. However, the Court made clear that in two areas these competences are shared with the EU member states: non-direct foreign investment (i.e. portfolio investment) and dispute settlement between investors and states.

On the one hand, the Court's decision thus confirms that agreements like CETA must be considered mixed agreements, requiring ratification by all EU member states (and thus also the Belgian regional parliaments). On the other hand, the Court's Opinion opened up the possibility to split investment protection from EU trade agreements, with the latter being approved in an 'EU-only' procedure. It is important to point out that also the 'EU-only' procedure is highly consensual as it requires a simple majority in the European Parliament and at least a qualified majority, and in practice *consensus approval*, by all member state representatives in the Council of the EU. This dual approach is also the route which the EU pursues for its trade and investment agreements with Japan. While the Economic Partnership Agreement has been concluded, bilateral negotiations pertaining to portfolio investment and investment arbitration are still ongoing and will, if concluded, take the form of a mixed agreement – as does the Strategic Partnership Agreement with Japan.

Policy implications

This policy brief examined why the EU's trade policy turned out to be resilient in the face of considerable politicisation and domestic resistance against the transatlantic trade agreements. The active NGO campaign and the high decision-making threshold among member states have not led to a standstill in EU trade policy. In fact, the EU is actively negotiating with a number of countries in order to conclude new agreements, and the 'Trump effect' has even accelerated certain negotiations such as those with Mexico and Japan. We argued that EU trade policy resilience can be explained by the lack of a genuine *pan-European* civil society mobilisation and opposition and by member state control over trade policy because of its consensual decision-making processes.

While politicisation *per se* is not necessarily negative as it leads to more public debate on important issues and potentially even to better solutions, oversimplifications and misinformation can become a challenge, especially in view of the stricter post-Lisbon ratification requirements for EU trade agreements. The clarification of competences by the CJEU generated the option of concluding separate trade and investment agreements to avoid lengthy and complicated ratification procedures for trade deals. This approach of splitting FTAs from broader questions negotiated in parallel has in fact already been practiced with regard to political cooperation agreements.

Several lessons can be drawn from this analysis. First, the anti-TTIP and anti-CETA mobilisation, as opposed to the lack of politicisation against the agreements with Japan, shows that not just the contents of trade agreements but also the (perception of) trade partners themselves matter. Given the US President's erratic trade policy since 2017, as exemplified by his stance on the Trans-Pacific Partnership and threats of 'trade wars', TTIP may in the future well be revived in a slimmed down version that excludes investment protection and arbitration. TTIP under a different name could then still trigger an NGO campaign 2.0, even though at the moment, freer trade appears to be more popular in Europe as a result of Donald Trump's opposition to it. The European Commission and the member states should then be better prepared to communicate their trade policy and its expected impact.

Second, separating investment protection from trade agreements outmanoeuvres in a way parts of the opposition to treaties like TTIP or CETA. Democratic control over FTAs covering only EU competences is carried out by the European Parliament and the governmental majorities in the member states. It ensures an effective trade policy and makes 'involuntary defection' in the ratification process of FTAs less likely, thus strengthening the Commission's credibility as a negotiator. At the same time, investment protection agreements remain subject to additional ratification (and 'input legitimacy') by national and regional parliaments.

Third, the European Commission now has a more solid legal argument against member states' political pressure to turn a trade deal into a mixed agreement than it did before Opinion 2/15. Moreover, there would no longer be a need for the provisional application of an agreement, which would create more legal certainty. On the other hand, the separate negotiation of stand-alone investment agreements risks weakening the Commission's bargaining leverage if not pursued strictly in parallel with the FTA.

Fourth, a negative Opinion 1/17 of the CJEU on whether the ICS is compatible with EU law would stall the ratification of CETA. Indeed, it may well be that the Court will find that the principle of equality under EU law is violated because foreign investors would have rights which domestic investors do not. Splitting off the investment part would then be a logical solution.

Fifth, in case the ratification of investment protection agreements fails, or the CJEU would consider the ICS not compatible with the EU legal order, the member states could revert to traditional BITs – although this was not the intention of the Lisbon Treaty which had included FDI in the common commercial policy. Compared to the Investment Court System, the ISDS mechanisms in those bilateral treaties are, however, much worse in terms of transparency or protection standards, in particular with regard to societal concerns. Under the post-Lisbon transitional arrangement, the EU member states may under certain conditions still conclude BITs. This could lead to a creeping re-nationalisation which would, however, at least to some extent contribute to avoiding a gap in the protection of EU investments abroad.

Finally, the EU is advocating the creation of a Multilateral Investment Court (MIC), which would address some of the legitimacy concerns faced by ISDS. On 20 March 2018, the Council of the EU adopted and published the mandate authorising the Commission to negotiate a convention establishing an MIC under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). It remains to be seen though how the CJEU will view such a judicial 'competitor', and Opinion 1/17 will be very instructive in this regard.

Sources

Baccini, L., P.M. Pinto & S. Weymouth (2017) "The Distributional Consequences of Preferential Trade Liberalization: Firm-Level Evidence", *International Organization*, vol. 71, no. 2, pp. 373-395.

Bauer, M. (2016) "Manufacturing Discontent: The Rise to Power of Anti-TTIP Groups", *ECIPE Occasional Papers*, no. 2, Brussels, European Centre for International Political Economy.

Buonanno, L.A. (2017) "The New Trade Deals and the Mobilisation of Civil Society Organisations: Comparing EU and US Responses", *Journal of European Integration*, vol. 39, no. 7, pp. 795-809.

CJEU (2017) "Opinion 2/15 on the Free Trade Agreement with Singapore Free Trade Agreement between the EU and the Republic of Singapore", 16 May.

Dür, A. (2007) "Avoiding Deadlock in European Trade Policy", in D. De Bièvre & C. Neuhold (eds), *Dynamics and Obstacles of European Governance*, Cheltenham, Edward Elgar, pp. 97-116.

Dür, A. & D. De Bièvre (2007) "Inclusion without Influence? NGOs in European Trade Policy", *Journal of Public Policy*, vol. 27, no. 1, pp. 79-101.

European Commission (2015) *Trade for All: Towards a More Responsible Trade and Investment Policy*, COM (2015) 497, Brussels, 14 October.

Gstöhl, S. & D. De Bièvre (2018) *The Trade Policy of the European Union*, London, Palgrave Macmillan.

Magnette, P. (2017) *CETA : Quand l'Europe déraille*, Waterloo, Les Éditions Luc Pire.

Mayer, H. (2015) "Between 'NATO for Trade' and 'Pride in Angst': The German TTIP Debate and its Spill-over into Wider Transatlantic Concern", in J.-F. Morin *et al.* (eds), *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World*, Farnham, Ashgate, pp. 45-57.

Meunier, S. (2005) *Trading Voices: The European Union in International Commercial Negotiations*, Princeton, Princeton University Press.

Paemen, H. & A. Bensch (1995) *From GATT to WTO: The European Community and the Uruguay Round*, Leuven, Leuven University Press.

Suzuki, H. (2017) "The New Politics of Trade: EU-Japan", *Journal of European Integration*, vol. 39, no. 7, pp. 875-889.

About the Authors

Dirk De Bièvre is Professor of Political Science at the University of Antwerp. He previously worked at the Max Planck Institute in Bonn and the University of Mannheim and was a Visiting Fellow at the London School of Economics and Political Science. He obtained his PhD at the European University Institute in Florence. Among his recent publications are *The Trade Policy of the European Union* (Palgrave 2018, with S. Gstöhl) and *Judicial Politics and International Cooperation: From Disputes to Deal-Making at the World Trade Organization* (ECPR Press 2016, with A. Poletti, 2018 Book Award ILAW-ISA).

Sieglinde Gstöhl is Director of the Department of EU International Relations and Diplomacy Studies at the College of Europe in Bruges. Before joining the College as Professor in 2005, she was at the Institute of Social Sciences at Humboldt University Berlin, the Liechtenstein-Institut in Bendern and the Center for International Affairs at Harvard University in Cambridge, MA. She holds degrees from the Graduate Institute of International and Development Studies in Geneva and from the University of St. Gallen. Her recent publications include *The Trade Policy of the European Union* (Palgrave 2018, with D. De Bièvre), *The European Union's External Engagement: Towards New Sectoral Diplomacies?* (Routledge 2018, ed. with C. Damro & S. Schunz), and *Theorizing the European Neighbourhood Policy* (Routledge 2017, ed. with S. Schunz).

Emile Van Ommeren is PhD researcher in the Department of Political Science at the University of Antwerp in a project on dispute settlement initiation at the World Trade Organisation. He previously worked for the Dutch Ministry of Finance. He studied at the University of Utrecht and the Free University of Brussels.