Bernd Lange’s balancing act

Running around the European Parliament nowadays can be a daunting task for people who want to keep up with the talks on TTIP, the Trans-Atlantic free trade negotiations between the US and the EU. Since the International Trade (INTA) committee decided to draft an own initiative report as some sort of ‘intermediary evaluation’ of the negotiations, attention has flocked towards the Parliamentary house to see how they’re assessing this hugely important dossier in contemporary European trade policy.

Ever since MEPs obtained veto power (after the Lisbon Treaty entered into force in 2009) in trade issues, opinions of parliamentarians matter more than ever. Bernd Lange (picture), the social-democratic German, is rapporteur for the resolution on TTIP. He holds the pen and will decide what is in the final text and what is not. Of course, he will have to take into account a whole bunch of opinions, not only from his colleagues in the INTA committee itself. No more than 14 other committees have decided to table their opinions to the resolution, which is (in Lange’s own words) “a record for this House”.

All those committees have already constructed draft opinions, and the deadline for tabling amendments in INTA itself has, as of 26 March, passed. This means that by now we have a broad look about the different groups’ views on what should and shouldn’t be included, and in what way they’d like to see the negotiations evolving.

The most pressing matter would undoubtedly be the inclusion of ISDS, an investor-to-state dispute settlement mechanism that would give foreign investors the right to challenge public policies before an international tribunal composed of private lawyers. Lange’s position is very clear on this, stating in the draft resolution that “such a mechanism is not necessary in TTIP given the EU’s and the US’ developed legal systems”. This statement was embraced by some groups, more specifically the ones more on the ideological left side. Yannick Jadot and Ska Keller, the two big “trade” guns of the Green party, are both supportive of the exclusion of ISDS and the search for an alternative, public settlement system in the future, preferably grounded on a multilateral basis. Helmut Scholz of the far-left GUE group shares this view, as does the EFDD (albeit for other reasons).
On the other side of the spectrum we have ECR, ALDE and EPP, with Emma McClarkin, Marietje Schaake and Godelieve Quisthoudt-Rowohl respectively as shadow rapporteurs, who see investor protection in the form of ISDS as necessary, although in need of reform to act as a 21st century clause, much in line with what was done in the agreement with Canada (CETA). In this way we see a clear rejectionist-reformist divide coming up between two ideological sides, with the social democrats in the middle.

And indeed, the support for ISDS (and the success of TTIP more generally) will largely depend on the position of S&DD. With regards to ISDS, Lange is not likely to change his position, even after Commissioner Malmström came into INTA (on 18 March) explaining her preliminary reforms to the system (including, amongst others, an appeal system and enshrining the right to regulate unequivocally in the agreement). These reforms pleased a lot of members, but failed to impress Lange, who stated that “I’m intending to stick with my position, until I have received a convincing explanation why we need it”, basically downplaying Malmström’s speech as completely unsatisfactory. Hearing other S&D members speak on ISDS also gives observers the impression that Lange is succeeding in aligning the group’s position on the crucial question if ISDS is really needed as the overall structure to protect investments in the US (and vice versa). It will be very interesting to see how he will incorporate the criticism he received on the wording of this particular issue, as it is not certain that retaining the exclusion of ISDS will get the support of a majority of MEPs. EPP, ALDE and ECR have 20 out of 41 votes, so whatever way the balance tips, differences will be very small.

But of course, it doesn’t stop here. We’ve seen several issues raised that again clearly show a divide between two political camps. On services, for example, there’s a fundamental disagreement to work either with a positive or a negative list (which means specifying clearly which sectors are included, or excluded, respectively, from being opened up and which has an effect on the ‘locking-in’ of future liberalization). Lange is vying for a positive list, while this was criticized by several members of the EPP group, stating that such a solution is simply not “future-proof” in a rapidly changing world as we live in today. The fact that chief negotiator for the European Commission, Ignacio Bercero Garcia, concluded that TTIP would strive towards a “hybrid” approach (like it does in TiSA) may therefore not be unsurprising.

Recently, the issue of data flows also (re)surfaced. Data flows are (or will be even more) at the heart of international commerce, so provisions for the flow of data across borders will undoubtedly be addressed in EU-US negotiations. This can be seen together with the issue of data localization, which addresses the question if EU data should be physically present on European soil, instead of being “in the cloud” somewhere in an American datacenter. But this whole data issue is being complicated by the fact that the European Parliament is in negotiations with the Council to conclude a new Data Protection Regulation (GDPR), which would form the basis of Europe’s digital strategy. Some MEPs
pointed towards the fact that you cannot speak about data flows before you have addressed how you want data to be handled, in Europe and in third countries, which practically means waiting to say anything about data flows until the GDPR is concluded (where the ambition is to land around end this year). Some EPP members on the other hand think it’s a bad idea to wait for GDPR to be concluded before advancing on the e-commerce (and thus data flow) chapters, as this would “limit our ambitions and make us handicapped to reach an ambitious agreement”, in the words of Christofer Fjellner.

Furthermore, as mentioned above, 14 other committees are tabling their opinions to the draft resolution, all with their own concerns and internal debates. At the time of writing, about 10 of 14 committees still have to vote on the draft opinion and the tabled amendments, but it can already be insightful to check some important committees’ draft reports, as here too the rapporteurs for opinion are the penholders and ultimately decide on the final text. The legal affairs (JURI) committee, for example, would be the natural expert on investor protection issues. Axel Voss (EPP) delivers a draft opinion that is purely reformist by nature, stating that “(...) reforms incorporated in CETA for mechanisms for the settlement of disputes between States and investors represent the right approach and must be developed further for TTIP”, followed by a whole range of suggestions for reform.

Jan-Philipp Albrecht, the German Green rapporteur for the civil liberties, justice and home affairs (LIBE) committee, puts in a fierce defense of EU data protection legislation, calling for a “comprehensive and unambiguous horizontal clause that fully exempts EU rules on the protection of personal data from the agreement (...), without any condition that it must be consistent with other parts of the TTIP”. Here too, reference is made to the fact that “the Commission can only negotiate on provisions which touch upon the flow of personal data provided that the full application of EU data protection rules is guaranteed”, which could be read as: as long as we don’t have a new rulebook on data protection ourselves, we can’t negotiate anything with a third country. The Greens’ amendments go even further, stating that negotiations on data should be “put on hold until the ongoing negotiations on Safe Harbor and the Data Protection Umbrella Agreement are successfully concluded”, which could significantly delay the talks on the e-commerce and telecom chapters.

INTA also tries to bridge gaps with other committees by organizing joint hearings to highlight overlapping concerns. Together with the industry and research (ITRE) committee, for example, there was a lot of talk on how to handle the now energy-abundant United States’ reserves of shale gas, with demands of lifting the crude oil exporting ban installed by the US. With the internal market (IMCO) committee, debates focused on regulatory cooperation and the difficulties of achieving mutual recognition due to some fundamental institutional differences in both Atlantic systems. Several public hearings reached out specifically towards civil society and citizens, to understand what TTIP will really mean for consumers, at the same time when organizations from all over the field are sending their recommendations directly to Lange’s office.
In short, Bernd Lange is up for a real balancing act, having to amend his own (personal and group’s) position with those of other groups inside INTA, 14 other parliamentary committees (with their own internal struggles and sometimes opposing views) and civil society. Lange has until 6 May to come forward with a final text, the day when the INTA committee will vote on all these amendments, ultimately paving the way for a vote in plenary between 18-21 May. These may well be voting milestones in the TTIP saga until then.

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