

The Winding Road of CETA

Only politically naive or uninformed observers could have been surprised by the leaked news about a change of political sentiments in Germany towards CETA. That the German government was discussing not to sign off an agreement with Canada as long as it entails a so-called Investor-State-Dispute-Settlement (ISDS) is old news, and since quite a while the signals were clear to everybody who was willing to follow this development. It is part of the business of negotiations that diplomats of the EU as well as of Canada were not willing to share this insight with the public at large. Rather, both sides kept to the pre-defined message that CETA is ready to go and only needs some more technical input until it moves to the final ratification procedure. It is part of the failure of our public discourse to accept this misleading message.

CETA is supposed to entail quite substantial elements that go far beyond traditional trade agreements, and thus it is correct to see it as a huge liberalization project that has the potential to generate additional income. What was widely neglected, though, is that CETA also entailed 20th century thinking, in particular in regards to the investment chapter. It is this thinking that now bounces back. What are the reasons for the new situation? The trigger for the concern, first, is TTIP - the negotiations between the EU and the US about a Transatlantic Trade and Investment Partnership. Unlike CETA the negotiations with the US immediately mobilized critical instincts on the side of civil society organizations, not only in Germany but also in some other EU member states. Given the already high level of alert of some parties in the European parliament it was soon clear that a business-as-usual approach towards trade negotiations will lead nowhere. Second, the European debate is so much more powerful than our Canadian conversation because the majority of actors who are critical about CETA and TTIP are at the same time very much in favour of free trade of goods and services. Thus they can't be treated as old-fashioned protectionists. Rather, it seems as they are much more 21st century actors than the CETA negotiators who seem to be stuck in old-fashioned trade thinking that assumes that maximum liberalization leads to best outcomes. Critics of CETA and TTIP may stress several elements of the negotiations but the core of their positions is resistance to ISDS (Investment-State-Dispute-Settlement) clauses. This mechanism is seen as a vehicle to undermine democratic sovereignty of states by offering the private sector the opportunity to oppose national laws and regulations via a private settlement trial. Third, the German government is a coalition government of right to the centre and left to the centre parties, and thus it is less a surprise that the SPD-led Ministry of Economics with its head Vice-Chancellor Sigmar Gabriel is open for rethinking CETA than is the support of speakers of the CDU/CSU for a critical stance towards ISDS. As a first mode of rethink Gabriel installed a high-level expert commission consisting of representatives of civil society organizations as well as of employer associations and trade unions. They started to scrutinize the available CETA text, and draw their conclusions for TTIP.

Political concerns in Germany over TTIP and CETA are not driven by protectionist instincts. Without ISDS provisions the debate would be different, and probably politically not very relevant at all. ISDS is a game changer. This may sound odd, given that Germany is one of the initiator of ISDS clauses and already in 1959 signed off an investment protection agreement with Pakistan. It was the scandal-riddled former head of the Deutsche Bank, Hermann Josef Abs, jointly with his British colleague Shawcross who developed the blueprint for ISDS clauses. Today about 3400 investment protection agreements are in operation globally, and member

states of the EU have by far the highest numbers of agreements. ISDS looks like a rational tool in a world where private investment abroad is potentially challenged by political decisions that result in expropriation or in a loss of the value of the investment. The less reliable legal systems in economies the more pressing the need to include ISDS clauses in agreements. The opposite is true, too. The more entrenched legal systems the less the pressure to have a ISDS clause. This is very much the view taken by the SPD in Germany as well as by its faction in the European Parliament. It comes handy that the new head of the Trade Committee of the European Parliament is a member of the SPD and already stated that CETA does not need an ISDS clause because both entities have highly developed legal systems that can easily deal with conflicts between governments and private business sectors.

Economic liberalization is a permanent challenge for democratic sovereignty of nation-states. ISDS potentially is a mechanism to shift the balance towards the private sector. According to UNCTAD figures, so far the number of actual cases is relatively small and that about fifty percent of all cases were won by states, about one quarter has been settled by compromise and another quarter has been won by private companies. Those figures should not be read as practical irrelevance of ISDS. Given the litigation practices of both, Canada and the US, ISDS offers a great tool for money making attorneys. More relevant than the money grab fear, though, are concerns that ISDS may become a clause that will set governments much more narrow limits for path-changing policies. The legal challenges posed against the 'Energiewende' project of the Merkel-government are widely seen as a foreshadow what may come with ISDS. Safeguarding democratic sovereignty against litigation from abroad as become the overriding issue in the German political system.

The German concerns are no deathblow for CETA. There are enough options to ratify an agreement that potentially creates win-win-situations without one-sided favouring of the private sector. The easiest way out of the deadlock is deleting ISDS from the CETA text and including language that secures investment security within the legal systems of both entities.

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