The CETA drama: Entering the dark age of protectionism and nationalism?

Ladies and gentlemen,

First of all, I would like to thank Prof. Hilpold and the Canadian centre studies for the kind invitation to share with you some of my observations regarding the potential consequences of the Canada Europe Trade Agreement (CETA) drama – as I call it.

In particular, my hypothesis is that we are entering the dark age of protectionism and nationalism again here in Europe – but may be also in the US.

What I want to do is to give you a short overview of CETA and in particular the newly proposed Investment Court System (ICS).

On that basis, I will make some observations as to the CETA drama as it was unfolding when Wallonie took the whole EU hostage by first not agreeing to sign CETA, but only after Wallonie extracted some important commitments from the central government of Belgium.

I will then conclude with some more general observations.

1. CETA and the ICS

CETA is the first trade and investment agreement that is concluded between Canada, EU and its Member States, after in December 2009 the Lisbon Treaty gave the EU exclusive competence on Foreign Direct Investment (FDI) – which does not mean that the EU has exclusive competence over all aspects of investment law and arbitration.

Indeed, by the very fact that the European Commission has voluntarily agreed to treat CETA – and by the way also the Transatlantic Trade and Investment Partnership (TTIP) – as *mixed agreements*, the European Commission has admitted that the EU is not exclusively competent.

This, however, collides with its previous held view regarding the EU-Singapore Free Trade Agreement (FTA), which has also been finalized, although nobody talks about that treaty.

Regarding, the EU-Singapore FTA, which is very similar to CETA, the European Commission has requested an Opinion by the EU Court of Justice**.** In her request, the European Commission is claiming that it is an EU-exclusive treaty.

Whether or not these treaties are exclusive will be determined by the Court probably sometime next year.

Of course, it would be more consistent if the European Commission would not claim anymore that it is exclusively competent.

The bottom line is that CETA will now have to be ratified by 28 national parliaments plus a few regional ones. This makes it quite likely that one or more of those parliaments will refuse to ratify CETA.

In addition, CETA is also challenged in front of at least two courts. First, before the German Constitutional Court. Second, and this is one of the commitments extracted by Wallonie from the Belgian government, is that Belgium would put CETA to the Court of Justice of the EU for an opinion as to the compatibility of CETA with EU law.

However, the funny thing about this is that Belgium or any other Member State or the European Parliament, the Council or the European Commission could have put CETA before the Court long time ago, but nobody has done that so far.

While Wallonie may have obtained a political commitment, legally speaking it is nothing new or special.

The fact that CETA and other international treaties are put in front of courts seems to be a general trend towards asking courts to take decisions, which should be taken by governments and parliaments.

Another important development is the increasing use of referenda.

For example, in the Netherlands a non-binding referendum on the Association Agreement between the EU and Ukraine was rejected.

Although it was a non-binding referendum, the Dutch government and most political parties in parliament said that they would respect the *vox populi* – whatever the outcome may be.

Currently, the Dutch government is trying hard to find a solution, which would respect the outcome of the referendum and enable the parliament to approve it.

Turning back to CETA: the organizers of the Ukraine referendum have now developed an appetite for organizing new referenda, and the next one will be about CETA. At least it seems very likely as they claim to have collected more than 190.000 signatures, while 300.000 are required.

Referenda – as the one on Brexit has shown – can create political turmoil and can have consequences, which may not be foreseen. Even the Italian Prime minister made his political future dependent on the outcome of the referendum on the reforms of the political system, which will be held next month.

Again, this is a shift of the decision from government and parliament towards voters.

Of course, one could say that referenda are the most democratic tool, but it may not always result in wise decisions.

Let me now turn to the question of why CETA and for that matter TTIP, which have been criticized so much.

One of the issues that has been at the centre of attention is the investor-State dispute system (ISDS), which has been a standard element of bilateral investment treaties (BITs) for decades.

Until recently, ISDS was unknown to the general public and even to most lawyers and academics.

This has dramatically changed with some disputes, which lend themselves for horror stories and bashing of multinationals.

The first examples are the tobacco cases of *Philip Morris v Australia* and *Id. v Uruguay*.

Those cases concerned the requirement of plain packaging of cigarettes, which means all packages look the same. Philip Morris was claiming that this violated its intellectual property rights.

Those disputes were portrayed as limiting the policy

space of governments to protect the health of their citizens because of fear of claims.

The outcome of those cases has been dismissal at the jurisdictional phase in the Australian case, while Uruguay won in the merits phase. In that case, the arbitral tribunal fully accepted the position that states can protect the public health without limitations.

The second case is *Vattenfall*, the Swedish energy company that has brought a claim against Germany because Germany decided right after the Fukushima disaster that all nuclear power plants should be shut down soon.

The case is ongoing, recently the oral hearings took place.

Again, this case was portrayed as an example for limiting the powers of government.

Things are not so easy though. ISDS is about compensation in case of unjustified expropriation, not about limiting the powers of governments to adopt laws for the protection of public goods, such as health and the environment.

Indeed, ISDS applies the same principles as we know from national constitutional law.

The state may expropriate for a public good, but must do so on the basis of due process of law, in a non-discriminatory manner and must be adequate compensation.

That is exactly what ISDS is about. It is not about reviewing or invalidating national legislation, but simply to check whether expropriation took place, which may have to be compensated.

Historically, ISDS was invented to protect foreign investments into unstable countries, so from Europe to Africa for example. Or from Western European countries into Eastern European countries.

And the fact, that Investors from EU countries are the most active users of ISDS, proofs the importance of it.

ISDS is not only used by multinationals, but also by SMEs and individuals.

Some people say, in Europe and in Canada we have good legal systems, so why would we need ISDS in CETA.

Well, if you look closely you will see that not all the legal systems are equally good.

We know that there are big deficiencies in for example Italy, Greece and most of Eastern European Member States of the EU.

In any case, the critique on the traditional ISDS has been so strong that the European Commission has proposed a new – what it calls - Investment Court System (ICS).

This ICS would be a semi-permanent two-tier court like system.

The first instance court would consist of 15 members (5 Canadian, 5 EU nationals, 5 from third states).

Decisions would be taken in chambers of 3 members.

The important point is that it would be only the Contracting Parties of CETA who would appoint the judges, so the investor/claimant is totally excluded from this.

Also, there is no choice anymore regarding arbitration rules and seat.

The appeal court would consist of 6 members.

The scope of review is very broad: it covers not only points of law but also points of fact.

This means there is no finality anymore, but cases be dragged for a long time, especially if the awards needs to be recognized and enforced before national courts.

The question, of course, is whether the possibility of appeal would actually invite more cases rather than less.

There are three other innovations, which I want to mention.

First, CETA contains a closed list of the Fair and Equitable Treatment (FET) standard as opposed to the broadly formulated one, which you usually find in BITs.

This means that only breaches of the FET which are listed may be considered breaches by the court, so the court has no room to develop the FET standard.

Second, CETA contains the possibility for the Contracting Parties to further adjust the FET list by common interpretation, which is binding on the court.

In addition, there is the possibility of adopting binding interpretations generally for the whole investment chapter, which may even have retroactive effect.

Therefore, Contracting Parties may directly interfere with on-going cases.

I am not sure this can be considered compatible with the rule of law.

Third, as is also the case in NAFTA, indirect expropriation for the protection of public goods do not have to be compensated – except in rare circumstances.

The bottom line is that this ICS proposal represents a shift towards giving States more control at the expenses of the investor/claimant.

The question to you of course is: who is going to use this potentially pro-State biased court?

2.The CETA drama

Now, let me turn to the CETA drama.

When the moment arrived for the Council to sign the CETA text, it seemed that all Member States were happy with the new ICS proposal.

However, suddenly Wallonie stood up and said that they cannot agree with CETA until a number of conditions were fulfilled.

First, they wanted additional guarantees for their agricultural producers, in particular they were afraid of Canadian meat and dairy products.

Second, they wanted that ICS is removed from CETA.

That demand was clearly not possible to meet because it would require the re-opening of the negotiations.

Instead, as I already mentioned Wallonie obtained the commitment of the Belgian government to bring CETA before the EU Court of Justice. That's all!

What is more important: the refusal of Wallonie echoed the more widespread feeling in Europe that the EU's move towards globalization must be stopped.

The financial crisis has clearly created the feeling that the EU is not delivering what it promised to do: namely to bring jobs and prosperity.

The critique against mega-trade deals, in particular TTIP, is of course not limited to Wallonie.

Here in Austria, but also in Germany, the Netherlands and France, there is no appetite for these deals. Al-

though, yesterday at the occasion of the visit of Mr Obama, Ms Merkel emphasized again the importance of TTIP. She said there is no way back from globalization.

In contrast, French trade minister Fekl recently argued that the European Commission cannot negotiate anymore alone, but national experts of the Member States must be involved.

And also national parliaments must have a greater say regarding trade deals.

The same voice of taking back control is heard in many countries across the EU and most visibly in the UK after Brexit and now also in the US after Mr Trump has been elected new President.

And if you see the high unemployment in Italy, Spain and France, it is understandable that people and governments are turning away from the EU.

My main point today is that the CETA drama is a clear signpost that we have indeed entered the dark ages of protectionism and nationalism.

CETA is far from a done deal.

TTIP is not coming with Mr Trump as new US President.

What did the EU deliver in terms of trade and investment deals after 7 years of having received the competence? Not very much.

Instead, we see a stronger role of Member States in the EU's trade policy, which may even go as far as a renationalization of that competence.

Even if that does not happen, the increasing involvement of Member States will undermine the negotiation power of the EU vis-à-vis the US or China.

Ironically strengthening the bargaining power was the very reason why the EU was given exclusive trade and investment competence.

Indeed, if the UK really leaves the EU, that fact alone will significantly weaken the EU, since the UK economy is so important.

3.General concluding observations

Let me conclude with some general observations.

Can globalization be stopped?

Can the googles, apples and easyjets be stopped?

Will CETA or TTIP make any difference?

Here I agree with Ms Merkel and Mr Obama: there is no way back from globalization.

Was Wallonie really against ISDS or CETA?

Of course not, they don't even know what it is!

Wallonie was against the general feeling of not having any control anymore over major decisions.

As I said before, it is a signal that large parts of the voters feel lost and want control back.

That is also the reason for Brexit and the election of Mr Trump, and may be the election of Mrs Le Pen in France.

People are afraid of losing their national identity.

What can the EU do about it?

In my view, regionalization and localization must be strengthened.

Here consumers and producers play an important role.

Buy locally made products; the share economy is another way of becoming more independent from global trade.

This means decision-making powers must be taken away from the EU and brought back to the national and regional level.

This would also enable to accommodate differences between the Member States.

The European Commission must accept that Greece will never be like Germany and Italy never like Sweden.

If that is accepted, trade and investment deals such as CETA and TTIP are something of the past, at least until the dark ages are over.

I am sure that in a decade or so the pendulum will swing back again and there will be again appetite for global trade and investment deals.

For the time being, it seems we must let the nationalists and protectionists take over and make a mess of it, so that the more reasonable and internationally minded people can rebuild everything again.

So, we must stay positive and remain patient.

Thank you very much!

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