

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

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The recent developments concerning the signature of the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU have illustrated the paralysis and inability of the EU and its Member States to deliver economic prosperity and create jobs - which used to be one of the very reasons for establishing the EU and giving it far-reaching competences in trade matters. Arguably, this CETA drama may very well be the signpost that the EU is entering the dark age of protectionism and nationalism.

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 TTIP - as mixed agreements, the European Commission has admitted that the EU is not exclusively competent. This approach, however, collides with its previous held view regarding the EU-Singapore FTA, which has also been finalized. Regarding the EU-Singapore FTA, which is very similar to CETA, the previous European Commission has requested an Opinion by the Court of Justice of the EU (CJEU). 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 in 2017. Clearly, it would be more consistent if the European Commission would stop claiming that it is exclusively competent.

But the bottom line is that CETA will now have to be ratified by 28 (or 27) national parliaments plus a few regional ones.

As the CETA drama has demonstrated, this makes it quite likely that one or more of those parliaments will refuse to ratify CETA or try to extract unrelated commitments in return for their ratification. Indeed, one of the commitments extracted by Wallonia from the Belgian government is that Belgium would put CETA to the CJEU for an opinion as to its compatibility with EU law.

However, the ironic thing about this commitment is that according to Article 218 (10) TFEU Belgium or any other Member State or the European Parliament, the Council or the European Commission could have put CETA before the Court long ago, but nobody has done that so far. So, while Wallonia may have obtained a political commitment to sell to its voters, legally speaking, it is nothing new or special.

In addition, CETA is also challenged before the German Constitutional Court. Recently, the Court rejected the request for an emergency injunction that would have prevented Germany from agreeing to the provisional application of CETA, but a decision on the merits of CETA is still awaiting.

So, the fact that CETA is put in front of courts seems to be a general trend towards asking courts to take decisions, which should actually 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 recently 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. The result is that 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 Dutch organizers of the Ukraine referendum have now developed an appetite for organizing new referenda, and the next one will be against CETA. At least it seems very likely that a referendum will be held as they claim to have collected about 200.000 signatures, while 300.000 are required.

Thus, referenda - as the one on Brexit has shown - can create political turmoil and can have consequences, which may not be foreseen. This is again confirmed by the recent referendum in Italy, which was lost by former Prime Minister Renzi and which has needlessly put Italy at the brink of yet another economic and financial crisis.

Hence, we see a shift of the decision-making process from governments and parliaments towards voters. Of course, one could say that referenda are the most democratic tool available, but it may not always result in wise decisions. Indeed, it appears that voters use the opportunity of referenda to express their generally felt frustrations, which often have nothing to do with the questions which are at stake in the referenda.

Indeed, 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 caused 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 Wallonia.

Here in Austria, but also in Germany, the Netherlands and France, there is no appetite for these deals. Although, at the occasion of the last visit of President Obama to Germany, Ms Merkel emphasized again the importance of TTIP.

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 as well as 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.

Thus, TTIP is not coming with Mr Trump as new US President, while CETA is far from a done deal. So, what did the EU deliver in terms of trade and investment deals after 7 years of having received the competence? No 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 re-nationalization of that competence. But even if that does not happen, the increasing involvement of and control by Member States will undermine the negotiation power of the EU vis-à-vis the US or China. But ironically maximizing the bargaining power of the Member States was the very reason why the EU was given exclusive trade and investment competence. Indeed, if the UK really leaves the EU, that already will significantly weaken the EU's negotiation position, since the UK economy is so important within the EU.

In short, we see a slow but steady return towards nationalism and protectionism in Europe and in the US with Mr Trump as President-elect.

But 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 who recently remarked that there is no way back from globalization. But the CETA drama as well as the Brexit and recent referendum in Italy are signals that large parts of the voters feel lost and want control back. Many people are apparently afraid of losing their national identity.

So, what can the EU do about it?

First and foremost, the European Commission must accept that Greece will never be like Germany and Italy never like Sweden. This would enable the EU to accommodate existing differences between the Member States.

Second, decision-making powers must be taken away from the EU and bring them back to the national and regional level.

Third, regionalization and localization must be strengthened. Here consumers and local producers play an important role: buy locally made products; the share economy is another way of becoming more independent from global trade.

In conclusion, it seems that trade and investment deals such as CETA and TTIP are something of the past, at least until the dark age is over. But in a decade or so the

pendulum may swing back again and there will be again appetite for global trade and investment deals.

Until then, we must stay positive and remain patient.