Re-Organizing Europe's Judicial Power through the Backdoor?

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Dropping CETA's current investment chapter and trilateralising its (re-)negotiation would provide the space for making a conscious, open, and unbiased decision in favour of an investor-state dispute-settlement mechanism in European trade and investment agreements.

European governments, businesses and civil society are engaged in a public debate on an investor-state dispute settlement (ISDS) mechanism in the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU. Recently, the Commission published the results of a massive public consultation on this matter accepting that there is indeed a need for further talks. The public, especially in countries like Germany, appears to take a strong interest in the question of how, and under which rules, Europe's judicial power should be organised. This is actually good news in an otherwise increasingly heated political atmosphere.

Indeed, the question of who has the final say in a society in case of a conflict is one that has the power to move our political hearts. It touches upon the core of democracy. Certainly, this is not the first time dispute-settlement mechanisms in international treaties have attracted public debate. For example, the controversial reception of some rulings of the European Court of Human Rights, and the British government's recent response, provide a telling illustration of the potential for conflict.

While ISDS is not about human rights but about the international judicial control of the exercise of sovereign powers by allowing investors to challenge governments outside domestic courts, it involves similar potential for dispute. Accordingly, whenever societies submit themselves to such mechanisms, it requires a debate about the means they want to permit to control their legislature and executive.

Despite the fact that a controversial public discourse, even opposition has been gathering momentum across Europe, the consolidated text of the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) – likely to be the EU's model agreement for years to come – was released for ratification. Apparently, this gave the whole debate a very different twist. Instead of debating in which way we want to organise our judicial branch, the (previous) European Commission has invited the European Parliament and national parliaments across the EU to answer a different question: do we want to have the very design of the judiciary chosen for us by the Commission? CETA establishes a mechanism for reviewing governmental authority functionally similar to domestic administrative and constitutional courts. Without the public having the chance to form a thorough opinion in a broad debate on who shall be entitled to control our government by which means, the Commission made its choices. By the way of example, out of several dispute settlement options available, a system of three ad-hoc arbitrators was elected to render fundamental decisions on the balance of public and private interests. Instead of making CETA a backup mechanism in case domestic courts fail to distribute justice, it established an alternative legal avenue. Or, just to mention another instance for a deliberate choice made by the Commission, possible errors of CETA arbitral tribunals in questions of substantive law cannot be corrected in an appeals procedure.

In the light of the current public concerns and the, back then still ongoing, public consultations on the investment chapter in TTIP, presenting the parliaments in Europe with a choice of "take it or leave it" in respect of a "hidden role model" for investment protection embodied in CETA might have a particularly stale aftertaste in terms of democratic culture: Was it not the European Commission in the first place that refused to develop a European model treaty that could have been put up for public scrutiny and allowed for a much-needed debate?

While the Commission's maneuver is part of the standard repertoire of an executive dealing with the legislator in the area of foreign relations, albeit one from the 19th century, we may ask ourselves whether we should accept the discussion being narrowed down to a choice between rejecting and approving the whole agreement. In fact, both options could prove to be too costly: Scrapping the entire agreement might deprive us of the economic

opportunities that are associated with trade liberalization and standardization. Approving it would establish an ISDS mechanism whose specific design entails far-reaching choices on organizing the judicial power of the EU and its member states which necessitate having a comprehensive discussion about their consequences and possible alternatives in order to command broader legitimacy.

It can hardly be doubted that ISDS, as a concept, is one of the most effective tools to manage political risk and promote the international rule of law. It can even be viewed as making a century-old idea within public international law more effective: that everyone is entitled to a minimum standard of treatment abroad at any given time. However, while the grand idea of an international rule of law undoubtedly deserves to be supported by the EU, one may wonder whether the present CETA text does not somewhat betray its domestic counterpart. The CETA text establishes a dispute-settlement system as a fully emancipated *alternative* to domestic courts, instead of stretching out a safety net in the event the latter fail to distribute justice. In doing so, it partially diminishes some of the world's most developed and refined domestic legal systems. Balancing private and public interests can then be carried out exclusively outside their jurisdictions. However, proceedings before CETA arbitration tribunals do not meet the same standards in terms of impartiality and appeals possibilities in order to correct previous erroneous decisions as those before the said domestic courts.

Whatever our personal view on that fundamental question is, finding ourselves faced with merely a choice of "accept it or forget it" would hardly be tolerable. In the present situation, if ratification of CETA is pressing in order to unlock its trade potentials and if substantial improvements of the investment chapter cannot be achieved before, it might be worth considering unbundling the CETA package. CETA would serve as a robust trade agreement without the investment chapter it now contains – perhaps an even better one. More importantly, leaving an investment chapter for later – dealt with in trilateral talks with the USA on TTIP – would give the current public debate the meaning it deserves, i.e., developing a more widely accepted answer to the question of how and under which rules Europe wants to organize its judicial power – without prejudging the outcome.

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