From the Board: 'The Paradox of Proliferation and Contestation of Economic Integration'

With the delivery of Opinion 1/17 on 30 April of this year, a major constitutional hurdle has been cleared for the European Union allowing it to include investor-state dispute settlement mechanisms in its international agreements with third states. The Opinion was requested by Belgium following the 'Walloon crisis' in 2016: Wallonia's refusal to consent to the federal government's signature of the EU's landmark trade-deal with Canada, the Comprehensive Economic and Trade Agreement (CETA), unless Wallonia's conditions were met.[1] The Walloon crisis was met with an extraordinary level of despair among the EU institutions. Commission president Jean-Claude Juncker lamented that '*if we would not be able to conclude a trade deal with Canada, I do not see how we can conclude trade deals with other parts of the world'* and European Council president Donald Tusk stated that he was *'afraid CETA could be our last trade agreement*'. The EU has since concluded the Japan-EU Free Trade Agreement (JEFTA) with Japan and is on course with its negotiations for trade deals with Mexico, Australia, New Zealand, Singapore, Mercosur, and even the United States.

These statements remain remarkable. Juncker's comments suggest that it is not the *content* of an agreement that is decisive of whether or not it should be democratically approved, but the *trade partner* with which it is concluded. Tusk's comment reflects a broader mantra in international economic law: that we must continuously negotiate new international economic agreements or face the end of the world as we know it. There is always a need for bigger, better, and more expansive levels of economic integration, similar to the need to keep peddling on a bike if one doesn't want to fall off. There is no way the General Agreement on Tariffs and Trade (GATT) and its diplomatic form of dispute resolution could be an achievement in and of itself. There is a persistent need for new negotiations crossing new frontiers: from tariffs to non-tariff barriers, from positive to negative lists, to regulatory cooperation, to public procurement, to competition,

[1] These conditions included requesting an Opinion of the European Court of Justice on the compatibility of the ISDS mechanism in the CETA with the EU Treaties. At the time, this legal issue was controversial, given the ECJ's reluctance to accept external oversight mechanisms in international agreements such as the European Court on Human Rights in Opinion 2/13. Academics, NGO's, judges associations, and even the legal service of the Council had voiced their doubts over the compatibility of the system with the Treaties.

'From the Board: 'The Paradox of Proliferation and Contestation of Economic Integration''. *Legal Issues of Economic Integration* 46, no. 3 (2019): 197–202.

intellectual property, and of course ever more judicialized forms of dispute settlement. The possibility of a potential *end* to the process of economic integration is simply too abhorrent to imagine.

A possible explanation for this narrative is what Jens Beckert has referred to as 'promissory legitimacy'.[2] Support for political authority can be derived from the credibility of promises political leaders make regarding future benefits of trade and investment agreements. Including Investor-State Dispute Settlement (ISDS) will attract more investment which in turn will result in greater economic welfare. Trade liberalization will result in specialization, which will result in economies of scale and other efficiencies which will also increase the size of the pie. And so forth. Trade and investment agreements therefore help politicians promise future benefits. Another possible explanation is simply that the primary benefits of these agreements – corporations that operate across several jurisdictions – have new or different demands over time.

This narrative and perception of the need for continuous negotiations and new agreements may explain in part why the Walloon opposition to CETA, or the current US administration's opposition to the Trans-Pacific Partnership (TPP), was labelled a 'crisis' and was met with such despair. Of course, key elements of opposition to current forms of economic integration go beyond resistance to new forms of integration and are a reversal: Brexit, the dismantling of the WTO's Appellate Body, and several of the 'trade wars' in which the United States is engaging. But the failure or even the mere delay of the entry into force of a new trade agreement will not be treated in the same way as 'ordinary' legislative defeats. Not only is the reversal or undoing of *existing* trade and investment agreements in this sense problematic, but even the mere blockage or delay of *new* agreements is an issue.

Yet for all this hand wringing, actual legal developments in the past few years demonstrate a *proliferation* of economic integration agreements, rather than a standstill or a reversal. The EU, for instance, is still negotiating and concluding new trade and investment agreements. According to DG Trade's website, there are ongoing negotiations with at least eleven countries, agreements with twenty-five countries are pending ratification, agreements with nine countries are provisionally applied since 2016, and agreements with ten countries have entered into force since 2016. These agreements have *broadened* the coverage of economic liberalization rules to new partners and *deepened* the level of integration both in terms of scope and through increasingly judicialized forms of dispute settlement. Even more significant, under the guise of ISDS reform, the Commission has obtained a mandate from the Council to negotiate a convention for a Multilateral Investment Court (MIC). If successful

[2] Jens Beckert, *The Exhausted Futures of Neoliberalism. From Promissory Legitimacy to Social Anomy*, J. Cult. Econ. 1–13 (2019).

(and Opinion 1/17 has given the project a boost), moving from ad hoc arbitration to a permanent multilateral court would be a major global institutional change. It would entrench and constitutionalize investment law in the global economic system beyond levels the WTO, with its quasi-judicial system, could ever imagine.

Nonetheless, one should question whether all this proliferation is a good thing. Martti Koskenniemi has warned of a process of 'disenchantment' with the current politics of international economic integration. Political decision-making has been taken over by experts and depoliticized, despite the fact that these decisions have important political and distributional implications and are taken by people with (strong) political views on international economic integration. This has happened particularly in the context of international economic law: it is expert lawyers and economists who write the rulebooks, administer, and arbitrate at the WTO and in the world of international investment law.

Proponents of the EU's current approach will point out how the EU and its trade partners have listened to concerns regarding the system, particularly those raised by civil society. The investment chapters in CETA and the MIC are presented as reforms of investment law, and EU politicians have gone so far as to label CETA the 'most progressive trade agreement ever negotiated'.[3] It is true that CETA and the planned MIC make some needed reforms: the appointment process for arbitrators has changed, there is a greater commitment to transparency, and of course the CETA seeks to preserve the infamous 'right to regulate' (not to be confused with the obligation to regulate). Indeed, even the European Court of Justice in Opinion 1/17 was at pains to emphasize that '*the discretionary powers of the CETA Tribunal and Appellate Tribunal do not extend to permitting them to call into question the level of protection of public interest determined by the Union following a democratic process*.'[4] Moreover, the EU has engaged in consultations with the South Korean government over its compliance with several labour provisions in the Trade and Sustainable Development chapter in the EU-Korea FTA. These consultations have come following discussions between the Commission and the European Parliament and civil society on the perceived inadequacy of the Trade and Sustainable Development (TSD) chapters, and have led to promises by the Commission to become 'more assertive in making full use of the existing range of tools and mechanisms available' under TSD chapters.[5]

---

[3] Even though the agreement was initialled after negotiations with the Harper administration (who referred to climate change as a 'socialist conspiracy').

[4] Opinion 1/17, CETA ECLI:EU:C:2019:341, para. 156. This part of the judgment was met with cynicism and disbelief by most academics familiar with the actual operation of investment law. Simon Lester aptly summarized the reaction by stating on twitter 'We can all agree that is incorrect, right?'.

[5] European Commission, *Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements* (Non Paper of 26 Feb. 2018), http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (accessed 19 June 2019).

Will these commitments satisfy academic and civil society contestation of current EU trade policy in particular? Unlikely. For one, it is important to keep in mind the EU's main idea behind reform of ISDS. It is not so much to make ISDS 'progressive', but rather to ensure the system's 'consistency, predictability, and correctness', a much more conservative outlook. Indeed, in internal memos to the Member States, it's apparent that the EU simply believes that ISDS reforms are merely '*ensuring the ongoing viability of the system by ensuring its legitimacy*'. Academics critical of ISDS have pointed out that the ongoing talks on reform in no way seek to address ISDS's 'great asymmetry', as Alessandra Arcuri has put it, in which investors have enforceable *rights*, but no enforceable *obligations* under ISDS. For another, the world of international economic governance is still led by experts – predominantly economists and trade and investment lawyers. Indeed, CETA stipulates that it is 'desirable' that Investment Court System (ICS) tribunal members 'have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements'. It is not inconceivable therefore that these tribunal members will come from the same very community of investment arbitration lawyers that are currently part of the more controversial ISDS system.

Moreover, those TSD chapters are governed by economic rationale rather than an environmental or social rationale. In Opinion 2/15 the ECJ found that the provisions in these chapters are of a trade nature, rather than an environmental or social nature, by holding that the TSD chapter in the EU-Singapore Free Trade Agreement (EUSFTA) is '*intended not to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the European Union and the Republic of Singapore by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection*'.[6] In other words, these chapters are a simply part of an economic transaction to limit (to a minimal degree) social and environmental dumping. They are not actually intended to intrinsically protect the environment or social conditions. At the same time, these TSD chapters are singled out as inferior to other aspects of the trade agreement, providing for a dispute settlement mechanism that only requires parties to '*make their best efforts to accommodate advice or recommendations of the Panel of Experts*'. And of course, no instrument such as the Trade Barriers Regulation exists for groups representing labour or environmental interests allowing them to obtain the same basic procedural rights that economic interests do have under EU law.

---

6 Opinion 2/15, EUSFTA ECLI:EU:C:2017:376, para. 166

However, the reforms do allow the EU to assert a counternarrative against the contestation of its trade agenda and gain the support of more centrist political forces in Europe. It may be that Europe's trade policy is being contested like never before. However, it is also true that Europe has embarked upon a journey of expansion and consolidation of economic integration through international law that surpasses anything seen by previous generations.

L.J.A.

May, 2019