TTIP and CETA
Some juridical and political perspectives

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OVERVIEW OF TOPICS
1. How to stop CETA before stopping TTIP
2. ISDS
3. Assessing the conditional veto-right by member states to TTIP and other trade treaties in Lisbon Treaty (Lisbon 207.4.)

SUMMARY CONCLUSIONS:

CONCLUSION part 1:
Strategic and legitimate to call for postponement of CETA ratification until political conclusion on TTIP reached. Trudeau govt to play a role?

CONCLUSION part 2:
- The most natural and promising strategy in debate about ISDS is simply to say that it is not needed. Conflicts should be taken to national courts and decided there.

CONCLUSION part 3:
207.4.b. could be used as a powerful tool for increased access to documents. It can be used as a tool for exercising a national veto only by a strongly committed government / parliamentary majority.

1. How to stop CETA before stopping TTIP

Because of the agressive ISDS in CETA, and for other reasons, it is essential to stop CETA. There is large agreement about this now in trade campaign groups.

We propose that we use the following simple argument: There is much public and political concern about TTIP. It is rational to decide about it first and postpone ratification of the lesser known, similar CETA until the political balance about treatments of this kind has been found throught the TTIP case.

This proposition is all the more natural after the change of government in Canada as there is reason to believe that the current Canadian government will accept such a delay in the EU.

There seems to be a need to campaign in Canada to get the Trudeau govt on board in postponement of CETA ratification. A position on this from Canada would greatly strengthen also the position of those in Europe who suggest that CETA is reopened.

CONCLUSION part 1:
Strategic and legitimate to call for postponement of CETA ratification until political conclusion on TTIP reached. Trudeau govt to play a role?

2. ISDS: mixed competence, commission's new proposal etc

- Koskenniemi: all lawyers seem to agree that TTIP will fall under mixed competence (and hence require national ratification). If there is in TTIP (or other agreements such as Singapore etc) an ISDS element that covers portfolio investment it will definitely fall under mixed competence.

- The ISDS in the CETA (EU-Canada trade agreement, negotiations have been concluded) is aggressive and will bring most of the negative impact of ISDS in TTIP.

- The commission has done smart work in dressing up its ISDS proposal for TTIP so that is seemingly takes care of the public concerns. Nevertheless, major problems remain. One source of problems is that under TTIP only those international treaties on human rights, labour standards, environment etc which have been ratified by both parties, EU and USA, can have restrictive implications for any new norms set in TTIP and for their interpretation in case of conflict.

- The track record of the legal tradition in trade disputes is (i) that confiscation is the overriding concern and (ii) that national context is a factor giving some protection to strong northern public unterest and democracy.

--> (i): In court cases over trade disputes human rights concerns are routinely overruled by the right of companies to be compensated for new legislation that threatens the profitability of their inevetsments.

--> (ii) The comparison of the waste treatment case in Mexico with the pollution standards case in California shows that in some places (like California) trade courts will say companies should have taken the high likelihood of a forthcoming sharpening of environmental standards into account before investing, but in (most?) other contexts (such as Mexico) such considerations have little weight.

- The China Argument is not valid

In centre-left circles one some times hears this argument for TTIP, even if with ISDS: We need a deal between the EU and the USA because otherwise China will rise to dominate global rule-setting. Especially, if we do not get ISDS in TTIP, we cannot get it into deals where China is a party ans then we will be left at the mercy of Chinese court in disputes over our investment there. Hence, we must get TTIP with ISDS

However: China already wants ISDS as proven in their trade deal with Australia (2014). China was the driver to get ISDS there. And Chinese companies have used ISDS three times (at least) already. So, we can get ISDS into deals with China even if it is not there in TTIP. Hence: we do not need ISDS (or other aggressive elements) in TTIP because of China.

CONCLUSION of part 2:

- The most natural and promising strategy in debate about ISDS is simply to say that it is not needed. Conflicts should be taken to national courts and decided there.

3. Assessing the conditional veto-right by member states to TTIP and other trade treaties in Lisbon Treaty (TFEU 207.4.)

Political historical background:

The Lisbon Treaty 207.4 gives member states the right to veto trade agreements if certain conditions are met. It also gives them the responsibility to assess of each trade agreement whether the agreement needs to be vetoed. The assessment has to be made individually by each member state. In case of challenge the final arbiter as to the legality of the veto is the ECJ (European Court of Justice).

The text of 207.4.b concerns the politically central issue of welfare systems.

207.4.b was brought into the treaty in 2003 on the initiative of Finland and was actively supported by Sweden. It gives member states a right to veto trade agreements regardless of whether the treaty falls within Union competence or mixed competence. 207.4.b is modelled on the "French" clause on audiovisual services of 207.4.b.

Text; of 207.4.a and b:

> "The Council shall also act unanimously for the negotiation and conclusion of agreements:
>
> (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
>
> (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

Political relevance today:

1. Exercise of veto is demanding

The mobilisation of a single government or parliamentary majority in any member state to veto TTIP or CETA on the basis of 207.4.b is politically demanding. It requires intellectual sophistication and /or high profile political commitment to a transformative intervention in the current "dispositive" ("discursive regime") of the international legal cum political order (practices of governance). This is so because at the root of concerns around 207.4.b must be a concern about the extent to which marketisation limits the effective space for democratic development of welfare policies and / or prejudices the effects of the international legal order on the domestic welfare regime in ways harmful to human rights concerns.

2. 207.4. as a vehicle for increased transparency

Regardless of how difficult it may be for any government to veto trade treaties by appeal to 207.4.b it is quite legitimate and possible for governments, parliaments and members of national parliaments to ask for full insight into the negotiations so that the parliament or its MP may readily assess the extent to which the ongoing negotiations are a reason for concerns from the perspective of the national obligations and responsibilities referred to in 207.4.b.

3. 207.4.b in relation to 207.4.a

While the political relevance of 207.4.a may be smaller that that of 207.4.b the wording of 207.4.a gives much more space for actually exercising national vetoes. (Any discussion about this in France?)

CONCLUSION of part 3:

> ***207.4.b. could be used as a powerful tool for increased access to documents. It can be used as a tool for exercising a national veto only by a strongly committed government / parliamentary majority.***