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Oleksandr Kovalov

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LIST OF ABBREVIATIONS

Canadian Generic Pharmaceutical Association	CGPA
Canadian Labour Congress	CLC
Comprehensive Economic and Trade Agreement	CETA
Court of Justice of the European Union	CJEU
Customs Unions	CU
Dairy Processors Association of Canada- Association des Transformateurs Laitiers du Canada	DPAC-ATLC
European Public Service Union	EPSU
European Trade Union Confederation	ETUC
European Union	EU
Fair and Equitable Treatment	FET
Free-Trade Agreements	FTA
General Agreement on Tariffs on Trade	GATT
General Agreement on Trade in Services	GATS
Gross Domestic Product	GDP
International Centre for Settlement of Investment Disputes	ICSID
International Chamber of Commerce	ICC
Investment Court System	ICS
Investor-State Dispute Settlement	ISDS
Non-governmental organisation	NGO
North American Free Trade Agreement	NAFTA
Organisation for Economic Co-operation Development	OECD
Preferential Trade Agreements	PTA
Public Services International	PSI
The Agreement on Trade-Related Aspects of Intellectual Property Rights	TRIPS
The Dairy Farmers of Canada	DFC
Trade and Investment Enhancement Agreement	TIEA
Trade and Sustainable Development	TSD
Trade Justice Network	TJN

Transatlantic Trade and Investment Partnership	TTIP
Trans-Pacific Partnership	TPP
United Nations	UN
United Nations Commission on International Trade Law	UNCITRAL
United Nations Conference in Trade and Development	UNCTAD
World Trade Organisation	WTO

INTODUCTION

After 7 years of negotiations, political leaders of European Union and Canada officially singed the Comprehensive Economic and Trade Agreement (CETA) in Brussel on 30 October 2016.[1] According to European Union Trade Commissioner Cecilia Malmström, CETA is "a very progressive trade agreement",[2] and the most comprehensive trade deal ever concluded between developed countries.[3] German Foreign Minister Frank-Walter Steinmeier shared this opinion, and claimed that CETA is "the best and most progressive trade agreement the European Union has ever negotiated", which could shape globalization and set a global standard.[4] Prime minister of Canada Justin Trudeau added that CETA is a "blue-print" for future trade agreements.[5]

This agreement became a consequence of trade policies of European Union and Canada. Both countries were members of World Trade Organisation since 1995. Taking into account opinions of some researchers that WTO losing its role as a forum for framing international trade rules and is not sufficient to ensure free, fair and open trade, more and more states began to rely on bilateral and regional agreements.[6]

In 2013, former prime minister of Canada Stephen Harper launched government strategy for differentiation of trade relationships and international investment of Canada, and provide new enhanced and favorable access to another markets for Canadian companies and investors.[7] In the

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[1] Council of the European Union, "Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part" 10973/16 (Brussels, 14 September 2016) (CETA)

[2] Cecilia Malmström, "CETA - An Effective, Progressive Deal for Europe", Speech on Civil Society Dialogue meeting, 19 September 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154955.pdf (accessed 31 July 2017)

[3] Cecilia Malmström, "EU Trade Priorities in 2016" Speech in Peterson Institute", Washington D.C., 10 March 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154345.pdf (accessed 31 July 2017) 4

[4] Frank-Walter Steinmeier, "CETA Gives Us a Chance to Set Standards. We Should Take It!", Interview on the website on German Federal Foreign Office, 9 September 2016, available at http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Interviews/2016/160909-BM-CETA-FR.html (accessed 31 July 2017)

[5] Samuel Osborne, "Ceta: Justin Trudeau Defends Controversial EU-Canada Trade Deal" (The Independent, 16 February 2017), available at http://www.independent.co.uk/news/world/americas/ceta-latest-justin-trudeau-trade-deal-eu-canada-parliament-prime-minister-a7583291.html (accessed 31 July 2017)

[6] Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016) European Institute of Public Administration Working Paper 2016/W/01, available at http://www.eipa.eu/files/repository/product/20160921135556_Workingpaper2016_W_01.pdf (accessed 31 July 2017) p. 9, see also Ludmila Borta, "CETA - Bilateral Trade Agreement Between the EU and Canada" (2014) CES Working Papers 1/2014, available at https://www.ceeol.com/search/article-detail?id=266720 (accessed 31 July 2017) p. 18

[7] Riyaz Dattu, Sonja Pavic, Nathaniel Lipkus, "TPP and CETA: Landmark Trade Deals that Canadian Businesses Need to Understand" (OSLER 9 December 2015) available at https://www.osler.com/en/resources/regulations/2015/tpp-and-ceta-landmark-trade-deals-that-canadian-b (accessed 31 July 2017), p. 1

framework of this Global Market Action Plan,[8] Canada entered into several free-trade agreements, such as Canada-South Korea FTA, Canada-Ukraine FTA, Trans-Pacific Partnership (TPP) and Comprehensive Economic and Trade Agreement (CETA).[9]

As for the European Union, it has a long history of creation and development strategic relationships with both developed and developing countries from different regions of the world, and international organisations as well. Considering EU participation in multilateral and, in particular, bilateral trade agreements, and by removing non-trade barriers and duties, the EU confirmed its intentions to become adept of the free trade.[10]

In 2015, the European Union Commission released new trade and investment strategy "Trade for all".[11] In this new strategy, the Commission reflects that advanced relationships of the European Union and its strategic trading partners could empower job creation and economic growth in Europe.[12] The purpose of the strategy was to ensure that trade policy of the EU would meet the demands and challenges of the economy in twenty-first century. This new approach should promote trade in services, digital trade and free movement of workers. In addition, it should safeguard high social, labour, health and environmental standards in the European Union. The EU Commission constitutes that new trade agreements and trade preference programs will not reduce any level of social protection and the states right to regulate.[13] In order to ensure protection of labour rights and environmental issues, and reflecting the commitment of the European Union to UN Sustainable Development Goals,[14] EU Commission proposed to implement Trade and Sustainable Development (TSD) chapters in all EU Free Trade Agreements.[15]

Considering the European Union external trade policy, the Commission evolved a plan to promote bilateral and regional agreements as an instrument to support the WTO for reclamation as a center

[8] Department of Foreign Affairs, Trade and Development, "Global Markets Action Plan. The Blueprint for Creating Jobs and Opportunities for Canadians Through Trade" (Canada 27 November 2013) available at http://www.international.gc.ca/global-markets-marches-mondiaux/plan.aspx?lang=eng (accessed 31 July 2017)
[9] Riyaz Dattu, Sonja Pavic, Nathaniel Lipkus, "TPP and CETA: Landmark Trade Deals that Canadian Businesses Need to Understand" (OSLER 9 December 2015) available at https://www.osler.com/en/resources/regulations/2015/tpp-and-ceta-landmark-trade-deals-that-canadian-b (accessed 31 July 2017), p. 1
[10] Ludmila Borta, "CETA - Bilateral Trade Agreement Between the EU and Canada" (2014) CES Working Papers 1/2014, available at https://www.ceeol.com/search/article-detail?id=266720 (accessed 31 July 2017), p. 17
[11] European Commission, "Trade For All. Towards a More Responsible Trade and Investment Policy", (Communication) COM (2015) 497 (EU Commission, Trade for All)
[12] European Commission, "How Trade Policy and Regional Trade Agreements Support and Strengthen EU Economic Performance", 26 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153270.pdf (accessed 31 July 2017), p. 2
[13] EU Commission, Trade for All, p. 7
[14] UNGA RES/70/1 (25 September 2015) UN Doc A/RES/70/1 (UN Agenda for Sustainable Development 2030)
[15] European Commission, "Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)" (Discussion Paper) 11 July 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (accessed 31 July 2017)

of world trade negotiating movement. Hence, free trade agreements should be that tool, which facilitates liberalization in the world trade.[16] In addition, the EU will include special provisions in the new free-trade agreements, which allows other interested parties to join them in the future.[17]

Investment protection provisions are substantial part of the trade agreements, because it is a crucial factor in attraction of foreign direct investments.[18] Several studies indicates that adoption of bilateral investment treaties could rise "a country's annual stock of inward investment" up to 10%.[19] Moreover, it helps to struggle with unemployment – for example, in 1990 only 21 million people were employed by foreign subsidiaries of international companies, but in 2011 this amount was increased up to 69 million.[20] The most common provisions of protection are against preferential treatment to local investors and discrimination, against expropriation and guarantee of fair compensation. International Chamber of Commerce constitutes that investment protection standards must be policy priority for every government[21].

However, there are completely opposite evidence of the impact of investment treaties.[22] Paying due consideration to existing bilateral investment agreements, they contain more or less similar provisions in terms of standards of protection. Prevalently, these standards remain very unclear, or do not refer to specific "nuances" of the countries, such as weak legal national systems or corruption.[23] Therefore, these agreements have merely the "declarative" influence, rather than direct economic benefits.[24]

This paper will try to examine whether the Comprehensive Economic and Trade Agreement (CETA) meets the challenges, described above. The primary focus will be dedicated to investment provisions of CETA, such as investor protection standards and Investment Court System. By

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[16] EU Commission, Trade for all, p. 29
[17] EU Commission, Trade for all, p. 29
[18] Eric Neumayer, Laura Spess, "Do bilateral investment treaties increase foreign direct investment to developing countries?" (2005) 33 (10) World Development, 28, available at http://eprints.lse.ac.uk/627/1/World_Dev_%28BITs%29.pdf (accessed 31 July 2017)
[19] ICC (International Chamber of Commerce), "Bilateral Investment Treaties and Investor-State Dispute Resolution" (Vienna 16 June 2014) available at https://www.icc-austria.org/fxdata/iccws/prod/media/files/20140616%20ICC%20Key%20facts%20on%20Bilateral%20Investment%20Treaties.pdf (accessed 31 July 2017) p. 1
[20] Ibid
[21] Ibid
[22] Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" (2010) University of Wisconsin Legal Studies Research Paper 1114, available at https://ssrn.com/abstract=1594887 (accessed 25 July 2017)
[23] Genevieve Fox, "A Future for International Investment? Modifying BITs to Drive Economic Development" (2014) 46 Georgetown Journal of International Law 229, p. 259
[24] Lauge Skovgaard Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence" [2010] Yearbook on International Investment Law and Policy 539, available at http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf (accessed 31 July 2017) p. 4

analyzing facts of the agreement, and various opinions of scholars, I believe we can get a better understanding about advantages of this trade agreement, and its potential risks.

Concerning the structure of the mater thesis, I will firstly overview historical and economic preconditions of the Comprehensive Economic and Trade Agreement, because it is crucial for overall assessment of its investment chapter. The separate attention will be dedicated to the role of public sector during negotiations process, and what impact it caused to the final agreement.

Chapter 2 will consider new approach in determining of investor protection standards, such as fair and equitable treatment, protection against indirect expropriation and legitimate expectation. Moreover, we will find the answer on the question of who could sue the state in case of the breach of investment protection obligation, or better, who is investor under CETA? Notwithstanding, the key idea of the Chapter 2 is whether these investment provisions could overlap the states "right to regulate".

The next part will be dedicated to the analyse of the new investor-dispute settlement system mechanism, its structure and procedural rules. As all existing investor-dispute settlement mechanisms, the new Investment Court System still faces criticism. The aim of this chapter we will be to examine its comparative advantage, according to other arbitration tribunals with a reference to scientific theories.

I. CETA AND ITS INVESTMENT PROVISIONS IN THE FRAMEWORK OF THE EU AND CANADA TRADE POLICY

1.1. Preconditions of the agreement.

1.1.1. Historical and political background.

In last years, regionalization was illustrated in different forms – free-trade agreements, political associations or in varieties of cooperation treaties. This approach became an instrument that different states and markets use as respond to globalization challenges.[25] Therefore, two big economic partners as Canada and European Union are also searching possibilities for deeper cooperation.

Prior to CETA the history of Canada–EU/EC trade relations originated from the Framework Agreement for Commercial and Economic Cooperation in 1976. This was basically an institutional guideline for collaboration in trade and regulatory harmonization, and was characterized as "the first large-scale agreement" for the EU with an developed country.[26] After that, EU and Canada concluded several branch agreements including the Agreements on Science and Technology (1996), Higher Education and Training (1995), Customs Cooperation (1998), Mutual Recognition (1998), Veterinary Equivalency (1998), Competition Cooperation (1999) and on Wine and Spirits (2004).[27]

In 2004, the idea of larger bilateral agreement appeared again. After EU-Canada Summit in Ottawa, the governments started negotiations about new trade deal, which was called Trade and Investment Enhancement Agreement (TIEA). This agreement might increase access to the markets, and include provisions about financial services, intellectual property rights, investment, regulatory cooperation, competition and public procurement.[28] Nevertheless, this effort to establish such high level of cooperation failed in 2006 after three rounds of negotiations.[29]

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[25] European Commission, "Reflection Paper on Harnessing Globalisation", (Communication) COM (2017) 240, p. 15
[26] Valerie J. D'Erman, "Comparative Intergovernmental Politics: CETA Negotiations between Canada and the EU" in Russell Alan Williams and Reeta Tremblay (eds), *Supranational Institutions and Governance in an Era of Uncertain Norms*, vol 4 (3rd issue, Politics and Governance 2016) p. 92
[27] European Commission, Government of Canada, "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership" (Joint Study) October 2008, available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf (accessed 31 July 2017) p. 163
[28] Department of Foreign Affairs and International Trade of Canada, "Canada-European Union Trade and Investment Enhancement Agreement", http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/tiea.aspx?lang=en accessed 26 July 2017
[29] D'Erman (n 25) 92

Discussions on closer economic partnership began at EU-Canada Summit in 2007 in Berlin,[30] where leaders agreed to complete a joint study. The purpose of this report was to examine the existing barriers, especially non-tariff, to the flow of goods, services and capital, and to estimate the potential costs and benefits of removing such barriers.[31] Consideration was also given to areas such as workers mobility, public procurement, intellectual property rights, telecommunications services and digital commerce, as well as to the potential benefits of extended collaboration in a wide range of related fields from regulatory cooperation to transportation.[32] The results of the study were launched in 2008 in a joint study "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership".

Following EU-Canada joint study and Joint Report on the EU-Canada Scoping Exercise,[33] the negotiations about Comprehensive and Economic Trade Agreement were announced at the Canada-EU Summit in Prague on May 2009.[34] The process of concluding the agreement took several years, because of wide range of issues that might be included in the final version of the agreement. Moreover, because of amounts of the parties that participated in negotiations process.

During all negotiations process, regional authorities and municipal governments harshly criticized central government in Ottawa for carrying on negotiations without any consultations and proper transparency.[35] Provincial authorities claimed for more cooperation in order to estimate their potential gains and losses from a prospective free trade agreement with so huge and competitive market.[36]

In contrast, the European Union insisted upon presence of regional representatives in the Canadian delegation, considering an essential interest of EU Member States to access public procurement contracts on municipal and provincial levels.[37] In addition, EU representatives recognized the implications of the provinces not being obliged to implement provisions of provincial competence

[30] European Commission, "2007 EU-Canada Summit Statement" (Press Release) C/07/13
[31] Ibid
[32] European Commission, Government of Canada, "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership" (Joint Study) October 2008, available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf (accessed 31 July 2017) p. 163
[33] Department of Foreign Affairs and International Trade of Canada, "Joint Report on the EU-Canada Scoping Exercise", March 2009, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-can-ue-rapport.aspx?lang=eng> accessed 26 July 2017
[34] Council of the European Union, "EU-Canada Summit Declaration (Presse 120) 9547/09
[35] Valerie J. D'Erman, "Comparative Intergovernmental Politics: CETA Negotiations between Canada and the EU" in Russell Alan Williams and Reeta Tremblay (eds), *Supranational Institutions and Governance in an Era of Uncertain Norms*, vol 4 (3rd issue, Politics and Governance 2016), p. 92
[36] Ibid, p. 91
[37] Stephane Paquin, "Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA" (2013) 68(4) International Journal 545, p. 546

(such as public procurements), concluded by the federal government.[38] Therefore, after taking active participation, provinces and territories also confirmed their obligation to take necessary measures for fully implementation of commitments they undertook during negotiations process.[39]

In 2013 after four years of negotiations, Commission President José Manuel Barroso and Canadian Prime Minister Stephen Harper reached a political agreement on the key elements of a Comprehensive Economic and Trade Agreement (CETA).[40] Under the new agreement, both sides will substantially eliminate duties, industrial and agricultural tariffs, improve protection of intellectual property rights, cover provisions on investment, public procurement, regulatory cooperation, temporary movement of company personnel etc.[41]

The trade agreement was signed in October 2016 during EU-Canada Summit, and from that time onwards, ratification and translation process began. In July 2016, the Commission officially proposed to submit CETA as a "mixed agreement",[42] thereby giving in to demands from several EU Member States, and striving to avoid further internal political contentions.[43] There were concerns that investment protection provisions, dispute settlement, property and expropriation aspects go beyond the exclusive competence of EU, and are in the area of liability of EU Member States.[44]

Apart from the debate on the CETA, EU Commission tasked CJEU to examine the competence of the EU to sign and conclude the EU Free Trade Agreement with Singapore, and determine if such provisions do indeed lead to a "mixed" agreement.[45] In its opinion, EUCJ constitutes that provisions about non-direct foreign investment and investor-states dispute settlement fall out of the exclusive competence of the European Union, therefore the agreement can not be concluded without the involvement of all of the Member States.[46]

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[38] Stephane Paquin, "Federalism and the Governance of International Trade Negotiations in Canada: Comparing CUSFTA with CETA" (2013) 68(4) International Journal 545, p. 546

[39] The Council of the Federation "Support for the Negotiation of a New and Comprehensive Economic Agreement with the European Union" (Statement) (Ottawa 20 February 2009) available at http://www.pmprovincesterritoires.ca/phocadownload/newsroom-2009/statement-eu-20feb09.pdf (accessed 17 July 2017)

[40] European Commission, "EU and Canada Conclude Negotiations on Trade Deal" (Press Release) IP/13/972

[41] European Commission, "Facts and Figures of the EU-Canada Free Trade deal" (Memo) MEMO/13/911

[42] Tobias Dolle, Bruno G. Simões, "Mixed Feelings about "Mixed Agreements" and CETA's Provisional Application" (2016) 3 EJRR 617, p. 617

[43] European Commission, "European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal" (Press Release) IP/16/2371

[44] Dolle (n 41) p. 621

[45] Case C–363/22 Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU [2015] OJ C 363

[46] Opinion of the Court 2/15 [2017] ECLI:EU:C:2017:376

This lead to provisional application of CETA – in this way the EU Member States can quickly apply treaty on a provisional basis those parts of the agreement, which concern trade. At first stage, EU Parliament gave its consent to CETA to apply provisionally. On 15 February 2017, the European Parliament voted by a margin of 408 to 254.[47] The second stage involves parliaments in EU countries to give their approval.

The main exclusions from provisional application of the Comprehensive Economic and Trade Agreement are investment protection chapter and investor-state dispute settlement system. In Chapter 2 and Chapter 3 we will go in much deep in these treaty provisions.

1.1.2. Economic background and impact.

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada will entail considerable new level of trade in goods and services, and generate further opportunities for investment. The agreement will also enhance the positions of exporters and investors from European Union by providing them extended access to the new markets, both on the state and provincial levels.[48]

In 2016 Canada was the European Union's 12th most important trading partner, accounting for 1.9% of the EU's total external trade.[49] The European Union was Canada's second most important trading partner, after the Unites States of America, with around 9.6% of Canada's total external trade in goods in 2016.[50] The value of bilateral trade in goods between the EU and Canada was €71.1 billion.[51] Machinery, chemicals and transport equipment dominate the European Union's exports of goods to Canada. Valuable metals and mineral products dominate the imports of goods from Canada. Machinery and chemicals also take an important part of the EU's imports from Canada.[52]

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[47] European Parlament, "CETA: MEPs back EU-Canada trade agreement", (Press Release) 15 February 2017, available at http://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement (accessed 31 July 2017)
[48] European Commission, "Facts and Figures of the EU-Canada Free Trade deal" (Memo) MEMO/13/911
[49] European Commission, "European Union, Trade in Goods with Canada" (Statistics) 3 May 2017, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113363.pdf (accessed 31 July 2017), p. 1
[50] Ibid, p. 8
[51] Ibid, p. 8
[52] "Countries and Regions - Canada" (European Commission), available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (accessed 31 July 2017)

After implementation, according to forecasts, the agreement will upsurge bilateral trade in in goods and services by 22.9% or €25.7 billion, promoting economic growth and employment in both trading partners. In total, the Comprehensive Economic and Trade Agreement could lead to growth of GDP of up to €11.6 billion per year for the EU.[53]

The biggest achievement of CETA is elimination of over 98% of tariffs in most of the sectors of economy, once the agreement comes into effect.[54] Canada will abolish duties in value of €400 million for goods originating in the European Union, and by the end of provisional application periods the value of duty removal will rise up to more than €500 million a year.[55] More market players will probably cause landslide of prices, and provide more choices and benefits for end consumers, without lowering of EU standards.[56] In addition, business will enjoy from investment protection provisions and investor-state dispute system.[57]

Despite of the positive forecasts of EU Commission, there are others researches that illustrate another effect of the agreement. Merely basing all predictions of the CETA's impact on expectations of total employment and constant income distribution, some scholars exclude any recognized risk of deeper liberalization.[58]

As for the more realistic scenario, key achievements of CETA such as cutting of trade costs and strengthen of competition measures will have "negative long-term effect".[59] Removal of external trade barriers between Canada and European Union will lead to demand shortfall in inter-EU trade relations.[60] Conversely, the result of it will be declines of labor costs, family income, fiscal revenues and increasing of government spending.[61]

By 2023, CETA countries could lose an amount 227,000 jobs, and 204,000 of them in the European Union. In the long term, falling of labor income share and wage correction could remove an additional share of domestic income from labor to capital owners. The fall of cumulative demand supported by higher unemployment could effect production and lead to welfare losses by 0.96% in Canada and 0.49% in European Union.[62]

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[53] European Commission, "Facts and Figures of the EU-Canada Free Trade deal" (Memo) MEMO/13/911
[54] European Commission, "CETA - a Trade Deal That Sets a New Standard for Global Trade" (Memo) MEMO/17/271
[55] Ibid
[56] Ibid
[57] Ibid
[58] Pierre Kohler, Servaas Storm, "CETA without Blinders: How Cutting "Trade Costs and More" Will Cause Unemployment, Inequality, and Welfare Losses" (2016) 45 International Journal of Political Economy 257, p. 284
[59] Ibid, p. 285
[60] Ibid, p. 281
[61] Ibid, p. 285
[62] Ibid

1.2. Role of public sector, trade and labor associations.

As was mentioned in paragraph 1.1.1 negotiations took so much time because of amount of the parties in negotiation process. In order to dispel concerns of the officials of the European Union that resistance on provincial level might interfere the liberalization of services and access to public procurements contracts, representatives of provinces and municipal authorities were included in to negotiation groups about CETA.[63]

The proposed free trade agreement also attract controversy between two vital labour bodies of the European Union and Canada - European Trade Union Confederation (ETUC) and Canadian Labour Congress (CLC). These organizations had different views towards free-trade agreements. Canadian labour movement had fears about investment protection issues, particularly investor-state dispute settlement system, considering experience of lawsuits against Canada in the framework of NAFTA.[64] Moreover, the CLC also contributed to the creation of the Canadian Trade Justice Network (TJN), which was founded to eract public awareness and obstruction to the scope of the EU-Canada negotiations about CETA.[65]

On contrary, the European Trade Union Confederation (ETUC) traditionally support liberalization in trade and free trade agreements between the EU and other countries.[66] ETUC agreed that removal of barriers to trade could cause not only economic growth, but also economic development.[67] However, ETUC refers to "multilateralism", rather than free-trade agreements, to promote social, labour and environmental standards of protection.[68]

Finally, both organization improved their positions and express transnational labour solidarity in the favor of the Comprehensive Economic and Trade Agreement.[69]

Other discussions occurred between public sector unions in the framework of international trade union federation Public Services International (PSI). The unions claimed for "a full evaluation of the social, environmental, and labour impacts of the proposed agreement, greater public scrutiny, and protection of governments' right to regulate in the public interest, protect existing public

[63] Teresa Healy, "Canadian and European Unions and the Canada—EU CETA Negotiations" (2014) 14:1 Globalizations 59, p. 60
[64] Ibid, p. 61
[65] Ibid, p. 63
[66] Ibid, p. 62
[67] Ibid
[68] Ibid
[69] Ibid, p. 65

services, or create new ones".[70] In addition, they objected the proposed investor-state dispute mechanism and accession to local public-procurements contracts.[71] European Public Service Union also calls for the rejection of CETA because it has negative affect on citizens via weak human and labor rights provisions, and pro-investor investment standards of protection.[72]

Positions of business groups are also quite different. For example, European dairy industry, in general, approved the conclusion of the Comprehensive Economic and Trade Agreement.[73] As European food and drink organization FoodDrinkEurope commented, that the agreement should increase the EU export of cheese to Canadian market in two times.[74] Conversely, the Dairy Processors Association of Canada-Association des Transformateurs Laitiers du Canada (DPAC-ATLC) and The Dairy Farmers of Canada (DFC) has expressed its concern about potential losses in sales and level of wages.[75] In addition, Canadian Generic Pharmaceutical Association (CGPA) projected higher drug costs for Canadian consumers, as a result of CETA's provisions about extension of patent term protection and existing of investor-state dispute mechanism. [76]

Moreover, on the both side of the Atlantic the Comprehensive Economic and Trade Agreement appeared very controversial. More than 3.5 million people from all over the European Union signed a petition against CETA and its "twin" agreement TTIP (Transatlantic Trade and Investment Partnership) in the framework of European Citizens' Initiative.[77] Dozens of scholars, non-governmental organizations and public institutions express concern over CETA and invoked their governments to reject it.[78] In majority of cases, the apprehensions arise about investment protection provisions, states right to regulate and investor-state dispute settlement.[79]

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[70] Ibid
[71] Teresa Healy, "Canadian and European Unions and the Canada—EU CETA Negotiations" (2014) 14:1 Globalizations 59, p. 65
[72] EPSU, "EPSU calls for the rejection of CETA because it's a bad deal for citizens", 14 March 2016, available at http://www.epsu.org/article/epsu-calls-rejection-ceta-because-its-bad-deal-citizens (accessed 31 July 2017)
[73] "European dairy welcomes CETA deal" (2016) December Dairy Industries International 14, p. 14
[74] Ibid
[75] Ibid, p. 15
[76] "CETA: A win for Canada or European pharma?" (2014) 186(15) CMAJ E565, p. 565
[77] European Commission, "Commission Decision of 4.7.2017 on the proposed citizens' initiative entitled "Stop TTIP"" C(2017) 4725 final, available at http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000008 (accessed 31 July 2017)
[78] Corporate Europe Observatory, "European and Canadian Civil Society Groups Call for Rejection of CETA" 28 November 2016, available at https://corporateeurope.org/international-trade/2016/11/european-and-canadian-civil-society-groups-call-rejection-ceta (accessed 31 July 2017)
[79] Corporate Europe Observatory, "Statement Against Investor Protection in TTIP, CETA, and Other Trade Deals" 22 February 2016, available at https://corporateeurope.org/international-trade/2016/02/statement-against-investor-protection-ttip-ceta-and-other-trade-deals (accessed 31 July 2017), also WarOnWant, "CETA: the Toxic EU-Canada Trade Deal" May 2016, available at http://www.waronwant.org/resources/toxic-ceta (accessed 31 July 2017); Pia Eberhardt, Blair Redlin, Cecilia Olivet and Lora Verheecke, "Trading Away Democracy. How CETA's investor protection rules could result in a boom of investor claims against Canada and the EU" (September 2016) Corporate Europe Observatory, available at https://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy (available 31 July 2017), Stuart Trew, "From NAFTA to CETA: Corporate Lobbying Through the Back

In order to clarify the intentions of the Parties of the treaty (next the Parties), and to reaffirm main principles, the Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union was submitted[80]. However, the opponents claim that it does not change or elucidate any of the specific provisions in CETA's text. On the contrary, it affirms concerns that investors can circumvent the national court systems and will enjoy sufficient rights without any responsibilities.[81]

1.3. Conformity with other FTAs.

In the present economic world, international trade liberalization happens in two ways. In the framework of World Trade Organization (WTO), Members participate in negotiations rounds, which usually results in some agreement about free-trade issues that all Members adhere to (like GATT, GATS, TRIPS). However, more and more countries refer to exception clause, which allow closer cooperation for states and more liberalization in trade in the forms of free trade areas (FTAs), customs unions (CU) and preferential trade agreements (PTA) with less developed countries.[82] The latest agreements such as the Comprehensive Economic and Trade Agreement (CETA) and Trans-Pacific Partnership (TPP) among Australia, United States, Canada, Mexico, Peru, Chile, Brunei, Malaysia, New Zealand, Singapore, Vietnam and Japan illustrate this trend. Moreover, crisis of Doha Development Round also provoked a "spaghetti bowl" of bilateral trade agreement outside the WTO agenda.[83]

Door" 9 February 2017 Canadian Centre for Policy Alternatives, available at https://www.policyalternatives.ca/publications/reports/nafta-ceta-corporate-lobbying-through-back-door (accessed 31 July 2017), Pia Eberhardt, "Investment Court System (ICS): The Wolf in Sheep's Clothing. The EU's Great Corporate Privilege Rebrand" May 2016, Public Services International, available at http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing (accessed 31 July 2017), Friends of the Earth Europe, "Investment Court System: ISDS in Disguise" 17 February 2016, available at http://www.foeeurope.org/investment-court-system-ISDS-disguise-170216 (accessed 31 July 2017), Corporate Europe Observatory, "The great CETA Swindle" 20 November 2016, available at https://corporateeurope.org/sites/default/files/attachments/great-ceta-swindle.pdf (accessed 31 July 2017), Trade Justice Network, "Why CETA is Bad for Canada" available at https://canadians.org/content/comic-top-ten-reasons-why-ceta-bad-canada (accessed 31 July 2017)

[80] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L 11/3 (Joint Interpretative Declaration)

[81] S2B, "Joint Interpretative Declaration on CETA. Unpacking the "Clarifications" on Investment Protection" 11 October 2016, available at http://www.s2bnetwork.org/wp-content/uploads/2016/10/Analysis-of-Investment-part-FINAL-interprepative-declaration-CETA-11-oct-1.pdf (accessed 31 July 2017)

[82] Art. XXIV General Agreement on Tariffs and Trade (GATT), 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948)

[83] Maria Panezi, "The WTO and the Spaghetti Bowl of Free Trade Agreements" (2016) 87 Policy Brief CIGI, available at https://www.cigionline.org/sites/default/files/pb_no.87.pdf (accessed 31 July 2017), p. 2

The European Union and Canada usually refer to FTAs in their foreign trade policies. From 1994 Canada was a member of North-American Free Trade Agreement (NAFTA) with USA and Mexico. Apart from tariff elimination, removal of non-tariff barriers, NAFTA provides some standards of protection for investors, such as fair and equitable treatment, right to compensation in the case of expropriation, and right to arbitration to settle disputes.[84] In particular, having experience of large investor-state lawsuits again Canadian government considering new states' regulation, the ISDC became one of the common threatens for Canadians and Europeans. These risks will be examined in detail in Chapter 3.

In the European Union, such agreements as TTIP, CETA and EU-South Korea free-trade agreements are named as agreements of "new generation", because they deal with issues that lay outside of the WTO, such as investment, public procurement, competition and intellectual property rights enforcements.[85]

EU-South Korea free-trade agreement entered into force in 2011, and goes further than any previous trade agreements in eliminating of trade barriers.[86] The focus of the investment provisions in the EU – South Korea FTA is on enhancing of investment environment,[87] and guaranteeing non-discriminatory access for establishments and investors in the market for services and non-services economic activities.[88] EU – South Korea FTA does not contain provisions about investor-state dispute settlement, hence enforcement of the obligations is secured only through the state-to-state dispute settlement mechanism provided for under the agreement.[89]

Transatlantic Trade and Investment Partnership (TTIP) caused a huge debates over the Atlantics and a waves of protest all over the European Union.[90] The draft of the agreement has been negotiating since 2013, but are still pending after the 15 rounds of negotiations.[91] The most concerns are about investor-state dispute settlement provisions. There is a common fear that

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[84] "NAFTA Key Provisions", available at https://www.iatp.org/files/NAFTA_Key_Provisions.htm (accessed 31 July 2017)
[85] Answer to written question by Cecilia Malmström on behalf of the Commission, E-005160/2015, 18 June 2015, available http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-005160&language=EN (accessed on 31 July 2017).
[86] "Countries and Regions – South Korea" (European Commission) available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/ (accessed 31 July 2017)
[87] Art. 1.1, Art. 7.11, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] L 127/6 (EU-South Korea FTA)
[88] Art. 7.14 EU-South Korea FTA
[89] James Mathis and Eugenia Laurenza, "Services and Investment in the EU - South Korea Free-Trade Area: Implications of a New Approach for GATS V Agreements and for Bilateral Investment Treaties" (2012) 13(2) The Journal of World Investment & Trade 157, p. 168
[90] European Citizen Initiative , "Stop TTIP", European Citizen Initiative, available at https://stop-ttip.org/ (accessed 31 July 2017)
[91] U.S.-EU Joint Report on TTIP Progress to Date, 17 January 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf (accessed 31 July 2017)

corporations from United States would receive enough rights to challenge governmental environmental and health standards in the tribunal, and, consequently, diminish standards of the European Union.[92]

As we see, opponents of the Comprehensive Economic and Trade Agreement and Transatlantic Trade and Investment Partnership claimed for the same apprehensions, referring to the states "right to regulate", investment protection standards, and investor-state dispute mechanism. In following chapters, we will discuss how CETA manages these provisions.

[92] Kim Bizzarri, "A Brave New Transatlantic Partnership", October 2013, Seattle to Brussels Network (S2B), available at https://www.tni.org/files/download/brave_new_atlantic_partnership.pdf (accessed 31 July 2017), p. 24

II. INVESTMENT PROTECTION PROVISIONS: FACTS AND FEARS

2.1. «Right to regulate» - limits and exceptions.

One of the purpose of international investment law rules is to attain a parity between the right of the host state to regulate, and the right of foreign investor to property and certain protection standards (fair and equitable treatment, access to justice, legitimate expectation etc.).[93] The "right to regulate" implies to the capability of the state to enact laws and administrative acts without potential risks of being sued and make amends under an international investment agreement.[94]

Under international public law, states can be awarded to compensate investors in case of infringement of International Investment Agreement and certain standards of treatment, to such an extent that state's acts has demolished or abridged the assessment of the investment.[95] Consequently, the "right to regulate" is not, in practice, merely about restraining the government's options to legislate.[96] However, it became one of the main subjects in the discussions over CETA and its investment chapter.

Moreover, here we need to mention the regulatory chill hypothesis. "In some circumstances, governments will respond to a high (perceived) threat of investment arbitration by failing to enact or enforce bona fide regulatory measures (or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished)".[97] Examples of such "regulatory chill" could be the cases when energy company Vattenfall contested €1.4 billion against Germany for imposing environmental taxes on coal-burning power station pants in the city of Hamburg. The case was settled only after the ecological standards were decreased by Germany.[98] Another example is postponed application of antismoking rules in Canada and New Zealand, ensuing lawsuit threats and concrete claims by large tobacco corporations.

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[93] CETA: Investment and the right to regulate, p. 1, http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599265/EPRS_ATA(2017)599265_EN.pdf

[94] Laura Puccio, "CETA: Investment and the right to regulate" February 2017, At a glance EPRS, available at http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599265/EPRS_ATA(2017)599265_EN.pdf (accessed 31 July 2017) p. 4

[95] Ibid

[96] Ibid, p.4

[97] Kyla Tienhaara, "Regulatory chill and the threat of arbitration: a view from political science" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) (Regulatory chil hypothesis), p. 6

[98] *Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG & Co. KG*, Request for Arbitration, March 30, 2009, Chapter 2 (36)

In CETA the “right to regulate” contains in Article 8.9,[99] and reaffirmed in Joint Interpretative Declaration. From there, “CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection and the promotion and protection of cultural diversity”[100].

In addition, the “right to regulate” is declared in the Preamble to CETA, which explains that the state preserves the “right to regulate” in that areas where there are “legitimate policy objectives”.[101] Conversely, statements in Preambles may be just figurative or offer some clarification to the “spirit of the law” and interpretation of the treaty, as well as they are not certainly obligatory.[102]

Furthermore, this statement differs from an analogous provision agreed in the OECD's draft multilateral investment agreement. The latter oblige government's regulations to be consistent with its obligations under the treaty,[103] otherwise stated, the “right to regulate” does not excuse violations of commitments under the treaty. CETA does not enact this *a contrario* approach, and instead launches a positive right,[104] stating that the fact of changing a law, unfavorably affecting the parties' expectations (expectation of profits, for example), does not mean in itself failure to comply with an investment protection obligation.[105]

Provisions about the “right to regulate” contained also in other parts of CETA. For example, in the chapter “Trade and Labour” the parties reaffirm their mutually rights to establish the level of employee protection and to adopt appropriate legislation in accordance with international agreements.[106] In the chapter “Trade and Environment” the parties also reiterate each other’s right to determine their own environmental priorities and domestic environmental protection standards, and to introduce relevant legislation corresponding to international environmental agreements.[107]

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[99] CETA Art. 8.9
[100] Joint Interpretative Declaration, p. 2
[101] National Board of Trade, “The Right to Regulate” in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA” 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 11
[102] Ciaran Cross, “Investor Protection in CETA: Gold Standard or Missed Opportunity” 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p. 8
[103] OECD (Organisation for Economic Co-operation and Development), “The Multilateral Agreement on Investment Draft Consolidated Text” DAFFE/MAI(98)7/REV1, p. 143
[104] Laura Puccio, “CETA: Investment and the right to regulate” February 2017, At a glance EPRS, available at http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599265/EPRS_ATA(2017)599265_EN.pdf (accessed 31 July 2017), p. 2
[105] CETA Art. 8.9.2
[106] CETA Art. 23.2
[107] CETA Art. 24.3

Nevertheless, CETA's "right to regulate" provisions are highly criticized. There are threatens, that formulations of articles about states right to legislate "gives a false sense of security",[108] because governments have to prove the necessity and legitimate object of any regulation. Therethrough, the definitions of "necessary" and "legitimate" are open for interpretation.[109] It is difficult to consider how a Tribunal in any future dispute might evaluate relationship between a regulation and its objective. This "nexus" between a regulation and its objective can be decisive in determining whether a state might enforce the exception or proving that certain measures were necessary.[110]

The list of suggestive "legitimate" policy objectives could also be inconclusive.[111] For example, UNCTAD guidelines recommend more broad (but non-exhaustive) list of policy exceptions, and to include maintenance of public order, prevention of tax evasion, along with measures to ensure "compliance with laws and regulations that are not inconsistent with the treaty".[112] Moreover, CETA does not contain any guidance how these public objectives might be enforced by the states in the future.[113]

Finally, critics claim that while states remain "the right to regulate", their legislative acts must be in accordance with their other CETA obligations and commitments, such as protection against direct and indirect expropriation and fair and equitable treatment.[114] Moreover, most of existing international treaties includes the same substantive rights for investors, which became the basis for hundreds of lawsuits against states measures for protection of health and environment.[115]

By virtue of that fact, CETA provides the same potential risk for investment claims and "regulatory chill". As Canadian law Professor Gus van Harten explains: "The problem is not that CETA prevents laws and regulations outright. It is that the CETA will make some laws and regulations too risky to pursue by putting an uncertain and potentially huge price tag on them... And it is the

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[108] Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Cecilia Olivet and Scott Sinclair, "Investment Court System put to the test" April 2016, CCPA, available at https://www.corporateeurope.org/international-trade/2016/04/eu-investment-proposal-won-t-prevent-corporate-attacks-health (accessed 31 July 2017), p. 33
[109] Ibid
[110] Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p. 8
[111] Ibid, p. 9
[112] UNCTAD (United Nations Conference on Trade and Development), "Investment Policy Framework for Sustainable Development 2015", p. 103
[113] Cross (n 109), p. 9
[114] Corporate Europe Observatory, "The great CETA Swindle" 20 November 2016, available at https://corporateeurope.org/sites/default/files/attachments/great-ceta-swindle.pdf (accessed 31 July 2017), p. 7
[115] Ibid

fact of the risk – i.e. a non-negligible risk of potentially massive liability for the state – that gives foreign investors their special bargaining power to undermine democratic regulation."[116]

2.2. Investment protection standards.

In order to guarantee adoption of non-discriminatory measures by the governments to protect legitimate public objectives without liability, EU and Canada provided new approach. By contrast to the drafting styles applied in earlier investment treaties, recent treaties indicate a current trend in greater accuracy in determining substantive obligations and related provisions.[117] Therefore, states have a chance to constrain the scope of the interpretation of these provisions by the tribunal, considering states' regulatory and legislative powers.[118] That is why CETA provisions on fair and equitable treatment, indirect expropriation, national treatment and exceptions contain more precise language and definitions, in order to exclude evaluative judgements by adjudicators.[119]

2.2.1. Concept of «Fair and equitable treatment»

Fair and equitable treatment is the most frequently enforced and most often effectively contended standard of investment protection.[120] Broad applicability of FET commitments has exposed its shielding effect for foreign investors but has also revealed numerous risks and equivocation.[121] As a general practice, fair and equitable treatment provisions in investment agreements are very abstract and "shed no light on the meaning of the concept", which lead to potential misinterpretation by the tribunals.[122] It is not infrequent, that arbitrators have been much criticized for deciding cases according to value judgment rather than applying a norm to the facts of a

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[116] Gus Van Harten, "The EU-Canada Joint Interpretive Declaration/Instrument on the CETA" (2016) Osgoode Legal Studies Research Paper 6/2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850281 (accessed 31 July 2017), p. 2, 6.
[117] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 27
[118] Ibid, p. 49
[119] Ibid, p. 27
[120] UNCTAD (United Nations Conference on Trade and Development), "Fair and Equitable Treatment" UNCTAD/DIAE/IA/2011/5, p. 1
[121] Ibid, p. XIII
[122] Henckels (n 116) p. 33

dispute.[123] Different tactics for interpretation varies from treaty to treaty. Various agreements merely provide that FET must be applied with no further amplifications. Others prescribe application of FET in compliance with international law, customary international law or the customary international law minimum standard of treatment of aliens.[124]

United Nations Conference in Trade and Development recommended several advices to increase the precision of treaty norms. One option is to complete broad treaty standards with detailed elucidations. Another one - to include an exhaustive or a negative list. Therefore, level of lucidity can be achieved in two ways: " (i) by specifying what the treaty obligation entails and (ii) by delineating what is not covered".[125]

The Article 8.10 in CETA guaranties that "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security (…)."[126] "Covered investments" belongs to accomplished investments, which are subject to the agreement. Hereby, the article does not protect access to market and prospective investments.[127]

In context of "full protection and security", states guarantee "the physical security of investors and covered investments".[128] This statement exclude "legal protection" from "full protection and security" principal. "Legal protection" refers to the state obligation for a stable legal environment,[129] or economic regulatory powers, [130] and quite often tribunals confirmed that "full protection and security" goes beyond just physical interference.[131] However, deficiency of this standard in the article could expand the states' "right to regulate".[132]

Then the Article provides a list of examples, which would constitute a breach of the obligation: denial of justice, fundamental breach of due process, manifest arbitrariness, targeted

[123] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 33, see also Roland Kläger, *"Fair and Equitable Treatment in International Investment Law"* (Cambridge University Press 2011) p. 86
[124] Henckels (n 122) p. 33
[125] UNCTAD (United Nations Conference on Trade and Development), "Interpretation of IIAs: What States can do" (2011) 3 IIA Issues Note, p. 8
[126] CETA Art. 8.10, Para.1
[127] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 16
[128] CETA Art. 8.10, Para.5
[129] National Board of Trade (n 126), p. 16
[130] Christoph Schreuer, "Full Protection and Security" (2010) Journal of International Dispute Settlement 1, p. 7
[131] *Siemens v Argentina*, Award, ICSID CASE No. ARB/02/8 (2007) 286, also *Azurix Corp. v The Argentine Republic*, Award, ICSID CASE No. ARB/01/12 (2006) 406
[132] National Board of Trade (n 126), p. 17

discrimination and abusive treatment of investors.[133] Exhaustive nature of the definition of FET in CETA demonstrates states' intentions "to avoid unanticipated and far-reaching interpretations by tribunals".[134] For Canada, this approach is compatible with its model treaty,[135] and note of interpretation,[136] considering experience in the framework of NAFTA[137]. As for the European Union, the Member States have assembled to elucidate this standard in order to prevent emergence of same complications, as USA and Canada in NAFTA.[138]

This approach seeks to reduce tribunals' interpretive discretion by clarifying the types of conduct that would violate fair and equitable treatment—and in some circumstances, the applicable threshold of gravity that would establish a breach.[139]

The Article 8.10 in CETA provides an exhaustive list of actions that violate the FET principle. "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security (…)."

The sense of "denial of justice" constitutes "an irreducible difficulty: the notion of fundamental procedural fairness".[140] It mainly consists of four groups of claims: violation of the benefit for trial by the court, unreasonable prolongation of the procedure, wrong application and intentional misapprehension of law by the court.[141] Moreover, Article 10.21 of CETA claims "the investor is not required to have exhausted all domestic legal means before they can bring the dispute to an arbitration tribunal", but in order to have ability to initiate proceedings for infringement of this principal, the exhaustion of legal means is obligatory condition.[142]

The principal of "due process and transparency" refers to minimum standard of protection under customary international law,[143] and means that governments must be unprejudiced in their

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[133] CETA Art. 8.10, Para. 2

[134] UNCTAD (United Nations Conference on Trade and Development), "World Investment Report 2012: Towards a New Generation of Investment Policies" (2012) United Nations Publication, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (accessed 31 July 2017), p. 147

[135] Canadian Model Foreign Investment Protection Agreement, 20 May 2004

[136] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (accessed 31 July 2017)

[137] Flavien Jadeau and Fabien Gélinas, "CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation" (2016) 13(1) Transnational Dispute Management, p. 5

[138] Ibid

[139] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 36

[140] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005), p. 98

[141] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2d edn Oxford University Press 2012), p. 179

[142] Paulsson (n 139) p. 130

[143] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at

relations with investors and transparent in decision-making process.[144] The paragraph stresses that infringement occurs only in the case of "fundamental" breach of this legal principle.[145] In this way, any failure to abide due process have to "reach a certain level of severity to be in breach of the state's obligations".[146] Thereafter, the determination of this tentative applicable margin for contravention relies on the tribunal.[147]

Protection against "manifest arbitrariness" is included to "fair and equitable treatment" in the decisions of several tribunals.[148] In view of this, the "manifest prerequisite" was incorporated to the list in order to limit the possible tribunal claims against the states.[149] Nevertheless, evaluative nature of "manifestly" and "arbitrary" concepts could lead to variety of interpretations, and Parties of the agreement failed "to achieve greater clarity—such as acting in bad faith or irrationally".[150]

In addition, paragraph 2(f) of Article 8.10, together with paragraph 3, constitute the possibility to expand the list of elements of FET obligation.[151] Without this option, tribunal in its decisions could introduce new additional abuses.[152] Nonetheless, now it provides a balance "between a fully exhaustive list and an illustrative list".[153]

2.2.2. Concept of «Legitimate expectation»

It is a common practice for the tribunals to examine the states' regulatory policy in the scope of "legitimate expectations".[154] In arbitral awards, it was mentioned as a "dominant element" of FET

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http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 18

[144] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 39

[145] CETA Art. 8.10, para 2

[146] Henckels (n 143) p. 40

[147] Ibid

[148] *Thunderbird v Mexico*, Award, NAFTA (2006) 197, *AES Summit Generation Limited and AES-Tisza Eromu Kft v The Republic of Hungary*, Award, ICSID Case No. ARB/07/22, (2010) 9.3.40

[149] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 20

[150] Henckels (n 143) p. 37

[151] CETA Art. 8.10, Para 2(f), Para 3

[152] Laura Puccio, "CETA: Investment and the right to regulate" February 2017, At a glance EPRS, available at http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599265/EPRS_ATA(2017)599265_EN.pdf (accessed 31 July 2017), p. 2

[153] National Board of Trade (n 148) p. 22

[154] Henckels (n 143) p. 37

standard.[155] From time to time tribunals apply broad approach in assessing the states' conduct,[156] and a narrow approach to the situations where it was allowed to act incompatible with those expectations.[157] In some cases the tribunal stated that the claimant could refer to "legitimate expectation" about certain way of conduct of the state, even if the latter did not make any particular commitments to the investor.[158] In others decisions tribunals assume generally applicable legislature as a commitment to investor, or publicly expressed government statements.[159]

Para. 4 of Article 8.10 constitutes, that when applying FET commitment "a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[160]

In this way, the merely breach of "legitimate expectation" does not mean independent claim.[161] Therefore, it should be taken into account by the tribunal in determining of the breach of "fair and equitable treatment" obligations, and, in case of violation of these commitments, infringement of "legitimate expectation" of the investor can overweight FET matters, listed in Para 2 Article 8.10.[162]

CETA limits the scope of "legitimate expectations" only to "specific representation", based on active actions made by state.[163] It will also allow the states to execute more broadly "right to regulate".[164] However, "specific representation" needs some clarification in terms of the form (written or verbal),[165] and character (the source of this representation – law or regulation).[166]

[155] *Saluka Investments BV v. Czech Republic*, Partial Award, UNCITRAL (2006) 302
[156] *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, 50
[157] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 37
[158] *Technicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2 (2003) 154
[159] *Enron Corporation Ponderosa Assets L.P. v Argentine Republic*, ICSID Case No. ARB/01/3 (2007), *National Grid Plc v The Argentine Republic*, UNCITRAL Case 1:09-cv-00248-RBW (2008)
[160] CETA Art. 8.10, Para 4
[161] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 23
[162] Ibid
[163] Ibid
[164] Paul Craig, *EU Administrative Law* (2nd edt Oxford University Press 2012), p. 553
[165] Nathalie Bernasconi-Osterwalder, Howard Mann, 'A Response to the European Commission's December 2013 Document „Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"' (February 2014 International Institute of Sustainable Development) available at http://www.iisd.org/sites/default/files/publications/reponse_eu_ceta.pdf (accessed 31 July 2017), p. 7
[166] Henckels (n 156) p. 38

Consequently, this "catch-all" provision gives the tribunal a broad opportunity for interpretation.[167]

2.2.3. Concept of «Indirect expropriation»

Most of the investment treaties contain provisions about expropriation,[168] which refers to the right to property as a human right.[169] Protection of investment against expropriation usually seek to find a balance between "legitimate government control" and intrusion to the right to property.[170] Moreover, it is a second most often invoked fundamental standard of international investment protection by the investors against the states.[171]

In case of direct expropriations – investor suffers a loss when transfer a legal title to the state.[172] If investors experienced effective loss of control over their property because of regulatory measures of the state – that could be grounds for a claim based on indirect expropriation.[173]

Tribunals use different approaches in determining what constitutes "indirect expropriation". Some uses "sole-effect doctrine"[174], where "substantial deprivation" of the right to property is decisive in assessing government regulatory measures.[175] Others apply "police powers doctrine",[176] when the main criterion is whether the states measures "pursues a legitimate public welfare

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[167] Nils Meyer-Ohlendorf, "Comments on Investment Protection under CETA: Good or Bad; New or Old" 2014 EcoLogic, available at http://ecologic.eu/11582 (accessed 31 July 2017) p. 3

[168] Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19 Journal of International Economic Law 27, p. 40

[169] European Convention of Human Rights (ECHR), Protocol 1, Article 1

[170] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 26

[171] Hanna Wilhelmer, "The 'Right to Regulate' in CETA's Investment Chapter – Fair and Equitable Treatment, Expropriation and Interpretative Powers" (Seminar Papers in University of Vienna 2014), p. 24

[172] Henckels (n 167) p. 40

[173] Laura Puccio, "CETA: Investment and the right to regulate" February 2017, At a glance EPRS, available at http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/599265/EPRS_ATA(2017)599265_EN.pdf (accessed 31 July 2017), p. 1

[174] Rudolf Dolzer, "Indirect Expropriation, New Developments?" (2002) 11 Environmental Law Journal 64, p. 65

[175] *SD Myers Inc. v. Canada*, Partial Award, NAFTA, 742416:01 (2000) 283

[176] Suzy H Nikiema, "Best Practices. Indirect Expropriation" March 2012 International Institute for Sustainable Development, available at http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf (accessed 31 July 2017), p.17

objective".[177][178] One more is so called "balancing approach",[179] where the proportionality of the measure is examined.[180]

Article 8.12 in CETA provides conditions for expropriation: only for a public purpose, under due process of law, non-discriminatorily and with payment of prompt, adequate and effective compensation.[181] In addition, the Parties included an explanatory Annex 8-A, which is a part if the agreement, and frames the scope of indirect expropriation through further clarifications.[182]

Annex 8-A gives a definition of indirect expropriation as measures of the state that "substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure".[183] The term "substantially" constitutes that reduction of the value of investment must be "very great, and more or less total",[184] and remains open for clarification to the tribunal. The notion of "fundamental attributes of property" refers to the investor's right to exploit revenues or expected benefits of the investment.[185]

Thereafter it provides list of factors that should be taken into account in evaluating of the states' measures: economic impact, duration, legitimate expectation of the investor and character of the measure.[186] As for the first criterion, regardless of the statement that merely negative affect of the measure on investment does not mean an expropriation,[187] it is still unclear which level of economic impact is critical.[188] Duration of the measure refers to the notion of "creeping expropriation", when investor suffers expropriation from cumulative effect of progression of regulatory measures.[189] Character of the measure refers to its object, content and intent, [190] which

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[177] Henckels (n 167) p. 40

[178] *Saluka Investments BV v. Czech Republic*, Partial Award, UNCITRAL (2006) 255

[179] Wilhelmer (n 170) p. 26

[180] *Technicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2 (2003) 122

[181] CETA Art. 8.12 Para 1

[182] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 27

[183] CETA Annex 8-A Para 1

[184] National Board of Trade (n 181) p. 34

[185] OECD (Organisation for Economic Co-operation and Development), "Indirect Expropriation' and the 'Right to regulate' in International Investment Law" (2004) OECD Working Papers on International Investment 2004/04, available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (accessed 31 July 2017), p. 15

[186] CETA Annex 8-A Para 2

[187] CETA Annex 8-A Para 2 (a)

[188] Hanna Wilhelmer, "The 'Right to Regulate' in CETA's Investment Chapter – Fair and Equitable Treatment, Expropriation and Interpretative Powers" (Seminar Papers in University of Vienna 2014), p. 26

[189] Peter D. Isakoff, "Defining the Scope of Indirect Expropriation for International Investments" (2013) 3 (2) The Global Business Law Review 189, p. 195

[190] CETA Annex 8-A Para 2 (d)

lead to proportionality analysis of the states' measures by the tribunal. In addition, including the requirement of "intent" to the concept of indirect expropriation would be hardly to prove by the investors.[191]

Non-discriminatory measures that "protect legitimate public welfare objectives, such as health, safety and the environment" are excluded from indirect expropriation, [192] which affirm provisions about states' "right to regulate".[193] However, public welfare measures would lead to indirect expropriation if their impact were "manifestly excessive in light of its purpose".[194] This require a proportionality test to determine the level of severity of the measure in light of its goal.[195] Consequently, this formulation is highly criticized for a possible detrimental effect on police measures.[196]

One of the element of legitimate expropriation is "prompt, adequate and effective compensation",[197] also known as the "Hull formula", and is highly debated in terms of the appropriate standard of compensation.[198] Therefore, in following paragraphs the Parties provided further guidance about calculating the compensation.[199] Valuation of investment must refers to "fair market value of the investment" at the time of the expropriation.[200] It refers to the principle of "restitutio in integrum" which means that damages shall compensate a loss.[201] Compensation must also contain "interest at a normal commercial rate from the date of expropriation until the date of payment". [202] However, it remains completely unclear what type of commercial rate should be applied – flat-rate interest or compound interest, which is significant when the dispute has been lasting for several years.[203]

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[191] Ursula Kriebaum, "FET and Expropriation in the (Invisible) EU Model BIT" (2014) 15 The Journal of World Investment & Trade 454, p. 465
[192] CETA Annex 8-A Para 3
[193] CETA Art. 8.9 Para 1
[194] CETA Annex 8-A Para 3
[195] Ursula Kriebaum, "FET and Expropriation in the (Invisible) EU Model BIT" (2014) 15 The Journal of World Investment & Trade 454, p. 466.
[196] Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p. 10
[197] CETA Art. 8.12 Para 1 (d)
[198] Cross (n 195) p. 10
[199] UNCTAD World Investment Report 2012, p. 148
[200] CETA Art. 8.12 Para 2
[201] Octavio Amezcua-Noriega, "Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections" August 2011 ETJN, Reparations Unit, available at https://www1.essex.ac.uk/tjn/documents/Paper_1_General_Principles_Large.pdf (accessed 31 July 2017), p. 3
[202] CETA Art. 8.12 Para 3
[203] National Board of Trade, "The Right to Regulate" in the Trade Agreement between the EU and Canada– and its implications for the Agreement with the USA" 18 September 2015, Dnr 3.4.2-2015/00532-5, available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf (accessed 31 July 2017), p. 32

2.2.4. Concept of «Investor» and "Investment"

In CETA, investor means "a natural person or an enterprise… other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party".[204] Furthermore, CETA provides more details about the concept of investor. For example, an enterprise should have "substantial business activities" in the territory of the Parties.[205]

The broad descriptions of who is investor in investment treaties leave opportunity for the treaty shopping.[206] CETA necessitates "a real economic link" with the economies of the Parties, [207] or to have real business operations there, in order not to protect "shell" or "mail box" companies.[208] Canada insisted on expanding the definition of investor also to those, who are going to make or are making investments, entailing "pre-establishment coverage",[209] which give the ability to investor so sue states in case of breach of certain obligation in "the pre-establishment phase".[210]

Nevertheless, even by preventing the abuse by mailbox companies, CETA could empower 41,811 US firms and the Canadian investors in the EU with new rights to sue the states.[211] After reorganization of their investments when a subsidiary could claim some rights on investment in one of the EU states, they could enjoy from investment protection provisions of CETA, including Investment Court System.[212]

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[204] CETA Art. 8.1
[205] CETA Article 8.1
[206] Pia Eberhardt, Blair Redlin, Cecilia Olivet and Lora Verheecke, "Trading Away Democracy. How CETA's investor protection rules could result in a boom of investor claims against Canada and the EU" (September 2016) Corporate Europe Observatory, available at https://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy (accessed 31 July 2017), p. 13
[207] Joint Interpretative Declaration, p. 3
[208] European Commission, "Investment provisions in the EU-Canada free trade agreement (CETA)" 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (accessed 31 July 2017), p. 3
[209] Nathalie Bernasconi-Osterwalder, "Commentary to the Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement (CETA)" February 2014 IISD, available at http://www.iisd.org/library/commentary-draft-investment-chapter-canada-eu-comprehensive-economic-and-trade-agreement (accessed 31 July 2017), p. 9
[210] Ibid
[211] PublicCitizen, "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP" 2 December 2014, available at https://www.citizen.org/sites/default/files/eu-isds-liability.pdf (accessed 31 July 2017)
[212] S2B, "Joint Interpretative Declaration on CETA. Unpacking the "Clarifications" on Investment Protection" 11 October 2016, available at http://www.s2bnetwork.org/wp-content/uploads/2016/10/Analysis-of-Investment-part-FINAL-interprepative-declaration-CETA-11-oct-1.pdf (accessed 31 July 2017), p. 3

III. INVESTOR-STATE DISPUTE SETTLEMENT: NOVELTY AND CRITICISM

3.1. Conditions for dispute settlement

There is a common practice for international investment agreements to include investor-state dispute settlement provisions.[213] However, legal systems of EU and Canada based on the rule of law, which guarantee protection of foreign investors with proper compensation,[214] or even, have constitution rights against abusive treatment made by the state.[215] Thereafter, investor-state dispute settlement gives foreign investors an extra judicial remedy, which could discriminate home companies and contravene fair competition on the market.[216]

Art. 8.18 of CETA provides a right to the investor to initiate the claim against one of the Parties to the Tribunal, which is constituted by the agreement.[217] Only claims considering non-discriminatory treatment (Section C) and investment protection standards (Section D) can only be submitted to the Tribunal.[218] Merely impact on the profit of the investor cannot serve as grounds for legal action.[219]

Moreover, it should be mentioned that CETA does not contain requirement for exhaustion of domestic remedies, thus investor could apply to national courts, other international tribunals, or dispute-settlement body, established by the agreement.[220] This requirement is generally not mandatory in most of investor-state arbitration provisions in investment treaties, [221] which, however, also granted privilege status for foreign investors.[222] Notwithstanding, CETA forbids to bring a simultaneous or subsequent claims to other courts.[223]

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[213] David Gaukrodger, Kathryn Gordon, "Investor-State Dispute Settlement: a Scoping Paper for the Investment Policy Community" (2012) OECD Working Papers on International Investment, 2012/03, available at http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (accessed 31 July 2017), p. 64

[214] Transport Environment, "Joint analysis of CETA's Investment Court System (ICS). Prioritising Private Investment over Public Interest" 29 June 2016, available at https://www.transportenvironment.org/sites/te/files/publications/ICS%20Joint%20Analysis%20integral%20revised.pdf (accessed 31 July 2017), p. 3

[215] Nils Meyer-Ohlendorf, "Comments on Investment Protection under CETA: Good or Bad; New or Old" 2014 EcoLogic, available at http://ecologic.eu/11582 (accessed 31 July 2017), p. 6

[216] Ibid

[217] CETA Art. 8.18 Para 1

[218] Ibid

[219] European Commission, "Investment provisions in the EU-Canada free trade agreement (CETA)" 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (accessed 31 July 2017), p. 4

[220] CETA Art. 8.22, Art. 8.24

[221] Gaukrodger (n 212) p. 76

[222] Transport Environment (n 213) p. 3

[223] CETA Art. 8.22 (f) and (g)

3.2. Introduction to Investment Court System

International investment agreements, and investor-state dispute settlement mechanism, have the aim to protect foreign investor from abused treatment of the state,[224] and make states' treaty obligations "more easily enforceable".[225] Investor-State Dispute Settlement (ISDS) is out-of-court arbitration process, that allows foreign investor to bring a claim against another state in order to challenge government decisions or to seek a compensation.[226] Investors from European Union are among the main users of ISDS system, and have already initiated more than 65% of all known ISDS claims all over the world.[227]

However, the existing systems of investor-state dispute settlement are much criticized. Divergent interpretations of weak treaty provisions lead to uncertainty and unpredictability of the results. The Vienna Convention on the Law of Treaties, constitutes that elucidation of treaty provisions must be in a broader context, considering compete legal relations of the parties.[228] Therefore, varieties of bilateral investment treaties and arbitral rules illustrate that investor-states disputes are practically never examined by "the same set of rules, neither in substantive nor in procedural terms".[229]

Another problematic is deficiency of the ability to appeal such decisions, in order to correct them or make relevant. Moreover, most of the cases are confidential. Even if most of the tribunals make decisions publicly available, the details of the case are usually kept in secret. Furthermore, growing costs of the proceedings provoked a phenomen of third-party funding, when some investment firms contributes to company's case in return of a share of the prospective compensation awarded.[230]

The original version of ICDS provisions in CETA and TTIP provoked a huge opposition in the society and academic community. A number of NGOs began public campaigns against CETA as

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[224] Marta Latek and Laura Puccio, "Investor-State Dispute Settlement (ISDS). State of play and prospects for reform" January 2015 Briefing EPRS, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (accessed 31 July 2017), p. 1

[225] Ibid, p.2

[226] Ibid, p.1

[227] UNCTAD (United Nations Conference on Trade and Development), "World Investment Report 2017. Investment and the Digital Economy" (2017) United Nations Publications, available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf (accessed 31 July 2017), p. 116

[228] Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, Article 31 VCLT

[229] Directorate-General for External Polices of the Union, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements" EXPO/B/INTA/2014/08-09-10, p. 60

[230] Latek (n 223) p. 5

a treaty entirely.[231] Others called ISDS as "one-sided dispute resolution mechanism that violates basic principles",[232] or that it makes company rights prevail over human rights.[233] The "ISDS" became "the most toxic acronym in Europe",[234] and obsolete for modern trade relations.[235] Obtaining the "right balance" between public policy choices and private security interests became the bullet point for the reform of ISDS.[236] That leaded to European Parliament resolution with a clear demand to introduce a new system, with independent professional judges and appellate mechanism.[237]

In the new version, CETA supersedes traditional method of investment dispute resolution and launces "independent, impartial and permanent investment tribunals".[238] It introduces an Investment Court System (ICS) as a two-tier mechanism for investor-state dispute settlement, which brings together elements of customary investor-state arbitration with court features.[239] The new ICS composed of the "Tribunal" as a tribunal of the first instance,[240] and the "Appellate Tribunal".[241]

The EU is promoting the ICS proposal as a new global standard,[242] and already included it to other international investment agreements.[243] In addition, CETA declares a clear intention for the

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[231] Thomas Fritz, "Public services under attack TTIP, CETA, and the secretive collusion between business lobbyists and trade negotiators" October 2015 Association Internationale de Techniciens, available at https://corporateeurope.org/sites/default/files/attachments/public-services-under-attack.pdf (accessed 31 July 2017), Pia Eberhardt, Blair Redlin, Cecilia Olivet and Lora Verheecke, "Trading Away Democracy. How CETA's investor protection rules could result in a boom of investor claims against Canada and the EU" (September 2016) Corporate Europe Observatory, available at https://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy (accessed 31 July 2017), see the 'Stop TTIP' European initiative against TTIP and CETA, available at https://stop-ttip.org/ (accessed 31 July 2017)

[232] Joseph E. Stiglitz, "How Trade Agreements Amount to a Secret Corporate Takeover" (*Huffington Post*, 18 May 2015) available at http://www.huffingtonpost.com/josephe-stiglitz/trade-agreements-amount-to-corporatetakeover_b_7302072.html (accessed 31 July 2017)

[233] Alfred de Zayas, "How Can Philip Morris Sue Uruguay Over Its Tobacco Laws?" (*The Guardian*, 16 November 2015) available at https://www.theguardian.com/commentisfree/2015/nov/16/philip-morris-uruguay-tobacco-isds-human-rights?CMP=share_btn_tw (accessed 31 July 2017)

[234] Paul Ames, "ISDS: The most toxic acronym in Europe" (*Politico*, 17 September 2015) available at http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/ (accessed 31 July 2017)

[235] European Commission, "Discussion on Investment in TTIP at the meeting of the International Trade Committee of the European Parliament" (Speech) SPEECH/15/4624

[236] Directorate-General for External Polices of the Union, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements" EXPO/B/INTA/2014/08-09-10, p. 57

[237] European Parliament, "Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)" (Resolution) P8_TA(2015)0252

[238] Joint Interpretative Declaration, p. 3

[239] August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 19 Journal of International Economic Law 761, p. 762

[240] CETA Art. 8.27

[241] CETA Art. 8.28

[242] European Commission. "CETA - a trade deal that sets a new standard for global trade" (Memo) MEMO/17/271, p. 2

[243] EU–Vietnam Free Trade Agreement, Chapter II Investment

creation with other interested parties of the international multilateral investment court.[244] United Nations Commission on International Trade Law (UNCITRAL) also supported this initiative, and created a special Working Group for starting of negotiation process.[245] According to some researchers, International Investment Court could become a proper alternative for the current ISDS system.[246] Replacement of case-by-case arbitrators by fix-termed judges is well-known precondition for judicial independence.[247] In addition, this position is also supported by UNCTAD.[248] Under this view, independence and impartiality of the judges can only be guaranteed only by "a security of tenure", which means to isolate judges from outside benefits, like reappointments or participating in the arbitration industry.[249] Hence, it would provide "legitimacy and transparency of the system", objectivity of adjudicators, and predictability and uniformity of the decisions.[250] Moreover, it gives more scope for states long-term planning in their policies.[251]

CETA's investor-state dispute provisions contain alternative dispute resolution facilities, such as amicable settlement, mediation and consultations.[252] CETA provides time guideline for the submission of the request for consultations within 3 years after the infringement was occurred, or 2 years in case of previous court proceedings.[253] Consultations must be held within a 60-day period, after the submission of the request.[254] Mediation mechanism is an innovation in treaty making, because only a few international investment agreements include such provisions.[255] Article 8.20 provide further rules about mediation procedure, appointment of mediators and final decisions.[256]

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[244] CETA Art. 8.29
[245] European Commission, "The United Nations has agreed to initiate work on possible multilateral reform of investment dispute settlement including the possible establishment of a multilateral investment court" (Factsheet) 10 July 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf (accessed 31 July 2017)
[246] Gus Van Harten, "Commentary: A case for an international investment court" (*Investment Treaty News*, 7 August 2008) available at http://www.iisd.org/itn/2008/08/07/commentary-a-case-for-an-international-investment-court/ (accessed 31 July 2017)
[247] Marta Latek and Laura Puccio, "Investor-State Dispute Settlement (ISDS). State of play and prospects for reform" January 2015 Briefing EPRS, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (accessed 31 July 2017), p. 6
[248] UNCTAD (United Nations Conference on Trade and Development), "Reform of Investor-State Dispute Settlement: in Search of a Roadmap" (2013) 2 IIA Issue Note, p. 1
[249] Ibid, p. 9
[250] Ibid
[251] Directorate-General for External Polices of the Union, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements" EXPO/B/INTA/2014/08-09-10, p. 59
[252] CETA Art. 8.19, Art. 8.20
[253] CETA Art. 8.19 (6)
[254] CETA Art. 8.19 (1)
[255] For example, Article 16.5 of the Japan-Mongolia EPA.
[256] CETA Art. 8.20

Conversely, new dispute-settlement system in CETA is still highly criticized. The opponents called it just "rebranding" of the former ISDS system,[257] and detect the same potential risk as with former ISDS provisions. Furthermore, ICS provides the same investor privileges,[258] because it creates "an asymmetric system" where only investors can sue states.[259] Moreover, this system would enable "the boom of investor claims" against EU Member States and Canada.[260]

In addition, this "Trojan Horse" would empower foreign investor in case of losing their profit to contest environmental laws and public health protection measures.[261] Among the most famous fears, is that ICS would also escalate the risk of claims against EU Member States in the mining and oil industries, where Canadian investors have substantial investment stocks,[262] and are already involved in several scandalous natural resource projects.[263]

The proponents assure that clearly defined investment protection standards, like indirect expropriation and fair and equitable treatment, would work as "a shield against unreasonable claims".[264] Thus, it would support "the rule of law", rather than "the rule of lawyers".[265] Moreover, on the contrary to "regulatory chill" effect, ICS could become a reason of "protectionist chill", when legislators would try to avoid to adopt protectionism measures, that could not be warranted by public objectives.[266]

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[257] Gus Van Harten, "Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP" (2015) Osgoode Legal Studies Research Paper 16/2016, available at https://ssrn.com/abstract=2692122 (accessed 31 July 2017), p. 1

[258] Pia Eberhardt, "Investment Court System (ICS): The Wolf in Sheep's Clothing. The EU's Great Corporate Privilege Rebrand" May 2016, Public Services International, available at http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing (accessed 31 July 2017), p. 7

[259] S2B, "Joint Interpretative Declaration on CETA. Unpacking the "Clarifications" on Investment Protection" 11 October 2016, available at http://www.s2bnetwork.org/wp-content/uploads/2016/10/Analysis-of-Investment-part-FINAL-interprepative-declaration-CETA-11-oct-1.pdf (accessed 31 July 2017), p. 3

[260] Pia Eberhardt, Blair Redlin, Cecilia Olivet and Lora Verheecke, "Trading Away Democracy. How CETA's investor protection rules could result in a boom of investor claims against Canada and the EU" (September 2016) Corporate Europe Observatory, available at https://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy (accessed 31 July 2017), p. 2

[261] Marta Latek and Laura Puccio, "Investor-State Dispute Settlement (ISDS). State of play and prospects for reform" January 2015 Briefing EPRS, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (accessed 31 July 2017), p. 2

[262] Eberhardt (n 259) p. 7

[263] Corporate Europe Observatory, "Gold Digging with Investor-State Lawsuits" February 2017, available at https://corporateeurope.org/international-trade/2017/02/gold-digging-investor-state-lawsuits (accessed 31 July 2017), p. 3

[264] Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016) European Institute of Public Administration Working Paper 2016/W/01, available at http://www.eipa.eu/files/repository/product/20160921135556_Workingpaper2016_W_01.pdf (accessed 25 July 2017) p. 9

[265] European Commission, "Discussion on Investment in TTIP at the meeting of the International Trade Committee of the European Parliament" (Speech) SPEECH/15/4624

[266] Koeth (n 263) p. 10

3.2.1. Permanent Investment Tribunal

Article 8.27 Para 2 constitutes that fifteen Members of the Tribunal shall be appointed by CETA Joint Committee.[267] In order to achieve parity and equal involvement, five members should be nationals of European Union Member States, five shall be nationals of Canada, and five Members of the Tribunal shall be third-country nationals.[268] The total amount of the Members of the Tribunal could be changed by the multiples of three. [269]

As for the qualification, it is similar to the requirements of other international tribunals.[270] Members of the Tribunal must satisfy the requirements of their countries to work in courts or as "jurists of recognised competence", with relevant expertise in the field of international investment law and resolution of investment disputes.[271] However, Parties could face some problems in nominating the Members of the Tribunal, because the pool of judges with such qualifications is not very big,[272] and positions might rather be taken by political appointees than eligible specialists.[273] Moreover, government-appointed Members of the Tribunal could have predictable prejudices to interpret the law in favour of their states.[274]

CETA provides, that the division of three Members of the Tribunal, with third-country nationals presiding over it, should hear each case.[275] In addition, members of each division for each case should to be chosen via randomised procedure.[276] From there, CETA introduced completely new approach to "the case-allocation mechanism", which is common to domestic judiciary system in many countries,[277] with a purpose to diminish investor influence.[278] This is a clear distinction from traditional investor-state arbitration procedures, when parties can choose their arbitrators for the

[267] CETA Art. 8.27 (2)
[268] CETA Art. 8.27 (2)
[269] CETA Art. 8.27 (3)
[270] August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 19 Journal of International Economic Law 761, p. 764
[271] CETA Art. 8.27 (4)
[272] Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016) European Institute of Public Administration Working Paper 2016/W/01, available at http://www.eipa.eu/files/repository/product/20160921135556_Workingpaper2016_W_01.pdf (accessed 25 July 2017) p. 13
[273] Christian Tietje "Investment Protection and Investor-State Dispute Settlement in the TTIP" in Sangeeta Khorana (ed.) *The Transatlantic Trade and Investment Partnership (TTIP). Negotiations between the EU and the USA. Caught between Myth and Reality?* (CIDOB 2014), p. 55,
[274] Koeth (n 271), p. 13
[275] CETA Art. 8.27 (6)
[276] CETA Art. 8.27 (7)
[277] Reinisch (n 269) p. 764
[278] Ibid

case.[279] Alternatively, parties of the dispute could agree on a sole Member of the Tribunal, who will be randomly chosen from third country nationals.[280]

By introducing these changes there were concerns whether new Investment Court System can still be considered as investor-state arbitration, or moved to kind of "judicial dispute settlement", and adopt "judgements", rather than "arbitral awards".[281] That is clear, that Parties need awards that can be compelled obedience by the ICSID Convention or New York Convention[282]. However, ICS could be regarded as a permanent arbitration tribunal, though its decisions could be enforced by New-York Convention.[283] Given the importance of clarification of this provisions, CETA constitutes, that all decisions of the Tribunal shall be considered as arbitral awards related to "claims arising out of a commercial relationship or transaction".[284] However, other concerns would raise if the claim will be brought against European Union as an entity, which is not part of the ICSID Convention.[285]

In order to insure independence, impartiality and availability of the Members of the Tribunal, both Parties shall pay them a monthly retainer fee,[286] which could be transformed into a regular salary.[287] However, unclear definition of "monthly retainer fee" gives a reason to believe that Members of the Tribunal will still be paid per case.[288] Consequently, they might interpret the law in favour of investors, in order to instigate more investor claims.[289] In this case, they have a risk

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[279] UNCITRAL (United Nations Commission on International Trade Law) Arbitration-Rules (adopted in 2013), Art. 9

[280] CETA Art. 8.27 (9)

[281] August Reinisch, "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" (2016) 19 Journal of International Economic Law 761, p. 762

[282] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958 (New York Convention)

[283] New York Convention, Article I (2)

[284] CETA Art. 8.41 (5)

[285] Reinisch (n 280) p. 769

[286] CETA Art. 8.27 (12)

[287] CETA Art. 8.27 (15)

[288] PowerShift, Canadian Centre for Policy Alternatives, "Investment protection and dispute settlement in CETA" (2016) Making Sense of CETA – 2nd edition 13, available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/09/Making_Sense_of_CETA_2016.pdf (accessed 31 July 2017), p. 16

[289] PowerShift, "Investment Protection in the EU-Canada Comprehensive Economic and Trade Agreement (CETA): a critical analysis" 12 May 2016, available at https://power-shift.de/wordpress/wp-content/uploads/2016/05/Powershift-Campact-TTIP_Unfairhandelbar-Analysis-InvestmentProt_CETA_May2016-final.pdf (accessed 31 July 2017), p. 4

to be marked as "for-profit arbitrators".[290] The Parties postponed adoption of "such important safeguards", hence now these treaty provisions are very weak.[291]

3.2.2. Appellate Tribunal

The Appellate Tribunal reviews awards of the Tribunal.[292] Awards of the Tribunal can be submitted to the Appellate Tribunal during 90 days after its adoption.[293] The Appellate Tribunal can "uphold, modify or reverse" the original decision, based on errors in application or interpretation of the law, facts and domestic law[294], and grounds stated in ICSID Convention.[295] However, CETA Joint Committee should determine procedure of appointment of Members of the Appellate Tribunal,[296] they will have the same requirements as the Members of the Tribunal.[297]

However, some grounds for appeal remains unclear. For example, wording as "manifest error" gives much space for the Appellate Tribunal for interpretation. I addition, CETA does not clarify the right of the Appellate Tribunal to make its own findings of facts or to refer it to the Tribunal of first instance for further enhancements.[298]

CETA is the first agreement that contain the ability to appeal awards of the Tribunal of the first instance.[299] Nonetheless, the merely existence of such mechanism, would force the losing party under the influence of the citizens (in case of the state) or shareholders (in case of a company) to challenge the Tribunal's decisions.[300] Similarly, it could increase charges and lengths of the

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[290] Pia Eberhardt, Blair Redlin, Cecilia Olivet and Lora Verheecke, "Trading Away Democracy. How CETA's investor protection rules could result in a boom of investor claims against Canada and the EU" (September 2016) Corporate Europe Observatory, available at https://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy (accessed 31 July 2017), p. 4

[291] PowerShift, Canadian Centre for Policy Alternatives, "Investment protection and dispute settlement in CETA" (2016) Making Sense of CETA – 2nd edition 13, available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/09/Making_Sense_of_CETA_2016.pdf (accessed 31 July 2017), p. 16

[292] CETA Art. 8.28 (1)

[293] CETA Art. 8.28 (9) (a)

[294] CETA Art. 8.28 (2)

[295] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States 14 October 2016 (ICSID Convention), Art. 52 1 (a-e)

[296] CETA Art. 8.28 (7)

[297] CETA Art. 8.28 (4)

[298] Preeti Bhagnani and Jade Harry, "The EU's Proposal for an Investment Court System: The ABA Investment Treaty Working Group Weighs In" (Young ICCA Blog, 3 February 2017) available at http://www.youngicca-blog.com/the-eus-proposal-for-an-investment-court-system-the-aba-investment-treaty-working-group-weighs-in/ (accessed 31 July 2017)

[299] Joint Interpretative Declaration, p. 4

[300] Christian Tietje "Investment Protection and Investor-State Dispute Settlement in the TTIP" in Sangeeta Khorana (ed.) *The Transatlantic Trade and Investment Partnership (TTIP). Negotiations between the EU and the USA. Caught between Myth and Reality?* (CIDOB 2014), p. 56

procedures, neutralizing the main benefit of investor-state dispute settlement as express verdicts.[301] However, appeal procedure could hypothetically lead to adoption of more comprehensible awards, but that does not mean their positive effects on the investor, because the Appellate Tribunal will base its decision on the same "substantive investors rights" granted in CETA.[302]

At the same time, any decision in appeal institution would have significant effect as precedents, de facto converting the Appeal Tribunal to a lawmaker.[303] Experience of national legal systems illustrates, that courts and tribunals of the first instance usually follow the legal practice of the appeal institutions even if it not legally binding, in order not to be revoked.[304] However, CETA constitutes that only CETA Joint Committee could provide binding interpretation of the investment provisions.[305]

3.3. Ethical rules for the Members of the Tribunal

Vast majority of international investment agreements do not neither contain special requirements about conduct of arbitrators, nor any challenge procedures for them in case of violation.[306] Most agreements refers to applicable arbitral rules, like UNCITRAL Transparency Rules, which make provisions for impartiality and independence of arbitrators.

Challenges for arbitrators may arise in case of existence of specific link to one of the parties, which could lead to potential bias.[307] Additionally, "issues conflict" is the most common conflict on interests. That happens when arbitrator, who participates in other arbitral cases, usually takes the same position in identical cases, referring to his previous decisions.[308]

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[301] Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016) European Institute of Public Administration Working Paper 2016/W/01, available at http://www.eipa.eu/files/repository/product/20160921135556_Workingpaper2016_W_01.pdf (accessed 25 July 2017) p. 13

[302] S2B, "Joint Interpretative Declaration on CETA. Unpacking the "Clarifications" on Investment Protection" 11 October 2016, available at http://www.s2bnetwork.org/wp-content/uploads/2016/10/Analysis-of-Investment-part-FINAL-interprepative-declaration-CETA-11-oct-1.pdf (accessed 31 July 2017), p. 4

[303] Christian Tietje "Investment Protection and Investor-State Dispute Settlement in the TTIP" in Sangeeta Khorana (ed.) *The Transatlantic Trade and Investment Partnership (TTIP). Negotiations between the EU and the USA. Caught between Myth and Reality?* (CIDOB 2014), p. 56

[304] Directoratee-General for External Polices of the Union, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements" EXPO/B/INTA/2014/08-09-10, p. 64

[305] CETA Art. 8.31 (3)

[306] UNCTAD (United Nations Conference on Trade and Development), "Investor-State Dispute Settlement" UNCTAD/DIAE/IA/2013/2, p. 94

[307] Ibid, p. 95

[308] Ibid

In order to ensure the independence of Members of the Tribunal, and prevent the rise of conflict of interest and potential prejudice,[309] Article 8.30 constitute the ethical guidelines.[310] Members of the Tribunal shall not receive orders from any government or organization, and "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement".[311] The mere fact, that a person receives remuneration from the government, does not mean any prejudice.[312] In addition, Parties showed their explicit intention to create "a code of conduct" for the Members of the Tribunal.[313]

However, there are doubts about practical effect of these rules. Firstly, there is no direct prohibition to serve like an arbitrator in other cases, which can cause conflict of interests.[314] Secondly, nothing prevents them from "private lawyering",[315] or as a counselor or expert in any other non-investment dispute, which is the most related conflict of interest.[316] Thirdly, there is "no cooling-off period" in the rotation of the Members of the Tribunal.[317] Consequently, ex-arbitrators could "reinvent themselves" as legal advisor of the investors, and challenge their former colleagues.[318] Thus, they could participate in the so-called "club of investment arbitrators", and contribute to the most of investment disputes and, consequently, stimulate investor claims against the states.[319] In addition, the fact that the Parties appoint the Members of the Tribunal, renew their terms and pay them fees may cause "pro-State" arbitration.[320]

[309] Joint Interpretative Declaration, p. 3
[310] CETA Art. 8.30 Para 1
[311] CETA Art. 8.30 Para 1
[312] CETA Art. 8.30 Footnote
[313] CETA Art. 8.44 Para 2
[314] S2B, "Joint Interpretative Declaration on CETA. Unpacking the "Clarifications" on Investment Protection" 11 October 2016, available at http://www.s2bnetwork.org/wp-content/uploads/2016/10/Analysis-of-Investment-part-FINAL-interprepative-declaration-CETA-11-oct-1.pdf (accessed 31 July 2017), p. 3, also PowerShift, Canadian Centre for Policy Alternatives, "Investment protection and dispute settlement in CETA" (2016) Making Sense of CETA – 2nd edition 13, available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/09/Making_Sense_of_CETA_2016.pdf (accessed 31 July 2017), p. 16
[315] Pia Eberhardt, "Investment Court System (ICS): The Wolf in Sheep's Clothing. The EU's Great Corporate Privilege Rebrand" May 2016, Public Services International, available at http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing (accessed 31 July 2017), p. 57
[316] Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p.12
[317] S2B (n 313), p. 3
[318] Wolfgang Koeth, "Can the Investment Court System (ICS) Save TTIP and CETA?" (2016) European Institute of Public Administration Working Paper 2016/W/01, available at http://www.eipa.eu/files/repository/product/20160921135556_Workingpaper2016_W_01.pdf (accessed 25 July 2017) p. 13
[319] Eberhardt (n 314), p. 57
[320] Preeti Bhagnani and Jade Harry, "The EU's Proposal for an Investment Court System: The ABA Investment Treaty Working Group Weighs In" (Young ICCA Blog, 3 February 2017) available at http://www.youngicca-blog.com/the-eus-proposal-for-an-investment-court-system-the-aba-investment-treaty-working-group-weighs-in/ (accessed 31 July 2017)

Nevertheless, incorporation of International Bar Association Guidelines on Conflicts of Interest in International Arbitration indicates an improvement, in comparison with other investment agreements.[321] However, the penalties for the breach of these requirements are deficient. [322] On the grounds of "conflict of interests", the Member of the Tribunal can be disqualified from hearing certain case,[323] but without any further sanctions.

In addition, there are no provision about validity of award made by this Member of the Tribunal, just as ability to cancel or review it.[324] CETA Joint Committee "may" remove a Member of the Tribunal under the recommendation of the President of the Tribunal or the Parties in case of misconduct,[325] but is "not obliged" to do it.[326] Moreover, these provisions do not forbid this former Member of the Tribunal to be reappointed again.[327] Hope, that prospective "Code of conduct" will cover these issues.

3.4. Conduct of proceedings

The original version of investor-state dispute settlement was highly criticized for the lack of appropriate transparency provisions.[328] That is why new Investment Court System provisions incorporate UNCITRAL Transparency Rules.[329] Among the more than 3000 investment agreements, only CETA provides such level of transparency covenants. [330]

Under these rules, the repository shall immediately makes "available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made".[331] Other documents,[332] such as submissions by the parties, expert statements, decisions and awards of the Tribunal or any other related documents will be openly

[321] Nils Meyer-Ohlendorf, "Comments on Investment Protection under CETA: Good or Bad; New or Old" 2014 EcoLogic, available at http://ecologic.eu/11582 (accessed 31 July 2017), p. 7
[322] Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p.12
[323] CETA Art. 8.30 (2)
[324] Cross (n 321) p.12
[325] CETA Art. 8.30, para (4)
[326] Cross (n 321) p.12
[327] Ibid
[328] Meyer-Ohlendorf (n 320) p. 7
[329] CETA Art. 8.36 (1)
[330] European Commission, "Investment provisions in the EU-Canada free trade agreement (CETA)" 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (accessed 31 July 2017), p.5
[331] UNCITRAL (United Nations Commission on International Trade Law) Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), Art. 2
[332] CETA Art. 8.36 (2)

available on the United Nations website, which will be fully funded by the European Union.[333] In addition, CETA constitutes that hearings in the Tribunal shall also be public.[334]

Nonetheless, there are essentially exceptions. The Tribunal could decide whether to disclose information or not.[335] In case of confidential information, business secrets, or information which with "disclosure would impede law enforcement", just as information which considers being contrary to the state essential security interests, this information may not be made public.[336] Moreover, the Tribunal can withhold information "where this becomes necessary for logistical reasons".[337]

Ability of the Tribunal to determine what could be disclosed, provides potential risks. One of the parties of the dispute should try to apply sensitive laws in a manner to protect its information from making publicly available,[338] and "hold in private" certain part of the hearings, in order to fulfill the requirements for protection.[339] It remains unclear how "broadly" these grounds may be used in upcoming cases.[340] Though, only future practical application of transparency rules will exhibit whether ICS provisions in CETA meet transparency apprehensions.[341]

One of the important novelties in CETA is the ability for third-party to participate in the dispute.[342] This provision permits non-disputing party, such as home-state of the investor, trade unions, non-governmental organizations to make submissions.[343] In addition, UNCITRAL Transparency rules also contains provisions, that allowed non-disputing parties to contribute to the disputes by making written submissions.[344] However, they need to fulfill special criteria,[345] that give much discretion to the Tribunal. The opponents claimed, that UNCITRAL provisions are basically corresponding the same provisions in ICSID Arbitration Rules,[346] and the latter has not meet transparency

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333 European Commission, "Investment provisions in the EU-Canada free trade agreement (CETA)" 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (accessed 31 July 2017), p.5
334 CETA Art. 8.36 (5)
335 CETA Art. 8.36 (5)
336 UNCITRAL Transparency Rules, Art. 7
337 UNCITRAL Transparency Rules, Art. 6 (3)
338 Nils Meyer-Ohlendorf, "Comments on Investment Protection under CETA: Good or Bad; New or Old" 2014 EcoLogic, available at http://ecologic.eu/11582 (accessed 31 July 2017), p. 8
339 Ibid
340 Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p.12
341 Meyer-Ohlendorf (n 337) p. 8
342 CETA Art. 8.38
343 CETA Art. 8.38 (2)
344 UNCITRAL Transparency Rules, Art. 4
345 UNCITRAL Transparency Rules, Art. 4 (3)
346 ICSID Arbitration Rules, Art 37

requirements to allow "society groups and NGOs to bring environmental or human rights concerns" during arbitration proceedings.[347]

Moreover, among the risks of amicus curiae are highly politization of the third-party, by so-called "industrial non-governmental organizations" or being funded by the states. [348] Another one, is that it can create sometimes unnecessary delay for the parties, because they need to study and reply to the submissions of the third-party.[349] In addition, there exists potential bias towards the respondent in the dispute.[350]

[347] Ciaran Cross, "Investor Protection in CETA: Gold Standard or Missed Opportunity" 1 October 2016, Greenpeace and International Centre for Trade Union Rights, available at https://business-humanrights.org/en/investor-protection-in-ceta-gold-standard-or-missed-opportunity (accessed 31 July 2017), p. 13

[348] Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration" (2010) 59(2) International Comparative Law Quarterly 373, p. 393

[349] Katia Fach Gómez, "Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest" (2012) 35 Fordham International Law Journal 510, p. 552

[350] Saravanan A, Subramanian S R, "The Participation of Amicus Curiae in Investment Treaty Arbitration" (2016) 5(4) J Civil Legal Sci 201, p. 4

Conclusions

The aim of this paper was to give an overall assessment of investor protection provisions in the Comprehensive and Economic Trade Agreement (CETA). A brief timeline of the history of the CETA shows that the European Union and Canada have a lot areas of cooperation on the different levels and in various sectors of economy. Crisis of the WTO as a driving force for trade liberalization make countries to look for another ways for elimination of trade barriers. Therefore, bilateral trade agreements became that option that both trade partners usually choose in their trade policies.

Moreover, new trade strategies, adopted in the European Union and Canada, constitutes that bilateral investment treaties is that instrument which could help to promote economic growth, boost employment and create welfare for the citizens. However, this position is the subject to debate, we have examined both sides of this theory. In addition, we provided critical analyze of the EU Commission’s forecast of the economic impact of the CETA.

We can confidently claim that investment protection provisions in CETA is the most controversial and diverging part of the treaty. For this reason, there were such big amount of participants in negotiation process, including representatives from Canadian provinces and municipal authorities, trade unions, members of business and lobby groups, and non-governmental organizations. Each of them had dissimilar positions concerning different elements of treaty, however a list of common threats were demonstrated. There were concerns, that high investment protection standards could diminish social and labour stability in the EU and Canada by lowering standards of social protection. In addition, it could interfere the ability of states to legislate in favour of protection of public health and environment.

Canada as a member of NAFTA faced already investors’ challenges of state legislative measures. One of the results of such court claims could be a situation of a “regulatory chill”, when the government cease to adopt certain laws in some economic sectors as a result of fear being sued by the investor and pay compensation.

Another sticking point was investor-state dispute settlement. ISDS mechanism usually included to investment treaties as one more guarantee for protection of investments, and CETA did not become exception. However, the opponents claimed, that advanced legal systems of the European Union and its Member States, as well as Canada, does not need extra provisions for judicial protection. In addition, it gives foreign investors an additional judicial remedy, which is discriminative in addition to domestic investors. Moreover, there is a point, that most of existing investment arbitration tribunals are "pro-investor", and are engaged in the mass of claims for financial matters.

In order to assuage all these doubts, CETA adopts new approach in determining of standards of protection. It consists of more precise language and wording, and implementing of exhaustive or negative lists in determination of some treaty obligations. This approach should seek the powers of tribunals to interpret treaty provisions in favour of investors, and provide predictability and succession in their decisions, which is crucial for long-term state's policy. Moreover, Canada and the European Union signed a Joint Interpretative Instrument, which became a binding part of the CETA, where underlying principles and commitments were reaffirmed.

Particular attention in this paper was dedicated to the balance of state's "right to regulate" and investment protection standards. States are allowed to adopt legislative measure under several conditions, such as achievement of public policy objectives and in the public interest as a purpose. However, the wording of this provisions is still criticized, because of complexity to prove the link between state's legal actions and public objectives.

As for other standards, in fair and equitable treatment CETA provides complete list of state's actions, that constitutes breach of the commitments. The exhaustive nature of this definition was warmly greeted by most of the scholars. The concept of legitimate expectation was included in fair and equitable treatment article, and realized in the form of "specific representation" that was made to investor. However, the form and the character of such "representation" remains unclear, thus give much space for interpretation for the tribunal. CETA also protects investors against indirect expropriation, and provides detailed guideline for payment of the compensation, considering fair market value of the investment at the time of expropriation and commercial rate's interest.

One of the arguments against CETA was that it would give ability for companies from other countries, in particular from USA, to sue Canada and the EU Member States via ISDS mechanism. In order to struggle with "mail" and "shell" companies, CETA necessitates a real economic link with the economy of Canada or one of the EU Member States. However, some critics claimed that simple restructure of investment actives would allow subsidiaries of US firms in Canada to fulfill these requirements and challenge governmental health and environmental protection measures.

The biggest innovation of CETA is introducing completely new investor-state dispute settlement system – Investment Court System. Considering the comments on existing dispute settlement mechanisms, CETA provides two-level court system – Tribunal, as a court of the first instance, and the Appellete Tribunal, as an appellee institution. According to EU Commission, this was the first step in to a creation of the multilateral investment court. In spite of procedure of appointment of the Members of the Tribunal, and remuneration rules, the opponents still argue that the system could have potential bias. However, inclusion of UNCITRAL Transparency rules, and prospective adoption of the Code of conduct, have all chances to improve the situation.

Throughout all the Chapters of this master thesis, we assessed different views on the CETA's investment provisions. We studied facts of the treaty, positions of the governments' officials, researched for a theoretical hypothesis, cited opinions of scholars and provided existing cases. Moreover, we tried to challenge the most popular threatens and risks, which CETA provides. As we have seen, some of them are justified. However, it is a fair assumption to say that CETA illustrated completely innovative approaches in the treaty making, but also in the drafting of the agreement. It became also a "model treaty" for the EU-Japan FTA.[351] Nevertheless, only future application of the agreement, in particular in part of investment protection, will illustrate whether CETA become a trade deal of the "new generation".

[351] Cecilia Malmström, "The Benefits of an EU-Japan Free Trade Agreement" Speech on Event at EU-Japan Business Round Table 11 July 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155745.pdf (accessed 31 July 2017)

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Abstract

Das Ziel dieser Arbeit ist es, eine Gesamtbewertung der Vorgaben zum Schutz von Investoren im „Comprehensive and Economic Trade Agreement (CETA)“ darzulegen. Das Abkommen repräsentiert aufgrund seiner substantiellen Regelungen zur Handelsliberalisierung die sogenannten “new generation”-Verträge. Außerdem kamen innovative Ansätze zur Bestimmung von Investitions-Schutzstandards zur Anwendung. Darüberhinaus wurde ein neuer Mechanismus zur Beilegung von Disputen unter Investoren und Staaten eingeführt, das „Investment Court System“. CETA ist in der EU und in Kanada immer noch Gegenstand von Kritik und Kontroversen. Die Befürworter behaupten, dass präzisere Definitionen von Schutzstandards das staatliche Recht auf Regulierung schützen würden. Auf der anderen Seite betonen Kritiker die Nachteile des Systems mit einer Bevorzugung von Investoren. In ihrem Bestreben, die wahren Gefahren von CETA abzuschätzen, konzentriert sich diese Arbeit auf eine umfassende Analyse verschiedener Studien über Interpretationen von Investitionsvorgaben und offizieller Aussagen über die CETA-Vorgaben. Der erste Teil widmet sich den politischen und wirtschaftlichen Voraussetzungen des Abkommens und seinen potentiellen Auswirkungen auf die Wirtschaft Kanadas und der EU sowie auf zukünftige Freihandelsabkommen. Die Rolle des öffentlichen Sektors während der Verhandlungen und seine Rolle bei der Formulierung der endgültigen Version des Abkommens werden hervorgehoben. Im nächsten Teil werden Investitions-Schutzstandards sehr detailliert erklärt. Dabei werden das Recht des Staats zur Regulierung, Verstöße gegen gerechte und angemessene Behandlung, das Konzept von Vertrauensschutz und die Definition von „Investor“ im Rahmen von CETA bedacht. Gesonderte Aufmerksamkeit wird auf die Struktur und Funktionalität des Investment Court Systems gerichtet. In diesem Teil werden die Verfahrensvorschriften, die Abläufe von Verfahren sowie Regelungen aus dem Bereich Ethik und Transparenz erläutert.

Summary

The aim of this paper is to give an overall assessment of investor protection provisions in the Comprehensive and Economic Trade Agreement (CETA). This agreement represents the so-called "new generation" treaties, because of its substantial trade liberalization rules. Furthermore, innovative approaches were applied in determining of the investment standards of protection. In addition, the new investor-state dispute settlement mechanism was introduced – Investment Court System. The CETA still faces criticism and controversy in the EU and Canada. The proponents claimed, that more precise definition of protection standards would safeguard the states "right to regulate". On the other hand, critics emphasized disadvantages of the system with pro-investor bias. In an effort to estimate the real threatens about the CETA, this paper will focus on comprehensive analyze of different researches about investment provisions interpretations, and official statements about the CETA provisions. First part will be dedicated to political and economic preconditions of the agreement, and its potential impact on the economy of Canada and the EU, as well as on prospective FTAs. The role of public sector during negotiations and on final version of the agreement will be emphasized. In the next part, investment protection standards will be explained in much details, considering right of the state to regulate, infringements of fair and equitable treatment, concept of the legitimate expectation and determination of investor in the CETA. Separate attention will be dedicated to the structure and functionality of the Investment Court System. In this part, the procedural rules, conduct of proceedings, ethical and transparency rules will be pointed out.