CETA AND REGULATORY CHILL

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Introduction

The by now quite famous European Union-Canada Comprehensive Economic and Trade Agreement (known commonly as CETA) was the end result of a quite lengthy negotiation process between the European Union and Canada. Even in 2002, there were plans on developing a comprehensive trade agreement between the parties.[1] As a precursor to the negotiation, the Commission submitted to the Council of the European Union a proposal, which would entitle the Commission to start formal negotiations on an economic integration agreement with Canada. The approvalwas granted in 2009. This entitlement was later amended in 2011 when the Commission got mandate to negotiate on detailed investment protection issues and investment related dispute settlement procedure. Both directives became partially public on December 15, 2015 due to the decision of the Council.[2] The amendment of 2011, mentioned above, is of critical importance for this work, as this made it possible for the CETA to contain comprehensive investment protection rules. However, we know from information leaked that the CETA draft has already contained a chapter on investment protection back in 2010. This chapter showed the influence of NAFTA, as it equated „fair and equal treatment" with the "minimum standard" of treatment of foreigners in international customary law. The term „ like circumstances" used by NAFTA was also taken over in the provisions on national treatment and most favored nation treatment.[3] NAFTA's evident influence might have been the result of Canada's outlook and the Commissions' limited authority. Thus, the draft of the CETA got significant criticism from European Union based stakeholders' groups because of the application of NAFTA's solutions, as they were unwilling to accept such a system of protection due to the many controversies surrounding it. As a result of this criticism, the Commission has partly changed its standpoint regarding the investment protection chapter in 2013, and tried to guarantee better protection for European investors' foreign investment abroad, however, these were only minor changes. Nevertheless, according to some opinions, the investment protection chapter of the CETA still shows the influence of the NAFTA.[4] The change of the Commission's position can be explained by the 2011 amendment, which gave free hand to the Commission to negotiate

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1 Delimatsis, Panagiotis: _TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy_, Tilburg Law and Economics Center Tilburg 2016. 11.

2 Press release of the Council of the European Union: http://www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/ (accessed: 20.10.2017).

3 Fontanelli, Filippo – Bianco, Giuseppe: _Article: Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States_. Stanford Journal of International Law Vol. 50, No. 2. 2014. 231.

4 Ibid. 232.

investment protection issues related to the CETA. Furthermore, the 2008 financial crisis might have affected its position, as the European Union needed capital, and the easiest way was to get it from North American investors. However, these investors likely wanted to have an investment protection system familiar to them, which would be something similar to the protection system of NAFTA.

The subsequent step of the CETA's development was on October 18, 2013 when the President of the European Commission José Manuel Barroso[5] and Stephen Harper Prime Minister of Canada reached a consensus regarding the most significant parts of the CETA. However, the details still had to be worked out.[6] The Committee on International Trade of the European Parliament, the INTA, received the text of the agreement as a classified document in August 2014.[7] The negotiations on the content of the agreement were closed in the same month. The next important step happened nearly two years later in February 2016, when the parties agreed to modify the proposed text of the agreement by introducing a new system of dispute resolution, based on the proposals of the European Commission.[8] Afterwards, in July 2016 the Commission finally made a formal proposal to the Council for signing the CETA. Here we should mention the case of Belgium, where the Vallon Regional Parliament was in the position to force Belgium to block the ratification of the CETA. This would have frustrated the conclusion of the agreement. In the end, Belgium and the European Union managed to handle the issue.[9] Thus, each member state gave consent on October 28, 2016, and the agreement was signed on October 30, 2016.[10] Subject to the decision of the Council, the CETA can be provisionally applicable, however, for it to enter into full force, the Council's decision, the European Parliament's consent, and carrying out the ratification procedure in each member state, are necessary.[11] Thus, the adoption of the CETA, on the side of the European Union, will be the result of a complex procedure, which is still not finished.

Based on what was discussed above, the CETA could thus be seen as the end result of a prolonged negotiation. It is a definite landmark for trade and investment policy in the European Union. Nevertheless, the national parliaments of EU member states must still approve the CETA before it can take full effect.

In this article, we will attempt to showcase the most important investment protection standards of the CETA, as well as present potential issues connected to them, and offer suggestions for resolving these.

2. Investment protection standards of the CETA

Contracting parties tried to avoid ambiguity regarding definitions, and to close loopholes

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[5] Currently, he works for Goldman Sachs International financial corporation.

[6] Fontanelli – Bianco, 2014. 232.

[7] Delimatsis, 2016. 12.

[8] Horváthy Balázs: *A transzatlanti kereskedelmi tárgyalások és a beruházási vitarendezés reformja.* In: Glavanits Judit – Horváthy Balázs – Knapp László (szerk.): Az európai jog és a nemzetközi magánjog aktuális kérdései. Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kar Nemzetközi Köz- és Magánjogi Tanszéke, Győr, 2016. 91.

[9] BBC: http://www.bbc.com/news/world-europe-37731955 (accessed: 20.10.2017).

[10] BBC: http://www.bbc.com/news/world-europe-37814884 (accessed: 20.10.2017).

[11] European Commission: http://ec.europa.eu/trade/policy/in-focus/ceta/ (accessed: 20.10.2017).

that were present in some of the previous international investment protection treaties. Here, we are going to analyze only a select number of standards from the CETA, deemed by the authors to be the most relevant from the article's perspective.

The first standard that should be discussed is the already mentioned „fair and equitable treatment". The first section of article 8.10 of the Agreement explicitly states that contracting parties guarantee for the investors of the other party fair and equitable treatment and full protection and security.[12] According to section 5 of the same article „full protection and security" means physical security of investors and covered investments.[13] Accordingly, „fair and equitable treatment" is dealt with in other sections of the agreement. Thus, section 2 enumerates what are the measures that breach „fair and equitable treatment" requirement. These are the followings: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the „fair and equitable treatment" obligation adopted by the Parties in accordance with paragraph 3 of article 8.10.[14] The last item of the above enumeration is discussed in section 3 of the Agreement, which states that the parties to the Agreement shall regularly, or upon request of a party, review the content of the obligation to provide fair and equitable treatment. According to the same section, the Committee on Services and Investment may propose recommendations regarding such issues to the CETA Joint Committee which makes the final decision.[15]

Though, section 2 contains a seemingly taxative enumeration, its last item and section 3 of the same article makes it possible to extend the cases of breach of „fair and equitable treatment". It is important to emphasize that item (f) of section 2 together with section 3 allow only extension. This means that measures from items (a) to (e) cannot be excluded from applying this mechanism.

It is interesting to mention that in February 2013, the draft of the Agreement did not contain such an exhaustive list, but relied on the application of general clauses. Finally, the parties diverged from the draft, with the aim to make the content of „fair and equitable treatment" clearer.[16] That is to say, instead of the general definition, they applied the above analyzed combined solution: a specific list and the possibility to extend it. This is in a way beneficial for North American investors, as treatment standards can be further extended.

The next section of article 8.10, that is worth examining regarding the analysis of „fair and equitable treatment", is section 4. This section states that in case of dispute settlement, the Tribunal[17] related to this treatment can take into account whether a party to the Agreement 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

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[12] CETA, art. 8.10. sec. 1.

[13] CETA, art. 8.10. sec. 5.

[14] CETA, art. 8.10. sec. 2.

[15] CETA, art. 8.10. sec. 3.

[16] Ünüvar, Günes: *The Vague Meaning of Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications.* Legal Interpretation in the Practice of International Courts and Tribunals, iCourts Working Paper Series No. 55, 2016. 18-19.

[17] The first instance court established by the CETA for resolving investment disputes arising under it.

the covered investment, but that the party subsequently frustrated (quasi implicit conduct of the party).[18] Thus, CETA empowers the Tribunal to take into account potential bad faith conduct of the parties to the Agreement, like luring in foreign investors with certain benefits and later revoking such, causing damages to these investors. An excellent, but extreme example for this might be the *Veolia Propreté v. Egypt* case, where a French foreign investor sued Egypt because of a rise in the monthly minimum wage, as well as other new labor regulations, and due to Egypt's subsequent refusal to modify the terms of the investment contract based on these new developments.[19]

In relation with article 8.10, section 6 and section 7 should also be mentioned. Section 6 provides that a breach of another provision of CETA, or of a separate international agreement does not establish a breach of article 8.10.[20] Section 7 states that the fact that a measure breaches domestic law does not, in and of itself, establish a breach of article 8.10.[21] These provisions aim to preclude avoidance of the application of rules stated in previous sections. Namely, if the Agreement made it possible to breach this article merely by the breach of other international agreement, of other provisions of CETA or of domestic law, the application of detailed rules laid down in section 1 could be avoided.

Related to the above-mentioned section 4 of article 8.10, article 8.9 of CETA should be discussed. Section 1 of this article states that the contracting parties keep their right to regulate to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.[22] Theoretically, this guarantees the right to regulate when it is needed for a public purpose, however, comparing it with section 4 of article 8.10 doubt might arise, due to the inevitable clash between the right to regulate for a public purpose and the investor's right to legitimate expectations. Sections 2 and 3 of article 8.9 further strengthens the right of states to regulate. Section 2 provides that the mere fact that a party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under CETA.[23] Section 3 states that not issuing, renewing or maintaining a subsidy is not a breach, provided there was no specific commitment under law or contract to issue, renew, or maintain that subsidy or to the terms or conditions attached to the issuance, renewal or maintenance of the subsidy.[24] These provisions basically function as counterbalance to section 4 of article 8.10, which tries to protect the investors against bad faith conduct of states, while these try to protect the public interest-based legislation of states.

Three further elements should be discussed as well, which are important innovation of CETA. The first one is that article 8.1 determines exactly who can be considered investor: party to the Agreement, a natural person or an enterprise of a party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the

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[18] CETA, art. 8.10. sec. 4.

[19] ICSID: https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/12/15 (23.10.2017.)

[20] CETA, art. 8.10. sec. 6

[21] CETA, art. 8.10. sec. 7

[22] CETA, art. 8.9. sec. 1.

[23] CETA, art. 8.9. sec. 2.

[24] CETA, art. 8.9. sec. 3.

territory of the other party. It is also important that enterprises under this definition should be constituted or organized under the laws of the party and has substantial business activities in the territory of that party to the Agreement. Investment is also defined by CETA.[25]

CETA also defines what constitutes an enterprise of a party. Besides requiring it to be constituted or organized under the laws of that party, it also demands it to have substantial business activities in the territories of that party. This clause was evidently designed to exclude shell corporations and enterprises from the provisions of CETA. However, CETA also recognizes enterprises that are constituted or organized under the laws of that party, and are either directly or indirectly controlled or owned by a natural person of that party or by an enterprise as described under the definition of the investor. This second category is more troubling, because it omits the "substantial business activity" clause and only requires the enterprise to be owned or controlled by a natural person of that party, or an enterprise fitting the description found in the investor's definition.[26]

The next element which should be dealt with is article 8.7. This article lays down the MFN (Most-Favoured-Nation) principle, which means that if any party to the Agreement concludes an agreement with a third party and this agreement provides for more favourable treatment to the investors of this third party, such treatment should be granted to the other CETA party as well.[27]

Section 4 of the same article can also be considered important, as it states that substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute treatment, and thus cannot give rise to a breach of CETA.[28] Hence, in theory, this precludes investors to invoke more advantageous substantial provisions from other international treaties during the dispute settlement procedure.

According to this section, an investor of a party may submit to the Tribunal a claim that the other party has breached an obligation under either Chapter 8 (chapter on investments) Section C (provisions on non-discriminatory treatment) or Section D (provisions on investment protection), and the investor suffered loss or damage as a result of the alleged breach.[29] This means that the breach of other provisions of CETA does not constitute standing for dispute settlement procedure.

All in all, we can say that CETA's chapter on investment is quite precise. It contains detailed and exact terms and standards, and there is a clear aspiration to close up back stairs. At the same time, it should be noted, especially related to section 4 of article 8.10, that despite of this attempt at precision, considerable discretion was left to the Tribunal.

3. "Regulatory chill" and the future of investment protection arbitration

There are several issues related to investment protection arbitration, both in economic and ssocial aspects. This part of the paper deals with the issue of regulatory chill and its potential effects and with the future of investment protection arbitration.

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[25] CETA, art. 8.1.

[26] CETA art. 8.1.

[27] OECD: *Most-Favoured-Nation Treatment in International Investment Law*. OECD Working Papers on International Investment. OECD Publishing. 2004/02. 2.

[28] CETA, art. 8.7. sec. 4.

[29] CETA, art. 8.18. sec. 1.

Legal disputes between foreign investors, who are usually multinational companies, and host states are often decided by international arbitration panels due to provisions in international investment agreements. Some may fear that these arbitration panels favor multinational companies (they have the incentive: more cases, more fees) and thus make governments reluctant to adopt appropriate policies. This stand in legislation due to such fear is called regulatory chill. In a wider sense, regulatory chill means that the given state's lawmaker will avoid making laws that might have generally negative effect on foreign investors, and in a narrower sense it means that they will avoid making specific laws for certain investments.

We can easily list some cases related to this issue: the *Philip Morris v. Australia* case, the *Philip Morris v. Uruguay* case (regulation related to public health), *Vattenfall v. Germany* cases (regulation related to environment), or the *Veolia v. Egypt* case (regulation related to minimum wage). In order to highlight the controversies arising around ISDS and its supposed regulatory chill effects, we are going to examine the two *Vattenfall* cases mentioned above. These cases significantly influenced German public opinion about investment arbitration, and thus deserve a deeper examination.

The first *Vattenfall* case concerned a planned power plant in Hamburg in 2009. This power plant was to be coal-powered, and was to be constructed by an investor named Vattenfall, a 100% government-owned Swedish utility company. However, problems arose where the local Hamburg government was replaced due to a local election, and the issuance of administrative permits related to emission controls, water quality and water usage were allegedly delayed by the new local government. Furthermore, Vattenfall also argued that the content of the permits themselves were not consistent with what was agreed upon with the previous local government. Thus, Vattenfall claimed that the local Hamburg government, and by extension, Germany, were in violation of the Energy Charter Treaty, specifically in relation to articles 10 (1) (fair and equitable treatment) and 13 (expropriation without compensation). Interestingly, the case never went before an arbitration tribunal, as Germany instead decided to settle the case with Vattenfall. Unfortunately, the contents of this settlement were not revealed to the public, and thus we do not know what the parties agreed upon.[30]

While it never went before an arbitration tribunal, this case still showcased the potential for conflict between international investment law and domestic regulation, environmental regulation in this particular case, which is one of the most sensitive legal topics nowadays. If the case went before an arbitration tribunal, the arbitrators would have had to decide whether the domestic environmental regulations are consistent with international investment law, specifically the Energy Charter Treaty in this case. In this hypothetical scenario, the effects of regulatory chill could have potentially been observed, as Germany could have been essentially penalized, for adopting environmental regulation that was detrimental to a foreign investor. Furthermore, the *Vattenfall v. Germany I* case also highlights that regulatory chill is not restricted to national legislation. In this particular case, the investor's alleged problems were tied to the conduct and decisions of the local Hamburg government. Which means that regulatory chill could even potentially reach local-level legislation or regulation, as the federal or central government might attempt to pressure local governments into not passing legislation sensitive to foreign investors.

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[30] Krajewski, Markus: *The Impact of International Investment Agreements on Energy Regulation*. European Yearbook of International Economic Law, 2013. 19.

While the second *Vattenfall* case also deals with conflict between the interests of a foreign investor and environmental regulation, the situation is fundamentally different, as in this case, German federal legislation was at the center of the proceedings. The case is still pending at the moment, and could have significant implications on the future of German anti-nuclear legislation, and thus environmental regulation. The background of this case lies with the Fukushima incident. In 2011, a tsunami caused significant damage to the Fukushima nuclear power plant, disabling its power supply and the cooling system of its reactors. This event led to the meltdown of the reactors, and thus triggered a serious radioactive release.[31] While the event was caused by unforeseen complications with the power supply of the nuclear power plant, international public opinion sharply turned against the usage of nuclear power in general. This paved the situation in Germany. Seeing the devastation of the Fukushima nuclear accident, the German parliament decided to amend the country's Nuclear Energy Act. The amendment ordered a more rapid phasing out of nuclear power in Germany, and the scheduled deadline for the completion of this procedure was brought forward to 2022. Besides this element, the amendment also proscribed the immediate shut-down of the oldest nuclear reactors in Germany. Vattenfall, the same Swedish company, owns and operates two of those to-be-shut-down nuclear reactors: the Krümmel and Brunsbüttel nuclear power plants.[32] The initial situation in this case shows exactly how environment-minded legislation, or environmental policy can conflict with the interests of foreign investors. Vattenfall alleged that this amendment, and especially the immediate shut-down of two of its nuclear reactors, caused it a significant loss of profits. Thus, Vattenfall initiated arbitration proceedings against Germany within the International Centre for Settlement of Investment Disputes, and also filed a lawsuit before the Federal Constitutional Court of Germany. The basis of these claims was the Energy Charter Treaty, under which Vattenfall was considered as a foreign investor.[33] The current compensation claimed by Vattenfall as a foreign investor is currently at 5.140 million USD.[34] As we can see in this situation, the environmental regulation harmful to a foreign investor's interests, immediately prompted a reaction through the reference to international investment arbitration. It is undeniable that for Germany, the second Vattenfall case has been a troubling and tiresome exercise, with no doubt significant legal fees attached. Even if it wins the case, such fees will remain. And if Germany loses against Vattenfall, the economic price will be significant even for the relatively large federal budget of Germany.

As it was mentioned above, while Germany is not particularly threatened by the damages awarded to foreign investors, its less wealthy counterparts are much more imperiled. A developing country might be more reluctant to introduce environmental legislation that might infringe with the interests of foreign investors, fearing of costly arbitration. The regulatory chill effect is very likely to loom over such cases. A host country acting in public interest is thus becoming increasingly endangered.

This can be an issue with the CETA as well. Moreover, the definition of investor in the Agreement is too broad, and almost every big US corporations have a Canadian

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[31] http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-accident.aspx (11.10.2017)

[32] Bernasconi-Osterwalder, Nathalie – Brauch, Martin Dietrich: *The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark*. International Institute for Sustainable Development. 2014. 2.

[33] Ibid. 2.

[34] http://investmentpolicyhub.unctad.org/ISDS/Details/467 (12.10.2017)

subsidiary.[35] They can try to challenge Canadian and EU environmental and other standards through the agreement's framework, as these standards are generally higher than the US ones.

Article 8.9 of the CETA reaffirms the right of the parties to regulate „within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity." Theoretically, investors without such provisions would have the right to sue the host state if it increases the minimal wages, creates more severe environmental protection rules, or just ceases granting earlier preferences, and the investor suffer damages due to these measures. Thus, it should be examined if article 8.9 is suitable to exclude the above-mentioned issues from dispute settlement procedure. The answer is not obvious to this question. Section 1 of article 8.9 enumerates certain legitimate policy objectives; however, it does not define the concept either in this article, or in article 8.1 which deals with definitions. Therefore, it can be interpreted that the determination of the content of this concept is entrusted to the courts established in the ICS system. This causes uncertainty, and there is no precedent yet.

The so-called „necessity test" could be the solution. According to this, the Tribunal should examine if such measures are necessary. However, the Agreement does not define this concept. Therefore, this causes again uncertainty for the host state.

The second section of the same article states that the mere fact of a party regulating, even if only through amendments, in a manner that negatively affects an investment, will not amount to a breach of obligations under the CETA. Similarly, the fact of a party interfering with an investor's expectations, including its expectations of profits, will not amount to a breach of obligations by itself. In our opinion, this is not sufficient. The motivation behind the fact might amount to the breach of an obligation under the CETA. And such a motivation will be examined by the Tribunal, the outcome of which will be uncertain. This might restrain states in some cases from legislating, because the necessity of the legislation will be decided by the Tribunal. In addition, as already mentioned, in the beginning there will be no precedents, which makes their decision even more unforeseeable. Thus, this might lead to the above mentioned regulatory chill.

Article 8.10 deals with fair and equitable treatment, what is also related to the issue of regulatory chill. As already mentioned above, this principle is open, enumerated cases can be extended by the Joint Committee, and section 4 practically gives free hands to the Tribunal when applying the principle. Thus, this principle in fact strengthens the position of potential investors. Although section 4's intended purpose is to prevent deceptive or malignant behavior from host states, the lax definition strengthens foreign investors and their claims, as stated before. That is to say, it can contribute indirectly to regulatory chill, since foreign investors can a claim a violation of this standard in the loosest of case.

Related to „regulatory chill" it is worth to deal with the issue of compensation. Although

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[35] According to art. 8.1 of CETA investor means a party, a natural person or an enterprise of a party, 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;

For the purposes of this definition, an enterprise of a party is:

(a) an enterprise that is constituted or organised under the laws of that party and has substantial business activities in the territory of that party; or

(b) an enterprise that is constituted or organised under the laws of that party and is directly or indirectly owned or controlled by a natural person of that party or by an enterprise mentioned under paragraph (a).

CETA prohibits punitive damages,[36] this is not enough to protect states. In the case of major investments even the compensation for the loss suffered can be a considerable amount. This can be a serious issue for member states of the European Union with scarce resources, for which even a compensation which has to be paid for a loss suffered can be a significant amount of money. This is enhanced by the fact that usually these are the states where there is need for new legislation in the social and environmental fields. Therefore, we can say that regulatory chill would cause the biggest harm to the financially vulnerable EU member states, such as Greece or the formerly socialist countries.

This leads us also to issues of fundamental rights, because, regulatory chill would potentially prevent the enforcement of second and third generation fundamental rights. These are, among others, related to the right to work, or from so-called third generation rights, the right to healthy environment, or the right to natural resources. Environmental and labor rights are of critical importance when it comes to sustainable development, yet these rights are the most threatened by regulatory chill. This is because foreign investors arguably have a vested interest in retarding the development of environmental rules and employee protection, as these legislative areas usually impose significant obligations on them, reducing their profit margins. And as private businesses, their profit margins constitute their primary and often only concern. Without legislation in these fields, the before mentioned rights would be thus endangered by the profit-seeking behavior of foreign investors and their investments.

However, there are two fundamental rights whose enforcement CETA could potentially aid in. The first is the right to private property. Due to the investment-property connection, the protection of foreign investments could be understood as a way to guarantee and strengthen the right to private property. Furthermore, the collective right to economic development can also be reinforced by CETA's investment protection scheme. This is because the importance of foreign investment, as mentioned before, has grown significantly in the recent decades. Ensuring foreign investment thus becomes one of the primary means by which governments can provide economic growth and development to its citizens. In any case, these benefits remain even more elusive than the alleged drawbacks, and thus cannot be considered to be definite advantages.

The definition of investor as defined in article 8.1 is also problematic. Although CETA excludes the possibility of establishing shell companies, the text is not precise enough to exclude companies from non-contracting states having detached subsidiary in a contracting state, in our view. This would lead to allowing, for instance, US investors to access the protections guaranteed by the CETA. Furthermore, more resourceful domestic investors can also use this method to access CETA protections and its related investor-state dispute settlement procedure against their own state of origin. At the same time, smaller domestic enterprises are in disadvantageous position, in the sense that they do not have the financial means to use the above mentioned back stairs (to establish foreign subsidiary). This could potentially distort competition between the various economic actors, since foreign investors from non-contracting states and larger domestic investors would have access to an extra method of enforceable dispute resolution, while smaller domestic investors would have to rely on domestic courts. Another problem might be that the procedure itself is extremely asymmetrical. This means that only investors can initiate proceedings in front of the tribunal, so only investors can become claimants. By contrast, states can only participate in these

[36] CETA, art. 8.39. sec. 4.

procedures as a respondent. However, states might have just cause to legal claim against investors. Obviously, states have other methods to achieve satisfaction in case the foreign investors provide just cause for them to do so, but in the process of accomplishing said satisfaction, they might open themselves up to CETA's investor-state dispute settlement procedure, as this process would inevitably clash with the interests of foreign investors.

Overall, we can say that CETA applies mostly US solutions, based on investment treaties (and the NAFTA) concluded by the United States, for investment arbitration, and one of the main problems is the issue of regulatory chill. Regulatory chill takes away the ability of host states to react to emerging social issues. And if they do try to react through legislation, their budget can suffer heavy losses, as the threat of foreign investors demanding compensation is an ever-present possibility. And if the state's budget suffers a reduction, then it will naturally lead to less social programs and public projects. In the European Union, civil protests have been used effectively to combat environmentally harmful policy decision, but with the monetary drawbacks faced by host states, these protests would have a much less significant effect on the states' decision-making. Thus, regulatory chill can potentially have a domino effect on host states, their public policy and the effectiveness of protests.

4. Conclusion

With this paper, we are also attempting to find solutions to the problems mentioned above. Here, we will present some of the suggestions that might help avoid the discussed issues.

One article that should definitively be modified is article 8.9, which gives the right to the parties to regulate. CETA should define exactly what should be understood under „legitimate policy objectives". The current solution with examples is adequate, however, there should also be a general definition for this concept. Furthermore, it would be wise to add a concrete and unambiguous provision that the Tribunal is bound by this article. Thus, if the act of the state complies with the notion of „legitimate policy objectives", irrespective of the motivation, the Tribunal cannot establish the breach of CETA related to this issue. Such amendments could significantly improve upon the lack of balance between the investor and the host state. Finally, the host states would not only formally, but also factually, be guaranteed the right to enact necessary legislation.

Furthermore, an amendment would also be prudent for article 8.10. The notion of „fair and equitable treatment" is far too broad. This should be narrowed down. We would advise to transform the currently used extendible list to a more taxative list. The provision which allows the CETA Joint Committee to extend the list should also be redacted, as well as the wide discretion given to the Tribunal in section 4 of the same article. Such actions would serve three goals: end the confusion related to the notion of „fair and equitable treatment", make the currently too investor friendly interpretable principle more balanced and neutral. And finally, it would create stability and legal certainty both for the investors and the host states, as the investors would know exactly what to expect, while the states would be aware of what legislation does not violate this principle.

It would be also wise to insert a general clause into chapter 8 of the CETA, which squarely states that investment protection cannot result in violation of fundamental rights. In addition to this, it would be necessary to regulate exactly the violation of which fundamental rights should be avoided. It should be made clear that the states would have the right to rely on these suggested hypothetical provisions during the dispute settlement procedure, and

that the Tribunal would be obliged to take into consideration these hypothetical articles. These additions would ensure, besides the amended article 8.9, that the Tribunal will not undermine fundamental rights with its awards.

Therefore, the measures described above could guarantee the avoidance of the so-called regulatory chill effect. Article 8.9 would thus reinforce the right to legislate, article 8.10 would precisely define the notion of „fair and equitable treatment", which would bring stability to both sides, and strengthen the view that public interest is not harmed due to investment protection.

Since the goal is to improve the balance of power between states and investors, there is also the possibility of introducing the initiation of legal action for states against foreign investors under the CETA. However, according to our opinion, this would not be an ideal solution, as the primary function of the dispute settlement procedure is to protect investors, and not host states against the investors. Therefore, the changes listed above would be sufficient to protect the interests of states during dispute settlements.

Similarly, we would recommend amending article 8.1. The definition of "investor" is not exact and precise enough, which might provide a chance to misuse the Agreement. Therefore, it would be reasonable to expressly exclude from this term subsidiaries which are under the control of third country investors or enterprises, or in which the majority owners are these (directly or indirectly). This might seem like a quite strict measure, but in our opinion, it is necessary to avoid the above-mentioned malversations. Shell companies must strictly be excluded from such definitions.

At the same time, it is necessary to address the situation of domestic investors. As mentioned earlier, economically stronger investors can find their way to be treated as foreign investors under CETA. However, smaller domestic investors are at a disadvantage, because they do not have the means to use loopholes. Therefore, we would suggest to make the CETA dispute resolution procedure accessible for domestic investors as well. In this case, there would be a need for special provisions. It would be particularly important to provide such possibility to domestic investors only as *ultima ratio*, as a last resort, so they should first exhaust domestic legal remedies before appealing to the Tribunal. This would presumably mitigate their disadvantageous situation. Furthermore, such solution would fit into the concept setting up of a multilateral investment protection court, which idea is supported both by Canada and the European Union. It might seem a bit strange at first glance to create such a possibility, but the authors see no other way currently to address the imbalance between foreign and domestic investors on the field of competitiveness.

To conclude our article, we can state that there is a great need for certain amendments to the text of the CETA, in order to solve the above-mentioned issues. Although, in many respects the CETA is more advanced and more detailed than BITs (Bilateral Investment Treaties) or other trade agreements, it also has certain imperfections and needs revision. This shows the landmark nature of the treaty, as mentioned earlier. Whether the CETA will manage to set a new standard for future international investment regulation, or whether it will remain as an example of an ultimately obscure international agreement, it will still be considered an important example of the current developmental phase of investment law from an EU perspective.