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EU INVESTMENT AGREEMENTS AND INVESTOR PROTECTION

The article deals with characteristics of investor protection provisions in the draft of Comprehensive Economic and Trade Agreement between Canada and European Union (CETA). The author analyses groups of CETA provisions regarding investor protection: fair and equitable treatment, direct and indirect expropriation, principles of non-discrimination, national treatment and most favored nation treatment, free transfer of funds, dispute resolution mechanism, as well as the matter of including "umbrella clause" in CETA. The author concludes that the draft CETA tends to eliminate the legal uncertainty regarding the protection of the rights of foreign investors, and introduces a new approach to the appointment of an investment tribunal.
Key words: CETA, investor protection, fair and equitable treatment, national treatment, most favored nation treatment, indirect expropriation, umbrella clause, investment tribunal.

After Ukraine's signing and ratifying the Association Agreement between Ukraine, of the one part, and the European Union, of the other part, studying the regulation of investment activity of the European Union (hereinafter – the EU) gained particular importance. With the entry into force of the Lisbon Treaty on December 1, 2009, pursuant to Article 207 of the Treaty on the Functioning of the European Union, common commercial policy is based on uniform principles, particularly in respect of foreign direct investment. That is, the competence on foreign direct investment has been transferred to the EU. EU Member States have lost the right to enter into bilateral investment agreements.

Only the EU as a subject of international law has an exclusive right to enter into agreements on foreign direct investment and the corresponding agreements of the EU Member States and third countries (around 1400 bilateral investment agreements)[1] should be replaced. As noted by H. Lentner, the competence of the EU in the investment agreement sphere marks the beginning of the development of a single EU approach to the international investment law, i.e. the so-called "unwritten" model of EU bilateral investment treaties[2], which is based on the NAFTA (North American Free Trade Agreement) model[3,4].

The EU conducts negotiations on trade agreements, which include provisions for investor and investment protection, with such countries as Canada, Singapore, Japan, India, China, the United States and others.

Currently, the EU and Canada are at the final stage of negotiations on the Comprehensive Economic and Trade Agreement between Canada of the one hand and the EU and its Member States of the other hand (hereinafter – CETA). After the negotiations, this agreement shall be approved by the EU Council and the European Parliament. Under CETA, more than 99% of tariffs between the EU and Canada shall be eliminated[5], as well as new opportunities for accessing the service and investment markets shall be created[6].

[1] *List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (European Parliament and the EU Council). *OJ L* 351, 20.12.2012, 40–46.

[2] Lentner, G. Uniform European Investment Policy?: The Unwritten EU Model BIT. *Journal of Law and Administrative Sciences,* 2, 160–161.

[3] Pantaleo, L, Investment Disputes Under CETA. Taking the Best from Past Experience? (February 27, 2016). *SSRN.* <https://ssrn.com/abstract=2739128> (February 01, 2017)

[4] Fontanelli, F. & Bianco, G. (2014) Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States. *Stanford Journal of International Law.* 50, 2, 211-245.

[5] *Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part COM/2016/0444 final 2016.* (European Commission) *EUR Lex.* <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52016PC0444> (2017, February, 01).

[6] Countries and regions. Canada. *Official website of the European Commission.* <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (2017, February, 01)

Investor protection under EU investment agreements including CETA was studied by such foreign scientists as N. Lavranos, F. Fontanelli, K. Henkels, H. Lentner, H. Wilhelmer, A. De Luca, L. Pantaleo and others.

The analysis of EU foreign direct investment treatment was conducted by D. Fedorchuk. Foreign experience of protecting investors' rights was examined by V. Stoika. The issues of investor protection in international investment arbitrations were researched by Yu. Chernykh, V. Poyedynok, V. Shestakov and others. However, in the Ukrainian studies, no attention has been paid to investor protection under EU investment agreements which the EU can conclude with the Lisbon Treaty's entry into force.

The aim of this article is to analyze the features of investor protection under CETA draft.

First of all, it should be noted that in the EU, there is no model of bilateral investment agreement with third countries. In 2010, the EU Commission stated that this model was neither possible nor desirable. The EU must take into account the specific circumstances in each negotiation, in particular, the interests of European investors, the development of partnerships with third countries, and features of the existing bilateral investment agreements of the EU Member States and those countries[1].

Negotiations on CETA conclusion officially started in 2014, while the discussion began much earlier. However, the agreement has not been signed yet. In particular, this is due the fact that the EU is still in search of a common agreed position with its strategic partners on the content of future investment chapters of free trade agreements. As stated by F. Fontanelli and G. Bianco, this is not an easy task, because on the one hand, the EU seeks to include in the agreements sufficient privileges for EU member states' investors, on the other hand, it does not want to provide wide legal autonomy to investors from third countries[2].

CETA draft is set out in Annex 1 to Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part COM/2016/0444 final, dated 05 July 2016[3]. It contains Chapter Eight (Investment), which includes investor protection provisions.

The first group of regulations to protect investors in CETA is investment treatment. Fair and equitable treatment occupies a central role in international investment treaties and is one of the standards often violated by host states. Traditionally, this concept helps protect a certain level of transparency in relation to investors, as well as their access to basic formal procedural rights in the host state. Fair and equitable treatment often includes protection of legitimate expectations of investors in the host state[4]. The principle of protection of legitimate expectations has the following meaning: changes in the investment law must be reasonably foreseeable and cannot arbitrarily deprive subjects of previously granted to them rights by means of their sudden cancellation, if these subjects reasonably acted with the assumption that these rights were unchangeable[5].

The approach on fair and equitable treatment set out in CETA draft is new. Article 8.10 of CETA Investment Chapter lists measures or series of measures that breach the obligations on fair and equitable treatment. These measures include: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and

[1] *Towards a comprehensive European international investment, COM (2010) 343 final 2010. (*European Commission*). Trade Websites: European Commission.* <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf>(2017, February, 01)

[2] Fontanelli F., Bianco G. (2014) Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States. *Stanford Journal of International Law*. 50, 2, 241.

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[4] Wilhelmer, H. (2014) The 'right to regulate' in CETA's investment chapter – fair and equitable treatment, expropriation and interpretative powers. *Website of Institut für Europarecht, Internationales Recht und Rechtsvergleichung*.
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harassment; or other breach of fair and equitable treatment obligations. This concretization has been made to eliminate "unwelcome" (according to the EU Commission) discretionary interpretation of legal norms by members of the investment tribunal[1]. The concept of legitimate expectations of the investor is limited to situations where a specific promise or statement was made by the state. Article 8.10 of CETA Investment Chapter guarantees full protection and security to investors.

Thus, a more progressive approach to determining fair and equitable treatment is implemented in CETA, as its draft determines concrete actions that are violations of this treatment as well as provides physical security for both investors and their investments.

Indirect expropriation is the second key standard of international investment agreements, which is often violated by host states. In the international investment law, expropriation (under certain conditions) is an established right of the host state. Expropriation is not prohibited, but its legitimacy is limited to four criteria[2]. Thus, in accordance with Article 8.12, CETA Investment Chapter, a Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except: for a public purpose; under due process of law; in a nondiscriminatory manner; and on payment of prompt, adequate and effective compensation.

In the case of ordinary (direct) expropriation when an investor incurs losses due to the transfer of property title, it can be found out easily. It is accompanied with a commitment to compensate the investor losses in the amount of fair market value of the property. However, detection of indirect expropriation is more challenging. It refers to situations when government actions negatively affect investor's property[3].

Regarding indirect expropriation, CETA draft differs from the traditional approach of the EU. The draft includes not only the prohibition of illegal expropriation, but also limits the scope of indirect expropriation through additional clarification and providing definition of indirect expropriation in Annex 8A. According to provisions of this Annex, direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. Indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it 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.

According to CETA, the determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, factbased inquiry. Several factors should be taken into account. Firstly, attention should be paid to the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred. Secondly, the duration of a measure or series of measures, its/their extent as well as its/their character, notably its/their object, context and intent should be considered.

Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

Another group of CETA provisions, relating to the protection of third countries' investors in the EU, comprises principles of non-discrimination, national treatment and most favored nation treatment. CETA's difference from the existing model of investment agreements of the EU Member States lies in the fact that its provisions apply to the investment admission to the market, while this matter is not usually regulated

[1] Investment provisions in the EU-Canada free trade agreement (CETA) 2013 (European Commission) *Trade Websites: European Commission.* <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (2017, February, 01)

[2] Wilhelmer, H. (2014). The 'right to regulate' in CETA's investment chapter – fair and equitable treatment, expropriation and interpretative powers. *Website of Institut für Europarecht, Internationales Recht und Rechtsvergleichung*. <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wilhelmer.pdf> (2017, February, 01)

[3] Wilhelmer, H. (2014). The 'right to regulate' in CETA's investment chapter – fair and equitable treatment, expropriation and interpretative powers. *Website of Institut für Europarecht, Internationales Recht und Rechtsvergleichung*. <https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wilhelmer.pdf> (2017, February, 01)

by bilateral investment agreements[1]. As for other issues, these standards are generally the same, although they have undergone significant detailing in comparison with classic bilateral investment agreements concluded by EU Member States.

We share C. Henckels' opinion, who notes that the draft CETA rules including those on a fair and equitable treatment, indirect expropriation, and national treatment contain more specific provisions than most existing bilateral investment treaties. Yet these provisions continue to provide broad powers to investment arbiters through the use of evaluative concepts such as "manifest arbitrariness", "rare circumstance", "manifestly excessive", "necessary" and others[2].

The provisions on the transfer of funds are an important guarantee for the protection of rights of foreign investors. Therefore, these standards are included in all bilateral investment treaties between EU Member States and third countries[3]. Such agreements guarantee investors the free transfer/conversion of funds related to their investments, including: contributions to capital, such as principal and additional funds to maintain, develop or increase investments, profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the investments etc. Article 8.13 of CETA contains several exceptions when restrictions on freedom of transfer of funds are allowed, for example in the case of bankruptcy, insolvency or protection of creditors' rights, transactions with securities, criminal or penal offences etc.

Current investment agreements do not always regulate exceptions to restrictions on freedom of transfer. For example, the Agreement between the Government of the Republic of Hungary and the Government of Canada for the Promotion and Reciprocal Protection of Investments[4] does not contain such limitations, while the Energy Charter Treaty, on the contrary, provides them (Article 14)[5].

Almost 40% of the total number of bilateral investment treaties in the world include "umbrella clause", which has a different formulation and is contained in different chapters of the agreements[6]. As noted by K. Ksenofontov, the essence of "umbrella clause" is to include into the text of the bilateral investment treaty the clause that the host party agrees to comply with any assumed obligations regarding investments carried out in its territory by citizens or legal entities of the other party. This provision is intended to erase the differences between the breach of contractual obligations and the breach of bilateral investment agreement – any behavior that violates the contract will automatically become grounds for filing a lawsuit to the competent arbitration under bilateral investment treaty, which was violated[7].

The matter of including "umbrella clause" in CETA draft is controversial. "Umbrella clause" is not contained in the final version of CETA draft. First, this is due to the fact that the EU Member States do not have a common approach to the advisability of its inclusion in the contract[8]. Second, Canada has a practice, which excludes protection of investors by using "umbrella clause". Canada has never included such provisions in its bilateral investment treaties.

In 2010, the Council of the European Union released its attitude to such provisions – they can be included in the agreement only "when necessary"[9]. As the judicial practice of international investment arbitration is characterized by lack of unity on the issue of the interpretation and application

[1] Lentner, G. Uniform European Investment Policy?: The Unwritten EU Model BIT. *Journal of Law and Administrative Sciences,* 2, 160.

[2] Henckels, C. Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP (2016). *Journal of International Economic Law, Forthcoming, 19(1).*

[3] De Luca, A. Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT (2014). *The Journal of World Investment & Trade*. 15, 3/4, 521.

[4] *Agreement between the Government of the Republic of Hungary and the Government of Canada for the Promotion and Reciprocal Protection of Investments* (Hungary – Canada) (Adopted 3 October 1991) E101513 – CTS 1993, 14

[5] *The Energy Charter Treaty* (adopted 17 December 1994, entered into force 16 April 1998) OJ L, 380, 24 (ECT) <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (February 03, 2017)

[6] Черних, Ю.С. (2009). Інвестиційний арбітраж: на перетині міжнародно-правового публічного та приватного регулювання. *Приватне право і підприємництво, 8,* 188.

[7] Ксенофонтов, К.Е. (2014). Зонтичные оговорки как механизм защиты иностранных инвестиций. *Законодательство и экономика*. 5, 51.

[8] Lentner, G. Uniform European Investment Policy?: The Unwritten EU Model BIT. *Journal of Law and Administrative Sciences,* 2, 161.

[9] De Luca, A. (2014). Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT. *The Journal of World Investment & Trade*. *15, 3/4,* 523.

of the "umbrella clause"[1], we believe this is another reason of the "umbrella clause" not having been included in CETA draft.

Proper dispute resolution mechanism is an important guarantee for the protection of investors. According to Article 8.27 of CETA, the Tribunal shall be established to decide claims submitted pursuant to CETA investment chapter. The CETA Joint Committee shall, upon the entry into force of CETA, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada 11 and five shall be nationals of third countries. Members of the Tribunal shall be appointed for a five-year term, renewable once.

Contrary to the traditional approach to the settlement of investment disputes, a tribunal will consist of members nominated by the EU and Canada, rather than by the investor and the respondent state. This model has been adopted from the practices of tribunals that settle disputes between the parties regarding the interpretation or application of bilateral investment treaties. Thus, according to Article 11 of Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments[2], investment tribunal shall be created for a particular case, each contracting party shall appoint one member of the tribunal and these two members shall then elect the third member – a national of a third state, who shall be chairman of the tribunal.

It should be noted that, according to CETA draft, the Tribunal shall only resolve disputes concerning non-discrimination rules (Section C of CETA investment chapter) and investment protection (Section D). Complaints relating to other matters shall not be accepted by the Tribunal (Article 8.18 of CETA). In particular, denial of access of foreign investors to the market, even if it implies violation of obligations under CETA, may be appealed only by CETA parties, i.e. by the EU and Canada and not by investors[3]. In the bilateral investment agreements entered into by the EU Member States, such exceptions are not usually given. For example, according to the Agreement between Ukraine and the Republic of Slovenia on the Mutual Promotion and Protection of Investments[4], arbitration can resolve "the dispute which may arise between a Contracting Party and an investor of the other Contracting Party regarding an investment of that investor in the territory of the first Contracting Party". The Agreement between the Government of the Republic of Poland and the Government of Canada for the Promotion and Reciprocal Protection of Investments signed on 06.04.1990 [5]makes reference to: "… dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as expropriation …or transfer of funds…".

Thus, the draft CETA tends to eliminate the legal uncertainty regarding the protection of the rights of foreign investors. First, it reveals in CETA's specifying the terms which have no clear framework and can be widely interpreted by investment tribunals. Thus, the draft agreement contains a list of measures, which define infringement of fair and equitable treatment, outlines the scope of the concept of legitimate expectations of investors and provides expanded definition of indirect expropriation. Second, CETA doesn't contain provisions for the protection of investors having varying practice of application and interpretation, such as "umbrella clause". Third, CETA contains a small amount of evaluation concepts as compared to existing bilateral investment treaties, although some definitions that can be interpreted discretionary by a tribunal, are retained in the draft agreement.

In addition, CETA introduces a new approach to the appointment of an investment tribunal, according to which members shall be appointed by the parties of CETA, i.e. by Canada and the EU, not by disputing parties. Cases that can be resolved by Tribunal are directly limited to violation of non-discriminatory rules and investment protection provisions.

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