The relevance of CETA's international investment protection for the EU precaution-ary principle

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1. Executive summary CETA inter alia protects Canadian investors in the EU against expropriation and covers the right to fair and equitable treatment.

2. In chapter 8, CETA includes international investment protection obligations that entail the risk of restricting the EU's capacity to regulate according to the precautionary principle. Although some improvements have been made compared to earlier investment protection agreements, these improvements are not sufficient to fully safeguard the precautionary principle.

3. Notwithstanding the integration of some limitations into the investment protection provisions and a reference to the right to regulate, the CETA agreement threatens the capacity to issue regulation in application and realization of the precautionary principle in so far as it creates new international obligations of the EU towards Canadian investors which could lead to investorstate disputes subject to arbitration. These obligations are also likely to decrease the EU's willingness to apply the precautionary principle in cases where its application could lead to such disputes.

4. Moreover, there are ambiguities in the text of the investment protection provisions, and there is no settled case law for interpreting these provisions with legal certainty. Hence, there is a risk that the CETA Investment Tribunal will interpret investment protection obligations in a way that restricts regulatory measures by the EU aimed at the application of the precautionary principle.

5. In addition, the future realization of the precautionary principle in the EU is threatened by the interplay between the CETA investment protection chapter and trade provisions from other CETA chapters, as these provisions contain several value judgments that could impair the realization of the precautionary principle, as was shown by foodwatch's study "CETA, TTIP and the precautionary principle" in June 2016. Although the investment chapter provides that, in arbitration proceedings, infringements of trade provisions would not automatically amount to a violation of obligations towards Canadian investors, the relevant clause is not sufficiently comprehensive and clear.

6. Thus, there is a significant risk that the protection of Canadian investors will be understood in the light of CETA trade obligtions which are highly problematic for the precautionary principle. This would concern a broad range of present and future EU regulations aiming at protecting health, the environment and consumers.

7. Through the interplay between the CETA investment protection chapter and other CETA chapters, EU regulatory measures may lead to compensation claims of Canadian investors before the CETA Investment Tribunal. This can provide an incentive to the EU to abstain in advance from precautionary regulation.

B. Introduction

In June 2016, Foodwatch published a study on "CETA, TTIP and the EU precautionary principle" which critically scrutinized whether provisions in the CETA draft and the EU proposals on TTIP endanger the continued effective application of the EU precautionary principle. Subject of the analysis were provisions on sanitary and phytosanitary measures, technical barriers to trade and regulatory cooperation.

As already remarked in that study, provisions on international investment protection envisaged in both treaties may also have an impact on the EU precautionary principle. The precautionary principle is particularly dependent on dynamically developing regulation. International investment protection may impair upon such regulatory freedom, because it aims for protecting the investor's trust in the stability and the status quo of the regulatory framework found when deciding to invest in the host state, and which might have even been assured to the investor.

This study aims at analyzing whether investment protection may threaten the continued application and fulfillment of the EU precautionary principle. The main focus of analysis is on the current CETA draft, the text of which has been finalized by the EU and Canada. As for TTIP, only EU negotiation proposals on an investment protection chapter by the EU Commission are officially available. These do not provide full certainty as to how the final treaty text will be drafted. As the exact wording of the relevant provisions is of great importance for their correct interpretation, the legal analysis is limited in this regard. However, it should be noted that the currently available EU TTIP proposals are in many ways similar to the final CETA provisions, and some conclusions on CETA may thus be relevant for TTIP as well.

C. Tensions between CETA's international investment protection provisions and the EU's precautionary principle

CETA entails international investment protection provisions in its chapter 8. Therein, the EU undertakes the reciprocal obligation vis-à-vis Canada to accord to Canadian investors and investments certain special additional international protection. Only in 2009, the EU gained the competence to do so, and thus enters uncharted territory. So far, only some EU member states concluded bilateral investment treaties with Canada: Estonia, Croatia, Poland, Rumania, Slovakia and Hungary. In line with long standing practice amongst OECD states, the other EU member states never concluded any such treaties with Canada, despite the fact that some of them had a long-standing policy practice regarding international bilateral investment pro-tection. CETA's investment protection chapter is by and large structured similarly to these earlier bilateral investment treaties. However, in its details, it includes a series of new and amended provisions as a reaction to increasing public criticism on the system of international investment protection. In particular, CETA foresees that these international investment protection obligations shall be enforced through a special international dispute settlement organ. Whereas international investment agreements so far often provided for international arbitral investment tribunals, composed of private arbitrators appointed by the parties to the dispute, CETA envisages to create an international investment court.

In recent years, there has been a substantially increasing number of international investment protection disputes and investment arbitral proceedings. Increasingly, state measures protecting health, the environment and consumers became the subject of such proceedings. There is concern that states will abstain from adopting measures for the protection of health, environment and consumers to avoid being sued for violating international investment protection obligations (the so-called regulatory chill effect).

Moreover, critics contend that states run the danger of having to pay compensation for measures taken for the protection of health, environment and consumers. These potentially high amounts can prove to be a substantial burden for public budgets.

This may also have consequences for regulations which aim for putting into practice the precautionary principle. The precautionary principle prescribes that the EU must continuously evaluate scientific developments and scientific uncertainty, and adapt its regulations accordingly if and when necessary in order to achieve high standards of health, environmental and consumer protection. In essence, the precautionary principle stipulates that the European Union under certain conditions can and sometimes even must take measures in the event "of a potential risk, even if this risk cannot be fully demonstrated or quantified or its effects determined because of the insufficiency or inclusive nature of the scientific data", as pronounced by the European Commission in its Communication from 2000 (EU COM (2000) 1 final). These measures may cause losses to investors and thus might induce investors to file CETA investment protection proceedings against the EU and claim compensation.

In the current CETA text, there are some minor improvements in comparison to earlier international investment agreements. Nevertheless, CETA's investment protection can threaten the realization of the European precautionary principle, as it creates new and additional international obligations of the EU to protect Canadian investors and investments (C.). Constraints on the precautionary principle can, moreover, emerge from the linkage of the investment protection chapter with other chapters and provisions of CETA as part of a single, comprehensive agreement (D.).

D. Risks for the realization of the precautionary principle through CETA's investment protection chapter

CETA's investment protection chapter inter alia creates international obligations of the EU to protect Canadian investors against expropriations, as well as to guarantee fair and equitable treatment. If the EU takes regulatory measures on the basis of the precautionary principle, this may violate the aforementioned investor rights. Canadian investors would be in a position to sue the EU before the CETA Investment Tribunal and demand compensation.

As a reaction to the increasingly critical discussions on international investment protection law, the negotiating parties included new provisions in CETA which aim for opening more regulatory space for the protection of health, the environment and consumers. However, these in principle welcome improvements are not sufficient. CETA investment protection disciplines still bear the risk of restraining the EU in regulating with the aim of giving effect to the precautionary principle.

I. Right to regulate

As one of the new investment protection provisions, CETA explicitly enshrines the right to regulate of the CETA parties. Earlier international investment protection agreements lack such an explicit provision. Most international arbitral tribunals derived such a right to regulate for other international investment agreements from the states' sovereignty and their obligations to protect their population and the environment. However, investorstate arbitral tribunals did not decide uniformly in this regard, no "established jurisprudence" could be observed. Likewise, it remained controversial if the host state of an investment was under an obligation to pay compensation even if it could legally invoke a right to regulate.

CETA's right to regulate clause may in principle cover measures on the basis of the precautionary principle. It appears that this clause covers the main aspects of health, environmental and consumer protection, and also clarifies that the frustration of an investment or investors' expectations do not in themselves constitute a violation of investment protection rights.

However, the systematic connection of this provision with the subsequent rules on investment protection is not crystal clear. On the one hand, one may argue that the right to regulate operates as a legal justification if and after a violation of investment protection obligations by a CETA party, hence for example by the EU, has been established. Then, the investor would only need to demonstrate why there was a violation of an investment protection obligation. It would be on the respective CETA state party to rely on the right to regulate and prove why its requirements are fulfilled in the given case. On the other hand, due to its systematic location introducing the investment protection chapter, one may perceive the right to regulate as a provision which informs the subsequent obligations on the protection of investors, both having to be read together. Then, legally making use of the right to regulate would already preclude a violation of these investment protection obligations. In this perspective, in an investorstate dispute, the onus would be on the investor to demonstrate why the measure at issue went beyond the right to regulate in order to claim a violation of the rights in the investment protection chapter.

It is clear that there is a decisive difference between the two interpretative conceptions as regards who is required to state the facts and who bears the burden of proof. In the first interpretative alternative, explicitly mentioning the right to regulate in the CETA text would have the meaning of reflecting and specifying current international investment protection law. In the second alternative, the provision would have a greater importance. Inter alia, it could cause the burden of proof to shift to the investor. However, it is an open question whether this second interpretative approach will be brought to bear in practice. CETA's text allows for such an interpretation, but is too ambiguous to consider it the only and clear meaning of the provision on the right to regulate.

II. Risks for the realization of the precautionary principle notwithstanding limitations of investment protection clauses

Furthermore, CETA provisions contain limiting language which restricts the scope of investment protection rights in comparison to other free trade agreements and bilateral investment agreements. The central investment protection rights with the greatest practical significance are the protection against expropriations and the right to fair and equitable treatment. Both rights are guaranteed by CETA.

1. The right to fair and equitable treatment

Art. 8.10 CETA encompasses the right to "fair and equitable treatment", which is one of the well-established investor rights in international investment protection law. According to it, investors and their investments are guaranteed to be treated fairly and equitably, including full protection and security.

The right to fair and equitable treatment is concretized in subparagraphs in CETA and oriented towards the observation of core principles of the rule of law. Furthermore, CETA treaty organs are obliged to review the content of the fair and equitable treatment obligation, giving CETA the character of a so-called "living agreement".

2. Protection against expropriation

Another fundamental element of international investment protection law is the protection against expropriation. International investment agreements commonly define the notion of "expropriation", preconditions for its legality, and in which form compensation must be paid.

Art. 8.12 para. 1 CETA includes the standard formulation in international investment protection law on the definition of expropriation and encompasses direct as well as indirect expropriations. However, CETA further concretizes the protection against expropriation in its Annex 8-A. The Annex defines forms of direct expropriation and also elaborates on the definition of indirect expropriations. The latter are determined as measures having an equivalent effect to direct expropriations, which is the case if a state measure 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. Moreover, as a further concretization, a violation of the obligation must be based on a case-by-case analysis that takes into consideration, among other factors, the economic impact of the measure, its duration and the extent to which reasonable expectations are interfered with. To be considered is also whether a single or a series of measures is at stake.

In Art. 8.12 para. 3 CETA, it is clarified that non-discriminatory measures which are designed and applied to protect legitimate public welfare objectives like health, safety and the environment, generally do not constitute indirect expropriations except that their impact is so severe in light of its purpose that they appear manifestly excessive.

3. Assessment of CETA's investment protection rules

The provisions and mechanisms presented limit at least in parts the protection against expropriation and the right to fair and equitable treatment in comparison to common provisions in other international investment agreements. They contribute to safeguarding the application of the precautionary principle by the EU to a certain extent.

However, it must be underlined that CETA creates a special international investment protection system. Notwithstanding the mentioned improvements in the details, CETA still creates special international rights for foreign investors and their investments. These entail rights to a treatment in accordance with the rule of law and to protect aspects of property which may be enforced against the treaty parties – the EU and Canada – through international judicial investor-state proceedings. It follows that CETA's investment chapter restricts both treaty parties' capacities to regulate.

In addition to the constraints arising from national and European law, the EU (and indirectly also its member states) also need to conform with investment protection law, which requires to examine possible violations for each envisaged regulatory measure separately. It is reasonable to conclude that CETA's investment chapter discourages the willingness to regulate, inter alia in continuously realizing the EU precautionary principle, notwithstanding the welcomed inclusion of a provision on the right to regulate.

The presented discouraging effect on regulatory activity is not insignificant. Often it is highlighted that the rule of law standards for the protection of property and investments in Canada, the EU and its member states go beyond the standard established by CETA's investment chapter. However, international investment protection even in the more advanced form agreed upon in CETA is not very concrete and its scope not very clearly defined. The international arbitral investment jurisprudence is far from uniform. Also, CETA's new provisions are open to interpretation in the future. Therefore, CETA's investment protection provisions do only scarcely provide for orientation and legal certainty. By establishing an international investment arbitration mechanism separated from the national and EU court system, the treaty parties run the risk that similar international investment protection provisions and EU as well as national standards are interpreted differently, causing legal uncertainty. Hence it is quite certain that the necessary administrative effort in preparing regulatory initiatives will increase, because the envisaged measures and the regulatory procedure must be scrutinized in the light of the named less structured international obligations. Taken together, these legal uncertainties and the greater administrative effort restrains the EU's regulatory space to continuously realize and give effect to the precautionary principle.

Even more, it remains unclear if the EU may justify measures based on the precautionary principle by reference to international obligations stemming from other international treaties. This concerns, for example, the Cartagena Protocol on Biosafety to the UN Convention on Biological Diversity, ratified by the EU.

These concerns cannot be countered by arguing that the Federal Republic of Germany's regulatory leeway is already substantially constrained by international investment agreements concluded in the past, which cover investment protection obligations and international investment arbitration. Firstly, this line of argument does not apply to the EU, which has only concluded a few international investment agreements. The EU is thus still in the position to minimize the constraints on its regulatory activity by additional and less predictable international investment protection obligations. Secondly, it is not convincing to consider the overtaking of new obligations to be innocuous by referring to already existing problematic in-vestment protection obligations.

4. Impact of the joint interpretative declaration by the EU and Canada, and the EU's unilateral declaration on the precautionary principle

Before Canada and the EU signed CETA, both parties issued a joint interpretative declaration on CETA. In addition, the EU brought forward an additional unilateral declaration with reference to the precautionary principle. However, in effect, these declarations do not contribute to safeguarding the precautionary principle and its application by the EU. The joint interpretative declaration, for example, only confirms the already existing other international obligations of the CETA parties with relation to the precautionary principle. However, the precautionary principle is guaranteed much more extensively in EU law than in international law. The EU's unilateral declaration does not substantially contribute to safeguarding the precautionary principle either. Apart from its ambiguous content, it remains unclear and questionable if such a unilateral declaration does produce any binding legal effect vis-à-vis Canada.

D. Impairment on the realization of the precautionary principle through the connection of the international investment protection chapter in CETA with other CETA chapters

Special consequences for the CETA investment chapter's impact on the precautionary principle follow from the close connection of that chapter to other chapters of the treaty. As will be demonstrated in this section, this may cause additional risks for the EU's capacity to continuously give effect to the European precautionary principle.

In the past, international investment protection was predominantly provided in separate bilateral international agreements. CETA follows an emerging trend to integrate such provisions into international trade agreements. CETA and comparable agreements cover extensive provisions on trade as well as a chapter on investment protection. These different parts of the agreements address very different questions and are also designed differently.

In particular, in an area of relevance for the precautionary principle, closer and problematic ties between these different parts of a trade agreement may be observed. In CETA's "trade part", there are a number of provisions on regulation which are suitable to threaten the continuous realization of the EU precautionary principle, as spelled out in the foodwatch study referenced above. These provisions on regulations aim for reducing so-called non-tariff barriers to trade. Apart from their reference to trade, they may also have an impact on investments.

For example, it is conceivable that the EU prohibits the use of a certain substance as a food additive due to risks for consumers' health. Such a measure would on the one hand be measured against CETA's trade provisions as concerns trade with this respective substance, and could possibly violate these.

At the same time, such a prohibitive measure could have an impact on the business of a Canadian investor in the EU who imports, produces, processes or markets this substance or its products. It is part of international investment protection's logic that the company, respectively the investor behind it, may then claim compensation before CETA's Investment Tribunal, and that the EU would have to defend its prohibitive measure as regards the undertaken investment protection obligations.

In light of the close connection between CETA's trade obligations and investment protection provisions, the question arises if a violation of a trade obligation automatically results in a violation of investment protection provisions. This question is central for giving effect to the European precautionary principle. As demonstrated in Foodwatch's study referenced above, these trade provisions are quite restrictive and in their extent rather unclear, thereby seriously threatening the continuous realization of the European precautionary principle. Would these rules constitute the standard to be applied to investment protection obligations, the "right to regulate" laid down in CETA's investment protection chapter would arguably be impeded to a large extent. In addition, investment protection and especially the threat of claims for compensation by Canadian investors against the EU could provide rather strong incentives against taking measures to give effect to the precautionary principle.

CETA's investment protection chapter entails a provision which demonstrates that the CETA parties were aware of this problem, and which seems to solve it at first glance. Art. 8.10 CETA, which covers the right of an investor to fair and equitable treatment, stipulates in its paragraph 6:

> *"6. For greater certainty, a breach of another provision of this Agreement [...] does not establish a breach of this Article."*

Thereby, it is clarified that the EU does not violate against its obligation to fair and equitable treatment vis-à-vis Canadian investors only by the fact that it took a measure which violates against the rather restrictive and not very clearly confined trade obligations of CETA.

However, Art. 8.10 para. 6 CETA does only concern the investor right to fair and equitable treatment, and does not cover CETA's other international investment protection obligations. This is true especially for the rules on expropriation in Art. 8.12, which do not contain any clarification comparable to Art. 8.10 para. 6. Of particular relevance could be cases of indirect expropriation in which a measure or a series of measures, as defined in Annex 8-A no. 1 b) CETA, "substantially deprive 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".

To determine indirect expropriations, it is possible to take into consideration "the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations", as stipulated in Annex 8-A No. 2 c) CETA. This formulation may allow the investor to refer to the expectation that the EU would comply with all CETA provisions, including the trade obligations. Interfering with this expectation could thus contribute to qualifying the respective measure as an indirect expropriation. This shows that CETA's trade obligations on regulations may indeed operate as a standard with an impact on CETA's invest-ment protection, more precisely on whether a measure is qualified as an indirect expropriation. In the example of the prohibition of the use of a substance as a food additive mentioned above, an investor who owns a facility in the EU which produces that substance may claim that, in view of the restrictive CETA trade obligations, he expected to be allowed to continue to produce and market this substance. By this argument, it could be easier to argue that a measure constitutes an indirect expropriation. Interfering with the expectation of compliance with CETA trade rules which restrict regulation thus can be a means to establish that a measure is an indirect expropriation.

On the other hand, the provisions on indirect expropriation also cover limiting passages which are relevant for the cases discussed here. Annex 8-A No. 3 CETA stipulates: "For greater certainty, 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, non-discriminatory 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." This passage should give effect to the "right to regulate". However, there is the risk that its indefinite notions are defined and concretized in light of CETA's trade obligations, too. In the example presented above, the Canadian investor could arguably claim that the EU does not follow "legitimate" public welfare objectives, because the EU had precisely accepted the restrictive CETA trade obligation not to take such a prohibitive measure. He could then argue that if the EU had undertaken such an obligation, a ban in breach of this obligation cannot constitute a "legitimate" public welfare objective in the sense of CETA. The clause aiming to safeguard the regulatory space of the parties to CETA would then not apply to the case.

Thus, there is a danger that a violation of a CETA trade obligation at the same time constitutes a violation of a CETA investment protection obligation. In particular, it is conceivable that in future disputes the CETA-Investment Tribunal will understand and develop the rather indefinitely worded investment protection provisions on expropriations in the light of CETA's trade obligations which threaten the continuous realization of the EU's precautionary principle.