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Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada

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1. Introduction

The present study offers an analysis and evaluation of the free trade agreement between Canada and the European Union, CETA (Comprehensive Economic and Trade Agreement), from a labour perspective. The examination is based on the now consolidated text of the agreement, published by the European Commission on 26 September 2014.[1] It concentrates on those areas that are of particular relevance to labour and trade unions. The study encompasses both a cross-sectoral analysis of the general provisions of the agreement and an overview of the potential impact on various branches.

In common with other trade agreements CETA comprises a framework agreement on various areas – such as trade in goods, services, investments – that are supplemented by specific lists of reservations pertaining to the EU and Canada. Both elements – framework agreement and list of reservations – form the basis of the present analysis.

In April 2009 the Council of the European Union conferred on the European Commission the negotiating mandate for the trade agreement with Canada.[2] This provides for the gradual and reciprocal liberalisation of trade in goods and services, as well as of trade-related norms, which goes beyond the level of commitments already entered into in the World Trade Organisation (WTO). The first round of negotiations took place in October 2009. In September 2011 the negotiating mandate was extended and henceforth empowers the Commission to negotiate also on the insertion of investment protection provisions, including an 'investor-to-state dispute settlement mechanism', in CETA.[3] This option was brought into being with the Lisbon Treaty, which declared foreign direct investment a basic EU competence.

At the Canada–EU summit on 26 September 2014 the European Commission and the Canadian government announced the formal conclusion of the CETA negotiations. Nonetheless, the text of the agreement may still be amended because the ratification process has not yet begun (see Annex). The agreement still has to undergo a process of 'legal scrubbing' so that it can then be translated into all the official languages of the EU. Formal submission to the European Council and the European Parliament for their assent can thus be expected not before the second half of 2015.[4] In the meantime the text may be modified.

Remarks made by EU Trade Commissioner Cecilia Malmström, according to which only 'minor clarifications and adjustments' could be made, are due rather to political

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[1] Consolidated CETA Text, published on 26 September 2014, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[2] Consejo de la Unión Europea 2009: Recomendación de la Comisión al Consejo de autorizar a la Comisión a entablar negociaciones para un acuerdo de integración económica con Canadá. Brussels, 22. April 2009, 591/09.

[3] http://www.bilaterals.org/?eu-negotiating-mandates-on&lang=en

[4] Bundestag, EU Liaison Office, Debate on the EU's Comprehensive Economic and Trade Agreement with Canada (CETA), report from Brussels, 12/2014, 22 September 2014.

than to legal considerations.[5]Contractual commitments for the EU could emerge at the earliest with the Council decision on CETA's signing and a possible provisional application of the agreement. The agreement will come to be binding under international law only with the Council decision on its conclusion.[6]

The Council – in contrast to the Commission – advocates the classification of CETA as a 'mixed agreement', which must be ratified by both the EU (Council and European Parliament) and the member states. The Council has stressed that it will not give its consent to the conclusion of CETA as an EU-only agreement, which would require only the approval of the Council and the European Parliament.[7] A report commissioned by the German Federal Ministry of Economic Affairs confirms the view of the German government, according to which CETA contains several regulatory areas that do not fall under exclusive EU competence thus requiring national ratification procedures in all member states. What makes CETA a mixed agreement are individual provisions on investment, transport, recognition of qualifications, health and safety and the manufacturing of pharmaceuticals.[8]

In contrast to previous EU free trade agreements the European Commission does not want CETA to be initialled by the two sets of negotiators before signature by the Council and the European Parliament, as this is not legally required.[9] In fact, Article 218 TFEU (Treaty on the Functioning of the European Union) – which regulates the negotiation and conclusion of international agreements by the EU – does not provide for initialling, but merely resolutions on the signature and conclusion of international agreements.

2. Liberalisation Commitments and General Exceptions

Like other free trade agreements CETA contains general liberalisation commitments, such as tariff elimination, market access, the non-discrimination principles of national treatment and most-favoured-nation treatment, as well as – a distinctive feature – investment protection standards, such as fair and equitable treatment and the prohibition of direct and indirect expropriation. Both parties to the agreement have

[5] http://www.euractiv.com/sections/trade-society/malmstrom-only-minor-adjustments-isds-trade-deal-canada-309906

[6] Rathke, Hannes 2014: Fragen zur Zuständigkeitsverteilung zwischen EU und Mitgliedsstaaten sowie zur Ratifikation des Abkommens über eine Transatlantische Handels- und Investitionspartnerschaft (TTIP). Deutscher Bundestag, Fachbereich Europa, PE 6 – 3000 – 49/14, 19 March.

[7] Council of the European Union 2014: 3311th Council Meeting, Foreign Affairs, Trade Issues. Press Release, Brussels, 8 May 2014, 9541/14.

[8] Mayer, Franz C. 2014: Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement) ein gemischtes Abkommen dar? Legal opinion for the Federal Ministry of Economic Affairs and Energy, 28 August 2014.

[9]Wire report: HAPOL CETA 12.9.2014

registered reservations with regard to these liberalisation commitments, however. These exceptions can be found, inter alia, in specific EU and Canadian lists of reservations, in sector-specific chapters of the agreement and in the general chapter on exceptions (Chapter 32). In addition, there are institutional provisions, such as those on the establishment of various committees to accompany implementation of the treaty (Chapter 30), as well as on the conduct of general dispute settlement proceedings – a so-called 'state-to-state' procedure as it can be initiated only by official representatives of either side (Chapter 33). If no agreement can be reached in the course of such a dispute settlement procedure the claimant has the right to suspend its own liberalisation commitments or to demand damages from the defending party (Article 14.13: 'Temporary remedies in case of non-compliance').

General exceptions: CETA's chapter on general exceptions (Chapter 32,) provides a framework– for retaining or adopting certain state regulations in the public interest (whether with regard to labour and social law or environmental and consumer protection). This chapter includes Article XX ('General Exceptions') of the WTO's GATT Agreement of 1994 permitting measures that are necessary for the protection of public morals, protection of human, animal or plant life or health, protection of exhaustible natural resources or measures related to the products of prison labour. Apart from the reference to prison labour, however, this article contains no reference to labour and social standards. It is imaginable that workplace safety measures might be justifiable on grounds of their health purposes.

Furthermore, all measures based on GATT Article XX must satisfy further conditions: they may not represent '*arbitrary or unjustifiable discrimination*' between countries '*where the same conditions prevail*'. Nor may they represent a '*disguised restriction on international trade*'. They must also be 'necessary' to carry out their respective purposes ('*necessary to protect human, animal or plant life or health*'). All these conditions give a tribunal tasked with adjudicating a dispute considerable scope for interpretation, while state authorities cannot be sure whether their measures will be deemed to comply with liberalisation commitments.

The imported GATT Article XX applies only to a part of CETA's chapters, including those on market access for goods, rules of origin and parts of the investment chapter. Article X.02 para 2 of CETA's chapter on general exceptions also contains other reservations referring to the chapters on Cross-border Trade in Services, Telecommunications, Temporary Entry and Stay of Natural Persons and also parts of the investment chapter. This article permits, inter alia, measures that are 'necessary' for the protection of security and public order or to secure compliance with laws or regulations (data protection, safety, protection against fraud). Besides the necessity test such interventions would have to undergo, measures to protect security and public order may be taken only in the event of a 'sufficiently serious threat' to the fundamental interests of society. Also in this paragraph specific labour and social standards are lacking, with the exception of the protection of health and data protection.

This is aggravated by the fact that the general exceptions in Article X.02 refer only to two sections of the investment chapter (Sections 2 and 3), but not to Sections 4 and

6. Section 4 contains the substantive investment protection standards (fair and equitable treatment, indirect expropriation), while Section 6 contains the investor-to-state dispute settlement procedure (see Chapter 4). Due to this loophole, state measures deemed to be protected by CETA's general exception clauses may still lead to claims for damages before international arbitration tribunals.

Employee data protection: Article X.02.2(c)(ii) enables as a general exception measures aimed at protecting privacy and confidentiality of data:

> *the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.*

However, as sections 4 and 6 of the investment chapter remain applicable to the general exceptions, data protection provisions or legal amendments in this area could be construed as infringements against the fair and equitable treatment of investors or as a form of indirect expropriation. This could also affect employee data protection, which in any case has been very weak to date. Although the subject of parliamentary debate for some years now, there is currently no specific law in Germany on employee data protection. Regulations of this kind are to be included in the EU's General Data Protection Regulation currently under negotiation. Whether this will represent progress for employee data protection at national level remains to be seen, however.[10] In any case, it would potentially be vulnerable under the current version of CETA rules.

Capital movements: The chapter on general exceptions also contains some restrictive reservations on capital movements and balance of payments difficulties. If capital movements 'in exceptional situations' endanger the economic and monetary union the EU may take safety measures, which have to be 'strictly necessary' and may not last longer than six months (Article X.03: *Temporary safeguard measures with regard to capital movements and payments*). EU member states that do not belong to EMU experiencing balance of payments difficulties may also restrict capital movements. However, also in this instance this shall apply only if they avoid 'unnecessary damage to the commercial, economic and financial interests' of the other party to the agreement (Article X.04: *Restrictions in Case of Balance of Payments and External Financial Difficulties*).

Taxation: The general exceptions on taxation also appear to be questionable. Although Article X.06 ('Taxation') allows the parties to adopt tax regulations that discriminate against foreign-based persons, investors or companies, certain tax

[10] http://www.heise.de/newsticker/meldung/EU-Datenschutzreform-Arbeitnehmer-haben-das-Nachsehen-2390338.html; http://www.deutschlandfunk.de/it-gipfel-arbeitnehmerdatenschutz-bleibt-auf-der-strecke.697.de.html?dram:article_id=300933; DGB opinion on the EU basic regulation on data protection, 12.9.2012: http://www.dgb.de/themen/++co++b302e502-0ef7-11e2-823f-00188b4dc422

changes may be subject to the so-called 'ratchet mechanism'. This mechanism means that a modification of a specific measure may not 'decrease its conformity with the provisions of this Agreement'. Article X.04 para 4 states:

> *Nothing in this Agreement or in any arrangement adopted under this Agreement shall apply: (…) to an existing non-conforming taxation measure not otherwise covered in paragraphs 1, 2, 4(a) to (e), to the continuation or prompt renewal of such a measure, or an amendment of such a measure,* ***provided that the amendment does not decrease its conformity with the provisions of this Agreement as it existed immediately before the amendment***.[11]

The practical consequence is that certain tax amendments may only be permitted when they enhance the conformity with CETA's basic liberalisation requirements. To that extent, amendments may only be more 'liberal', not more restrictive or discriminatory. However, which tax measures might actually be affected by the ratchet mechanism is not clear from the wording of this article.

Nonetheless, investor-to-state arbitration on tax measures is, in principle, permissible, according to Article X.06 para 7. In this case, however, the EU and Canada have the option of determining, in bilateral consultations, whether a tax regulation violates the non-discrimination obligation and investor protection. Such 'joint determination' shall be binding on an investment tribunal (Article X.06.7(3)). However, experience to date with the subsequent interpretation of individual clauses by parties to treaties shows that investment tribunals scarcely consider themselves to be bound by them. For example, the interpretation of the standard of 'fair and equitable treatment' agreed on in 2001 by the parties to NAFTA was largely ignored by investment tribunals (see Chapter 4.2 below).

3. Trade in Goods and Removal of Customs Duties

As far as trade in goods is concerned, CETA is much more significant for Canada than for the EU. Canada ranks only twelfth among the EU trading partners, while the EU ranks second among Canada's partners, after the United States (total imports and exports). In 2013, 1.8 per cent of EU goods exports went to Canada (with the value of 31.6 billion euros); the share of Canadian goods in total EU imports was 1.6 per cent (with the value of 27.3 billion euros). Over the past 10 years Canada has generally maintained a trade deficit with the EU (with the exception of 2011). In 2013, both Germany and the EU as a whole had a trade surplus with Canada of over 4

[11] Emphasis added.

billion euros, respectively.[12] Germany imported goods with a value of 4.4 billion euros from Canada in 2013, while exports reached 8.8 billion euros.[13]

Customs duties are already very low: EU tariffs on Canadian imports are around 1 per cent, on average, while Canadian tariffs on EU goods average 2.56 per cent. Germany exports mainly vehicle and machinery products to Canada, as well as chemical products, with cars being by far the most important item. Significant German export products on which Canada imposes tariffs are cars (6.1 per cent tariff rate) and automotive parts (3.16 per cent tariff).

Germany imports from Canada mainly raw materials (iron ore, hard coal, copper, aluminium) as well as vehicle and machinery products. In the EU raw materials are already mainly tariff-free. Important Canadian goods on the German market on which customs duties are still imposed include turbojet parts (average tariff 1.43 per cent), other aircraft (2.33 per cent) and gears (2.41 per cent) (see Table 1).[14]

Table 1: Top 10 German imports from Canada

Rank	Sector code (HS 1996)	Description	Sector	Trade volume (in million USD)	Tariff rate (in %)
1	2601	Iron ores	Minerals	394	0
2	8411	Turbojets,pts	Vehicle manufacturing	372	1,43
3	2701	Coal	Minerals	224	0
4	2603	Copper ores	Minerals	217	0
5	3004	Medicaments	Chemicals	157	0
6	8802	Other aircraft	Vehicle manufacturing	143	2,33
7	1201	Soya beans	Agri-Food	129	0
8	7118	Coin	Manufacturing	118	0
9	8483	Gears etc.	Mechanical	116	2,41

[12] European Commission, Directorate-General for Trade, Trade with Canada, 27.8.2014.

[13] Destatis, Außenhandel: Rangfolge der Handelspartner im Außenhandel der Bundesrepublik Deutschland 2013, Statistisches Bundesamt, Wiesbaden 2014.

[14] Aichele, Rahel/Felbermayr, Gabriel 2014: CETA: Welche Effekte hat das EU-Kanada Freihandelsabkommen auf Deutschland? IFO Schnelldienst 24/2014, Jg. 67, 22 December 2014, pp. 20–30.

			engineering		
10	8803	Aircraft parts	Vehicle manufacturing	88	1

Source: Aichele/Felbermayer 2014:*CETA: Welche Effekte hat das EU-Kanada Freihandelsabkommen auf Deutschland?* IFO Schnelldienst 24/2014, Jg. 67, 22 December 2014, p. 24.

With the exception of some agricultural products CETA eliminates tariffs on all goods (see Chapter X: *National Treatment and Market Access for Goods*). The bulk of tariffs will be eliminated on the agreement's entry into force, while a small part of them will be phased out three, five or seven years later (Annex X.5: *Tariff Elimination*). Tariffs on industrial products will be removed entirely at the latest seven years after CETA's entry into force.[15]

4. Investments

CETA's chapter on investment also covers investments in the services sector (corresponding to GATS mode 3). It contains a very broad capital-based definition of investments (Article X.3). Accordingly, an 'investment' is any form of asset controlled directly or indirectly by an investor and that exhibits the characteristics of an investment (such as capital expenditure, profit expectation, assumption of risk). By way of example, the list includes enterprises, shares, stocks, bonds, business loans, concessions, construction, production and revenue sharing contracts, as well as intellectual property rights. Services concessions that play an important role in municipal provision of basic services can thus, under some circumstances, come under investment protection. Services concessions were only recently included in the EU package of directives on public procurement, although with significant derogations with regard to water supply, rescue services and municipal loans.

According to the CETA definition, an 'investor' can be either an enterprise or a natural person of a party. Branches and representative offices, on the other hand, are excluded from this definition. A further provision lays down that companies must sustain 'substantial business activities' in the EU or Canada in order to count as 'investors'. The EU's intention with this clause is to rule out 'letter-box' companies. What constitute 'substantial business activities', however, is not further specified and thus open to interpretation. Based on the broad notion of 'investment' it might be enough for a Canadian investor to hold some shares in an EU company to be counted as engaging in 'substantial business activities' and thus be eligible to CETA's investment protection.

[15] European Commission, CETA: Summary of the final negotiation results, December 2014.

The other provisions of the investment chapter concern establishment, non-discrimination, investment protection standards, investor-to-state dispute settlement (ISDS) and public debt.

4.1 Establishment and Non-Discrimination

Establishment (market access, performance requirements): The provisions on *market access* (Article X.4) refer to state measures at all administrative levels (local, regional, national). They prohibit several market-access requirements that impair investment and in particular with regard to the number of foreign enterprises – for example, through numerical quotas, monopolies, economic needs tests – the value of the investment, the quantity of output, limits on foreign capital participation or the number of people employed in a sector or company. Also prohibited are requirements that prescribe the choice of a particular legal form of association for a company. *Performance requirements* (Article X.5) prohibit the prescription for investors of 'a given level or percentage of domestic content' or the purchase of domestic goods and services.

Various state regulatory measures could come into conflict with market access obligations, such as denial of operating licences in order to prevent predatory competition. Measures of this kind could be interpreted as prohibited quantitative restrictions. This is relevant, for example, with regard to the granting of licences to shopping malls, supermarkets, transport operators, clinics and law firms.

Besides that, market access rules step up the privatisation pressure on savings banks. Some German *Länder* allow savings banks (*Sparkassen*) to create share capital, which harbours the risk of privatisation due to the capital's tradability. For this reason *Länder* have capped the transferability of share capital and have restricted its purchase to public sector institutions. These measures could be interpreted as CETA violations, however, because quantitative restrictions of capital participation and requirements concerning the legal form of association were involved (on this see Section 12.9 below).[16]

Non-discrimination (national treatment, most-favoured-nation treatment): *National treatment* (Article X.6) requires that the parties to the agreement ensure treatment for investors from the other party that is no less favourable than the treatment of its own investors in 'like situations'. All state measures that serve to improve the position of domestic companies as against foreign companies violate this principle. This applies in principle also to subsidies and other privileges, unless specific exceptions apply (see Chapter 7 below). Moreover, this principle also applies to indirect or de facto discrimination. Formally neutral state measures that apply similarly to domestic and

[16] Seikel, Daniel 2011: Wie die Europäische Kommission Liberalisierung durchsetzt: Der Konflikt um das öffentlich-rechtliche Bankenwesen in Deutschland, Max-Planck-Institut für Gesellschaftsforschung, MPIfG Discussion Paper 11/16. Ver.di 2008: Gegen die Privatisierung von Sparkassen in Hessen: Dokumentation einer Kampagne, Berlin, March.

foreign suppliers may nevertheless count as violations of national treatment if it can be proven that foreign suppliers are affected in a particular or exclusive way.[17]

Most-favoured-nation treatment stipulates that the parties to the agreement ensure that investors from the other party receive no less favourable treatment than investors of all other third countries in like situations. As in the case of national treatment, formally neutral state measures can be considered de facto discrimination if they affect suppliers of individual third countries disproportionately.

4.2 Investment Protection Standards

This section of the investment chapter contains substantive protection standards such as fair and equitable treatment and protection against expropriation. The fair and equitable treatment standard (Article X.9) is the most widely used protection standard in ISDS procedures. Tribunals have interpreted it to mean that it grants investors a right to a 'stable and predictable' regulatory environment that meets their 'legitimate expectations'. Legislative changes or the introduction of new regulatory requirements are vulnerable in this way. The European Commission claims, however, that the definition of fair and equitable treatment in CETA is likely to restrict the interpretative scope of investment tribunals. To that end, Article X.9 lists a number of situations that are to represent a violation of fair and equitable treatment, and links 'legitimate expectations' to a 'specific representation' from the state towards investors.

However, it is doubtful that the listed situations – such as denial of justice, breach of due process, manifest arbitrariness – would prevent tribunals from broad interpretations because previous attempts at specification, such as those undertaken by the NAFTA states some years ago, proved fruitless.[18] Furthermore, investors base their grievances on precisely the same situations listed in CETA. Thus, for example, the company Lone Pine, in its investment suit against Canada, complains that the fracking moratorium in the Canadian province of Quebec is 'arbitrary, capricious and illegal'.[19] In another case an ICSID tribunal found that the Argentine province of Santa Fe had disregarded the 'legitimate expectations' of water utility Suez by refusing to allow rate increases and thus had violated the principle of fair and equitable treatment.[20]

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[17] Krajewski, Markus/Kynast, Britta 2014: Auswirkungen des Transatlantischen Handels- und Investitionsabkommens (TTIP) auf den Rechtsrahmen für öffentliche Dienstleistungen in Europa, Studie im Auftrag der Hans-Böckler-Stiftung, Erlangen-Nürnberg, 1 October 2014.

[18] Porterfield, Matthew C. 2013: A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals. IISD, 22 March.

[19] http://www.canadians.org/media/lone-pine-resources-files-outrageous-nafta-lawsuit-against-fracking-ban

[20] Suez vs. Argentine, ICSID Case No. ARB/03/17, Decision on Liability, 30.7.2010.

Furthermore, it is not clear what is to be understood by a 'specific representation'. Instead of restricting the application of the fair and equitable treatment clause, this provision could lead, alarmingly, to its extension. For example, it is feared that 'specific representation' could also have the function of an 'umbrella clause'.[21] As widely interpreted by international arbitration tribunals an umbrella clause encompasses all obligations that states or state authorities have entered into with regard to investors, regardless of whether they are of a legal or a treaty-based nature.[22] A government's 'specific representations' towards investors could include not only verbal assurances but also contractual obligations. As a consequence, any violation of a commercial contract between state authorities in the EU and Canadian investors could be interpreted as a violation of CETA, which opens the door to its dispute settlement mechanisms.

The umbrella clause thus elevates normal contractual disputes, which are usually dealt with under national contract law, to the international level of a trade agreement. This also applies to contracts that do not provide for international arbitration. Thus the umbrella clause enables an incalculable number of potential investment disputes that will no longer be handled by national courts, but by international tribunals.

CETA contains another significant substantive protection standard in the form of direct and indirect expropriation (Article X.11), the latter being of greater relevance these days. The definition of this standard in a special annex (Annex X.11, p. 183) is also supposed to prevent a broad interpretation. However, it, too, is scarcely adequate to narrow the scope of interpretation and effectively protect the right to regulate. Indirect expropriation is defined as a measure or series of measures whose effect is similar to expropriation, in that it 'substantially deprives the investor of the fundamental attributes of property in its investment'. By contrast, only government measures that are non-discriminatory and are 'applied to protect legitimate public welfare objectives', such as health, safety and the environment, are permissible. This qualification is subject to the further reservation that such measures may not be 'manifestly excessive' with regard to their intended purpose (Annex X.11.3). However, what constitutes a 'legitimate public welfare objective' and what measures are to be regarded as not 'excessive' remains open to broad interpretation.

Given the broad scope for interpretation, indirect expropriation finds frequent application in arbitration tribunals. An ICSID tribunal, for instance, ruled that the denial of an operating licence for a hazardous waste landfill by the Mexican authorities in Guadalcávar constituted indirect expropriation.[23] In the case *Vivendi vs Argentina* another ICSID tribunal also found indirect expropriation (in addition to a violation of the fair and equitable treatment principle). After disputes with the local

[21] Sinclair, Scott et al. 2014: Making Sense of CETA. An Analysis of the Final Text of the Comprehensive Economic and Trade Agreement, Canadian Centre for Policy Alternatives, September 2014.

[22] Marshall, Fiona 2011: Risks for Host States of the Entwining of Investment Treaty and Contract Claims: Dispute Resolution Clauses, Umbrella Clauses, and Fork-in-the-Road. IISD, Best Practices Series, Bulletin 4.

[23] ICSID 2000: Metalclad versus Mexico, ICSID Case No. ARB(AF)/97/1, Award, 30.8.2000.

authorities of Tucumán province, where Vivendi had obtained a concession to supply water, the French utility terminated the concession agreement and claimed damages. The provincial authorities refused to allow increases in charges and complained of poor water quality.[24] Many other measures could clash with this protection standard, such as the rent cap recently adopted in Germany to protect tenants from sharp rent increases. This could be interpreted as interfering with property of foreign investors engaged in Germany's housing stock.

General exceptions: Article X.14 on general exceptions exempts procurements and subsidies from certain provisions of the investment chapter. According to Article X.14.5 the principles of market access and non-discrimination do not apply to public procurements and subsidies. However, these areas are not excluded from the specific investment protection standards of fair and equitable treatment and indirect expropriation. As a consequence, claims against certain public tenders or subsidies could be based on these two protection standards.

4.3 Investor-to-State Dispute Settlement (ISDS)

The investor-state procedure provided for in CETA refers to the so-called 'post-establishment' phase. According to Article X.1.4, investor claims before arbitration tribunals related to 'establishment' are exempted. Nonetheless, the non-discrimination principles and the chapter's specific protection standards shall apply. The European Commission points out that the procedure contains some reforms, such as greater transparency (hearings would be public, documents accessible and opinions of third parties possible). Confidential documents remain classified, however (Article X.33 and Article X.34). It will also still be possible to go before an international tribunal without having previously exhausted national legal remedies (Article X.21).

Parallel claims also remain possible, along the lines pursued by, for example, Vattenfall in the wake of Germany's renunciation of nuclear power. After the German government took the decision to amend the Atomic Energy Act in 2012 the Swedish company filed a suit both before the Constitutional Court in Karlsruhe and before the ICSID in Washington. Vattenfall grounded its constitutional complaint in Karlsruhe on the assertion that the amended Atomic Energy Act would infringe its property rights.[25] Shortly before that the company had already initiated the ICSID proceedings in order to pursue its claim for damages of 4.7 billion euros via a private arbitration tribunal.

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[24] In the case *Vivendi vs Argentina* the tribunal of the World Bank's arbitration court (the International Centre for Settlement of Investment Disputes, ICSID), besides a violation of the fair and equitable treatment standard, found indirect expropriation, since Vivendi had terminated its water supply concession in the Argentinian province of Tucumán due to disputes with the local authorities concerning charges and water quality. See: ICSID 2007: *Vivendi vs Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

[25] http://www.zeit.de/wirtschaft/unternehmen/2012-07/vattenfall-atomaustieg-klage

In this connection CETA only prohibits simultaneous claims *for damages* before a tribunal and a national court concerning the same matter (Article X.21.1). However, it is not prohibited to pursue a claim before a national court *on the legality* of a measure and, at the same time, to file a suit *for damages* before an international tribunal.[26] This is exactly what Vattenfall did. Thanks to CETA it may also be possible in future for Canadian investors to proceed along two tracks against German requirements: before national courts and before international tribunals.

One of the most blatant shortcomings of arbitration tribunals – the lack of an appeal body – remains in place. On this CETA merely provides that the Committee for Services and Investments to be established under the agreement should carry out consultations (Article X.42). The outcome remains open, however. As there has been no agreement to date on the establishment of an appeal body it is doubtful that this will change substantially after the agreement comes into force.

4.4 Annex on Public Debt

The Investment chapter also contains an annex on public debt (Annex X: Public Debt), which concerns rescheduling of government bonds and other debt instruments. This is relevant to situations of the kind experienced by Greece with its debt 'haircut' in 2012. The annex regulates negotiated debt restructurings, which would include, according to Article 3, not only comprehensive debt swaps, as in the case of Greece, but also modification of bonds and other debt instruments.

According to Article 1 of the annex, in principle no investor-to-state claims are eligible for restructuring that assert a violation of non-discrimination and investment protection. This general prohibition is partly offset in the final clause of this article, however. According to that, cases against restructuring are permissible when complainants base their claims on potential infringements of national treatment or most-favoured-nation treatment:

> *1. No claim that a restructuring of debt issued by a Party breaches an obligation under Sections [Non-Discriminatory Treatment, Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 6 [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission,* ***except for a claim that the restructuring violates Article X.6 [National Treatment] or Article X.7 [Most-Favoured Nation]***.[27]

[26] Bernasconi-Osterwalder, Nathalie, 2014: Reply to the European Commission's Public Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership. IISD Report, June 2014.

[27] Emphasis added.

Based on this provision financial investors domiciled in Canada could thus file a claim for damages if an EU government restructures government bonds or modifies bond contracts and individual creditors disapprove of the changed conditions. Along these lines Slovak and Cypriot bond holders who opposed the Greek debt haircut in 2012 filed a claim before the World Bank's arbitration tribunal, the ICSID. The basis of their claim were the bilateral investment treaties (BITs) between Greece, on one hand, and the Slovak Republic and Cyprus, on the other.[28]

5. Services

5.1 Cross-border Trade in Services

The chapter entitled Cross-border Trade in Services encompasses two modes of providing services: (i) from the territory of one party into that of the other, which corresponds to GATS mode 1; and (ii) in the territory of one party to the consumers of the other party, which corresponds to GATS mode 2 (Article X-08: Definitions).

Excluded are services rendered in the exercise of governmental authority (Article X-01.2a). This refers to the very narrow definition of GATS Article I.3(c), according to which:

> *'services supplied in the exercise of governmental authority' means any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers.*

The numerous grey areas in which public and private service provision touch and situations of competition arise are thus not protected by this clause. Besides that, the EU excludes audiovisual services and Canada excludes 'cultural industries'. Also exempted are financial services and air transport services, the latter with several substantial exceptions, however, such as ground-handling services (see Section 12.8 below). Public procurement, as long as it is not for the purpose of commercial resale, is also excluded, as are subsidies and other forms of state support (Article X-01.2). By contrast, the chapter does not include any specific exemption clauses for labour or social standards.

Once again, however, the principles of national treatment (Article X-02) and most-favoured-nation treatment (Article X-04) are found. Article X.05 on *market access* mentions the prohibition on imposing quantitative restrictions on the number of service suppliers, the value of services or output.

[28] ICSID 2013: Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8.

5.2 List of Reservations: Annexes, Standstill and Ratchet

Canada and the EU have established exceptions from the liberalisation provisions of the Investment and Services chapter. They are included in comprehensive schedules of commitments for both parties. In the case of the EU the list of reservations contains both EU exceptions and member state exceptions.[29] In contrast to the WTO services agreement, GATS, which contains a so-called 'positive list', CETA takes a negative-list approach. A positive list includes only those areas and measures in which the parties are prepared to accept liberalisation. In CETA's negative list, by contrast, all areas that are not listed may be subject in principle to liberalisation, which can also affect newly emerging services, for example, in the area of e-commerce. What is not to be liberalised is explicitly included in the negative list, which is why this approach is also referred to as 'list it or lose it'. It is far from transparent, because it is scarcely discernible which areas were to be completely liberalised.

CETA's negative list contains restrictions on the fundamental liberalisation principles of establishment (market access, performance requirements) and non-discrimination (national treatment, most-favoured-nation). These restrictions are to be found in two annexes. **Annex I** contains reservations arising from current regulatory measures, be they laws or other provisions (*Reservations for Existing Measures and Liberalisation Commitments*).[30] These reservations are subject to 'standstill' and the 'ratchet'. While the 'standstill' mechanism fixes the regulatory status quo, the ratchet mechanism requires that future liberalisations also automatically become CETA commitments.

Both clauses are found in both the investment chapter (Article X.14.1 (a) and (c)) and in the services chapter (Article X-06.1 (a) and (c)), although not explicitly. Rather the standstill and ratchet mechanisms arise from specific formulations in the investment and services chapters. Thus the exceptions listed in Annex I refer, on one hand, only to existing measures not in conformity with CETA ('*any existing non-conforming measure*'), which causes the standstill to come into effect (Article X-06.1 (a)); on the other hand, changes in such measures may not lessen conformity with the CETA provisions on non-discrimination and market access. Modifications are permissible, according to Article X-06.1 (c) only:

> *to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X-02 (National Treatment), X-04 (Most-Favoured-Nation Treatment) and X-05 (Market Access).*

Changes made to investment and services reservations may to that extent only be 'more liberal' within the meaning of the CETA rules, which thus corresponds to the ratchet mechanism.

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[29] The EU list of reservations is found on p. 1,200 of the consolidated CETA text.

[30] See consolidated CETA text, pp. 1,200 ff.

Annex II, by contrast, contains restrictions on future measures (*Reservations for Future Measures*) intended to allow the implementation of more discriminatory regulations or the revision of former deregulations (for which reason it is sometimes referred to as the 'policy space' appendix).[31] However, the extent to which the reservations contained in Annex II in fact open up such policy space depends largely on their specific wording. An analysis of Annex II reservations shows that there are definitely loopholes that again narrow the putative regulatory flexibility (see Section 5.4, as well as various examples in Section 12). Both annexes include the EU reservations, followed by member states' reservations.

5.3 Annex I – Reservations: Examples

In Annex I of its schedule the EU has included a very narrow market access reservation for postal services:

> *In the EU, the organisation of the siting of letter boxes on the public highway, the issuing of postage stamps, and the provision of the registered mail service used in the course of judicial or administrative procedures may be restricted in accordance with national legislation.*

In addition, the EU reserves the right to bind the issuing of licences for the provision of postal services to universal service obligations. Based on the standstill mechanisms (standstill, ratchet), any extension of the activities of public postal companies or postal companies acting on behalf of the public sector that go beyond the areas cited here (that is, siting of letter boxes, the issuing of postage stamps and the handling of judicial or administrative mail) may, under certain circumstances, constitute an infringement of CETA rules.

It should be noted here that, despite past liberalisations and privatisations in the postal sector, it cannot be ruled out in principle that the state will change its preferences. It is important to understand that, contrary to what many people imagine, in the EU up to now only Malta and the Netherlands have fully privatised their former public postal service. In the majority of member states, although these services have been transformed into private-law entities, most remain 100 per cent in state ownership. In some other cases governments retain lower shareholdings.[32] The German government, for example, has a 21 per cent share in Deutsche Post AG, through its development bank KFW.[33] The public interest in this sector thus still exists and a potential extension of state activities cannot be ruled out categorically.

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[31] Consolidated CETA text, pp. 1,497 ff.

[32] WIK-Consult 2013: Main Developments in the Postal Sector (2010-2013), Study for the European Commission, Directorate General for Internal Market and Service, Bad Honnef, August 2013, p. 16.

[33] http://www.dpdhl.com/de/investoren/aktie/aktionaersstruktur.html

Another Annex I reservation on the part of the EU concerns railway transport:

> *The provision of rail transport services requires a licence, which can only by granted to railway undertakings established in a Member State.*

Licences for cross-border rail transport are thus given only to rail companies established in the EU. Because of the standstill clauses an extension of the requirements that goes beyond the prerequisite of establishment – for example, the imposition of certain public service obligations – may be considered an infringement of CETA.

Germany's Annex I list also includes various restrictions on the licensing of doctors, emergency services or telemedicine services. If these restrictions came to be relaxed if CETA came into force – for example, licencing might be made easier – these liberalisations would become a binding treaty obligation on the basis of the ratchet mechanism. Revising them at a later date would possibly be a violation of CETA.

5.4 Public Services and the Public Utilities Exception

Services of general interest are in principle covered by CETA. Limited exceptions exist only in relation to services rendered in the exercise of governmental authority and audiovisual services. In both cases, however, the scope of these exceptions is not defined precisely (for audiovisual services see Section 12.7 below).

Activities carried out 'in the exercise of governmental authority' are excluded from the chapters on investment and cross-border trade in services. They are defined more precisely as follows (investment chapter: Article X.3):

> *activities carried out in the exercise of governmental authority means an activity carried out neither on a commercial basis nor in competition with one or more economic operators.*[34]

Because in broad areas of services of general interest public providers exist alongside private companies or operators providing services on behalf of the state (utilities, transport, education, health care, culture) situations of competition can arise, meaning that these areas fall outside the scope of governmental authorityso that CETA rules apply.

In addition, the EU has included an exception for public services in Annex II, the so-called public utilities reservation, which has also been used in other EU free trade agreements:

[34] In the corresponding definition in Article X-08 of the services chapter 'activities' is replaced by 'services'.

Type of Reservation: *Market Access*

Description: *Investment*

In all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators. (…) Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical.

This reservation does not apply to telecommunications and to computer and related services.

This reservation also contains an indicative list of service sectors subjected to monopolies or exclusive rights. The public utilities reservation has several loopholes, however:

- It refers only to investments, not to cross-border trade in services, for example, via the internet.
- It refers only to CETA market access provisions, not to national treatment, most-favoured-nation treatment and investment protection standards.
- The bulk of public services are provided neither as a 'public monopoly' nor as the 'exclusive right' of private providers. Services delegated to private operators are often in competition – for example, care services or waste disposal – and are therfore not provided as an 'exclusive' right.
- The exclusion of telecommunications from this reservation contradicts the EU universal service directive (Directive 2002/22/EC), which explicitly permits the imposition of universal service obligations on the providers of electronic communication networks. These obligations can be considered as a form of 'specific service obligations' referred to in this reservation. Universal service obligations include, among others, an obligation to provide the service to all end-users – regardless of their geographical location – at affordable prices.[35]

6. State Enterprises, Monopolies, Delegated Rights

Also of significance for the public sector is the chapter on State Enterprises, Monopolies and Enterprises Granted Special Rights or Privileges. The chapter's scope of application is potentially far-reaching. The entities covered by it include monopolies, oligopolies, companies with specific competition-restricting rights and state-owned or -controlled enterprises (see Article 1). The chapter does not include

[35] See: Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) in the version amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

any restrictions with regard to administrative levels or geographical area, so that municipal enterprises and service suppliers are also covered.

Although Article 3 in principle permits the establishment of state enterprises or the granting of specific rights, the organisations privileged in this way may not discriminate against Canadian providers (on EU providers in the case of Canada) in their purchase or sale of a good or a service (Article 4). Besides the activities they carry out in fulfilment of their public service obligations, organisations privileged in this way must operate 'in accordance with commercial considerations', for example, with regard to price setting and quality in their purchase and sale of goods (Article 5). However, aArticles 4 and 5 are to be excluded from certain sections of the investment and services chapters. Yet, which sections these are to be surprisingly remains open (see Article 2.3).

The chapter on competition policy is to be read as supplementary to this chapter. In it, the Parties commit themselves to taking appropriate measures against 'anti-competitive business conduct' (Article X-01). According to Article X-02 services of general economic interest are in principle covered by EU competition law. This applies, however, only to the extent that competition rules do not impair the performance of public service tasks. However, in accordance with Article X.03.1 no dispute settlement procedure provided for in CETA will be applicable to the competition chapter. The phrase '*Nothing in this Chapter shall be subject to any form of dispute settlement under the Agreement*' suggests that this exclusion relates to both the general dispute settlement mechanism (that is, the state-to-state procedure) and to the investor-to-state procedure of the investment chapter.

7. Subsidies

Distributed over several chapters CETA contains various regulations on state subsidies. According to Article X.3.1 of the chapter on subsidies, a party to the agreement can call for consultations with the other party if a subsidy prejudices its interests. The party addressed should endeavour either to 'eliminate' its support measures or to 'minimise any adverse effects'. Specifically, Article X.3.3 states:

> *On the basis of the informal consultations, the responding Party shall endeavour to eliminate or minimise any adverse effects of the subsidy, or the particular instance of government support related to trade in services, on the requesting Party's interests.*

However, no further sanctioning option is given here because this article is excluded from the dispute settlement mechanism of the agreement, according to Article X.9.

The chapter on cross-border trade in services, in turn, rules out subsidies from its scope of application in principle (Article X.01 (g)). The investment chapter differs from this, however: it exempts subsidies only from the market access and non-

discrimination rules, but not from the principle of fair and equitable treatment and protection from expropriation (Article X.14 (5b)).

Although pressure to eliminate public subsidies might also arise from the consultation mechanism the loophole in the Investment chapter appears to be particularly problematic. Private competitors could blame the subsidy given to competitors operating on behalf of the public sector for sales losses and present it as a form of indirect expropriation. Compensatory payments, for example, granted to not-for-profit welfare organisations, hospitals or housing associations might thus come under pressure from investment tribunals.

The introduction of new state support instruments – for example, in education, culture or the media – could, in some circumstances, be considered as a violation of fair and equitable treatment. Private providers already active in the market and fearing a competitive disadvantage might claim a breach of their 'legitimate expectations' (see Section 4 above).

8. Government Procurement

The CETA chapter on government procurement encompasses the purchase of goods, services and works by procuring entities of the EU, the German federal government, the federal *Länder* and municipalities. The chapter's appendices indicate the thresholds above which the procuring entities must open up their contracts to Canadian providers. The thresholds are given in terms of special drawing rights (SDRs), a currency basket used by the IMF. At present, 1 SDR is the equivalent of 1.1916 euros (31 December 2014).

According to Annex 1 of the procurement chapter[36] federal authorities and ministries must issue tenders in relation to supplies and services above the value of 130,000 SDR; *Länder* and municipalities – according to Annex 2 – must do so above a value of 200,000 SDR (this also applies explicitly to hospitals, schools, universities and various social services). According to Annex 3 the threshold for the procurement of supplies and services from utilities operating networks in the areas of drinking water, energy and transport is 400,000 SDR. On top of that, the threshold for all works is 5 million SDR (see table).

CETA: EU thresholds for tenders (in SDRs)			
	Supplies	Services	Works
Annex 1 (central government	130,000	130,000	5 million

[36] Consolidated CETA text, pp. 658ff.

entities)			
Annex 2 (subcentral procurement entities in accordance with the NUTS regulation)	200,000	200,000	5 million
Annex 2 (subcentral procurement entities in accordance with the public procurement directive)	Hospitals, schools, universities, social services: 200,000 Other: 355,000	Hospitals, schools, universities, social services: 200,000 Other: 355,000	5 million
Annex 3 (entities operating networks in accordance with the utilities directive)	400,000	400,000	5 million

Assuming these commitments in an international treaty means that public authorities lose the possibility of changing these thresholds. Associations of municipalities are calling for a substantial raising of the thresholds in order to achieve wider scope for directly awarding public contracts without having to put them out to tender.[37] Any political effort to raise thresholds would require more than amending CETA, however. The EU has already adopted similar thresholds within the framework of the plurilateral Government Procurement Agreement (GPA), which to date has been signed by 15 parties, including the United States and Canada.[38]

Article IV.6 of the procurement chapter goes beyond non-discrimination between domestic and foreign suppliers and prohibits, among other things, so-called 'offsets'. Article I (k) defines offsets as follows:

> *offset means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.*

Clauses enabling to bind the award of public contracts to compliance with social criteria are thin on the ground, however. Article III on Security and General Exceptions contains the relevant measures on the protection of public morals, order and safety, as well as health. Also protected are measures referring to goods or services produced by people with disabilities, philantropic institutions or prison

[37] Bundesvereinigung der kommunalen Spitzenverbände 2014: Forderungen an das neugewählte Europäische Parlament, 10.4.2014.

[38] The thresholds of the Government Procurement Agreement are available at the following link: http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm

labour. But specific social and labour standards are lacking also in this instance. The extent to which compliance with collective agreements may be construed as an aspect of 'public morals' or occupational safety as an aspect of health protection thus remains subject to interpretation. In the event of a dispute it would be examined whether such social procurement criteria were really 'necessary' or whether they represent 'unjustifiable discrimination' or a 'disguised restriction on international trade'.

The conditions for participation in a tender process contain a number of criteria on whose grounds bidders can be excluded, including false declarations, failure to fulfil previous contracts, final convictions, professional misconduct or tax offences (Article VII.4). These criteria can also be used for social requirements. Thus, for example, previous violations of labour and social security regulations could be grounds for excluding a bidder.

Article IX.6 allows procuring entities to lay down technical specifications, which, among other things, serve to protect natural resources or the environment. Labour and social standards are not mentioned here either. Article XIV.5, finally, lays down as award criteria that (i) the most advantageous tender should prevail or (ii) if the price is the sole criterion, the lowest price shall be the decisive factor. It is a matter of dispute, however, whether the 'most advantageous tender' could also include social criteria. Some experts affirm this, others argue that only the 'economically' most advantageous tender would qualify.[39]

9. Domestic Regulation and Recognition of Professional Qualifications

Domestic regulation and the closely connected recognition of professional qualifications refer to CETA parties' laws governing establishment and the professions and can thus affect competition on labour markets.

Domestic regulation: Chapter 14 on Domestic Regulation is intended to ensure that licensing requirements and procedures, as well as qualification requirements and procedures are based on criteria that prevent 'arbitrary' decision-making on the part of the relevant authorities (Article X.2.1). These criteria shall be (i) clear and transparent, (ii) objective and (iii) established in advance and made publicly accessible (Article X.2.2). The parties are obliged to provide arbitration mechanisms that enable investors or service suppliers to lodge an appeal against official decisions. These arbitration mechanisms should be independent of the institutions that take the decisions on licensing and qualifications (Article X.2.6).

[39] Krajewski, Markus/Krämer, Rike 2013: Die Auswirkungen des revidierten WTO-Übereinkommens über öffentliche Beschaffungen ('Government Procurement Agreement', GPA) von 2012 auf soziale und arbeitnehmerfreundliche Beschaffungsentscheidungen. Abschlussbericht, Hans-Böckler-Stiftung, February.

According to Article X.2.7:

> *Each Party shall ensure that licensing and qualification procedures are as simple as possible and do not unduly complicate or delay the supply of a service or the pursuit of any other economic activity.*

On top of that, authorisation fees shall be ‘reasonable’ and ‘commensurate’ with the costs incurred and ‘shall not in themselves restrict the supply of a service or the pursuit of any other economic activity’ (Article X.2.8). In the event of a dispute, based on these formulations, licensing and qualification requirements would be subject to a proportionality test, which can put existing procedures under pressure of justification.

The EU and Canada have excluded individual sectors from the scope of application of the chapter on domestic regulation. The EU has exempted health, education, social services, gambling and betting, audiovisual services, as well as the collection, purification and distribution of water (see Article X.1.2b). However, no comprehensible criteria are discernible in the selection of the excluded sectors. Far more branches in the public and private sectors could be affected by the licensing and qualification requirements.

Recognition of professional qualifications: The chapter on Mutual Recognition of Professional Qualifications provides a framework and lays down conditions for the treatment of Mutual Recognition Agreements (MRA). According to Article 1.2:

> *This chapter applies to professions which are regulated in both Parties, including in all or some EU Member States and in all or some Provinces and Territories of Canada.*

As a Mutual Recognition Agreement, according to Article 1.4, shall apply throughout the entire territory of the EU and Canada, this would also affect EU member states in which, to date, there have been no specific rules on the relevant professions. The parties are obliged to encourage the relevant institutions and professional associations to submit drafts of MRAs to a bilateral joint committee (Article 3a). If both parties accept the mutual recognition agreement it would be adopted by the joint committee.

In addition, the chapter contains an annex with non-binding guidelines on MRAs (*Guidelines for Agreements on the Mutual Recognition of Professional Qualifications*). Besides remarks on form and content, these guidelines include a four-step process for mutual recognition: (i) verification of the ‘overall equivalence’ of qualifications, (ii) evaluation of ‘substantial differences’ between requirements, (iii) compensatory measures (for example, supplementary tests) and (iv) identification of the legal conditions for recognition. It appears critical here that, among other things, it is unclear how the ‘equivalence of qualifications’ is to be established. Could, for example, practical experience in a profession substitute for a formal qualification?

Furthermore, according to Article 4b, a party may not make mutual recognition dependent on residency requirements or the acquisition of qualifications or experience within its jurisdiction:

> *(b) Recognition under an MRA cannot be conditioned upon:*
> *(i) a service supplier meeting a citizenship or any form of residency requirement, or*
> *(ii) a service supplier's education, experience or training having been acquired in the Party's own jurisdiction.*

Additional qualifications or experience acquired in the host country can, however, represent entirely legitimate requirements for the recognition of professional qualifications.

If the joint committee accepts an MRA, a Canadian service supplier in the EU – and vice versa – benefits from national treatment. The responsible authorities shall 'accord to this service supplier treatment no less favourable than that accorded in like situations to like service suppliers' certified in its own jurisdiction (Article 4a). The MRA thus comes under the general CETA rules, including the dispute settlement procedure.

For this reason one might ask, as a matter of principle, whether it is at all desirable to include the mutual recognition of professional qualifications in the framework of a free trade agreement. Such agreements can also be concluded outside a free trade agreement, as is already standard practice. The MRA between the Canadian province of Quebec and France provides an example.[40]

According to data from the Canadian government the professional associations of architects of both parties have held discussions on a MRA. Other associations have declared an interest in concluding agreements in future, including engineers and foresters.[41]

10. Temporary Labour Migration

The chapter on Temporary Entry and Stay of Natural Persons for Business Purposes regulates temporary residence in the EU and Canada for various categories of workers from the two parties. The chapter does not apply, according to Article 1.2, to people seeking access to the labour market or permanent residence. The specific obligations show, however, that CETA is an agreement that promotes circular labour migration which may affect the labour market. Experience shows that the linking of

[40] http://www.mrifce.gouv.qc.ca/en/grands-dossiers/reconnaissance-qualifications/entente-quebec-france

[41] Government of Canada 2013: Canada-European Union Comprehensive Economic and Trade Agreement: Technical Summary of Final Negotiated Outcome, Agreement-in-principle.

generally permissible short-term assignments to a rotating labour force can lead to unfair competition.

Officially, however, the regulations will be without prejudice to the labour law, social security, collective agreements or minimum wages of the two parties (Article 1.5). Furthermore, the commitments in this chapter do not apply in cases in which the 'intent or effect' of temporary labour migration is to interfere with labour disputes or labour negotiations (Article 1.6).

Article 2, however, demands that:

> *Each Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1(1), and, in particular,* ***shall apply those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement****.* (Emphasis added.)

In addition, application fees shall be reasonable and commensurate. The chapter contains differentiated categories of workers, who are to be given different rights with regard to the duration of their stay (see table).The category of 'intra-corporate transferee', in this context, reflects the recently adopted EU directive on the intra-corporate transfer of third-country nationals (the so-called ICT directive).

CETA: Length of stay in the event of temporary labour migration Chapter *Temporary Entry and Stay of Natural Persons for Business Purposes* (Art. 7.5; 8.4; 9.3)			
Category			**Length of stay**
Key Personnel			
	Intra-Corporate Transferees		
		Senior Personnel	The lesser of 3 years or the length of the contract, with a possible extension of up to 18 months at the discretion of the Party
		Specialists	The lesser of 3 years or the length of the contract, with a possible extension of up to 18 months at the discretion of the Party
		Graduate Trainees	The lesser of 1 year or the length of the contract
	Investors		1 year, with possible extensions
	Business Visitors for Investment Purposes		90 days within any six month period
Contractual Service Suppliers			Cumulative period of not more than 12 months, with possible extensions in any 24-month period or for the duration of the contract
Independent Professionals			Cumulative period of not more than 12 months, with possible extensions in any 24-month period or for the duration of the contract
Short-term Business Visitors			Maximum 90 days in any 6-month period

Some EU member states have included reservations (especially work permits or economic needs tests) in a specific list for the categories ‘key personnel’ and ‘short-term business visitors’ (Appendix B). Germany, however, has made no entries in this list.

Another list contains sectoral commitments for the categories ‘contractual service suppliers’ and ‘independent professionals’ (*Annex 1: Sectoral Commitments on Contractual Service Suppliers and Independent Professionals*). In many branches

Germany has given open access via these two categories (for example, for accounting and IT services or management consultancy). In many other sectors, however, Germany reserves the right to implement economic needs tests, namely in respect of contractual service suppliers in the case of architects, engineers, doctors, midwives, vets, nurses, suppliers of environmental services and tour guides, as well as in respect of the repair and maintenance of vessels, rail equipment, motor vehicles, aircraft and machinery. In all these sectors 'independent professionals' remain unbound; in other words, for this category of workers no commitments apply.

11. Trade and Labour

In contrast to many other EU trade agreements, CETA does not contain a human rights clause that demands respect for human rights and democratic principles. In the event of a violation of human rights or core labour standards such clauses enable to suspend an agreement unilaterally in whole or in part.[42] Because of this gap normative conflicts are possible between CETA and the European system of fundamental rights, so that compliance with EU law could lead to an infringement of CETA commitments. According to experts in international law Fischer-Lescano and Horst, without a human rights clause 'there is no adequate handle for interpreting obligations under EU law on the protection of human rights and the public interest as limiting the application of CETA'.[43] Inclusion of such a clause would enable the resolution of normative conflicts.

Regulations on international labour standards are included only in the chapter on Sustainable Development. This contains two subchapters, one on trade and labour, the other on trade and the environment. In the chapter on trade and labour the parties reaffirm their commitments as members of the International Labour Organisation (ILO),[44] with particular reference to the ILO Declaration on Fundamental Principles and Rights at Work, which are realised in the eight ILO conventions on core labour standards (Article 3).

Canada has signed only six of the eight core labour standards, however: the two exceptions are Convention No. 98 on the right to collective bargaining and Convention No. 138 on the minimum age for admission to employment. In this connection, Article 3 para 4 states that the parties shall make 'continued and

[42] Bartels, Lorand 2014: A Model Human Rights Clause for the EU's International Trade Agreements. German Institute for Human Rights/Misereor, Berlin/Aachen, February 2014.

[43] Fischer-Lescano, Andreas/Horst, Johan 2014: Europa- und verfassungsrechtliche Vorgaben für das Comprehensive Economic and Trade Agreement der EU und Kanada (CETA). Legal opinion on behalf of Attac/München, Bremen, October 2014.

[44] It is important to note that the EU itself is not a member of the ILO. In contrast to the EU member states no direct commitment thus arises from this provision for the EU.

sustained efforts towards ratifying the fundamental ILO Conventions to the extent that they have not yet done so'. However, this non-binding formula does not impose an obligation on Canada to ratify the two missing core labour conventions.

In addition, Article 3 para 4 provides that both parties shall inform one another concerning progress with ratification of the fundamental and priority ILO conventions. Canada has to date signed only two of the four priority conventions; still lacking are Convention No. 81 on labour inspection in industry and commerce and Convention No. 129 on labour inspection in agriculture. Besides that, according to Article 3 para 2 the parties are supposed to promote the aims of the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalisation.

A bilateral committee for trade and sustainable development (the name is still not final) considers all issues related to the whole sustainability chapter (Article 8 para 2). Furthermore, the parties are supposed to consult with civil society advisory groups for labour or sustainable development, or to set up such groups if they do not already exist (Article 8 para 3). There is supposed to be balanced representation of employees and employers in these advisory groups.

Similar to other EU treaties the labour chapter provides for a specific mechanism for disputes; in other words, there is no access to the general CETA dispute settlement mechanism. Violations of the commitments arising from this chapter can thus not be punished with trade sanctions. It is stated explicitly in Article 11 that, in the event of a dispute, the Parties 'shall only have access to the rules and procedures laid down in this chapter'. In the event of a conflict, first and foremost bilateral government consultations are provided for (Article 9). If they fail to produce results a party can apply for the establishment of a three-person panel of experts (Article 10). This panel produces a report with recommendations, which are to be published. If the experts establish that there has been a violation the two parties are supposed to reach agreement on remedial measures or an action plan. However, the chapter leaves open what is to happen if the two arties fail to agree on either remedial measures or an action plan.

The fact that the labour chapter does not contain arbitration procedures underpinned by sanctions is due to EU pressure. In contrast to the Europeans, Canada advocated the sanctions option in the course of negotiations. According to the Canadian proposal, the panel of experts would meet again in the event of a failure to reach agreement on remedial measures in ordert to decide on the imposition of compensation payments. The level of such payments would have been determined by the damages caused by the violation (up to a maximum of 15 million US dollars). Howerver, the EU side rejected any monetary sanctions in the event of violations of the labour chapter. On the other hand, Canada envisaged this sanctions mechanism only for the sub-chapter on trade and labour, not for the sub-chapter on trade and the environment.[45]

[45] See: European Commission 2013b: CETA – Draft Texts as of 17 December 2013, Chapter X+1: Trade and Labour, Annex 2: Monetary Assessments.

Article 4 of the labour chapter contains a clause intended to prevent the parties from lowering labour standards in order to boost trade or to attract investments. Encouraging trade and investment shall not be pursued by derogations from national labour law. If the labour chapter were underpinned by sanctions this clause could assume an important function in preventing policies aimed at improving national competitiveness by meddlingwith labour and trade union rights. Measures of that kind are currently being implemented in both Canada and the European Union.

12. Sectors

12.1 Motor Vehicles and Transport Equipment

Motor vehicles are among the only industrial goods in relation to which CETA provides for transitional periods for the abolition of tariffs. In the EU the tariffs on buses (tariff rate 10 or 16 per cent) shall be set to zero after five years, those on cars and caravans (10 per cent) after five or seven years and those on trucks (10 or 22 per cent) after only three years.[46]

Furthermore, CETA contains detailed rules of origin that determine how large the proportion of value added in Canada (or the EU) must be in order to count as a Canadian (or EU) product and thus to be able to benefit from trade preferences (Rules of Origin and Origin Procedure Protocol). The regulations are above all relevant to all goods in whose production components from third countries are used. For example, according to the product-specific list of rules of origin (Annex I: Product-specific Rules of Origin) at least 50 per cent of the production value of a car must be of Canadian or EU origin in order to benefit from trade preferences. Seven years after CETA's entry into force this value rises to 55 per cent.[47]

However, it is easier for auto manufacturers in EU member states to reach the domestic content threshold because components from all EU member states count as part of domestic value added. In Canada, by contrast, US (General Motors, Ford, Chrysler) and Japanese (Toyota, Honda) producers operate assembly plants that often obtain a large proportion of their components from the United States or Mexico, and thus do not count as Canadian components. For this reason a special regulation confers a quota of 100,000 cars on Canada, with regard to which domestic content may be lower, namely 30 per cent of the transaction value or ex-works price or 20

[46] See EU Tariff Schedule: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/03_02.aspx?lang=eng or Consolidated CETA Text, pp. 531ff; explanation of *Staging Categories*: Category A: tariffs are abolished with the coming into force of CETA; B: abolition after 3 years; C: after 5 years; D: after 7 years; E: exemptions from tariff abolition; AV0+EP: with coming into force the ad valorem tariff is abolished, while the specific tariff remains in place. Cf. CETA Consolidated Text, Trade in Goods, Annex X.5 Tariff Elimination.

[47] See Consolidated CETA Text, p. 601, Harmonized System Code 8703.

per cent of the net cost of the product (*Product-specific Rules of Origin: Section D – Vehicles*).

Canada has to date exported only a few cars to the EU (the figure fluctuates between 5,000 and 10,000 cars), while in 2013, for example, Canada bought around 118,000 cars manufactured in the EU, making up 7 per cent of all Canadian purchases of new vehicles. Canada's UNIFOR trade union thus doubts that the new quota will lead to a substantial increase in Canadian exports. The carbrands produced in Canada are barely known in the EU and have little market presence. Furthermore, the auto manufacturers operating in Canada have to date shown little interest in increasing exports to the EU. The quota is thus rather symbolic in nature.[48]

Nonetheless, it cannot be ruled out that, over the longer term, Canadian automobile exports to the EU will increase. However, if Canada were to reduce the large trade deficit with the EU in the automobile sector there would have to be a strong increase in Canadian exports. In total trade in cars and car parts Canada imported goods from the EU worth 5.6 billion dollars in 2013, while Canada's exports amounted to only 262 million dollars.[49]

In addition, CETA provides for the option of so-called 'cumulation', which permits the use of components from countries with which Canada and the EU have signed free trade agreements with comparable regulations. As a member of the North American free trade zone NAFTA Canada already has a free trade agreement with the United States. The EU, in turn, is currently negotiating with the United States on the Transatlantic Trade and Investment Partnership (TTIP), whose conclusion is already anticipated by CETA. If TTIP comes to fruition and includes rules of origin comparable to those in CETA the quota granted to Canada of 100,000 automobiles with a lower domestic content shall be dropped a year after CETA's entry into force. Instead, a joint rule of origin integrating US and Canadian production would come into force. In that case 60 per cent of value added must take place in the United States or Canada in order to be able to export cars to the EU tariff-free.[50]

Because Canada, too, is abolishing its tariffs on cars and car parts EU producers, because of their much higher market shares in Canada, are likely to benefit much more than Canadian car-makers and suppliers. Whether this will translate into substantial employment effects in Germany, however, is questionable, given the comparatively low importance of the Canadian market for the German automobile

[48] Stanford, Jim 2014: CETA and Canada's Auto Industry: Making a Bad Situation Worse, Canadian Centre for Policy Alternatives, May 2014.

[49] Ibid. p. 10.

[50] See Consolidated CETA Text, Annex 1: Product-specific Rules of Origin, p. 601, footnotes 69 and 70, as well as Section D – Vehicles, Note 1, pp. 630f.

industry. Of the around 4.2 million cars exported by German car-makers in 2013 only 76,000 went to Canada (around 1.8 per cent).[51]

The sustainability impact assessment commissioned by the European Commission comes to the conclusion that the total exports of the EU automobile industry could increase over the long term (that is, by 2020) due to the tariff reduction by between 0.08 and 0.17 per cent and employment by 0.03 and 0.09 per cent. With regard to trade in other transport equipment, by contrast, in relation to which Canada is also competitive in the EU, EU exports could shrink slightly (by between 0.07 and 0.24 per cent). The same applies to employment in these areas, which could suffer losses of between 0.07 and 0.18 per cent.[52]

12.2 Audiovisual Services

The EU exempts audiovisual services from the chapters on cross-border trade in services, domestic regulation and subsidies. However, the scope of this exemption is unclear because CETA does not contain a definition of audiovisual services. Nor is there any indication about which version of the UN's Central Product Classification (CPC) is taken as a basis, so that no reliable statement on the sectoral scope of this exemption is possible. For example, according to the current CPC Version 2.0, motion picture, videotape, television and radio programme production are included among audiovisual services, but not broadcasting of audiovisual content. In contrast to earlier CPC Versions, *Broadcasting, programming and programme distribution services* now form part of the Telecommunications sector (*Telecommunications, broadcasting and information supply services*).

In CETA, the transmission of radio and television programming is exempt from the telecommunications chapter (see Section 12.6 below), but not from the other parts of the agreement. Furthermore, audiovisual services are excluded only from parts of the investment chapter, namely the sections on establishment and non-discrimination (Sections 2 and 3). In Article X.1.3 of the iInvestment chapter it reads:

> *For the EU, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to Audiovisual services.*

Audiovisual services are thus not exempted from the sections on investment protection (Section 4) and investor-to-state dispute settlement (Section 6). Section 4 of the investment chapter contains the broadly interpretable material protection

[51] See Verband der Automobilindustrie: https://www.vda.de/de/services/zahlen-und-daten/jahreszahlen/export.html

[52] Kirkpatrick, Colin et al. 2011: A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada, Final Report, June 2011, Trade 10/B3/B06, pp. 183ff.

standards of fair and equitable treatment and indirect expropriation, on which the bulk of ISDS claims rest. Thus it cannot be ruled out that individual elements of state regulation of the audiovisual sector in EU member states might be challenged as possible violations of these two protection standards. It has to be noted in this respect that the US film and TV industry, which is pushing into the EU market, uses Canada intensively as a low-cost production location because the Canadian government and various provinces offer the film industry a range of tax concessions.[53]

12.3 Water Supply and Waste Management

The EU has included an Annex II exemption for the collection, purification and distribution of water in its schedule of commitments:

> ***Type of Reservation:*** *Market Access, National Treatment*
> ***Description:*** *Cross-Border Services and Investment*
> *The EU reserves the right to adopt or maintain any measure with respect to the provision of services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the provision of drinking water, and water management.*

The reservation concerns market access and national treatment, but not most-favoured-nation treatment and investment protection standards. It also does not extend to sewage services. For this reason Germany has included a reservation for waste management in its Annex II list (*Waste Management: Sewage, refuse disposal, and sanitation services*), which, besides refuse disposal and sanitation, also encompasses sewage services:

> ***Type of Reservation:*** *Market access*
> ***Description:*** *Cross-Border Services and Investment*
> *Germany reserves the right to adopt or maintain any measure prohibiting the cross-border provision of services and requiring establishment with respect to the supply of waste management services, other than advisory services. Germany reserves the right to adopt or maintain any measure relating to the designation, establishment, expansion, or operation of monopolies or exclusive services suppliers providing waste management services.*

The reservation concerns market access, not national treatment, most-favoured-nation treatment and investment protection standards. Service suppliers in the area

[53] http://inmedia.revues.org/123; https://canadiandimension.com/articles/view/waiting-for-hollywood-canadas-maquila-film-industry

of waste management, once they have obtained market access in Germany, can thus claim national treatment under CETA rules, if they consider they have been discriminated against. The European Commission provides the following explanation on its website concerning the protection of public services in EU free trade agreements:

> *There is just one condition, which concerns companies from outside the EU which a government has already allowed to operate in its territory. In such cases, the government must treat the companies concerned the same way as it treats European ones.*[54]

As the reservation does not apply to investment protection standards a supplier established or domiciled in Canada could, under some circumstances, also assert violations of the principle of fair and equitable treatment or the prohibition of indirect expropriation. This option can also be exercised by European multinational companies who are established in the Canadian market. For example, the French companies Suez Environnement and Veolia, active in the German utilities and waste management market, have establishments in Canada.[55]

Furthermore, the German exemption is confined to monopolies and 'exclusive service suppliers', which excludes those suppliers of waste management services, who are in competition with one another and thus cannot be deemed as 'exclusive' service suppliers.

12.4 Education, Health Care and Social Services

In Annex II of its schedule the EU has included exceptions for the areas of education, health care and social services, which limit CETA liberalisations to 'privately financed' services. With regard to education, for example, the reservation reads as follows:

> ***Type of Reservation:*** *Market Access, National Treatment, Performance Requirements, Senior Management and Boards of Directors*
> ***Description:*** *Cross-Border Services and Investment*
> *The EU reserves the right to adopt or maintain any measure with regard to the provision of all educational services which receive public funding or State support in any form, and are therefore not considered to be privately funded.*

[54] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1128&serie=793&langId=en

[55] http://www.veoliawaterstna.com/about/locations-north-america/; http://www.suez-environnement.com/group/international-presence/sites/

This exception applies to the CETA rules on market access, performance requirements and national treatment, but not to most-favoured-nation treatment and investment protection standards. The EU schedule contains similar reservations for health care and social services. Further restrictions state that the authorisation of privately funded service suppliers may be subject to concessions and economic needs tests.

However, it has not been conclusively determined how far a service with mixed funding from public and private sources still counts as publicly funded and thus would be exempted from the relevant CETA rules. For example, the phrase 'public funding or State support in any form' leaves it open how high the proportion of public funding would have to be in order not to qualify as a privately funded service.[56] Similarly unclear is the understanding of 'public funding'. For example, fees that are decreed by the state, but are to be paid by beneficiaries could be regarded as private funding (tuition fees at adult education centres, fee-based master's programmes at public universities, contributions to statutory accident, health or care insurance).[57]

As the exception does not apply to most-favoured-nation treatment (this provides for equal treatment of suppliers from all third countries), a Canadian education provider could take legal action alleging that it has been treated less favourably than providers from, for instance, the United States or Australia.

Germany has an additional Annex II reservation for health care and social services, however, which is supposed to protect the funding of the social security system:

> ***Type of Reservation:*** *Market Access, National Treatment, Most-Favoured Nation Treatment, Performance Requirements, Senior Management and Boards of Directors*
> ***Description:*** *Investment*
> *Germany reserves the right to adopt or maintain any measure with regard to the provision of the Social Security System of Germany, where services may be provided by different companies or entities involving competitive elements which are thus not 'Services carried out exclusively in the exercise of governmental authority'.*

This exception refers to the rules on both establishment and non-discrimination, but not to CETA's investment protection standards. They do not include cross-border trade in services, either. But as many insurance products are offered via the internet, there could be a loophole here for international insurance groups with Canadian

[56]The formulation '*in any form'* is likely to refer to the different forms that state support can take (for example, subsidies, interest subsidies, tax relief, guarantees, subsidised training and further training, preferential provision of goods and services or the granting of exclusive and special rights).

[57]On this see: Krajewski, Markus/Kynast, Britta, 2014: Auswirkungen des Transatlantischen Handels- und Investitionsabkommens (TTIP) auf den Rechtsrahmen für öffentliche Dienstleistungen in Europa, Erlangen-Nürnberg, 1.10.2014.

establishments. Furthermore, insurers could also invoke investment protection standards.

12.5 Electricity and Gas Networks and Their Remunicipalisation

In the EU's GATS schedule of 1994 'Services Incidental to Energy Distribution' – which also encompass local electricity and gas distribution networks – were not included. They first emerge in the GATS Consolidated Schedule of 2006, although that has not yet entered into force. The EU negotiated this new schedule with WTO members after 10 new member states acceded to the EU in 2004. However, even in that instance most member states designated modes 1, 2 and 3 as 'unbound'; in other words, they have not made any commitments in energy distribution (with the exception of four eastern European states).

In CETA there is now an Annex II reservation for the EU that refers to electricity and gas transmission systems, as well as to pipeline transport:

> ***Sector:*** *Energy*
> ***Sub-sector:*** *Electricity and gas transmission systems, oil and gas pipeline transport*
> *Industry classification: ISIC Rev 3.1 401, 402, CPC 7131, CPC 887 (except advisory and consultancy services)*
> ***Type of Reservation:*** *National Treatment, Market Access, Performance Requirements, Senior Management and Boards of Directors*
> ***Description:*** *Investment*
> *Where an EU Member State permits foreign ownership of a gas or electricity transmission system, or an oil and gas pipeline transport system, the EU reserves the right to adopt or maintain any measure with respect to Canadian enterprises controlled by natural persons or enterprises of a third country which accounts for more than 5% of the EU's oil or natural gas or electricity imports, in order to guarantee the security of the energy supply of the EU as a whole, or of an individual EU Member State.*

The exception refers to transmission networks such as high-voltage power lines – not to local distribution networks. It only refers to the specific case in which a company domiciled in Canada acquires control of more than 5 per cent of EU oil, gas and electricity imports. In such a case the EU reserves the right of regulatory intervention in order to ensure security of energy supply. Local electricity and gas networks, which are currently being remunicipalised in many cities, are thus not included. However, individual EU member states have added specific exceptions for energy distribution which would also include local networks. An example can be found in Belgium's Annex II:

> ***Description:*** *Cross-border services and Investment*

Belgium reserves the right to adopt or maintain any measure related to energy distribution services and services incidental to energy distribution.

The exemption refers to market access and national treatment and could perhaps also permit remunicipalisation of local networks. Germany, however, has reserved no such exemption that would protect the remunicipalisation of electricity and gas networks. The EU's public utilities exemption could also offer no protection because it refers to market access, but not to cases in which energy companies have already entered the market and are operating networks. For example, Veolia is engaged in local energy supply on both the Canadian (together with Electricité de France) and German market.[58]

12.6 Telecommunications and E-Commerce

The EU schedule of commitments contains no EU or German exceptions related to telecommunications. Furthermore, the EU has excluded telecommunications from the public utilities exemption, although this contradicts the EU universal service directive (see Section 5.4 above). This sector is thus entirely subject to the CETA provisions, which are contained, among other places, in the sector-specific telecommunications chapter (Chapter 17). This regulates issues of non-discriminatory network access, cross-border data transfer, interconnection, competition and supervision. Excluded from the scope of application is the transmission of radio and TV programmes, with the exception of contribution links (Article X.1.2):

This Chapter does not apply to any measure of a Party affecting the transmission by any means of telecommunications, including broadcast and cable distribution, of radio or television programming intended for reception by the public, but for greater certainty it would apply to a contribution link.

Similar to the chapter on general exceptions (see Chapter 2 above) the telecommunications chapter contains only a very restricted clause on data protection, which, among other things, may adversely affect the measures currently under discussion to improve employee data protection. According to Article X.2.4 the parties should take 'appropriate measures' to protect the privacy of the users of public telecommunications services. This only applies, however, on condition that these measures do not represent arbitrary or unjustifiable discrimination or a disguised restriction on trade:

a Party shall take appropriate measures to protect: (…) the privacy of users of public telecommunications transport services, subject to the requirement that such

[58] http://www.dalkia.ca/en/about-us/; http://www.veoliawasser.de/content/stadtwerke

> *measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.*

In the event of dispute, improved employee data protection would thus have to pass a fourfold test: it has to be ‘appropriate’, not ‘arbitrary’, not ‘unjustifiable’ and not a trade restriction in disguise.

In Article X.7 the chapter concedes to the parties the right to impose universal service obligations:

> *Each Party shall ensure that any measure on universal service that it adopts or maintains is administered in a transparent, objective, non-discriminatory and competitively neutral manner. Each Party shall also ensure that any universal service obligation imposed by it is not more burdensome than necessary for the kind of universal service that the Party has defined.*(Article X.7.2)

Based on this wording universal service obligations would be subjected to a demanding necessity test in the event of a dispute, which could severerly restrict the scope for regulation. This could have a negative impact, for example, on requirements to facilitate universal and affordable access to fast broadband networks. Furthermore, all suppliers should be eligible to compete for the provision of universal services. Selection of a service provider shall take place in an efficient, transparent and non-discriminatory way (Article X.7.3).

The e-commerce chapter has a somewhat narrower regulatory scope and fewer commitments. Electronic deliveries shall not be subject to customs duties or other fees, other than domestic taxes or other charges (Article X-02). Again, the clause on data protection is relatively weak. The Parties ‘should’ adopt or maintain measures for the protection of the personal information of e-commerce users. If they do this, however, they are obliged to take into account international data protection standards of relevant international bodies(Article X-03: Trust and Confidence in Electronic Commerce):

> *Each Party should adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce and, when doing so, shall take into due consideration international standards for data protection of relevant international organisations of which both Parties are a member.*

As international data protection is still extremely underdeveloped the obvious question here is how far higher national standards may bemaintained against weaker international ones. This question is already being discussed within the EU with regard to the draft General Data Protection Regulation. CETA, however, remains silent on higher national standards.

In addition, the parties have agreed on a dialogue on e-commerce. In the EU's schedule of commitments there are no specific exceptions with regard to electronic trade. Nor has any EU member state asserted reservations in this economically important area.

12.7 Maritime Transport

In the GATS agreement of 1994 WTO members were unable to reach agreement on commitments concerning international maritime transport. Subsequent negotiations also foundered. Accordingly, the maritime transport services sector is absent from the EU's GATS schedule of 1994. The sector only surfaces in the GATS Consolidated Schedule of 2006. However, most EU member states have not adopted liberalisation commitments here; in other words, the sector is designated 'unbound' with regard to market access and national treatment (exceptions: Estonia, Hungary, Latvia, Lithuania, Malta, Slovenia).

With CETA, however, the EU and Canada have made more comprehensive commitments, which are laid down in the chapter on international maritime transport services. This encompasses the maritime transport of people and goods between (i) Canadian and EU ports, (ii) between Canadian or EU ports, on one hand, and ports of third countries, on the other, and (iii) between the ports of different EU member states (see Article 5: Definitions). It requires non-discrimination of vessels and maritime transport service suppliers of the other party with regard to access to ports, use of infrastructure and services such as towage and pilotage, as well as access to berths and container terminals (Article 1: Scope). Excluded, however, are cargo handling services performed by dock labour, when the workforce is organized independently of stevedoring and terminal operator companies.[59]

The chapter also lists five obligations (Article 2): (i) transport fleets of both parties are permitted to transfer empty containers freely between the ports of the parties; (ii) fleets of the parties may provide feeder services between all ports of the two parties; (iii) the parties may adopt or maintain agreements with third states concerning cargo sharing; (iv) international cargo transport may not be reserved for locally registered vessels; and (v) fleet operators may not be prohibited from entering into contractual relations with transport firms of the other party that offer multimodal transport. These basic liberalisation obligations may be subjected to restrictions in the schedules of commitment, however.

The EU has reserved several Annex II exceptions that restrict market access and national treatment in maritime transport. These refer to establishment requirements with regard to registration of vessels, possible nationality requirements for crews, national cabotage rights within the EU (with the exception of the repositioning of containers) and national registration of pilotage and berthing services. Furthermore,

[59]See Article 5: Definitions: 'maritime cargo handling services (…) does not include work performed by dock labour, when this workforce is organized independently of stevedoring or terminal operator companies'.

pushing or towing boats remain under EU flags. These exceptions do not apply to most-favoured-nation treatment and investment protection, however.

Germany has also made an Annex I reservation that sets out the conditions for entry in the German shipping register. Another German Annex I reservation describes access to German inland waterways: vessels in the ownership of third-country nationals need specific authorisation, cabotage rights are reserved for German and EU vessels and exceptions for vessels from third countries may be granted only on the basis of reciprocity. Furthermore, approval of pilots is restricted to EU and Swiss citizens. Other restrictions can apply to the renting, leasing or chartering of cargo ships, as well as transport contracts with foreign ships that want to use Germany's inland waterways.[60]

As the German reservations concern inland shipping, the loopholes of the EU reservations on maritime transport remain in place. Shipping companies active in maritime transport can thus invoke the most-favoured-nation and investment protection rules. For this reason, changes in the use of ports and port services – such as amendments to fee schedules, stricter employment and environmental protection – could be interpreted as breaching 'legitimate' investor expectations. It should be noted that the large shipping companies established in German ports also have establishments in Canada (for example, Maersk, MSC, CGA CGM, Hapag Lloyd).

The re-regulation of maritime transport called for by trade unions could come into conflict with CETA. The demand raised by the International Transport Workers' Federation (ITF) and the European Transport Workers' Federation (ETF) to reserve maritime cabotage rights as far as possible for national flag vessels of the country concerned would violate CETA if the EU member states granted Canada the same cabotage rights on a reciprocal basis. The ITF and the ETF also demand that the employment conditions on-board ships operating between different states shall be those of the country which applies the most favourable standards.[61] However, CETA's maritime transport chapter does not contain any social clauses on which such a demand could be based.

Canada permits fleets registered in the EU not only to reposition empty containers, but also provide feeder services between the ports of Halifax and Montreal. Furthermore, EU ships with a temporary license may participate in tenders for dredging.[62] Ships registered in Germany and enjoying cost advantages due to the low wages of their crews from third countriesmay also benefit from these

[60]See Consolidated CETA Text, pp. 1347f.

[61]See: ETF 2014a: Solidarity Statement on Behalf of the European Seafarers' Trade Union Affiliated to the ETF, Brussels, 3 September 2014; as well as ETF 2014b: ETF MTS position paper on the Transatlantic Trade and Investment Partnership (TTIP) negotiations, Brussels, August 2014; ITF 2011: Mexico City Policy: ITF policy on minimum conditions on merchant ships, Second edition, November 2011.

[62]See: Consolidated CETA Text, pp. 795 and 653.

liberalisations.[63]However, further employment for German or EU seafarers on German ships is scarcely to be expected from these Canadian concessions.

12.8 Air Transport

Certain air transport services come under the provisions of both the investment and the services chapter. This includes (i) the repair and maintenance of aircraft, (ii) the sale and marketing of air transport services, (iii) computer reservation systems, (iv) groundhandling and (v) airport operation services (or airport management) (see investment chapter, Article X.1.2; services chapter, Article X-02.1 (e)).

The EU has registered a reservation for supporting services for air transport and rental of aircraft in Annex I, which is thus subject to the ratchet mechanism. Only in certain exceptional instances, EU airlines may lease aircraft registered in Canada from Canadian companies. Only those airlines can obtain operating licences that are in majority ownership of EU states, EU citizens or citizens of countries that have signed reciprocal agreements with the EU.

Groundhandling services in the EU, according to the reservation, can be subject to establishment requirements, while airports may limit the volume of suppliers. In the case of large airports there may ‘not be less than two suppliers’:

> *The number of providers in each airport may be limited. For "big airports", this limit may not be less than two suppliers.*[64]

The aim of the European Commission‘s recent airport package to raise the number of groundhandling operators at major airports from two to three[65] and thus to increase competition (with the predictable consequence of further downward pressure on wages and working conditions) would be in line with this wording, however. The clause ‘not less than two suppliers’ expressly permits an increase. As it concerns an Annex I exception subject to the ratchet mechanism, any increase to three suppliers occurring after CETA’s entry into force would automatically become a binding commitment.

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[63]Based on the option of limited operation under a foreign flag (the so-called *Bareboat-Charter* rule) and their entry in Germany‘s second register, of the, at present, 3,103 ships in Germany’s merchant ship register only 158 sail under a German flag and with German conditions. See: Bundesamt für Seeschifffahrt und Hydrographie 2014a: Statistik der deutschen Handelsflotte ab BRZ 100, 30.11.2014; Bundesamt für Seeschifffahrt und Hydrographie 2014b: Bestand der nach §7 FIRG ausgeflaggten Handelsschiffe ab BRZ 100 (Bareboat-Charter), 30.11.2014.

[64] See Consolidated CETA Text, p. 1211.

[65]http://www.reuters.com/article/2014/12/12/us-eu-aviation-idUSKBN0JQ1K220141212

Furthermore, the EU reservation provides for establishment and concession requirements for airport operation services. Access to computer reservation systems can be made dependent on reciprocity. In addition, the EU has inserted a most-favoured-nation exception in Annex II for auxiliary air transport services.

12.9 Financial Services

CETA's Financial Services chapter concerns two main areas (see Article 2: Definitions): (i) insurance and insurance-related services and (ii) banking and other financial services. Insurance services include, among other things, direct insurers, reinsurers, brokerage, consulting and settlement services. Banking and other financial services include savings and loans, leasing, credit cards, exchange and over-the-counter trading (including proprietary trading), various money market, currency and derivative trading, asset management, payment and settlement services, data processing, consulting and intermediation. Given this broad spectrum, risky practices and products also fall within CETA's provisions, including banks' proprietary trading with their depositors' savings and many forms of only weakly regulated over-the-counter derivatives trading.[66]

Excluded from this chapter are public retirement plans, social security systems, governments' financial activities and activities of public entities (Article 1.5). Public entities, which according to the definition in Article 2(c) would be excluded, include governments, central banks and state-owned or -controlled entities that mainly fulfil official purposes, as long as they do not 'principally' provide 'financial services on commercial terms':

> *'Public entity' means:*
> *1. a government, a central bank or a monetary authority of a Party or any entity owned or controlled by a Party, that is principally engaged in carrying out governmental functions or activities for governmental purposes,* ***not including an entity principally engaged in supplying financial services on commercial terms.***[67]

This wording may also be used to restrict the economic room to manoeuvre of public financial institutions.

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[66]The definition of '*Banking and other financial services'* explicitly refers to '*(…) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: (a) money market instruments (including cheques, bills, certificates of deposits); (b) foreign exchange; (c) derivative products including futures and options; (d) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements; (…)*'

[67] Emphasis added.

Likely to hinder any re-regulation of financial services are the relevant prohibitions of quantitative restrictions of market access in Article 6. These could clash with measures recently adopted in the EU to introduce position limits on commodity futures or the ban on 'naked' (unsecured) short selling of shares, bonds and credit default swaps. The prohibited quantitative restrictions also include the ban on capping foreign participation in financial institutions (Article 6(a)(iv)):

> *Neither party shall adopt or maintain (…) measures that: (a) impose limitations on: (…) the participation of foreign capital in terms of maximum percentage limits on foreign shareholding in financial institutions or the total value of individual or aggregate foreign investment in financial institutions.*

The extent to which this prohibition could affect public credit institutions would have to be examined. For instance, some German *Länder* allow savings banks to create share capital, thereby exposing them to the risk of privatisation because of the tradability of share capital. The *Länder* have thus generally capped the transferability of share capital and restricted the purchase to public-law institutions (in other words, savings banks, regional banks or their associations). However, these restrictions are already controversial under European law. Financial institutions with establishments in Canada could now also question their conformity with CETA. The agreement would thus help private banks to push forward the privatisation of savings banks.[68]

Also questionable is Article 13 (New Financial Services) which requires that a CETA party approves any new financial services that the other party would also approve.[69] Different supervisory standards in Canada and the EU could be exploited in a way that would favour the dissemination of risky financial products.

The chapter also contains an exception for supervisory measures (Article 15: Prudential Carve-Out) that may be implemented for the protection of investors or for the stability of the financial system. Such measures must be 'reasonable', which in turn opens up considerable scope for interpretation. Furthermore, the Annex to the Financial Services chapter contains an extremely cumbersome mechanism for applying the 'prudential carve-out' in the case of investor-state disputes (Annex XX).[70]

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[68]Seikel, Daniel 2011: Wie die Europäische Kommission Liberalisierung durchsetzt: Der Konflikt um das öffentlich-rechtliche Bankenwesen in Deutschland, Max-Planck-Institut für Gesellschaftsforschung, MPIfG Discussion Paper 11/16. Ver.di 2008: Gegen die Privatisierung von Sparkassen in Hessen: Dokumentation einer Kampagne, Berlin, March.

[69]The actual wording is: '*Each Party shall permit a financial institution of the other Party, on request or notification to the relevant regulator, where required, to supply any new financial service that the first Party would permit its own financial institutions to supply under its domestic law in like circumstances. (…).'*

[70]Annex XX of the Financial Services Chapter. Understanding between Canada and the EU. Guidance on the application of Article 15 (Prudential Carve-out) and Article 20 (Investment Disputes in Financial Services).

An intergovernmental committee – the Financial Services Committee – is to act as a filter in deciding whether a government may reject an ISDS complaint by invoking the prudential carve-out. In judging the legitimacy of a supervisory intervention it has to be assessed whether it 'is not so severe in light of its purpose that it is manifestly disproportionate to the attainment of its objective'. Furthermore, an intervention may not constitute either a 'disguised restriction on foreign investment' or an 'arbitrary or unjustifiable discrimination'. With these formulations the filter mechanism again puts obstacles in the way of financial sector regulation.

A decision arising from the bilateral consultations of the filter mechanism on the admissibility of an ISDS claim shall be binding on an arbitration tribunal. This raises the question, however, of how such decisions might be enforced in relation to private arbitration tribunals (see Sections 2 and 4.2 above).

13. Summary

1) The general exceptions from the basic liberalisation commitments contained in CETA are too narrow and cumbersome to effectively protect right to regulate in the public interest. This applies above all to labour and social standards, which are absent from the general exceptions. Only occupational safety measures may, in some instances, be justified on health and safety grounds.

2) As the investment protection standards and the investor-to-state dispute settlement procedure (ISDS) apply to data protection rights, employee data protection in Germany and the EU is potentially at risk from investment claims. This applies particularly to provisions such as the EU's General Data Protection Regulation currently under negotiation.

3) The general exceptions offer no effective protection for taxation because measures taken in that area may in principle be the object of investor-state claims. On top of that, some changes in tax rules are subject to the ratchet mechanism; in other words, in future these rules may only be made more 'liberal' and not more restrictive.

4) Both Germany and the EU have run a substantial trade surplus with Canada in recent years (in the case of Germany, 4.4 billion euros in 2013). With the exception of some agricultural products CETA abolishes tariffs on all goods. The bulk of tariffs will be abolished when the agreement enters into force, the rest three, five or seven years later.

5) The iInvestment chapter has numerous shortcomings. The circumvention of national jurisdiction via ISDS will be maintained, as will the extremely broad definition of 'investment' and the possibility of an expansive interpretation of substantive protection standards. Parallel claims continue to be permitted, while a binding appeals body is lacking. While state regulation is subject to cumbersome requirements, there are no binding social and labour standards.

6) The annex to the investment chapter on public debt permits investor-state procedures against debt restructurings or modifications of bond agreements if investors invoke infringements of national treatment or most-favoured-nation treatment. This leaves the door open for further claims for damages in the event of any debt haircuts or changes in bond conditions.

7) The schedules of commitment, based on the negative list approach, do not indicate which areas will be fully liberalised. The Annex I reservations are subject to the standstill and ratchet mechanisms; in other words, they may only be further deregulated, not reregulated. Future liberalisations will become binding commitments. The Annex II reservations, although deemed to provide regulatory flexibility, contain numerous loopholes.

8) The public utilities reservation, which is supposed to protect public services, is inadequate. It only concerns market access rules, not national treatment, most-favoured-nation treatment and investment protection standards. Furthermore, it applies only to monopolies and the few suppliers on whom 'exclusive' rights have been conferred by the state. In addition, it wrongly excludes telecommunications: the public service obligations that are supposed to be protected by the reservation are also applicable in this sector.

9) Although state-owned enterprises, public monopolies and companies granted special rights by the state are still permitted, they may not discriminate against Canadian suppliers in their sales and purchases. With regard to activities beyond the fulfilment of their public mission they must operate on a 'commercial' basis, for example, in setting prices and their quality requirements.

10) CETA contains various rules on subsidies. While the services chapter excludes subsidies from its scope of application, the subsidies chapter permits consultations if a party considers that it has suffered damage. The protection standards of the investment chapter (fair and equitable treatment, indirect expropriation) are applicable to subsidies, which could make, for example, state compensation payments to non-profit companies vulnerable to legal claims.

11) The chapter on public procurement sets thresholds for transatlantic tenders, which affect the federal government, the *Länder*, municipalities and utilities operating networks. Although the chapter contains some environmental clauses, binding social clauses are largely absent. As a result, linking the award of contracts to compliance with collective agreements or the payment of minimum wages may clash with CETA.

12) The rules of the chapter on domestic regulation may put licensing and qualification requirements under pressure to deregulate. The EU has excluded very few services from this chapter, but no comprehensible criteria are discernible for the selection of exclusions. Far more sectors could be affected by these disciplines.

13) The recognition chapter contains rules for the mutual recognition of professional qualifications and related agreements. The parties are prohibited from making mutual recognition dependent on the acquisition of additional domestic qualifications. It remains to be seen how the equivalence of qualifications is to be determined. Moreover, it is not evident why professional recognition should even be part of a

trade agreement. This may be done outside trade agreements, as is already standard practice.

14) Although the chapter on temporary labour migration shall be without prejudice to national labour law and permanent access to the labour market, the linking of the permitted short-term assignments to a rotating labour force may still lead to unfair competition. The chapter lays down rules on the maximum duration of stay for various categories of workers. When it comes to approval, however, the parties must avoid ‘unduly impairing or delaying trade’.

15) Because CETA does not contain a human rights clause, conflicts of norms can arise, so that compliance with EU law can lead to a violation of CETA rules. Canada has not yet ratified ILO Conventions No. 98 and No. 138, but CETA contains no obligation to do so. Violations of the chapter on trade and labour are not negotiable under the general dispute settlement mechanism. The EU blocked Canada’s proposal to underpin the labour chapter with sanctions.

16) At the latest seven years after CETA’s entry into force the last tariffs on vehicles must be abolished on both sides. EU producers are likely to benefit disproportionately because they have a much higher market share in Canada than Canadian auto manufacturers have in the EU. Nonetheless, only very modest positive employment effects are predicted in the EU. With regard to trade in transport equipment, by contrast, in which Canada is pretty competitive, the outcome could be slightly negative.

17) The EU excludes audiovisual services from the chapters on services, domestic regulation and subsidies. However, the scope of this exception is unclear because CETA does not contain a definition of audiovisual services. Furthermore, investment protection standards are applicable to the sector and ISDS procedures are possible. It must be noted here that the US film and TV industry, which is pushing into the EU market, uses Canada intensively as a low-cost production location.

18) The EU’s Annex II exception for the collection, purification and distribution of water refers only to market access and national treatment, not to most-favoured-nation treatment and investment protection, as well as sewage services. Germany’s Annex II exception for waste management (including sewage) does not refer to national treatment, most-favoured-nation treatment and investment protection. These gaps could also be exploited by European companies with Canadian establishments.

19) In Annex II the EU restricts CETA liberalisations with regard to education, health and social services to ‘privately funded’ services. It is unclear, however, how services receiving mixed funding from public and private sources would be handled and whether mandatory fees would convert public services into private ones. Furthermore, the exception does not refer to most-favoured-nation treatment and investment protection.

20) Germany’s Annex II reservation for health and social services, which is supposed to protect the social security system, does not refer to cross-border services, which could potentially provide online insurance providers with a loophole. In addition, the

protection standards of fair and equitable treatment and of indirect exploitation are applicable.

21) The EU's Annex II energy exception refers only to transmission networks, such as high-voltage power lines, but not to local electricity and gas distribution networks, which are often being remunicipalised in Germany. These remunicipalisations are not protected in CETA. Individual member states, such as Belgium, have also excluded energy distribution networks, but not Germany. These gaps could also be exploited by European energy groups with establishments in Canada.

22) The EU list of reservations contains no exceptions for telecommunications, which is thus subject to the full panoply of CETA provisions. Although the telecommunications chapter provides the possibility of universal service obligations, it imposes restrictive conditions. Such obligations must not be 'more burdensome than necessary'. The same applies to data protection. Improved employee data protection, for example, must not be 'arbitrary', 'unjustifiabl' or a 'disguised restriction on trade'.

23) The E-commerce chapter stipulates that customs duties and other fees shall not be imposed on electronic deliveries. The EU's list of reservations does not contain any kind of exception in this regard. If the parties impose data protection requirements, they shall be based on international standards. As these are extremely underdeveloped the question remains, to what extent stricter national standards might prevail over weaker international ones.

24) The rules on international maritime transport liberalise access to ports and cabotage rights. The gaps in the exception clauses enable shipping companies to invoke the most-favoured-nation and investment protection standards. Changes in port regulation – e.g., user fees, social and environmental standards – would be vulnerable. Similarly, re-regulations could be challenged (e.g., national cabotage privileges, application of labour standards of those countries which are most favourable to crews).

25) Various air transport services are subject to the provisions of the investment and the services chapters, including groundhandling. The EU has registered an Annex I reservation in this regard. In the case of large airports at least two groudhandling operators must be authorised. The current aim of the European Commission to raise the number of operators from two to three would be compatible with this reservation. Such an increase would become a binding commitment due to the ratchet mechanism.

26) The chapter on financial services permits risky business models and products (e.g., proprietary trading, derivatives), while unreasonable obstacles are put in the way of financial supervision. Public institutions that principally engage in the provision of financial services on a commercial basis are covered by the chapter. The ban on quantitative market access restrictions could clash with savings bank laws that limit the tradability of share capital in order to prevent privatisation.

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Annex

Procedure for Ratifying Trade Agreements in the EU

Initialling: After the technical conclusion of the negotiations and 'legal scrubbing' the chief negotiators of both parties initial the text of the agreement. Initialling implies a provisional establishment of the text, which at this point is not legally binding. The text can subsequently be amended. The Commission points out, however, that initialling is not legally required and in the case of CETA is not planned.[71]

Signature: At the proposal of the Commission the Council of the EU decides on the signature of the agreement. The voting procedure depends on the content of the agreement. As a rule, the Council gives its assent by a qualified majority. Under certain circumstances unanimity can be required, for example, in relation to many aspects of intellectual property, foreign direct investment and trade in services (in particular in relation to audiovisual, cultural, social, educational and health services) (see Article 218 TFEU). After signature by both parties the Council transmits the agreement to the European Parliament for its consent.

Provisional Application: Together with the signature the Council also has the possibility of passing a resolution on the provisional application of the agreement. If the partner to the agreement also decides to do this, binding obligations arise even before the agreement enters into force.

Mixed Agreement: If the agreement concerns areas that fall within the exclusive competence of the member states or the shared competence between the Union and the member states, additional ratification by the EU member states is required. However, there are some disagreements over the classification of agreements as mixed or EU-only.

Conclusion: After the consent of the European Parliament and, if necessary, ratification by the member states, the Council adopts a resolution to conclude the agreement. Only after its conclusion does a treaty become legally binding under international law.[72]

[71] BMWi 2014: wire report: HAPOL CETA 12.9.2014.

[72] Rathke, Hannes 2014: Fragen zur Zuständigkeitsverteilung zwischen EU und Mitgliedsstaaten sowie zur Ratifikation des Abkommens über eine Transatlantische Handels- und Investitionspartnerschaft (TTIP). Deutscher Bundestag, Fachbereich Europa, PE 6 – 3000 – 49/14, 19 March. As well as: European Commission 2013: Trade negotiations step by step. DG Trade, September 2013.