

**The limits of EU and constitutional law for the
Comprehensive Economic and Trade Agreement
between the EU and Canada (CETA)**

Legal opinion
on behalf of attac/Munich

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B. Question

Since 2009, the European Commission (EC) and Canada have been negotiating a free trade and investment agreement, the Comprehensive Economic and Trade Agreement (CETA). Initially, the Agreement was planned as a simple trade agreement. But in 2011, the EU Foreign Affairs Council extended the mandate for the negotiations to include an investment chapter. Apart from the removal of customs barriers, CETA is now supposed to contain a number of measures that give rise to constitutional and European legal questions. Thus, the Agreement will provide for the elimination of non-tariff barriers to trade, the coordination of health care and plant protection measures, the deregulation of trade in services, the protection of direct and indirect investments, the mutual recognition of qualifications, mutual access to public procurement and the adjustment of intellectual property rights. Moreover, a Standing Regulatory Council – consisting of representatives from the EU and Canada – and an arbitral jurisdiction for investor-state disputes are to be established. Since August 2014, a first draft of the CETA has been available to the public.¹

The following opinion assesses whether this “CETA Consolidated Text” of August 5th, 2014 complies with EU and constitutional law. The opinion is limited to some selected regulatory fields of CETA. It does not claim to be exhaustive, but focuses on those provisions that dominate public discussion.

In this context, the following three issues are of special importance:

1. Does CETA in its present form comply with EU law? Does it observe the distribution of competences between the EU and its Member States and between the EU institutions? Is it in accordance with the requirements of EU law, especially regarding the provisions of the Charter of Fundamental Rights (CFREU)?
2. Is CETA in its present form constitutional? Which provisions of the German Basic Law apply to a free trade and investment agreement? What must the German authorities – also within the EU institutions (such as the European Council) – do to ensure the constitutionality of the CETA?
3. Which legal remedies are available to verify whether CETA complies with EU law and the Basic Law?

¹ This draft can be found at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng> (last visited 20 Nov. 2014).

C. Legal opinion

Part I: EU law requirements for CETA

Regarding EU law, three types of requirements must be distinguished: the question of EU competence (1.), the requirements for a proper ratification process (2.), and the substantive requirements (3.).

1. Competence of the EU

Pursuant to the principle of conferral, codified in Article 5(1) TEU, the European Union requires a competence for each legal act binding member states or creating institutions. Such a competence has to be either explicitly conferred by the texts of the Union Treaties or it must be possible to deduce it from them.² This applies also without restrictions to the external relations of the EU, that is, each act of the EU with respect to third parties or international organizations requires a contractual assignment of competences. Therefore, the Union has no general authority to conclude all-encompassing international agreements. Instead, the competence of the EU for each subject area of an international agreement has to result from European Union law.³ Although it is assumed in some cases that the question of competence for the conclusion of an international agreement has to be answered “in view of its essential subject” and not “on the basis of individual provisions which, on the whole, can be characterized as incidental or auxiliary provisions”⁴, this cannot apply to the distribution of competences between the EU and its Member States because of the principle of conferral; a regulatory activity in individual fields without special authorization, even in the form of incidental or auxiliary provisions, is specifically not provided by Union law. Therefore, the main topic of the treaty is not controlling for the purpose of competences. As soon as the EU lacks the required competence with regard to individual provisions of the international agreement, the agreement as a whole has to be concluded as a “mixed” agreement, even if those provisions are “of minor importance”.⁵ Since free trade agreements regularly affect multiple areas of competence, in legal practice all recent free trade agreements have been concluded as mixed agreements⁶, even after the Treaty of Lisbon came into effect.⁷

CETA comprises multiple regulatory areas: freedom of establishment, immigration, the recognition of qualifications, data protection, copyright laws, financial services, investment protection. The question is whether the EU is competent to regulate each of these individual areas. If the Union lacks the competence for parts of the agreement, the agreement would have to be concluded as a so-called “mixed agreement”, which means that the Member States participate as contracting parties and are involved into the ratification process according to their respective national stipulations.

A recent opinion, authored by Franz C. Mayer on behalf of the German Federal Ministry of Economic Affairs, explains in detail that the EU does not have the exclusive competence to conclude the CETA.⁸ Therefore, the following discussion of the question of competence will be confined to some particularly problematic areas.

² Bast, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union. Kommentar*, 2014, Article 5 TEU, para. 13.

³ Weiß, in: Grabitz/Hilf/Nettesheim (n. 2), Article 207 TFEU, para. 91.

⁴ Hahn, in: Calliess/Ruffert, *EUV/AEUV*, 4th edn. 2011, Article 207, para. 59.

⁵ Weiß, in: Grabitz/Hilf/Nettesheim (n. 2), Article 207 TFEU, para. 91.

⁶ For mixed agreements in general, cf.: Eeckhout, *EU External Relations Law*, 2nd edn. 2011, pp. 212ff.

⁷ Hahn, in: Calliess/Ruffert (n. 4), Article 207, para. 67.

⁸ Mayer, Legal opinion for the Federal Ministry for Economic Affairs and Energy, 28 August 2014.

1.1 Investment protection: Substantive regulations

One of the areas regulated by CETA is investment protection.⁹ Pursuant to Chapter 10, Article X.3. CETA, the term “investment” encompasses:

“Every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”

This is to include, amongst other things, “kinds of interest in an enterprise” (Chapter 10, Article X.3. CETA, “investment” (e)).

Furthermore, in Chapter 15 Article X.1.(3) and (4) as well as in Articles X.19 and X.20 CETA, large parts of substantive investment protection and of state-investor arbitration are extended to financial services. According to the very extensive definition laid down in Chapter 15 Article X.2.(a) CETA, the term “financial services” encompasses

“any service of a financial nature. Financial services include all insurance and insurance related services, and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature.”

The EU’s competence to regulate investment protection could result from Article 207(1)(1) TFEU. According to this article, the EU is competent to regulate foreign direct investments in the context of the common commercial policy. It is highly controversial whether this competence is to be interpreted narrowly as encompassing only the *trade* aspects of the investment¹⁰ or whether it entitles the EU to regulate *all* fields related to foreign direct investments.¹¹ Referring to EU and international developments, it is at least unanimously “assumed that a direct investment requires a lasting and direct relationship between the investor and the enterprise as well as a minimal opportunity for the investor to exert a certain effective influence on enterprise policy.”¹² This view was also held by the German Federal Constitutional Court in its ruling on the Lisbon Treaty:¹³

“The extension of the common commercial policy to ‘foreign direct investment’ (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term ‘foreign direct investment’ only encompasses investment which serves to obtain a controlling interest in an enterprise [...]. The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements..”

Therefore experts agree that portfolio investments, i.e. investments that do not aim for a minimum opportunity to exert influence, are not included in the definition of direct investments and are thus,

⁹ Cf. Chapter 10 CETA.

¹⁰ Krajewski, External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?, 2005 *CMLRev* 91 (114).

¹¹ Weiß, in: Grabitz/Hilf/Nettesheim (n. 2), Article 207 TFEU, para. 40.

¹² Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, 2010 *EuZW* 207, at 208-9.

¹³ BVerfGE [=Decisions of the Federal Constitutional Court of Germany] 123, 267, at 420 para. 379; official English translation available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (last accessed 25 Nov. 2014).

because of the clear wording in this respect,¹⁴ not covered by Article 207(1) TFEU.¹⁵ The chapter on investment protection in the CETA would therefore only be covered by Article 207(1) TFEU if it exclusively contained regulations for foreign direct investments within the narrow meaning of Article 207(1) TFEU.

Conversely, Chapter 10 Article X.3. CETA makes use of a broad definition of investment without imposing any special requirements regarding minimum influence. Furthermore, the chapter on financial services contains a number of regulations which also cover portfolio investments. Thus, CETA does not differentiate between those foreign direct investments covered by Article 207(1) TFEU and portfolio investments which are not covered by this definition, but contains regulations extending to both equally. Since the EU, pursuant to Article 207(1) TFEU, is not competent to regulate portfolio investments, this competence remains with the Member States. The regulation of those investments therefore requires the conclusion of a mixed agreement.¹⁶ Also the extension of investment protection to the wide range of financial services is clearly not covered by Article 207 TFEU either.

Some authors advance a so-called implied concurrent external competence of the EU, derived from the internal competence, to argue that the EU is competent to conclude international agreements regarding portfolio investments.¹⁷ However, the extension by the Lisbon Treaty of the Union's competence for foreign direct investments was implemented in knowledge of the differentiation between foreign direct investments and portfolio investments.¹⁸ If the Member States had aimed at conferring a competence for portfolio investments in the Lisbon Treaty, they would not have used the clearly limited term "foreign direct investment" in Article 207 TFEU. Furthermore, an implied concurrent external competence is out of the question for systematic reasons as well. If the EU already was allowed to adopt any regulation on investments, the extension of its competence by the new Article 207 TFEU would have been of merely declaratory value. But the Lisbon Treaty's extension of the EU's competence to foreign direct investments was justified explicitly by the fact that the EU had been lacking competence in that area up until then. Therefore, assuming an implied concurrent external competence for portfolio investments clearly conflicts with the regulatory content of Article 207 TFEU, which was added as part of the Lisbon Treaty.

In addition, systematic considerations speak against deriving an implied external competence from Articles 63ff TFEU. Article 63 TFEU prohibits any restriction on the movement of capital within the framework of that Chapter of the TFEU. The CETA regulations concerning investment protection, however, go far beyond a prohibition of restrictions, so that it is impossible to base them on an implied external competence derived from Articles 63ff TFEU. After all, Article 216(1) TFEU was created for implied external competences, partially codifying the AETR case law.¹⁹ Even if we assume that there is room for further unwritten competences alongside Article 216(1) TFEU, competences of that kind must at least not subvert the regulatory content of Article 216(1) TFEU. Article 216(1) TFEU inter alia acknowledges an implied external competence of the Union to conclude an international

¹⁴ Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht* No. 83, 2009, p. 16.

¹⁵ See i.a. Hahn, in: Calliess/Ruffert (n. 4), Article 207, para. 43; Bungenberg, *Die Kompetenzverteilung zwischen EU und Mitgliedstaaten „nach Lissabon“*, in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, 81.

¹⁶ Weiß, in: Grabitz/Hilf/Nettesheim (n. 2), Article 207 TFEU, para. 92.

¹⁷ Hindelang/Maydell, *Die Gemeinsame Europäische Investitionspolitik – Alter Wein in neuen Schläuchen?*, in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, 11.

¹⁸ See Mayer (n. 8), pp. 12-13.

¹⁹ See Frenz, *Handbuch Europarecht*, vol. 6, 2011, para. 5152 ff.

agreement only in cases where this is necessary to achieve one of the objectives referred to in the Treaties. Even in a rather broad interpretation, this necessity requires that “treaty-making powers are needed to effectively exercise an existing internal competence.”²⁰ This is definitely not the case if it is possible to conclude a mixed agreement,²¹ so that with regard to the CETA, there is no necessity in the sense of Article 216(1) TFEU.

1.2 Investment protection: Settlement of disputes between investor and state

For disputes between investor and state the CETA stipulates an *investor-state dispute settlement* (ISDS) mechanism. Arbitration clauses of this kind are (with the exception of the financial services) part of many bilateral investment treaties and enable an investor to bring an action against a state before an arbitral tribunal.

This raises the question whether the EU’s competence to regulate foreign direct investments pursuant to Article 207 TFEU includes the negotiation of arbitration clauses as well. Some argue that Article 207 TFEU confers to the EU an extensive competence regarding foreign direct investments, which also includes the negotiation of arbitration clauses. This sweeping extension of the competence to regulate foreign direct investments raises however substantial concerns. For the transfer of judicial functions requires a legal basis.²² This results essentially from the fact that the transfer of judicative functions constitutes a transfer of sovereign rights.

Even if we assume that Article 207 TFEU confers a competence to negotiate arbitration clauses, this competence cannot reach further than the substantive content of the competence provision. But CETA contains arbitration clauses that not only cover disputes regarding foreign direct investments, but that are also applicable to portfolio investments. Since however the EU is not even competent to regulate portfolio investments as such, it may not agree upon arbitration clauses for those, either.²³

It is furthermore especially problematic that CETA extends the scope of the arbitration clauses to the field of financial services. This field is not covered by Article 207 TFEU. A competence to negotiate arbitration clauses in the field of financial services could therefore only exist as an ancillary competence deduced from Articles 63ff TFEU, which deal with the movement of capital and payments. But these inward-looking competence provisions on market freedoms do not allow the conclusion of a general externally oriented competence to establish arbitration courts for these fields. The EU allocates the task of jurisdiction to the courts of the member states (as far as they apply the law of the EU) and to the CJEU. This allocation of jurisdiction establishes a conclusive and well-balanced system of legal protection for EU law. Changes to that system, like the creation of the General Court (EGC, formerly Court of First Instance) or the submission to the jurisdiction of the European Court of Human Rights (ECtHR) therefore required an amendment of primary law. For large parts of the market freedoms, like the freedom to provide services or the free movement of goods, the EU is not even internally competent to establish an extensive arbitration mechanism beyond the jurisdiction of EU Law. Admittedly, the CJEU assumes that in individual cases, when concluding an international agreement, the EU may be competent to submit to an external jurisdiction for the disputes in relation to that international agreement.²⁴ But this competence does not include the general and extensive transfer of judicative functions from EU courts to external authorities. Instead,

²⁰ Vöneky/Beylage-Haarmann, in: Grabitz/Hilf/Nettesheim (n. 2), Article 216 TFEU, para. 11.

²¹ Hindelang/Maydell (n. 17), p. 69 n. 225.

²² See Krajewski (n. 10), p. 114.

²³ Mayer (n. 8), pp. 15–6.

²⁴ For detailed information on the substantive requirements for the transfer of judicative function, cf. section 3.1. below.

such a submission may only take place in cases where the CJEU's monopoly of jurisdiction regarding EU law is not affected. Thus, the CJEU, in the context of the establishment of a Patent Court, established that although the EU had no jurisdiction in patent disputes the Member States were not allowed to confer the jurisdiction for patent disputes on an international court, because this would deprive their courts, as 'ordinary' courts within the European Union legal order, of the task to implement EU law.²⁵ This applies also to the conferral of judicative functions by the EU. Within the framework of the market freedoms, the EU has thus no general competence to establish arbitration tribunals for entire economic sectors. The EU may not simply confer judicative functions on mechanisms outside the jurisdiction of EU law. Therefore it does not have an extensive ancillary competence to establish arbitration tribunals for all fields of EU law. Consequently, Articles 63ff TFEU do not provide a competence to establish arbitration tribunals for the field of financial services.

Finally, investment protection proceedings pose considerable liability risks to the member states. The EU has no competence to substantiate the liability of the Member States occurring in the context of investment protection proceedings, either.²⁶

1.3 Other areas

Apart from that, the competence of the EU is highly questionable regarding a wide range of other regulatory areas as well. This applies in particular to the field of transport, but also to the fields of protecting intellectual property (see especially the limit on the exercise of powers laid down in Article 345 TFEU, which protects the Member States' right to regulate the system of property ownership), the mutual recognition of professional qualifications, occupational health and safety, good manufacturing practice for medicinal products as well as provisions regarding the right of residence and standards to regulate administrative procedures. In those fields – as Franz C. Meyer develops in detail – the EU has only limited competences.²⁷ CETA exceeds those competences.²⁸

1.4 Establishment of committees

Furthermore, CETA establishes an administrative substructure consisting of a CETA Joint Committee and a number of specialized committees.²⁹ These committees will be endowed with extensive competences regarding the implementation of the Agreement.³⁰ It is debatable, however, whether the creation of this committee structure is consistent with the distribution of competences between the EU and the Member States. The committees are exclusively composed of executive representatives of the EU and Canada, but not of the Member States, although CETA is a mixed agreement.

The EU does not have exclusive competence to regulate all fields of CETA. To the extent that the committees are concerned with fields which fall within the jurisdiction of the Member States, the competence of the committees exceeds the competence of the EU. In particular, such a competence cannot be justified with an ancillary competence of the EU, since the EU is explicitly not competent to single-handedly conclude an agreement if it affects fields which fall under the competence of Member States. As a consequence, the EU is not competent to establish a committee which is to operate in those fields, either.

²⁵ CJEU, opinion 1/09 of 8 March 2011 – Patent Court, paragraph 80.

²⁶ Mayer (n. 8), p. 16.

²⁷ Ibid., pp. 16ff.

²⁸ For detailed information see *ibid.*, pp. 16ff.

²⁹ CETA, Chapter 30, "Administrative and Institutional Provisions", Article X.01.

³⁰ For detailed information on the committees cf. section 3.2. below.

This lack of competence could not even be rectified by concluding CETA as a mixed agreement, as even a mixed agreement could not simply confer new competences on the EU. On the contrary: According to the jurisprudence of the CJEU, provisions outside of EU law are permitted only in so far as they do not alter the distribution of competences.³¹ Therefore, CETA is not allowed to establish committees in which the Member States are not represented. The Union is not “authorized to cause a shift of competences by concluding mixed agreements.”³²

Consequently, the current committee structure of CETA is contrary to EU law as it violates the distribution of competences between the European Union and the Member States. At best this could be rectified by appointing representatives of the Member States to the committees as well, as far as these committees affect fields which according to the EU’s distribution of competences remain the sole responsibility of the Member States.

1.5 Interim conclusion

For numerous areas of CETA, the EU lacks regulatory competence, which therefore remains with the Member States. Thus the EU does not have the competence to conclude the agreement on its own; the Member States of the EU will also have to approve CETA. Thus, CETA is a so-called “mixed agreement.” But even if CETA will be concluded as such, the establishment of the regulatory committees transgresses the competence of the EU as long as the Member States are not represented in the committees. This violation of the distribution of competences cannot be remedied by having the Member States approve CETA in the Council. The distribution of competences between the EU and its Member States is not at the disposal of the parties to the agreement. Therefore, it cannot be circumvented by an international agreement or a vote in the European Council. Additionally, the German representative in the Council is not constitutionally authorized to approve the conclusion of an agreement that manifests a transgression of competences.

2. The ratification procedure at the EU level

The next question concerns the procedure in which CETA will have to be ratified. The procedure regarding ratification by the Member States results from their respective constitutional provisions; for the requirements according to the German Basic Law, see Part II of this opinion. The requirement for the ratification of agreements such as CETA according to EU law are laid down in Articles 207 and 218 TFEU.

2.1 Consent of the European Parliament

Pursuant to Article 218(VI)(a)(iii) TFEU, which Article 207 TFEU does not derogate, the European Parliament must consent to agreements which establish a specific institutional framework by organizing cooperation procedures. The creation of a committee system and of a regulatory council³³ under CETA constitute such a specific institutional framework. Consequently, the consent of the European Parliament is necessary for the ratification of CETA under EU law.

The required consent results also from Article 218(VI)(a)(iv) TFEU, since the arbitral agreement and the exemption from customs duties may have important budgetary implications for the EU. In addition, a number of regulatory fields of CETA require the ordinary legislative procedure, Article

³¹ CJEU, judgment of 27 Nov. 2012, C-370/12 – Pringle, [2012] EUECJ C-370/12, para. 158.

³² Schmalenbach, in: Calliess/Ruffert (n. 4), Article 216 TFEU, para. 43 (transl.).

³³ See section 3.2. below.

218(VI)(a)(v) TFEU. This applies e.g. to the migration of workers (Article 46 TFEU), the recognition of qualifications (Article 53 TFEU) or environmental protection (Article 19 TFEU).

2.2 Unanimity in the Council

Pursuant to Article 207(IV)(2) TFEU the Council – i.e., pursuant to Article 15 TEU, the respective responsible ministers – has to act unanimously for the conclusion of a trade agreement, if the agreement concerns the trade in services, commercial aspects of intellectual property or foreign direct investments. Since CETA affects all three fields, a qualified majority in the Council is not sufficient. The EU may ratify CETA only if a unanimous consent in the Council is achieved.

3. Substantive legality

Another question is whether the regulations contained in CETA fulfill the substantive requirements of EU law. According to Article 205 TEU, the EU's action on the international scene "shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Title V Chapter 1 of the Treaty of the European Union." This refers mainly to Article 21 TEU, in which the general provisions on the EU's external actions are laid down. The reference in Article 205 TFEU is not a statement of a merely declarative effect, but a legally binding, actionable obligation of the EU to comply with these principles, objectives and general provisions.³⁴ Pursuant to Article 21(1) TEU the EU is committed to democracy, the rule of law, the universality and indivisibility of human rights and the principles of international law when acting at the international level. Furthermore, Article 21(1) TEU contains a commitment to sustainable development and environmental protection. "The systemically implied politicization of the common trade policy is intensified again by the principle of consistency in Article 21(3)(3) TEU (n.v.) which was significantly strengthened in the Treaty of Lisbon."³⁵ CETA would have to comply with these EU law requirements in terms of content.

3.1 ISDS arbitration clauses

First of all, it is questionable whether CETA's arbitration clauses for investor-state dispute settlements (ISDS), which also extend to the field of financial services, are substantively compatible with EU law.

The Commission³⁶ seems to be of the opinion that the compatibility of such ISDS clauses with EU law is generally evidenced by the fact that the EU is already – or will be – subject to the jurisdiction of the European Court of Human Rights (ECtHR) and the Dispute Settlement Mechanism of the WTO. However, both the ECtHR and the WTO Dispute Settlement mechanism are substantially different from ISDS procedures.

First of all, it must be borne in mind that in order to subject the EU to the jurisdiction of the ECtHR, the Member States had to change the primary law in Article 6 (2) TEU, after the CJEU had found that the EU lacked the competence to accede to the European Convention on Human Rights (ECHR).³⁷ Moreover, unlike Investment Tribunals, the ECtHR is not a one-sided institution exclusively designed

³⁴ Nettesheim/Duvigneau, in: Streinz (ed.), *EUV/AEUV*, 2nd edn. 2012, Article 205, para. 1; Cremer, in: Calliess/Ruffert (n. 4), Article 205, para. 2.

³⁵ Tietje (n. 14), pp. 19f (transl.).

³⁶ See Commission: Handelsabkommen mit Kanada verfassungsrechtlich unbedenklich. Press release of 31 Oct. 2014, available at: http://ec.europa.eu/deutschland/press/pr_releases/12818_de.htm (last accessed 25 Nov. 2014).

³⁷ CJEU, opinion 2/94 of 28 March 1996 – ECHR.

for the protection of investor rights, but according to Article 19 ECHR serves to protect all rights and duties under the Convention³⁸, thus balancing conflicting societal interests. The WTO Dispute Settlement Understanding (DSU) does not even provide for an individual complaints mechanism for private individuals.³⁹ Nor does WTO law grant rights to private individuals,⁴⁰ for according to the case law of the CJEU neither WTO agreements⁴¹ such as GATT nor decisions of the Dispute Settlement Body⁴² are directly applicable under EU law. Thus, the examples of the ECtHR and the WTO Dispute Settlement mechanism do not prove that ISDS clauses are in line with EU law. Rather, they point to the distinctive problems of ISDS clauses. We therefore have to carefully evaluate whether the ISDS clauses of CETA comply with EU law.

In view of a number of opinions by the CJEU on whether and to which extent Member States are allowed to submit to an additional jurisdiction by means of an international agreement, this is doubtful. Of particular relevance in this context are the Court's opinions on the jurisdiction of the EEA,⁴³ on the settlement of the dispute over the European common aviation area (ECAA)⁴⁴ and on the creation of a unified patent litigation system.⁴⁵ The Court decided that the creation of such jurisdictions is subject to different requirements⁴⁶ resulting from the principle of preserving the autonomy of the European Union legal order.⁴⁷

3.1.1 The principle of autonomy of the European Union legal order

In its opinion on the EEA, the ECJ states that “an international agreement providing for system of courts, including a court with jurisdiction to interpret its provisions, is not in principle incompatible with Community law.”⁴⁸ The creation of such a court must, however, not “affect the allocation of responsibilities defined in the Treaties,” which must be ensured by the Court of Justice.⁴⁹ In the ECAA opinion, the ECJ confirms the principles laid down in the EEA opinion und proclaims that external jurisdictions must not call into question the Court's exclusive task of reviewing the legality of acts of the Community institutions.⁵⁰ With regard to patent disputes it finally states:

“While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as ‘ordinary’ courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the

³⁸ See Lenski, in: Karpenstein/Mayer, *EMRK*, 2012, Art. 19 para. 1ff.

³⁹ See Hilf/Salomon, in: Hilf/Oeter, *WTO-Recht*, 2nd edn. 2010, §7.

⁴⁰ See Hörmann, in: Hilf/Oeter (n. 39), §8.

⁴¹ CJEU, judgment of 23 November 1999, C-149/96 – Portugal v Council; CJEU, judgment of 14 December 2000, C-300/98 and C-392/98 – Parfum Christian Dior.

⁴² CJEU, judgment of 1 March 2005, C-377/02 – Leon van Parys NV; CJEU, judgment of 9 September 2008, C-120/06 P – FIAMM and C-121/06 P.

⁴³ CJEU, opinion 1/91 of 14 Dec. 1991 – EEA 1.

⁴⁴ CJEU, opinion 1/00 of 18 April 2002 – ECAA.

⁴⁵ CJEU, opinion 1/09 of 8 March 2011 – Patent Court.

⁴⁶ For a summary of the requirements cf. CJEU, Patent Court opinion (n. 45), para. 74ff.

⁴⁷ Regarding the autonomy of the European Union legal order and investment arbitration tribunals cf.: Hindelang, Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen, *WHI-Paper* 01/11, available at http://www.whi-berlin.eu/tl_files/documents/whi-paper0111.pdf (last accessed 20 Nov. 2014).

⁴⁸ CJEU, EEA opinion (n. 43), para. 70.

⁴⁹ *Ibid.*, para. 35.

⁵⁰ CJEU, ECAA opinion (n. 44), para. 24.

case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.”⁵¹

Therefore, the principle of autonomy of the European Union legal order clearly sets limits for establishing investment arbitration tribunals under EU-Law.

3.1.2 The autonomy of the European Union legal order and ISDS clauses

These requirements resulting from the principle of autonomy of the European Union legal order can also be applied to investment arbitration.⁵² For even situations occurring as part of an investment arbitration may potentially subvert the autonomy of the Union legal order.⁵³ This would be the case, for example, if an arbitration tribunal “is assigned to determine whether the European Union’s secondary law constitutes a violation of the investor rights according to an investment protection agreement.”⁵⁴ Furthermore, it is possible that a Member State that has to recover aid under article 108(2) TFEU could be sentenced to pay damages by an investment arbitration tribunal.⁵⁵ This calls into question the autonomy of the European Union legal order since the payment of damages would effectively grant the investor the advantages of an aid received contrary to EU law and would therefore constitute an unlawful situation according to EU law.

That is why doctrine stresses that the principle of autonomy of the European Union legal order imposes very narrow limits on the legitimacy of investment arbitration.⁵⁶ In this perspective, the establishment of investment arbitration tribunals is indeed not precluded by EU law from the outset, but it requires that the arbitration tribunals submit to preliminary rulings by the CJEU:

“To the extent that investment tribunals may apply and interpret EU law in an international arbitration under an EU IIA, which seems likely to be the case, investment tribunals could not settle such disputes. This is because they would, as a matter of EU law, have to be in a position to request a preliminary ruling on the interpretation of the EU Treaties from the CJEU in accordance with Article 267 TFEU. In effect, it would seem that the EU could only include investor-State arbitration clauses in EU IIAs with third States following a change in EU primary law such that investment tribunals could request a preliminary ruling. Even if the EU were to make this change, the EU’s treaty partners are unlikely to accept a dispute settlement mechanism which would require, or even provide the possibility of a tribunal to request a preliminary ruling from the CJEU.”⁵⁷

Investment arbitration tribunals interpreting or applying EU law are therefore only considered legitimate if it is ensured that they are integrated in the preliminary ruling proceedings pursuant to Article 267 TFEU. This, however, requires an amendment of primary law to the effect that the

⁵¹ CJEU, Patent Court opinion (n. 45), para. 80.

⁵² Cf. i.a. Herrmann, *The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy*, 15 *JWIT* 570 (2014); Hindelang, *Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU-Abkommen*, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union nach Lissabon*, 2011, 157, at 177-8; Burgstaller, *Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems*, 15 *JWIT* 551 (2014), 569.

⁵³ Hindelang (n. 52), pp. 173ff.

⁵⁴ Bings, *Neuordnung der Außenhandelskompetenzen der Europäischen Union durch den Reformvertrag von Lissabon*, 2014, p. 120 (transl.).

⁵⁵ Regarding this constellation cf.: Hindelang (n. 52), pp. 177-78.

⁵⁶ Burgstaller (n. 52); Lavranos, *Designing an International Investor-to-State Arbitration System After Opinion 1/09*, in: Bungenberg/Herrmann (eds.), *Common Commercial Policy after Lisbon*, 2013, pp. 199ff.

⁵⁷ Burgstaller (n. 52), p. 569.

investment arbitration tribunals are entitled to request a preliminary ruling pursuant to Article 267 TFEU.⁵⁸ Up to now, they are not, according to the jurisprudence of the CJEU⁵⁹ and to unanimous doctrinal opinion.⁶⁰

But the principle of autonomy of the European Union legal order goes beyond that. Through this fundamental concept, the Court clarifies that the establishment of a parallel jurisdiction within the framework of the EU must not lead to a situation where actions of the EU and its Member States are subjected to requirements which may come into conflict with substantive EU law. Furthermore, the distribution of competences within the EU must not be subverted by a parallel jurisdiction. All in all, investment arbitration is therefore ultimately required to be extensively and comprehensively consistent with the substantive and competence-related provisions of EU law.

3.1.3 Violation of the autonomy of the European Union legal order

The investment arbitration provided for by CETA does not comply with these requirements. CETA does not include any regulations to preserve the autonomy of the European Union legal order. Instead, it may produce conflicts between the requirements of EU law and of those of investment protection law; conflicts that cannot be resolved by preliminary ruling proceedings pursuant to Article 267 TFEU, as that would require an amendment of primary law. This problem does not only concern the matter of State aid, mentioned above. Direct conflicts between an arbitral judgment and EU law can occur wherever an investor's payment obligations under environmental, revenue or tax law are effectively thwarted by a matching arbitral award of damages to the investor. This becomes even more important as CETA arbitration will also extend to the entire field of financial services and therefore cover an additional economic sector. Concerning financial services, it remains yet unclear how the activities of the arbitration tribunals will affect regulation of this sector, which is already a very delicate matter.. The interpretive monopoly of the CJEU is not adequately ensured, either – if only because the arbitration tribunals will interpret provisions of CETA which, as an international agreement, is an “integral part of the European Union legal order.”⁶¹ Moreover, an arbitration tribunals will have to interpret EU law when deciding whether an act by an institution of the EU or by a Member State implementing EU law violates any assurances provided by investment protection clauses.

Therefore, the investment arbitration as provided by CETA is incompatible with the principle of autonomy of the European Union legal order and thus unlawful according to EU law.

3.2 The CETA committee structure

With its committee structure, CETA establishes its own administrative substructure. The organization and function of the committees are laid down mainly in Chapter 30, “Administrative and Institutional Provisions.”

Article X.01(1) of this Chapter establishes the CETA Joint Committee. The Joint Committee comprises executive representatives of the EU and Canada. Not only is the Joint Committee responsible for the further development of CETA under para. (3), it also supervises the Specialized Committees in accordance with para. (4)(b) and lays down extensive instructions for them. In this context, the Joint

⁵⁸ Hindelang (n. 52), p. 183.

⁵⁹ Cf. i.a. CJEU, judgment of 23 March 1982, case 102/81 – Nordsee Hochseefischerei, [1982] EUECJ R-102/81; CJEU, judgment of 27 Jan. 2005, C-125/04 – Denuit & Cordenier v. Transorient, [2005] 1 CMLR 48.

⁶⁰ Instead of all: Bings (n. 54), pp. 119–20.

⁶¹ Cf. Ehrlicke, in: Streinz (n. 34), Article 267 TFEU, para. 21 (transl.).

Committee has numerous substantive competences as well. It may, for example, broaden the subject matter of the Agreement considerably. Thus, it may extend the exemptions regarding the application of import duties (Article 5 of the Chapter on “National Treatment and Market Access for Goods”) as well as the “Rules of Origin” (Article 34 of the respective chapter). Finally, the Committee is to decide which additional intellectual property rights are to be included in the agreement (Article X.03 of the Chapter on “Investment Protection”). No restrictions for the Committee are mentioned in this context.

The Specialized Committees regulated in Chapter 30 Article X.02 are amongst others the Committee on Trade and Goods⁶², the Committee on Services and Investment⁶³, the Joint Customs Cooperation Committee⁶⁴, the Sanitary and Phytosanitary Committee⁶⁵, the Financial Services Committee⁶⁶ and the Sustainable Development Committee⁶⁷. The functions and the organization of the Specialized Committees are regulated – in general – in Chapter 30 and additionally in the chapters of CETA concerning the fields for which the respective committees are responsible. These numerous Specialized Committees also have some very extensive tasks regarding the development, configuration and interpretation of CETA.

As discussed above, this committee structure has to preserve the internal distribution of competences of the EU, which must not be prejudiced by an international agreement.⁶⁸ But such a prejudice would occur, for example, if the committee structure cut into the competences conferred on an EU institution by EU law, for instance by subverting the participation rights of the European Parliament or the jurisdiction of the CJEU. If and insofar as the participation in the committees affects legal actions on which EU law imposes special requirements regarding procedure and competence, the EU has to ensure that those are not subverted by the committee structure.

In general, EU law requires for each field of activities of a committee that the representation of the EU is organized in such a way that any decision abides by the requirements of democracy and rule of law. This means, for example, that in all cases which would internally require the participation of the European Parliament, parliamentary participation also has to be ensured within the committees. Therefore it has to be assessed for both the CETA Joint Committee and for each Specialised Committee in how far their work competes with the EU’s procedures and the competences of its institutions.

3.2.1 Joint Committee

CETA particularly enables the Joint Committee to substantively extend the subject matter of the Agreement in the fields of intellectual property rights, the exemption from customs duty and the rules of origin. A substantive limit to this extension cannot be found in CETA.

In view of the distribution of competences within the EU, this is particularly problematic since according to Article 218 TFEU the European Parliament is entitled to participation when new obligations under international law are incurred. Legal obligations with “important budgetary implications for the Union,” for instance, may thus only be incurred after the consent of the

⁶² Chapter 30, Article X.02(1)(a) CETA.

⁶³ Chapter 30, Article X.02(1)(b) CETA.

⁶⁴ Chapter 30, Article X.02(1)(c) CETA.

⁶⁵ Chapter 30, Article X.02(1)(d) CETA.

⁶⁶ Chapter 30, Article X.02(1)(f) CETA.

⁶⁷ Chapter 30, Article X.02(1)(g) CETA.

⁶⁸ CJEU, judgment of 27 Nov. 2012, C-370/12 – Pringle, [2012] EUECJ C-370/12, para. 158.

European Parliament has been obtained (Article 218(6)(a)(iv) TFEU). Since the EU is entitled to treating custom revenues pursuant to Articles 28 and 31 TFEU as its own resources (Article 311 TFEU), an extension of the exemption from customs duties may not be adopted without obtaining consent of the European Parliament case-by-case.

Therefore, the conferral of competence on the Joint Committee is unlawful on these grounds alone.

3.2.2 Committee on Services and Investment

Furthermore, also the Specialized Committees must observe the competence framework laid down in EU law. In the following, this will be examined using the Committee on Services and Investment⁶⁹ as an example. The Committee on Services and Investment is, amongst other things, responsible for the issues related to Chapter 10 on “Investment”.⁷⁰ The tasks and responsibilities of the Committee on Services and Investment result inter alia from Chapter 10 Article X.42 CETA.

One of the most important tasks of the Committee on Services and Investment is that it may develop interpretations of CETA that are binding for the arbitration tribunals.⁷¹ NAFTA already contained a similar regulation for the NAFTA Commission in Article 1131(2).⁷² This mechanism is understood as a new form⁷³ to bind and control the arbitration tribunals.⁷⁴ This is to ensure that the tribunals, when interpreting the investor rights, do not exceed the level of protection desired by the parties of the agreement. But from the point of view of EU law, it is questionable whether the EU is allowed to establish a committee with such binding interpretation competence by means of an international agreement.

According to Article 19(1) TEU, the CJEU is responsible for the binding interpretation of EU law. This applies also to international agreements, which according to settled case-law are subsumed under acts of EU organs pursuant to Article 267(1)(b) TFEU.⁷⁵ For the reasons mentioned above in the context of the establishment of an arbitral jurisdiction⁷⁶, the EU may not withdraw the interpretation competence with regard to EU law from the CJEU by establishing a committee structure.

Finally, the conferral of the binding interpretation competence does not only affect the jurisdiction of the CJEU, since other EU institutions like the European Parliament also do not participate in the interpretative declarations. Pursuant to Article 218 TFEU, however, the Parliament must be involved if an obligation under international law is incurred. Therefore, the conferral of the interpretation competence on the Committee deprives the European Parliament of important opportunities to exert the influence it is entitled to in the negotiation and the adoption of EU law. The European Parliament is not allowed to relinquish these opportunities a priori, either. In fact it may only consent to CETA if it is assured that any further development of CETA undertaken by the Specialized Committees preserves its participation rights pursuant Article 218 TFEU.

⁶⁹ Cf. Chapter 30, Article X.02(1)(b) CETA.

⁷⁰ Cf. Tams, Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach?, 15 *JWIT* 585 (2014), 599–600.

⁷¹ Cf. Chapter 10, Article X.27(2) CETA.

⁷² Cf. Tams (n. 70), pp. 599–600.

⁷³ Cf. e.g. van Aaken, Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions, 11 *Transnational Dispute Management* 1 (2014).

⁷⁴ Cf. Tams (n. 70), pp. 599–600.

⁷⁵ Karpenstein, in: Grabitz/Hilf/Nettesheim (n. 2), Article 267 TFEU, para. 20.

⁷⁶ See section I.3.a. above.

Therefore, the establishment of the Committee on Services and Investment is – *pars pro toto* – only consistent with EU law if it is assured that the competences of the Member States, the CJEU, the European Parliament and other EU institutions are not impaired by the conferral of competences on the Committee.

3.3 Provisions regarding human rights and environmental law

In terms of content, it is furthermore debatable whether CETA complies with the provisions regarding human rights and environmental law.

3.3.1 Substantive legal obligations of the EU

Negotiating the substantive standards of protection for investment protection and other contents of CETA, the Union is also bound by EU law provisions on human rights and environmental law.

The provisions regarding environmental law result especially from Article 37 CFREU (“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”) and from Articles 191ff TFEU.

In terms of human rights, the most important codifications relevant here are the Charter of Fundamental Rights of the European Union (CFREU), the European Convention on Human Rights (ECHR) and its First Additional Protocol (AP-I ECHR) as amended by Protocols no. 11 and 14,⁷⁷ the 1961 European Social Charter (ESC)⁷⁸, the 1996 Revised European Social Charter (RESC),⁷⁹ the International Covenant on Civil and Political Rights (ICCPR),⁸⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸¹ as well as the United Nations Convention of Rights of Persons with Disabilities (UNCRPD).⁸² In the context of the assessment, we furthermore consult the core labor standards of the International Labor Organization (ILO) as they are laid down in eight Conventions – the 1948 Freedom of Association and Protection of the Right to Organize Convention, the 1949 Right to Organize and Collective Bargaining Convention, the 1930 Forced Labor Convention, the 1957 Abolition of Forced Labor Convention, the 1951 Equal Remuneration Convention, the 1958 Discrimination (Employment and Occupation) Convention, the 1973 Minimum Age Convention and in the 1999 Worst Form of Child Labor Convention – as well as in the ILO “Declaration on Fundamental Principles and Rights to Work”, which summarizes the regulatory content of these ILO Conventions.⁸³

In negotiating CETA, pursuant to Article 6(1) TEU, the EU institutions are bound by the CFREU, made legally binding by the Lisbon Treaty. The Charter defines in detail the framework for the fundamental rights obligation laid down in EU law.⁸⁴ Pursuant to Article 51 CFREU, it applies whenever EU institutions act. Therefore, the CFREU applies always and at all times for the organs of the EU, including with regard to the negotiation of international agreements. As a consequence, the actions of the EU at the CETA negotiations must be measured against the CFREU without exception.

⁷⁷ Protocol 14: CETS no. 194; protocol 11: CETS no. 155.

⁷⁸ CETS no. 35.

⁷⁹ CETS no. 163.

⁸⁰ 9999 UNTS 171.

⁸¹ 993 UNTS 3.

⁸² 2515 UNTS 3.

⁸³ ILO Conventions no 87, 98, 29, 105, 100, 111, 138 and 182. The “Declaration on Fundamental Principles and Rights to Work” was adopted by the ILO at its 86th Session in Geneva on 18 June 1998.

⁸⁴ For details on the structure and the scope of the human rights obligations of the EU concerning external actions see Fischer-Lescano, *Human Rights in Times of Austerity Policy*, 2014, pp. 22ff.

Moreover, the institutions of the EU are bound by the ECHR, the European Social Charter, the ICCPR and the ICESCR regarding their external actions. Admittedly, these conventions are not legally binding for the EU. But EU law expresses an obligation to respect those codifications. The savings clause of Article 53 CFREU guarantees the existing level of protection of the human rights conventions ratified by the Member States. And Article 21(1) TEU requires that the EU's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world:

“democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

Additionally, regarding social policy, Article 151(1) TFEU stipulates that the EU and the Member States shall pursue a number of social objectives,

“having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.”

Both instruments – the ESC and the 1989 Community Charter – are also mentioned in the preamble of the TEU. The preamble of the CFREU mentions “the Social Charters adopted by the Union and by the Council of Europe,” which refers to both the RESC and the ESC. These references indicate that the (R)ESC are legally binding at least for measures of the EU pursuing the objectives of Article 151 TFEU.

The relevance of the human rights codifications in EU law amounts to more than just laying down noncommittal declarations of goals. According to Article 6(3) TEU, the fundamental rights of the EU have their roots in general legal principles, which continue to bind the EU institutions even after the more detailed CFREU entered into force. These principles come into effect when the Charter offer a narrower scope of protection. Establishing these general principles in its settled case-law, the CJEU takes into account not only the constitutional traditions of the Member States, mentioned in Article 6(3) TEU, but also international human rights treaties that bind the Member States. In this way, it referred to the Convention on the Rights of the Child and also the ICCPR.⁸⁵

Additionally, the EU is bound by the ILO Conventions, of which there are almost 190 by now. In contrast to its Member States, the EU is not a member of the ILO; it has only observer status and does not participate in the legislative process. The Conventions concluded within the framework of the ILO are therefore not directly applicable to the EU. However, EU law makes several references to the ILO Conventions. Both the preamble of the TEU and Article 151 TFEU refer not only to the ESC, but also to the 1989 Community Charter of the Fundamental Social Rights of Workers, which in turn demands in its preamble that “inspiration should be drawn from the Conventions of the International Labour Organisation and from the European Social Charter of the Council of Europe.” Those Conventions of the ILO to which all Member States are parties thus form part of the general legal principles which bind EU organs according to Article 6(3) TEU. In its opinion regarding ILO Convention No 170,⁸⁶ the ECJ also highlights the basic will of the EU to bind itself to the laws of the ILO.⁸⁷

⁸⁵ CJEU, judgment of 27 June 2006, C-540/03 – EP v. Council, [2006] ECR I-5769, para. 37.

⁸⁶ CJEU, opinion 2/91 of 19 March 1993 – ILO Convention No. 170.

⁸⁷ Kokott, in: Streinz (n. 61), Article 351, para. 30 (“A binding obligation by the Union is obviously intended.” Transl.); for the evaluation of the jurisdiction of the Union see Heuschmid and Klebe, Die ILO-Normen in der

Moreover, analogous to social human rights, the ILO standards are also binding via the CFREU as well. This results, on the one hand, from Article 52(3) CFREU, which ensures the consistency between the Charter and the ECHR. On the other hand, since the ECtHR refers to the standards of the ILO to interpret the standards of the ECHR,⁸⁸ the ILO standards are also indirectly binding via the corresponding provisions of the ECHR within their scope of application.⁸⁹ Concerning the right to industrial action, for example, this means that the EU is bound by ILO Convention No 87 via Article 28 and Article 52(3) CFREU in conjunction with Article 11 ECHR.⁹⁰

The EU is thus constrained by human rights commitments when negotiating CETA. It may not acquit itself of its obligations laid down in EU and international law by way of an international agreement, as the ECJ made clear e.g. in the *Kadi* case.⁹¹ There, it asserted that obligations from international agreements must not prejudice the constitutional principles of the EU Treaty, including the EU's human rights obligations under Article 6 TEU.⁹² With regard to CETA, a number of problematic issues arise in this context, especially with respect to safeguarding human rights and environmental law standards in investment protection law (3.3.2), to the lack of social standards (3.3.3), to the insufficient standards regarding health and the environment (3.3.4) and with respect to the lack of protection of individual and common goods (3.3.5).

3.3.2 Insufficient safeguard of human rights and environmental law standards in CETA

The first question to be considered is whether the CETA regulations on investment protection are compatible with the human rights and environmental law standards that are binding for EU law. The CETA *Sustainability Impact Assessment*,⁹³ a report produced on behalf of the Commission, casts doubts on that. Amongst other things, the report advises against any ISDS clauses in the CETA chapter on investment protection, since it cannot be proven that such clauses have any economic effects in favor of investments, whereas there is a real threat of negative effects on environmental and social issues.⁹⁴ These doubts are considerably increased by a report by the Canadian Centre for Policy Alternatives,⁹⁵ which demonstrates in detail that some clauses of the CETA subvert standards regarding environmental law, labor rights and social law and restrict the possibilities for regulation. In the following, this will be examined individually and in relation to the legal instruments listed above.

Rechtsprechung der EU, in: Däubler/Zimmer (eds.), *Arbeitsvölkerrecht. Festschrift für Klaus Lörcher*, 2013, pp. 336 ff.

⁸⁸ ECtHR, judgment of 12 Nov. 2008, Appl. No. 34503/97 – *Demir and Baykara v. Turkey*, [2008] ECHR 1345, paras. 147 and 166; see also ECtHR, judgment of 21 April 2009, Appl. No. 68959/01 – *Enerji Yapi-Yol Sen v. Turkey*, [2009] ECHR 2251, para. 40f.

⁸⁹ Nußberger, *Auswirkungen der Rechtsprechung des EGMR auf das deutsche Arbeitsrecht*, 2012 *Recht der Arbeit* 270.

⁹⁰ Lörcher, in: Däubler (ed.), *Arbeitskampfrecht*, 3rd edn., 2011, § 10, para. 65ff.

⁹¹ CJEU, judgment of 3 Sept. 2008, joined cases C-402/05 P and C-415/05 P – *Kadi*, [2008] 3 CMLR 41.

⁹² *Ibid.*, paras. 316ff.

⁹³ Kirkpatrick et al., *A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada*, Final Report June 2011, available at http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf (last accessed 20 Nov. 2014).

⁹⁴ Kirkpatrick et al., *A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada*, Final Report June 2011, pp. 337ff.

⁹⁵ Sinclair/Trew/Mertins-Kerkwood (eds.), *Making Sense of the CETA. An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement*, Canadian Centre for Policy Alternatives, Sept. 2014.

3.3.2.1 The practice of investment arbitration

One look at the practice of investment arbitration shows that concerns with regard to the respect for human rights and environmental law during ISDS proceedings are not unfounded. Some investment protection proceedings gave rise to conflicts with i.a. the right to health⁹⁶, the right to water⁹⁷ and with general environmental rights.⁹⁸ Also the current proceedings in *Chevron v Ecuador*⁹⁹ show that the (human) rights of third parties often receive only insufficient attention in arbitration proceedings. In these proceedings, to which the arbitration rules of UNCITRAL¹⁰⁰ apply and which were initiated on grounds of a bilateral investment treaty (BIT) between the USA and Ecuador, Chevron objects to the enforcement of a judgment by an Ecuadorian court which had convicted Chevron to a payment of billions in damages to a group of plaintiffs.¹⁰¹ In several interim awards, the arbitration panel obliged Ecuador to avert the enforcement of that judgment.¹⁰² This gave Ecuador the choice either to interfere with the otherwise independent judiciary of the country in an unconstitutional manner or to pay billions in penalties to Chevron. Thus the arbitration proceedings function additionally as an authority which is de facto able to override even the decisions of the final courts of appeal¹⁰³ and which deprives the persons affected of the rights they have in legal proceedings without letting them participate in the arbitration proceedings. The lacking consideration for the rights of third parties who do not participate in the proceedings themselves is the focus of an intense debate in the literature on investment protection law.¹⁰⁴ A particular point of criticism is that such proceedings may have the effect that states will not be able to comply with their responsibility to protect the human rights of third parties, as investment arbitration tribunals pay no or very little attention to these rights.¹⁰⁵ This becomes also evident in proceedings regarding the privatisation of water. In these cases, states claimed a duty to guarantee their own population the right to water, even if the water supply had been privatised. Most arbitration tribunals, however, did not accept this reasoning.¹⁰⁶

Ultimately, the two *Vattenfall* proceedings, in which the Swedish energy company sues the Federal Republic of Germany for damages, also manifest the grave implications that arbitration proceedings

⁹⁶ Valentina, Reconciling Public Health and Investor Rights: The Case of Tobacco, in: Dupuy/Petersmann/Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, 2009, pp. 452ff.

⁹⁷ Cf. Thielbörger, The Human Right to Water Versus Investor Rights: Double Dilemma or Pseudo-Conflict, in: Dupuy/Petersmann/Francioni (n. 96), pp. 487ff.

⁹⁸ Pavoni, Environmental Rights, Sustainable Development, and Investor State Case Law: A Critical Appraisal, in: Dupuy/Petersmann/Francioni (n. 96), pp. 525ff.

⁹⁹ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, Case No. 2009-23.

¹⁰⁰ UNCITRAL (United Nations Commission on International Trade Law) is a commission established by the UN General Assembly.

¹⁰¹ Sala Única de la Corte Provincial de Sucumbios, Case no. 2011-0106, Judgment of 3 Jan. 2012, confirmed by: Decision of the national court *Corte Nacional de Justicia*, Aguinda, of 12 Nov. 2013.

¹⁰² *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, Case No. 2009-23, First Interim Award on Interim Measures of 25 Jan. 2012; Second Interim Award on Interim Measures of 16 Feb. 2012; Third Interim Award on Jurisdiction and Admissibility of 27 Feb. 2012; Fourth Interim Award on Interim Measures of 7 Feb. 2013; First Partial Award on Track I of 17 Sept. 2013.

¹⁰³ Cf. e.g. Fölsing, *Chevron gegen Ecuador: Lehren für den transatlantischen Investorenschutz*, 2014 *Recht der Internationalen Wirtschaft* 500.

¹⁰⁴ Francioni, Access to Justice, Denial of Justice and International Investment Law, 20 *EJIL* 729 (2009).

¹⁰⁵ Reiner/Schreuer, Human Rights and International Investment Arbitration, in: Dupuy/Petersmann/Francioni (n. 96), pp. 82ff, at 86f.

¹⁰⁶ Cf. e.g.: *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010; *Aguas Del Tunari, S.A., v. Republic of Bolivia*, ICSID, Case No. ARB/02/3.

may have for matters concerning environmental law¹⁰⁷ and how “a tension can arise between them and the national constitution.”¹⁰⁸ This result is shared by many authors dealing with the clash between environmental matters and investment protection law.¹⁰⁹ In addition, there are a number of arbitration tribunals on the question whether environmental requirements constitute an indirect expropriation or the violation of other investor rights. Legal practice shows that the arbitration tribunals certainly apply a broad definition of indirect expropriation. The arbitration tribunal in the case *Metalclad v. Mexico*¹¹⁰, for example, assumed that the prohibition to operate a landfill constitutes an indirect expropriation.¹¹¹

Finally, there are a multitude of cases in which arbitration tribunals grapple with the question whether a state’s regulatory measures to protect public interests may lead to claims for compensation due to obligations resulting from investment protection law. The case *Methanex v. USA*, initiated on grounds of NAFTA arbitration clauses, dealt with the question in how far the prohibition of certain carcinogenic substances by the US state of California may lead to claims for compensation by the Canadian company Methanex whose production was affected by such a prohibition.¹¹²

Therefore, a majority of authors seeks to find ways to absorb such collisions by safeguarding human rights and public interests in the arbitral proceedings.¹¹³ In particular, an interpretation of investor rights consistent with human rights¹¹⁴ and proportionality assessments¹¹⁵ are being advanced to achieve this objective. For new agreements, a number of specific proposals aiming at the respect for the human rights, environmental law and other public interests have been made.¹¹⁶

Against the background of this arbitration practice, it must be made sure that the investment protection regulations of the CETA do not collide with the legally binding human rights and environmental provisions of international and EU law. The EU has to ensure in particular that CETA does not deteriorate or decrease existing human rights and environmental law protection standards (principle of non-regression).¹¹⁷

¹⁰⁷ Krajewski, Umweltschutz und internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des Transatlantischen Handels- und Investitionsabkommens (TTIP), 2014 *Zeitschrift für Umweltrecht* 396ff.

¹⁰⁸ Krajewski (n. 107), p. 400.

¹⁰⁹ Pavoni (n. 98).

¹¹⁰ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of 30 Aug. 2000.

¹¹¹ Cf. Krajewski (n. 107), p. 397.

¹¹² Cf. *Methanex Corporation v. United States of America*, (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005 – no damages were granted, however.

¹¹³ Cf. e.g. Reiner/Schreuer (n. 105), 83f.

¹¹⁴ Cf. Simma, Foreign Investment Arbitration: A Place for Human Rights, 60 *International and Comparative Law Quarterly* 572 (2011); Simma/Kill, Harmonizing Investment Protection and International Human Rights: First steps towards a methodology, in: Kriebaum et al. (eds.), *International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer*, 2009, pp. 677ff, at 695ff.

¹¹⁵ Cf. Krommendijk/Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration, in: Dupuy/Petersmann/Francioni (n. 96), pp. 422ff.

¹¹⁶ Cf. Nowrot, How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?, 15 *JWIT* 612 (2014).

¹¹⁷ For the non-regression principle regarding the human rights see CESCR, General Comment No. 3, E/1991/23, 14 Dec. 1990, para. 9.

3.3.2.2 The CETA investment protection clauses

Amongst other things, CETA grants investors protection against expropriation¹¹⁸ and indirect expropriation.¹¹⁹ Furthermore, it assures them fair and equitable treatment.¹²⁰ Protection standards of this kind can be found in many bilateral investment treaties (BITs).¹²¹ Since these assurances are procedurally safeguarded by means of an ISDS mechanism¹²² and are also applicable to the field of financial services, one has to ask whether the EU's human rights obligations as well as environmental law issues and other aspects of public interest are being accorded sufficient weight in CETA investment protection proceedings to avoid clashes like those that were experienced in the practice of investment protection law up until now.

During the negotiations of CETA, those problematic experiences have only partially been taken into account. There are mainly three ways how public interests may be included into the investment protection proceedings provided by CETA:

Firstly, Chapter 10 Article X.27 of CETA contains specifications on the applicable law. Thus, a Tribunal is obliged to interpret CETA in accordance with the Vienna Convention on the Law of Treaties (VCLT) and the rules and principles of international law. The interpretation rules laid down in Article 31 VCLT, which is generally seen as codifying international customary law,¹²³ require inter alia that, when interpreting a treaty, "any relevant rules of international law applicable in the relations between the parties"¹²⁴ shall be taken into account. This includes the relevant human rights obligations, a requirement which has already been confirmed with regard to existing bilateral investment treaties.¹²⁵ When interpreting CETA, the CETA Tribunals therefore have to take into account human rights as rules of international law within Article 31(III)(c) VCLT. This is confirmed by the fact that in its preamble, CETA obliges the parties to respect human rights.

Secondly, Annex X.11(3) to Chapter 10 CETA determines the scope of indirect expropriation which is binding for the Tribunal: "For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations." This regulation is to ensure that the States continue to be able to adopt regulations to protect public interests without facing claims for damages.¹²⁶

¹¹⁸ Chapter 10, Article X.11 in conjunction with Annex X.11 to Chapter 10 CETA.

¹¹⁹ Ibid.

¹²⁰ Chapter 10, Article X.9(1) CETA. For general information on the FET standard cf.: Schernbeck, *Der Fair and Equitable Treatment Standard in internationalen Investitionsschutzabkommen*, 2013.

¹²¹ For an analysis of these clauses in the CETA cf.: Kriebaum, *FET and Expropriation in the (Invisible) EU Model BIT*, 15 *JWIT* 454 (2014).

¹²² Cf. section I.3.a. above.

¹²³ Cf. Sorel/Boré, in: Cortein/Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. 1, 2011, Article 31, para. 5ff.

¹²⁴ Article 31(III)(c) VCLT.

¹²⁵ Simma/Kill (n. 114), pp. 695ff; Simma (n. 114), pp. 584ff.

¹²⁶ For this clause cf.: Nowrot (n. 116), p. 635; too optimistic regarding this clause: Schill, *Auswirkungen der Bestimmungen zum Investitionsschutz und zu den Investor-Staat-Schiedsverfahren im Entwurf des Freihandelsabkommens zwischen der EU und Kanada (CETA) auf den Handlungsspielraum des Gesetzgebers*, September 2014, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-investitionsschutz,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> (last accessed 20 Nov. 2014); for criticism of the assessment by Schill see Krajewski, *Anmerkungen zum Gutachten von Dr. Stephan Schill zu den Auswirkungen der Bestimmungen zum Investitionsschutz und zu den Investor-Staat-Schiedsverfahren im Entwurf des CETA auf den Handlungsspielraum des Gesetzgebers vom 22.9.2014*, 2014 available at

Thirdly, and finally, Chapter 10 Article X.27(2) of CETA offers the parties the possibility to develop binding interpretations for the Tribunal within the Committee on Services and Investment,¹²⁷ which increases the parties' opportunities to exert influence on the proceedings.¹²⁸

3.3.2.3 Lack of guarantees regarding human rights and environmental law in CETA

It is questionable, however, whether these mechanisms suffice to ensure in individual cases that respect for substantive human rights guarantees is sufficiently safeguarded in the CETA investment protection proceedings.¹²⁹ It is indeed the case that a CETA Tribunal, as discussed above, is obligated to take into account human rights when interpreting investor rights, and that non-discriminatory measures to protect legitimate public interests will usually not constitute an indirect expropriation. But this alone cannot guarantee that an arbitration tribunal will not subvert EU human rights obligations in favor of investor rights in individual cases, since CETA does not bind the Tribunal to the same international and EU human rights protection standards to which the EU is subject. The only explicit reference to human rights in the chapter on investment protection can be found in a Joint Declaration at the end of the chapter,¹³⁰ referring to a special case.

Up until now, CETA itself does thus not guarantee that the EU's substantive human rights obligations will be safeguarded in the arbitration proceedings. In the following, these findings will be explained in relation to the principle of fair and equitable treatment (aa), indirect expropriation (bb) and the procedural rights of third parties (cc).

(a) Human rights and fair and equitable treatment

Chapter 10, Article X.9(1) CETA requires a fair and equitable treatment of investors. Paragraph 4 of the same article indicates that a host State violates this standard if it frustrates a legitimate expectation it created in the investor regarding the investment. That means, for example, that if a host State promised an investor certain administrative authorizations, the investor can rely on this promise, even if they are legally problematic or even unlawful. Concerning this matter, the report of the Canadian Centre for Policy Alternatives explains:

“This clarification tilts the balance in favour of the investor and poses a clear threat to the rights of governments to regulate, and especially to alter and strengthen regulatory approaches in response to changing circumstances, new knowledge, investor behaviour, public perceptions of risk, and democratic decision-making. It singles out the ‘legitimate expectations’ that investors may hold for their investments as an interpretive issue that tribunals may consider — even above issues relating to the public interest.”¹³¹

Administrative authorizations for major projects regularly also ensure the rights of third parties. Thus, authorizations pursuant to construction law, planning and environmental law will safeguard the individual rights of neighbors and residents regarding the protection of their health and property and of the environment. Third parties may assert and enforce these rights before national courts

http://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/EU-USA_Freihandelsabkommen/Thesenpapier_Klageprivilegien_in_CETA.PDF (last accessed 20 Nov. 2014).

¹²⁷ Cf. Chapter 10, Article X.27(2) CETA.

¹²⁸ Cf. Nowrot (n. 116), pp. 640ff.

¹²⁹ Cf. Sinclair/Trew/Mertins-Kerkwood (eds.) (n. 95).

¹³⁰ The Joint Declaration says: “With respect to Article X.15 (Denial of Benefits– Investment), Article Y (Denial of Benefits – CBTS) and Article XX (National Security Exception – Exceptions), the Parties confirm their understanding that measures that are ‘related to the maintenance of international peace and security’ include the protection of human rights.”

¹³¹ Sinclair/Trew/Mertins-Kerkwood (eds.) (n. 95), p. 16.

even if the government gave investors assurances which are not compatible with these rights. But the structural provisions for arbitration proceedings make it impossible to take into account the rights of third parties and environmental issues in any way before arbitration tribunals.

The failure to take into account those rights cannot be justified by the claim that third parties still have the option to assert their rights in the national courts and that their rights are therefore not affected. In many constellations, the decision of an arbitration tribunal affects third parties directly and immediately. As the Chevron/Ecuador proceedings¹³² show, an arbitration tribunal can oblige a State to prevent the enforcement of a judgment which third parties obtained in a domestic lawsuit against an investor; in such cases, the enforcement of third party rights is thwarted in national jurisdiction as well. Moreover, if an arbitration tribunal grants an investor damages for the reclaim of a State aid granted contrary to EU law in the amount of the reclaimed aid, this not only violates the principle of autonomy of the European Union legal order. According to German and EU law, a competitor would be entitled to claim that the unlawfully granted aid – or the payment of damages – violates his fundamental right to freedom of competition.¹³³ But the competitor will not be allowed to assert this right before an arbitration tribunal. He does not participate in these proceedings at all. The practical effect of the decision of the arbitration tribunal would therefore render the right of the competitor ineffective.

The principle of fair and equitable treatment is therefore only compatible with EU human rights obligations if there are clear provisions that this principle is not violated if a host State acts in order to give effect to its obligations towards third parties or the general public under human rights law.

(b) Human rights and indirect expropriation

Another problematic issue regarding the rights of third parties is the protection of investors against indirect expropriation provided by CETA. Arguably, the above-mentioned limitation of indirect expropriation in Chapter 10 Annex X.11(3) CETA¹³⁴ allows the States sufficient latitude for regulation in favor of “legitimate public welfare objectives, such as health, safety and the environment.”¹³⁵ However, this is cast into doubt by the multitude of undetermined legal terms in Annex X.11;¹³⁶ in particular, a measure cannot benefit from the exemption in Annex X.11(3) if it is *manifestly excessive*. Ultimately this would enable the arbitration tribunals to evaluate the compatibility of regulatory measures with investor rights by means of a broadly defined proportionality assessment.

The current proceedings which Canada is facing in the context of NAFTA are evidence of the risk that even if the term “indirect expropriation” is defined rather narrowly, there may be a certain tendency to give priority to investment protection where it conflicts with potentially adverse individual or collective rights. Thus, Canada is presently facing arbitral proceedings in which investors claim a violation of their rights on grounds of a negative environmental evaluation of one of their major projects.¹³⁷ Furthermore, Canada faces massive damage claims by an oil-extracting company after

¹³² See the references given in n. 99.

¹³³ Cf. BVerwGE [=Decisions of the Federal Administrative Court] 30, 191, para. 57.

¹³⁴ Chapter 10, Article X.11 in conjunction with Annex X.11 to Chapter 10 CETA.

¹³⁵ To this effect, see in particular Schill (n. 126).

¹³⁶ Cf. Krajewski (n. 126), pp. 4ff.

¹³⁷ William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, Case No. 2009-04.

Québec imposed a moratorium on fracking,¹³⁸ a situation which led to massive criticism by a variety of groups against the restrictions NAFTA imposes on the government's scope for action. Finally, the extension of the CETA arbitration clauses to financial services exceeds comparable clauses of NAFTA and thus opens up an area of activity for the arbitration tribunals whose impact cannot yet be assessed.¹³⁹ However, the action of a Chinese insurance company against Belgium¹⁴⁰ based on a BIT because of measures taken in the context of the financial crisis demonstrates that this especially sensitive regulatory area offers a multitude of opportunities to take legal actions, putting considerable pressure on the justification of regulatory measures.

This is particularly alarming with regard to the protection of the rights of third parties, since a government measure will not be regarded as indirect expropriation only if it serves *legitimate public welfare objectives*.¹⁴¹ According to this wording, the clause does therefore not include measures to protect the rights of an individual third party. Furthermore, the exceptions regarding indirect expropriations apply only to a very narrowly defined range of public welfare objectives, namely health, safety and environmental matters. This begs the question: What about other public interests? CETA does not clarify sufficiently that non-discriminatory measures advancing social policies, consumer protection, tax or fair trade policies etc. do not constitute indirect expropriation as protected by CETA, either.

The regulations regarding the protection against indirect expropriation are therefore only compatible with EU law if it is guaranteed that measures to protect public interests and measures to protect individual rights under EU law of third parties do not constitute an indirect expropriation within Chapter 10 Annex X.11 CETA. To achieve this, the regulatory exception in Annex X.11(3) would have to limit the freedom of interpretation of the investment arbitration tribunals considerably.

(c) Procedural rights of third parties

Finally, it is particularly problematic that CETA violates the right to an effective remedy laid down among others in Article 47 CFREU. Article 47 CFREU grants the right to an effective remedy before a court to any person whose rights or freedoms guaranteed by EU law have been violated. CETA violates this guarantee because, as shown above, arbitration proceedings may immediately prejudice the rights of third parties. However, CETA grants no procedural rights to individuals who deem their fundamental or human rights violated by a decision of a tribunal. They cannot participate in the investment protection proceedings between state and investor and have no opportunity to challenge the decision of the tribunal, as they would be entitled to under EU law. Thus, they are deprived of their rights. In its *Kadi* decision, the ECJ affirmed that the right to be heard before a court must not be subverted by an international agreement.¹⁴²

Therefore, the jurisdiction of the tribunals either would have to be contractually limited to cases in which the rights of third parties are not affected, or a procedure must be established which enables

¹³⁸ Lone Pine Resources Inc. v. The Government of Canada, UNCITRAL, see Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA of Nov, 2012, available at <http://www.italaw.com/cases/documents/1607> (last accessed 20 Nov. 2014).

¹³⁹ Sinclair/Trew/Mertins-Kerkwood (eds.) (n. 95), pp. 18ff.

¹⁴⁰ Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29.

¹⁴¹ Chapter, Article X.11 in conjunction with Annex X.11 to Chapter 10 CETA refers in paragraph 3 to "measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment."

¹⁴² CJEU, judgment of 3 Sept. 2008, C-402/05 P – Kadi, [2008] 3 CMLR 41, para. 326.

an affected person to challenge the decision of an arbitration tribunal. That means in particular that an individual must be able to lodge an appeals against decisions by an arbitration tribunal before the CJEU, on grounds of a violation of their subjective rights granted by international and EU law.

3.3.3 Insufficient safeguard of social standards in CETA

More generally, it is debatable whether CETA sufficiently takes into account the social standards laid down in international and EU law, in particular, whether the Agreement ensures that the standards that are mandatory under EU law are respected in the arbitration proceedings and within the administrative Committees.

In the chapter on government procurement (Chapter 21), e.g., there is no unambiguous commitment to social standards. Chapter 21 Article III CETA (“Security and General Exceptions”) contains a savings clause for measures (a) necessary to protect public morals, order or safety, (b) necessary to protect human, animal or plant life or health, (c) necessary to protect intellectual property or (d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labor. However, there is no explicit mention of social criteria – like tying public procurement to the commitment to observe collective agreements, to the respect for the core labor standards of the ILO, etc. This involves the danger that if the EU complies with the relevant human rights obligations, this may be construed as a breach of agreement in relation to CETA. Although criteria for awarding contracts such as the “most advantageous tender” (Article XIV(a)) allow an interpretation which might include social factors,¹⁴³ the regulations in this chapter lack a strong and clearly defined emphasis on the possibility to ensure a high level of social standards. This is as problematic with regard to the mentioned core labor standards as with regard to the fundamental right to collective bargaining autonomy (Article 28 CFREU).

The observance of international labor standards is in fact mentioned in the chapter on trade and labor (Chapter 24). But the objectives set here are too vague and thereby invisibilize the existing tension. Thus, for example, the parties of CETA reaffirm their obligations in relation to the ILO, referring explicitly to the ILO Declaration on Fundamental Principles and Rights to Work (Chapter 24 Article 3(1) and (2) CETA). As mentioned, this Declaration affirms the fundamental rights contained in the eight ILO Conventions on core labor standards. Since according to its para. 2 this applies even if an ILO Member has not ratified all of these Conventions, Canada’s non-ratification of Convention No. 98 on collective bargaining and Convention No. 138 on the minimum age for admission to employment and work is partially remedied; however, it is unclear whether this incorporates the Conventions in their entirety or only their basic principles. Moreover, it is unclear what the reference to this Declaration implies for the EU, who is not an ILO Member. Also the objective that the parties “will make continued and sustained efforts towards ratifying the fundamental ILO Conventions to the extent that they have not yet done so” (Article 3(4)) is too vague, especially since the EU is not a formal member of the ILO. If Article 3 of this Chapter calls to mind that each party to the Agreement acts “in accordance with its obligations as member of the ILO,” this has no binding effect on the EU.

The chapter on trade and labor provides for dispute settlement before a panel of experts (Articles 9ff.), which could specify such indeterminate objectives. However, the consultation procedure with the ILO provided in Article 10(9) of this Chapter remains too vague, as it is not clear in how far the opinion of the ILO must be taken into account.

¹⁴³ On this, see Krajewski/Krämer, *Die Auswirkungen des revidierten WTO-Übereinkommens über öffentliche Beschaffungen* (“Government Procurement Agreement”, GPA) von 2012 auf soziale und arbeitnehmerfreundliche Beschaffungsentscheidungen. Final report 2013.

Thus, CETA does not sufficiently guarantee the rights to participation and collective bargaining or the protection of workers. It affects the corresponding domestic laws and regulations of the EU Member States – particularly with regard to the regulation of the labor market and the social security systems, of the principle of collective bargaining autonomy, of the right to strike, of minimum wages and of collective agreements – without stating sufficiently clearly that the minimum standards of EU law are mandatory core elements.

3.3.4 Insufficient health and environmental standards in CETA

Likewise, the regulations regarding health and environmental standards are problematic. The bold political declarations¹⁴⁴ are not reflected in the legal basis.

While Article 35 CFREU requires the institutions of the EU to guarantee a high level of health protection when establishing and implementing policies and measures, CETA chooses a fundamentally different approach. This is particularly evident when it comes to the regulation of biotechnology. In this context, Article X.03(1) of the chapter on Dialogues and Bilateral Cooperation (Chapter 29) provides:

“The Parties also note the importance of the following shared objectives with respect to cooperation in the field of biotechnology:

...

- (b) promoting efficient science-based approval processes for products of biotechnology;
- (c) cooperating internationally on issues related to biotechnology such as low level presence of genetically modified organisms;
- (d) engaging in regulatory cooperation to minimize adverse trade impacts of regulatory practices related to biotechnology products.”

This shows that the objective of the policies in this field is not to ensure a high level of health protection but “to minimize adverse trade impacts of regulative practices.” Furthermore, the “low level presence of genetically modified organisms” mentioned in lit. (c) is incompatible with the essential principles of European environmental and health law – the precautionary principle, zero tolerance, liability and labelling (Article 191 TFEU in conjunction with Article 3(3) TEU and Article 11 TFEU).¹⁴⁵ A confidential report prepared for the Bundestag confirms this conclusion concerning genetically modified organisms; inter alia, it states that CETA would impede stricter regulation for the labeling of genetically modified animal feed.¹⁴⁶

The regulatory indifference towards setting binding standards in this field is also noticeable in the chapter on sustainability (Chapter 23) where the focus is on “voluntary best practices” instead of on binding regulation: “Encouraging the development and use of voluntary schemes relating to the sustainable production of goods and services, such as eco-labelling and fair trade schemes” (Chapter 23 Article 3(2)(a) CETA).

¹⁴⁴ “Neither will there be chlorine chicken nor will we have any genetically modified foods imported into the European Union in the future.” (Chancellor Merkel, quoted from: Mayer-Rüth. Merkel und Gabriel verteidigen TTIP, in: Tagesschau of 19 Sept. 2014, available at <http://www.tagesschau.de/wirtschaft/ttip-102.html>, our translation).

¹⁴⁵ An opinion also held by Stoll/Krüger, *Agrar- und verbraucherpolitische Auswirkungen des CETA*, January 2014, available at https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/EU-USA_Freihandelsabkommen/Stoll-Krueger_CETA-Kurzstudie.pdf (last accessed 20 Nov. 2014), p. 12.

¹⁴⁶ The report is on file with the authors.

3.3.5 Lack of protection of individual and common goods in CETA

In contrast to multiple others of the EU's investment agreements¹⁴⁷ which contain at least a so-called "essential elements" clause, CETA comprises no general reference to human rights and environmental law outside of the Preamble. Such a clause usually demands respect for human rights and democratic principles and thus warrants an implementation of the respective agreement that is consistent with the human rights. In the trade agreement between the EU and its Member States and Colombia and Peru, for example, this clause can be found in Article 1 ("General"):

"Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement."

These human rights clauses have been a core element of the commercial policy of the EU up until now. They make it possible to contractually sanction also those rights violations which at first glance bear no factual relationship with the execution of the agreement. The previous forms of use of the clause, however, were tailored to cases where the contractual partner violates human rights. But there are also clauses which prioritize individual and common goods over the economic rationale in their respective application, like for example Article 17(1) of the BIT between Canada and Tanzania, which states:

"Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement shall not be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources."¹⁴⁸

Such a clause on human rights and environmental law, which serves as powerful protection of the relevant standards in the context of advanced trade and investment agreements,¹⁴⁹ should not limit itself to mentioning those rights if it is to be effective. It should also provide a procedural protection mechanism and stipulate a consultation process in case an obligation under CETA contradicts obligations of one party with respect to individual and common goods. The aim of this process, in turn, should be to enable the respective parties to observe their obligations toward individual and common goods. Examples for clauses and procedural rules of that kind have already been developed.¹⁵⁰ Finally, such a clause should also guarantee procedural rights of action for individuals

¹⁴⁷ For references see Dimopoulos, *EU Foreign Investment Law*, 2011, p. 242.

¹⁴⁸ Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, signed 16 May 2013 (effective from 9 Dec. 2013), available at www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng (last accessed 20 Nov. 2014).

¹⁴⁹ For further examples see Nowrot (n. 116), p. 632ff.

¹⁵⁰ The German Institute for Human Rights and Misereor, for example, recently proposed a model clause which could be exemplary for this purpose (even though there should be a stronger focus on the requirements regarding environmental law), see Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements*, Deutsches Institut für Menschenrechte & Misereor, February 2014, available at <http://www.institut-fuer->

and – with regard to environmental issues – for organizations, if need be. The key is to preserve the possibility to implement measures to protect individual and common goods without being held liable under CETA.

The absence of such a clause is problematic in particular in case of multi-polar fundamental rights constellations,¹⁵¹ that is, constellations in which several individual with conflicting fundamental rights – and thus also third parties who are not protected by CETA – are affected.¹⁵² Without a general clause permitting the protection of individual and common goods, there is no sufficient handle to interpret the EU obligations to protect human rights and public interests as a limitation for CETA's application. Thus there is a serious danger of inconsistencies between EU fundamental rights provisions and the requirements of CETA. In that case, the EU legal order could – in structural analogy to the constellation underlying the *Kadi* case¹⁵³ – come into conflict with the CETA requirements, absent a general clause on human rights and environmental law facilitating the resolution of this contradiction by interpreting CETA consistently with human rights. As in the *Kadi* case, this may lead to the situation that the observance of EU law and its obligations to protect individual and common goods commands a violation of the EU's international legal obligations.

In compliance with EU law obligations, conflicts between human rights and environmental law obligations and CETA requirements are therefore to be alleviated by a clause which allows the protection of individual and common goods. This clause should provide for a consultation procedure that includes the European Parliament in case individual and common goods are jeopardized. The introduction of such a clause could be completed by the establishment of a human rights protection mechanism which involves civil-society actors as well.¹⁵⁴ Its judicial enforceability – especially with regard to the right of an effective remedy of third parties (Article 47 CFREU) – would have to be guaranteed.

3.3.6 Interference with the Right to local self-government in CETA

In EU law, local self-government is a key component of the EU's pluralistic association.¹⁵⁵ It finds expression in the European Charter of Local Self-Government¹⁵⁶ as well as in Article 4(2) TEU, according to which the European Union respects “the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” Institutionally, the right to local self-government is safeguarded in Article 307 TFEU by means of the “Committee of the Regions.”

menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf (last accessed 20 Nov. 2014), pp. 36ff.

¹⁵¹ Cf. Calliess, Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis, in: 2006 *Juristenzeitung* 321.

¹⁵² See Part I section 3.3.2 above.

¹⁵³ CJEU, judgment of 3 Sept. 2008, C-402/05 P – *Kadi*, [2008] 3 CMLR 41, para. 326: “It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”

¹⁵⁴ See the proposals in Bartels (n. 150), pp. 36ff.

¹⁵⁵ Bogdandy/Schill, Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag, 70 *Heidelberg Journal of International Law* 701 (2010), 705.

¹⁵⁶ This treaty, opened for signature by the Member States of the Council of Europe in Strasbourg on 15 Oct. 1985, took effect on 1 Sept. 1988.

CETA interferes with the municipal right to self-government in several ways:

The use of the so-called “negative list” in CETA (e.g. in Article X.06(1) of Chapter 11 “Cross Border Trade in Services”), according to which only listed fields do *not* fall within the scope of the CETA, means that new administrative activities are automatically deprived of the possibility to be independently organized by means of local self-government. In contrast to the positive list approach of, for example, GATT, this constitutes an interference with the right to local self-government whose scope is not clearly determined.

Moreover, Chapter 11 Article X.06(1)(c) CETA establishes a so-called “ratchet effect” which makes it impossible to revise existing deregulation, for example by means of re-municipalization. According to this rule, measures are only exempt from the principles of Articles X.02 (“National Treatment”), X.04 (“Most Favoured Nation Treatment”) and X.05 (“Market Access”) if they increase conformity with those principles or at least keep it at the same level.¹⁵⁷ This imposes a significant restriction on the freedom to make autonomous local arrangements.

Local freedom of organization is also prejudiced by the fact that “public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.”¹⁵⁸ This is problematic since many local services are explicitly not provided in the form of monopolies and exclusive rights, e.g. the operation of nursing homes, adult education centers, etc.¹⁵⁹ CETA excludes only very few forms of public services from the requirements of cross-border liberalization. Thus, CETA expands market access in the municipal sector in a way which makes a local governance oriented towards public welfare very difficult.

Finally, local organizational autonomy is prejudiced by the fact that the CETA chapter on Government Procurement (Chapter 21) provides very low minimum thresholds (partially starting from 228,000 €); above these thresholds, CETA prohibits procurement without inviting tenders. Municipal contracts therefore require an invitation for tenders even if they concern hospitals and social services, which makes it impossible for the municipalities to privilege their own, non-profit or local businesses when awarding contracts.

Chapter 21 Article IV(6) exceeds the non-discrimination principle for domestic and foreign tenderers by prohibiting so-called “offsets,”¹⁶⁰ which Article I(k) defines as “any condition or undertaking that encourages local development.” It is thus prohibited to link the award of a contract to conditions which promote local development, improve the current account, prescribe the use of local pre-products, or impose similar requirements. This also prejudices the right to local self-government.

With the negative list, the ratchet clause, the extensive market deregulation also regarding municipal services and with the prohibition of offsets, CETA includes, all in all, a number of measures which – particularly in combination – significantly prejudice the guarantee of local self-government. An EU law argument could build on this seeking to have the CJEU ensure at least the core elements of local self-government.

¹⁵⁷ The principles do not apply only if “the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X02 (National Treatment), X04 (Most Favoured Nation Treatment) and X05 (Market Access).”

¹⁵⁸ Annex II - Reservations for Future Measures (EU) of 4 Aug. 2014, p. 3.

¹⁵⁹ See the references in Fritz, *TTIP vor Ort*, 2014, available at http://blog.campact.de/wp-content/uploads/2014/09/Campact_TTIP_vor_Ort.pdf (last accessed 20 Nov. 2014) p. 13.

¹⁶⁰ “With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.”

Part II: Constitutional requirements for CETA

Apart from the EU law requirements, there are also constitutional provisions which have to be taken into account with regard to CETA.

1. Procedural requirements: Ratification of CETA

Firstly, the ratification of CETA would have to be in compliance with the Basic Law (*Grundgesetz*), the German constitution.

1.1 Competence to conclude the agreement

This concerns first of all the competence to conclude the agreement. Article 23 of the Basic Law (BL) mirrors at the constitutional level the principle of conferral laid down in EU law (see above Part I, at 1.). The institutions of the EU only have the competences which have been conferred to them by the individual Member States – in this case by the Federal Republic of Germany. In relation to the field of trade and investment protection, which is of interest here, this means that in matters for which the EU has no competence under Article 207 TEU, the participation of the national legislator in international agreements is required. Here, we refer to the explanations above. It is the responsibility of the Federal Constitutional Court of Germany (FCC) to decide in individual cases whether the principle of conferral is observed. This is decided with reference to the standards of Basic Law, not those of EU law.

1.2 Legislative procedure

In the case of “mixed agreements,” there is a debate over which rules control the domestic ratification procedure. On the one hand, it is conceivable that the procedure pursuant to Article 23(1) BL would apply, as CETA can be seen as a transferal of sovereign powers, including to the EU.¹⁶¹ This view can be based on the fact that the regulatory committees which are to be established will also have a legislative and thus sovereign function.¹⁶² On the other hand, arguably the rules of Article 59(2) BL on the conclusion of international agreements apply in cases of mixed agreements as well.¹⁶³

For the ratification procedure of CETA, the outcome is identical (unlike for the informational obligations of the Federal Government), since both alternatives require the consent not only of the lower house, the *Bundestag*, but also that of the upper house of the German Federal Parliament, the *Bundesrat*, in which the states (*Länder*) are represented. According to the 1957 Lindau Agreement, the consent of the *Länder* is necessary if a treaty touches upon exclusive competences of the *Länder* – if it interferes, for example, with the educational autonomy of the *Länder* and their competence over administrative procedures (Article 84 BL), as CETA does by regulating the mutual recognition of professional qualifications in Chapter 13.

2. Substantive requirements

CETA also has to comply with substantive constitutional requirements. In this respect, those regulations of the agreement which provide for court-assisted investment protection (2.1), set up the

¹⁶¹ Heyde, in: Umbach/Clemens, *GG*, 2001, Article 23, para. 85.

¹⁶² See Part I section 3.2 above.

¹⁶³ Jarass, *GG*, 13th edn 2014, Article 23, para. 1a.

regulatory committees (2.2), prejudice local self-government (2.3) and obstruct the observance of the human rights and environmental law (2.4) appear particularly problematic.

2.1 Article 92 BL: Judicial monopoly of jurisdiction in investment protection

With respect to investment protection, it is problematic that CETA establishes a parallel jurisdiction in form of the arbitration clause for investor-state disputes.

According to Article 92 BL, the judicial power is vested in “the judges.” While this provision does not prohibit private parties from setting up arbitration tribunals via contract, it is yet unclear in how far the establishment of investor-state arbitration tribunals in international agreements is compatible with the constitutional guarantee of a state monopoly of jurisdiction. Some authors argue that arbitration tribunals can also be established in the area of public law since this area is not covered by Article 92 BL.¹⁶⁴ Others claim that the existing regulations – which are much more narrow in scope than CETA – already approximate the boundaries of what is legitimate.¹⁶⁵ The most extensive opinion is that arbitration agreements for administrative law disputes constitute a violation of Article 92 BL.¹⁶⁶

The Federal Constitutional Court has not yet pronounced itself on these issues. When determining the scope of Article 92 BL, one of the most important tasks of the Court would be to consider the viability of an argument which is usually advanced in favor of arbitration, namely that arbitration constitutes a way to avoid the institutionally caused bias of domestic judges.¹⁶⁷ For this argument stems from a time when domestic courts were not yet embedded in supranational jurisdiction networks (from the ECtHR to the CJEU and the human rights committees). The fact that they are should strongly mitigate the assumption that domestic courts usually rule in favour of the national interest (whatever that may be). This international embeddedness of domestic courts constitutes an institutional safeguard of the judges’ impartiality, which, considering the functional dangers of bias in commercially framed arbitration tribunals, must be considered superior to the tribunals of transnational arbitration.¹⁶⁸

In any case, the Basic Law’s decision in favor of international cooperation and its openness toward international law cannot go so far as to undermine the fundamental principle of the constitutional division of powers. The establishment of arbitration tribunals in fields of regulatory policies endangers this balance of interests and leads to functional bias which can hardly be compatible with Article 92 BL.

It is an open question whether the Federal Constitutional Court would conclude, similar to the CJEU, that arbitration tribunals are illegitimate as a matter of principle because of the conflict with the autonomy of jurisdiction of the Basic Law. It might also find it necessary to restrict investment protection (indirect investments, “fair and equitable treatment”) and to formulate a reservation for domestic jurisdiction regarding fundamental rights and environmental law for polygonal and multi-polar fundamental rights constellations and regulative policies. This could be linked to a mechanism of preliminary ruling under Article 100 BL, to avoid that measures which are constitutionally

¹⁶⁴ Stumpf, *Alternative Streitbeilegung im Verwaltungsrecht*, 2006, pp. 31ff.

¹⁶⁵ Wolff, in: Umbach/Clemens (n. 161), Article 92, para. 45.

¹⁶⁶ Hillgruber, in: Maunz/Dürig, *GG*, up to date as of 2011, Article 92, para. 89.

¹⁶⁷ Classen, *Der EuGH und die Schiedsgerichtsbarkeit in Investitionsschutzabkommen*, 2012 *Europarecht* 611, at 625–26.

¹⁶⁸ Regarding the legitimacy deficit of international jurisdiction, especially with respect to the lack of appeal proceedings see also Bogdandy/Venzke, *In wessen Namen?*, 2014, pp. 253f.

legitimate and required are challenged by arbitration tribunals which do not meet the high standards of Article 92 BL and which do not provide for effective appeal proceedings.

2.2 Article 38 in conjunction with Articles 20(1), 28 BL: Democratic legitimacy

Moreover, the decision on the organization of the social and economic order has to be entrusted to the democratic process under the Basic Law. In this respect, the domestic and European principles of social democracy are interlinked.¹⁶⁹ The principle of democracy prohibits the legislator from introducing measures which disproportionately impede democratic leeway.

Since the Federal Constitutional Court's Lisbon judgment, it has been settled case-law that Article 38 BL comprises a subjective right to democratic process.¹⁷⁰ This requires in particular the adoption of procedural security measures to prevent inordinate normative momentum in the CETA Committees. According to its *Outright Monetary Transactions (OMT)* decision, the right of each person to elect the *Bundestag* laid down in Article 38(1) BL goes beyond a mere formal legitimation of (federal) state authority and includes the fundamental democratic content of the right to vote;

“This grants the individual the right to influence the political formation of opinions with his or her vote and to have an impact on them. Within the scope of Art. 23 BL, citizens who are entitled to vote are thus protected from being deprived of the right to a legitimate government and to influence the exercise of public authority, which an election provides, by transferring the responsibilities and powers of the German *Bundestag* to the European level to such an extent that it violates the principle of democracy....”¹⁷¹

CETA is problematic in this respect because it combines indeterminate investment protection terms and deregulation provisions with a system of enforcement which establishes a variety of regulatory committees with the CETA Joint Committee presiding over them.¹⁷²

In this structure, representatives of the Member States are intended to participate neither in the Specialized Committees nor in the Joint Committee. Thus, there is no longer any connection between the Committees and the German legislator. This opens up a largely uncontrollable legislative process within the framework of CETA which may regulate new fields and rights without any control and may even extend the scope of the CETA, which is highly problematic against the background of constitutional jurisprudence. The Federal Constitutional Court should be urged to rule that (1) representatives of the Member States including Germany must be able to participate in the committee structure and that (2) the German representatives would be bound by decisions of the German *Bundestag*. In its Lisbon judgment, the Federal Constitutional Court devised an elaborate system of parliamentary rights to issue instructions and ‘pull the emergency brake’ as well as of prior enabling acts (implemented in the Act on the Responsibility for Integration, IntVG).¹⁷³ The implementation of these mechanisms will have to be demanded with regard to the Joint and Specialized Committees of CETA.

¹⁶⁹ Fischer-Lescano/Möller, *Europäische Grundrechte und die Konstitutionalisierung sozialer Demokratie in Europa*, in: Fischer-Lescano et al. (eds.), *Europäische Gesellschaftsverfassung. Konstitutionalisierung sozialer Demokratie in Europa*, Schriftenreihe des ZERP, 2009, pp. 313ff., with further references.

¹⁷⁰ BVerfGE 123, 267 – Lissabon, at 420 para. 379; official English translation available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (last accessed 25 Nov. 2014).

¹⁷¹ BVerfG, 2 BvR 2728/13 of 14 Jan. 2014, para. 51, official English translation available at: http://www.bverfg.de/en/decisions/rs20140114_2bvr272813en.html (last accessed 25 Nov. 2014).

¹⁷² See Part I section 3.2 above.

¹⁷³ BVerfGE 123, 267 (n. 170).

2.3 Human rights and environmental law

With regard to CETA's interferences with human rights and environmental law, the constitutional requirements are equivalent to those of EU law, complemented by the constitutional stipulations regarding, for example, the national objective of environmental protection (Article 20a BL). The explanations above¹⁷⁴ on the unlawfulness of CETA under EU law this also apply to the Basic Law. In this case as well, legal concerns could be alleviated by the introduction of a clause on human rights and environmental law and the establishment of procedures in relation thereto.

2.4 Article 28(2) BL: Guarantee of local self-government

Article 28(2) BL protects the right to municipal self-government. The Basic Law guarantees the municipalities not only a specific area of responsibility, but also the right to manage their affairs autonomously and to claim 'unallocated' tasks for themselves and to manage them on a municipal level.¹⁷⁵ For projects of the European Union, Article 10 of the Act on the Cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG) obligates the legislator both to preserve the right of the municipalities and of associations of municipalities to regulate the affairs of the local community and to protect their interests.

With regard to the constitutional guarantee to local self-government, the provisions of CETA, especially in their interaction, are highly problematic for the same reasons as under EU law.¹⁷⁶ While the guarantee of Article 28(2) BL exists "within the limits prescribed by the laws," these must safeguard its core elements ("identity-defining characteristics of municipal self-government")¹⁷⁷ and respect the principle of proportionality.¹⁷⁸ As demonstrated above, CETA includes a number of measures – the negative list, the ratchet clause, the extensive market deregulation also for municipal services, and the prohibition of offsets – which significantly prejudice the constitutional guarantee of municipal self-government, particularly in combination. A constitutional challenge would have to show this and to expose the lack of proportionality of this interference.

¹⁷⁴ See Part I section 3.3 above.

¹⁷⁵ BVerfGE 119, 331, at 362 and 107, 1, at 13.

¹⁷⁶ See Part I section 3.4 above.

¹⁷⁷ BVerfGE 107, 1, at 12.

¹⁷⁸ BVerfGE 95, 1, at 27.

Part III: Legal remedies

1. Legal remedies at the EU level

The compliance of CETA with EU law may be reviewed before the CJEU by means of an action for annulment (Article 263 TFEU), an action against infringements of the principle of subsidiarity (Article 263 TFEU) and a request for an opinion under Article 218 TFEU. The CJEU may prescribe interim measures according to Article 279 TFEU.

1.1 Action for annulment, Article 263 TFEU

According to Article 263 TFEU, which establishes the legal framework for an action for annulment, the CJEU has jurisdiction over actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. According to Article 263(3) TFEU, the CJEU shall also have jurisdiction in proceedings instituted by any natural or legal person against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

In this case, an action for annulment could be brought against a possible Council decision pursuant to Article 218(6) TFEU concluding the CETA negotiation proceedings. The privileged plaintiffs, in this case in particular the Member States and the European Parliament, could bring such an action for annulment before the CJEU. Since CETA affects the legislative rights of the *Länder*, the *Bundesrat* may demand pursuant to Article 7 EUZBLG that the federal government of Germany institute these proceedings.

Natural and legal persons may bring an action as well; that includes public legal entities such as *Länder* or municipalities. But they have to show that they are particularly affected. This represents a rather serious obstacle. Actions brought by municipalities against restrictions of their right to self-government would therefore have to show unambiguously that they are immediately affected.

1.2 Action against infringements of the principle of subsidiarity, Article 263 TFEU

According to Article 8 of the Subsidiarity Protocol,¹⁷⁹ an action for annulment can also be brought as an action against an infringement of the principle of subsidiarity. Such an action against a decision of the Council pursuant to Article 218(6) TFEU concluding the CETA negotiations could be brought by the Member States themselves or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof on grounds of an infringement of the principle of subsidiarity as laid down in Article 5(3) TEU. It is, however, uncertain whether this allows a challenge concerning the lack of competence of the EU as such. In any case, such an action can be brought if the exercise of the EU's competence violates the principle of subsidiarity in an area of shared competence.¹⁸⁰ According to Article 5(3) TEU, in case of shared competence – which according to Article 4(2) TFEU includes for example consumer and environmental policy – the EU may act only if

¹⁷⁹ Protocol (No 2) to the TEU and the TFEU on the Application of the Principles of Subsidiarity and Proportionality, OJ C 83/206, 30 March 2010.

¹⁸⁰ It is disputed whether it is possible to admonishing the lack of competence of the EU this way, see Buschmann/Daiber, Subsidiaritätsrüge und Grundsatz der begrenzten Einzelermächtigung, 2011 *Die Öffentliche Verwaltung* 504, at 505ff.

the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at the EU level.¹⁸¹

Actions against an infringement of the principle of subsidiarity brought by the Member States would have to be based on this argument. For the Federal Republic of Germany, such an action would have to be instituted by the federal government. According to Article 7 EUZBLG, the government would also have to oblige to a request of the *Bundesrat* in this respect. Further, the *Bundestag* could bring an action against an infringement of the principle of subsidiarity; pursuant to Article 8 of the Subsidiarity Protocol in conjunction with Article 23(1a) BL and Article 12 IntVG, a request of a quarter of the members of the *Bundestag* would suffice. This quorum was modified by Article 126a(3) of the Rules of Procedure of the *Bundestag* as a consequence of the formation of the grand coalition. According to this, the *Bundestag* brings an action against a legislative act of the European Union which constitutes an infringement of the principle of subsidiarity before the ECJ pursuant to Article 23(1a) BL if “all members of the *Bundestag* of the parliamentary parties that do not form the federal government” request it.

1.3 Request for an opinion, Article 218(11) TFEU

Furthermore, there is the possibility to request an opinion pursuant to Article 218(11) TFEU. The opinion may be requested at any time – especially before the conclusion of an agreement. This procedure has a preventive function. Therefore, the CJEU refuses to have an opinion drawn up if the negotiations of the agreement have already been concluded and it has been ratified.¹⁸²

The request may be made by the European Parliament or the Member States. Also in this case, the *Bundesrat* may demand that the federal government makes the request (Article 7 EUZBLG).

2. Legal remedies at the national level

At the national level, legal action before the Federal Constitutional Court can especially be brought in the form of a constitutional complaint or a so-called *Organstreit*, i.e. a dispute between state organs. To prevent CETA from establishing irreversible facts at the national and European level, a request for interim measures pursuant to Article 32 of the German Federal Constitutional Court Act (BVerfGG) might be necessary.

These procedures could be used to challenge the (possibly impending) consent of the German representative in the Council, which has to vote unanimously according to Article 207(4)(2) and (3) TFEU, or the (possibly impending) national consent act needed to conclude CETA as a mixed agreement.

2.1 Constitutional complaint

To be admissible, constitutional complaints would have to argue that CETA specifically interferes with spheres of national democracy protected by Article 38(1) BL, and that it impermissibly constrains the national legislator. According to the jurisprudence of the Federal Constitutional Court, the substantive content of that guarantee is violated if the effectiveness of the right to vote is threatened in an area that is essential for the political self-determination of a nation, that means, if the democratic self-government of the nation – embodied in particular by the *Bundestag* – is

¹⁸¹ Geiger in: Geiger/Khan/Kotzur, *EUV/AEUV*, 5th edn. 2010, Article 5 TEU, para. 12.

¹⁸² CJEU, opinion 3/94 of 13 Dec. 1995, Rep. 1995 I-4577 – GATT/WTO/Framework Agreement on Bananas, para. 14; opinion 1/94 of 15 Nov. 1994, Rep. 1994 I-5267 – WTO, para. 12.

permanently prejudiced to such an extent that core political decisions can no longer be made autonomously.¹⁸³ It therefore requires that the transfer of decision-making competences is clearly defined.¹⁸⁴ This in particular is problematic with regard to CETA. Another constitutionally problematic aspect is the observance of Article 19(4) in conjunction with Article 92 BL. With the establishment of investment arbitration tribunals, the right to a fair hearing is prejudiced in a systematic and fundamental way, since that entails the emergence of a field of proceedings where citizens are not able to effectively assert their rights.

2.2 Dispute between state organs

According to the Federal Constitutional Court, the same applies to competence disputes between governmental bodies. If the scope of political action of the *Bundestag* is in danger of eroding as EU institutions and authorities usurp its competences, the *Bundestag* must not remain inactive. If it does not comply with its responsibility with respect to integration, the parliamentary parties may – via representative action (Article 64(1) BVerfGG) – take action and assert the rights to respect for democratic decision-making authority in their own name against the federal government (with regard to the voting behaviour within the Council of the European Union) or against the parliament itself (with regard to a possible consent act).¹⁸⁵

¹⁸³ BVerfGE 129, 124, at 168ff.

¹⁸⁴ BVerfGE 123, 267, at 351ff.

¹⁸⁵ BVerfGE 123, 267, at 337; 132, 195, at 247.

D. Summary

1. CETA is a “**mixed agreement.**” It may only come into effect if both the EU and the Member States ratify the agreement. Under the Basic Law, that does not only require the consent of the *Bundestag*, but also that of the *Bundesrat*.
2. The establishment of **investor-state arbitration tribunals** in CETA violates the judicial monopoly of jurisdiction laid down in EU law (Article 19 TEU in conjunction with Articles 263ff TFEU) and constitutional law (Article 92 BL). Furthermore, the EU does not have the competence to extend such a procedure to portfolio investments and to the field of financial services.
3. CETA violates the principle of democracy enshrined in constitutional and EU law by using indeterminate legal terms like “indirect investment” and “fair and equitable treatment,” which disproportionately restrict the **democratic organization of the economic and social order** by granting claims for damages, and whose interpretation is assigned to a democratically illegitimate **committee system** with the Joint Committee at its top. The European Parliament and the domestic legislative and executive bodies are not sufficiently integrated into this system. Additionally, there are several regulatory areas with regard to which the EU lacks the competence to establish the committees, so that decisions must not be taken in committees in which the national bodies are not represented.
4. With the negative list, the ratchet clause, the extensive market deregulation also of municipal services, and with the prohibition of offsets, i.e. the prohibition of a deliberate promotion of local interests, the CETA disproportionately prejudices the **guarantee of local self-government** as laid down in EU and constitutional law.
5. In view of the EU’s and the Member States’ human rights and environmental law obligations, CETA is problematic because it does not sufficiently incorporate **social, labour, health, environmental and human rights standards.**
6. With regard to the judicial enforcement of the obligations explained above, it is possible to bring matters before the **Court of Justice of the European Union (CJEU)** which may issue interim orders pursuant to Article 279 TFEU:
 - a. CETA may be brought before the CJEU by **requesting an opinion.** The request may be made in particular by the European Parliament and by the Member States. According to Article 7 IntVG, a demand by the *Bundesrat* to this effect would be mandatory for the German federal government.
 - b. **Actions for annulment** pursuant to Article 263 TFEU may be brought before the CJEU by privileged plaintiffs, in particular the European Parliament and the Member States. According to Article 7 IntVG, a corresponding demand by the *Bundesrat* would be mandatory for the German federal government. Non-privileged plaintiffs, in particular municipalities and legal persons, would have to show that they are individually affected.

- c. An **action against an infringement of the principle of subsidiarity** may be brought before the CJEU by the Member States, their parliaments and chambers thereof. According to Article 126a of the Rules of Procedure of the Bundestag, this presupposes a request by “all members of the Bundestag of those parliamentary parties that do not form the federal government.”
7. With regard to the judicial enforcement of the governmental obligation explained above, it is possible to bring matters before the **Federal Constitutional Court of Germany** by means of either a constitutional complaint or a dispute between state organs. The German representative in the Council may be provisionally prohibited to consent to the CETA by means of an interim order pursuant to Article 32 BVerfGG.