Republic of Bulgaria
ECONOMIC
AND SOCIAL COUNCIL

OPINION

on

"Potential social, economic, environmental and consumer effects of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States"

(own-initiative resolution)

Sofia, 2017

The Economic and Social Council (ESC) included in its Action Plan the elaboration of an opinion on: **"Potential social, economic, environmental and consumer effects of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States".**

The elaboration of the opinion was assigned to the Social Policy Commission (leading), the Labour, Income, Living Standards and Industrial Relations Commission and the International Cooperation and European Integration Commission.

Mr. Ivelin Zhelyazkov – a member of ESC Group I – Employers, and Mrs. Vanya Grigorova – a member of ESC Group II – Trade Unions, were appointed rapporteurs on the opinion.

At its Plenary Session, held on 20 November 2017, ESC discussed and adopted this opinion.

1. **Conclusions and Recommendations**

1.1. The Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA) and its impact on the EU and Bulgaria should be assessed both in terms of the opportunities for development it provides as well as in terms of the potential risks it contains, its possible implications for individual national economies should be discussed, and all aspects of its practical implementation should be analysed.

1.2. ESC's principled position is that encouraging the development of trade relations between Bulgaria and the European Union (The EU), on the one side, and developed economies around the world, on the other, is a positive policy that it fully supports. ESC maintains the opinion that "civil societies in Europe and Canada share some common values, including economic ones, which underpin the identity of these societies in the 21st century. Uniting these principles can bring added value to both the European Union and Canada as well as, ultimately, to the whole international community"[1]. At the same time, ESC notes that it is very important to consider the possible risks to the competitiveness of Bulgarian and European businesses in general, and also risks of introducing practices that would not be in line with the EU's socio-economic and legal achievements.[2]

1.3. For ESC, CETA cannot be defined as wholly positive or as entirely negative, insofar as its individual clauses, taken as a whole, do not have a single effect.

1.4. ESC is of the opinion that CETA goes far beyond the scope of customary trading or investment protection contracts as it also includes issues such as justice, social security, public services, health, environmental and labour standards, protection of intellectual property.

1.5. According to ESC, the overall rationale of CETA is to maximize the liberalization and facilitation of commodity exchange between the business entities of the Contracting Parties.

1.6. ESC recognizes the fact that the objectives and thematic scope of CETA are similar to those of NAFTA (the North American Free Trade Agreement of 1994 between USA, Canada and Mexico), TPP (the Trans-Pacific Partnership) and TTIP (the Transatlantic Trade and Investment Partnership). The parts that secure the rights of foreign investors

[1] Opinion of the European Economic and Social Committee on EU-Canada relations of 16 September 2010.
[2] Position of the Association of Industrial Capital in Bulgaria (AICB) on the signing of the Comprehensive Economic and Trade Agreement (CETA) and the expected impact of this act on the negotiations with the United States of America on the Transatlantic Trade and Investment Partnership (TTIP) http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf

in both directions and the provision of services of public interest attract the greatest attention as they have a direct impact on all other aspects of CETA.

1.7. ESC calls on the National Assembly and the Council of Ministers of the Republic of Bulgaria to objectively take into account both the public concerns related to the signing and the ratification of CETA and the achievements in the course of the negotiation process.[3] In this context, ESC insists on the establishment of an internal mechanism to ensure the most effective results for the Bulgarian economy from the implementation of the CETA.

1.8. ESC recalls that, following the December 2013 regulations, the European Union must find a way to resolve the visa issues with Canada, regardless of whether the Comprehensive Economic and Trade Agreement with Canada will be ratified.

1.9. ESC expresses the unanimous position of its members that, in the context of global trade relations, the role of civil society organizations will be of particular importance for the ratification of CETA insofar as civil society has enormous potential for impact in each of the Contracting Parties.

2. Introduction

2.1. The Comprehensive Economic and Trade Agreement between Canada and the European Union was signed on 30 October 2016 and endorsed by the European Parliament on 15 February 2017. Ratification is forthcoming in a total of 38 national and regional parliaments in the EU and Canada.

2.2. ESC attaches great importance to the fact that although much of CETA is provisionally implemented since September 2017, due to ambiguous social attitudes within the EU, it is possible (and the legislation of 17 Member States allows) to hold national referenda on the necessary ratifications.

3. Essence of CETA

3.1. The agreement is structured in 30 chapters including: national treatment and market access, anti-dumping measures, technical barriers to trade, sanitary and phytosanitary measures and standards, customs duties, subsidies, investments, cross-border trade in services, temporary entry and residence for private individuals, mutual recognition of qualifications, regulations within countries, financial services, maritime transport, communications, e-commerce, competition policy, state-owned enterprises, monopolies and enterprises with special rights and privileges, intellectual property,

[3] Position of the Bulgarian Industrial Capital Association - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf

regulatory cooperation, sustainable development, labour rights, ecology, transparency, etc.[4]

3.2. As a consequence, of the use of CETA, the cumulative effect has to be taken into account, because it can be expected that there will be a variety of direct and additional indirect effects. It is possible to predict and evaluate these effects by different methods and to obtain specific probability results for the EU and for each individual Member State.

3.2.1. The macroeconomic effects of CETA will primarily comprise its impact on external trade flows between the EU and each individual country on the one side and Canada on the other. Changes in the export and import of goods will probably also affect intra-EU trade flows between Member States. Some of them may be diverted to Canada but others may indirectly affect the exports of some of the other Member States. For example, exports and production in our country of end-product components that are being produced in other EU countries can increase due to increased exports of higher added value products to Canada.

3.2.2. Expectations for the future consequences of the application of CETA should be formed in the context and as a projection of the specific commodity structure of exports and imports, of the structure of the EU economy, of individual Member States, and in particular that of Bulgaria, as well as of the comparative competitive advantages of the production and export of goods demonstrated by them over the last years.

3.2.3. Increasing exports to Canada will help to increase net exports as one of the components and sources of GDP growth in individual Member States. In the case of a positive effect of exports on the growth of national and regional production and on the possible increase of foreign direct investment flows, the conditions of economic growth will improve. It can be further accelerated and under the influence of multiplying and accelerating domestic investment, rising incomes and revitalizing consumer demand. Along with such optimistic expectations there are more pessimistic assessments. In some scientific studies, the findings suggest that these effects may also be reversed – as a negative impact of CETA on exports, public-private investments, national investment, income growth and GDP.[5]

[4] Official text of CETA in Bulgarian http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/bg/pdf

[5] See for example Kohler, P., S. Storm, CETA Without Blinders: How Cutting 'Trade Costs and More' Will Cause Unemployment, Inequality and Welfare Losses, GDAE Working Paper 16-03, September 2016, http://www.ase.tufts.edu/gdae/policy_research/CETA_simulations.html

3.3. New opportunities are opening up for certain Bulgarian sectors. According to the Bulgarian Ministry of Economy[6] there is a potential for increasing exports of light industry products, mainly confectionery and textile products. Currently, the former are taxed in Canada by 4-8%, textiles by 17-18%. Exported textiles annual average for 2013-2015 is worth 7 million USD. In some previous years there has been a significant export of electric accumulator batteries, the customs duty for which has been 7%. However, it is noted that for textile products customs duties will only fall within quantitative quotas across the EU.

3.4. Based on CETA, 53% of the duties over agricultural commodities will be removed. It is also noted in the same source that we export to Canada chocolate waffles, canned fruits and vegetables, wines, provisionally preserved fruits, etc. Canada is a strong meat producer, and precisely in this sector, Bulgarian live stock industry currently has an ever more limited presence on the national market. The production of pork satisfies 30-40% of domestic needs and of veal – 16.6%. There are allowances for "sensitive" items such as dairy products, while eggs, egg products, poultry and turkey remain within current limitations. At the same time, it should be noted that, according to the Ministry of Economy, there have been no registered imports of meat and milk from Canada to Bulgaria over the past 5 years.

3.5. The purely commercial part of CETA is of limited importance as the customs tariffs of the developed countries have been radically abolished as early as in the 1990s within the Uruguay Round of GATT (General Agreement on Tariffs and Trade). Growth expectations are mainly related to access to government services and government procurement and to the reduction of "non-tariff barriers", the main ones being the differences in standards, certification procedures and the like.

3.6. According to data of the Bulgarian National Bank, net foreign direct investment (FDI) from Canada to Bulgaria in 2015 amounted to 3.8 million Euros, and according to preliminary data for 2016, have decreased by 1.3 million Euros.[7] FDI from Canada to Bulgaria amounted to 1.4% of all FDI in the country in 2015. The direct investments made from Canada in the past are concentrated mainly with the mining and business process outsourcing industries.[8] Due to mergers and divisions in the corporate world, the long-term national identification of investments is rather conditional. (For example, the company Magna Powertrain registered in Canada became the owner of the German company Ixetic in Bulgaria). More generally, in the new century, investments from developed economies to Bulgaria, to Eastern and Southern Europe, and to less

[6] Opinion of the Ministry of Economy on the effects of CETA
https://drive.google.com/file/d/0B8BGEkWcf_HJckIxQkhEYlNlZzA/view?usp=sharing
[7] The Bulgarian National Bank, Statistics, Statistical Database, Foreign Direct Investment in Bulgaria (BPB6).
[8] Bilateral external economic relations with Canada, Ministry of the Economy
https://www.mi.government.bg/bg/themes/kanada-186-333.html?p=eyJwYWdlIjo0fQ

developed countries in general, marked an impressive growth until the 2008 crisis, and afterwards steady decline. This is a global process on which international trade agreements obviously have little influence. The same applies to the most commonly discussed factors such as local legislation and the level of corruption.

3.7. More than 99% of Bulgarian companies are in the "small and medium" category. They provide 75% of all jobs and 62% of the added value. Despite the discussion of this issue in the public domain, only two measures are envisaged in the text of CETA for small and medium-sized enterprises (SMEs): improving electronic access to information and an opportunity for future discussion of measures to reduce arbitration costs if investments from the other side of the ocean are affected by decisions of the recipient state.

3.8. In general, small businesses have less export per unit of production due to the high share of administrative costs. The size of such companies logically derives from their small market. Today, there are 20.9 million SMEs in the EU (93% with less than 10 employees), but only 619 000 export to outside the EU. The same is true for Bulgaria. Therefore, companies in Bulgaria will be exposed to the same type of competitive pressure as they are now facing large Western European companies, but to a greater extent, due to the inclusion also of large companies from North America. Due to the close integration of Canada and the USA, 42,000 US companies operating in the EU, including the largest ones, have subsidiaries in Canada[9] and will enjoy the benefits from CETA[10].

4. Investment Court and Dispute Settlement

4.1. CETA includes a revised "investor-state dispute settlement" (ISDS) mechanism. It allows investors to seek redress from a state without resorting to or after being left unsatisfied by the decisions of the local courts. Its decisions do not repeal acts of the state but fix monetary compensations for damages incurred by investors as a result of these acts. Similarly to the mechanism for resolving disputes in CETA, the now existing International Investor State Dispute Resolution Centre (ISDSC) at the World Bank, located in Washington. There are various (positive and negative) views on the operation of this international centre, as well as suggestions for changing its working rules.

5. Reforms in the investor-state dispute settlement mechanism in CETA

5.1. For ESC, it is undeniable that investment protection is an emphasis of CETA – 80 of the 454 pages of the main text of the Agreement are devoted to it. Modern rules,

[9] Uniworld, "American Firms Operating in Foreign Countries," Uniworld database, according to data of November 2014

[10] https://www.citizen.org/documents/EU-ISDS-liability.pdf

providing a high level of investment protection, a fair and transparent dispute settlement mechanism, are being created, while preserving the right of states to regulate in the public interest. The aim is to maximize investment across countries. At the same time, on the initiative of the European Commission, serious reforms were introduced in the investor-state dispute settlement mechanism – country as proposed in the TTIP.

5.2. The need for improvements in the arbitration mechanism has been ripe for a long time. Above all, a permanent Investment Court System (ICS) is created. The court has a fixed list of 15 court members, five of whom are Canadian citizens, five are EU citizens and five are citizens of third countries.

5.3. An appellate instance is created within the ICS. It will increase the responsibility of the first instance, ensure a uniform interpretation of the concepts on the basis of precedents and allow states to better foresee the risks before taking legislative and administrative steps. Hearings and protocols are publicly available unless the court decides that a hearing should be closed. There is the intention that the Joint Committee on CETA will seek ways to reduce legal costs for small lump sums and for small and medium-sized companies. At the same time, ESC finds worrying the fact that specific forms and deadlines for such decisions are not stipulated.

5.4. In March 2016 the European Commission considered the possibility that ICS could be made up of full-time judges who would not have side commitments, but gave up this idea. The members of the panel will continue to have the right to sit as arbitrators in other institutions, which preserves the possibility of a conflict of interest. A code of conduct similar to that of the ICSID is introduced, which, however, fails to put an end to controversial court practice. The European Commission also abandoned the idea it had in connection with the similar permanent court under TTIP – to create the possibility other parties, affected by the decision on an action – competitors, associations, NGOs, citizens, to take part in the process.

5.5. It is likely that companies with more limited financial capabilities will have limited access to the CETA investor-state dispute settlement mechanism, as such actions are inevitably accompanied by considerable costs not only in terms of the fees of court members but also for highly qualified (respectively highly paid) lawyer protection. Practices so far indicate that the average cost in such an action is 8 million USD[11].

5.6. Following the ratification of CETA, the existing bilateral agreements between the countries of Eastern Europe and Canada will cease.

[11] OECD Working Papers on International Investment 2012/03 http://www.oecd-ilibrary.org/docserver/download/5k46b1r85j6f-n.pdf?expires=1492722073&id=id&accname=guest&checksum=E9C758F69D027474EC0E22EAE7AD8135; European Commission ISDS Some facts and figures http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf

6. **Protection of foreign investments**

6.1. ESC draws attention to the fact that the Convention on the International Court of Justice on Investment Disputes at the World Bank does not provide a definition for "investment". In practice, the concept is expanded to include not only actual invested funds but also initial studies and even an investment intention, current market value, expected future profits. An analogous problem is presented by the concept of "indirect expropriation" of the investment in question. This puts states at constant danger of being punished for attempting to regulate problems starting from the issuance of mining development permits and extending to governments' responses to nationwide crises.

6.2. CETA defines the term "investment". The criterion that the business entity must have substantial activity on the territory of the recipient country is explicitly stated. This should exclude "mailbox" companies that are actively used to select a suitable country by the claimant. But no quantitative definition of "substantial" is given. This is left to the discretion of the court.

6.3. ESC recognizes as positive the possibility for state protection, as set out in Section F "Resolution of investment disputes between investors and states". Item 8.18 (3) reads: "For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process". This allows the state to avoid arbitration not only for non-compliance with the particular contract by the investor, but also on the basis of a proven undue influence of the investor on state employees and politicians at the time of entering into the contract, as well for the subsequent refusal to exercise control over the investor.

6.3.1. An improvement compared to the usual norms is the explicit clarification in Art. 8.9: "For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section ("Investments")."

6.3.2. ESC draws attention to the fact that the negative impact of a state act on an undertaking in itself is not a violation and it is therefore necessary to prove a breach of one of the following guarantees: "fair and equitable treatment", "non-expropriation", "most-favoured nation treatment", "market access". However, many of these principles have a fairly broad interpretation of the current arbitration practice, but we should recognize that there are already clear definitions of these principles in CETA, which does not imply the mechanical use of arbitration practices created prior to the Agreement.

6.3.3. CETA provides for an obligation to "fair and equitable treatment". The

arbitrators are obliged to interpret the violations only in the sense of Art. 8.10 (2). Article 8.10 (2b) states that a "fair treatment" deficit exists in the case of a "substantial breach of the requirement for a fair trial". Defining "fair" by "fair" is tautological and does not import sufficient clarity, thereby giving the arbitrators room for subjective judgment.

6.3.4. Item 4 allows to take into consideration the non-realization of "legitimate expectations". ("When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."). Arbitration practice shows that there is no robust procedure in which to establish what "expectation is created" in the investor, whose fault it is that such an expectation is created, etc. However, there are cases when oral statements without minutes at a closed meeting have been determined precisely as "creating an expectation"[12]. In the case "*Mikulla v. Romania "*, before joining the EU, the state gave preferential terms to a particular investor in the mineral water sector. Accession to the EU has made preferences incompatible with Community law and therefore punishable. The investor, however, claims that an "expectation has been created" that preferences will remain in force for at least 10 years. (As a result, whatever it does, the state will have to pay penalty either to the European Commission or to the investor.)

7. Impact of CETA on public services

7.1. The "Joint Interpretative Instrument"[13] of the EU and Canada appended to CETA "recognizes and reaffirms the right of the state authorities at all levels to provide and support the provision of services that are considered public, including in areas such as public health and education, social services and housing, and water provision and water cleaning". "CETA does not prevent states from determining and regulating the performance of these services in the public interest", nor from extending them. The same statement ensures that CETA will not prevent public authorities from returning or taking over public services that were previously in private hands (Item 4).

7.2. CETA preserves the right of Member States to restrict market access to "services deemed at national or local level to be public services which may be subject to both a public monopoly and exclusive rights granted to private operators". The same provision is also made for the right of Member States to determine the number of distributors of pharmaceutical products.

[12] Metalclad Corporation in United Mexican States (Merits) 30 August 2000.
[13] http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/bg/pdf

7.3. In Annex 1 Art. 8.15 "Reserves for existing measures and commitments for liberalization" lists a number of existing sectors with reserved state prerogatives. States can deregulate these explicit sectors but can only change them in the future "to the extent that the change does not reduce the compliance of the measure with market access, national and most favoured nation obligations." i.e. states will not be able to return the sector back to the same level of public control that existed before. This is called a "thumb mechanism"[14] – fluctuations in regulatory policy become a one-way forward move towards privatization, regardless of the occurrence of changes in the circumstances and the public interest.

7.4. At the same time, ESC draws attention to the fact that the EU and Canada have provided for numerous exceptions in CETA for services of public interest (in the areas of communal services, health care, education, social protection, etc.). There are no reservations regarding the guarantees of "fair and equal treatment" (8.10) and against "direct and indirect expropriation" (8.12).

7.5. Previous EU trade treaties retained the right of states to protect public interest services through a "positive list" of sectors or services they want to release for fair competition. In CETA, for the first time, the EU and the Member States have adopted the reverse approach, indicating only the sectors or measures they want to protect.

7.6. ESC shares the idea set out in the CEEP Opinion on EU Trade Agreements, according to which "... starting work to overcome market barriers in areas such as market access to services, public procurement and competition may potentially conflict with freedom of choice of public authorities on how to provide, commission and organize services of general economic interest today and in the future. In addition, the right of public authorities to ensure high quality public services can be undermined. As a result, trade agreements can lead to erosion of the existence and quality of services of general economic interest, as well as have an impact on the structure of public service enterprises "[15].

7.7. Moving from a "positive list" approach to a "negative list" approach poses a serious risk of gaps in its preparation and, respectively, threatening the competitiveness of sectors not included in the "negative list". ESC's concerns are based on the fact that the scope of the application of CETA is much wider than the previous Free Trade Agreements entered into by the European Union, and this is the first time in history where the EU has agreed to apply so-called "negative list": all spheres fall under the provisions of this agreement unless they are explicitly listed in any of the annexes. The "negative list" principle can create many critical situations for a range of products and services, especially for services of general economic interest, which are subject to

[14] Known as ratchet mechanism.
[15] CEEP Opinion on EU Trade Agreements, Brussels, 20 May 2015, Opinion.07, http://www.ceep.eu/wp-content/uploads/2016/06/16opinion07_EU-Trade-Agreements.pdf

constant change for reasons of social and technological nature. Making a complete list is virtually impossible.[16]

7.8. All reservations are summarized in two types of annexes[17]: Annex I (p. 979-1293)[18] contains all reservations, expressed reservations and reserved exceptions to existing discriminatory measures (in the sense of positive discrimination). For example, the EU has applied a list of exceptions in the areas of health care, social services and education services. While Annex II (p. 1294)[19] contains all exceptions for possible future discriminatory measures. Here the EU has listed possible exemptions related to water collection and purification, as well as water supply. Reservations have also been made in connection with so-called "public utilities"[20].

7.9. In Annex II, the EU has made reservations[21], has created exceptions for "public utilities", but unfortunately these exceptions apply only to public monopolies and to granting exclusive rights. Moreover, the notion of "public utilities" does not exist under EU law and therefore everything that concerns it is too conditional. The Agreement lists the following areas as examples of "public utilities": "related scientific and technical consulting services, research and development services (R&D) in the field of social sciences and humanities, technical testing and analysis services, environmental services, health care services, transport services and ancillary services to all modes of transport. Exclusive rights for such services are often granted to private operators, such as public sector concession operators subject to specific service obligations. Given that public services often exist at a "sub-central" (lower than central) level, detailed and in-depth enumeration for individual specific sectors is virtually impossible".[22] These exceptions are very unclear and therefore do not constitute a complete exclusion of services of general economic interest from the scope of the Agreement.

7.9.1. ESC does not underestimate the good faith of the EU negotiators but appeals to the complexity of applying the negative list in such a complex, dynamic or even constantly changing environment as the services of general economic interest.[23]

[16] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf
[17] Ibid. - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf
[18] See Consolidated Text at CETA, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[19] Ibid. - http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[20] CEEP Opinion on International Trade Agreements and Services of General Interest (TTIP, CETA and so on.), (International Trade Agreements and Services of General Interest (TTIP, CETA, etc..), Brussels, 19 December 2014, PositionPaper.08), p. 5, http: //www.ceep.me/wp-content/uploads/ 2016/04 /CEEP-Position-Paper-on-CETA.pdf.
[21] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf
[22] CEEP Opinion -http: //www.ceep.me/wp-content/uploads/ 2016/04 /CEEP-Position-Paper-on-CETA.pdf.
[23] Pleading in defence of the negative list, in a very recent text from April 2016 The European Commission's Directorate-General for Trade gives an example of just one of the services of general economic interest - water supply, how the same result can be achieved either with a positive or a negative list. Under the General Agreement

7.9.2. According to ESC, even people with considerable practical and academic experience that we cannot suspect in bias against negative lists, at least because they objectively and in a balanced way highlight their advantages, warn of underwater stones in this type of agreement.[24] For example, Peter Gallagher, one of the undisputed authorities on international trade issues and agreements on world trade in Australia, commenting on the Trans-Pacific Partnership Agreement, synthesized his position as follows: "Negative list schedules of commitments are a prominent characteristic of the Services and Investment Chapters of the proposed TPP agreement. In this short paper I consider the evident benefits, and the less evident shortcomings of negative-list schedules of commitments. I suggest that even superficially ambitious negative-list agreements are difficult to parse and prone to manipulation by interested producers and agencies."[25]

7.9.3. In order to properly manage the risks identified above, ESC proposes to negotiate the specific parameters of the Agreement:

- to give a tighter definition of investment in agreements, excluding concessions, and to reject the definition of services of general economic interest deviating from the definitions in EU legislation (the actual replacement of "services of general economic interest" with "public utilities");

- to allow the application of social, environmental and innovation criteria in the award of public contracts and concessions in line with EU rules.[26]

7.9.4. ESC shares the assessment of the Commissioner for Trade of the European Commission, Ms Cecilia Malmström, that "CETA takes on our new (EU) approach to investment and resolving disputes around them." The revised text of

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on Trade in Services (GATS) a positive list agreement, the EU does not make any commitments in the sector of water collection, purification and supply. For this reason, this sector does not appear on the list and there is no need for any reservations to maintain a future margin of discretion with respect to national treatment and market access commitments. (Market Access Commitment - Commitment to enable both service providers and investors on both sides to access their internal market for services. Commitment to national treatment - the commitment to treat foreign service providers and investors no less favourably than their own suppliers and investors.) Under the CETA agreement, which is a negative list free trade agreement, the EU achieves the same future discretion, making a reservation in Annex II. The TISA (the Trade in Services Agreement), which is a hybrid agreement for free trade, uses a positive list of market access and a negative list for national treatment. Here, it is enough to make a record of national treatment in order to achieve the same freedom of operation as in GATS and CETA. No explicit record is required for market access, as the sector is "unbundled" (as is the case with GATS). See European Commission, DG Trade, Services and Investment in EU trade deals. Using "positive" and "negative" lists, April 2016, http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf.

[24] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf

[25] Gallagher Peter, Negative-list schedules of the TPP, Melbourne Law School, May 15-th 2016, p. 1, http://law.unimelb.edu.au/__data/assets/pdf_file/0003/1954155/Gallagher,-Negative-list-schedules-of-the-TPP.pdf.

[26] Ibid., page 3.

CETA includes a new article by which the European Commission declares that the rights of national governments to regulate and ensure that investment disputes will be resolved and adjudicated in full compliance with the rule of law.[27]

7.9.5. Thus, the agreement reached on investment disputes no longer refers to any ad-hoc arbitration but a permanent, institutionalized dispute resolution mechanism where members will be pre-appointed and will adhere to a very strict code of conduct.[28]

7.9.6. ESC shares Ms Cecilia Malmström's view that "by making the system work as an international court, we will ensure that citizens can trust it to make honest and objective judgments"[29], as well as the view that EU member states have over 1,000 other contracts with obsolete ISDSs[30], set out in them, which need to be reformed.[31]

7.9.7. ESC believes that the progress made in maintaining the right of states to regulate and at the same time to propose an acceptable mechanism to protect investment and to resolve disputes between investors and countries needs to be further developed in further negotiations for the possible conclusion of the TTIP. What has been achieved in the EU-Canada negotiations should be deepened and refined during the negotiations with the United States, with no retreat from the achievements of CETA at the core. The latter would be in line with the official positions of a number of EU Member States.[32]

7.10. The negative list does not exclude reservations to the general rules. Important commitments for national treatment, most-favoured nation treatment, as well as the

[27] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf
[28] Vincenti Daniela, EU, Canada change ISDS clause, get closer to "gold-plated trade deal", EurActiv, February 29-th 2016, https://www.euractiv.com/section/trade-society/news/eu-canada-change-isds-clause-get-closer-to-gold-plated-trade-deal/
[29] The news of the agreement reached and the statement of Ms Cecilia Malmström were welcomed by the various parliamentary groups in the European Parliament. Among the former was the spokesman for the Progressive Alliance of Socialists and Democrats for Trade, MEP David Martin, who described this as "a first step towards renewing and modernizing investment protection in trade agreements between democratic states with a well-functioning legal system".
[30] ISDS (Investor-State Dispute Settlement)- means: resolving disputes between investors and states, which is supposed to be a neutral international arbitration procedure.
[31] In the European Parliament, this opinion was articulated by MEP Marietje Schaake of the Liberal Group. She said: "We do not want secret courts that allow companies to put pressure on European rules and regulations. The biggest problem is that EU member states have 1300 other contracts with obsolete ISDSs in them. They need to be reformed. Together with the Canadians and other international players, we have to work on an international court modelled on the basis of the World Trade Organization as a solution, https://www.euractiv.com/section/trade-society/news/eu-canada-change-isds-clause-get-closer-to-gold-plated-trade-deal/.
[32] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf

most difficult to operationalize "fair and equitable treatment" and "protection against expropriation", are not excluded. This creates unpredictable risks.

7.10.1. The reservation concerning water collection, purification and supply does not provide for wastewater disposal, although in practice the two activities are inseparable.

7.10.2. In Article 8.15 (5) the supply of government procurement services and the subsidies for services of general interest are excluded only with regard to national treatment, market access, etc., but not to "fair and equal treatment" and "expropriation". This calls into question the budget support for transport, water supply, etc.

7.10.3. The scope of the reservations is practically very narrow. For example, the Market Access Reservation states that "all services deemed to be public services at the national or local level may be subject to a public monopoly or to exclusive rights granted to private operators..." In fact, very few of the current services of public interest in Bulgaria are an exclusive state monopoly.

7.10.4. Therefore, CETA allows states to regulate, but obliges them to pay for regulating. They will do this through compensation for the investor – whether voluntary or following an ICS decision. The economy is a large system of directly and indirectly linked economic entities. Changes in any link of this system inevitably lead to changes in others links. The right to compensation is tantamount to the state taking the negative outcomes of entrepreneurial risk.

7.10.5. Due to the approach of the negative list adopted by the negotiating parties, there are risks to states to be found liable by ICS and ordered to pay compensation.

8. Implications of CETA for the countries of Eastern Europe and in particular for Bulgaria

8.1. Eastern European countries are particularly vulnerable to investor claims due to their lower international status. In 2013 the Czech Republic is subject to 26 cases, Poland – to 16. In Estonia, Tallina Vesi, the concessionaire of the water supply in Tallinn, is seeking compensation from the state at the amount of 90 million Euros based on estimates for loss of profit for the period until 2020 due to the refusal of the Estonian Competition Commission to raise the price of water by 17%. The ground for the claim

is denial of 'fair and equal treatment' provided for in a bilateral agreement for encouraging investment between the Netherlands and Estonia.[33]

8.2. For Bulgaria, the most recent examples are the claims made after force majeure measures were undertaken to control the price of electricity since 2013 until now. The shocks affected the expected profits from renewable energy sources, TPP Maritsa Iztok 1 and 3 ("AES 3C Maritza East 1" EOOD and "Contour Global Maritza East 3" AD), as well as the financial stability of National Electricity Company, reflected negatively on the expenses of the big industrial consumers of electricity and last but not least – of household users. But only the first three types of entities mentioned are foreign investors and they receive or will receive their compensation – the "Maritza" power plants through a special agreement, and the energy distribution companies – in case the court upholds their claims based on of bilateral agreements with Austria and the Czech Republic. The financial means for these direct or indirect compensations are at the expense of domestic consumers, the production industry and government debt.

8.3. A more important effect of the financial loss resulting from arbitration decisions in favour of private claimants is the increased regulatory rigidity due to the danger that a foreign investor may seek redress through an arbitration mechanism.

8.4. ESC takes note of the fact that only a small number of Bulgaria's reservations regarding national treatment, most-favoured nation treatment and market access can be attributed to services of general interest. They protect narrow sectors in which there are statutory regulations: private education services, cross-border railway transport, pharmaceutical mail sales, geodetic and cadastral services, banking services. It should be noted that Bulgaria has made a reservation to maintain the fracking ban as regards the "national treatment" clause and market access for investment.

9. Impact of CETA on the labour market and employment

9.1. In Chapter 23 Trade and Labour, the two Contracting Parties declare their willingness to observe the labour standards established by the International Labour Organization (ILO). Canada undertakes to ratify and implement core ILO Conventions. Guarantees and legislative measures that are already available in EU and Canadian domestic law are described in detail.

9.1.1. This chapter declares the right of states to define their priorities in the field of labour. Article 23 (4) reads: "A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment."

[33] https://www.tni.org/files/download/ourpublicwaterfuture-10_chapter_eight.pdf

9.1.2. Thus, the principle that international trade and investment cannot be an incentive for competition between countries at the expense of labour rights is reproduced in a trade agreement. This is a step towards ending the race to the bottom between countries for ever lower compensation of hired work. Its cessation would lead to an increase in consumer demand and investment, and hence an increase in social stability in industrialized countries, as well as catching-up developments in the Third World.

9.1.3. ESC finds measures such as those described above are long necessary. Labour protection standards are also included in trade agreements between USA and Central America, Colombia, South Korea. They even provide for monetary compensations and trade sanctions.

9.2. The mechanism for the enforcement of the principles in Chapter 23 is essentially consultative. It is envisaged to set up a Trade and Sustainable Development Committee within its framework – a Civil Society Forum. Upon one party's complaint for breach against the other, an Expert Group may be set up to confirm or reject the complaint in a report and, in the latter case, to make recommendations. The two sides (the EU and Canada) are then obliged to "make efforts ... to identify appropriate measures or, if appropriate, to decide on a mutually satisfactory action plan". It is explicitly emphasised that other means, including international commercial arbitration, will not be used: "In any dispute arising in connection with this chapter, the parties shall resort only to the rules and procedures provided for in this Chapter". Canada has proposed to introduce financial sanctions of up to 16 million Euros per year, but this is not envisaged in the final text. Furthermore, trade unions and employers' organizations cannot directly initiate these procedures, but only raise their questions in the intended forums.

9.2.1. In this legal framework, according to the ESC, labour protection enforcement measures are disproportionate to those protecting the interests of foreign investors. In situations where states have to look for a balance between the two types of interest, government and municipalities may also face a dilemma: to choose between attracting investors and creating jobs, or to trigger the described dispute resolution mechanism under Chapter 23.

9.2.2. In the practice of these deals between the USA, Central America, Colombia, South Korea, there are many cases that show the poor willingness of the latter three countries to cooperate in securing the right of association, settling unpaid salary disputes, admitting inspectors to work place, as well as the reluctance of the

US Department of Commerce to trigger the procedures[34] provided by the agreements.

9.3. The Trade Commissioner expects from CETA results in terms of creating decent jobs, balanced income growth and expanding entrepreneurship opportunities. Estimated econometric simulations commissioned by the European Commission are neutral to the employment factor even in their baseline assumptions (i.e. they accept axiomatically that after the period of structural change, it will return to the level before them). Some recent studies predict a rather negative effect – loss of jobs in the EU and a reduction in the total labour and capital incomes of one worker.[35]

9.3.1. A result that is not questioned by most researches is that income inequality will increase. The current effects of free trade agreements on income show a lowering of the income of people with secondary or lower education and a concentration of increase in capital owners and highly educated people.

9.3.2. In particular, CETA gives the EU wider access to public procurement in Canada and relief for temporary agency workers in Canada. It is likely that this change, either directly or indirectly, will increase the export of labour force and consequently reduce its supply in Bulgaria. On the other hand, there may be an increase in the IT sector, the outsourcing of call-centre business services and related

services. But in this sector, Bulgarian employees will be in price competition with tens of millions of employees in underdeveloped countries.

10. Consequences of CETA for environmental standards, food safety and GMO

10.1. The European Commission points out that CETA contains "strict rules for the protection of ... the environment". Like in the chapter on Trade and Labour, in Chapter 22 on Trade and Sustainable Development and Chapter 24 on Trade and Environment, the Parties commit themselves to objectives such as "trade that supports sustainable development", "environment-friendly trade", etc. This is clearly indicated in the "Joint Interpretative Instrument", which was designed to respond to public anxiety. At the same time, the agreement does not include mechanisms and binding obligations. The

[34] http://laborrights.org/blog/201412/justice-delayed%E2%80%A6the-long-road-guatemala-cafta-complaint
[35] http://www.ase.tufts.edu/gdae/policy_research/ВИТС_simulations.html

environmental provisions of CETA cannot be enforced through trade sanctions or financial penalties if violated.

10.2. Notwithstanding the assurances of the EC and Canada in the Interpretative Instrument, a detailed reading of the Agreement and the Declaration itself shows that this right is in reality not protected. There are no additional safeguards or mechanisms to protect the right to regulate, but simply a reaffirmation of Art. 8.9 (Chapter 8 of CETA).

10.2.1. In a separate unilateral declaration (number 7 in the Council minutes)[36] The EU states that "nothing in CETA may prevent the application of the precautionary principle in the EU, as set out in the Treaty on the Functioning of the EU". However, precautionary measures that violate the rules of CETA on investment, the internal regulation, cross-border trade in services, technical barriers to trade, etc. can still be challenged by the injured investors or the Canadian state, because these declarations should be interpreted only within the core text of CETA.[37]

10.2.2. Instead of guaranteeing the "precautionary principle" on which all EU food and chemicals safety standards and procedures are built, the "Joint Interpretative Instrument" of CETA, EU and Canada "reaffirms the safeguards commitments that (the parties) have undertaken under international agreements" (Art. 1d). This refers not to the Community's own principle but to international agreements (which include, for example, the World Trade Organization (WTO)), which offer less protection

and do not only depend only on the EU and Canada. WTO accepts only temporary actions under the precautionary principle: one of the reasons why the EU lost the case filed by the US and Canada against the European ban on importing beef treated with hormones[38], and its strict GMO policy.

10.2.3. The main threat to regulation comes from the chapter on regulatory cooperation. The mechanism for "regulatory cooperation" in CETA (Ch. 21) is of particular importance as the parties are bound by it in order to try to gradually bring their regulations into line with it.

10.2.4. With Art. 25.2.2 (b) the Parties agree to "promote the use of efficient scientifically-based procedures for the approval of biotechnological products". In addition, Chapter 21 contains a potential attack on the precautionary principle.

[36] http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf
[37] https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-06-21_foodwatch-study_precautionary-principle.pdf
[38] European Communities — Measures Concerning Meat and Meat Products (Hormones) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm

Article 21.4 urges the parties to "carry out joint research programmes in order to: [...] prepare, where appropriate, a common scientific basis". While sounding safe, these texts actually refer to the fundamentally different regulatory approach used in Canada and the US, "science-based approach". According to this approach, a product is stopped from the market (full preliminary testing is not carried out) only after its harmful nature is proven, whereas the precautionary principle applied in the EU requires the business operator to prove that the product is safe before it is placed on the market. In the EU, the decision whether or not to take the risk of a specific product is also based on scientific analysis, but it is made at the political level. In order for a genetically modified food to be imported and marketed within the EU, it is first required to make a risk assessment of the European Food Safety Authority (EFSA). However, the authorization to place food on the market is given by the EC, which means that even if the agency can say that a product is safe, it may not obtain a marketing authorization.

10.2.5. According to ESC, triggering an arbitration clause against the precautionary principle could weaken EU and Bulgarian laws on food safety and environmental protection and prevent the introduction of new rules and standards for environmental and public health protection. For example, Bulgaria, based on this principle, introduced a moratorium on shale gas exploration and extraction using the fracking method and a ban on cultivation on the territory of the country of GMOs.

11. Taking into account the importance of public debates not only in Bulgaria but also in the European Union on the common trade policy in the field of international agreements, ESC recommendations to the Bulgarian government a constructive approach and positions when participating in negotiations for such comprehensive trade agreements. In the following principles, the ESC takes into account the new global processes and challenges. A real agreement is needed between all states and unions and guarantees in areas that are often completely ignored or directly undermined in the negotiations:

11.1. Full transparency of the negotiation process- access to the discussion and to the proposals of each party to the agreement should be given to representatives of all civic groups (consumer, trade union, environmental and other organizations). It is unacceptable for citizens to wait for the texts to be finalized and only then to make proposals. As the negotiators postpone for later, there comes a time when they refuse to make changes because it is too late and there is no way for the negotiation to open for debate over a thousand pages again after years of negotiations.

11.2. Guaranteeing all international conventions and treaties on human rights, the rights of

women and workers. Recognizing and joining the ILO golden labour standards by all states involved in the globalization processes. These are minimum regulations on basic labour issues – the fight against child labour abuses, debilitating working conditions, the need for a minimum wage, decent wages, with which civilized states cannot make compromises,

11.3. Observing the interests of the Bulgarian producers by creating opportunities for preservation and development of incentives for Bulgarian production and consumption of Bulgarian goods.

11.4. Adequate compensations for economically weaker countries – there are many cases where even industrialized nations are opening their markets, but their export earnings are limited. They need financial help to take advantage of the new opportunities. Trade itself does not allow them to develop sustainably.

11.5. In its trade negotiations policy, Bulgaria, together with other less developed EU members, should pursue the following objectives:

11.5.1. To refine investor protection texts that have been mechanically incorporated into trade agreements from the 1990s and early 2000s in order to protect themselves from the wave of "capricious claims" and the tendency to privilege external economic subjects with respect to domestic ones. To assert a position for a narrow, clear and comprehensive definition of the terms "investment", "indirect and direct expropriation" and "fair and equitable treatment". To uphold these objectives in the EC's general negotiating policy.

11.5.2. To take reasoned and objective positions to improve the operation of international investment institutions for disputes between investors and countries towards closer application of the principles of objectivity, independence, equivalence of parties to the process, publicity of bids, judgments and evidence as well and the participation of all parties affected by the decision (including representatives of local capital, labour, consumers and environmentalists).

11.5.3. Bulgaria to support the EC's view that bilateral pre-accession investment treaties between Western and Eastern European countries should be discontinued. The same applies to contracts between East European countries. They create a privilege for some economic operators in the common market and therefore discriminate against others. Its position must be that they now contradict Community law and predetermine the development of the EU at several "speeds".

11.6. Protection for emerging industries and companies from sectors of national importance – time and conditions are needed to build up intellectual and economic opportunities. If they are not provided, international corporations press them with economies of scale and disproportionate opportunities for research and development.

11.7. Limiting the effect or abolishing escalating tariffs – with low duties on unprocessed materials and resources and high tariffs for finished products. In this way, developed countries provide cheap resources for businesses in their territory, but deprive poorer countries of the added value that their workers could produce.

11.8. Adopting regulations to curb financial speculation in order to prevent a new global economic and financial crisis. Even the IMF recognizes that uncontrolled flows of speculative capital lead to high risk.

11.9. The new situation, where huge flows of refugees are heading for Europe, must also be reflected in the comprehensive agreements between the major economies, as it affects both the social and the economic conditions in them. The free movement of capital must be linked to the free movement of people and labour. European partners must also accept part of the refugee flows in their whole range of educational, family and economic characteristics – a measure that the new UN Secretary-General, Antonio Guterres, insisted upon.

11.10. ESC recommends that the agreements in force be evaluated. Bilateral and multilateral free trade treaties that contain investor protection clauses involving supranational arbitration must be terminated because they threaten fundamental human rights. According to ESC, trade should be fair as well as free.

11.11. In conclusion, ESC stresses that the efforts of the EU institutions and -EU Member States should be geared to the correct implementation of the negotiated agreement. Moreover, what has been negotiated in CETA should be the foundation from which the EU should not step back in the (prospective) negotiations of the Transatlantic Trade and Investment Partnership (TTIP) agreement. The signing of CETA should not in any way signal the "spurring" of the TTIP negotiations. They must be conducted carefully, taking full account of the interests of the EU as a whole and with the utmost respect for the interests and considerations of the Member States and their autonomous regions.[39]

[39] Position of BICA - http://bica-bg.org/wp-content/uploads/2016/10/CETA-Stanovishte_AIKB_US.pdf

(signed)

Professor Lalko Dulevski, Ph.D

PRESIDENT OF THE ECONOMIC AND SOCIAL COUNCIL