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CODE OF CONDUCT FOR ARBITRATORS IN CETA – A STEP FORWARD IN INVESTMENT ARBITRATION?

ABSTRACT

This paper presents the Code of Conduct for arbitrators in CETA, which will apply to investor-state dispute settlement initiated under Comprehensive Economic and Trade Agreement concluded between the European Union and Canada. The Code of Conduct for arbitrators constitutes an innovation in investment treaties, especially taking into account that it is said to be binding. Therefore, in this article the provisions of the Code as well as its role and significance will be examined to assess whether the Code is a milestone in dealing with ethical issues in investment arbitration.

KEYWORDS

CETA, investment arbitration, code of conduct, ethical code for arbitrators

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INTRODUCTION

This paper tries to analyze the provisions of Comprehensive Economic and Trade Agreement (CETA)[1] establishing a Code of Conduct for arbitrators. The Code of Conduct for arbitrators in CETA has been announced as the first binding ethical code that will apply to investment disputes initiated under CETA.[2] It is considered to oblige arbitrators to continuously disclose any possible conflict of interest as well as to maintain their independency and impartiality.[3]

In this paper I argue that binding Code of Conduct is certainly a step into right direction to protect impartiality and independence of arbitrators as well as to ameliorate the system of investment arbitration in general, however its provisions, structure and mechanisms it deploys are far from expectations and do not resolve concerns presented by critics and researchers. The Code does not include the specificities of investment disputes in sufficient manner; it does not decisively solve problems associated with impartiality and independence of arbitrators by, for example, creating distinct and separate profession of investment arbitrator that would be intended to solve investment disputes under CETA. Moreover, it does not provide institutions authorized to control and sanction arbitrators who have acted contrary to ethical standards as well as clear mechanisms that would apply in such situations. Therefore, its meaning may in practice be reduced.

In the first part of the paper I will present the mechanisms of investment arbitration introduced in CETA as a background for further considerations concerning the Code of Conduct for arbitrators; furthermore I will outline the

[1] The Comprehensive Economic and Trade Agreement is a free-trade agreement between Canada and the European Union. CETA tackles a wide range of issues to make business between Canada and EU easier. It is going to remove customs duties, end limitations in access to public contracts, openup services' market, offer predictable conditions for investors and, last but not least, help prevent illegal copying of EU innovations and traditional product, compare: *CETA – Summary of the Final Negotiating Results*, [online] http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf [accessed: 10.11.2015]; A. Cosbey, *Inside CETA: Unpacking the EU-Canada Free Trade Deal*, [online] http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal [accessed: 10.11.2015]; *Kompleksowa umowa gospodarczo-handlowa (CETA)*, [online] http://ec.europa.eu/trade/policy/in-focus/ceta/index_pl.htm [accessed: 10.11.2015].

[2] *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, [online] http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf [accessed: 10.11.2015], p. 3.

[3] *How Investment Protection Affects the "Right to Regulate"*, [online] http://isds-blog.com/tag/ceta/ [accessed: 10.11.2015].

content of Code of Conduct envisaged in CETA Consolidated Text[4] in the view of other similar instruments like, for example, International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).[5] Finally, I will try to answer a question if the Code of Conduct set up in CETA creates a new quality in establishing standards of conduct for arbitrators involved in investment disputes.

ISDS IN CETA

Investor-State Dispute Settlement (ISDS) has been one of the most criticized elements in CETA.[6] Critics argue that ISDS has been originally created for settling disputes between an investor from a developed country with stable legal system and a developing country, where legal protection based on strong standards and binding laws could not have been guaranteed. In such situation the justified claims of private investors might not be sufficiently protected before state national courts that could have been strongly influenced by the national authorities. Therefore the investors' interests would risk to be exposed to the omnipotence of state powers.[7] To counter this threat ISDS system has been introduced to grant investors that their claims will be reviewed and decided by an independent and impartial body in a form of an international arbitral

[4] *Consolidated CETA Text*, [online] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed: 10.11.2015].

[5] International Bar Association Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on Thursday 23 October 2014, available at: *IBA Guides, Rules and Other Free Materials*, [online] http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Standards, Principles and Ethics [accessed: 10.11.2015].

[6] *Seattle to Brussels Network*, [online] https://www.tni.org/files/download/seattle_to_brussels_ceta_analysis.pdf [accessed: 10.11.2015]; N. Bernasconi-Osterwalder, *The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?*, "Investment Treaty News", Issue 4. Volume 3. June 2013, [online] http://www.iisd.org/pdf/2013/iisd_itn_june_2013_en.pdf [accessed: 10.11.2015], pp. 10–13; C. Lewis, *„Reformed" or Not, Corporate Handouts in Trade Agreements Are as Dangerous as Ever*, [online] http://www.huffingtonpost.com/courtenay-lewis/reformed-or-not-corporate_b_6277200.html [accessed: 10.11.2015]; A. Cosbey, op. cit.

[7] S. Balthasar*, Spory o przyszłość arbitrażu inwestycyjnego w Unii Europejskiej*, „Przegląd Prawa Handlowego" 2014, nr 2, p. 41; C. Wiśniewski, O. Górska, *Zakres jurysdykcji trybunału arbitrażowego w świetle dwustronnych umów o ochronie i popieraniu inwestycji*, „Przegląd Prawa Handlowego" 2012, nr 7, pp. 10–11.

tribunal.[8] However, between EU and Canada this threat does not exist because both legal systems of the parties to CETA are strong, reliable and independent from executive power.[9] Therefore, there is small risk that national courts of EU Member States will favor their respective states over legitimate interests of investors and violate the rule of fair and just process. Reversely, it can be pointed out also that in Canada national courts operate independently so they will examine the cases filed by EU investors without prejudice. It is therefore questionable whether ISDS is whatsoever needed in CETA.[10]

In addition, investment arbitration has insofar gained murky reputation. It has been accused of favoring international corporations and allowing them to seek billions of dollars in compensation for public interest policies that corporations allege reduce their profits.[11] The ISDS mechanism is deemed to empower corporations to sue national governments in private arbitration proceedings over hazardous waste safeguards, fracking bans, nuclear energy phase-outs and minimal wage policies.[12] It has been also pointed out that investment arbitration allows private investors to challenge national regulations adopted for protection of relevant citizens' interests, which undermines the state right to regulate as well as to bypass national court and force the sovereign states to conduct proceedings before an arbitral tribunal in non-transparent and non-controllable method.[13]

The EU Commission (that since the Lisbon Treaty in 2009 has competences over foreign direct investment)[14] explains, however, that the ISDS in CETA will be ameliorated and abovementioned threats will be eradicated. The Commission

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[8] P. Muchlinski, F. Ortino, C. Schreuer, *Oxford Handbook of International Investment Law*, Oxford 2008, pp. 725–728.

[9] *CETA: Trading Away Democracy*, [online] http://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy [accessed: 10.11.2015].

[10] According to EU Commission the ISDS is needed in CETA to provide clearer and more precise investment protection standards; provide for new and clearer rules on the conduct of procedures in arbitration tribunals – including complete transparency; as well as improve the functioning of arbitral tribunals, compare: *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, op. cit.

[11] C. Lewis, op. cit.

[12] Ibidem.

[13] N. Bernasconi-Osterwalder, op. cit., p. 12; G. Domański, M. Świątkowski, *Naruszenie przypisywanej państwu umowy z inwestorem zagranicznym a naruszenie traktatu o ochronie inwestycji*, „Przegląd Prawa Handlowego" 2006, nr 11, 2006, pp. 18–19; M. Dziurda, C. Wiśniewski, *Wpływ umów BIT na suwerenność państw*, „Przegląd Prawa Handlowego" 2013, nr 12, pp. 13–18.

[14] S. Woolcock, *EU Trade and Investment Policymaking After the Lisbon Treaty*, "Intereconomics", Vol. 45, No. 1, January/February 2010, pp. 22–25, [online] https://www.ceps.eu/system/files/article/2010/02/22-25-Woolcock_0.pdf [accessed: 10.11.2015].

plans to reform the current mechanisms by introducing several changes.[15] One of the proposed solutions concerns introducing the Code of Conduct for arbitrators that will contain ethical rules and will apply to all investment disputes initiated under CETA. According to EU Commission, the Code of Conduct will prevent conflict of interests, which are likely to occur providing the number of potential investment disputes arising out of CETA and will provide effective mechanisms of replacing an arbitrator who is not complying with the Code. The decision in this regard will be taken by an outside party, which is the Secretary – General of the International Center for the Settlement of Investment Disputes (ICSID), and not by the fellow arbitrators. The Commission points out that the fellow arbitrators risk being perceived as being more lax on possible conflicts of interest and hence might not effectively intervene when possible conflicts occur.[16]

STRUCTURE AND CONTENT OF CODE OF CONDUCT IN CETA

As it has been presented above, the Code of Conduct is only one instrument of improving the investment arbitration but definitely one with the strongest impact on influencing arbitrators and their work. It is agreed that international

[15] For example by: 1) introducing the right of the EU and Canada to regulate to pursue legitimate public policy objectives such as the protection of health, safety, or the environment; 2) providing for a precise definition of "Fair and Equitable treatment"; 3) providing detailed language on what constitutes indirect expropriation; 4) issuing of compulsory licenses in accordance with WTO provisions guaranteeing access to medicines cannot be considered an expropriation; 5) covering by the definition of investment only assets that possess the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, and a certain duration; 6) not protecting so-called "shell" or "mailbox" companies; 7) exceptionally strong protections against frivolous claims; 8) encouragement of alternative dispute resolution; 8) limited post-establishment rights; 9) prohibitions on seeking remedies in domestic courts and through ISDS at the same time; 10) full transparency—all documents will be public, all hearings open, interested parties (NGOs) can make submissions; 11) introducing a roster of arbitrators; 12) effective mechanisms for the parties to the agreement (the EU and Canada) to issue binding interpretations; 13) a possible appellate mechanism, compare: *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, op. cit., pp. 1–6; N. Bernasconi-Osterwalder, H. Mann, *A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"*, [online] https://www.iisd.org/sites/default/files/pdf/2014/reponse_eu_ceta.pdf [accessed: 10.11.2015], pp. 4–25.

[16] *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, op. cit., p. 3.

arbitration relays on trust.[17] The trust between parties but most of all between parties and arbitrators creates the value of arbitration. The parties must have confidence that arbitrators will be impartial, independent and will have the necessary moral, professional and personal qualification to fairly and properly settle a dispute. When the trust disappears, arbitration will no longer be an effective method of resolving cases.[18] At the same time the proliferation of potential disputes that will be brought before arbitral tribunals will definitely cause the increase of number of new arbitrators who will be needed to handle them. Therefore, tightening the profession of an investment arbitrator by imposing on them a binding Code of Conduct, which will set up standards of acting for all arbitrators appearing in investment cases under CETA, will contribute to the increase of trust between parties and arbitrators. It will also influence harmonization and even unification of standards applying to conflict of interests that arbitrators may encounter as well as it will have major positive impact on the ISDS in CETA as a fair and effective method of settling disputes.

The Code of Conduct is necessary in investment arbitration for many reasons. First, it is a required tool for arbitrators to guide them in case of conflict of interests that may easily occur, especially taking into account the number of potential disputes that will result out of CETA. Second, it is crucial from the states' perspective. It has been acknowledged that the independence of arbitrators is problematic resulting from the fact that arbitrators are generally lawyers from international law firms who appear in some cases as counsels and in other as arbitrators (judges), which might place at risk their impartiality and independence. Third, it is justified due to the growing institutionalization and judicialization of investment arbitration.[19] Arbitrator commences (rightfully) to be treated more as a profession that requires professional training, competences and qualification. Therefore, there are emerging regular mechanisms that are to establish certain standards but also watch if arbitrators are observing them.[20]

Hence it is vital that the EU Commission recognizes the problems connected with arbitrators' impartiality and independence. To address this issue the Code of Conduct is formulated in accordance with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration with which arbit-

[17] D. S. Rajoo, *Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations*, "Contemporary Asia Arbitration Journal" 2013, Vol. 6, No. 2, pp. 329–347, [online] http://ssrn.com/abstract=2397659 [accessed: 10.11.2015].

[18] Ibidem, p. 339.

[19] J. Rajski, *Etos arbitrażu*, „Przegląd Prawa Handlowego" 2013, nr 5, p. 4.

[20] Ibidem, pp. 4–5; M. H. Koziński, [in:] *System Prawa Handlowego*, t. VIII: *Arbitraż Handlowy*, red. A. Szumański, Warszawa 2010, pp. 934–935.

rators are to comply.[21] IBA Guidelines are the most popular document that guides arbitrators in case of conflict of interests. They have already gained wide acceptance within the international arbitration community. Arbitrators commonly use the IBA Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators. According to the IBA Guidelines' general principle: 'every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated'. To achieve this aim the IBA Guidelines contain provisions as to disclosure of information, conflicts of interest, relationship of the arbitrators, the scope of application, duty of the parties and the arbitrator. The popularity of IBA Guidelines is compromised by the fact that they have a form of soft law and subsequently their provisions are not legally binding.[22]

The Code of Conduct for arbitrators in CETA is based on IBA Guidelines provisions, however the Code employs different wording and has different structure. The Code is added to CETA as Annex II and contains 8 titles and 21 articles. In first part of the Code the principle notions like arbitrator, candidate for arbitrator and proceedings are defined. Then, under first section, titled *Responsibility to the process*, the fundamental principle of proper conduct of proceedings is set out. It states: 'Every candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved.'[23]

Second section is titled *Disclosure Obligations*. It contains a vast regulation indicating what the candidates for arbitrators must reveal. The code does not repeat the IBA red, orange and green lists but instead indicates in direct way what should be disclosed. For example, it requires that the candidates must disclose any interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. In particular, candidates for arbitrators should disclose any financial interest and any financial interest of the candidate's

[21] *IBA Guides, Rules and Other Free Materials*, op. cit.

[22] P. Hodges, *The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?*, [in:] *Austrian Yearbook on International Arbitration*, eds. C. Klausegger et al., Vienna 2015, pp. 205–229.

[23] *Consolidated CETA Text*, op. cit., p. 480.

employer, partner, business associate or family member in the proceeding or in its outcome and in any other relating proceedings that may interfere with this proceedings. As well as any past or existing financial, business, professional, family or social relationship with any interested parties in the proceeding, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same goods.[24]

Third section is titled *Duties of Members* and regulates the conduct of arbitrators during the proceedings. It imposes on arbitrators an obligation to perform their duties thoroughly and expeditiously with fairness and diligence. As well as they must not delegate their duties to other persons. In addition the arbitrators should take proper measures to ensure that their assistants and staff comply with the provisions of the code.[25] This section is distinctive because the IBA Guidelines do not contain a general obligation imposed on arbitrators to perform their duties thoroughly and expeditiously.

The title of the fourth section is *Independence and Impartiality of Members*. It repeats and strengthens the requirement of arbitrator independence by stating that they shall not be influenced by self-interest, outside pressure, political considerations, public clamor, and loyalty to a Party or fear of criticism. In addition, an arbitrator shall not accept any benefit that would interfere or even appear to interfere with the proper performance of his/her duties. An arbitrator may not use his/her position on the arbitration panel to advance any interests and should avoid the impression that others are in a special position to influence her or him. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgment. A member must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.[26]

Section five titled *Obligations of Former Members* imposes on former arbitrators a duty to avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or ruling of the arbitration panel.[27]

Under section six, the *Confidentiality* is regulated. It imposes general and wide obligation of maintaining any information concerning proceedings or acquired during proceedings in private and prescribes using any such inform-

[24] Ibidem, pp. 480–481.
[25] Ibidem, p. 481.
[26] Ibidem, pp. 481–482.
[27] Ibidem, p. 482.

ation to gain personal advantage or advantage of others or to adversely affect the interests of others.[28]

Section seven and eight concern respectively Expenses and Mediators.[29]

DRAWBACK OF THE CODE OF CONDUCT

Although the general idea of introducing the legally binding Code of Conduct for arbitrators deserves approval, the initial project of this document is far from expectations.

First, it should be pointed out that the Code of Conduct is not decisively binding. Pursuant to *Article X.25: Constitution of the Tribunal* of the Consolidated CETA Text: 'Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment).'[30] It means that arbitrators in fact will have a choice between the Code of Conduct, established in accordance with CETA and IBA Guidelines.[31] Provided that IBA Guidelines have been created for commercial arbitration, choosing them will not significantly change the ethical approach of arbitrators to investment arbitration. In addition its application might be reduced due to the fact that IBA Guidelines are already known and in use, so arbitrators may be likely to choose them as an instrument they know instead of complying with new rules with yet unknown interpretation.

Second, despite the quality of IBA Guidelines, they have been created to serve to international commercial arbitration and hence they do not recognize the particularisms of investment disputes. Therefore, the Code of Conduct in CETA should be more properly adjusted to address specific concerns on arbitrator conflicts in investment arbitration. The parties should not have a choice between the IBA Guidelines or a special code but instead the Code should integrate and build on the IBA Rules and bring in investment-specific elements. For example, the Code of Conduct should clearly state that arbitrators in an investment treaty cases might not concurrently act as counsel in other investment treaty arbitrations.[32]

[28] Ibidem.

[29] Ibidem.

[30] Ibidem, p. 171.

[31] M. Maes, *Investment Protection in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)*, published on 5 March 2014, [online] http://eu-secret-deals.info/upload/2014/02/Investment-in-CETA-MarcMaes-S2B-analysis-140306.pdf [accessed: 10.11.2015], p. 8.

[32] N. Bernasconi-Osterwalder, op. cit., p. 13.

Third, the Code of Conduct's function has been to strengthen impartiality and independence of the arbitrators. This objective is to be accomplished by providing ethical rules to eliminate conflict of interests as well as eliminating situations in which arbitrators are deciding in favor of a party that has nominated her/him. To achieve this objective EU Commission has enhanced the roster of arbitrators as an implementation of the Code of Conduct. It is pointed out that if arbitrators were chosen by lot from the roster and not nominated by parties, it would firmly enhance their impartiality and reduce their eagerness to decide in favor of one party also in expectation to be nominated by this party in next case. Unfortunately, choosing arbitrators from the roster has not been adopted and roster itself has been introduced only within limited scope. Pursuant to Section 3 Article 14.7. of the CETA Consolidated Text, the parties shall consult to chose arbitration panel within 10 working days, which means that first two arbitrators are nominated by the investor and the state unilaterally and both parties must agree to chose the chairperson.[33] The roster only comes into play when the parties fail to appoint the presiding arbitrator or fail to appoint their own arbitrator.[34] It means that in fact the roster system under CETA is more a facade decoration than is designed to truly solve a problem with impartiality and pressure made on arbitrators by nominating parties because a situation when a party fails to appoint its arbitrator seems to be very rare.

Fourth, the Code of Conduct for arbitrators, apart from serving arbitrators themselves by guiding their actions and aiding them in case of conflict of interests, serves also additional objectives. It should legally verify arbitrators' conduct and provide mechanisms, institutions and sanctions that would complement the system and come into play when ethical provisions are violated. The need to establish high guarantees of impartiality of arbitrators (even similar to those of judges in national courts) is extremely important in Investor-State arbitration, which many times concerns public matters and is (or at least should be and is commencing to be) exposed to public scrutiny.[35] Not only are the investment disputes concerning elementary human rights, environmental issues and state's right to regulate but also the amount of compensation demanded by investors against states and associated responsibility of arbitrators justifies the highest possible impartiality and independence. In this context all inevitable connections between investors and investment arbitrators, who come from most influential and cosmopolitan law corporations, contribute to reduction of trust in investment arbitration as a fair and efficient method of solving

[33] *Consolidated CETA Text*, op. cit., pp. 465–466.

[34] Ibidem, pp. 465–466; N. Bernasconi-Osterwalder, H. Mann, op. cit., p. 22.

[35] D. Euler, M. Gehring, M. Scherer, *Transparency in International Investment Arbitration*, Cambridge 2015, pp. 1–27.

investment disputes but what is even more important they create a ground for abuses and possibilities of corruption.[36] To counter this problem the Code of Conduct should provide mechanisms that will control the arbitrators' conduct, allow holding them responsible for their wrongdoings and imposing on them certain sanctions. Unfortunately, the Code of Conduct in CETA does not stipulate what happens when an arbitrator violates the Code of Conduct apart from the right of both parties to demand to replacement of arbitrator. Pursuant to art. 23 of the Annex I of the CETA Consolidated Text, when the party considers that an arbitrator does not comply with the Code of Conduct, the party must notify the other party and if they agree, they replace the arbitrator. If they do not agree, the chairperson is entitled to choose an arbitrator and his decision is final.[37] It means that the Code of Conduct in CETA does not deal in fact with the problem of violating its provisions if the only sanction that can be imposed on an arbitrator is removing him/her from the proceedings (which of course may have sound consequences because it tarnishes his/her credibility and reduces his/her chances to be appointed in next proceedings).

Fifth, more emphasis should be put in the Code of Conduct on the CETA Institutional Body's powers relating to administering disputes. This Authority is introduced in CETA Consolidated Text as an organ that has many competences, for example to manage the implementation of the Chapter XX: Technical Barriers to Trade; to address any issue that a Party raises related to the development, adoption or application of standards, technical regulations or conformity assessment procedures; to facilitate discussion of the assessment of risk or hazard conducted by the other Party; to encourage cooperation between the standardization and conformity assessment bodies of the Parties; to exchange information on standards, technical regulations, or conformity assessment procedures.[38] When it comes to ISDS its role is similar to the Secretariat and the Court of international arbitration institutions that administer arbitrations' proceedings in spite of the fact that investment disputes are administered by separate arbitration rules chosen by the parties.[39] For example, the CETA Institutional Body establishes a list of arbitrators to form a roster and administers it by verifying if the arbitrators from the list meet imposed requirements and conform with the CETA; it draws by lot the members of the arbitration panel from the list in case the parties are unable to agree on the composition of the arbitration panel within stipulated time. The constitution of CETA

[36] T. Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, "Journal of International Arbitration" 2013, Issue 3, pp. 267–281.

[37] *Consolidated CETA Text*, op. cit., p. 475.

[38] Ibidem, p. 89.

[39] Ibidem, pp. 168–169.

Institutional Body is a positive and necessary implementation to CETA in general but to ISDS system in particular. However, its competences as to administering disputes should be enhanced, for example it should be the CETA Institutional Body that receives the notification from the parties about non-compliance with the Code of Conduct by the arbitrators as well as the CETA Institutional Body should take final decision about exclusion such arbitrator from the proceedings and not the chairperson who might be acquainted with such arbitrator and reluctant to exclude her/him from the proceedings.

CONCLUSIONS

The need to improve ISDS as a system of settling investment disputes in CETA has been commonly acknowledged.[40] Apart from many changes to the existing system the introduction of the Code of Conduct was viewed as an innovation distinct from existing ethical codes because it meant to be biding and related to the needs of investment disputes. Truly binding code of conduct was supposed to govern not only ethical rules applied in conflict of interests and disclosure of documents but to create a regulation encompassing standards of competence, possible certification and licensing of investment arbitrators settling disputes under CETA, disciplinary provisions that would apply in case of breach of the Code of Conduct, independent regulatory or supervisory bodies that would watch arbitrators and intervene in case of breach of ethical standards as well as general professionalization and institutionalization of ISDS under CETA, for example by choosing arbitrators by lot from the roster administered by CETA Institutional Body or even by creating a permanent arbitration court that would deal with all matters resulting from ISDS under CETA.[41] Such changes, which are aimed at lifting from investment arbitration the opacity veil and exposing its conduct, procedures and arbitrators to public light as well as subject the proceedings to public scrutiny, will significantly contribute to better assessment and better functioning of investment arbitration. Unfortunately, the Code of Conduct in CETA lacks abovementioned innovations and proposes instead a set of directives embodied in a soft law instrument.

[40] Compare: *European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI))*, [online] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN [accessed: 10.11.2015].

[41] M. McIlwrath, *Professionalizing Arbitration: A Response to the New York Times Articles on Privatizing Justice*, [online] http://kluwerarbitrationblog.com/2015/11/04/professionalizing-arbitration-a-response-to-the-new-york-times-articles-on-arbitration/ [accessed: 10.11.2015]; J. Rajski, op. cit., p. 7.

Hence, it might be concluded that the presented Code of Conduct in CETA is more a harbinger of conclusive and consecutive changes that hopefully will come than the change itself.

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