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**Regulation of Foreign Direct Investment  
for the Reason of Security: Analysis of **CETA****

Dai Tamada  
Kobe University

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# Introduction

## 1. Hinkley Point

- Nuclear Power Plants (2 units)  
(EPR: European Pressurized Water Reactor of Areva), £24bn, at Hinkley Point C in the UK.



- Shareholding  
EDF (France): 66.5%  
China General Nuclear Corporation (CGN 中国广核集团) and  
China National Nuclear Corporation (CNNC 中国核工业集团公司): 33.5%

## Questions and concerns

- No technology leak? No danger to security?
- How to (or should we) exclude (or regulate) China money, SOE and FDI?

# Introduction

## 2. New era of mega FTAs

**TPP:** Trans-Pacific (US-Japan): signed

**TTIP:** Trans-Atlantic (US-EU): under negotiation

**CETA:** EU-Canada: signed and provisionally applied

**RCEP:** ASEAN + Japan, China, Korea, India: under negotiation

**J-C-K FTA:** Japan, China, Korea: under negotiation

**FTAAP:** Asia-Pacific

## 3. Backlash and criticism against globalization

- economic protectionism: Mr. Donald Trump
- criticism from weak industry (agriculture)
- economic partnership without political partnership?



## Introduction

	Applicable Law	Principles and exceptions
<b>Trade Law (WTO Law)</b>	WTO Agreement (unified regulation) and FTA	<ul style="list-style-type: none"><li>▪ free movement of goods, services (relatively tangible).</li><li>▪ applicability of exception clause (GATT Articles 20, 21)</li></ul>
<b>Investment Law</b>	BIT, IIA, FTA/EPA, TPP, TTIP, CETA etc. (spaghetti bowl)	<ul style="list-style-type: none"><li>▪ free movement of capital, money (relatively intangible)</li><li>▪ applicability of exception clause</li><li>▪ <b>liberalisation of FDI vs. Security interest</b></li></ul>

# I. CETA



## I. CETA

### **CETA: EU-Canada Comprehensive Economic and Trade Agreement**

- adopted by the Council and signed at the EU-Canada Summit on 30 October 2016.
- The European Parliament will need to give its consent to the agreement before it can be **provisionally applied**. Provisional application allows European businesses and consumers to reap the benefits of the agreement early on.

## II. Investment Chapter

### Chapter 8 (Investment)

Section A: Definition and scope

Section B: Establishment of investments (market access, PR)

Section C: Non-discriminatory treatment (NT, MFN)

Section D: Investment protection (FET, expropriation)

Section E: Reservations and exceptions

Section F: Resolution of investment disputes between investors and states

- one of the most controversial chapters was **Chapter 8 (including ICS)**.
- Since **the Investment Court System (ICS)** is a new issue in trade agreements and the public debate on it is not finished in many countries, the choice of EU Member States is that **ICS will be out of the scope of provisional application of CETA**. This choice is supported by the Commission.

### III. Liberalization of investment

#### 1. Difference between “**protection**” and “**liberalization**” of investment

“protection”	<ul style="list-style-type: none"><li>▪ to protect <b>already established</b> investments</li><li>→ normal investment agreement</li></ul>
“liberalization”	<ul style="list-style-type: none"><li>▪ to provide non-discriminatory treatment to the investment <b>not yet established</b></li><li>→ host-States have to open its market to foreign investors</li><li>→ deeper relationship among contracting Parties</li><li>→ “partnership” agreement</li></ul>

### III. Liberalization of investment

#### 2. Liberalization clause (= pre-NT clause)

##### **CETA Article 8.6 National treatment**

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the **establishment, acquisition**, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

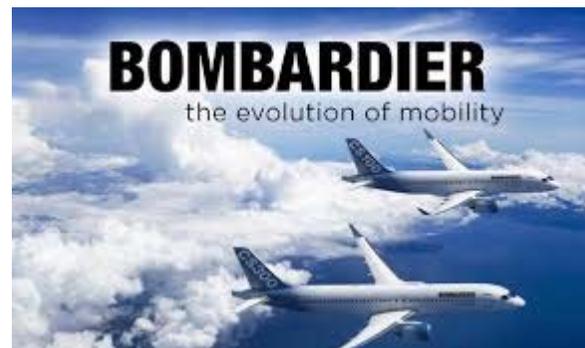
- no discrimination between foreign investors and domestic investors at the “establishment” and “acquisition” phase (= pre-establishment phase)  
= Pre-NT clause = liberalization clause  
→ CETA is a liberalization treaty

## III. Liberalization of investment

### **3. Consequences of liberalization**

- a host-State has to amend or abolish its laws which prohibit foreigners from investing in its domestic market
- ex. if State A has a law which limits giving license of mining to domestic investors (i.e. excluding foreign investors), State A has to abolish this law
  
- Which industrial sector has been opened by the CETA?

## IV. Opened market: air service



## IV. Opened market: air service

### CETA Article 8.2: Scope

2. With respect to the **establishment or acquisition** of a covered investment, Sections B and C **do not apply** to a measure relating to:

(a) **air services**, or related services in support of air services and other services supplied by means of air transport, **other than**:

- (i) aircraft repair and maintenance services;
- (ii) the selling and marketing of air transport services;
- (iii) computer reservation system (CRS) services;
- (iv) ground handling services;
- (v) airport operation services; or

## IV. Opened market: air service

- Section B = “Establishment of investment”
- Section C = “Non-discriminatory treatment” (including NT)

### What will happen?

- CETA protects **air services, other than** (i) to (v)
  - Pre-NT is applied to (i) to (v)
  - foreign investors can invest in (i) to (v)
  - Markets of (i) to (v) are opened to foreign investors

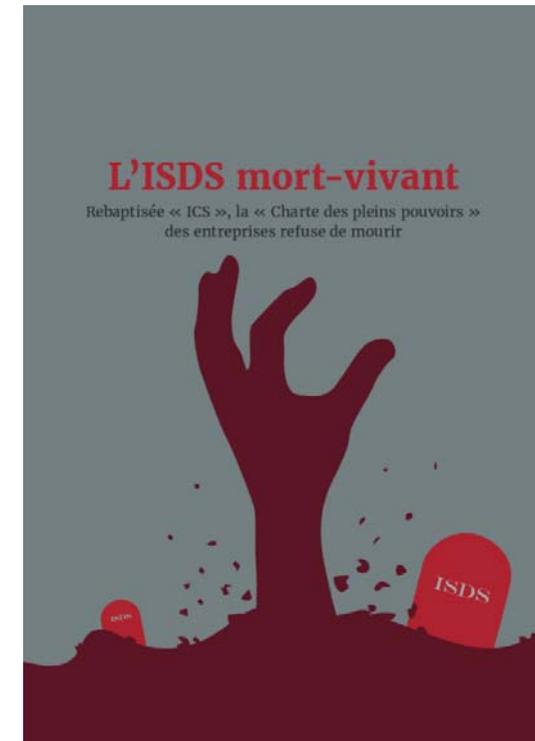


## V. Procedural defence

### 1. No application of ISDS

#### What is ISDS?

- **ISDS** = investor-State dispute settlement
- foreign investors are allowed to submit claims against host-State alleging violation of obligation
- favorable results for investors
- limiting the regulatory power of host-States
- world-wide criticism against ISDS
- biggest issue in FTAs



## V. Procedural defence

### 1. No application of ISDS

#### **CETA Article 8.2: Scope**

4. Claims may be submitted by an investor under this Chapter only in accordance with Article 8.18, and in compliance with the procedures set out in Section F. Claims in respect of an obligation set out in **Section B** are excluded from the scope of Section F. Claims under **Section C** with respect to **the establishment or acquisition** of a covered investment are **excluded** from the scope of Section F. **Section D** applies only to a covered investment and to investors in respect of their covered investment.

- Pre-NT claim cannot be submitted to ISDS (=Section F).

## V. Procedural defence

### 2. Application of SSDS (State-State dispute settlement)

#### **CETA Article 8.18: Scope**

1. Without prejudice to the rights and obligations of the Parties under **Chapter Twenty-Nine (Dispute Settlement)**, an investor of a Party may submit to the Tribunal [...] a claim that the other Party has breached an obligation under:

- (a) **Section C**, with respect to the **expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal** of its covered investment; or
- (b) **Section D**:

- “establishment” and “acquisition” are omitted in Art 8.18.1. (a)
  - Pre-NT is not subject to ISDS
- Pre-NT claim can be submitted to **SSDS** (= Chapter 29)
  - dispute can be settled directly by EU and Canada

## VI. Substantive defence

### 1. Exceptions

#### **CETA Article 8.15: Reservations and exceptions**

1. Articles 8.4 through 8.8 do not apply to:

(a) **an existing non-conforming measure** that is maintained by a Party at the level of:

(i) **the European Union**, as set out in its Schedule to Annex I;

(ii) **a national government**, as set out by that Party in its Schedule to Annex I;

(iii) **a provincial, territorial, or regional government**, as set out by that Party in its Schedule to Annex I; or

(iv) **a local government**.

(b) the continuation or prompt renewal of a non-conforming measure referred to in subparagraph (a); or

(c) [...]

## VI. Substantive defence

### 1. Exemptions

#### **CETA Article 8.15: Reservations and exceptions**

2. Articles 8.4 through 8.8 do not apply to a measure that a Party adopts or maintains with respect to a sector, subsector or activity, as set out in its Schedule to **Annex II**.

▪ Annexes I and II = list of sectors and industries exempted from the application of Art 8.4 (Market access), Art 8.5 (PR), Art 8.6 (NT), Art 8.7 (MFN) and Art 8.8 (SMBD)

## VI. Substantive defence

### **Reservation I-C-6 (Canada) [restriction of shareholding]**

▪ Measures: Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.). Canadian Arsenals Limited Divestiture Authorization Act, S.C. 1986, c. 20. Eldorado Nuclear Limited Reorganization and Divestiture Act, S.C. 1988, c. 41. [...]

▪ Description: Investment

1. A “non-resident” or “non-residents” may not own more than a specified percentage of the voting shares of the corporation to which each Act applies. [...] If there are limits on the percentage that an individual Canadian investor can own, these limits also apply to non-residents. The restrictions are as follows:

**Air Canada: 25 per cent** in the aggregate;

**Cameco Limited** (formerly Eldorado Nuclear Limited): **15 per cent** per non-resident natural person, **25 per cent** in the aggregate; [...]

## VI. Substantive defence

### **Reservation I-C-21 (Canada) [Certificate requirement]**

- Sub-Sector: Aircraft repair and maintenance services. Ground handling services (line maintenance only) [...]
- Type of Reservation: **National treatment**
- Market access Measures: Aeronautics Act, R.S.C. 1985, c. A-2  
Canadian Aviation Regulations, S.O.R./96-433: [...]
- Description: Cross-Border Trade in Services Aircraft and other aeronautical product repair, overhaul or maintenance activities (including line maintenance) required to maintain the airworthiness of Canadian-registered aircraft and other aeronautical products **must be performed by persons meeting Canadian aviation regulatory requirements** (that is, approved maintenance organisations and aircraft maintenance engineers). **Certifications are not provided for persons located outside Canada**, except sub-organisations of approved maintenance organisations that are located in Canada.

## VI. Substantive defence

### Reservation of Poland

- Sector: Transport
- Sub-Sector: Supporting services for air transport
- Type of Reservation: National treatment. Market access
- Measures: Polish Aviation Law of 3 July 2002, Articles 174.2 and 174.3 3
- Description: Investment

[...]For **airport operation services, foreign participation is limited to 49 per cent.**

## VII. General exceptions

### 1. Exception based on the public security and public order

#### **CETA Article 28.3: General exceptions**

For the purposes of [...] Sections B and C of **Chapter Eight (Investment)** [...], nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:

- (a) to protect **public security** or public morals or to maintain **public order** [...]

## VII. General exceptions

### 2. Exception based on the national security

#### **CETA Article 28.6: National security**

Nothing in this Agreement shall be construed: [...]

(b) to prevent a Party from taking an action that it considers necessary to protect its **essential security interests**:

(i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a **military** or other security establishment;

(ii) taken in time of **war** or other emergency in international relations; or

(iii) relating to **fissionable and fusionable materials** or the materials from which they are derived;

(c) prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining **international peace and security**.

## VIII. Conclusions

- CETA is a (normal) FTA: **liberalization** of investment
- EU and Canada agreed to open several **air service** markets
  - with several reservations (to protect domestic markets)
  - important impacts on **TTIP** (EU and USA)
- **ISDS** (including ICS) continues to be a controversy (cf. EU-Vietnam)

