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A Question of Democracy: The German Debate on International Investment Law.

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Germany's position on international investment law and investor-State arbitration is attracting increasing attention since the signing of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) in September 2014 has been deferred, inter alia, because of opposition from Sigmar Gabriel, Germany's Federal Minister for Economic Affairs and Energy. Is Germany, the country that not only has concluded the first bilateral investment treaty (BIT) in 1959 but also has the densest network of BITs worldwide, as some fear, joining the coalition of critics in fundamentally reversing its international investment policy?

Mounting Criticism of International Investment Law in Germany in Context

As I argue in the Editorial of the latest issue of the Journal of World Investment and Trade, the matter is not quite that tragic. To appreciate fully the current debates they must be put into context. That context is first and foremost an ongoing investment arbitration regarding Germany's nuclear power phase-out (*Vattenfall II v. Germany*). This is already the third investment treaty case against Germany. However, none of the earlier ones, a little-known UNCITRAL proceeding under the Germany-India BIT from the 1990s and *Vattenfall I v. Germany*, which involved environmental standards for a coal-fired power plant, had significant political repercussions.

Vattenfall II, however, is special because it involves more than the (simple) challenge of a politically sensitive legislative measure. Rather, the nuclear power phase-out touches on an issue that has marked Germany's social and political culture over the past three and a half decades like no other issue apart from the fall of the Berlin Wall and German reunification. The Green movement, which initiated and later mainstreamed a process of fundamental social, political and ecological transformation of German society, would have been virtually unthinkable without opposition to nuclear power. The 2011 nuclear power phase-out marks the keystone of this transformatory process. Its challenge in *Vattenfall II* not only questions a fundamental social and political settlement, but is also easily instrumentalized to turn public opinion against investor-State arbitration more generally. Add to that an at best half-informed press, and you have a scary-looking storm of public skepticism of investor-State arbitration. This peculiar setting hypes public opinion.

The Emergence of a Broad and Open-Ended Political Debate

Notwithstanding the wide-spread criticism, it is important to note that no official government position to reverse Germany's stance on international investment law generally has been taken. On the contrary, rather than rushed action, we are seeing the emergence of a debate that – beyond the inevitable political saber-rattling – tries to be objective, representative, open, and open-ended. In fact, core political actors in Germany appear determined to create a rational and well-informed framework for the debate about CETA and future investment agreements, such as the Trans-Atlantic Trade and Investment Partnership (TTIP), which always looms in the background, more generally.

First, both chambers of the German parliament have started conducting expert hearings and plenary debates on CETA and international investment law more generally. Second, a TTIP Advisory Group with representatives of various stakeholders, including German industries, labor unions, churches, consumer associations, environmental groups, agricultural production, local communities, and transparency international, amongst others, has been created to advise the Ministry for Economic Affairs and Energy, which is in charge of international investment agreement. And finally, the Ministry commissioned a legal opnion on whether the investment chapter in CETA restricted the legislator's policy space beyond existing restrictions under Germany constitutional law and EU law. I had the occasion to render this legal opinion and report on it further below. All of this has the purpose to rationalize the debate and provide a basis on which political institutions, social interest groups, and the public at large can form an opinion on investor-State arbitration.

Policy Space under CETA, the German Constitution and EU Law

On substance, one of the core concerns for assessing investment treaty disciplines is the extent to which they reduce 'policy space', in particular that of the legislator, for pursing democratically endorsed policies. To answer this question, a comparison between investment treaty disciplines and existing limitations under constitutional and supranational law is instructive. After all, the claim that investment treaty disciplines afford better protection than existing constraints is wide-spread.

Yet, in my study for the German Federal Ministry for Economic Affairs and Energy, I come to quite a different conclusion as regards the relationship between CETA, the German Constitution and EU law when it comes to the restriction of policy space. This is how my conclusion translates in relevant part:

– The international legal obligations in CETA that grant protection to investments of Canadian investors impose restrictions on the legislator that are independent of German constitutional and State liability law as well as of EU law. … Yet, CETA hardly imposes restrictions on the legislator's regulatory space that go beyond those already in existence under constitutional and EU law. Only the right to national and most-favored-nation treatment results, to the extent none of the numerous exceptions applies, in a substantial improvement of the legal protection of Canadian investors. Through CETA, they are granted protection that is, as regards market access and protection of existing investments, equivalent to that enjoyed by domestic investors under the constitution's fundamental rights and by EU investors under fundamental freedoms and fundamental rights granted under EU law. This reduces the legislator's policy space insofar as discriminations of foreign investors due to their Canadian nationality become inadmissible. This notwithstanding, the numerous exceptions that CETA contains significantly narrows the right to equal treatment both for Canadian investors in Germany, as well as for German (and other European) investors in Canada.

– As regards the protection of existing investments against interferences by the legislator other than discriminatory treatment, CETA falls short of the protection granted by German constitutional law and EU law. In relation to legislative measures, the right to fair and equitable treatment under CETA is essentially limited to a prohibition of manifestly arbitrary measures and a minimum level of protection of legitimate expectations. By contrast, the protection granted by the concept of the rule of law ('Rechtsstaatsprinzip') and the principle of proportionality under the German constitution are more comprehensive. Similarly, the provisions in CETA protecting against direct and indirect expropriation are not farther-reaching than parallel protections under the German constitution. In addition, the legislator's policy space is expressly protected against limitations through a variety of exceptions in CETA, including for the protection of national security, the environment, or public health, as well as exceptions regarding taxation and the regulation of financial markets.

– Differences between constitutional law and EU law, on the one hand, and the provisions protecting investments under CETA's investment chapter, on the other hand, exist with respect to the legal consequences of breaches of the respective provisions. However, divergences in this respect are essentially due to structural differences of the legal regimes in question. Unlike under constitutional law and EU law, the legal consequences of a breach of CETA are limited to compensation and damages; the repeal or the adoption of a legislative measure cannot be demanded. As a substitute for the absence of a right of an investor to demand the establishment of a CETA-compliant state of affairs, CETA permits an immediate claim for compensation and damages; it thereby deviates from the situation under constitutional law where compliance with primary obligations takes precedence over the State's liability for damages. Yet, since the restrictions CETA imposes on legislative action are less imposing than those under constitutional law and EU law, the liability risk is manageable. Similarly, the standard for calculating compensation and damages, including interests, only marginally deviates from German State liability law. Yet, depending on the circumstances, the costs for pursing claims in investor-State arbitration may be higher than in proceedings before domestic courts.

– An important difference between CETA and constitutional law and EU law concerns the enforcement mechanism in investor-State arbitration proceedings. Yet, access to arbitration is subject to high procedural hurdles and is only available for a narrow class of claims. The risk that arbitral tribunals under CETA further develop the applicable legal standards, and thereby extend State liability, are mitigated by institutional mechanisms. This cannot be seen as a limitation of the legislator's policy space that goes beyond constitutional law and EU law.

– Overall, CETA essentially imposes no restrictions on the legislator that go beyond existing restrictions under constitutional or EU law. On the contrary, in central aspects CETA lags behind the level of investment protection offered under constitutional law and EU law. Concerns in respect of liability risks of the Federal Republic of Germany or of the limitation of the legislator's policy space because of the provisions on the protection of investments in CETA are therefore negligible. Rather, the relatively low level of international investment protection puts the value of the investment chapter in CETA for the protection of German and European investors in Canada into question.

The Need for Democratic Endorsement of Investment Rules

Whether Canada and the EU can live with the CETA investment chapter both in respect of their defensive and offensive interests is a political question beyond legal expertise. My conclusions

suggest, however, that the investment chapter in CETA is neither the anti-democratic, policy-space-eating beast that some opponents of investment treaty disciplines evoke, nor does it represent the same high level of investment protection contained in the 1300+ existing Member States' BITs.

Yet, what the study tries to do is to furnish a rational basis for the current debates. Having this debate is, despite the heat with which it is sometimes conducted, a positive development because only the type of public debate we are now seeing in Germany will enable international investment law to develop, on a solid democratic basis, into its next phase, that of large-scale trade and investment agreements between major regional economic blocks, whether between the EU and the United States or between the EU, China, India, and ASEAN. After all, in order to be effective and legitimate, international investment law must be democratically endorsed – and that is why debates, such as the one we are seeing in Germany, should be encouraged more generally, rather than stalled.

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