Editorial: The German Debate on International Investment Law

Mounting Criticism of International Investment Law in Germany; Policy Space under CETA, the German Constitution and EU Law; 2014 in Retrospect; In This Issue

Mounting Criticism of International Investment Law in Germany

The future of international investment law and investor-State arbitration remains highly debated. This is particularly true in respect of the investment chapters in the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation between the European Union (EU) and the United States and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, of which a final text has been agreed upon in September 2014.1

In reaction to the publication of CETA’s investment chapter, which is widely regarded as a reflection of the EU Commission’s thinking on investment protection more generally,2 and is possibly a blueprint for TTIP, a vivid debate has ensued in Germany with investor-State dispute settlement is severely criticized. Opposition to CETA’s investment chapter comes from the Green Party, the socialist party Die Linke, as well as labor unions and various non-governmental organizations; but also the Social Democrats, whose party leader Sigmar Gabriel is, as Federal Minister for Economic Affairs and Energy, in charge of international economic agreements, are critical of investor-State arbitration in CETA.

The debate continues, but for now the signing of CETA, originally scheduled to take place at the EU-Canada summit in September 2014, has been put off. 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 and fundamentally reversing its international investment policy?

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In my view, the matter is not quite that tragic. Above all, the current debates in Germany must be put into context to become understandable. That context is first and foremost Vattenfall’s arbitration under the Energy Charter Treaty regarding Germany’s nuclear power phase-out (Vattenfall II). Yet, just pointing to the fact that Germany has now joined the ranks of respondents is too simple an explanation for the current criticism. Two earlier investment treaty arbitrations, a little-known UNCITRAL proceeding under the Germany-India BIT initiated in the late 1990s and Vattenfall I v Germany, which involved a dispute about environmental standards for a coal-fired power plant in the City of Hamburg, had no significant political repercussions.

The Vattenfall II case, however, is special because it involves more than the challenge of a politically sensitive legislative measure; much more: 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 German reunification. The Green movement would have been unthinkable in its present form without opposition to nuclear power and the peace movement during the Cold War is likely to have been significantly different.

The entire political and social landscape in Germany, in other words, has been so deeply influenced by the struggle against nuclear power that Vattenfall II, and with it investor-State arbitration generally, is seen as a challenge to a fundamental social and political settlement and hence to democracy more generally. Add to that an at best half-way informed press that understands little even of the basics of international investment law and investor-State arbitration, and you have the perfect storm of public skepticism vis-à-vis investor-State arbitration.

Notwithstanding the wide-spread criticism, it is important to note that no official government position has been taken that would reverse Germany’s stance on international investment law and investor-State arbitration generally. In fact, criticism at present is (still) largely limited to investment disciplines in agreements with other developed economies. What is more, rather than blind and predetermined attacks against established features of international investment law, we are seeing the beginning of a debate that – beyond the inevitable political saber-rattling – tries to be objective, representative, and open.

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3 Vattenfall AB and others v Federal Republic of Germany, ICSID Case No ARB/12/12 (registered 31 May 2012).
4 Sancheti v Federal Republic of Germany, UNCITRAL, Award (6 June 2001) (proceedings terminated because Claimant failed to pay advances on costs) (award on file with author).
5 Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co KG v Federal Republic of Germany, ICSID Case No ARB/09/6, Award (11 March 2011).