Hochschule für Wirtschaft und Recht Berlin
Berlin School of Economics and Law

Effects of CETA and TTIP on Social Standards

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Structure of the presentation

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     - FET-standard
     - Protection against indirect expropriation

II. Labour chapter of CETA (and TTIP)

III. Conclusions

I. General aspects of trade agreements like CETA and TTIP

- Bilateral trade agreements aim on the elemination of trade barriers = reduction/elemination of statuta-ry regulation.
- Guiding principle of the negotiations.
- Opposite of the main assumption in labour law, that unequal power of the parties makes protection laws imperative to provide protection for the wea-ker party.
- Information was made publicly available only after immense public pressure.

II. Investment protection (chapter 8 CETA)

1. General aspects

Influence of trade rules on labour:

- States could deregulate labour, or fail to improve labour standards, in order to gain competitive ad-vantages over other States (regulatory distor-tions.

Influence of investment rules on labour:

- States may be prevented from improving labour standards, as this could violate investment pro-tection standards (policy space concerns).

2. Most favoured treatment (Art. 8.7.1 CETA)

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Opportunity for investors to invoke other investment agreements concluded by the host country in question, should these offer more favourable treatment than the BIT concerned;

- even if this was not the original intention of the contracting parties;
- moreover: „import“ of standards from older BITs, even if the content is „bizarre“, like Art. 5.3 of the BIT between Germa-ny and Ethopia from 1951;
- These rules could serve as a gateway against parity code-termination of German supervisory boards!!!

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3. „*Fair and Equitable Treatment (FET)*"

Chapter 8, Art. 8.10 CETA

- Most ISDS-procedures (private dispute settlement) are based upon violation of the FET-Standard.
- Breach of contract e.g. in CETA (Art. 8.10.2) through: *"denial of justice", "significant breaches of ordinary court proceedings", "obvious arbitrariness", "targeted discrimination" or "improper use"* (…).
- *"Legitimate expectations, may be derived from specific assurances which may have been raised in the inves-tors*" (Art. 8.10.4 CETA).
- These undefined legal expressions were broadly inter-preted in ISDS proceedings in the past.

ISDS-proceedings based upon violation of FET-standard:

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- **Centerra vs. Kyrgystan** (2006): ISDS-procedure by Canadian mining company after the Kyrgyz government prescribed extra pay for miners working at high altitude (case still pending or outcome not accessible to public).
- **Veolia vs. Ägypten** (2012): arbitration based upon the BIT between France and Egypt. The city Alexandria had refused contract changes (Veolia wanted to introduce to counter higher costs, arising among others from the introduction of a national minimum wage). Due to media reports, Veolia is demanding € 82 million in damages (case still ongoing).
- **Noble Vetures vs. Romania:** 2001 ISDS-procedure of US-commodities group for 365 Mio US $ of damages. Investment became more expensive due to protests and strikes; although Romania won the case, the country was facing enourmous costs, because the costs of the procedure are shared.

4. Protection against direct and indirect expropriation

- Mandatory compensation in cases of direct or indirect
- CETA defines an indirect expropriation like this: *“Indirect expropriation occurs where a measure or series of measures of a party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure”* (CETA, Annex 8-A.1.b).
- Even regulative measures reducing the value of an investment are affected, which might be relevant in terms of social standards.

Example for ISDS-procedure based upon indirect expropriation

- **Foresti vs. Südafrika** (2007): Claim of investors from Italy and Luxemburg for compensation (350 Mio. US-$), be-cause the new act on mining contained elements of antidis-crimination in favor of black workers (*Black Empowerment Act).* Dispute settlement in 2010, after the state made con-cessions in favour of investors.

Acknowledged as grounds of justification in CETA are:

- "*non-discriminatory measures"* aimed at "*legitimate public purposes*", such as *"health, safety and the environment*".
- Social standards are not mentioned.

III. Enforcement of social standards through

labour chapter of trade agreements?

Social standards in labour (or sustainability) chapters

- Recent investment protection or trade agreements (US and also EU) contain a sustainability or social chapter.
- This is the case for CETA (as well as it was for TTIP).
- Nevertheless, it is questionable, wheather these chapters strenghten the implementation and enforce-ment of social standards.

Labour standards in sustainability chapters (EU &. USA)

- **EU Trade Agreements:** Sustainability chapters are exclu-ded from „normal“ mechanisms of sanctions.
- „Sanction“ only via only a consultation or complaints me-chanism („naming and shaming“); but complaints can on-ly be made by the con-tracting parties, not by represen-tatives of civil society.
- **US Trade Agreements:** regular dispute settlement me-chanism is applicable to sustainability chapter.
- Still only very limited effect, because dispute-settlement-mechanism is applied only in rather exceptional cases on the violation of labour standards (1. case ever: Guatemala).

IV. conclusions

- The analysis of the free trade agreements illustrates the tense relationship between state`s interest in regulation and investment protection rules which aim at protecting investors and their interests.
- Unless the investment protection chapter stays the same, it is rather doubtful weather an annex or a protocol will change the outcome of ISDS-cases.
- FTAs like CETA promote privatization tendencies and environmental and social standards are seen as “obstacles”.
- This might trigger the dynamic of a competitive-based deregulation of standards and can be considered as a threat for social standards.

Thank you very much for your attention!

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