Convenience translation
of the summary of the legal expertise by Dr. Stephan Schill LL.M. (NYU) for the Federal Ministry of Economics and Energy regarding the "Impact of the provisions on investment protection and on investor-state dispute settlement in the draft Free Trade agreement between the EU and Canada (CETA) on the scope for the legislature to act"

Brief summary

The provisions on the protection of investments by Canadian investors set out under international law by CETA impose statutory constraints on the legislature which are separate from German constitutional and state liability law, and the provisions of EU law. Here, CETA– subject to wide-ranging exceptions - provides for market access rules, national treatment and most-favoured-nation treatment for Canadian investors, protects the stock of investment in place from narrowly defined legislative interventions (in particular, expropriation without compensation and indirect expropriations, violation of the principle of fair and equitable treatment, and entitlement to full protection and security) and contains provisions to ensure the free movement of capital. The violation of these provisions can be challenged in state-to-state arbitration procedures and, subject to significant restrictions regarding market access provisions, the field of financial market regulation and taxation, in investor-state dispute settlement procedures.

However, CETA imposes virtually no additional substantive constraints on the scope of the legislature to act, compared with existing German constitutional and EU law. The only aspect which leads to a substantial improvement in the rights of Canadian investors is the entitlement to national treatment and most-favoured-nation treatments far as none of the many exceptions applies. CETA grants Canadian investors a status which corresponds to the protection of domestic investors by fundamental rights of the German Constitution and to the protection of EU investors by the fundamental rights and freedoms under EU law regarding market access and the protection of existing investments. By these provisions the scope of the legislature to act is reduced insofar as it is no longer permissible to treat investors in a worse way because of their Canadian nationality. However, numerous exceptions substantially reduce the entitlement to comprehensive equal treatment both for Canadian investors in Germany and for German (and other European) investors in Canada.

With regard to the protection against legislative intervention afforded to existing investments, CETA remains significantly below the protection by German constitutional law and EU law in substantive terms. The entitlement to fair and equitable treatment by the legislature is basically reduced to a ban of manifestly arbitrary measures and a minimum level of protection of legitimate expectations. The protection afforded by the German constitutional principle of the rule of law and the principle of proportionality is more wide-ranging. The CETA provisions on the protection against expropriations and indirect expropriations do not exceed constitutional requirements. Also, the scope for the legislature to act is protected against CETA-related restrictions by a large number of exceptions, including exceptions to protect national security, the environment or public health, and exceptions for the taxation and financial market regulation.

There are differences between German constitutional and EU law on the one hand and CETA investment protection provisions on the other in terms of the legal consequences. However, these are mainly related to differences in the legal systems. Unlike in constitutional and EU law, the legal consequences of CETA provisions are restricted to payments of compensation and damages. The investor cannot demand repeal or enactment of legislation. As a substitute for the absence of an investor´s claim to demand a CETA-compliant legal situation, CETA allows for the direct claim of payments of compensation and damages, and thus deviates from the German constitutional principle of priority for primary legal protection with correspondingly few possibilities of state liability. However, since the benchmarks for the illegality of legislative action set by CETA are higher than those under national and EU law, the risk of liability is relatively limited. Also, the amount of payments of compensation and damages, as well as the calculation of interest, only differ marginally from the provisions of German state liability law. It is possible that the cost of asserting and defending claims in investor-state dispute procedures is higher than the legal expenses at national courts.

The enforcement mechanism of investor-state arbitration bodies constitutes an important difference between CETA and German constitutional/EU law. However, there are high barriers to access and substantial restrictions on the basis for claims. Dangers of further development of the law by CETA arbitration bodies, which might result in an increase in liability, are alleviated by institutional mechanisms. There is no indication that the scope for the legislature to enact legislation is constricted in a way that goes beyond German constitutional and EU law.

Thus overall, CETA does not contain any constraints on the legislature which significantly exceed existing constitutional/EU requirements. On the contrary, in major aspects CETA lags behind the protection of investment already provided by constitutional and EU law. Any concerns about the investment protection provisions in CETA in terms of the potential liability of the Federal Republic of Germany or constraints on legislative action can therefore be disregarded. Rather, the comparatively low level of protection for investment provided by CETA under international law calls into question the value of the investment chapter for the protection of German and European investment in Canada.