

NATURAL RESOURCES IN CENTRAL ASIA: A CHALLENGE TO REGIONAL LAW AND POLITICS?

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Natural resources in Central Asia: a challenge to regional law and politics?¹ – is the question posed to this panel. I shall concentrate on the *legal* dimension of the challenge, although these legal aspects depend upon *preceding political decisions* concerning the question which natural resources shall be used for what purpose, to what extent and by whom. Obviously this implies many basic choices: in particular whether and to which extent a state wants to make *economic* use of its resources, whether this use should be made domestically along the lines of a *market driven* or a *regulated economy* and whether this use should be carried out in cooperation with *foreign partners*.

On this panel I like to concentrate on the third aspect and submit three observations: first on the basic abstract pattern of the legal challenge in cases of cooperation with foreign partners (I), second on the legal framework developed in this respect so far in the case of Kazakhstan with a specific view in relation to the European Union and Germany (II) and third on the perspectives of this framework and its ramifications for the domestic legal order (III).

I. Concerning, first, the *starting point* of the *basic pattern* of the legal challenge in cases of cooperation with foreign partners, the situation of the *natural resources of Kazakhstan* may serve as an illustrative example for Central Asia. It is well known that the country “has an abundant supply of accessible mineral and fossil fuel resources.”; according to the estimates in a release of the Embassy of Kazakhstan the country has the second largest uranium, chromium, lead and zinc reserves, the third largest manganese reserves, the fifth largest copper reserves and it ranks among the top ten for coal, iron and gold and has the 11th largest proven reserves of both petroleum and natural gas. It also possesses large deposits of phosphorite and potassium.

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1. If and as far as the foregoing political decision is to use and to market these natural resources in an ***economically and technologically professional way***, then the wish is obvious to apply the internationally best available techniques of extraction, distribution and marketing. If for this purpose ***foreign know how*** and ***foreign investment*** is required and wanted, ***then*** the legal aspect of attracting, promoting and protecting foreign know how and capital investments comes into play. Hence the basic legal challenge boils down to the issue of ***protection*** of foreign investors ***by means of legal certainty*** as different from political discretion.

This challenge is ***not specific*** for Central Asia, but a ***general world-wide*** feature of cross-border investments. The necessity of legal certainty results from the potential conflict between – on the one side – the economically ***only long-time profitable*** commitment of the investor and – on the other hand – (*unfavourably*) ***changing political attitudes*** towards the foreign investment in the host country. Prominent historical examples are the changing attitudes towards US investments in Iran after the overthrow of the Shah in 1979 or in Cuba after the Castro revolution in 1959. In these days the Swedish energy provider Vattenfall, which is invested in German nuclear plants, seeks recompense for the German nuclear phaseout of 2011 (in the political tsunami-wake of Fukushima) which requires the shut down of older nuclear reactors in Germany.

2. ***Legal certainty*** comprises ***three core elements***: rules of protection (which are clear and reliable); independent dispute settlement bodies (such as courts of arbitration panels); and compliance with the rules and disputes resolutions.

II. This brings me to the second observation: the development of the ***legal framework developed so far*** in Kazakhstan with a specific view in relation to the European Union and Germany. Here the challenge of attracting and protecting foreign investments has generated both unilateral and international legal action and devices.

1. The ***unilateral*** legal action (in the sense of domestic legal action) concerns in particular the promotion of foreign investment by programming and stimulating them, such as in the case of Kazakhstan: (1.) institutionalising the purpose by setting up a Foreign Investors' Council, (2.) adapting domestic tax law, in particular by a 10 year exemption from corporation tax, an 8 year exemption from property tax and a 10 year freeze on most other taxes; (3.) establishing other incentives such as a refund of capital investments of up to 30% once a production facility is in operation. Legal certainty of foreign investors is served by such incentives as far as (1.) their allocation is regulated by clear rules and procedures, (2.) their observance in cases of disputes can be controlled by independent bodies (in the sense of courts) and (3.) the public authorities comply with decisions of these bodies, which are in favour of the investor. This requires the domestic observation of the core elements of the rule of law.
2. The ***international*** legal action of Kazakhstan concerns promotion and protection of investments and is, in particular, visible in the conclusion of international treaties. In relation to the European Union and to Germany several legal instruments have been created.
 - a. In relation to the ***Union and its Member States*** elements of legal certainty in the promotion and protection of investments are visible in the Partnership and Cooperation Agreement of 1995 (the PCA – into force since 1999) which contains mutual obligations for trans-national investments of both sides and which are either ***explicitly*** formulated for investments or are ***implicitly*** relevant for them as general framework provisions.

The ***first*** category (explicit provisions) is marked by the favourable climate clause for private investments (Art. 46), by the cooperation provisions for increasing investment and trade in mining and raw materials (Art. 49) and in energy (Art. 53) and by the chapter on the establishment and operation of companies (Art. 23 to 29: with the no less favourable treatment principle, the key personnel employment privilege and the stand still clause for restrictions).

The **second** category (implicit provisions) is formed in particular by the cooperation provisions on science and technology (Art. 50) and environment protection (Art. 54), the title on legislative cooperation in the sense of compatibilisation of the Kazakh legislation with that of the Union (Art. 43) and the legally important provisions on non-discriminatory access of natural and legal persons to the courts and administrative organs of the other party to defend their individual rights and their property rights (Art. 84 par. 1) as well as those on encouraging the adoption of arbitration for the settlement of disputes arising out of transactions concluded by economic operators of the parties (Art. 84 par. 2). Disputes between the High contracting parties themselves can be made subject to a conciliation by a panel of three conciliators, but its recommendations are not binding upon the Parties (Art. 87 par. 3).

In contrast to these manifold settings for investments the PCA **does not** deal with the issue of legal certainty for private investors in relation to the politics of the parties. This results from the lack of competence of the former EC at the time of its conclusion.

b. Here the **bilateral** national dimension comes in. E.g.: the specific **German-Kazakh** relation is **generally** governed by the **Treaty** on the Promotion and the Mutual Protection of Capital Investments of 1992. It is – besides a joint declaration on partnership – supplemented by a recent **Agreement** on partnership in the areas of raw materials, industry and technology of 2012. While the latter is politically important for establishing stable conditions and programmes for investments, the **Treaty of 1992** contains the **substance of legal certainty** for an investor. It addresses all its three afore mentioned core elements in the presently best possible way: (1.) the **substantive rules of protection** (Art. 4 to 9: with the principle of full protection and full security; with the prerequisites and limits of expropriation or equivalent measures, in particular the requirements of serving the common good and of full and prompt compensation, and with the free transfer of capital and earnings); (2.) the **dispute settlement by an independent body** (Art. 11 par. 2), namely by the right of each party to initiate a mandatory arbitration and, in absence of a divergent agreement of the parties to the dispute, to an arbitration within the framework of the International Centre for Settlement of Investment Disputes of 1965 (ICSID); (3.) the **binding nature of the arbitral award** combined with the obligation to enforce it in accordance

with the applicable domestic law. Whether this rule is complied with depends on the actual domestic state of the rule of law, in particular on the political respect for arbitral decisions. Moreover the Treaty provides (4.) also for a mandatory arbitration with binding decisions in ***disputes between the High contracting parties*** over the interpretation and application of the Treaty (Art.10).

III. My third observation is directed towards the ***perspectives*** of the ***framework of legal certainty***. There are three aspects to consider: the ramifications of the new competences of the EU (1), the development of the general role of arbitration (2) and the ramifications of the WTO (3).

1. Following the reform Treaty of Lisbon the EU has obtained the ***exclusive competence*** in the commercial policy area of foreign direct investment (Art. 207 TFEU; Art. 3 lit. e TEU), presently understood in the scholarly majority opinion as an investment over 10% of the capital of a company. This concerns in particular agreements on the protection of trans-national investments.

As a matter of course this internal shift of competences within the EU cannot nullify the hundreds of bilateral investment treaties of Member States of the EU with third countries – according to the “***pacta sunt servanda***” doctrine in international law (affirmed by analogy to Art. 351 TFEU). This maintenance in force is internally supported by the recent EU Regulation 1219/2012 on transitional arrangements for bilateral investment agreements (Art. 2 to 6). **However**, in the case of ***incompatibilities*** of such a treaty with Union law the Member State concerned is internally obliged to endeavour eliminating incompatibilities, if there are any (Art. 351 par. 1 TFEU).

More important is the consequence that the conclusion of ***any new agreements*** (including the amendment of existing bilateral agreements) is governed by the ***exclusive competence of the Union***. In order to reasonably cope with this gigantic task the mentioned Regulation establishes the principle that, subject to certain conditions, a Union State shall be ***authorized*** to enter into negotiations with a third country to amend an existing or to conclude a new bilateral investment agreement.

Whether, to which degree and with which changes in the area of legal certainty the Union will **develop this policy** in the future, is subject to ongoing discussions. A Communication from the Commission for a comprehensive European international investment policy (COM(2010)413 final) dating from 2010 does not give clear clues to concrete changes in the legal certainty issues. On the one hand it emphasizes the values of the established arbitration system, but seems to nurture some doubts about certain elements (such as, e.g., the suitability of ICSID for EU agreements; the lack of transparency of arbitration; the lack of permanent arbitrators).

2. This leads directly to the second aspect, the discussion of the **general role of arbitration**. Arbitration is a **proven** and trusted instrument in the settlement of international investment disputes. **However**, in the ongoing negotiations of a TTIP between the EU and the USA, this device has come under sharp attack under several aspects: in particular the lack of transparency, the lack of judicial control of arbitral awards by state courts and the fear that arbitration panels might pursue a tendency to favour foreign investors at the expense of reasonable regulations of the host state which protect health, social standards, the environment or the consumer. In order to overcome these objections a new concept could emerge, namely the **interdependence between** – on the one hand – **the requirement of international dispute settlement and** – on the other hand – **the domestic state of the rule of law**. The core of this concept is the idea of **mutual trust** in the respective judicial system of the partners. However, it is very doubtful, that such an approach would obviate the attractiveness of arbitration panels. Their swift and efficient functioning is proven. Moreover, the activation of state courts has the demanding requirement that each partner assesses the judicial system of the other partner as equivalent to its own system. As a consequence equivalence or approximation of the domestic legal orders – both in rules and practice – would be indispensable. Hence, as long as such a situation is not achieved, the role of dispute settlement by means of arbitration will continue.

3. A last look shall be cast on possible **inspiring ramifications** of the **WTO** in combination with several of its agreements such as TRIMS, GATT, GATS and TRIPS. Is it conceivable that its specific dispute settlement system generates ramifications for the issues of legal certainty in settling investor-state-disputes?

This is rather ***doubtful*** in terms of ***concrete*** devices. Already the TRIMs is void of rules on the repatriation of capital returns and compensation issues. In particular the WTO-DSU is marked by fundamental differences in comparison to the traditional BITs: in particular (1.) by a different objective, namely settling disputes between states, not between private investors and States; (2.) by a different procedure which allows for political adjustment at certain points; and (3.) by a different form of relief, namely obliging a state to adjust its practices to its obligations instead of retrospective compensation.

However, the WTO-system can, despite these differences, strengthen the ***general conviction*** that the protection of border-crossing investments should be governed not by political discretion, but by the rule of law. This is a permanent challenge not only for Central Asia, but for any region on the globe.