Implications of the proposed Investment Court on dispute resolution under the ECT

Christer Söderlund

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ISDS – a hotly debated topic

• Is it
  - A threat to the autonomy of EU law?
  - Creating ”regulatory chill”?
  - Upsetting the balance of the playing field?
  - Shielding public policy matters from democratic control?

• If so
  - Will an ”Investment Court System” make things better?
Putting ISDS into perspective

- The *de minimis* impact of investment treaty arbitration
- EU Member States are normally not respondents in investment treaty cases - examples
  - Austria: 0
  - Denmark: 0
  - England: 0
  - Finland: 0
  - Luxembourg: 0
  - The Netherlands: 0
  - Sweden: 0

*Source: Investment Treaty Arbitration website*
Treaty co-existence and Treaty overlap

- The Energy Charter Treaty
  - 52 signatory states worldwide
  - Including 27 of the 28 Member States
  - Including the European Union itself

- The Treaty on the Functioning of the European Union (TFEU)
  - 28 Member States as signatories

- The ICSID Convention
  - Approximately 160 signatory states, including all but one of the EU Member States (but not the European Union itself)
EU Member States reject the call to terminate intra-EU bilateral investment treaties

By Damon Vis-Dunbar
10 February 2009
Commercial Arbitration

**Eastern Sugar v Czech Republic**
- **Award of 27 March 2007; declaration in favour of jurisdiction**

**RJ Binder v Czech Republic**
- **Ad hoc proceedings under the UNCITRAL Arbitration Rules in Prague. Award on jurisdiction of 6 June 2007; declaration in favour of jurisdiction**

**EURAM v Slovakia**
- **Ad hoc arbitration under the UNCITRAL Arbitration Rules in the Hague; Award on 22 October 2012 in favour of jurisdiction**

**Achmea v Slovakia**
- **Ad hoc arbitration under the UNCITRAL Arbitration Rules in the Hague; Award on Jurisdiction of 26 October 2010; declaration in favour of jurisdiction. Setting aside before the Oberlandsgereich Frankfurt am Main dismissed in a decision of 10 May 2012**
ECT is different from BIT:s as

- The European Union is a "Contracting Party"
- The ECT is a multilateral treaty
- The ECT includes EU Member States and non-EU Member States
- The ECT allows other treaties to prevail if more favourable to the investor (Article 16 (1) ECT)
Where has the (EC Treaty and) TFEU and the ETC clashed?

- Transitional issues (disputes in the electricity field, Hungary)
- New arrivals – disputes in the photovoltaic sector (Spain, Italy, Czech Republic, Bulgaria)
EDF v Hungary

- Ad hoc arbitration under the UNCITRAL Arbitration Rules in Zürich, Award for USD 107 million (non-public)
- A setting-aside action before the Federal Tribunal in Switzerland dismissed. The public policy aspect of EU's prohibition of state aid was invoked (inter alia). The arbitral award was upheld

AES v Hungary

- ICSID Case No ARB/07/22
- Award 23 September 2010, the claims dismissed

Electrabel v Hungary

- ICSID Case No. ARB/07/19
- Award 25 November 2015; the claims dismissed (with the ”possible exception” in respect of an issue related to ”Net Stranded Costs”)


- Intra EU-dispute under the Energy Charter Treaty concerning Spain's withdrawal of benefits in exchange for investment in the photovoltaic sector. The action was dismissed on the merits (with a partial dissent)
- *Amicus curiae* brief by the European Commission

- The EU Intra-EU arguments against jurisdiction
  - The investors were investors of the same REIO, i.e. supposedly within the EU;
  - The ECT includes an "implicit disconnection clause (Art 16(2) ECT and Art 31(1) VCLT);
  - The Parties proscribed from turning to any other forum than CJEU pursuant to 344 TFEU (which applies to parties to the TFEU).
Investment protection by domestic legal recourse

Source: ZEIT Online, 1 October 2014
EU-negotiated Trade and Investment Agreements

- The Canada – EU Comprehensive Economic and Trade Agreement (CETA)
- The European Union – Singapore Free Trade Agreement (EUSFTA)
- The Transatlantic Trade and Investment Partnership Agreement (TTIP)
- EU-Vietnam Free Trade Agreement (agreed text as of January 2016)

US-led Trade and Investment Agreements

- The Trans-Pacific Partnership (Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, Vietnam, Chile, Brunei, Singapore, New Zealand)
Does the present system of investment protection serve as a custodian of international public policy?

- De-politicized
- Impervious to lobbying
- Devoid of vested interests
- Non-aligned
- Strictly circumscribed waiver of immunity
- Minimising sovereignty compromise
- Cost efficiency