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EU Law and Investment Law: Two Worlds Apart?

Nikos Lavranos (NL-Investmentconsulting) · Wednesday, January 28th, 2015

The Inaugural Conference of the European Federation for Investment Law and Arbitration (EFILA) took place on Friday, 23 January 2015, in the Senate House of the Queen Mary University of London. 160 participants ranging from academics, arbitrators, arbitration institutions, companies, lawyers to NGOs reviewed a full day long the EU's first 5 years of European investment policy.

The conference was kicked off by the first panel which immediately dived into the fundamentals, namely, the pros and cons of the existing investor-state dispute settlement system (ISDS). The range of the critique was broad spanning from essentially leaving it to arbitral tribunals to find the right balance, over possible and necessary reforms towards outright rejection of any place for arbitral tribunals in a constitutional law-based system. That discussion showed that it very much depends on the perspective as to whether ISDS continues to provide benefits or whether it is to be considered a serious danger to a democratic system.

After that fundamental discussion, the focus turned towards the increasing interaction between EU law and investment law. This interaction – or rather tension – is progressively more visible in all aspects of the EU's investment policy. The tension was heavily debated in the second panel on intra-EU issues, where the different perspectives determine the outcome of that interaction. Those who have an EU law perspective are firmly based on the principle of primacy of EU law over all other sources of law. For them, EU law is the game changer, which pushes aside any existing obligations of the EU Member States, which may exist by virtue of intra-EU BITs, the Energy Charter Treaty (ECT) or the ICSID Convention. In contrast for those who continue to approach investment law arbitration from a public international law perspective, there is no reason to treat EU law any different than any other source of international law. Consequently, any existing obligations ought to be respected by the EU and its Member States and any conflicts should be resolved on the basis of the usual instruments of treaty interpretation and rules of conflicts.

The same tension was also central to the third panel which looked at the extra-EU issues. The recent opinion of the Court of Justices of the EU (CJEU) regarding the accession to the ECHR, does not seem to make it easier to turn the tension into a fruitful judicial dialogue. The primacy of EU law and the exclusive, final, authoritative jurisdiction of the CJEU combined with the preliminary ruling systems, seems to leave

little room for international arbitral tribunals. Indeed, as the Micula case shows, the influence of the EU institutions becomes ever wider, reaching from intervening as amicus curie towards preventing the payment of the award.

Essentially, two solutions were suggested. The first, more practical and realistic solution was the advice for investors who want to bring arbitral proceedings against the EU and/or a EU Member State to stay as far as possible away from the EU. The second, more theoretical solution, was that the CJEU and arbitral tribunals adopt the "Solange"- approach (as long as), similar to the one which the European Court of Human Rights and the CJEU have been using to accommodate their co-existence as supreme courts within their respective legal systems.

The final two panels looked into future treaty making and future EU investment policy.

The essential message of those panels was that states are back in control. States are increasingly changing the rules of the game by modifying the contents of the investment treaties. Those treaties have become longer and more complex with more carve-outs. States re-asserting their control in arbitral proceedings as well: from adopting binding interpretations to further limiting the rights of investors turned claimants. Governments and members of Parliament (both European and national ones) as well as the European Commission are the new actors, who shape the future EU investment policy on the basis of other factors than was the case in the past. Investor and investment protection have been pushed into the background, while the preservation of policy space and other (sometimes irrational) political concerns dominate the decision-making process.

In sum, the timing and the topic of EFILA's Inaugural conference could not have been better. If the conference has made one thing clear, it is that EU law and investment law are two worlds apart and that it is going to be very difficult to build a bridge between those worlds unless both worlds introduce some more flexibility in their perspectives.

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