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Challenges in Front of the Successful Evolution of the FDI Protection Regime: EFILA Annual Conference

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The 4th EFILA Annual Conference, held in London on 31 January 2019, offered a lively discussion about the future of the European investment policy among the EFILA's distinguished guests. As expected, the focal topics were the ISDS reform, the EU proposal for Multilateral Investment Court ("MIC"), and the way forward. The MIC proposal was the subject-matter of the Keynote Speech delivered by **Colin Brown** (Directorate General for Trade, European Commission ("EC")), and the subsequent panel debate moderated by **Arif H. Ali** (Dechert), which included **John Gaffney** (Al Tamimi & Co), **Mélida Hodgson** (Foley Hoag), **Veronika Korom** (ESSEC Business School Paris), and **Saadia Bhatty (**Gide Loyrette Nouel) as speakers. Nonetheless, the clash between the world of investment arbitration and the EU investment policy naturally came across as the *leitmotif* of the other panels as well. The following post examines certain aspects of the EU proposal and its possible loopholes in light of other recent developments, such as (i) the unsuccessful enforcement of the ICSID award in *Micula v. Romania* in Sweden, (ii) the EU Member States' Declaration on the legal consequences of Achmea, and (iii) the AG Bot Opinion in Opinion 1/17 on the compatibility of CETA's Investment Court System ("ICS") with EU law.

EU MIC Proposal

Much has been said about the ongoing ISDS reform and, in particular, the EU MIC proposal (*see* Kluwer Arbitration Blog posts, for instance, here, here, and here). At the dawn of 2019, Nikos Lavranos noted that 2019 might prove to be the year of the EU's "Big Harvest" with respect to its ISDS aspirations and that its first assessment will take place at the EFILA Annual Conference. While it is too early to comment on the first prediction, the second one was accurate. Whereas the EU MIC proposal has many strands, almost all of which were vigorously debated by the panellists, I will here concentrate on a couple of them, which come to show that the EU might not be aiming at completely dissolving the current system. These are: (i) the dichotomy between substantive rules of protection and dispute resolution mechanism, and (ii) the enforcement of investment awards/decisions.

First, it seems that the EU does not currently take issue with the substantive rules of investors' protection in the BIT network. Indeed, there can hardly be raised an objection against rules prohibiting discrimination and expropriation, as well as rules ensuring fair and equitable treatment of investors. This was recently underscored by the Submission from the EU and its Member States

to the UNCITRAL Working Group III on ISDS reform of 18 January 2019:

> …[T]he precise scope of jurisdiction of the standing mechanism and **the substantive rules that it would apply are determined by the underlying treaties.** This implies that **the substantive rules** that the standing mechanism would apply **may evolve with the underlying treaty rules**. (emphasis added)

The EU's sympathy for the standards of investor protection is further evidenced by its recent investment treaty practice — *i.e.* CETA, EU-Vietnam IPA, EU-Singapore IPA — which endorses the well-established standards of investment protection subject to modifications providing more regulatory space for the sovereigns.

Second, as clarified during the conference, the EU considers the effective enforcement of awards/decisions vital. Thus, in the EU's view, the domestic review at the enforcement stage does not make sense. Rather, the EU will endorse an ICSID-like enforcement regime at an international level which would be provided for in the future convention establishing the MIC mechanism. As pointed out in the recent EU Paper, this is in line with the idea of having a two-tier system with a first-instance court and appellate tribunal with the latter exercising the function of annulment or set-aside currently vested with the ICSID annulment committees and, respectively, national courts. With respect to enforcement in States which are not parties to the conventional regime, the EU would opt for the application of the 1958 New York Convention.

Apparently, the crux of the EU's reformist idea concerns predominantly the institutionalization of the system and the introduction of a permanent body which can address the perceived flaws of the investment arbitration, namely the lack of (i) predictability and certainty, (ii) deliberative process, (iii) independence and impartiality safeguards, and (iv) costs and duration cap.

Micula Enforcement in Sweden

Against this backdrop, on 23 January 2019, the Nacka District Court in Sweden refused to enforce the ICSID Award in the *Micula v. Romania*. This is one of the most interesting episodes in the long-running saga involving the Micula brothers, Romania, the EC, and various enforcement courts. As pointed out by another commentator, the *Micula* case foreshadowed the clash between the investment arbitration world and EU law long before *Achmea*. But unlike *Achmea*, which concerned a battle for dispute settlement supremacy, *Micula* presented a frontal collision between substantive rules, namely the FET provision of Sweden-Romania BIT, and EU rules on State Aid. The first one prevailed in the ICSID arbitration where the majority of the tribunal decided that Romania breached the BIT by revoking certain tax and customs incentives notwithstanding the obligations towards EU arising out of the State's accession. Nonetheless, the conflict recurred at the post-award stage as in March 2015 the EC decided that any payment of the compensation awarded by the ICSID tribunal would be incompatible with the EU law and would constitute illegal State aid thus effectively foreclosing Romania from respecting the award.

The Swedish court sided entirely with the EU law and declared that enforcing the award would run counter the principle of sincere cooperation established in the CJEU case law which obliges Member State courts to respect 2015 EC decision and decline enforcement. This is a particularly

powerful message by the Swedish court if one takes into account the fact that enforcement proceedings concerned an ICSID award. Unlike enforcement under the New York Convention, the ICSID Convention, to which Sweden is a Contracting State since 1967, provides for a self-contained enforcement regime which allows no review by domestic courts. Pursuant to Art. 54 ICSID Convention, each Contracting State shall recognise and enforce an ICSID award as if it were a final judgment of a court of that State.

Challenges Ahead

The brief remarks set out above demonstrate that States, regional organisations, and think tanks will face significant challenges in shaping the new regime of FDI protection and dispute settlement.

A. Substantive Conflicts

First, achieving predictability and certainty of the outcome is not premised solely on an effective dispute settlement mechanism. Even the most objective and knowledgeable pool of adjudicators can produce inconsistent results if there is no clarity with respect to the applicable law. As evidenced by *Micula*, the confrontation between EU law and investment treaty arbitration is not limited to issues of procedural character, but finds its roots in the conceptually different nature of the two systems. Thus, establishing a clear and uniform legal framework which is able to reconcile both systems is crucial for successful reform. In the *intra*-EU context, the obstacles seem to be the lack of uniform substantive rules on the protection of foreign investors. This *lacuna* is all the more problematic in light of the recent Declaration of 15 Member States on the legal consequences of the CJEU Judgment in Achmea which evidences, *inter alia*, Member States' firm intention to terminate their *intra*-EU BITs. As suggested by Nikos Lavranos, one possible measure to remedy this situation could be the adoption of an EU regulation on investment protection. Alternatively, to the extent that substantive rules on investor protection remain in force as between the Member States, the relevant stakeholders should come up with an effective mechanism to resolve conflicts between substantive rules preventing thereby Micula-like scenarios. In this respect, seeds of reasonableness could be found in AG Bot Opinion with respect to the compatibility of CETA's ICS with EU law, who pointed out that "*the autonomy of the EU legal order is not a synonym of autarchy*" (para. 59). This is equally valid with respect to the EU's external investment policy and possible conflicts between treaty provisions and EU law. As set out by one panellist during the EFILA Conference, the coherence between MIC and EU law should be based on a set of key principles, among which: (i) respect for the autonomy of EU law, (ii) exclusive application of investment treaty law as interpreted by the rules of international law, rather than EU law, (iii) sufficient safeguards for the exclusive jurisdiction of CJEU, (iv) the binding power of CJEU's interpretation of EU law, and (v) the preservation of the role of national courts in the dialogue under Art. 267 TFEU.

B. Enforcement

Leaving the question of enforcement of the MIC decisions under the New York Convention aside, the *Micula* enforcement saga proves that the establishment of an effective self-contained and supranational enforcement system is dependent on having uniform and coherent legal framework of substantive protection, as well as means for resolution of conflicts between various set of rules

operating on the international level. Hopefully, negotiators, policymakers, and all relevant stakeholders will quickly grasp the problems and will successfully address the challenges in shaping a new just and fair regime of foreign investment protection.

This entry was posted on Monday, February 11th, 2019 at 8:07 am and is filed under EU Law, European Commission, ICSID Arbitration, Multilateral Investment Court
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