Topical Issues in ISDS: Review of Recent Developments in the European Union

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The CERSA (CNRS- University Paris II Panthéon-Assas) organized its third event in a series of seminars on selected topics in international investment law and investor-state dispute settlement (ISDS) (for the report of the first seminar, see here). The seminar on ***Topical issues in ISDS: EU Investment Law*** was held in Paris on 7 February 2019 and moderated by Professor Catharine Titi (CERSA). Practitioners Paschalis Paschalidis (Shearman & Sterling, Paris), Amy Roebuck Frey **(**King & Spalding, Paris**)**, Professor Marc Bungenberg (Saarland University, Germany) and investment treaty negotiator Andre von Walter (European Commission DG TRADE) gathered to discuss the latest reforms in investment dispute resolution in the European Union.

1. The Comparison of Investment Protection Standards under EU Law and International Investment Law

Paschalis Paschalidis recalled that the traditional view shared amongst many arbitral tribunals was that EU law covered admission of investment, and once investment was past that stage there was no form of protection. This is no longer true. A recent example is the CJEU judgment Joined Cases C-52/16 and C-113/16

(rendered on the same day as *Achmea*) concerning expropriation usufructuary rights over agricultural lands by the government of Hungary and grounded on free movement of capital. EU law also provides post-investment protections and certain comparable provisions such as FET, but it does not apply yet to every aspect of state activity, as there are still pockets of significant Member States sovereignty in areas of taxation, criminal law and sovereign debt (see the Greek PSI).

Amy Roebuck Frey considered that EU law, from an investment treaty point of view, is sometimes viewed as a risk largely due to a lack of understanding. While it is overly simplistic to equate "legitimate expectations" under EU law with the substantive protections developed under investment treaty case law (the latter includes broader protections), she suggested there should be more studies to see if, on the whole, investors and investments are given equivalent protections in the two legal orders of EU law and international investment law.

Marc Bungenberg further remarked that the *Micula* case was already paradigmatic of a shock of cultures between EU law and international investment law. The material standards of protection and enforcement in EU law, even if the European Commission argues the EU upholds high standards, will depend on the Member States will and the functioning of their respective judicial systems.

2. The *Achmea* Judgement and its Consequences for Intra-EU Bilateral Investment Treaties, Energy Charter Treaty (ECT) and ICSID Arbitrations

Paschalis Paschalidis indicated that on 28 January 2019 in the ICSID *Sodexo v. Hungary* case, another arbitral tribunal ruled out on an objection based on *Achmea.* It reached the same conclusion as in *UP and C.D v. Hungary*. Concerning the Dutch-Slovak BIT at issue in *Achmea*, EU law was applicable via two doors: domestic law of the host state and international law. arbitral tribunals, such as the ones in *Blusun v. Italy* and *Electrabel v. Hungary*, also accepted EU law's quality as international law.

Amy Roebuck Frey argued that Article 26.6 of the ECT does not refer to domestic law but to "applicable rules and principles of international law", which is why some tribunals have decided that EU law is not international law for the purposes of that provision. Article 16 of the ECT on Conflict of Treaties, providing that the most favorable treaty applies, may prove difficult for the CJEU to reconcile with its

reasoning in *Achmea*, as Article 16 is binding on the CJEU, the EU being a member of the ECT.

Even in the context of intra-EU BITs, we cannot say with complete accuracy that all such treaties fall within *Achmea*. It is worth noting that, following *Achmea* and the declarations of certain EU Member States, a Swedish court in *Micula* considering enforcement efforts did not dismiss the case on jurisdictional grounds.

2.1. The Implications of the Political Declarations Signed by the EU Member States in Brussels Regarding the Consequences of the Achmea *Judgement*

Amy Roebuck Frey was critical of the Member States' Joint Declaration underlining rationale of attempting to end pending cases. From a legal perspective, only BITs containing similar wording to the BIT in *Achmea* should be terminated, since the CJEU only addressed those treaties. She posited that the declaration of the other 5 Member States referring to intra-EU BITs "such as those issued in *Achmea*" is consistent with that view. In any case, in principle, neither intra-EU BITs nor the ECT can be amended by issuing a declaration; the treaties themselves provide the means for amendment.

Paschalis Paschalidis understands that several, if not all, Member States do not treat these declarations as treaties. Regardless of their status as treaties or not, the interesting question is whether these declarations constitute "subsequent agreements" in the sense of Article 31.3.a of the Vienna Convention on the Law of Treaties (VCLT).

2.2. The Tension Between Member States' Positions in the Recent Declarations and the Fundamental Right of Legal Certainty for EU Investors/Survival clauses

Amy Roebuck Frey commented that if the EU Member States amend the ECT, the VCLT provisions on modification may also apply. Interestingly, Italy one of the signatories of the political declaration has previously withdrawn from the ECT and yet has emitted a declaration on the survival clause. It is not clear that a contracting party can take any step to modify a treaty after its withdrawal from that treaty has taken effect.

3. The Experience with Opinions of the Advocate General of the EU and

Opinion 1/17

Marc Bungenberg explained that in 70% of the cases the Court follows the opinion of the AG. Paradigmatically, the more important the case, the less likely is that the Court will follow the AG, such as in the emblematic case *Van Gend en Loos*, as well as in *Achmea*, Portugal/Council in regard to the direct applicability of WTO Law or the accession of the EU to the ECHR (Opinion 2/13).

Opinion 1/17 of AG Bot, which declares CETA's ICS mechanism to be compatible with EU law, it comes in a politically charged context. The approach of AG Bot is interesting, but it does not indicate finally what is to come.

4. The EU Transition from *ad hoc* ISDS Arbitral Tribunals to a Permanent and Two Layered Investment Court System (ICS)

Andre von Walter explained the project for the creation of a multilateral investment court (MIC) – or a plurilateral court – that could lead to a multilateral court. Asked why the EU decided to move away from investment arbitration, he noted that the EU Member States' governments, most EU citizens and policy makers do not feel comfortable when arbitration is applied to a vertical public law relationship as it is the case for treaty-based investment disputes; that the classic features of arbitration applied to public law disputes are perceived as problematic along with the limited review mechanisms of the current ISDS system. The creation of a MIC would bring more coherence and predictability. Commercial arbitration and State-to-State arbitration are in different situations, but for treaty disputes between individuals and states, the EU does no longer negotiate arbitration systems.

4.1 Method of Appointment of Adjudicators by States and Ensuring Independence under the ICS

Andre von Walter explained that many crucial questions arise with regard to the methods of selection and appointment of adjudicators. In the EU's view, the mandate of the adjudicators of any future investment court should be non-renewable, forbid double-hatting and provide guarantees of full independence. The adjudicators should above all have a public international law experience and could come from Justice, Academia, legal professions or other areas.

4.2. Multilateral Investment Court and State of Play of the ISDS Reform

Negotiations Within UNCITRAL

Andre von Walter observed that the EU's reform ideas have been channeled in the discussions in UNCITRAL. There has been an appetite to work multilaterally on ISDS reform, so the two tracks were combined in Working Group III (WG III). The mandate of WG III is articulated in three steps: identifying concerns about the ISDS regime, considering whether reform is desirable in regard to those concerns, and what can be the options of reform in a third step. The Documents provided on the website of DG TRADE set out the EU's proposals for the third stage of the mandate. Systemic reform is important. The current state of play at UNCITRAL appears to be a delicate balance between different types of reform.

Finally, ***Marc Bungenberg*** **discussed in detail concrete options in relation to the institutional set-up of a multilateral investment court. He stressed** the need to focus on the rule of law, reduced costs, transparency considerations, consistency in the case law and the enforcement of MIC decisions. In this respect, he drew on his recent monograph, co-authored with August Reinisch, "From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court", which presents the first comprehensive study of the feasibility of establishing a MIC.

In conclusion, the discussion of these recent developments and open questions reveal that international investment law in the European Union is a vibrant field with still many pending issues. The near future will show how these questions and issues will be resolved.