Kluwer Arbitration Blog

Who's A Respondent In Light of Art. 207 of the Lisbon Treaty?

Patricia Nacimiento (Herbert Smith Freehills) · Friday, April 30th, 2010 · Herbert Smith Freehills

Art. 207 of the Lisbon Treaty defines the new common commercial policy of the European Union, and states that it shall furthermore relate also to "foreign direct investments". This provision has the appeal of an outright earthquake, given that the field of foreign investment, and in particular investment treaties, has always been the exclusive realm of the member states (at least in theory, the legal reality was different, though: the EU has concluded mixed free trade agreements with third states not only comprising matters of commercial policy, but also of investments). It has accordingly drawn the comments and critique of numerous scholars. Yet, to my mind it seems that this provision conceals more than it reveals: All we know so far is that the European Union will somehow take part in the foreign investment business in the future. The extent and the manner of its new role is widely unclear: The trouble starts with the term "direct foreign investment" itself, which is not defined. There are a number of other questions which are left unanswered by Article 207: What happens to existing BITs now that the competence to such treaties has – at least in part – been elevated to the EU level? Concededly, until the EU signs treaties of its own, there is little point in arguing that the member states have to cancel their existing BITs, but what happens if the EU does? Will there be parallel treaty structures in respect of direct and indirect investments? Or will there be joined treaties, negotiated and concluded by both the EU and the member states, originating from separate competences (I think, with regard to feasibility, this is the more likely option, especially with a view to the lack of competence of the EU to regulate matters of expropriation, cf. Art. 345 of the Lisbon Treaty)? When negotiating new investment treaties, will the EU take the position of an export- or an import-oriented state, given that the Union comprises both types of states?

Most of these questions require decisions to be made by the Commission and the ECJ, not so much because of legal considerations, but because the competence conferred by Art. 207 is too general and broad as to allow for a definite answer in either direction. It is this very indetermination of the competence, however, which is intriguing in that it allows for learned guesses on how the future of investment treaties in Europe could look. As an arbitration lawyer, I am personally most interested in the question of who would be liable and who would be eligible as a respondent in arbitration in the event a future EU investment treaty is breached.

If the investment treaty is signed by both the EU and the member states, i.e., a multilateral treaty (this is the scenario I would like to discuss, since it is, in my view the most probable one), there is, to my mind, a multitude of possible outcomes. The respondent and/or liable parties could possibly be:

1. only the entity which caused the breach, i.e., either the EU (in the case of a breach of EU officials, for example the competition authorities) or one or more infringing member states. This option would be inspired by a notion of the member states and the EU being coequal partners to the

treaty and only severally liable.
2. The EU and the member state who breached the treaty. Such an option would, in legal terms, amount to several liability and attribution of a violation committed by a member state to the EU.
3. The EU and all of the member states, following a concept of joint and several liability.
4. The EU or the infringing member state, at the choice of the EU/member states. Such a mechanism would mirror the existing rule in s. 26 of the Energy Charter Treaty ("The communities and the member states concerned will determine who is a respondent party to arbitration proceedings (…)".

Which will it be? I think that this depends first and foremost on the terms of the respective treaty, but which option would be desirable in terms of policy? Furthermore, in the absence of specific terms, the determination of liability and the status as respondent to investment arbitration proceedings might also require some deliberation as to the nature of the relationship between the EU and the member states in the context of multilateral investment treaties.

This entry was posted on Friday, April 30th, 2010 at 1:19 pm and is filed under Europe, European Law, Legal Practice, Legislation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.