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Multiple Investment Treaties Between The Same States?: The Case Of The ECT

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By Odysseas G. Repousis[1)]

In a given investment dispute, it is not impossible to imagine that two or more investment treaties will be applicable and will concurrently provide for recourse to international arbitration. In addition, a host of other instruments may also be in force and pave the way for an international investment claim, such as national investment laws and investment contracts, which may well exist in parallel to investment treaties. When however claims are pressed under investment treaties, a reference to the concurrent application of two or more such treaties is most likely to be understood as a reference to two or more investment treaties between *different* contracting states. In practice, the discontents of this concurrent or parallel application of investment treaties are depicted in the CME and Lauder cases[2)]. Nevertheless, this post deals with another case of parallelity in international investment law, namely that of investment treaties between the *same* contracting states. While this can more amply be evidenced in the context of current international lawmaking[3)], it still is interesting to examine one of the earliest examples of parallel investment treaties between the same states, that of the Energy Charter Treaty (ECT) and the bilateral investment treaties (Bits) entered into between its member states (*intra* ECT Bits).

The importance of the existence of the ECT side to side with the *intra* ECT investment treaties is twofold. First, for investment disputes in the energy sector both of the above treaties will be applicable, since the former is delimited to such disputes while the latter cover any disputes, therefore energy disputes are also included within their scope. Second, both the ECT and the *intra* ECT Bits provide for an investor-state arbitration clause. It may therefore be asked whether for investment disputes in the energy sector, it would be more preferable to file a claim under an *intra* ECT investment treaty instead of bringing the same claim under the ECT or even under both the ECT and an *intra* ECT Bit. The reason that could drive such an action would be to presumably avoid some of the provisions found in the ECT.

In regard to the question of what these provisions might be, reference must be made among others to the fact that the ECT contains a GATT article XX-like exception [art. 24] as well as a denial of benefits provision [art. 17]. In contrast, the majority of the *intra* ECT Bits do not contain such provisions. Given however that *prima faciae* for an investment dispute in the energy sector, both the ECT and an *intra* ECT investment treaty may be applicable, it can further be asked whether treaty interpretation may lead to the prevalence of one over the other treaty. Therefore, it could be

asked whether the later concluded treaty prevails over the prior one (the *lex posterior* principle) [art. 30 VCLT][4] or whether the parties to the ECT have consented to the sole application of that regime to investment disputes in the energy sector (the *lex specialis* principle)[5]. A closer however look to the ECT reveals that there exists a specific conflicts clause that favors its parallel application alongside the *intra* ECT investment treaties [art. 16]. This in turn means that there is space for a disputing investor to submit an investment dispute in the energy sector under an *intra* ECT investment treaty instead of the ECT and therefore avoid provisions such as that of the denial of benefits clause provided for in the ECT, that could potentially affect its right to seek redress. Regardless to say that the cardinal notion of perfected consent in international arbitration could also lead to the same result even if the specific conflicts clause of article 16 did not exist. It thus remains to be seen whether it is more beneficial to freely allow investors to elect between two or more investment treaties concluded between the same states, even when these treaties provide for dissimilar protections.

To return to the ECT, attention must be had to the Yukos related disputes. These five claims have been initiated against Russia by shareholders of the Yukos oil company. While however in all the above five claims the ECT was applicable, recourse under this treaty was sought only in the first three cases [Yukos v. Russia, Hulley v. Russia and Veteran v. Russia]. In the other two cases, the shareholders of the Yukos oil corporation elected to submit their claims under intra ECT investment treaties even though the ECT was concurrently applicable [RosInvest v. Russia and Renta v. Russia]. Given the nature of the latter cases, it can be assumed that the claims were filed under the respective Bits among others in order to avoid the denial of benefits clause contained in the ECT. However, it cannot be said with extreme surety that had these investors invoked the ECT, their claims would have failed. This can be explained with reference to the findings of ECT tribunals on the denial of benefits clause, which propose a hard test and in no case liken the most recent findings of the Pac Rim Cayman in the context of the CAFTA-DR, which ruled that this provision can even be invoked before “the expiration of the time limit fixed for the filing of the counter-memorial” [para. 4.85]. In any case, the filing of a claim under *intra* ECT investment treaties instead of the ECT may also be pressed in order to avoid the bearing that previous rulings may have. For example, in regard to the applicability of the MFN clause to dispute settlement clauses, the rulings in Plama v. Bulgaria may prove decisive for subsequent claims under the ECT. Such bearing can presumably be avoided by invoking a claim under an *intra* ECT Bit. Indeed, in RosInvest where recourse was solely sought under an *intra* ECT investment treaty, although the ECT was also applicable, the arbitral tribunal applied the MFN clause to dispute settlement provisions.

To conclude, the examination of the ECT and the intra ECT investment treaties as an example of parallelity in international investment law may reveal the potential dangers that may lurk when states opt for the co-existence of various yet dissimilar investment treaties between them. Certainly, the ramifications of such actions should not be overstated yet if one reflects on the dangers that may be created if parallelity is advanced in the wider examples of current international investment regionalization, it may well prove another destabilizing factor of international investment law.

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References

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See CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, (March 14, 2003), and Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, (September 3, 2001).

?2

Current investment lawmaking is supportive of a regional multilateralization of investment law, without however the prior termination of the “old” bilateral investment treaties (BITs). An example is the China-ASEAN Agreement on Investment signed in 2009 and the older BITs entered into between China and the ASEAN countries. See also UNCTAD, The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?, 3 IIA MONITOR (2013) (Geneva and New York: United Nations Publications, 2013).

?3

See Vienna Convention on the Law of Treaties (VCLT), art. 30, 8 ILM 679 (1969) and 63 AJIL 875 (1969).

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?5 See art. 55 of ILC’s Articles on Responsibility of States for Internationally Wrongful Acts.

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