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A New and Improved Investment Protection Regime: Truth Or Myth!

Shilpa Singh Jaswant (OP Jindal Global University, India) · Sunday, February 3rd, 2019

With the proposed investment court system, the European Commission aims to limit criticism revolved around Investor-State Dispute Settlement due to its lack of legitimacy, transparency and appellate mechanism. The investment regime under Comprehensive Economic and Trade Agreement with Canada (hereinafter "CETA") and European Union-Viet Nam Free Trade Agreement (hereinafter "EUVFTA") could be a solution by bringing transparency, consistency, and institutionalization in investment protection. The article addresses the compatibility of the new system with EU law as any violation of the autonomy of EU law would not be optimistic to its future. Meanwhile, a Member State of the EU (Belgium) has sought an opinion from the Court of Justice (hereinafter "the CJEU") on whether the investment court system in CETA is compatible with EU law, even though that system is promising and would lay down stepping stones of improved investment protection.

Achmea Ruling and its Effect to the Jurisdiction of the Tribunal under CETA and EUVFTA

The *Achmea* ruling confirms that intra-EU BITs are incompatible with EU law while its effects reverberate to agreements entered by the EU with third countries. As per the judgment, arbitral tribunals under investment agreements, when entered between Member states, are outside the judicial system of the EU and incompatible with the autonomy of EU law since arbitral tribunals were empowered under the principle of *lex loci arbitri* to include and interpret EU law (the Community treaties and secondary laws).[1)] However, the ruling may not be applicable in full since investment protection in CETA and EUVFTA are concluded as mixed agreements meaning the EU and its Member states are parties to them.

A logical conclusion is that the Tribunal established under CETA and EUVFTA would not fall within judicial framework of the EU since its jurisdiction is limited to claims related to breaches of investment agreements and to determine if a measure of a Member state and/ or of the EU is in violation of the standards set in the agreements. It can only resolve a dispute under the applicable law, i.e., the provisions of an investment agreement.

The ECJ places responsibility on the arbitral tribunal to protect the autonomy of EU law by not giving an inconsistent interpretation to it. In the past, the ECJ has protected autonomy of EU in many cases and call it as the "essential" characteristics[2)], originating from an independent source of law, i.e., the Treaties.[3)] Further saying that the standard of review to protect the autonomy of EU

law is a matter of these tribunals and Member states too. Since the ECJ has never been eager to open doors of interpretation to a tribunal which is out of the EU judicial framework and Member states are obligated to bring issues related to EU law to the ECJ. The reasoning of the judgment is discussed in the blog in posts here, here and here.

On the contrary, if the ECJ finds that the Tribunal under CETA and EUVFTA is part of the judicial framework of the EU and that it could send for preliminary ruling under Article 267 TFEU departing from its previous judgments, even then it has responsibility to protect autonomy of EU law along with uniform and consistent interpretation and application of EU law. In both situations, an interpretation of EU law done by the tribunals may affect the consistency. However, by looking at the features (discussed below) of the Tribunal assure that autonomy of EU law is protected, at least in theory.

Ensure Jurisdiction of Domestic Courts and ECJ

CETA and EUVFTA under Article 8.22(1)(f) & (g) CETA and Article 3.34 (1) EUVFTA preclude parallel proceedings at a domestic or international court or tribunal so as to not to undermine the authority of tribunals which could mean taking away exclusive jurisdiction of the ECJ. The previous posts of the blog discuss the concerning issue from the point of view of human rights, available here and here. Even when the agreements do not allow parallel proceedings for disputes related to an alleged measure which is inconsistent with agreements, the Tribunal is under obligation to stay its proceedings or take into account proceedings under international agreement which may affect the findings of the Tribunal or the compensation awarded due to the use of "shall" found in Article 8.24 CETA and Article 3.34(8) EUVFTA. These agreements assure that in case the Tribunal failed to do so, the appellate body has authority to modify or reverse award on "manifest errors in the appreciation of facts, including….. *relevant domestic law*" under Article 8.28 CETA and Article 3.42 (1) EUVFTA. It is important that the tribunals under agreements take into consideration decisions of the ECJ and domestic courts effectively and importantly, ensure the supremacy of EU law and full respect to decisions of the ECJ. Perhaps the limited scope of disputes of the Tribunal done by the drafters of the agreements, especially the interpretation and application of EU law is a solution to it. The tribunals under Article 8.31 CETA and Article 3.42(3) EUVFTA are not allowed to interpret and apply the provision of EU Treaties including prevailing domestic laws and shall follow the prevailing interpretation given to the domestic law. While determining the consistency of measures, it has to consider the domestic law as a matter of fact which also includes EU law.

Issue of Competence and International Responsibility

After the *opinion on EU-Singapore FTA*, it is important to look at the nature of the agreement concluded: CETA and EUVFTA are concluded as mixed. The question of competence would not affect the interpretation of the investment agreements done by the tribunals. The question of determining obligation arising from the agreements whether it would be the responsibility of the EU or Member states requires interpretation of the agreements and, due to their drafting, it would be within the jurisdiction of the ECJ. The agreements have placed the obligation of international responsibility on the EU to determine respondent.

In other words, the right to access tribunal as per the rules to determine respondent by the EU in both agreements would allow foreign investors to initiate proceedings without affecting the autonomy of EU law, supremacy of EU law and would promote legal certainty. This conclusion

would also put away any future doubts on competences, *inter alia* on lawmaking and concluding the agreement between Member states and the EU which would be mutually exclusive of the determination of respondent done to fix international responsibility. The issue of competence would, however, justify the reason to conclude the agreements as mixed agreements since some areas are shared between the EU and its Member states.

Unique Features of the Investment Court System

The institutionalization would ensure legitimacy and consistency to decisions after introducing an appellate body. While allowing participation of non-disputing third parties and interpretations of provisions to the agreements from scholars and person of interest, having compulsory resolution through an amicable mechanism like conciliation and mediation and transparency are front-runners. The members of tribunals are appointed by a committee as per the agreement while cases are allotted on a random basis to a roster of judges much like done in WTO panel. After the award, the Tribunal would be dissolved and the question of sending back to the same tribunal after appellate body's decision is still unanswered. Moreover, it does not contribute to 'permanent structure' since members are paid retainer fees and can take up other occupation unless otherwise decided. It can still be said that the system is not balanced out and independent, instead, it seems semi-permanent or hybrid.

Due to a proliferation of investment agreements, the tribunals organized may give rise to different conclusions relating to a similar commercial situation and similar investment rights to the similar in the provisions of these agreements questioning procedural fairness. None of the agreements deal with the correlation of the tribunals. Additionally, another procedural flaw observed that both the agreements do not directly deal with a question on jurisdiction and thus the parties must wait until the final award is issued to appeal a positive or mixed jurisdiction award.

In sum, the investment protection in the agreement has room for improvement. That can be done by creating a new regime of investment protection with a multilateral investment court which would be permanent in nature with full tenured and impartial judges for the problem of coherence and determinacy. The consistency would be ensured with a permanent appellate mechanism and the treaties would be considered at par with one another. As concluding remarks, the present system in the agreements is a way forward to institutionalize investment protection. But, this optimism should not be taken blindly and hinder improvement and develop a better system.

References

?1 Opinion 1/09 on *Creation of Unified Patent Litigation system* of 08.03.2011, para 89; Judgment in *Achmea*, C-284/16 of 06.03.2018, para 58.

?2 Opinion 2/13 on *accession of EU to the European Convention on Human Rights* of 18.12.2014

?3 Opinion 1/09, para. 65.

This entry was posted on Sunday, February 3rd, 2019 at 5:20 am and is filed under Achmea, CETA, EU-Vietnam Free Trade Agreement, European Union
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