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A New Approach to Intra-EU ISDS

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The Lisbon Treaty granted to the EU the competences on Foreign Direct Investment (FDI). The exercise of those competences on FDI has not been smooth in the area of Investor-to-State Dispute Settlement (ISDS), in particular, regarding the application of ISDS between a Member State and the investor of another Member State either whether those ISDS are based on a Multilateral Treaty (MT) or on a Bilateral Investment Treaty (BIT).

Until now the arbitral tribunals (Tribunals) have rejected the challenges against their jurisdiction over intra-EU ISDS. An example of the reasons followed to keep jurisdiction can be found in the Decision on the Achmea issue within the case Vattenfall. These reasons orbit around the formula *pacta sunt servanda*: the States of the investors and the respondent States are different and sovereign contracting parties to a treaty with ISDS provisions (the Energy Charter Treaty (ECT)); these treaties shall be interpreted in accordance with their own terms; there is not any explicit or implicit disconnection clause and the creation of a set of obligations applicable in some intra-EU disputes and another set of different obligations applicable to other disputes would damage the coherence in the ECT; there is no EU Law primacy over the ECT and the conflict of laws should be solved in favor of the ECT in accordance with basic principles as *lex poxterior* or *lex specialis*.[1)]

In short, all the analysis is based on the Law of Treaties with constant references to the Vienna Convention and numerous citations of previous awards. It is under debate whether the interpretation Tribunals are making of the Vienna Convention is right or wrong. But it is undeniable that the Vienna Convention approach is a valid and necessary approach.

It is also useful to analyze the practice followed by the International Community regarding the interface between Conventions and EU Law. Here are some findings:

- The 1968 Brussels Convention has no general disconnection clause. Nevertheless, the EU Brussels I Regulation 44/2001 (today replaced by Regulation 1215/2012) substituted that Convention in the relationships between all the Member States except Denmark. (Art. 69 Regulation 44/2001)
- The 1961 Hague Convention on the Law Applicable in respect of the Protection of Infants and the 1980 Hague Convention on Child Abduction have no disconnection clause. Nevertheless they were replaced in the relationships between Member States by the Regulation Brussels II bis 2201/2003. (Art. 60 Regulation 2201/2003)
- The 1965 Hague Convention on Service of Documents has no disconnection clause in favor of EU legislation. Nevertheless it was replaced in its application between Member States by

Regulation 1348/2000 (today substituted by Regulation 1393/2007). (Art. 20 Regulation 1348/2000)

- The 1970 Hague Convention on Evidence has no general disconnection clause. Nevertheless it was replaced in Member States relationships by Regulation 1206/2001. (Art. 21 Regulation 1206/2001)
- The 1980 Rome Convention on Law Applicable to Contractual Obligations has no general disconnection clause. Nevertheless it was replaced in the relationships between all Member States except Denmark and a few territories by Regulation Rome I (Regulation 593/2008). (Art. 24 Regulation 593/2008)
- The 1971 Hague Convention on Law Applicable to Traffic Accidents and the 1973 Hague Convention on Law Applicable to Products Liability have disconnection clauses only for Conventions. Nevertheless they were replaced in the intra-EU relationships by Regulation Rome II (Regulation 864/2007). (Art. 28 Regulation 864/2007)
- There are dozens of bilateral conventions between Member States on recognition and enforcement of decisions that were replaced by the Brussels I Regulation 44/2001. (Art. 69 Regulation 44/2001)

Therefore, there is a reiterated practice that once the EU considers it has its own legal regime on a field, EU Law replaces bilateral and MTs treaties on that same field in the relationships between Member States. This practice has been followed as mandatory by Member States and by third States.

This practice has applied regardless of whether there is or not a disconnection clause in the convention replaced by EU Law and regardless if the convention is bilateral or multilateral. This practice has never been resisted by Member States or by third States. For instance, neither a Member State nor a third State has ever said that Hague Convention on Product Liability should apply intra-EU instead of Regulation Rome II or that the Hague Service of Documents Convention should apply intra-EU instead of the Service of Documents Regulation.[2)]

The determination about when there is disconnection in favor of EU Law has always been an EU's decision. No State (Member or Third State) has individually declared that EU Law is not enough to achieve the objectives of a convention and has decided to continue applying that convention over the EU Law. The disconnection decision is taken by the EU itself and has not required any additional decision or denunciation by a Member State party in the convention replaced.

Bearing in mind this factual practice accepted by the International Community, we have to revisit the arbitral awards. The Charter of the United Nations is the establishing Treaty of the International Court of Justice (ICJ).[3)] Article 38 (1) of the ICJ statute lists the sources of International Law and includes the International Custom "as evidence of a general practice accepted as law".

We have seen that there is a general practice accepted as Law that when the EU considers it has its own legal regime on a field, the EU itself can decide if it supersedes a convention. This has been respected as Law not only by Member States but also by third States and international organizations.

Someone could argue that the disconnection requires an EU Regulation. This is a weak argument and would imply that the internal regulation of an international organization can revoke a convention. That would be in open contradiction with the Law of Treaties. What allows the

disconnection (not the revocation) from a convention is the practice accepted as Law that the EU can give intra-EU prevalence to its own rules.

The foundation of arbitration is the mutual consent. Is there mutual consent where in accordance with the applicable International Custom the ISDS rules of a convention should be sidelined by the EU wish of having its own different regime? Should the Tribunals start over, balance the real value of previous awards -that are not source of International Law- and take more into consideration an actual source of International Law that is a practice accepted as Law by the International Community?[4)]

This new approach may have impact not only on future awards but also on the recognition and enforcement of awards already issued. The jurisdiction of the Tribunals for intra-EU ISDS could be reanalyzed and if, applying the International Custom, there was not mutual consent for intra-EU ISDS, there might be a ground for non-recognition of the award.[5)]

In particular, claimants usually try to enforce their awards in the USA. The USA is party to Hague Conventions with no disconnection clause where the EU has, nevertheless, disconnected in favor of EU Law for intra-EU affairs. This has happened with no opposition by the USA. Therefore, the USA has a practice accepted as Law that respects the disconnection in favor of EU Law for intra-EU affairs. Consequently, in accordance with an International Custom accepted by the USA it could happen that there is not a valid arbitration agreement.

In conclusion, until now the issue of intra-EU ISDS has been decided by Tribunals taking exclusively into account one source of International Law and giving a tremendous relevance to the jurisprudence, which is not a source of international law. It would be advisable that the Tribunals take into account all the sources of International Law and not only the Law of Treaties even if this new approach could lead to surprising results.

References

?1 The *Vattenfall* case is based on a MT but similar arguments are being used for BITs, i.e., submissions made in different courts to enforce the *Micula* award.

?2 The author of the post personally negotiated most of the EU instruments listed above. He was also a representative to the Hague Conference of Private International Law (HCPIL) on behalf of Spain and on behalf of all the Member States in the first semester of 2010. He can declare under oath that the prevalence of EU Law was accepted with no further discussion by Member States, third States or by the HCPIL.

?3 Art. 103 of the Charter sets the principle of primacy of the Charter. This principle of primacy has been rejected for the EU Law by many arbitral awards. If we would extrapolate those awards to the Charter of the UN, the Charter would have no primacy.

?4 For instance, the Hague Convention on Service of Documents has been ratified for more than 40 third States and none of them has raised any problem with the disconnection in favor of EU Law.

?5 Article 5 of the New York Convention

This entry was posted on Friday, April 5th, 2019 at 4:58 am and is filed under Achmea, Energy Charter Treaty, European Union, Intra-EU ISDS
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