

SIMPLIFYING MATTERS

STOCKHOLM ENERGY CHARTER TREATY FORUM

Implications of the proposed Investment Court on dispute resolution under the ECT

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ISDS – a hotly debated topic

- Is it
 - A threat to the autonomy of EU law?
 - Creating "regulatory chill"?
 - Upsetting the balance of the playing field?
 - Shielding public policy matters from democratic control?
- If so
 - Will an "Investment Court System" make things better?

Putting ISDS into perspective

- The *de minimis* impact of investment treaty arbitration
- EU Member States are normally not respondents in investment treaty cases - examples
 - Austria: 0
 - Denmark: 0
 - England: 0
 - Finland: 0
 - Luxembourg: 0
 - The Netherlands: 0
 - Sweden: 0



Source: Investment Treaty Arbitration website

Treaty co-existence and Treaty overlap

- The Energy Charter Treaty
 - 52 signatory states worldwide
 - Including 27 of the 28 Member States
 - Including the European Union itself
- The Treaty on the Functioning of the European Union (TFEU)
 - 28 Member States as signatories
- The ICSID Convention
 - Approximately 160 signatory states, including all but one of the EU Member States (but not the European Union itself)



Investment Treaty News



EU Member States reject the call to terminate intra-EU bilateral investment treaties

By Damon Vis-Dunbar
10 February 2009

Commercial Arbitration

Eastern Sugar v Czech Republic

- Award of 27 March 2007; declaration in favour of jurisdiction

RJ Binder v Czech Republic

- *Ad hoc* proceedings under the UNCITRAL Arbitration Rules in Prague. Award on jurisdiction of 6 June 2007; declaration in favour of jurisdiction

EURAM v Slovakia

- *Ad hoc* arbitration under the UNCITRAL Arbitration Rules in the Hague; Award on 22 October 2012 in favour of jurisdiction

Achmea v Slovakia

- *Ad hoc* arbitration under the UNCITRAL Arbitration Rules in the Hague; Award on Jurisdiction of 26 October 2010; declaration in favour of jurisdiction. Setting aside before the Oberlandsgericht Frankfurt am Main dismissed in a decision of 10 May 2012

ECT is different from BIT:s as

- The European Union is a "Contracting Party"
- The ECT is a multilateral treaty
- The ECT includes EU Member States and non-EU Member States
- The ECT allows other treaties to prevail if more favourable to the investor (Article 16 (1) ECT)

Where has the (EC Treaty and) TFEU and the ETC clashed?

- Transitional issues (disputes in the electricity field, Hungary)
- New arrivals – disputes in the photovoltaic sector (Spain, Italy, Czech Republic, Bulgaria)

EDF v Hungary

- *Ad hoc* arbitration under the UNCITRAL Arbitration Rules in Zürich, Award for USD 107 million (non-public)
- A setting-aside action before the Federal Tribunal in Switzerland dismissed. The public policy aspect of EU's prohibition of state aid was invoked (*inter alia*). The arbitral award was upheld

AES v Hungary

- ICSID Case No ARB/07/22
- Award 23 September 2010, the claims dismissed

Electrabel v Hungary

- ICSID Case No. ARB/07/19
- Award 25 November 2015; the claims dismissed (with the "possible exception" in respect of an issue related to "Net Stranded Costs")

Charanne B.V. and Construction Investments S.À.R.L. v. Kingdom of Spain, SCC Arb. No. 062/2012, Final Award (21 January 2016)

- Intra EU-dispute under the Energy Charter Treaty concerning Spain's withdrawal of benefits in exchange for investment in the photovoltaic sector. The action was dismissed on the merits (with a partial dissent)
- *Amicus curiae* brief by the European Commission



Charanne B.V. and Construction Investments S.À.R.L. v. Kingdom of Spain cont.

- The EU Intra-EU arguments against jurisdiction
 - The investors were investors of the same REIO, i.e. supposedly within the EU;
 - The ECT includes an "implicit disconnection clause (Art 16(2) ECT and Art 31(1) VCLT);
 - The Parties proscribed from turning to any other forum than CJEU pursuant to 344 TFEU (which applies to parties to the TFEU).

Investment protection by domestic legal recourse

ATOM-MORATORIUM

E.on fordert Schadenersatz für AKW-Stillegung

Der Energiekonzern verlangt 380 Millionen Euro für die entgangenen Gewinne nach Fukushima. Die Bundesregierung hatte 2011 die Abschaltung mehrerer Kraftwerke veranlasst.

Source: ZEIT Online, 1 October 2014



EU-negotiated Trade and Investment Agreements

- The Canada – EU Comprehensive Economic and Trade Agreement (CETA)
- The European Union – Singapore Free Trade Agreement (EUSFTA)
- The Transatlantic Trade and Investment Partnership Agreement (TTIP)
- EU-Vietnam Free Trade Agreement (agreed text as of January 2016)

US-led Trade and Investment Agreements

- The Trans-Pacific Partnership (Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, Vietnam, Chile, Brunei, Singapore, New Zealand)

Does the present system of investment protection serve as a custodian of international public policy?

- De-politicized
- Impervious to lobbying
- Devoid of vested interests
- Non-aligned
- Strictly circumscribed waiver of immunity
- Minimising sovereignty compromise
- Cost efficiency