The Compliance of Investment Protection Mechanisms in Free Trade Agreements with EU Law

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Outline of the Presentation

- Brief review on the state of play of international trade and investment agreements, with respect to investor/state dispute settlement
- The specificity of the EU legal system and the prerogatives of the CJEU
- The significance of the recent decision of the CJEU on Achmea v. Slovakia
- The issue of compatibility of CETA with primary EU law
- The proposal of a multilateral investment court as a possible remedy
- The way forward

The Fragmentation of International Investment Law

- The proliferation of bilateral investment agreements (including intra-EU agreements)
- The EU approach to bilateral and regional Free Trade agreement with an investment component (CETA, Singapore, Vietnam, Japan…)
- Plurilateral and multilateral approaches (WTO, UNCTAD, OECD, draft MAI)
- Proposal of a multilateral investment court

The Unbalanced Nature of International Investment Agreements

- Investment protection v. the right to regulate
- ISDS v. the rule of law
- Investor treatment v. investor obligations
- The missing link of sustainable development

Carve-outs (from the Treaty and/or ISDS)

- Measures taken for purposes of public order or national security (considered self-judging)
- Measure taken for the purpose of affirmative action (positive discrimination) in favour of disadvantaged groups
- Intellectual property rights protection: measures taken in conformity with TRIPs obligations such as compulsory licencing cf. CETA Art 8.12 (6): "*For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS agreement and Chapter 20 (Intellectual Property) of CETA do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS agreement or Chapter 20 does not establish an expropriation.*"
- Financial services, in particular prudential measures

The Challenge of Investor/State Dispute Settlement

- Problems of Legitimacy of ad hoc arbitration
- The Investment Court System of CETA as a permanent mechanism of arbitration
- Review and enforcement of arbitral awards

The Unique Nature of European Law

- Autonomy
- Primacy
- Unified Interpretation
- The prerogatives of the CJEU
- The Mechanism of preliminary rulings

Issues of Compatibility

- Intra-EU investment agreements
- The Energy Charter Treaty
- New EU Free Trade agreements
- The proposed World Investment Court

Achmea v. Slovakia as a Landmark Decision

- The Achmea preliminary ruling: key facts and elements of procedure
- The conclusions of the AG
- Key holdings of the court decision
- The implications for existing and future agreements

The Court's Central Holding in the Achmea Case

- "In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure judicial protection of the rights of individuals under that case law…"
- "In particular the judicial system thus conceived has as its keystone the preliminary ruling procedure provided for in Art267 TFEU, which by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member states, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well, as ultimately the particular nature of the law established by the Treaties"
- "A tribunal such as that referred to in Art 8 of the BIT (Netherlands/Slovakia) cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Art 267 TFEU and is therefore not entitled to make a reference for a preliminary ruling."

Implications of the Achmea Decision

- For all intra-EU BITs having an ISDS mechanisms
- For the application of the Energy Charter Treaty involving the EU and its Member States (except Italy) as contracting parties
- For the RTAs (with investment protection) in process (under exclusive EU competence and mixed competence EU/Member States
- For the proposal of a World Investment Court

The Referral of CETA to the CJEU

- Provisional application of CETA exclusive of investment protection and ISDS
- Referral by the Belgian Federal Government in compliance with an internal Belgian-Belgian agreement concluded during the process of signature of CETA (Art 218 (11) TFEU)
- Arguments put forward:
- Incompatibility of the Investment Court System (ICS) with the European Charter of fundamental rights
- Incompatibility with the primacy and autonomy of European law and the prerogatives of the CJEU

The CETA Investment Court System as a Permanent Structure for Arbitration

- Permanent panel of judges
- Established by Section F of Chapter 8 of CETA
- Considered to be independent and impartial
- Using contradictory proceedings
- Application of legal rules (CETA and as a supplement the applicable European and Canadian law)
- Taking mandatory legal decision
- Conceived as a model for all future EU treaties with an investment component as well as for a future World Investment Court
- Provides for an appeals mechanism
- No obligation to obtain preliminary rulings of the CJEU on questions of interpretation of EU law

The Issue of Incompatibility of ICS with the Fundamental Principle of Equality (European Charter of Fundamental Right forming an integral part of the TFEU)

- Privileged access for foreign investors (of the CETA Treaty Partners) to a dispute settlement system more favourable than the procedures applying to national investors: provisions for fair and equitable treatment, indirect expropriation and possibility for treaty shopping
- No compelling reason for differential treatment in favour of foreign investors: no evidence that ISDS has a real impact on investment flows between countries with developed legal and judicial systems

The Incompatibility of ICS with the Primacy and Autonomy of European Law

- Relevance of EU law interpretation for CETA investment protection adjudication
- Is ICS capable of requesting preliminary rulings by the CJEU on the interpretation of European law?
- CETA does not provide any obligation of ICS to request such rulings in accordance with Art 267 TFUE which would be binding on its future proceedings
- Applicability of Achmea holding to ICS

Implications for the World Investment Court

- Absence of fair multilateral rules for investment
- Substantial differences between bilateral/regional treaties
- No evidence that this institution is needed for treaty relations between states with developed legal and judicial systems
- Usefulness of WIC (including the appeals mechanism) for dispute settlement under existing RTA/BITs?
- Usefulness for particular high risk/long term investment contracts between governments and investors (on the basis of individual contractual consent)?

The Political Economy of ISDS/ICS

- Increasing existing inequalities in favour of big multinationals
- Undermining the rule of law
- The problem of corporate capture of regulatory processes
- Issues of national sovereignty, parliamentary control and public opinion
- Constitutional challenges
- Mismatch between official positions and public opinion

Extracts of the Opinion of the German Association of Judges (Deutscher Richterbund - DRB)

- *"The German magistrates association rejects the proposal of the European Commission to establish an investment court (within the framework of the Transatlantic Trade and Investment Partnership –TTIP)…"*
- *"The DRB sees neither a legal basis nor a need for such a court…"*
- *"The creation of special courts for certain groups is the wrong way forward…"*
- *"Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts. As such the ICS emerges not as an international court, but rather as a permanent court of arbitration."*

Conclusions

- More efforts are needed to come up with a fair and balanced model for international trade and investment treaties, privileging multilateral solutions;
- Legal certainty is key but cannot be achieved through ad hoc arbitration, inspired by commercial arbitration procedures;
- The ICS included in CETA is an improvement but does not meet the fundamental requirements of equal protection of all types of investors nor is compatible with the jurisprudence of the CJEU on the primacy and autonomy of European law;
- Pending the proceedings before the CJEU according to 218(11) of the TFUE, the ratification of CETA should be put on hold;
- Chapter 8 on Investment Protection and Dispute Settlement of CETA should be re-examined and consideration be given to alternative mechanisms for dispute settlement for all types of investors, through judicial process as well as mediation and conciliation;
- ISDS in its present form is not a necessary component of an effective investment policy;
- The EU Commission as well as Member States would be well advised to consider alternatives and take into account the views expressed by civil society organisations in its actual and future treaty policy.