Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues

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According to Article 207 (1) of the so-called Lisbon Treaty the European Union ("the EU") has gained explicit exclusive competence with regard to Foreign Direct Investment ("FDI").[1] However, the very precise meaning of FDI and, as a consequence, the precise extension of such new EU competence remains unclear.[2] This already has the potential of creating the surreal situation in which scholars and commentators have to take a position and argue about something which is left undefined by the legislator itself.

Because of the usual complex EU dynamic and the peculiar relationship between the different EU institutions there is the risk that the precise coverage of the EU new FDI competence will remain unclear for a long time into the future. Distinguished scholars have argued that there is the real risk that the Commission and the Council may end up fighting on the issue with the matter ultimately being sent to the Court of Justice of the European Union.[3] As with many things in life, what from a theoretical point of view is considered as working very well might in practice be working in a much less efficient manner.

Such a surreal situation therefore makes one wonder whether it is positive that FDI has been transferred in the area of explicit EU competence by the Lisbon Treaty in the first place. It also calls into question the efficacy in the year 2012 of the rather dated and old EU governance system as applied to investment matters.

[1] EU, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ C 306/1.

[2] For an in-depth analysis of the legal meaning of the FDI concept see Burgstaller, The future of Bilateral Investment Treaties of EU Member States, in: Bungenberg/Griebel/Hindelang (eds.), *European Yearbook of International Economic Law / Special Issue, International Investment Law and EU Law,* 2011, pp. 62–63.

[3] Kuijper, Foreign direct investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy, From the Board, Legal Issues of Economic Integration 37 (2010) 4, p. 270.

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It is of course normal and common that a primary and quasi constitutional source of EU law such as the Lisbon Treaty does not define in detail precisely what is to be understood by FDI. What is less normal however is that the same Member States that contributed to the drafting of the Treaty as well as the EU institutions, such as the Commission, the Council, and the Parliament are incapable of coming to a common interpretation of such a basic concept and which is constitutional in nature under EU law. Bearing in mind the above, the present paper discusses selected procedural and jurisdictional issues related to investment arbitration in the EU after the Lisbon Treaty from a broader arbitration related perspective. While of course examining in-depth, where appropriate, the relevant sources of EU law and case law, the present work is framed without account being taken of the different legal basis under municipal (EU) law concerning intra- and extra-EU Bilateral Investment Treaties (BITs) and arbitrations.

The author argues that the municipal law differentiations between the BITs and future arbitrations under the new Common Commercial Policy FDI competence and the internal market intra-EU one is illogic and devoid of purpose. While of course justified under an EU law perspective, such a dichotomy is, however, incomprehensible from the perspective of arbitration and public international law.

As will be demonstrated below, many of the problems related to the dispute settlement mechanism and possible solutions to those problems at the intra and extra EU BITs levels overlap or are, at least, partially similar. Therefore while under EU municipal law intra-EU arbitration problems fall squarely outside the intended coverage of the present commentary on the Common Commercial Policy, the author nonetheless considers it appropriate to examine them also.

The Intra-EU Investment Arbitration Saga: Are They All Wrong?

It is well known to investment arbitration and EU law specialists, that currently there are various active arbitration proceedings concerning so-called intra-EU BITs. In practice this means that an EU investor of a given Member State e.g. a Dutch investor is suing an EU Member State e.g. the Slovak Republic, basing its claims on the relevant BIT between the Netherlands and the Slovak Republic. Such kind of intra-EU arbitration has taken and continues to take place under different arbitration rules and institutions, namely inter alia SCC, UNCITRAL as well as ICSID.[4] It is worth noting from an international public law perspective that under

[4] See Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration rules available at http://www.sccinstitute.com/skiljedomsregler-4.aspx; Convention on the Settlement of Investment Disputes between States and National of other States (ICSID Convention) available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; United Nation Commission on International Trade law (UNCITRAL) arbitration rules available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html. See also International Chamber of Commerce (ICC) arbitration and ADR rules available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf, as well as the Permanent Court of Arbitration (PCA) system at http://www.pca-cpa.org/showpage.asp?pag_id=1028.

the latter set of rules, it is not possible to challenge the arbitration tribunal award under the relevant Courts of the EU Member States. This is because Article 52 of the ICSID Convention only provides the possibility of challenging an ICSID award in an annulment proceeding before an ICSID annulment Committee based on very limited grounds of annulment. This is made even clearer by Article 53 of the Convention which lays down that an ICSID award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the said Convention.

Until now, the situation described above has almost always been dealt with by scholars and by EU institutions as one related to the compatibility of such intra-EU BITs arbitrations with EU law only.[5] The European Commission has in the past decided to intervene as *amicus curiae* during some intra-EU arbitration, namely inter alia ICSID arbitration proceedings against Hungary (*AES v. Hungary* and *Electrabel v. Hungary*) in order to defend what it perceives to be the primacy of EU law over investment law and arbitration.

The Commission's reasoning in the above mentioned cases has been reported and commented by Christophe von Krause and Florian Quintard.[6] The two authors in their contribution also duly mentioned the Commission's intervention along the same lines in the *Eureko v. Slovak Republic* case and argued that "This development is one of several recent manifestations of the Commission's opposition to the application of BITs between Member States of the European Union". The European Commission's reasoning is also based on policy considerations related to equality of rights and the duties of all citizens of the EU which, in the Commission's views, would be jeopardized if some of them could benefit of more favourable substantive rights than others just because they belong to an EU Member State that has intra-EU BITs in place. It has therefore been reported that the European Commission has been pushing for the denouncement of all intra-EU BITs, but (thankfully in the view of the author) so far without success.[7]

Against the above background, there are various aspects of the intra-EU BIT arbitration saga that so far have been underestimated or not commented on at all. As anticipated above, while technically speaking under EU law they do not fall within the ambit of the Common Commercial Policy, it is none the less worth briefly examining them because they have an indirect link with some jurisdictional problems linked to the new EU FDI policy concerning BITs between EU Member States and third countries.

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[5] Podestà, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, The Law and Practice of International Courts and Tribunals 8 (2009) 2, p. 225; Lavranos, New developments in the Interaction between International Investment Law and EU law, The Law and Practice of International Courts and Tribunals 9 (2010) 3, p. 431.

[6] See: http://kluwerarbitrationblog.com/blog/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/.

[7] See Lavranos, New developments in the Interaction between International Investment Law and EU law, The Law and Practice of International Courts and Tribunals 9 (2010) 2, p. 431 (432); Wehland, Intra-EU Investment and arbitration: Is EC Law an obstacle, ICLQ 58 (2009) 2, p. 297.

Fiction vs Reality?

The basic unwritten and unspoken assumption of most analyses performed to date by EU lawyers and the European Commission concerning the intra-EU arbitration issue is that in real life EU law has primacy over the domestic law of the Member States. Also, another basic unspoken assumption is that all citizens of the European Union would have the same possibility of asserting their EU law rights before the various national Courts of the Member States and therefore they would be treated equally in the application of EU law. It should not matter whether one has the same claim before a Court in the United Kingdom, in Italy or in Slovakia: the assumption is that his–her rights under EU law should be protected in the same manner. In turn, the Supreme Courts of the Member States in the same manner, should be prepared, if necessary to refer a preliminary ruling to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

Of course if the above was true and accurate those arguing that intra-EU BITs would discriminate between EU citizens of the different Member States might have a fair point. One of course could still argue that such BITs would be *EU law plus* from a substantive rights point of view, but that would be a different story. The problem is, however, that the assumption of the equality of access to justice in all Member States is simply untrue and *prima facie* inaccurate.

It is well known to those practicing international trade law in different EU Member States that the Courts and Tribunals of the various EU Member States have different approaches, training, and policies as far as the application of EU law is concerned.

Suffice it to consider, for instance, an area of the Common Commercial Policy such as anti-dumping and anti-subsidies which has been EU competence for decades. A recent in-depth analysis of the judicial review applied by the EU judicature in such areas of law by both the centralized EU Courts (General Court and Court of Justice) and by the Courts of the Member States proves beyond reasonable doubt that something is not working as it should be.[8]

In short, the authors of that study found various instances in which the same principles and EU law Regulations and rules in the trade law field have been applied in the most disparate manner by the Courts of different Member States without the case being referred to the Court of Justice of the European Union. At the same time, the authors identified some procedural bars to reaching the Supreme Court present in some EU Member States which *de facto* render difficult the application of the provisions of Article 267 TFEU in certain Member States.

Against the above background, it is unclear what the European Commission has done so far, from an enforcement perspective, under the so-called infringement proceedings in the Common Commercial Policy field in order to guarantee **substantive equality of arms** between EU Citizens as far as judicial proceedings are concerned.

[8] Vermulst/Rovetta, Judicial Review of Anti-dumping Determinations in the EU, Global Trade Customs Journal 7 (2012) 5, p. 239.

Despite the absence of any in-depth analyses on that concept in other areas of EU law more linked to the internal market, such as EU customs law, there are signs according to which the situation would be the same. In such areas, however, the EU Commission has been more willing, at least in some isolated cases, to tackle EU Member States for the malfunctioning of their judicial systems.

On 24 November 2011 the European Commission announced that it had requested Italy to implement proper appeal procedures on requests for remission or reimbursement of customs duties. The reason was that Italy, in certain cases, did not allow a judicial review for negative decisions relating to requests for the remission or reimbursement of customs duty.[9] One of the main reasons that prompted the European Commission's intervention was the fact that the Italian Supreme Court had decided, in splendid isolation, on various issues of EU law in a manner at variance with the Court of Justice of the European Union and the courts of other Member States without feeling the need for making a preliminary reference to the Court of Justice itself.

If one takes the above into account, there are qualified indications covering different areas of EU law according to which the courts and tribunals of the different EU Member States would, at least in certain cases, be working differently from each other and causing **substantive discrimination** between EU citizens under EU law. Turning now to intra-EU and investment arbitration matters, the reality is that intra-EU investment arbitration is also relied upon by EU investors to offset any substantive difference of treatment offered by the different courts and tribunals of the EU Member States. Another reason for such an approach is, of course, also the potentially broader and more favourable substantive BIT rights coverage when compared to EU law.

The European Commission and EU law purists' analysis, which is perhaps correct on paper and from a formal point of view under EU law, however, is incorrect when seen from a broader perspective. If future scholarly works or studies performed by the European Commission should prove that the problems identified above are also present in the intra-EU arbitration arena then the non-discrimination theory put forward by the Commission would fall because it would have been based on an unspoken incorrect premise.

In fact intra-EU BITs and arbitration are to be seen as a welcome tool to overcome and offset substantive inequality between EU citizens as caused, at least in part, by the judiciary of the different Member States. Assuming *arguendo* that such a situation would still be judged in breach of EU law, the author argues that this would be a particularly efficient breach of EU law that should not be remedied but instead encouraged.[10]

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[9] See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1423&format=HTML&aged=0&language=EN&guiLanguage=en.

[10] See in general on the efficient breach theory in international law Posner/Sykes, Efficient breach of International Law: optimal remedies, "legalized non-compliance" and related issues, Stanford Law and Economic Olin Working Paper no. 409 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780463##.

Is the Way Out a Jurisdictional One?

Under EU law in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU) national courts have the possibility, or if they are the court of last instance the duty, of referring matters of EU law to the Court of Justice of the European Union.[11]

However, in 1982 with the landmark *Nordsee* case the Court of Justice clarified that arbitral tribunals established by agreement of the parties are not entitled to make a preliminary reference.[12] The Court of Justice clarified in *Nordsee* that an arbitral tribunal constituted pursuant to an arbitration agreement is purely private in nature because its authority derives only from party autonomy and therefore it is not a "court or tribunal of a Member State" within the meaning of current Article 267 TFEU.[13]

It is now well settled that an arbitration tribunal cannot make a preliminary reference where the parties to an agreement are neither legally nor actively obliged to have their dispute decided by arbitration, and where the authorities of the Member States in question are neither involved in the decision to use arbitration, nor required to intervene automatically in the proceedings before the arbitral tribunal.[14]

The Court of Justice in *Eco Swiss* reconfirmed the validity of the *Nordsee* doctrine and it also clarified that where questions of EU law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award. The Court of Justice also explained that only at this stage of the procedure is it for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court of Justice of the EU to obtain an interpretation or assessment of the validity of provisions of EU law which they may need to apply when reviewing an arbitral award.[15]

The correctness of such an approach by the Court of Justice concerning commercial arbitration has been criticized by certain scholars.[16] Advocate General Saggio, in his Opinion in the *Eco Swiss* case conceded that a possible alternative approach would, of course, be to allow arbitrators to make references for a preliminary ruling.[17]

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[11] See on the preliminary ruling mechanism Broberg/Fenger, *Preliminary References to the European Court of Justice*, 2009.

[12] ECJ, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG.*, [1982] ECR 1095.

[13] See for a detailed commentary concerning the implications of *Nordsee* for arbitration matters Stylopoulos, *Arbitrators Judges or Not? An EC approach*..., available at http://kluwerarbitrationblog.com/blog/2009/03/09/arbitrators-judges-or-not-an-ec-approach%E2%80%A6/.

[14] Broberg/Fenger, *Preliminary References to the European Court of Justice*, 2009, p. 80.

[15] ECJ, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I 3055, at 32–34.

[16] Prechal, 'Community Law and National Courts: The lessons from Van Schijndel', in Common Market Law Review 35 (1998) 3, p. 681.

[17] Opinion of Mr. Advocate General Saggio in ECJ, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I 3055 at 32 (with footnote 18).

It would seem that there are good reasons to argue that the Court of Justice approach is probably wrong. By preventing commercial arbitration tribunals from making preliminary rulings on the interpretation or validity of EU law the Court of Justice contributed to rendering the application of EU law less effective. For the latter to be properly applied one will have to wait for an interim or partial award to be issued and then challenge such an award, something that seems to be illogical and impractical. By contrast if arbitral Tribunals could immediately refer a given EU law matter to the Court of Justice, then EU law would be applied immediately in a very effective manner.

That being said on commercial arbitration, one wonders whether the above-mentioned case law of the Court is applicable to investment arbitration tribunals sitting within the EU territory and dealing with intra-EU BITs. Contrary to what happens with the vast majority of commercial arbitration Tribunals, they are not established by the will of the parties, namely the investor and the defending EU Member State. Instead their existence is foreseen in a BIT negotiated and concluded by two EU Member States which has the force of law of a fully fledged public international law Treaty both under EU law and the Vienna Convention on the Law of Treaties. In other words, contrary to what happens with commercial arbitration tribunals established by contract, investment arbitration tribunals derive their jurisdiction from the law, namely the relevant BIT which foresees specific dispute settlement provisions.

Of course then depending on the relevant BIT and the factual situation at issue arbitration might take place under different sets of rules or procedures such as UNCITRAL, ICSID, SCC, PCA, or even on an ad-hoc basis. Furthermore and as anticipated above, the relevant BIT is not a contract negotiated between the investor and the relevant Member States but has instead the force of law for both. It would therefore seem that there is no reason why the *Nordsee* principles should bar an intra-EU investment arbitration tribunal from referring an EU preliminary law question to the Court of Justice of the European Union under Article 267 of the TFEU.

If such a solution was adopted many of the current intra-EU BITs arbitration problems could be solved at an early stage instead of obliging the EU Commission to intervene before arbitral tribunals with third participants submissions. The same holds true concerning the relevant defending Member State's need to challenge an award before a domestic court to invoke EU law. This, at least in theory, would also solve the problem of the absence of judicial review of ICSID arbitration awards as far as intra-EU investment arbitrations are concerned.

Against the above background one has, however, to concede that the above proposed solution has one important shortcoming. It would, in fact, subject the investment arbitration tribunal jurisdiction and investment arbitration law to review by the Court of Justice and intra-EU investment arbitration law to EU law. It is however worth recalling that in any event EU law matters discussed in intra-EU ad-hoc, ICC, SCC or UNCITRAL arbitrations would probably reach the Court of Justice anyway when the arbitrators' awards is challenged before EU domestic Courts via preliminary ruling by those Courts. Therefore it seems practical and fair "anticipating the EU law problem" by empowering arbitral tribunals to make preliminary rulings to the Court of Justice if they feel it is appropriate.

By contrast concerning ICSID intra-EU arbitrations it would seem that the proposed solution, although attractive in theory, would in practice be inappropriate because it would run against Articles 52 and 53 of the ICSID Convention. The latter articles prohibit any non-ICSID form of review of a given arbitral award.

It is therefore proposed to consider that all intra-EU investment tribunals with the exclusion of those under ICSID would have the possibility of referring a preliminary ruling to the Court of Justice of the European Union. It has to be conceded though that this proposed approach is probably problematic from the point of view of both EU law and investment arbitration. At the same time, however, it is certainly better than the current chaos on intra-EU BITs that exists and, from a practical perspective, the fact that it does not perfectly match with classical EU or investment law is an encouraging starting point. As with many things in life, from time to time solutions which are problematic from a theoretical perspective may prove to work very well in practice.

Common Commercial Policy Selected Jurisdictional Issues Related to Investment Arbitration

The above discussion concerning jurisdictional related problems in intra-EU investment arbitrations may also serve as a useful context in order to examine the issue of investment arbitrations related to the new FDI EU competence. While in the EU a highly politicized debate between stakeholders, the European Commission, the European Parliament and the Member States is ongoing concerning the precise substantive coverage of the said new EU competence, the very important jurisdictional and dispute settlement issues are not debated in the same manner.

A useful starting point to better understand why such jurisdictional and dispute settlement matters are so important, probably much more important even than the substantive FDI coverage, is the contribution of Nikos Lavranos in the present volume to which reference is made here.[18] The author agrees with Lavranos' high profile legal analysis the conclusion of which should, however, worry the EU institutions. He, in the view of the author very correctly, argues that ". . . .only very limited room is left by the ECJ to Member States and the European Institutions for establishing a properly functioning independent investor to state arbitration system within the European legal order, which, however, is exactly what is needed for the future of European investment policy". However, the author thinks that what is needed is an investor-to-state arbitration system which, contrary to intra-EU arbitration matters, is not linked to the European legal order in the sense of not being subject to the Court of Justice jurisdiction.

[18] Lavranos, Is an international investor-to-state arbitration system under the auspices of the ECJ possible?, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973491.

The Real Decision Making Power Is in Luxembourg Not in Brussels: Policy Perspective Chaos?

While, as anticipated above, discussions on the substantive FDI coverage are currently ongoing in Brussels, in the quiet of the Kirchberg plateau in Luxembourg the Court of Justice of the European Union has probably already indirectly decided the fate of FDI arbitrations.[19]

Or to put it differently, the Court has *de facto* rendered impossible the establishment of an arbitration system which is independent from EU law and from its ultimate jurisdiction basing its reasoning on primary EU law. By doing so it has taken away from the Commission, the Parliament and the Member States any decision making power related to such an issue.

In Opinion 1/09, dealing with the issue of a unified patent litigation system the Court of Justice recalled that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.[20] The Court also recalled the well established principles that the essential characteristics of the European Union legal order are, in particular, its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[21] Past case law of the Court of Justice was of the view that the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.[22] The Court has also clarified in the past that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order.[23]

However, despite the above it then found in Opinion 1/09 that the envisaged agreement creating a unified patent litigation system was not compatible with the provisions of the founding EU Treaties. This was because the international court envisaged in the draft agreement at issue on patents was to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law,

[19] ECJ, Opinion 1/09, *European and Community Patent Court,* [2011] ECR, n.y.p.

[20] See also ECJ, Case 26/62, *van Gend & Loos*, [1963] ECR 1, 12 and ECJ, Case 6/64, *Costa*, [1964] ECR 585, 593.

[21] See ECJ, Opinion 1/91, [1991] ECR I-6079, paragraph 21.

[22] See ECJ, Opinion 1/91, [1991] ECR I 6079, paragraphs 40 and 70.

[23] See ECJ, Opinion 1/00, [2002] ECR I-3493, paragraphs 21, 23 and 26.

in particular regulations and directives in conjunction with which that regulation would, when necessary, have to be read, namely provisions relating to other bodies of rules on intellectual property, and rules of the TFEU concerning the internal market and competition law.[24] Likewise, such a newly established Patent Court might have been called upon to determine a dispute pending before it in the light of the fundamental rights and general principles of European Union law, or even to examine the validity of an act of the European Union.

It is worth recalling that in order to avoid any incompatibility with EU law the drafters of the unified patent litigation system had subjected it to the Court of Justice jurisdiction by allowing the possibility for the newly established patent Court to refer preliminary rulings to the Court of Justice. That however, in the view of the Court of Justice was not enough to render it compatible with EU law.

Bearing the above in mind, let us now examine what margin for manoeuver is left by EU law for the establishment of an independent investment arbitration system concerning the newly established FDI EU competence. It is well settled in investment arbitration matters that an investment tribunal can be called upon to examine and interpret a domestic law legislative act by the defending Member States. Now if the defendant is an EU Member State or in the future the EU itself one can imagine many situations in which a third country investor could argue that a given EU secondary (or even primary) law act, like a regulation or a directive, has impaired his investment rights as protected by the relevant BIT.

In such a situation the investment tribunal constituted to examine the case would inevitably have to perform an analysis and interpretation of the relevant EU law provisions at issue. However, from an EU domestic law perspective, this would be forbidden by the case law of the Court of Justice and in particular by the principles established in Opinion 1/09. It is true that in the area of trade law the EU action has been regularly scrutinized before WTO Dispute Settlement Panels and Appellate Body for many years now, but to counterbalance such "external scrutiny" and to protect the EU legal order and probably also itself the Court of Justice has generally denied direct effect to WTO law in the EU legal order.[25]

This would not be possible concerning investment arbitration matters whose unfavourable arbitral awards would inevitably have to be applied and complied with by the defendant Member State or, in the future, by the EU by paying compensation to the winning investor. Furthermore, after Opinion 1/09, even should a third country agree to negotiate a BIT or any other procedural rules which would foresee the possibility by the arbitral tribunal to refer a preliminary ruling to the Court of Justice, it would not be enough to make it compatible with EU law.

[24] ECJ, Opinion 1/09, *European and Community Patent Court,* [2011] ECR, n.y.p., para 78.

[25] See on the recent developments of the (lack of) direct effect doctrine Bronckers, From "direct effect" to "muted dialogue": recent developments in the European courts' case law on the WTO and beyond, Journal of International Economic Law 11 (2008) 4, p. 885.

As EU law currently stands after Opinion 1/09, the author fully shares Lavranos' conclusion that in order to overcome and supersede the resistance by the Court of Justice a modification of the EU founding treaties is necessary.[26]

What Kind of Investment Arbitration Mechanism for the Future?

What has been described above is worrying in the sense that while the Commission, the Parliament and the Member States are currently discussing huge and complex theoretical policy perspectives related to the new FDI competence in Brussels, the Court of Justice has already indirectly potentially decided what the EU will (not) do concerning the future investment arbitration mechanism for extra-EU BITs.

This is a perfect example of how, in fact, the EU system has tended to work in many areas in the last few years: many words and cultivated discussions in Brussels but hard facts in Luxembourg. As we have seen above, some authors including the present one are of the view that it is necessary to amend the EU Treaties in order to establish a proper investment arbitration mechanism for extra EU-BITs.

The next question that arises is what kind of amendment is needed? The answer to that question probably is that if one wants to establish a proper and well functioning investment arbitration mechanism the latter has to be divorced from any procedural and judicial link with EU law and, more importantly, with the Court of Justice of the EU.

As has been shown above, the establishment of such a link might be justified for intra-EU arbitrations but it is not at all logical for extra-EU ones. The reason for such a proposed choice is to continue the good old tradition of independent investment arbitration Tribunals linked neither with the investor nor the host State's Courts which on balance has worked well up to now.

It is probably better to pay the price of continuing to have fragmented but independent case law by arbitral tribunals rather than to have a monolithic one under the auspices and final control of the Court of Justice. This is because there is the risk, as seen in Opinion 1/09, that the latter would "pollute" investment arbitration with EU law concepts and goals thereby rendering investment tribunals dependent on the will of the Court of Justice.

The author does not see any reason why a third country should accept an "independent" arbitration system which would be subject, directly or indirectly, to the Court of Justice jurisdiction, i.e. to the jurisdiction of a domestic Court of the other contracting party.

The European Commission is currently reflecting upon what kind investment arbitration mechanism it would like to establish, but the author argues that following Opinion 1/09 it has very limited policy space on the issue. In the meantime, what should investment tribunals called upon to decide in extra-EU BITs arbitrations do if an EU law measure-issue is at stake during the arbitration?

[26] See Lavranos, Is an international investor-to-state arbitration system under the auspices of the ECJ possible?, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973491.

The answer to that question is very simple: such Tribunals should continue to act in an independent manner and simply ignore the EU domestic investment policy discussions and problems as they have done to date. Such Tribunals have a duty to the relevant BIT and to investment law, not to EU law and its institutions. Considering how things are going nowadays in the EU there is a good chance that while people in Brussels continue their interesting discussions for years, such tribunals may continue working quietly for a longtime to come.[27] That is of course, unless someone in Luxembourg wakes up one morning and decides that this would be forbidden by the EU Treaty for some mysterious reasons or by some unwritten legal principle of EU law.

Conclusion

The situation concerning the way investment arbitration works as a whole in the EU is worrying. This is because both at the internal market intra-EU BITs level as well as at the commercial policy extra-EU BITs level the clash between investment arbitration law and practice and EU law principles is creating serious, practical, problems.

The tendency of EU law and the Court of Justice to claim primacy over any other legal system does not help in finding a balanced solution to such problems. While for intra-EU BITs a partial solution might come in the form of a preliminary reference by non-ICSID arbitration tribunals to the Court of Justice of the EU, this is not possible or desirable for extra-EU FDI investment arbitrations. The debate going on at EU institutional level is concentrating mostly on many substantive FDI issues but up to now fails to take due account of the fact that, as things stand today, the EU is not in a condition to set up any proper investment arbitration system concerning its FDI competence.

The Court of Justice, with Opinion 1/09, has made clear to all that it is the ultimate policymaker of the Union and that it is the supreme and sole decision making power insofar as judicial matters are concerned. As things stand today in the aftermath of Opinion 1/09, even assuming for the sake of argument that the ICSID Convention could be modified to allow participation by international organizations, the EU would not be able to adhere to it.

One is therefore left with the strong doubt, and this is of course mere provocation by the author, that probably it would have been better to have left the FDI competence in the hands of the Member States instead of transferring it to EU level. Again, what in theory seems to be an optimal solution, in practice is proving to be a serious problem. The fault however is not with the Commission and the other EU Institutions. The fault lies with the drafters of the Lisbon Treaty, namely the

[27] Of course this would not be the case for those tribunals established in the context of EU's FTA investment chapters.

Member States. Of course in the long run the EU will find a proper solution to such problems and establish an efficient working system. However, in the year 2012 and in the current globalized world the long run is no longer an option. The world and emerging countries move very fast, and the EU will have to do the same or inevitably lose power and influence. The EU classical method of policymaking seems to be struggling with reality, at least insofar as investment arbitration law is concerned.