

Model EU Bilateral Investment Treaty and the Reform of International Investment Protection Regime.

Background

In the light of the recent changes to the EU law brought by the Lisbon Treaty 2009, this research project seeks to focus on issues relating to the EU's Common Commercial Policy (CCP) and the impact that the latest EU Treaty amendments may have on the future of international investment law. The primary area of the analysis will be the inclusion of matters relating to Foreign Direct Investment (FDI) in the scope of Article 207 of the Treaty on the Functioning of the European Union (TFEU). The main research questions concern the reform of international investment protection regime which is likely to be triggered by the future emergence of the model EU Bilateral Investment Treaty (BIT).

The official Communication¹ released by the European Commission in 2010 sets the direction for the new EU common investment policy. The main objectives of this new policy are to improve foreign investment rights for all European investors and to attain a level playing field in investment protection standards across all 27 member states². The Commission also aims to achieve a greater degree of integration between investment liberalisation and investment protection³, as well as implement 'state-of-the art' investor state dispute settlement system⁴.

In relation to the substantive rules that the EU seeks to include in its future BIT the Commission lists standard provisions commonly found in investment protection agreements, such as: 'most-favoured-nation treatment', 'national treatment', 'fair and equitable treatment', 'full security and protection', 'umbrella clause', protection against unlawful expropriation, as well as free capital and payments transfers⁵. Moreover, consistently with the objectives of the TFEU, and in line with the current trends in the treaty practice,⁶ the EU seeks to use its new investment protection agreement to pursue some of its public policy objectives relating to protection of the environment, labour standards, cultural diversity, consumer protection and human rights⁷. The Commission also proposed ambitious amendments to the investor-state dispute settlement system and expressed a wish for the EU to become a member of the Convention on the Settlement of Investment disputes between States and Nationals of Other States (ICSID)⁸.

The Commission has a challenging task ahead of not only finding a consensus amongst the investment protection rules contained in almost 1200 BITs, but also improving the effectiveness of currently existing investment protection regime. Since the BITs concluded individually by the EU member states constitute over a half of the investment agreements currently in force⁹ the development of the model EU BIT is expected to have major implication on the future of investment protection regime worldwide.

Research Questions

Jan Kleinheisterkamp wrote that the "the entry into force of the Lisbon Treaty in 2009 has shaken the European landscape of investment treaty law"¹⁰, paraphrasing this statement this research project seeks to examine to what extent the Lisbon Treaty changes will 'shake' international landscape of investment treaty law. Therefore, the main research question concerns the reform of the customary investment protection rules that will be brought by the EU's future model BIT.

In addition, the research will explore matters concerning EU's future involvement in the investor-state arbitration. Since, to date the EU has not played a major role in this area, which was acknowledged by the Commission in its official Communication¹¹, there are number of technical difficulties relating to the EU joining ICSID Convention¹², which is

¹ The official Communication from the Commission states that the Union's future investment policy will integrate both investment liberalisation and protection and will incorporate investor-state dispute settlement mechanism. Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European International Investment Policy', (Communication), COM (2010) 343 final, 5

² Ibid, 6.

³ Ibid, 5.

⁴ Ibid, 10.

⁵ Ibid, 8-9.

⁶ Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, (OUP 2008), 24-26.

⁷ Communication, n 1, 9.

⁸ Ibid, 10.

⁹ Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?', (2012) 15(1) EJIL.

¹⁰ Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra-And Extra-EU Dimension of the Energy Charter Treaty', (2012) EJIL, 85.

¹¹ Ibid, 10.

currently only open for signature by the states¹³. A possible accession of the EU to the ICSID convention or emergence of a new and bespoke system for settling disputes between EU investors and third states will also have a significant impact on the customary international law for investment protection.

Importance of the Research

The proposed EU's investment protection agreement will be an important milestone in the evolution of the customary international investment law. Firstly, the EU's model BIT will be a consolidation of investment treaty law contained in over 1200¹⁴ agreements signed by 27 European States over the past 54 years¹⁵. The success of this initiative would substantiate a thesis proposed by Lowenfeld¹⁶ and elaborated on by Alvarez¹⁷, that the "BIT movement reached consensus" and the substance of international law has changed with the existing investment protection agreements becoming almost identical¹⁸.

However, the model EU's investment protection agreement will not only crystallise the common standards found in international investment law practice, thus define the substance of international investment protection regime, it could also be a catalyst for future reform.

As recognised by the European Commission the success of its investment initiative is dependent upon the EU's model BIT providing a level of investment protection that is higher than that found in BITs concluded by the individual EU member states¹⁹. This can only be achieved through implementation of amendments that in practice increase the protection rights of European investors and guarantee effective enforcement through state of the art investor-state dispute settlement system.

Thus, the critical analysis of the future reform to the international investment protection regime, which will be the substance of this research project, will be an invaluable contribution to the development of international investment protection law. This research not only seeks to critically assess amendments that the European Commission has already proposed to the existing international investment protection rules, it also aims to identify further possible improvements based on existing treaty and case law, thus providing valuable advice to the institutions of the EU for the advancement of the emerging common investment policy.

Methodology

The study will be mainly based on the analysis of the primary sources comprising model bilateral investment agreements developed by the individual member states and arbitral awards involving European investors and EU member states. The comparative analysis of existing treaty practice by the EU member states will allow identification of the highest protection standards currently existing. This will be a starting point for identifying minimum standards for the EU model BIT. The analysis of the case law and the academic criticism that arbitral awards faced to date will enable identification of amendments to the existing customary investment protection law which could be introduced by the EU's model BIT.

Finally, the analysis will include a detailed examination of the texts of the ICSID Convention, TFEU, applicable EU Regulations and Communications and other documents relevant in the context of the EU's accession to the ICSID Convention. This approach will enable the discovery of all incompatibilities existing between the systems and subsequently will allow for identifying amendments required to enable EU's membership in the ICSID Convention. Comparative analysis of other dispute settlement mechanisms available to the EU will enable a discovery of an alternative solution available to the Union.

¹² The ICSID has been named as the EU's preferred forum for resolution of investor-state disputes. Commission, n 1, 10.

¹³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Centre for Settlement of Investment Disputes (ICSID), 1965, Art. 67.

¹⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=854> <accessed on 6 January 2013>

¹⁵ The first BIT was concluded between Germany and Pakistan in 1959. M Sornarajah, *The International Law on Foreign Investment*, (3rd Edition, CUP, 2010), 172.

¹⁶ Andreas F Lowenfeld, 'Investment Agreements and International Law', (2003) 123(42) Colum. J. Transnat'l L.

¹⁷ Jose E. Alvarez, 'BIT on Custom', (2009) 42(17) N.Y.U. J. Int'l L. & Pol.

¹⁸ Andreas F Lowenfeld, n 16, 130.

¹⁹ Communication, n 1, 10.

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