European Law and Bilateral Investment Treaties: Exploring the Grey Areas
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EC and Investor-State Dispute Settlement System: some thoughts

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Many observers[2] connect the issue of EC participation to investor-state arbitration with the topic extensively addressed by previous speakers – namely with the changes brought by the Lisbon Treaty. This issue is in reality not that new and actually has been on the table for quite some time.

Hence, let us first take a little step back and consider together some of the terms which are at use here.

What is FDI? While there is no single definition of "foreign investment", bilateral and multilateral agreements have traditionally been adopting a very wide definition of investment – essentially, anything of economic value can be "investment".[3] Further, with respect to foreign investment it seems useful to distinguish between the "entry" and "operation" phase of the investment (or the "establishment" and "post-establishment" phase).

If one briefly looks at the core competencies of the EC (consider, e.g., internal market or competition rules) one can see that, for instance, the EC is actually responsible for a great deal of that what is usually termed as the "operation" of foreign investments. There is naturally also Article 56 of the EC Treaty, which concerns capital movements. The importance of that provision for FDI has to be considered carefully, however, particularly in the light of the recent judgment of the ECJ in the *Fedium Finanz* case.[4]

Next, let's recall the Energy Charter Treaty (ECT), concluded in 1994 and entered into force in 1998. The ECT famously incorporates an elaborated investor-state disputes settlement regime. Given the fact that the EC is a party to that treaty, the issue of responsibility for certain areas of investor-state disputes arose also in that context. One needs to point in this respect to the statement made by the EC on the occasion of the conclusion of the Energy Charter Treaty by the EC back in 1998.[5]

In this respect, there are not necessarily any real obstacles in principle for the EC to become a party to an international investment-dispute arbitration system. However, there are some

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[2] See, e.g., http://www.biicl.org/files/3727_newsletter_vol_02.pdf
[3] Petr Ondrusek, *The legal definition of foreign investment in international economic relations*, *The Lawyer*, No. 2, Prague, 2000, pages 149-169.
[4] C-452/04 of 3 October 2006.
[5] OJ, L69/115, 9 March 1998.

obstacles on the part of the current international investor-state arbitration system to be able to accommodate reliably the EC.

We can identify these obstacles (or concerns) by making a comparison with the normal state-to-state arbitration system (e.g., WTO). Here is a list:

- Increase in disputes.
- Systemic considerations are not present in investor-state disputes.
- Individual access to justice?
- A risk that the arbitration tribunal "gets it wrong."
- Detailed and developed legal standards.