EU BITs with Third States: What Role for ICSID?

Investor-State Dispute Settlement in EU BITs with Third States

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Topics Addressed

1. EU BITs with Third States: Recent Developments
2. Commission Draft Regulation and Communication
3. European Parliament Resolutions
4. ICSID, ICSID Additional Facility and UNCITRAL Rules
5. Selected Issues:
   – No Level Playing Field
   – Enforcement
   – International Responsibility
EU BITs with Third States: Recent Developments – Overview

• 1 December 2009: Article 207 TFEU: New exclusive EU competence for foreign direct investment (FDI)
• 7 July 2010: European Commission:
  – Draft Regulation for transitional arrangements for BITs of EU Member States with Third States
  – Communication "Towards a comprehensive European international investment policy"
• 6 April 2011 and 10 May 2011: European Parliament Resolutions on Draft Regulation and Communication

EU BITs with Third States: Recent Developments – Draft Regulation

• Authorisation that BITs remain in force
• Commission review of BITs:
  – Conflict with EU law
  – Obstacle to conclusion of future EU BITs
• Withdrawal of authorisation
• Authorisation to amend and conclude BITs
• 10 May 2011: Resolution by European Parliament
EU BITs with Third States: Recent Developments – Communication

• No EU Model BIT
• Selective approach: Negotiations with Canada, India, China and Russia
• Commitment to high standard of investment protection
• Commitment to international arbitration to settle investment disputes
• European Commission as respondent in international arbitration
• 6 April 2011: Resolution by European Parliament

EU BITs with Third States: Recent Developments – EP Resolution

• "Changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process, the possibility to use amicus curiae briefs and the obligation to select one single place of investor-state arbitration."

• "Is aware that the EU cannot use existing [ICSID] and [UNCITRAL] dispute settlement mechanisms since the EU as such is a member of neither organisation [...]; requests that the Commission and the Member States take up their responsibility [...] to work towards the necessary reforms of the ICSID and UNCITRAL rules."
EU BITs with Third States: ICSID

- The EU cannot accede to the ICSID Convention
- Article 67 ICSID Convention: "This Convention shall be open for signature on behalf of States members of the Bank."
- Article 65 ICSID Convention: "Any Contracting State may propose amendment of this Convention."
- Article 66 ICSID Convention: "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval."

EU BITs with Third States: ICSID Additional Facility

- ICSID Additional Facility Rules apply where one party to a dispute is party or is a national of a party to the ICSID Convention and the other is not
- Article 2 of the Additional Facility Rules: "The Secretariat [...] is hereby authorized to administer [...] proceedings between a State [...] and a national of another State [...]."
- Amendments by simple majority in the Administrative Council (compare Article 6 ICSID Convention)
EU BITs with Third States: UNCITRAL

- Article 1(1) UNCITRAL Rules 2010: "Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree."
- Designed to be used by any actor
- Could be used without any problem

Selected Issues I: No Level Playing Field

- Including reference to ICSID would permit EU investors to commence ICSID arbitration
- No level playing field for Polish investors (only EU Member State that is not a Contracting Party to the ICSID Convention)
- No reciprocity: Third party investors cannot commence ICSID arbitration (in particular, not enforce under the ICSID Convention) against the EU
Selected Issues II: Enforcement

- Article 52 ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."
- Non-ICSID awards enforced under the New York Convention
- Need to ensure same level of enforceability in EU BITs with Third States

Selected Issues III: International Responsibility

- Communication: "The [EU], represented by the Commission, will defend all actions of EU institutions. Given the exclusive external competence, the Commission takes the view that the EU will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned."
- Who pays?
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