

Peter Ratz

International and European Law Problems of Investment Arbitration involving the EU



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Für meine Familie und insbesondere meine Schwester Christina

Abbreviations and Term Definitions

AA	Association Agreement
AA with Chile	Agreement establishing an association between the European Community and its Member States, and the Republic of Chile (as defined under 1.2.2.1)
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
AG	Advocate General
Agreement with Israel	Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States and the State of Israel (as defined under 1.2.2.1)
AP	Arbitration Panel
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BL/LUX-Singapore	BIT Agreement between the Government of the Republic of Singapore and the Belgo-Luxembourg Economic Union on the Promotion and Protection of Investments (as defined under 4.3.2.2.1)
BU-Singapore BIT	BIT concluded between Bulgaria and Singapore (as defined under 4.3.2.2.1)
CAN-CZ BIT	Agreement between Canada and the Czech Republic for the Promotion and the Reciprocal Protection of Investments (as defined under 4.3.2.2.2)
CAN-HR BIT	Agreement between the Government of the Republic of Croatia and the Government of Canada for the Promotion and Protection of Protection of Investments (as defined under 4.3.2.2.2)
CAN-HUN BIT	Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments (as defined under 4.3.2.2.2)
CAN-LAT BIT	Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (as defined under 4.3.2.2.2)
CAN-POL BIT	Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments (as defined under 4.3.2.2.2)
CAN-RO BIT	Agreement between the Government of Canada and the Government of the Republic of Romania for the Promotion and Reciprocal Protection of Investments (as defined under 4.3.2.2.2)
CAN-SK BIT	Agreement between Canada and the Slovak Republic for the Promotion and the Reciprocal Protection of Investments (as defined under 4.3.2.2.2)
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CCP	Common Commercial Policy
CEE	Central and Eastern Europe(an)
CEFTA	Central European Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CETA Joint Interpretative Instrument	Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (as defined under 4.4.2.2)
cf.	confer
CFI	Court of First Instance
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CIL	Customary international law

Abbreviations and Term Definitions

CLEER	Centre for the Law of EU External Relations
CMLRev	Common Market Law Review
CPIUN	Convention on the Privileges and Immunities of the United Nations
CZ-Singapore BIT	Agreement between the Government of the Czech Republic and the Government of the Republic of Singapore on the Promotion and Protection of Investments (as defined under 4.3.2.2.1)
DE-Singapore BIT	Treaty concerning the Promotion and Reciprocal Protection of Investments between the Federal Republic of Germany and the Republic of Singapore (as defined under 4.3.2.2.1)
DG	Directorate General
DRM	Dispute Resolution Mechanism
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECAA	European Common Aviation Area
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ELJ	European Law Journal
EMRK	Europäische Menschenrechtskonvention
EP	European Parliament
EPA	Economic Partnership Agreement
EPA with CARIFORUM	EPA between the CARIFORUM States and the European Community and its Member States (as defined under 1.2.2.1)
EPA with Mexico	Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States and the United Mexican States (as defined under 1.2.2.1)
EU	European Union
EU IIA(s)	EU international investment agreement(s)
EuR	Zeitschrift Europarecht
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FRR	Financial Responsibility Regulation
FR-Singapore BIT	Agreement between the Government of the French Republic and the Government of the Republic of Singapore on the Encouragement and the Protection of Investments (as defined under 4.3.2.2.1)
FTA	Free Trade Agreement
FTA with Singapore	Free Trade Agreement between the European Union and the Republic of Singapore (as defined under 4.2.2)
FTA with South Africa	Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa (as defined under 1.2.2.1)
FTA with South Korea	FTA between the European Union and its Member States and the Republic of Korea (as defined under 1.2.2.1)
FTA with Vietnam	FTA between the European Union and the Socialist Republic of Vietnam (as defined under 1.2.2.1)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs

Abbreviations and Term Definitions

GFCC	German Federal Constitutional Court
GrCh	Grundrechte-Charta
HU-Singapore BIT	Agreement between the Republic of Hungary and the Republic of Singapore on the Promotion and Protection of Investments (as defined under 4.3.2.2.1)
i.a.	inter alia
IBA	International Bar Association
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est
IIA(s)	International Investment Agreement(s)
IISD	International Institute for Sustainable Development
IMO	International Maritime Organization
ISDS(M(s))	Investor-to-State Dispute Settlement (Mechanism(s))
LV-Singapore BIT	BIT concluded between Latvia and Singapore (as defined under 4.3.2.2.1)
MEP	Member of the European Parliament
MFN	Most-Favored-Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organization(s)
NT	National Treatment
NL-Singapore BIT	Agreement on economic cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore (as defined under 4.3.2.2.1)
PC	Patent Court
PCA	Permanent Court of Arbitration
PLO	Palestinian Liberation Organization
PL-Singapore BIT	BIT concluded between Poland and Singapore (as defined under 4.3.2.2.1)
PTA	Preferential Trade Agreement
REIO	Regional Economic Integration Organization
SCC	Stockholm Chamber of Commerce
SK-Singapore BIT	Agreement between the Slovak Republic and the Republic of Singapore on the Promotion and Reciprocal Protection of Investments (as defined under 4.3.2.2.1)
SI-Singapore BIT	Agreement between the Government of the Republic of Singapore and the Government of the Republic of Slovenia on the Mutual Promotion and Protection of Investments (as defined under 4.3.2.2.1)
SSDS(M(s))	State-to-State Dispute Settlement (Mechanism(s))
TA with Colombia and Peru	Trade Agreement between the European Union and its Member States and Colombia and Peru (as defined under 1.2.2.1)
TCN	Troop Contributing Nation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom of Great Britain and Northern Ireland
UK-Singapore BIT	Agreement between the Government of the UK and the Government of the Republic of Singapore for the Promotion and Protection of Investments (as defined under 4.3.2.2.1)
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNFICYP	UN Peacekeeping Force in Cyprus
UNITAF	UN International Task Force

Abbreviations and Term Definitions

UNMIK	UN Interim Administration Mission in Kosovo
UNO	United Nations Organization
USSR	Union of Socialist Soviet Republics
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZÖR	Zeitschrift für öffentliches Recht

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All errors and omissions are of course entirely mine.

Sure, it works in practice, but will it work in theory?

Freely adapted from Ronald Reagan.

Abstract

It is the purpose of this thesis to answer the question to what extent due to international and European law problems, investors and contracting parties are offered a level of protection with regard to investment arbitration under EU international investment agreements that is lower than the level of protection investors and contracting parties are offered with regard to investment arbitration under BITs concluded by and among states.

Five potential reasons for a decreased level of protection for investors and contracting parties under EU international investment agreements will be analyzed, from the extent of the EU's legal obligations under international investment protection law to the enforcement of arbitral awards.

With regard to the extent of the EU's legal obligations under international investment protection law, the conclusion will be arrived at that this issue does not lead to a decreased level of protection.

Also, EU practice has already remedied one potential factor for a decreased level of protection, which is ineffective dispute settlement mechanisms (a significant risk remains here, however, with regard to this practice not being compatible with the relevant guidelines developed in the jurisprudence of the CJEU; see below).

Another factor leading to a decreased level of protection for investors and contracting parties under EU international investment agreements that will be analyzed below is the enforcement of arbitral awards. The enforcement of arbitral awards against the EU remains a critical issue (mainly because of the lack of commercial EU assets abroad that could be seized by third states). Also, there is a risk that courts of third states could deny protection to the EU under the New York Convention. It will be argued, however, that this issue could be remedied to a large extent in a quite straightforward fashion on an *ad hoc*, bilateral basis.

Two factors leading to a decreased level of protection for investors and contracting parties under EU international investment agreements remain, however:

While there are sufficient legal bases for the attribution of violations of EU agreements to the EU or its Member States in most cases, responsibility gaps exist where discrepancies between primary obligations of the EU and its Member States exist. Firstly, a responsibility gap exists in cases

where EU Member States are bound by EU legal rules the implementation of which violates international law obligations of the Member States, the adoption of which by the EU in the first place, however, did not violate international law obligations of the EU. Secondly, a responsibility gap exists in cases of “pure” (i.e., non-mixed) EU international investment agreement containing EU obligations which do not correspond to obligations of the Member States. It will be argued that, with regard to the former case, in the case of Member States implementing EU rules in violation of their international law obligations, the relevant conduct will not be attributable to the relevant Member States and will not constitute a violation of EU international law obligations. With regard to the latter case, it will be argued that in the case of Member States taking purely domestic measures, in violation of the international law obligations of the EU, the relevant conduct will not be attributable to the EU and will not constitute a violation of the international law obligations of the relevant Member States.

Furthermore, it will be shown that in order to defend the autonomy of the EU legal order, the CJEU has developed a set of guidelines to be implemented in dispute settlement mechanisms (for both state-to-state and investor-to-state disputes). The CJEU requires, i.a., that arbitral tribunals be obliged to submit requests for preliminary rulings to the CJEU on questions relating to European law (and that they be bound to implement these rulings), that non-EU actors must not decide on who shall be the respondent in arbitration proceedings (the EU or its Member States) and that there be an appellate mechanism to the CJEU in place to ensure the uniform interpretation of EU law throughout the Union. Furthermore, arbitral tribunals are required to comply with EU human rights guarantees.

It will be argued that these guidelines have not been implemented in relevant existing EU agreements to a large extent. This is because they are hardly acceptable to third states. If they were in fact implemented in EU international investment agreements, arbitration proceedings would no longer be depoliticized, as decisions by arbitral tribunals would have to implement the jurisprudence of the CJEU. If they are not implemented, however, there is an obvious risk here that the CJEU will find the relevant agreements to be incompatible with EU law. This is also true for a number of existing EU free trade and investment agreements.

An amendment of the European Treaties may thus be required to fix the situation. Further, EU Member States should push for a renegotiation of international treaties that contain obligations that are (or could potentially become) incompatible with EU law.

1. Introduction

1.1 Relevance of the research topic

The ever more active role played by international organizations has been one of the most important trends in international relations over the past few decades: International Organizations are no longer mere discussion fora for states, but active players on the international stage.¹ They save states from sovereign default, deploy troops and conclude free trade and investment agreements.

Still, while international organizations play an increasingly important role in international relations, uncertainty persists about how they fit into the established system of international relations and international law. These systems have been created by and for states; ““benefits” to the States and State survival remain the highest objectives of the system”² (meaning: the system of international law). Given the increasingly important role of international organizations in international relations, it is crucial to determine the impact that differences between the status of states and international organizations under international law have on the way international organizations operate under international law as compared to states. Quite obviously, it would be beyond the scope of a doctoral thesis to analyze these questions with regard to all existing international organizations and all relevant fields of international law. This is why they shall be analyzed with regard to one particular international organization (the European Union) and one particular field of international law (international investment arbitration).

The European Union has been chosen for analytical purposes here as the questions raised above are particularly relevant with regard to the European Union. The EU is clearly the most advanced example for an international organization playing an active role in international relations.³ Its structure combines a classical intergovernmental wing (the former CFSP

1 Evans, Malcom (editor), *International Law*, 2nd edition, Oxford University Press, 2006, p. 278.

2 Evans, *supra* note 1, p. 62.

3 Odermatt, *infra* note 1288, p. 18.

1. Introduction

pillar of the EU) and a supranational wing (the former EC pillar of the EU), which arguably makes the EU the international organization covering the most far-flung set of policy areas and also the international organization with the highest degree of political autonomy from its member states.⁴

International investment arbitration has been chosen for analytical purposes here as the EU approach to international investment arbitration is certain to have a significant economic impact. If legal issues concerning international investment arbitration involving the EU cannot be solved in a manner that is (perceived by third states and investors as) satisfying, this could lead to a delay in the conclusion of EU international investment agreements (or even in such agreements not being concluded at all), which would decrease both the attractiveness of the EU as an investment receiving economic unit and the willingness of EU investors to seize economic opportunities in investing abroad.⁵ The EU approach to dispute settlement in international investment protection will also have a significant impact on arbitration as a means of peaceful dispute settlement in general: If the EU approach turns out to be unsatisfying for third states and investors, the legitimacy and attractiveness of arbitration as a means of dispute settlement is likely to decrease in general and other forms of dispute settlement may flourish. Furthermore, international investment arbitration involving the EU is a relatively recent phenomenon: The EU has only acquired the exclusive competence to conclude international agreements governing foreign direct investments (article 3 para. 1 and article 207 para. 1 TFEU) upon the entry into force of the Lisbon Treaty.

1.2 Definition of the research question and key terms

1.2.1 Definition of the research question

The research topic set forth above under 1.1 raises the question to what extent the level of protection under EU international investment agreements is equivalent to the level of protection under “traditional” BITs.

4 Odermatt, loc.cit.

5 *European Commission*, Communication COM(2010) 343, adopted 7 July 2010, p. 10: “Investor-state is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.”.