Towards a Repository of Policy Options for IIA Reform

Meeting
EU law and investment treaty law: convergence, conflict, or conversation?[1]

Academic EFILA's Inaugural conference, 23 January 2015, London, United Kingdom
Mr. Nikos Lavranos,
Secretary General, European Federation for Investment Law and Arbitration (EFILA)

As previously mentioned at OGEMID, the Inaugural Conference of the European Federation for Investment Law and Arbitration (EFILA) took place on Friday, 23 January 2015, in the Senate House of the Queen Mary University of London. 160 participants ranging from academics, arbitrators, arbitration institutions, companies, lawyers to NGOs reviewed a full day long the EU's first 5 years of European investment policy.

The purpose of this contribution is to follow-up on EFILA's conference by highlighting some of the fundamental questions that were debated, which could be further discussed.

The main conclusion from this conference is that the views are divergent because they very much depend on the perspective. Those who approach investment law and arbitration from a classical EU law approach, can only accept the full supremacy of EU law and the final authority of the Court of Justice of the EU (CJEU) in conjunction with the preliminary ruling system. So, there is no room for international arbitral tribunals, intra-EU BITs disputes or intra-ECT disputes. On the other side of the spectrum, we have those who base their perspective on public international law and thus view EU law and the CJEU as part of it - without having any sui generis status.

This tension between EU law and investment law runs like a thread throughout the conference, without that a solution is possible which would allow for a co-existence of the two. The "Solange"-approach was suggested as a way out or at least as a way to maintain a practical solution. But the CJEU's Opinion on the EU's accession to the ECHR and the European Commission's approach in Micula and as active intervener calling for the supremacy of EU law seem to question the viability of the "Solange-approach".

So, the first question is: Is there a way to establish a functioning co-existence between EU law and international investment law in Europe? Or must one of the two submit to the other? This question relates to all aspects of investment law from the questioning of the grandfathering of the 1,400 BITs towards the (non)execution of ICSID awards.

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[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

The other fundamental question, which is connected to the previous one is, whether there is any place at all for arbitral tribunals in legal systems based on constitutional, democratic discourse? If so, what role/functioning can arbitral tribunals perform, which cannot be performed by the other branches and bodies of a state? The third, more forward looking, question is the question of how can BITs and ISDS be used to promote sustainable investments, the Rule of Law and the protection of fundamental rights? It goes back to the positive narrative of why states have and continue to sign BITs with ISDS. **In light of Commission President Juncker's Investment Programme, the discussion must be re-framed towards the benefits of BITs and ISDS.** There is no doubt that Europe, but not only Europe, needs more FDI (preferably sustainable ones) and jobs. Equally, there is no doubt that the Rule of Law, effective judiciary and efficient and fair administration, transparency etc. are still lacking in many parts of Europe as the many international benchmarks show.

So, the question is: how can BITs and ISDS positively contribute to achieving those aims? **For EFILA this means that the discussion must be moved away from the narrow, scare mongering, level of how terrible BITs and ISDS supposedly are, towards the more general, wider level of BITs and ISDS being an inherent element of encouraging sustainable FDI, creating jobs and promoting the Rule of Law.**