5 THINGS TO WATCH IN INTERNATIONAL INVESTMENT LAW

TRENDS AND DEVELOPMENTS

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"EPPUR SI MUOVE…"

- Access to treaty protection
- Process
- Substance
- Reform driven by UNCTAD, EU, UNCITRAL, ICSID, States, tribunals, with some investor input

1. REBALANCING INVESTMENT TREATIES

- The current count of BITs: 2844 (UNCTAD)
- Old-generation treaties are defined as those concluded between 1959 and 2011, prior to the launch of UNCTAD's Investment Policy Framework for Sustainable Development in 2012. Some pre-2012 treaties already contain elements of new-generation treaties. Likewise, some treaties that were negotiated and concluded after 2012 fail to incorporate reform elements
- Old-generation BITS typically feature broad and vague formulations and include few public policy exceptions or safeguards (UNCTAD)

1. REBALANCING INVESTMENT TREATIES

- Tribunals and courts generally propounded a **balanced approach to interpretation of BITs**: "*The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a* ***balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments****, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations*." (Saluka v Czech Rep., 2006)
- Some ISDS tribunals have adopted expansive interpretations of the broad provisions in old-generation BITs: e.g. *Tecmed v Mexico* on leg. expectations

1. REBALANCING INVESTMENT TREATIES

- Focus on **business-society relationship**: Responsible Business Conduct (i) the positive contribution businesses can make to sustainable development and inclusive growth; and (ii) avoiding adverse impacts on others and addressing them when they do occur (OECD)
- The **sustainable development agenda (e.g., the 2015 UN Sustainable Development Goals; UN Guiding Principles on Business and Human Rights**) advancing the protection of environment, human rights, labour rights; good governance standards.

  "*international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law*" and non-State actors are under a negative obligation "*not to engage in activity aimed at destroying*" human rights (**Urbaser v Argentina**)

1. REBALANCING INVESTMENT TREATIES

- Recent IIA examples: "*Investors and investments shall uphold human rights in the host state*." (**Art. 18(2), 2016 Morocco-Nigeria BIT**) and investors "*shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties*" (**Art. 18(4), 2016 Morocco-Nigeria BIT**) ; **Art. 16 of 2021 model BIT of Canada**; **Art. 7 of 2019 model BIT of The Netherlands.**
- ECT modernisation project: since 2018;

  -among objectives - **make the ECT greener** and promote implementation of Paris Agreement and UN Sustainable Development Goals – no consensus;

  -key concern around climate change "stranded assets" and the potential costs of ISDS claims (in some estimates these could reach at least €1.3 trillion by 2050); EU proposal to phase out investment protection of fossil fuels from ECT by the end of 2030

1. REBALANCING INVESTMENT TREATIES

- Safeguarding of regulatory space - e.g. "*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Chapter*." (**art. 2.2. of EU-Singapore IPA**)
- Lack of coherence in treaty-making: opportunities for treaty shopping
- EU-China relations: negotiations on investment protection agreement in the next two years; ratification of 2020 Comprehensive Agreement on Investment by the end of 2021 (on freeze currently)

2. ISDS – TRENDS

- *"The vast majority of these cases are based on old-generation treaties: all ISDS cases initiated in 2019 and 99 per cent of the total number of known cases – virtually all cases – have been filed pursuant to treaties concluded before 2012"* (UNCTAD)
- The energy switch:
  - Nuclear energy phase-out: *Vattenfall v Germany*
  - Decarbonisation: *Uniper v The Netherlands* and *RWE v The Netherlands*
  - More RE cases: Ukraine, Romania, Bulgaria etc.?
- National security screening: *Huawei v Sweden*
- Belt and Road cases – China has 124 BITs
- B3W –USD40 tn for global infrastructure development by G7 countries

3. ISDS – PROCEDURAL REFORM

- ICSID – since 2016, five working papers, amendments to be put to Contracting States for adoption in October 2021
- UNCITRAL Working Group III to implement ISDS reform – project started in 2017, to end by 2025.
- Code of Conduct for Adjudicators in International Investment Disputes – ICSID & UNCITRAL draft v2 published in April 2021 – deadline for comments: 2 July 2021

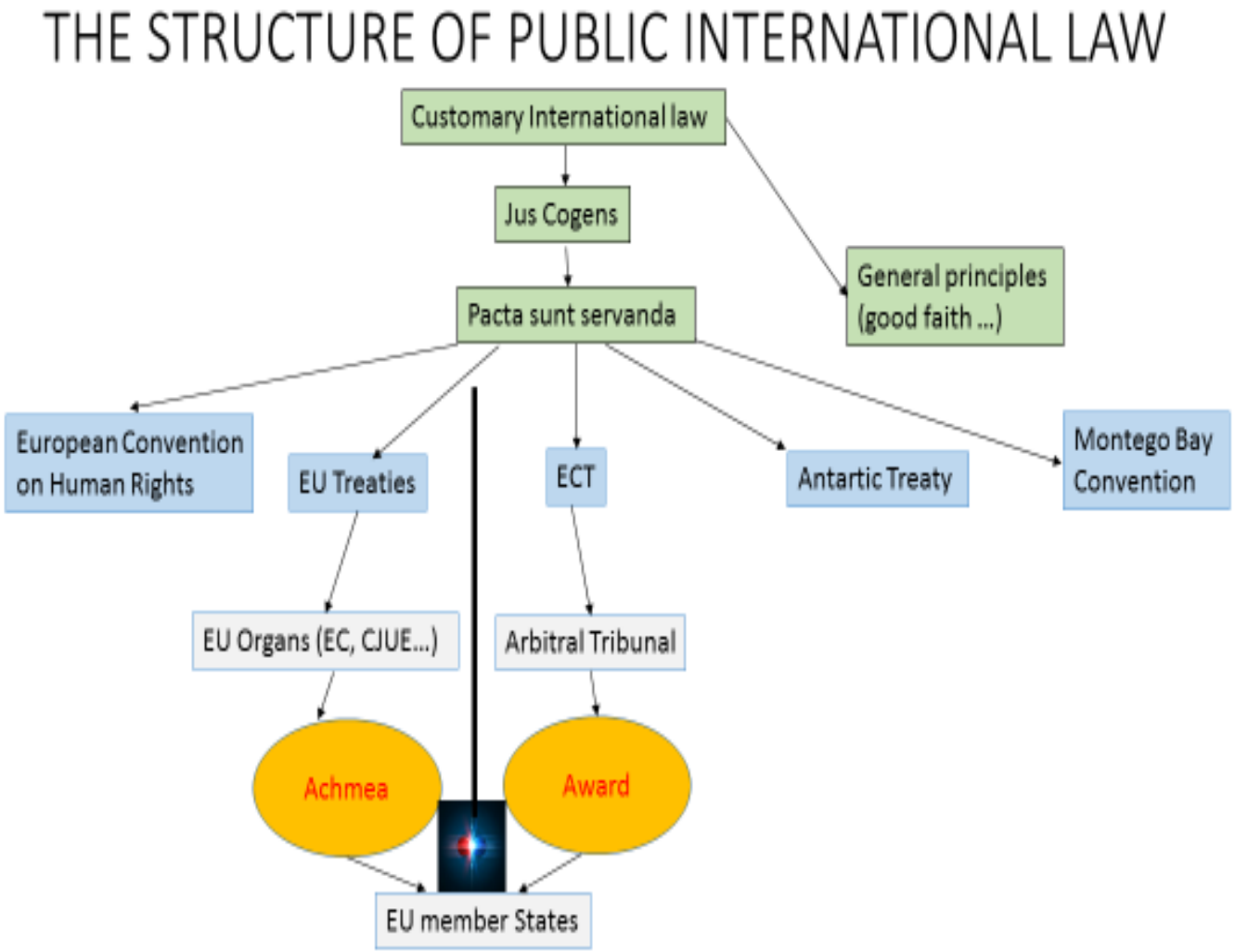
4. INTRA-EU ISDS

- The *Achmea* saga: from the CJEU's *Achmea* ruling to the Multilateral Termination Agreement (23 MS, ratified by HU) and the OLG decision in Raiffeisen II v Croatia
- What about the ECT?
  - Excluded from MTA – HU declared that the *Achmea* Judgment concerns only intra-EU BITs
  - 3 December 2020: Belgium's request for a CJEU opinion on intra-EU ECT claims
  - 11 February 2021: *in Italy v Novenergia and Athena* the Svea CoA decides to refer to CJEU the question of applicability of ECT ISDS provision to intra-EU disputes
  - 3 March 2021: CJEU AG opinion in Moldova v. Komstroy: ISDS under the ECT is incompatible with EU law insofar as it permits arbitration b/w EU investors and MS
  - 11 May 2021: The Netherlands' application to German court to determine the admissibility of intra-EU arbitrations under the ECT

4. INTRA-EU ISDS

- ISDS tribunals upheld their jurisdiction over intra-EU ECT claims – e.g. Eskosol v Italy:

"EU Treaties are not general international law displacing all other sub-systems of international law; rather, they exist side-by-side with other sub-systems, including those created by various multilateral treaties. The ECT is one such other sub-system of law"



5. SELECT UNSETTLED ISSUES

- Jurisdiction – ICSID or non-ICSID forum:
  - dual nationality:

    -Lex specialis: "…*contrary to the ICSID Convention, which expressly excludes dual nationals in its Article 25, the UNCITRAL Rules do not contain any such restriction. The issue of dual nationality should be resolved considering the Treaty, as it is the* lex specialis *between the Parties. In fact, the Contracting States could have chosen to include a restriction for dual nationals but did not include it in the Treaty*." (Pugachev v Russia)

    -Import of dominant and effective nationality principle: "*in the area of international investments, if the treaty is silent [on the protection of dual nationals], the application of the general principles of international law leads to the application of the principle of dominant and effective nationality (DEN) for dual nationals*." (Heemsen v Venezuela)

5. SELECT UNSETTLED ISSUES

- Jurisdiction – ICSID or non-ICSID forum:
  - Salini test (contribution, duration, risk) or the objective meaning of "investment"
  - Forum is irrelevant: "*What the ICSID Additional Facility Rules or the ICSID Convention do or do not impose is not relevant in this regard. It cannot be the case that the scope of 'investment' in a bilateral investment treaty changes depending on the arbitral forum. No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment*." (Nova Scotia Power v Venezuela)
  - Forum is relevant: "*it is not appropriate to import "objective" definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration*" (Guaracachi v Bolivia)

5. SELECT UNSETTLED ISSUES

- Merits – preservation of regulatory/policy space – what are the limits?

"*Governments often have to make controversial choices, which especially those directly affected may view as mistaken, based on misguided economic theory, placing too much emphasis on certain social values over others. It is not the task of an investment treaty tribunal to evaluate the policy choices that often underpin economic decisions. This being so,* ***the margin of appreciation accorded to the State cannot be unlimited****; otherwise the substantive treaty protections would be rendered wholly nugatory. In the Tribunal's view, the limits of the State's power are drawn by the principles of reasonableness and proportionality, which must guide a tribunal's assessment of the allegedly harmful changes in the legislation*" (PV Investors v Spain)

5. SELECT UNSETTLED ISSUES

- Damages – more rigorous quantum analysis?

-Lack of sufficient reasoning: " *There is no doubt that tribunals have discretion in the awarding of damages, however the Committee fails to see, because the Tribunal does not explain, how merely acknowledging that the Tribunal has discretion is the consequence of the analysis proposed by the Tribunal as regards loss of opportunity. The acknowledgement that a tribunal has discretion is merely a general affirmation of one of the powers of a tribunal, but such general affirmation, in the context of the Award, cannot be the sole reason to award a nominal value of damages. The acknowledgement by the Tribunal of its discretion is a stand-alone affirmation that has no clear connection with the preceding paragraphs so that the reasoning of the Tribunal from the premises to the conclusion can be followed*." (Annulment Committee in Perenco v Ecuador)

- ICCA-ASIL Task Force on Damages tool before ICCA 2021 Congress

5 THINGS TO WATCH

- How will the rebalanced, sustainable development-oriented, greener treaties shape investment protection?
- Where will the new ISDS cases come from?
- How will the ISDS procedural reform shape the process?
- Will there be intra-EU BIT/ECT arbitration?
- Will ISDS jurisprudence converge on, or narrow, the unsettled issues on jurisdiction and merits? Will there be more rigorous damages analyses?