



EU investment Policy and its Influence on Investment Contracts

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- **Reforming the System**
 - **EU as a New Player in IIL**
 - **Rebalancing also Investment Contracts**

Starting Point I: EU in International Investment Law

- **EU a new player in international investment law since 2009**
- **EU is taking over competences from EU Member States**
- **EU investment policy has only partly been analyzed**
- **A lot of work in EU investment treaties**
- **Little work on effects of EU Law on Investment Contracts**

Starting Point II: Rebalancing the System

- we have been witnessing a shift in the content of Contract
 - legitimization is discussed, which has influences on stabilization clauses
 - investors obligations are discussed,
 - it is argued that these can be made far more effective in contracts than in treaties
 - Environmental concerns
 - Corporate Social Responsibility
 - Investment screening on entry of investments

Shift to more contract based ISDS

- it is expected to have a shift toward more contract based ISDS
 - lowering of investor`s investment protection in more recent EU and EU member states BITs
 - limited fet
 - limited indirect expropriation
 - limited MFN
 - very often no umbrella
 - limited national treatment
 - More exceptions and right to regulate
 - Reduced scope of application

effect of EU law developments on contracts – side effects of EU investment Policy

- **reduced protection against regulatory expropriation**
- **Question whether applicable Law can be EU Law – Achmea**
 - Open question
 - Be careful when you want to seek enforcement in MS
 - Avoid forum in the EU
 - Avoid in contracts to determine EU Law as applicable law
 - Might have an effect on validity of arbitration clause

Reform of ISDS and effects on State Contracts

- Move towards an MIC
- Discussions in UNCITRAL
- All negotiations by EU and its Member States will strive for an MIC
- DCFTA if investment is covered this will mean a new system
- MIC Members would have the option to foresee the MIC as the relevant DS mechanism and forum also for State Contracts

History of MIC Discussion so far ...

- 6/2016 CIDS Study by Kaufmann-Kohler/Potestá
- 2017 Mandate UNCITRAL WG III
- 3/2018 Negotiating Mandate for EU Commission
- 1/2019 EU Submission to UNCITRAL on establishing a standing mechanism
- 2020 First Draft Statute MIC

What does MIC mean?

MIC means

- Completely new system
- International Court system
- Permanent Judges
- Appellate Instance
- Transparency
- No arbitration, but international court procedures
- No arbitrators pick by parties
- Lower costs
- More time efficient

EU Approach in CETA

Art. 8.29 CETA Establishment of a multilateral investment tribunal and appellate mechanism

“The Parties shall pursue with other trading partners *the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes*. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.”

UNCITRAL WGIII and the MIC

- WG III mandate 10 July 2017
 - UNCITRAL Commission entrusts Working Group III to further work on a multilateral reform of ISDS as per the following mandate:
 - I. Identify and consider concerns regarding ISDS;
 - II. Consider whether reform is desirable in the light of any identified concerns;
 - III. If the Working Group concludes that reform is desirable, develop any relevant solutions to be recommended to the Commission.**

Art. 8.29 CETA

- The MIC-Article
 - The Parties shall pursue with other trading partners *the establishment of a multilateral investment tribunal* and appellate mechanism for the resolution of investment disputes.
 - **International obligation** for CETA Parties to pursue establishment ...
 - Are CETA parties still allowed to conclude agreements with old approach not foreseeing the transfer of ISDS from arbitration to an MIC?
 - See Art. 46 Model FIPA 2021

Organisational Structure

■ Judges

- Representing the different legal systems and regions of the world
- Total Independence, **full time**, being available at all times ---- no no double hatting!!
- Highly qualified, not only in trade and investment law, but also in public law – constitutional and administrative law

- MIC would be ---
 - ---- faster??
 - ---- cheaper???

Jurisdiction of an MIC

- All Investor State Disputes
 - Home State of Investor has to be MIC Member
 - Respondent State has to be an MIC Member

- Compulsory or voluntary?
- Counterclaims?
- State-Investor Disputes?

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