BETWEEN TRIBUNAL AND COURT - DIFFERENCES BETWEEN THE "CLASSICAL" BILATERAL INVESTMENT TREATIES AND THE CHAPTERS ON INVESTMENT PROTECTION IN FREE TRADE AGREEMENTS OF THE EUROPEAN UNION

Arbitration as such is a widespread form of dispute settlement not limited to investment law. Investment arbitration is not a new form of dispute settlement but has existed for half a century.

National courts are not a meaningful alternative to investor-State arbitration. In many countries there are no independent courts. Even if national courts are independent they display a strong tendency to decide in favor of the forum state (which after all is their employer). In many countries courts are so slow and inefficient that delays amount to a denial of justice. Where the adverse action by the State is in the form of legislation their courts will be bound to apply the legislation. Under many constitutions treaty standards cannot be applied by domestic courts unless these standards have been incorporated into the local law. In some cases the executive has simply ignored court decisions in favour of investors. In some cases the complaints of investors are directed against treatment by national court. Finally, unlike national judgments, arbitral awards can be enforced in over 150 countries worldwide either under the New York or under the ICISD Convention.

Another alternative to investor-State arbitration would be diplomatic protection. A State exercising diplomatic protection pursues a claim of its national against

another State. Compared to investor-State arbitration, the exercise of diplomatic protection has considerable disadvantages for investors as well as for the States concerned. Depolitisation of investment disputes was an important reason for elaborating the Convention for the Settlement of Investment Disputes. There has been a time when conflicts about the treatment of foreign investors were a cause for fierce confrontation between home and host States of investors.

In the 19th century more than 40 military interventions often by European States occurred in Latin America. In 1956 the dispute arising from the nationalization of the Suez Canal led to a military invasion in Egypt by the United Kingdom and France. Also the Cuba crisis had its root cause in nationalizations of US investors by Cuba; the US – Iran conflict started out as a conflict between the Anglo-Iran Oil company and Iran, before it turned into a conflict between the UK and Iran after the nationalization of Anglo Iranian Oil company and later between the US and Iran because of widespread nationalizations and expropriations of US companies after the Iranian Revolution.

International investment arbitration does not only offer advantages for investors but also for home and host Sates. Without access to investor-state arbitration, diplomatic protection is often the method of choice to settle a conflict between an investor and a State. This implies that the conflict is turned into an inter-State conflict. This has negative implications for the international and economic relations of the States involved. Investors have no right to obtain it. Political, military and economic strength rather than law often have a decisive role on the outcome of an exercise of diplomatic protection. For a host State, being sued before an investment tribunal is often a much lesser evil than being exposed to the US State Department's or the EU Commission's pressure. That is the reason

for the prohibition to exercise diplomatic protection while an investment dispute is pending before an investment tribunal.

Bilateral investment treaties, BITs, are currently the most important basis for the settlement of investment disputes. About 3500 are currently in force. As long as European States concluded such treaties with developing countries or former eastern bloc countries they did not attract public attention let alone criticism. Only when the EU started to negotiate with the US public criticism was raised against this form of dispute settlement.

We could see a spill over to the Comprehensive Economic and Trade Agreement, CETA, treaty between the EU and Canada. The other treaties under negotiation with Singapore, Japan, China and several other countries do not attract public attention.

The criticism raised by public opinion against the system concerned so-called regulatory chill, frivolous claims, secret proceedings and too much influence of investors on the arbitral process.

Although these perceived problems were either already solved in modern treaties or by adapted arbitration rules or not supported by case law, they influenced the way in which the EU negotiated investment chapters in recent free trade agreements.

One of them is the Comprehensive Economic and Trade Agreement between the EU and Canada.

Let us turn to the protection standards of the investment chapter in the Canada EU Free Trade Agreement. The negotiation mandate spoke of the "*highest possible level of legal protection and certainty for European investors*" and the

"*promotion of the European standards of protection*". But compared to a classical European Bilateral Investment Treaty, the protection standards have considerable limitations.

Fair and equitable treatment, the standard most frequently invoked by investors, has been defined for the first time in this treaty. In doing this, limiting qualifiers have been used:

- *A "breach of due process*" must be "*fundamental*"
- *arbitrariness* must be *"manifest".*
- *Discrimination* has to be *"targeted"* and *"on manifestly wrongful grounds, such as gender, race or religious belief".*

Stabilization, a criterion mentioned in earlier awards, does not figure in the list of potential violations. Therefore, a change of the legal system per se cannot amount to a violation of this standard. Legitimate expectations may but do not have to be taken into consideration by tribunals.

Expropriation is another standard that is often criticized in the public discussion. Expropriations are in principle legal under international law but require compensation.

In contrast to most European BITs the investment chapter of the Canada EU Free Trade Agreement incorporates the so called police powers theory. The right to regulate is included in the definition of expropriation.

"Except in rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect

legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."

As a consequence the investors have to bear the financial consequences of measures in the public interest.

The CETA text explicitly safeguards in numerous provisions throughout the text the possibility to regulate without need to compensate.

Standard clauses like the umbrella clauses, whereby a contract breach becomes arbitrable under an investment treaty have not been included into the CETA text. The most favoured national clause has been deprived of all its traditional meaning since the new text has excluded the importation of more favourable substantive as well as procedural standards from treaties with third states.

Unlike typical European BITs, the CETA contains a non-discrimination clause concerning the establishment and the acquisition of investments. But acquisition and establishment are explicitly excluded from the possibility to arbitrate.

The CETA treaty, that is meant to serve as a model for future treaties, also departs from the classical model of investor-State arbitration. Due to public pressure the EU wanted to create a Court. But for purposes of enforceability through the New York Convention or the ICSID Convention the outcomes of the mechanism have to be arbitral awards. The treaty speaks of a "tribunal" but it is highly doubtful whether the mechanism established in CETA is a tribunal.

The dispute settlement procedure provided for by the CETA will be fully transparent and the treaty provides for a mechanism to allow for the immediate dismissal of claims that are manifestly without legal merit.

In contrast to existing investment protection treaties, the CETA provides for a permanent decision-making body. The parties to the dispute have no right to choose their arbitrators but members of the tribunal are selected in a radically different way than in traditional investment arbitration.

The text stipulates that the 15 Members of the Tribunal shall be appointed by a bilateral high level CETA Joint Committee for a renewable five-year term rather than by the parties to a dispute. Five of the Members of the Tribunal shall be nationals of Member States of the EU, five shall be nationals of Canada and the other five shall be third-country nationals. That nationals of the parties may serve as arbitrators is an important departure from the ICSID system. Under the ICSID Convention nationals have in principle been excluded from serving as arbitrators to ensure the neutrality of the tribunal.

Individual cases shall be decided by divisions of three members of the Tribunal. The President of the Tribunal selects the three division members on a random basis that has to lead to unpredictable appointments. This is a radical change from the existing system where the parties selected “their” arbitrators. It was meant to reduce the influence of investors on the composition of the tribunal. This has been achieved; investors have zero influence on the composition of the tribunal. However, it has highly increased state influence on the formation of tribunals and therefore, raises doubts concerning the neutrality of the tribunal.

The new system also provides for an appeals mechanism. Awards rendered by the Tribunal can be appealed to the Appeals Tribunal within 90 days of their issuance. In addition to the existing annulment grounds, errors of law and manifest errors in the appreciation of facts are a reason for appeal. The Appeal

Tribunal cannot only annul the award but also uphold, modify or reverse the Tribunal's award.

There will be different Appeal Tribunals for the different treaties the EU is negotiating. The problem of inconsistent awards will persist. There is no reason why different appeal Tribunals applying different treaties should develop a more consistent practice than different tribunals applying different treaties.

Because of the important deviations from the current system it is highly questionable whether this mechanism is an arbitral tribunal. The awards can certainly not be qualified as awards under the ICSID Convention. The ICSID Convention provides that "an award shall not be subject to any appeal or to any other remedy except those provided for in this Convention". Therefore, the appeals mechanism under CETA is a clear deviation from the ICSID Convention. It remains to be seen whether national courts of third states will accept the decision of the tribunal as "awards" rendered under the New York Convention. This leads to insecurity as far as enforcement of the "awards" is concerned.

Therefore, the CETA treaty leads to lowered investor protection standards and a dispute settlement system that is radically different from the existing one. It is certainly unable to produce ICSID awards and it creates uncertainties for the enforcement under the New York Convention.