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Nico Basener

Investment Protection in the European Union

Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements

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Für Meike, meine Geschwister und meine Eltern

Vorwort

Die vorliegende Arbeit wurde zum Sommersemester 2017 von der Universität zu Köln als Dissertation angenommen. Bis zur Drucklegung konnte daher Literatur und Rechtsprechung bis Juni 2017 berücksichtigt werden.

Für die vielseitige Unterstützung, die mir bei der Erstellung dieser Arbeit zuteil wurde, möchte ich mich an dieser Stelle ganz herzlich bedanken.

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Die Idee zu dieser Arbeit geht zurück auf meinen Studienaufenthalt an der Université de Paris 1 / Panthéon-Sorbonne während des deutsch-französischen Magisterstudiengangs. Während des Verfassens eines Beitrags zu einer dort einzureichenden schriftlichen Seminarbeit, stieß ich erstmals auf die – damals noch sehr junge Fragestellung – der Interaktion von Europarecht und Investitionsschutzrecht. Nachdem die Frage zwei Jahre später immer noch nicht umfassend gelöst schien, wuchs die Idee zu dieser Arbeit.

Mein Dank gilt daher auch Frau Prof. Dr. Dauner-Lieb, die mich während eben dieser Studienzeit als Programmleiterin, aber auch danach, mit Rat und Tat begleitete und förderte. Sie trägt einen erheblichen Anteil daran, dass diese Arbeit heute in dieser Form erscheinen kann.

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Abschließend gilt mein Dank selbstverständlich meinen Eltern, meinen Geschwistern und meiner Lebensgefährtin. Meinen Eltern und meinen Geschwistern, da sie mich auf meinem bisherigen Lebensweg und im Rahmen meiner Ausbildung stets unterstützten und mir diese ermöglichten. Meiner Lebensgefährtin, weil sie es war, die mich stets neu

aufbaute, stets Verständnis hatte und durch ihren Rückhalt in wesentlichem Maße dazu beigetragen hat, dass diese Arbeit erfolgreich abgeschlossen wurde.

München, Juli 2017 *Nico Basener*

Literaturverzeichnis

Abbreviations:

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
cf.	please refer to
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union which shall compromise the reference to the Court of Justice of the European Coal and Steel Communities, the Court of Justice of the European Communities, the Court of First Instance, the General Court and the Court of Justice
ECHR	European Convention on the protection of Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
et al.	and others
EU	European Union
EU Law	All sources of law deriving from primary or secondary law of the European Union, including the TEU, TFEU, general principles of the law applicable in the European Union as derived by the CJEU, secondary law and those general principles and conventional obligations of international law which are binding within the European Union and its member states
European Treaties	All treaties concluded between the EU member states since the Treaty of Rome, including all amendments (until the Lisbon Treaty) and accession treaties
FCN treaties	Treaties of Friendship Navigation and Commerce
FET	Fair and Equitable Treatment
f / ff	following page / following pages
FPS	Full Protection and Security
ICC	International Chamber of Commerce
IIA	International Investment Agreement (including BITs and multilateral investment treaties as well as trade agreements, which include provisions on investment protection)

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
IMF	International Monetary Fund
LCIA	London Court of International Arbitration
MFN	Most-Favoured Nation
para	paragraph (*Randnummer*)
p.	page / pages
SCC	Stockholm Chamber of Commerce
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

Introduction

Presumably only few aspects of the European Union's common commercial policy currently attract more attention in the public and political sphere than the negotiation of the two trade agreements CETA[1] and TTIP[2] by the European Union (EU) with Canada and the United States of America. Besides fears about the "*blurring*" of consumer protection and environmental standards, the most controversial aspect of these agreements is the inclusion of an investment protection mechanism in both agreements.[3] The most militant oppositions express conclusions such as:

> "The most invidious aspect about TTIP is the investment agreement […]. It's about stopping parliament[s] from passing regulations that would protect our economy, our people, our health."[4]

The general concept of such investment protection mechanism is as follows: two or more states agree upon a certain number of substantive protection standards for investors abroad in an international agreement. Those standards could e.g. include a prohibition of discriminatory measures towards the investor or a prohibition of expropriation. Whenever a state undertakes a specific measure, *inter alia* as Germany did by adopting the law on the termination of nuclear plants after the accident in Fukushima, foreign investors may not only challenge this measure (the law ordering the termination) under the domestic legal framework but also under the protection standards conferred in the international investment agreement (IIA). Hence, even though the measure may comply with the requirements of national (constitutional) law, it might however breach the protection standards agreed upon on the international level. Additionally, those treaties usually refer the disputes arising from IIAs to international arbitral tri-

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1 Comprehensive Economic and Trade Agreement, under negotiation since 2009.

2 Transatlantic Trade and Investment Partnership, under negotiation since 2011.

3 Cf. also: *Lang*, Der EuGH und die Investor-Staat-Streitbeilegung in TTIP und CETA (Beit. zum Transnat. Wirt.-R, Vol. 138, 2015), p. 6.

4 Joseph Stiglitz, Nobel Price winner 2001 (economics) and former head of the IMF and IEA, interview on 10/10/2015 relating to the TTIP regulations with GEDProject, available at https://www.youtube.com/watch?v=sIfO5HRRjQg [last checked on: 28/02/2017].

bunals and hence carve out these investment disputes from the national judicial framework. Most of the current criticism is closely related to this regulation.[5]

Besides all criticism, the EU member states were among the leading countries when concluding and implementing investment protection mechanisms through IIAs. Predominantly the EU member states tried to foster investment protection through the conclusion of bilateral agreements – also referred to as bilateral investment agreements (BITs) – with other states all over the world. The result is an extensive network of IIAs concluded by EU member states either among themselves (intra-EU IIAs) or with non-member states (extra-EU IIAs).

The problem to be addressed in this thesis: Potential conflicts between EU law and intra-EU and extra-EU IIAs

The current debate on TTIP and CETA should not obscure the discussions on a different subject which is closely interlinked but dates back before the first negotiations of those agreements were started in 2009 and 2011. Given that the competence to negotiate such agreements was transferred to the EU in 2009 only, previous IIAs were negotiated by the member states. Approximately in 2006/2007 the question arose how EU law and international investment law interact and how potential conflicts of both systems could be resolved. The questions are of multiple nature. Lets imagine two EU member states that have concluded an IIA including several substantive protection standards. One of these states has granted particular advantages to investors to build up their business in disfavoured regions of the member state, in order to enhance economic development. The European Commission might consider such advantages to constitute state aids in terms of Art. 107 TFEU and thus prohibited under EU law, which leads to their mandatory revocation towards the investor.[6] The investor, besides potentially challenging the revocation of aids before national courts or the

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5 Cf. comment by the German Judges Association, available at: http://www.zeit.de/politik/ausland/2016-02/ttip-deutscher-richterbund-schieds gerichte [last checked on: 28/02/2017].

6 The example is provided by reference to the facts in the reknown *Micula Case,* cf.: *Ioan Micula, Viorel Micula & others vs. Romania*, 11.12.2013 – ICSID Case No. ARB/05/20 - Final Award and Decision on Jurisdiction and Admissibility dated 23.09.2008.

CJEU, might also seek judicial protection by an arbitral tribunal, basing its claim on the IIA. Indeed, it can be argued that revoking an advantage previously granted to an investor might violate such investor's legitimate expectations and thus be contrary to the so-called fair and equitable treatment standard guaranteed under an IIA. What should the member state do? Risking infringement proceedings in the European context to avoid being ordered to pay damages by an arbitral tribunal based on the investment treaty? Can arbitral tribunals even be competent to rule upon the legality of a measure which is mandatory under EU law without impeding on the competences of the European Courts? What would be the effect of contradicting decisions by the arbitral tribunal, basing its considerations on the IIA and European Courts, judging the case by reference to national and EU law? The questions become even far more complicated when taking into consideration that both frameworks *ab initio* claim absolute supremacy within their respective framework. Whereas EU law is essentially based on the principle of supremacy as one of the fundamental rules to guarantee its so-called autonomy and its uniform application, international investment law usually refers to the general principle in international law that changes in a state's domestic law cannot excuse violations of international obligations (cf. Art. 27 Vienna Convention on the Law of Treaties (VCLT)).

These questions are more than theoretical. In the last decade, a considerable number of disputes was closely related to the question of the interaction of EU law with international investment law. In 2015, 130 pending investment arbitration cases were based on intra-EU IIAs (19% of all cases).[7] Additionally disputes based on extra-EU IIAs, involving the responsibility of an EU member state, are increasing, a fact which was nearly unconceivable for long times. This increase in procedures raised particular interest for these questions. In several of the arbitral proceedings EU member states tried to demonstrate that IIAs could not set aside the obligations undertaken under EU law. Although taken into consideration by several arbitral tribunals, these objections were mostly dismissed very clearly. The European Commission is actively seeking to face the (alleged) threat to the uniform application of EU law within the member states through such investment proceedings. The last attempt of these interventions were infringement proceedings initiated in 2015 against several member states which accuse them of being in violation of EU law by

7 *UNCTAD*, World Investment Report, 2016, p. 105.

keeping IIAs in force, despite the threat to the autonomy of the EU's legal order. Several national courts were also sought with the question in the context of enforcement or setting aside proceedings regarding arbitral awards being rendered based on IIAs involving EU-member states. One of the most prominent proceedings in *Achmea (former Eureko) vs. Slovak Republic* finally led to a preliminary ruling reference of the German Federal Supreme Court on 10.05.2016 to the CJEU regarding the validity of dispute settlement provisions in intra-EU IIAs and their effect on the arbitral tribunal's jurisdiction.[8]

Literature review

Despite the tremendous importance of the subject and the increasing number of arbitral awards rendered in the meantime[9], the current perception of the conflict in literature remains rather fragmented. *Ahner* analysed the possibilities for the EU to conclude future IIAs but expressly carves out the problems arising in the context of intra-EU or extra-EU conflicts.[10] *Schmitt* explored the consequences of the shift of competences for foreign direct investments to the EU through the Lisbon Treaty, without treating the difficulties which derive from the potential conflicts of IIAs and EU law in arbitration proceedings.[11] *Bräuninger* exclusively focuses on the (potential) discrimination of investors in extra-EU IIAs, which will only

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8 *Engel*, SchiedsVZ, 2015, 218, 218, cf. also: *Peterson*, IA Reporter Vol. 9, No. 11 (2016), 2, 2 f.

9 Cf. *inter alia* the awards: *Binder vs. Czech Republic*, 06.06.2007 – UNCITRAL - Award on Jurisdiction; *Eastern Sugar vs. Czech Republic*, 27.03.2007 – SCC No. 088/2004 - Partial award; *Euram vs. Slovak Republic*, 22.10.2012 – PCA Case no. 2010-17: First Award on Jurisdiction; *Achmea vs. Slovak Republic*, 26.10.2012 – PCA Case No. 2008-13 - Award on Jurisdiction, Arbitrability and Suspension; *Electrabel vs. Hungary*, 30.11.2012 – ICSID Case No. ARB/07/19: Decision on Jurisdiction, Applicable Law and Liability; *EDF vs. Hungary*, 04.12.2014 – UNCITRAL - Award; cf. also the judgements / orders rendered by national courts, *inter alia*: *Higher Regional Court Frankfurt*, SchiedsVZ (2013), 119, 10.05.2012 – 26 SchH 11/10; *German Federal Supreme Court*, 03.03.2016 – I ZB 2/15; *Swiss Federal Supreme Court, 1èr Cour de droit Civil*, 06.10.2015 – 4A 34/2015.

10 *Ahner*, Investor-Staat-Schiedsverfahren nach Europäischem Unionsrecht, 2015.

11 *Schmidt*, Die Kompetenzen der Europäischen Union für ausländische Investitionen in und aus Drittstaaten, 2013.

be of minor importance for this thesis.[12] General literature and handbooks contain very little on the specific subject matter.[13] Several articles and discussion are centred around the recent decisions of the arbitral tribunals, without however questioning the overall approach of those tribunals.[14] Others try to limit the discussion either on the international law perspective or the EU law perspective, which might lead to, at least partially, ignoring the far-reaching implications of the question in practice for both, investors and states.[15] Additionally, with the upcoming negotiations of the free trade agreements, the focus shifts on particular issues of policy making and potential possibilities how to reconcile investment protection and EU law in future agreements.[16]

Focus of the thesis

However, a comprehensive approach of how the arbitral tribunals should address the question of conflicting provisions in EU law and international investment law, both regarding intra-EU IIAs as well as extra-EU IIAs, is missing so far. From a current perspective, this conflict will subsist for quite a while, given that the negotiations on agreements which should replace pre-existing IIAs are pending and it becomes more and more doubt-

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12 *Bräuninger*, Investitionsschiedsgerichtsbarkeit und Diskriminierungsverbote, 2015.

13 The most extensive debates can be found in the different chapters in *Bungenberg/Griebel/Hobe u. a.* (Eds.), International Investment Law, (2015), cf. inter alia: Chapter 4: II. European Bilateral Approaches or Chapter 7: II EU Rules and Obligations related to investment; furthermore the different contributions in *Bungenberg/Griebel/Hindelang* (Eds.), Internationaler Investitionsschutz und Europarecht, (2010) also address the interferences but, however, largely foucs on the future competences of the EU in the context of the Lisbon Treaty.

14 Cf. inter alia: *Reinisch*, LIEI Vol. 39, No. 2 (2012), 157; *Wehland*, ICLQ Vol. 58, Iss. 2 (2009), 297; *Söderlund*, JOIA Vol. 24, Iss. 5 (2007), 455.

15 Among the largest contributions in journals feature: *Burgstaller*, JOIA Vol. 26, No. 2 (2009), 181; *Dimopoulos*, CMLR Vol. 48, No. 1 (2011), 63; *Eilmansberger*, CMLR Vol. 46 (2009), 383; *Hindelang*, LIEI Vol. 39, Iss. 2 (2012), 179; the recent contribution by *Tietje/Wackernagel*, JWIT Vol. 16, Iss. 2 (2015), 205 has a different focus but treats overlapping questions with regard to this thesis.

16 *Hindelang*, AVR Vol. 53 (2015), 68; *Lang*, Der EuGH und die Investor-Staat-Streitbeilegung in TTIP und CETA (Beit. zum Transnat. Wirt.-R, Vol. 138, 2015); *Lenk*, EJLS Vol. 8, No. 2 (2015), 6.

ful, if those agreements will ever (and to which extent) include any particular provisions on investment protection. Hence, a comprehensive analysis of the existing particularities and conflicts in this – existing – situation of overlapping legal frameworks is of predominant importance. As a senior associate of a renowned law firm involved in several of the current disputes puts it:

> „The problem about this subject is that 'Internationalists' do not listen to 'Europeanists' and vice-versa."[17]

This thesis will thus try to overcome these difficulties by furnishing a comprehensive analysis of how arbitral tribunals should consider EU law in arbitration proceedings arising in the context of an international investment protection dispute. The focus will be on disputes based on IIAs concluded by EU member states with other member states as well as non-member states, which engage the responsibility of an EU member state under the respective IIA. Within this analysis, the questions of the interference of EU law with all stages of the arbitration proceedings should be questioned, including the question of whether (or whether not) EU law is part of the applicable law in those disputes, which effects it might have on the arbitral tribunal's jurisdiction or the substantive protection provided under international investment law.

Several questions should however be excluded from this analysis. First, the question of state-contracts will not be further analysed. These contracts, which are usually concluded between investors and states regarding a particular investment, represent several particularities, which could also interact with EU law, but which are subject to a completely different setting than IIAs as international treaties. Second, mixed agreements concluded by the EU and the member states, will not be treated in deeper detail as well. The reason for this omission is basically that the only existing treaty, the Energy-Charter-Treaty, represents particularities linked to its negotiation, which could bias the overall analysis and set a completely different focus. Furthermore, given the recent uncertainties regarding the inclusion of investment protection in further agreements, the situation remains highly uncertain. However, within the analysis, whenever possible, some of the particularities or consequences for mixed agreements will be highlighted. Third, given the considerable amount of contributions regarding the EU's future competences, this subject will only be treated when

17 Quote from an off-the-record conversation with a senior associate having been involved in several proceedings based on either intra-EU or extra-EU BITs.

necessary to derive consequences for the existing IIAs. The focus should be exclusively on the conflict between IIAs and EU law.

Structure of the analysis

Addressing this conflict requires a three-step approach.

First, following this introduction, the different mechanisms of investment protection within the EU should be explained (*Part I*). This requires an analysis of the roots of modern investment protection through IIAs as well as its basic features. These features will be contrasted to the most important provisions of EU law which might be advanced by investors in the EU in order to protect their investment against measures from EU member states or the EU. It will be demonstrated that *de facto* both frameworks, EU law as well as investment protection through IIAs, build two overlapping frameworks, which have not been construed in a coordinated approach. The analysis of the different protection standards under both frameworks serves as a basis for the entire understanding in the further thesis and developments. Having compared those two frameworks and having taken into consideration the particular features of each of them, Part I will finish by outlining various potential conflicts of both frameworks regarding investments in the EU.

Second, based on these potential conflicts, the following parts of the thesis will develop solutions how to resolve these conflicts in arbitration proceedings. To be able to develop those solutions, one needs to fundamentally distinguish between intra-EU and extra-EU disputes. Given the different actors in question, the approach to resolve the conflict as well as the considerations to take into account, cannot be identical in the extra-EU and intra-EU context. Hence, the analysis will be separated. The conflict regarding EU law and intra-EU IIAs should be addressed first (*Part II*). It will be demonstrated that the conflict between the provisions of EU law and intra-EU IIAs lead to the arbitration clause and the substantive protection standards contained in IIAs to be set aside by conflicting provisions of EU law. To demonstrate this, it will be first shown that EU law can be considered as international law. Second, it will be developed that under the relevant rules of conflict of law applicable in this context, the provisions of EU law prevail over conflicting provision under any international obligation by the member states and conflicting provisions of international law need to remain unapplied. It will then be outlined that arbitration clauses contained in IIAs actually conflict with EU law and hence need to

be set aside and that a substantial guarantee provided in an IIA cannot alter the member states' obligations under EU law.

After having advanced the solution to be applied in the intra-EU context, the question how to consider EU law in the extra-EU context will be deployed (*Part III*). After having a look on the current perception of the conflict, the potential influences and implications of EU law on the arbitration proceedings will be outlined. The major part of this extra-EU analysis will however focus on the development of a new approach how to address questions of EU law in international arbitration proceedings based on extra-EU IIAs which is influenced by similar solutions developed by the ECtHR regarding multi-level legal frameworks in the well-known *Bosphorus-Decision.* These developments should in particular demonstrate that despite of various arbitral tribunals having concluded the contrary, the protection offered by EU law and IIAs can at least be considered equivalent, enabling new procedural approaches to address the conflict between both frameworks. Finally, given the results, a brief outlook should outline several prospects of the solution for the current discussions on trade agreements and the future investment policy of the EU (*Part IV*). The previously found theses will then be summarised in the Conclusion.

Terminological comments

For matters of clarification, several terminological issues should be addressed at this stage as well. For the purpose of this thesis, European Treaties will refer to the integrity of treaties concluded by EU member states since the creation of the European Coal and Steel Community in 1951 and the Treaty of Rome establishing the European Economic Community and European Atomic Energy Community in 1958. Hence, as long as not expressly denominated, this includes all amendments to the Treaty of Rome, such as the Brussels Treaty, Single European Act, etc. until the Lisbon Treaty, as well as the Accession Treaties by new member states.

Similarly, EU law will refer to the integrity of law in relation with the EU, which means: primary law as contained in the European Treaties (TEU, TFEU, Charter), secondary law issued by institutions of the EU (directives, regulations, decisions) as well as all general principles of EU law developed in the jurisprudence.

For further simplification, all decisions by the Court of Justice of the European Coal and Steel Communities, the Court of Justice of the European Communities, the Court of First Instance, the General Court and the