Investor-state dispute settlement and its impact on International Investment Law

OC - (ILA-14133) - ARBITRATION PROCEDURE IN BILATERAL INVESTMENT TREATIES – INTERACTIONS BETWEEN NATIONAL, EUROPEAN AND INTERNATIONAL COURTS

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Abstract

The term bilateral investments treaties refer to bilateral agreements for the promotion and mutual protection of investments. The main goals of BITs are to create favorable conditions for investments by investors of one contracting party in the territory of the other contracting party. This investments shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other party. A BITs provide major benefits, including national treatment, "most-favored nation" treatment, protection from expropriation and performance requirements for investments, reparation of investments, protects against unlawful activities of offices, as well as protection against legal changes leading to unjustified harm to investors. Although in many cases investments are already granted most of these rights under national laws, such as the right to due process and protection from expropriation, the BITs would give investors additional benefit, such as access to neutral investor-state dispute settlement. Entrusting the settlement of disputes to arbitrators allows to remain independence and in the same time they are obliged to fully investigate the case and evaluate it in the context of applicable law, just like national courts. Additionally practice shows that investors have a better chance to obtain a positive decision and award large compensation corresponding to the actual damage suffered than in national courts. When a dispute between contracting state and the investor of the other contracting state cannot be settled in an amicable way both parties can submit the dispute to the arbitration procedure to be mutually agreed. BITs provisions indicated on several arbitration procedures which can be used: 1) UNICITRAL, 2) International Center for the Settlement of Investment Disputes, 3) Institute of Arbitration at the Chamber of Commerce in Stockholm, 4) International Chamber of Commerce in Paris. As a rule the arbitration decision is final and binding for the parties in conflict.

Clauses of a similar provisions are commonly used in about 200 BITs concluded between the Member States of the European Union, and hundreds adopted in the world. On 6 March 2018 the Court of Justice of the European Union ruled in the *Achmea* case (C-284/16) that BITs violated EU law, so the future of BITs arbitration procedures in European Union is already decided. As BITs are not compatible with EU law, those agreements mostly are currently in period of termination. Like in case of BIT between Polish and Portugal of 11 March 1993, which was terminated and will expire

on 3 August 2019. However according of the BIT, the provisions of Articles 1 to 10, so regulations apply to arbitration procedures as well, shall remain in force until 3 August 2029. Irrespective of situation in European Union BITs bar foreign governments from using investment restrictions and still play an important role in the international commercial relations.

The paper is devoted to different aspects of arbitration procedure like: composition of the tribunal and place of arbitration, qualification and impartiality of arbitrators, applicable law, provisional and final remedies, transparency, accountability and quality, but first of all, to relations between national courts and international arbitration (courts). In this respect, a significant question of the paper is not to defining the scope of rights and/or obligations of investors or states according to BITs but whether such investors can satisfy any rights in arbitration procedures and whether this procedures are really valid and final. In this respect the paper is trying to find an answers on several questions. Whether there is possible a judicial review of the validity of the arbitral decision made by the national courts? And if so, to what extend such judicial review can be exercised by national courts? At the other end of the scale is a question about a possibility of parallel international commercial arbitration or judicial proceedings (Permanent Court of Arbitration)? And how above interactions can impact on the (uniform) interpretation of international law? The main method used in the paper is formal-dogmatic. The paper focuses mainly on analyses of the provisions of the selected BITs, some national law regulations, UNICITRAL Rules, 1965 Washington Convention. Beyond the analyses of binding documents the paper focuses on the judgment of the Court of Justice of the European Union and some selected cases investigated in arbitration procedures.

Palavras-chave : arbitration, investments, courts