Federal Markets "Momentum" Research Group
mtatk Magyar Tudományos Akadémia Társadalomtudományi Kutatóközpont

CEU Department of Legal Studies
CENTRAL EUROPEAN UNIVERSITY

Investment arbitration and national interest: Central and Eastern European experiences in the light of the upcoming EU-US Free Trade Agreement

May 20, 2016

Venue: "Kisterem", Hungarian Academy of Sciences
Széchenyi István tér 9. 1051 Budapest, Hungary

Convener: Csongor István Nagy, research chair and head of the Federal Markets "Momentum" Research Group of the Center for Social Sciences at the Hungarian Academy of Sciences

Introduction

Due to the approaching EU-US Free Trade Agreement (TTIP), investment arbitration came to be one of the central issues of the contemporary discourse on public and economic policy. The new generation of free trade agreements,[1] addressing the submission of sovereign states in separate chapter, generated fierce debates and brought to the fore of social dispute decade-old problems concerning the democratic legitimacy of investment disputes and their encroachment on independent national economic and financial policy. Some argue that investment disputes are settled in the frame of intransparent ad-hoc arbitral proceedings devoid of any democratic legitimacy, which are (because of their ad-hoc and secret nature) inconsistent and unpredictable. Critics assert that the current pattern of the settlement of investment disputes quite often strips national courts (including national constitutional courts) of their legitimate powers and vests ad-hoc and intransparent bodies with the competence to adjudicate public law questions, such as the validity of national legislation adopted by parliaments having democratic legitimacy, the review of the rationality of national regulatory decisions, the supervision of the fairness of national legal procedures and the exercise of contractual rights emerging from genuine commercial agreements.

Background

The first investment protection treaty (concluded in 1959 by Germany and Pakistan) was meant to convert certain constitutional requirements (e.g., expropriation, protection of legitimate expectations) into international obligations so as to 'guarantee' them (guarantee function). The initial purpose of these treaties was to project certain constitutional requirements to the level of international disciplines; they were normally concluded between developed and developing countries and led by the concerns related to the latter's legal system; the obligations assumed were, as a matter of courtesy, mutual, that is, reciprocal. However, these treaties, arguably, did not aim at establishing higher (or in any sense different) standards for investment protection than the one already part of the constitutional traditions of western democracies; the rationale was to convert the relevant constitutional rights and principles into international law guarantees in the form of bilateral agreements, so they could not be nullified unilaterally.

[1] EU-US: Transatlantic Trade and Investment Partnership (TTIP), EU-Canada Comprehensive Economic and Trade Agreement (CETA).

Nonetheless, there was no global agreement and especially no uniformity as to the investment protection standards; it is noteworthy that although goods, services and knowledge (intellectual property) are regulated in the temple of world trade (WTO), investment issues, including investment protection, were almost entirely left out (with the exception of the relatively insignificant provisions of the TRIM).

The major turning point was when even developed democracies started concluding bilateral investment treaties among themselves. Today, investment protection became an integral part of the new generation free trade agreements, some of which are concluded between developed democracies (e.g. Canada, European Union, United States). With this, the guarantee function was put into the shade, and investment protection law fully detached from its original *raison d'être*.

Although, interestingly, investment protection, at least as far as substantive standards are concerned, has always remained, for the most part, bilateral, without a realistic chance for a multilateral system, during this half-century, this pattern brought about a labyrinthine network of bilateral arrangements, and investment protection took a life of its own. Instead of a duplicate it became an independent parallel system.

The major sources of uncertainty are the investment protection treaties' 'treatment provisions' (fair and equitable treatment, security and protection, non-discrimination and national treatment). These principles center around fluid concepts, confer on arbitral tribunals extremely wide powers to review national policy decisions and national administrative and judicial proceedings, entailing far-reaching consequences for states.

Central European perspectives

Central and Eastern Europe is the litmus paper of investment arbitration in Europe. Central European countries are popular targets of investment disputes: the overwhelming majority of the cases against EU Member States are the proceedings launched against countries from the region. Arguably, these states may be characterized by intensive intervention in the market, the state's strong regulatory role and the entrenched social status of public services, which, by their nature, may interfere with the economic interests of foreign investors. In these procedures, arbitral tribunals judge measures that are part of the core of national regulatory sovereignty, such as national privatizations, protection of public health, regulation of prices and curbing of monopolies, and the exercise of contractual rights.

It is not a surprise that, arguably, Central European countries have made attempts to question the unconstrained reach of international investment arbitration. For instance, the Czech Republic and Slovakia proclaimed intra-EU bilateral investment treaties invalid, since they are irreconcilable with EU law (this position is reinforced by the

Commission's launching infringement procedures with the purpose of abolishing bilateral investment agreements between Member States).[2] Arguably, Poland rejected the 1965 Washington Convention, because this would deprive Polish courts of the possibility to reject the recognition and enforcement of arbitral awards that go counter to Polish public policy. A similar approach was followed by Hungary when, in 2011-2012, it excluded arbitration in cases concerning national assets; after these rules passed the muster of the Hungarian Constitutional Court, the Hungarian parliament amended them in 2015. This demonstrates how difficult it is to maintain unilateral national patterns in a global system. Due to the provisions of the CETA and TTIP, CEE Member States may encounter even a more complex situation.

As Central Europe has a pivotal importance from the perspective of international investment disputes and this region disposes of traits leading to peculiar responses, it is essential to channel the region's experiences into the public discourse on new generation free trade agreements.

[2] European Commission – Press release. Commission asks Member States to terminate their intra-EU bilateral investment treaties. Brussels, 18 June 2015, available at http://europa.eu/rapid/press-release_IP-15-5198_en.htm

Conference program

The conference addresses the universal issues of investment arbitration from a Central European perspective. The first section is devoted to the global questions of the subject, such as the general considerations of investment arbitration, new generation free trade agreements (TTIP and CETA), and the vexed question whether there is need for investment arbitration between developed democracies and whether investment arbitration goes beyond the constitutional requirements of developed democracies. The second section presents the experiences of CEE Member States.

9.00-9.20 *Registration*

9.20-9.30 *Welcoming remarks*
Tibor Tajti (professor, acting head of the Department of Legal Studies, chair of the International Business Law Program, Central European University)

Universal questions – general issues

New generation free trade agreements: economic sovereignty and international governance

Session chair: John James Barcelo III (professor, Cornell University)

9.30-9.50 *Lex mercatoria publica: constitutional law and constitutional limits in private-public arbitration*
Stephan Schill (professor, University of Amsterdam)

9.50-10.10 *The settlement of investment disputes through the lenses of an arbitrator*
Roy Gonas (arbitrator & Fulbright specialist, Miami)

10.10-10.30 *The CETA, the TTIP and investment protection*
Céline Lévesque (professor, dean, University of Ottawa)

10.30-10.45 Q&A – *Discussion*

10.45-11.00 *Coffee break*

Is there need for extra guarantees against EU Member States?

Session chair: Attila Badó (professor and department head, University of Szeged)

11.00-11.20 *Intra-EU investment disputes*
Veronika Korom (associate, Sherman & Sterling Paris)

11.20-11.40 *The jurisprudence of the ECtHR: do investors need special protection?*
Pál Sonnevend (professor, ELTE Law School)

11.40-12.00 *Investment arbitration between developed democracies: the experiences of the NAFTA*
Sarah Bauerle Danzman (assistant professor, Indiana University)

12.00-12.15 Q&A – *Discussion*

12.15 – 13.20 *LUNCH BREAK*

Central and Eastern European perspectives

Baltic states, Czech Republic and Poland

Session chair: Csongor István Nagy (research chair, head of the HAS Federal Markets "Momentum" Research Group & head of department, University of Szeged)

13.20-13.40 *Baltic states*
Inese Druviete (associate professor, director, Riga Graduate School of Law)

13.40-14.00 *Czech Republic*
Michal Nulicek (partner, Rowan Legal)

14.00-14.20 *Poland*
Dr. Wojciech Sadowski (partner, K&L Gates Jamka sp.k.)

14.20-14.35 Q&A – *Discussion*

14.35-14.50 ***Coffee break***

Hungary, Romania, Serbia and Slovakia

Session chair: Péter Krekó (director, Political Capital Policy Research and Consulting Institute)

14.50-15.10 *Hungary*
Csongor István Nagy (research chair, head of the HAS Federal Markets "Momentum" Research Group & head of department, University of Szeged)

15.10-15.30 *Romania*
Dr. Catalin Stanescu (senior associate, Bordianu si Asociatii)

15.30-15.50 *Slovakia*
Miroslav Kabát (senior state counsellor, Ministry of Finance of the Slovak Republic)

15.50-16.10 *Serbia*
Zoltán Víg (professor, Univerzitet Singidunum, Belgrade)

16.10-16.25 Q&A – *Discussion*

RECEPTION TO FOLLOW