

Challenges of Regionalism in International Investment Law and Arbitration and its Impact on the Energy Charter Treaty

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Introduction: Rising Regionalism in International Investment Law

The ECT cannot be viewed in isolation, but has numerous interaction with international investment law more generally; moreover, the challenges to international investment law and arbitration, and developments in the law and practice of this broader field, will have repercussions on the ECT, its functioning and further development.

A. Rise in regionalism in two regards

1. the use of regional instruments, instead of bilateral instruments, to grant investment protection and to pursue investment liberalization (among Member States)
2. regional organizations themselves become actors in international investment law by concluding investment-related agreements with non-members

B. Worldwide trend

1. Start was NAFTA
2. EU with new FDI policy since the Lisbon Treaty
3. Asia: APEC, ASEAN, Central Asia, Middle East
4. Africa: the Common Market for Eastern, Southern Africa (COMESA), and the Southern African Development Community (SADC)
5. Latin America: MERCOSUR, the Caribbean Community (CARICOM)
6. Transregional: Trans-Pacific Partnership (TPP), EU-US, US-China, EU-China, etc.

C. Impact of this development is still uncertain:

Will this lead to increased convergence and hence serve as a building block of multilateralism or will it lead to increasing complexity and increasing fragmentation?

Contextualizing Rising Regionalism

A. Criticism of International Investment Law and Investment Treaty Arbitration

1. Broad reconsideration of States international investment policy
2. Criticism of NGOs for lack of social/non-investment dimension of investment law

B. Problems Identified with International Investment Law

1. Problem of Coherence in Application and Interpretation of IIL
 - a. Fragmented sources of international investment law (mainly bilateral treaties)
 - b. One-off dispute settlement through arbitration
2. Amount of policy space and appropriate public-private balance
 - a. Protection of the environment
 - b. Labor standards
 - c. Health standards
 - d. Indigenous peoples
 - e. Sustainable development!
3. Accountability of arbitrators for investment law-making
 - a. Interpretation of very vague standards (FET, indirect expropriation, etc)
 - b. Development of precedent system
 - c. No effective control mechanism

The goal therefore is an overall coherent, balanced and accountable system of investment law and investor-State dispute settlement.

C. Reactions to these Challenges

1. Recalibrating investment treaties
 - a. substantive re-balance, inclusion of exceptions, more concrete treaty standards, more transparency, fine-tuning of dispute settlement provisions
 - b. started with 2004 US and Canadian BITs and now adopted by EU, China, etc.
2. Integration of investment and trade in so-called Preferential Trade and Investment Agreements)
3. Reforming investor-state dispute settlement
 - a. Return to domestic courts
 - b. Return to diplomatic protection

- c. Appeals mechanism
- d. Permanent investment court
- e. Alternative dispute settlement mechanisms
- 4. Renewed discussion on multilateral investment treaty
- 5. Rising Regionalism
 - a. Various projects address and pick up on many of the reform debates
 - b. Substantive rebalancing (environment, health, etc.)
 - c. Transparency
 - d. Creation of organs to issue binding interpretations as a counterweight to arbitrators

The above discussed changes aim at a more coherent, balanced and accountable investment regime. In this context, regionalism can have a great potential to create more convergence, to better balance public and private, and to make arbitrators more accountable

Effect of Regionalism on Energy Charter Treaty in Context of Challenges to IIL

A. Achievements of the ECT (assessed in light of challenges to international investment law)

1. Overall a very positive balance
2. ECT effectively protects energy investments
3. Makes available dispute settlement mechanism in particular in countries with weak judicial institutions
4. Creation of level-playing field for transnational energy networks: sectoral, but multilateral treaty!
5. Addresses interactions between investment and non-investment concerns
 - a. Economic governance: trade in energy, competition policy, energy transit, access to capital markets, state-owned enterprises, and taxation
 - b. Social and environmental governance: environmental rules and side agreement, non-precluded measures clauses
 - c. Existence of an institutional infrastructure (secretariat, ECT conference meetings, etc)
6. Largely meets challenges for predictability, uniform rules (multilateralism), and public-private balance; lack of transparency in investor-State dispute settlement is still an open front

B. Threats to the ECT acquis stemming from embeddedness in IIL

1. Spillover of IIL-Criticism to ECT
 - a. Critics do not distinguish between BITs and ECT
 - b. Danger that not sufficient attention is paid to such criticism (as happened in general IIL) within the ECT community
2. Threats from investment arbitration
 - a. Arbitrators actively cross-cite: insufficient attention to ECT specificities
 - b. Danger of incoherences from interaction between ECT and general IIL
3. Rising Regionalism
 - a. Aims to address challenges to IIL
 - b. But no carve-outs for energy investments (->application in parallel with the ECT)
 - c. Some ECT members may completely isolate themselves from ECT rules: eg intra-EU: problem for outsiders and for level-playing field
 - d. Unclear relationship between ECT and regional investment initiatives
 - e. Both of these issues should be addressed

By Way of Conclusion: Recommendations for the ECT Community Arising Out of the ECT's Embeddedness in the Broader Field of International Investment Law

A. Engage with non-investment constituencies (on various levels)

1. Intra-government (ministries for environment, social matters, etc) and inter-government
2. Through involvement with international organizations that deal such other issues (eg. UNEP, UNDP, UNCTAD, etc.)
3. Through dialogue with NGOs and public interest organisations
4. Through engagement with scholars of international law, investment law, energy law, global governance

B. Engage with dispute settlement actors

1. Dispute settlement institutions
2. Arbitrators
3. Dispute resolution and investment arbitration scholars
4. Building expertise within the Secretariat and creating outreach activities on investor-State dispute settlement

C. Engage actively with regional integration

1. Further discussion on topic with and among ECT member states
2. Enhance dialogue with the integration institutions themselves
3. Establish agreement on the relationship between ECT acquis and regional initiatives so that benefits for level-playing field are exported to regional initiatives rather than risking fragmentation by increased regionalism
4. Energy law is perhaps the next frontier of global governance; let's build on the existing institutions and export ECT experience, rather than succumb to outside challenges, including that of regionalism.