



A. Introduction

This paper deals with a two-fold issue. The first issue is whether or not the new generation of European investment agreements, replacing existing BITs of Member States with third countries, will have direct effect in the EU. The second issue is whether or not the ECT, or to be more precise its Part III on investment promotion and protection, has direct effect.

B. No-Direct Effect of EU Investment Agreements

The answer to the first issue is indeed quite straight and simple. The CETA between Canada, and the EU and its Member States, and the Free Trade Agreement with Singapore, the two European agreements with Chapters on investment protection, upon which negotiations are currently closed, explicitly exclude that their provisions will have direct effect in the legal systems of the Contracting Parties.

The policy choice of the Council and Commission to explicitly deprive provisions of free trade agreements (FTAs), and now investment agreements, of their possible direct effect *ex-ante* is a long-standing decision.

The EU institutions openly took the “no direct effect” decision with reference to European agreements on trade even before the entry into force of the Lisbon Treaty.

To illustrate the point the act of conclusion of the Free Trade Agreement with South Korea, which has been widely regarded as representing the new European practice in trade matters, is worthy of mention. As it is well known, although concluded after the entry into force of the Lisbon Treaty, the FTA with South Korea was negotiated in conformity with the pre-Lisbon treaty provisions on common commercial policy.

The Council Decision on the signing, on behalf of the European Union, and provisional application of the [Free Trade Agreement between the European Union and its Member States, and the Republic of Korea](#) of 16 September 2010 provides that “the Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.” (Article 8)

However, the device of excluding direct effect of international treaty provisions through the Preamble of (or a specific provision included in) decisions concluding the agreements



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adopted by the Council is not capable *per se* of reaching the purpose with sufficient certainty, if one looks at the case-law of the Court of Justice of the EU.

According to the well-settled case law of the Court of Justice, when the Contracting Parties themselves have not specified in the international agreement what effect its provisions have in their domestic legal systems, the question is “to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community...” (Case C-149/96, [Portuguese Republic v Council of the European Union](#), Judgment of 23 November 1999, par. 34 referring to Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, par. 17). The opposite holds true when the exclusion of direct effect is set in the agreement itself. It is the position of the Court of Justice that: “in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties.” (Case C-149/96, *cit.*, para. 34; and Case C-366/10, [Air Transport Association of America \(ATAA\) and others v Secretary of State for Energy and Climate Change](#), Judgement of 21 December 2011, par. 49 with reference to Case 104/81 *Kupferberg*, par. 17, and Case C-149/96 *Portugal v Council*, par. 34).

Considering that the exclusion of direct effects, if provided for unilaterally by the EU institutions, cannot be taken for granted since the issue falls within the exclusive competence of the Court, the most recent tendency in European treaty practice on both trade and investment is towards the inclusion of specific treaty provisions excluding any direct effect to be agreed upon with the other Contracting Party. This is the case with the CETA and the FTA with Singapore.

Article 17.15 of the FTA with Singapore tellingly titled “No Direct Effect” provides that “...nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.” Article 30.6, paragraph 1, of the CETA titled Private Rights first reproduces verbatim the wording of the afore-mentioned article of the FTA with Singapore, and then goes on to state in even clearer terms that “nothing in this Agreement shall be construed [...] as permitting



this Agreement to be directly invoked in the domestic legal systems of the Parties.” Furthermore, Article 30.6, paragraph 2 specifies that “[a] Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.”

I. Rationale of the no-direct effect treaty-making option

The rationale behind the no-direct effect provisions of the new generation of ‘commercial’ treaties of the EU, and the explicit qualification of the international obligations of the Contracting Parties (the obligations of each Contracting Party towards the investors of the other Parties included) as inter-party obligations under public international law lies in the possible interplay between different (but interconnected) principles of European law on the relationship between the European legal order and international obligations of the EU and its Member States, as developed by the Court of Justice of the EU in its case-law.

The first relevant principle is the principle of autonomy of the EU legal order from (not only the domestic laws of the Member States but also) international law, i.e. the protection of the specific characteristics and autonomy of the EU legal order (the European judicial system included) from international law obligations and external judicial mechanisms established by international agreements between the EU and third Parties. (See, *inter alia*, CJEU, [Opinion 2/13](#), 18 December 2014, par. 179-190).

The other relevant principles are the principles that agreements concluded by the EU form an integral part of EU law, and are binding upon the institutions of the EU and Member States (Article 216(2) TFEU). The necessary corollaries to the above monist approach, as enshrined in the treaty and traditionally followed by the Court, are the principles of direct effect and supremacy of international law over European secondary legislations within the EU.

The afore-mentioned principles, and their interplay, as well as the European case-law thereon, have been extensively investigated in legal scholarship, and are subjects deserving a longer discussion than the one that can be made here. Without extensively discussing the afore-mentioned principles, few observations on the interplay between the autonomy of EU law, on the one hand, and the principle of direct effect (and supremacy) of international law, on the other, from a European perspective will be made here.



As one can infer from the European case-law, the autonomy of the EU legal system (its judiciary included) from international law seems to be perceived to be more in danger when the provisions of an international agreement between European Union and third Parties have direct effect within the EU legal system, and the agreement concerned establishes its own adjudication mechanism.

The no-direct effect treaty-making option, and the consequent de-linking of international treaty commitments from EU law is aimed to avoid possible interferences between the EU judicial system and international judicial mechanisms contracted by the EU with third Parties by treaty.

The no-direct effect provisions protect not only EU law and the EU judicial system from international law but also international law and international judicial mechanisms from EU law.

II. The link between the no-direct effect provisions and the provisions on investor-State dispute settlement mechanism

The afore-mentioned aim of the no-direct effect provisions of new European commercial agreements cannot be appreciated in full without considering some features of the provisions on the settlement of investor-to-State disputes included therein.

The clauses on the settlement of investor-to state disputes provide investors with the right to submit their treaty claims just to international treaty *forum*, without mentioning at all domestic judges as an alternative forum. As opposed to what is provided for in the new generation of European treaties, Article 26(2) of the Energy Charter Treaty envisages domestic judges of the Contracting Parties as alternative forum to international arbitration at disposal of protected investors for their treaty claims, in conformity with the BIT practice of capital exporting MSs.

Moreover, Article 8.22 of the CETA subjects the access of an investor to the investment dispute settlement mechanism to the withdrawal of "*any existing proceeding before a tribunal or court under domestic or international law with respect to a measure...*" that the claimant investor alleges to constitute a CETA breach, and the waiver of "*its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to*" in its CETA claim.



Similarly, according to Article 9.17.1(f)-(g) of the FTA with Singapore the international arbitration fora provided for by the treaty itself are available to a protected investor only if, *inter alia*,

“(f) the claimant [investor]:

(i) withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection); and

(ii) declares that it will not submit such a claim before a final award has been rendered pursuant to this Section;

(g) the claimant:

(i) withdraws any pending claim concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) submitted to another international tribunal established pursuant to this Section, or any other treaty or contract; and

(ii) declares that it will not submit such a claim in the future; and

(h) no final award concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) has been rendered in a claim submitted by the claimant to another international tribunal established pursuant to this Section, or any other treaty or contract.”

III. Open issues

The provision of the CETA on Private Rights seems to exclude any effect whatsoever of its provisions in the domestic legal systems of the Contracting Parties. The no-direct effect provision of the treaty with Singapore is less categorical in that respect. Under Article 17.15 of the FTA with Singapore the provisions of the treaty (investment protection provisions included) cannot be construed as conferring rights upon individuals. On the contrary, the same article leaves the issue of the validity of European acts vis-à-vis EU's international commitments still open.

The issue of validity of the acts of the EU in the light of its treaty obligations is connected with the traditional monistic position of the Court of Justice that agreements concluded by the EU form an integral part of EU law, and are binding upon the institutions of the EU and Member States. The corollary to the afore-mentioned approach is the principle of



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supremacy of international law over EU's secondary legislations. As is explained by the Court itself, the validity of European acts (legislative acts included) "...may be affected by reason of the fact that they are contrary to a rule of international law" (Case C-162/96 [A. Racke GmbH&Co. and Hauptzollamt Mainz](#) [1998] ECR I-3688, par. 27). The above principles perfectly described the openness of the EU legal order towards international law maintained by the EU judiciary until the mid-1990s.

The Court restated in the abstract the above principles in January 2015 (CJEU, Joined Cases C-401/12 P to C-403/12 P, [Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht](#), par. 52). That notwithstanding it has so limited the scope of application of its original monistic approach over recent years so that the possibility of reviewing the legality of European acts against EU's treaty obligations has become the exception, rather than the general rule. (CJEU, Joined Cases C-401/12 P to C-403/12 P, [Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht](#), 13 January 2015, cit., par. 56-59).

This more recent strand of case-law casts doubt on whether the Court of Justice of the EU still sticks to its traditional monistic approach since it seems to have substantially endorsed a dualistic approach.

On the basis of the afore-mentioned case-law linking the supremacy of international provisions to their direct effect within the EU, as well as of reciprocity considerations, it appears to be very unlikely that the Court will consider the provisions of new generation of commercial treaties of the EU as capable of operating as parameters of legality of EU acts in line with its case-law on WTO obligations, although this possibility cannot be entirely ruled out. As asserted by the Court itself, even if a treaty "...contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement". (Case C-377/98 [Netherlands v. Parliament and Council](#) [2001] ECR I-7079, par. 54) In any case, international treaty provisions will maintain indirect effect within the EU on the basis of the well-established principle of consistent interpretation.

Furthermore, the no-direct effect provisions, such as those contained in the CETA and the



FTA with Singapore, do not exclude that the provisions on investment protection of the agreements of the EU may operate in any case as parameters of legality for Member States' measures in infringement proceedings of the EU Commission against the Member States. (Case C-239/03, [Commission of the European Communities v. French Republic](#), 7 October 2004).

Such effect seems to be de-linked by the Court from the issue of whether or not individuals may directly invoke the provisions of an international agreement before the EU judiciary or domestic judges of the Member States, as well as the issue whether said international agreement is a purely "Community agreement" or a mixed agreement. It is the position of the Court of Justice that "...mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence." (Case C-239/03, *Commission of the European Communities v. French Republic*, cit., par. 25 referring to Case 12/86 *Demirel* [par. 9, and Case C-13/00 *Commission v Ireland*, par. 14)

This occurs when the provisions of an international agreement govern a field largely regulated by European legislation. As is stated by the Court, "in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement". (Case C-239/03, *Commission of the European Communities v. French Republic*, cit., par. 26 with reference to Case 12/86 *Demirel*, par. 11, and Case C-13/00 *Commission v Ireland*, par. 15)

In such cases "there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments." (Case C-239/03, *Commission of the European Communities v. French Republic*, cit., par. 29)

C. Direct effect of the ECT and its Part III on investment protection

The second issue investigated here is whether or not the ECT, or to be more precise its Part III on investment promotion and protection, has direct effect within the EU.

The ECT does not contain any specific provision dealing with its effect in the domestic



systems of the Contracting Parties. The only reference in the ECT to domestic implementation issues is to be found in Understanding 16, which regards the possibility for investors to submit investment disputes to domestic courts under Article 26(2)(a) of the treaty.

According to Article 26(2) ECT the investor may choose to submit the investment dispute “for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article [*i.e.*, an ICSID arbitration, an UNCITRAL arbitration, or an arbitration proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce]”.

Understanding 16 clarifies that “Article 26(2)(a) (the possibility for investors to resort to domestic courts of the Contracting Parties) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.”

Nevertheless, Understanding 16 does not refer to the possible direct effect of Part III of the treaty in the domestic systems of the Contracting Parties. Rather, it states that Article 26(2)(a) should not be interpreted as implicitly including an obligation upon the Parties under the treaty to adopt (further) domestic measures implementing Part III. Accordingly, Understanding 16 seems to assume that Part III has direct effect within the domestic legal systems of the Contracting Parties, rather than the opposite.

However, the issue concerning the effects that the substantive obligations of protection have in the domestic systems of the Contracting Parties have been left, to a certain extent, by the treaty to the interpretative practice of each Contracting Party.

As far as concerns the EU, by applying the test and criteria developed by the Court on the matter the question cannot but be answered in the affirmative.

The test developed by the Court can be summarized as follows: “a provision of an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.” (See, *inter alia*, C-18/90, [Office national de l'emploi / Kziber](#), 31 January 1991, par. 15, also referring to Case 12/86 Demirel).



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The provisions on investment protection of the ECT clearly meet the afore-mentioned test, despite the issue has not been yet settled by the Court of Justice. The Court had the opportunity to deal with the matter, but avoided it in Case C- 264/09, [Commission v. Slovak Republic](#), 15 September 2011.

Moreover, investors protected under the ECT are addressees and beneficiaries of the standards of protection included therein (among others, for instance, the protection from direct and indirect expropriation, the fair and equitable treatment standard, and the most constant protection and security) and can directly enforce them in investment arbitration against the host Contracting Parties or before the competent domestic judges, as is provided for in Article 26(2) ECT.

Given the above it would be difficult to deny that the investment provisions of the ECT are self-executing, therefore have direct effect in the EU, and in the domestic legal systems of its Member States, in line with the principle of uniform interpretation and application of EU law (of which the ECT provisions form an integral part).

Further elements confirm that Part III of the ECT was intended by the EU and its Member States to have direct effect in their domestic legal systems. These are the statements of policies, practices and conditions of the EU and its MSs not allowing an investor to resubmit a dispute already submitted to their domestic judges (EU judiciary included) to international arbitration at a later stage.