Paris Baby Investigation – Episode 6 :
The future of investment arbitration within the European Union, with Pr. Mathias Audit (English transcript)

[Introduction]

(00:46) PBA: Today, we have the pleasure to be with Professor Mathias AUDIT. Hello Professor.

(00:53) Mathias Audit: Hello Madam.

(00:55) PBA: You are a partner and also the founder of AUDIT DUPREY FEKL. You are a professor at the Sorbonne Law School. You are co-director of the Master 2 "Arbitration and International Trade Law" at the Université Panthéon Sorbonne. You regularly sit as an arbitrator, as sole arbitrator, co-arbitrator or chairman of an arbitral tribunal, whether in the context of ad hoc or institutional arbitration proceedings. In your practice, you advise both private companies and States or public entities. In your university functions, you teach certain courses on international trade law, foreign investment law and also project financing law. You therefore have considerable experience in investment arbitration as a lawyer, arbitrator and professor. That is why you are with us today and we thank you again for your time.

(01:55) Mathias Audit: Thank you very much for the invitation. I'm delighted to be a part of this podcast.

(02:01) PBA: Let's dive into the subject of this podcast. The question of the articulation between European Union law and investment arbitration has been a central issue in recent news of international arbitration law. It has already caused a lot of ink to flow in recent years, and will certainly continue to do so.

Mr. Audit, as a reminder for our listeners, could you go back to the reversal of the last few years, initiated by the Achmea ruling, and followed by others, such as Komstroy and PL Holdings, and explain to us what the practical consequences of this reversal were?

(02:37) Mathias Audit: Indeed, the Court of Justice, and even before, the European Commission, have shown a rather strong opposition to investment arbitration in the intra-European context, i.e. between an investor originating from a member state of the European Union and a member state of the European Union. Initially, the Commission's amicus curiae appeared in the context of arbitration proceedings, i.e. between European investors and EU Member States. Then, thanks to the Achmea ruling, the Court of Justice

was seized of the matter and in this case, the Court of Justice decided to put an end to the possibility of initiating arbitration proceedings based on a bilateral investment promotion treaty, a BIT, concluded between two EU Member States. The reasoning behind the Achmea judgment is linked to the exclusive right of interpretation and application of EU law, as it were, contained in the Treaty on the Functioning of the European Union and granted to the Court of Justice. It is for this reason that the arbitral tribunals would be led to interpret and apply European law in the context of investment arbitration that the Court of Justice considered that this arbitral mechanism should be discontinued.

The consequence was, first of all, this decision, but then a treaty was concluded between 23 Member States of the Union, which put an end on May 5, 2020 to intra-European BITs, i.e. nearly 300 BITs, which were concluded between European States. Following this, we recently had a PL Holding ruling, which is a less significant ruling, in which we were confronted with a particular situation, which is that the content and the offer of arbitration contained in an intra-European BIT had been taken up in a contractual mechanism. The Court of Justice has extended, as it were, the solution of the Achmea judgment to this contractual solution. All this concerns intra-European BITs, and then the question of the Energy Charter Treaty remained unresolved. Moreover, in the preamble to the treaty of 5 May 2020, which I have just mentioned, the Energy Charter had been left out, and rightly so, because it is a treaty which is not exclusively intra-European, but which also involves third countries.

The question of the compatibility of the arbitration mechanism with the law of the European Union, this mechanism which appears in the treaty of the energy charter was put to the Court of Cassation in a case Komstroy, and on this occasion, even if the question was not put to him the Court of Justice extended the Achmea solution to the arbitration mechanism based on the treaty on the energy charter. As a result, today, at least from the point of view of the Court of Justice, the arbitration mechanism, which is included in the Energy Charter Treaty, can no longer be used between European investors and European states. There are many cases of this type, particularly against Germany, Spain, Italy and also against France.
The consequence is that for European states, for the Court of Justice, the arbitration mechanism, whether based on an intra-European BIT or on the Energy Charter, can no longer be activated.

On the other hand, the arbitral tribunals - there are a number of examples of arbitral tribunals - consider that they do not have to take this solution into account in any way. As a result, today there are still proceedings underway, arbitration proceedings, and even new ones that have been initiated recently, notably a case against France. The consequence is that the arbitral tribunals consider that, on the whole, they do not have to take into account the case law of the Court of Justice.

From the European point of view, with the European States, the Court of Justice and the European Commission, the arbitration mechanism does not have to be activated when it is intra-European. But from the point of view of arbitration tribunals, it can still be activated.

(07:43) PBA: From what you have just explained to us, we understand that it is no longer possible for an investor from the European Union to base his investment arbitration proceedings on the basis of a bilateral investment protection treaty. In this case, the investor will have no choice but to sue the state in case of a dispute before its own courts. Would it be possible for you to enlighten us on the risks that this entails for the investor and, above all, will EU law be able to offer the same protection as that guaranteed by BITs?

(08:16) Mathias Audit: The investor has always had the possibility to bring an action before the courts of the European state in whose territory he has invested. It obviously depends on the local procedural rules, on the litigation options that exist and it is therefore very variable depending on whether one has invested in France, in Poland or in Lithuania.
The rules are undoubtedly different. On the other hand, what is quite identical is the fact that the particularity of investment arbitration is not so much the substantive rules that it lays down but rather the possibility of financial compensation that it allows. That is to say that the investors on the basis of these arbitration procedures obtain a financial compensation, which can be very important of their damage. I am not sure that investors can obtain such financial compensation before the courts of Member States. There is obviously a difference, whether it is justified or not, that is another question. There is a clear difference between what is possible for an investor to obtain before an arbitral tribunal and what is possible to obtain before a national court.

(09:38) PBA: In your opinion, were these developments a way for the Court of Justice of the European Union to rebalance the power dynamics between investors and states? And was this rebalancing in your opinion necessary?

(09:51) Mathias Audit: What I think is that the Court of Justice, more than rebalancing, wanted to remove the mechanism. That is obvious. Is this decision linked to an old and important criticism of investment arbitration, in which it is considered that investment arbitration is favourable to investors and unfavourable to States? No doubt. The distant origins of the case law of the Court of Justice lie in this debate, it is quite possible. Whether this rebalancing was necessary, to tell the truth, I cannot comment on this point, as far as the Court of Justice is concerned. My feeling is that the Court of Justice has made this choice and from the point of view of the jurisprudential policy of the Court of Justice, I find that this choice is its own and belongs to it.

On the other hand, what I find more debatable is the way in which the decision is motivated. There is an aspect of jurisprudential policy, one can agree or disagree, that is another subject.

In the end, it is an appreciation, which is almost extra-legal, and then there is a technical aspect, it is the way in which the decisions are motivated, and I must say that I am not convinced, especially by the motivation in the Achmea decision. It has improved a bit in the more recent case law, and it is true that on the whole the arguments developed by the Court of Justice to put an end to investment arbitration in the European context could have been better.

Second, was this rebalancing necessary? It is true that if we take up the global debate on investment arbitration, and this question of the weight of the investor and the weight of the States, we can see that for some time, for a number of years, there has been a form of rebalancing that has taken place in investment arbitration itself, with undoubtedly greater consideration of the interests of States, with a theory such as the "Policy Powers" theory, which is a theory that is developing in investment arbitration, with the new generations of BITs that take into consideration the interests of States, and which to a certain extent, and for a certain number of them, can impute obligations to investors, with the possibility that is developing of allowing the State to formulate counterclaims against investors. Investment arbitration, independently of the European Union, as it exists today is not the same as it was at the beginning of the 2000s or at the end of the 1990s, when indeed the trend was frankly pro-investor. I think that today, a rebalancing has taken place overall in terms of investment arbitrage. It's hard to say if it's enough, but it's very clear.

(13:05) PBA: In the first part of your answer, you mentioned the reasoning of the Court of Justice, which may be debatable, and my question is the following: through all these decisions, have the judges of the Union not operated a certain disjunction within the hierarchy of norms, since they have given precedence to European principles over the international commitments of the States?

(13:27) Mathias Audit: Yes, it is undeniable that there is a question of hierarchy of norms that is quite clear in this jurisprudence for several reasons. The first is that from the point of view of public international law, and I think this is all a matter of perspective. In any case, from the point of view of public international law, it is certain that the European treaties have the same hierarchical value as the BITs or the Energy Charter. They are treaties of public international law and therefore have the same hierarchical rank. It is true that from the point of view of public international law, giving one precedence over the other could be considered as a matter of debate.

Now, from the point of view of European law, and of the Court of Justice, these treaties are also texts of European law. The Court considers that, as such, it has the possibility to review them and even to control them. It is a position, to take up a very important and very theoretical debate in public international law, and a debate relating to the coexistence of legal orders, it is a very dualist and non-monist position, in the sense that the Court of Justice treats the question from its point of view, from the point of view of the European legal order. It

considers that from the point of view of the European legal order, it considers that finally the European texts and in particular the provisions of the Treaty on the Functioning of the European Union, which grants it a form of exclusivity in the application of European law, well, this provision is somehow superior to the arbitration mechanism that was in the BITs, or that appears in the Energy Charter Treaty.

(15:21) PBA: In any case, whatever the basis, the current state of affairs is that it is no longer possible for an investor to start an arbitration procedure either on the basis of a BIT, or on the basis of the Energy Charter Treaty, or through a contractual mechanism under PL Holdings. Are there any other alternatives for initiating arbitration proceedings?

(15:56) Mathias Audit: Just to pick up on your question, this only concerns European investors. These investors always have the possibility of initiating proceedings, since a procedure has just been initiated against France on the basis of the Energy Charter Treaty, and there is also one against Italy. Investors still have this possibility. But what happens afterwards, and how the award is made and above all how it is enforced, is another question. In concrete terms, they still have the possibility of initiating investment arbitration proceedings, in any case, on the basis of the Energy Charter, but on the basis of BITs it seems more complicated to me, insofar as there is this treaty between the Member States of the European Union which puts an end to intra-European BITs. But on the basis of the Energy Charter, it is still technically possible for the time being, that being the fact that there is a denunciation by a certain number of European States, starting with France, but also Poland, Germany and the Netherlands, which have denounced the treaty on the Energy Charter, will certainly have consequences on these procedures. It is still technically possible. It will be less so in a year's time when these denunciations come into force.

As far as contractual arbitration is concerned, the scope of the PL Holding Court's decision is very limited. It is only the fact that in this contract, this kind of agreement that was concluded between the investor and the state (Poland in this case), this contract was based on the terms of a BIT, and for this reason, it was deemed ineffective by the Court of Justice. On the other hand, in the context of a contract that would be concluded between a European State and an investor from another Member State, a specific investment contract, in the State of the Court of Justice, it does not seem to me that there is any impossibility of inserting an arbitration clause in it, but it would be a contractual arbitration and not an arbitration based on a treaty.

(18:17) PBA: What do you think of the European Union's proposal to establish a court dedicated to the settlement of this type of dispute?

(18:33) Mathias Audit: This is obviously a project that emerged a number of years ago. Indeed, the European Union and a certain number of European States, starting with France and Germany, are very much in favor of it. The mandate to develop this Court has been

entrusted to the UNCITRAL (United Nations Commission on International Trade Law) which is based in Vienna. There are debates and work at the moment within the UNCITRAL to develop this multilateral investment court. The idea is to have a permanent Court with judges who would exercise this function on a permanent basis.

So we are in fact very far from arbitration. As it stands, it is difficult to assess this project because when you read the UNCITRAL documents, there are in fact several concurrent projects. Firstly, it is difficult at this stage to have a precise idea of what this Court could be. Secondly, there is strong opposition to this Court from a number of non-European States, starting with the United States. It is not at all certain that this project will see the light of day.

(19:56) PBA: Do you think that the Court of the European Union can reverse these positions?

(20:03) Mathias Audit: I would be very surprised. This jurisprudential trend is very strong, we have had several decisions: Achmea decision, Komstroy decision, PL Holding decision. But there is also the Eurofood judgment, on a slightly different question, but which takes up the Achmea decision. I don't see the Court of Justice in the medium term on this case law, I would be extremely surprised.

(20:43) PBA: To conclude, I would mention that a good part of our listeners are students and some are interested in investment arbitration and would even like to make a career in this field. With the recent developments mentioned above, is it a good idea to pursue this specialization, especially if you want to practice in France?

(21:00) Mathias Audit: I would say that in general it is not a good idea, not because investment arbitration is going to stop in the next few years, but because it is a specialization that is too restricted. There are some law firm teams that only do investment arbitration. It exists. But we're talking about a small number of people. I object to the idea that you have to overspecialize is not advice I would give generally, and mine in particular. Therefore, choosing investment arbitration seems to me to be too narrow a field and in law there are many interesting things, in litigation, in arbitration. This over-specialization does not seem to me to be a good option for a student.

(22:06) PBA: We are coming to the end of this podcast. Mr. Audit, thank you for your time and for this interesting exchange.

(22:13) Mathias Audit: Thank you for inviting me, I was delighted to participate in this radiophonic experience.