Problems Relating to Intra-EU BITs in the Investment Treaty Cases

Relevant decisions: *Eastern Sugar v Czech Republic* (2007); *Binder v Czech Republic* (2007); *Austrian Airlines v Slovak Republic* (2009); *Oostergetel & Laurentius v Slovak Republic* (2010); *Eureko v Slovak Republic* (2010); *AES Summit Generation Limited v Hungary* (2010); *Electrabel v Hungary* (2012)

Question 1: What is at stake?

EU States have concluded almost half (around 1,200) of the total number of BITs in existence in the world. There are approximately 190 intra-EU BITs, but these have generated a great number of investment disputes. Many investors outside Europe, for instance, channel their investments in Europe through Dutch B.V.s due to the favourable tax regime.

European Commission says that Intra-EU BITs amount to an "anomaly within the EU internal market"; Commission expects that all existing intra-EU BITs will be terminated or allowed to lapse

Lisbon Treaty's grant of exclusive competence to EU in respect of foreign direct investment has no relevance to intra-EU investment

Question 2: Does the fact that an investment treaty dispute raises a question of EU law have the effect of depriving an investment treaty tribunal of jurisdiction?

No: Commission's submission that ECJ has exclusive jurisdiction whenever an issue of EU law arises in a dispute has been rejected and rightly so by several tribunals (e.g. *Electrabel*, *Eureko*, *Binder*, *Eastern Sugar*)

Commission's argument is that intra-BITs give dispute resolution rights to nationals of some EU Member States which are not enjoyed by others and this results in discrimination and violation of equal treatment principle in EU law; a private party cannot rely on provisions of the BIT to justify a breach of EU law

But investment treaty tribunal is vested with jurisdiction by virtue of BIT and (if applicable) ICSID Convention; international law is controlling; fact that investors may have more rights under BIT does not mean that there is an incompatibility between BIT and EU law; nothing in EU law precludes investor-state arbitration (*Electrabel*, *Eureko*)

Commission's further argument is that if investment treaty tribunal interprets EU law then this undermines the compulsory jurisdiction of the ECJ

Art. 344 TFEU[1] ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."); *Mox Plant Case*[2]

But ECJ has no interpretative monopoly over issues of EU law; it does have a monopoly on the final and authoritative interpretation of EU law but that is completely different; national courts both within the EU and sometimes outside it have to apply EU law and the EU legal order could not function unless that was the case; national courts are not obliged in every case to refer questions of interpretation of EU law to the ECJ (the *acte clair* doctrine); Art. 344 TFEU limited to disputes between Member States (*Eureko*, *Electrabel*)

Franfurt Court of Appeals subsequently ruled in Slovakia's challenge to the *Eureko* Tribunal's decision on jurisdiction;[3] confirmed that ECJ has no monopoly on interpretation or application of EU law

ECJ likely to take harder line: Court's opinion on European Economic Area Agreement[4] (Community has power to agree on international dispute resolution procedures in free trade agreement but such procedures cannot be used to resolve issues concerning allocation of competences between EU and Member States within the exclusive jurisdiction of ECJ); Court's opinion on European Common Aviation Area[5] (international dispute resolution procedure should not render binding decisions on EU law); Court's opinion on European and Community Patents Courts[6] (creation of Patent Court would violate ECJ's exclusive jurisdiction over significant issues of EU law because Patent Court may be called upon to determine a dispute in light of the fundamental rights and general principles of EU law or examine the validity of an act of the EU)

In cases such as *Electrabel* the respondent State did not raise a jurisdictional objection on this basis but the European Commission as an intervening party did

Question 3: Who is the correct respondent in a case raising a question of EU law?

Particularly relevant in respect of Energy Charter Treaty (ECT) because EU is a party

Electrabel: Commission submitted that EU was proper party to ECT proceedings and not Hungary; Tribunal accepted that if claim was directed to engaging legal responsibility of EU for decision of Commission

[1] Treaty on the Functioning of the European Union (entered into force on 1 December 2009
[2] Case C-459/03, *Commission v Ireland* [2006] ECR I-4635.
[3] Case No. 26 SchH 11/10, 10 May 2012.
[4] Opinion 1/91, *European Area Agreement I*, 14 December 1991, ECR 1991, I-6079.
[5] Opinion 1/00, *European Common Aviation Area*, 18 April 2002, ECR 2002, I-3498.
[6] Opinion 1/09, *European and Community Patents Courts*, CJEU, 8 March 2011.

then EU would be proper party (as a signatory to the ECT) but this was not what the claim was directed to; Commission has issued guidelines as to how correct respondent should be identified in ECT cases

EU is not and cannot be a party to the ICSID Convention

Problem that ECJ considers that it has exclusive jurisdiction to determine competences between EU and Member States; if issue of correct respondent is contentious such that investment treaty tribunal has to rule on it then likely to be interpreted by ECJ as usurpation of its jurisdiction

Question 4: How is EU law applicable in an investment treaty dispute?

Three possibilities: (i) as international law; (ii) as a distinct legal order; (iii) as part of domestic law of host State

Electrabel: whole of EU is part of the international legal order; not legitimate to draw a distinction between the EU treaties and the implementing regulations, directives and decisions adopted by EU organs

Contra *Kadi*:[7] ECJ emphasized that EU is a distinct autonomous legal order (allowed ECJ not to be bound by Security Council Resolution by virtue of Art. 103 of UN Charter)

Eureko: "EU law may affect the capacity of a State to consent to an international treaty, or may affect the performance of obligations under the treaty, or may be part of the law applicable to determine the scope of obligations under the treaty, or may affect the manner in which disputes arising under the treaty must be settled and the jurisdiction of tribunals established outside the EU legal order."

Question 5: Is there a possibility of a conflict between investment treaty law and EU law?

Most likely candidates for conflicting obligations in BIT with EU law: prohibition of performance requirements; unqualified capital transfer guarantees; national or MFN treatment; respect for existing state aids (through FET obligation or otherwise)

Commission has successfully brought infringement proceedings against Austria, Sweden and Finland in relation to their extra-BITs in respect of the unqualified capital transfer guarantees (infringes right of Council to restrict free movement of capital and payments between Member States and third countries)

[7] Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR 11-3649.

Most likely scope for conflict: if party claims that decision by the Commission is a violation of EU law and/or international law and therefore host State cannot excuse its actions by reference to that decision

Electrabel: no attack on the validity of any decision of the European Commission; instead acts of Hungary in not correctly enforcing the decision of the Commission within its permitted margin of appreciation under EU law; ECT does not protect investor as against the host State from the enforcement by the host State of a binding decision of the Commission under EU law

AES Summit: reliance upon EU law by host State to justify a measure only permissible if there is an obligation under EU law for the host State to act in a certain way (e.g. a binding decision has been rendered by the Commission); acts/omissions in anticipation of a binding obligation not protected

Question 6: How should conflicts be resolved?

Art. 16 ECT ("Relation to Other Agreements")[8] or Art. 59 VCLT ("Termination or suspension of the operation of a treaty implied by conclusion of a later treaty"):[9] investment treaty and EU law are not the same subject matter therefore these conflict rules are not applicable (*Electrabel*; *Eastern Sugar*; *Eureko*)

Eureko: "EU law does not provide substantive rights for investors that extend as far as those provided by the BIT"

Art. 351 TFEU:[10] only provision in EU law dealing with status of treaties concluded by EU's Member States vis-à-vis EU law; Art. 351 protects only

[8] "Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment."

[9] "1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

[10] "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where

the rights of third parties under investment treaties concluded with Member States before their admission to the EU; EU law prevails over investment treaties as between EU Member States; same result under Art. 30(3) VCLT[11]

Electrabel: there is no principle of international law compelling the harmonious interpretation of different treaties; EU law can be reconciled with ECT because (i) unlikely that EU would have signed up to ECT if it meant that EU was entering into obligations incomptable with EU law; (ii) ECT and EU have similar objectives in relation to anti-competitive conduct including unlawful state aid; (iii) there is implicit recognition in Art. 1(3) of ECT[12] that Member States would have to comply with EU law even if leads to interference with a covered investment

Possible solution presented by ECHR in *Bosphorus v Ireland*:[13] act which is in conformity with EU law will be considered in conformity with the ECHR if the two bodies of law are equivalent in their protection "as regards both the substantive guarantees offered and the mechanisms controlling their observance"; but ECJ likely to perceive conflicts between EU law and BITs more readily

Question 7: What if investment treaty tribunal renders an award incompatible with EU law?

Commission can initiate proceedings against a Member State (e.g. if Member State in giving effect to an arbitral award violates EU law by paying out an illegal subsidy promised to an investor) under Arts. 258 & 260 TFEU

National court of Member State might set aside award given that EU law forms part of public policy (*Eco Swiss*[14]) or refuse recognition or enforcement.

Private parties (e.g. competitors of investors) can bring actions for damage caused by grant of illegal state aid

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appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

[11] "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty."

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[13] Application 45306/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (Judgment, 30 June 2005).

[14] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

The most extensive consideration of these issues to date is in *Electrabel v Hungary*

Facts: Power Purchase Agreement (PPA) signed in 1995 by Dunamenti and Hungarian state monopoly for purchasing electricity in Hungary in 1995; Dunamenti subsequently privatized; Hungary acceded to the EU in 2004; Commission decided in 2008 that PPA provided unlawful state aid to the generator; Hungary ordered by Commission to refrain from granting such state aid and to recover unlawful state aid paid over since 2004; Hungary notified Dunamenti that PPA could no longer be performed after 2008 and passed legislation terminating the PPA; Dunamenti started proceedings against Commission before ECJ seeking annulment of Commission's final decision; Electrabel as shareholder of Dunamenti brought ECT claim challenging legality of Hungary's implementation of Commission's decision