The European Commission’s Opposition To Intra-EU BITs And Its Impact On Investment Arbitration

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The growing success of investment arbitration may collide with the European Commission’s attitude towards intra-EU BITs, as shown recently by a development reported in August 2010 (the IA Reporter, August 5, 2010, Vol. 3, No. 12) regarding the *Eureko v. Slovakia* arbitration. In this case, Eureko initiated a claim against the Slovak Republic based on the Netherlands-Slovakia BIT. In the jurisdictional phase of the proceedings, the arbitral tribunal invited the Commission to provide its observations on the claim. In its response, as reported by the IA Reporter, the Commission cast “serious doubts” on the jurisdiction of the tribunal to hear a claim based on an intra-EU BIT.

This development is one of several recent manifestations of the Commission’s opposition to the application of BITs between Member States of the European Union.

The question of the applicability of an intra-EU BIT was raised in the *Eastern Sugar v. Czech Republic* arbitration (Partial Award, 27 March 2007). In this case, two letters from the Commission were considered by the Tribunal. These included statements such as: “where the EC Treaty or secondary legislation are in conflict with some of these BITs’ provisions […] Community law will automatically prevail over the non-conforming BIT provisions”; “intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence”; or “that Member States [should] exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements.” The Commission therefore considered that intra-EU BITs should be rescinded because they were superseded by EU law (notwithstanding the fact that EU law does not confer access to arbitration to investors).

In September 2008, the Commission intervened directly in two ICSID arbitration proceedings against Hungary (*AES v. Hungary* and *Electrabel v. Hungary*) by filing *amici curiae* briefs. It has been reported that the Commission took Hungary’s side by stating that the power purchase agreements between the investors and a Hungarian State-owned entity violated EC law as they could restrict competition, thereby not taking account of the protection granted to the investors by the investment treaty at stake. The Commission’s view, based on the supremacy of EC law over investment treaties, seems to leave little room for the application of investment treaties between Member States.

The Commission’s views were also expressed in more informal settings: during a conference on investment law and the European Union in Paris in April 2009, the Commission reiterated its views on the supremacy of EC law over intra-EU BITs. International law specialists held a different position, according to which questions relating to conflicts between treaties must be resolved by the application of the Vienna Convention on the Law of Treaties, including Article 59 which sets out conditions for a treaty to be terminated by the conclusion of a later treaty.

The two letters by the Commission analyzed by the tribunal in the *Eastern Sugar* case provide us with the reasons behind the Commission’s position.

In the first letter, addressed to the Czech Republic, the Commission advances the argument that “the application of intra-EU BITs could lead to a more favourable treatment of investors and investments between the parties covered by the BITs and consequently discriminate against other Member States, a situation which would not be in accordance with the relevant Treaty provisions.” What does this difference of treatment amount to? One element of BITs comes to mind: the right of investors to have recourse to international arbitration. Indeed, only EU investors whose State of origin has entered into a BIT with the host State would have access to international arbitration.

In the second letter, addressed to the Economic and Financial Committee, the Commission states that investors starting arbitration proceedings based on intra-EU BITs "could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome."

Therefore, the Commission seems to consider that the application of intra-EU BITs, including access to arbitration, may be a source of inequality between EU citizens as well as a hindrance to the harmonized development of EC law.

During the April 2009 Paris conference, certain speakers criticized the Commission's position and stressed the importance of access to arbitration in the build-up of a European area of freedom, security and justice. However, the recently reported intervention by the Commission in the *Eureko v. Slovakia* case confirms the Commission's apparent opposition to arbitration under intra-EU BITs.

A measure of hope is to be found in the attitude of Member States and tribunals.

As highlighted by the Economic and Financial Committee in a 2008 report: a "clear majority of Member States prefer to maintain the existing [intra-EU BITs], in particular with a view to the provisions on […] investor-to-state dispute settlement."

In addition, in the *Eastern Sugar* case, the arbitral tribunal stated that the BIT in question was not superseded by EC law because, inter alia, this was not expressly set out in the treaties marking the Czech Republic's accession to the EU nor in the BIT; and the conditions set out in Article 59 of the Vienna Convention were not satisfied. Also, in the newly published *AES v. Hungary* award (Award, 23 September 2010), the tribunal stated that EC law, "once introduced in the national legal orders … is part of these legal orders" and that "a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations."

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