Kluwer Arbitration Blog

About the Ostrich, the Micula Brothers and other European Fables

Gloria Alvarez (University of Aberdeen) · Wednesday, April 22nd, 2015

'By putting its head in the sand, the ostrich can see no problems, and if it can't see any problems, they don't exist" ***[1]***

To what extent can legal systems differ? Can these differences be legitimate enough to collapse a "conflictive" legal system? These two ambitious questions are difficult to be answered in one go, and are rather susceptible to being answered differently. Regardless of the legal context and origin of the given answers, only one general rule should apply: *no ostriches are allowed*. And please allow me to explain what I mean by that.

By burying its head in the sand, the ostrich limits itself to internally scrutinise a broken view, this action hinders the ostrich's full panorama. As a consequence, the ostrich is not able to detect major risks and failures. There is no consciousness of the ostrich's externality and thus the possibility of detecting external solutions to external problems is null.

The apparent conflict between EU Law and Investment Arbitration has opened the door to the active interest of the stakeholders involved in this relationship. In particular, the European Commission has played different roles; while in some cases the Commission has been characterised as a friend of the court (*amicus curiae*) it has also adopted a more adversarial role as an investigating authority.

Under ICSID Rules (Rule 37), the Commission has frequently participated as a non-disputing party by submitting *amicus curiae* opinions. *AES Summit* v *Hungary, Electrabel* v *Hungary*, *Antin* v *Spain*, *Eiser* v *Spain are some of the Commission's amici* participations, which have been already addressed in this blog by Epaminontas Triantafilou, Carlos Gonzalez-Bueno and Laura Lozano.

However, the participation of the Commission in investment cases is not limited to the ICSID rules and framework of international law. As part of the EU policies and internal actions laid down in the Lisbon Treaty (TFEU), the European Commission has the possibility to investigate and decide if Member State measures qualify as (illegal) aids. These internal provisions have been used by the DG Competition Authority (part of the Commission) to investigate the *Micula* award (ICSID Case No. ARB/05/20).

The outcome of the investigation concluded the illegality of the ICSID award as it allegedly infringes EU state aid rules. In doing so, it is possible that the Commission has ignored the holistic

interaction of legal systems. By impersonating an ostrich, the Commission has wrongly applied internal laws to an international decision but it also refused to contribute to the legitimization of the EU as an actor of international investment law. By burying its head in EU Law, the Commission believes to have protected the rules of EU Competition Law, while in reality it has provoked Romania's breach of international obligations under one of the most important hallmarks of international law.

In 2005, the Romanian government revoked duty exemptions, which affected the *Micula* Brothers and three of their companies' investments. *Micula et.al* initiated ICSID proceedings under the Sweden-Romania BIT arguing breach of fair and equitable treatment by the Romanian Government. Romania's primary defence was to invoke the incompatibility of the duty exemptions with EU Law. Hence, prior to Romania's accession to the EU, any incentive or aid prohibited under the EU *acquis* favouring certain investors ought to be rescinded.

The ICSID Tribunal awarded $ 250 million against Romania and partial payment of the award was implemented by offsetting taxes owed by one of the claimants. Romania then sought the Commission's services to determine the possibility of paying the outstanding amount of the award to a natural person (*i.e.* the *Micula* Brothers). The Commission initiated investigation proceedings under TFEU Article 108(2), while issuing a "suspension injunction" against the final payment of the award.

The path of reasoning taken by the Commission was centred on the award's purpose. If the main objective of the award constitutes the repayment of the duty exemptions initially withdrawn, this repayment would constitute a new and illegal state aid. On March 30th 2015, the Commission concluded that payment of the ICSID award would constitute an economic advantage for the investor, which is an unlawful aid under EU Law.

Assertively, the Commission seemed to recognise and describe the award as a payment in compensation. However, the Commission also used indistinctively the wording of economic measure and award. The consequence of analysing the award as an economic measure rather than a compensation payment modifies the nature and purpose of the award itself (*See Chorzow Factory* Case, were distinction was drawn between economic measure and compensation payment).

In this particular case, the difference is that while economic measure is a very generic concept that indeed could cause an illegal preferential treatment to an undertaking, payment for compensation is a specific international sanction, where obligation(s) of international law have been breached and damages to the investor ought to be paid (*i.e. breach of* FET protections under a BIT).

Outside the *acquis*, the Commission indirectly divested the functions granted to ICSID tribunals and *ad hoc committees* (Chapter VII ICSID Convention). In particular, the Commission's scrutiny implemented to the *Micula* Award could be treated as the type of revision ad hoc committees are competent of (ICSID Convention Article 52(3)). In the opinion of the author, DG Competition went even beyond ad hoc committees' competences. This is because the Commission went all the way at looking into the merits of the dispute when analysing the appropriateness and the proportionality of the compensation payment.

The ICSID *ad hoc* faculties divested are not the only sensible issue at stake. With the categorisation of the ICSID award as illegal, the principle of observing an ICSID award as final and binding (Article 53 and 54 of ICSID convention) has also been breached by a third authority

that is not jurisdictionally competent to do so, at least in the scope of the BIT and ICSID Convention. At the moment, the *Micula* award is also under the scrutiny of an ICSID *ad hoc committee*, this *committee* is expected to assume consciously its externality and potential impact with other legal systems, hopefully in this ICSID forum *no ostriches will be allowed* …

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[1] Jan Klabbers, Treaty Conflict and the European Union, Cambridge University Press (2009), p 11.

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