Latest Developments Concerning European Bilateral Investment Treaties

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Two major events have taken place recently regarding the situation of Bilateral Investment Treaties concluded between European Member States ("Intra-EU BITs") and Bilateral Investment Treaties concluded between an European Member State and a State not Member of the EU ("Extra-EU BITs"). The fate of these agreements was surrounded up until now by a veil of uncertainty: on the one hand, the European Commission considered that Intra-EU BITs lead to discrimination among Member States and were thus unacceptable; on the other hand, the Lisbon Treaty, entered into force in December 2009, granted exclusive competence for foreign direct investment to the European Union and thus lead to questions regarding the survival of Extra-EU BITs (Article 207 of the Treaty on the Functioning of the European Union, available here).

Regarding Extra-EU BITs, the situation has been clarified by the adoption on 12 December 2012 by the European Parliament and Council of the "Regulation establishing transitional arrangements for bilateral investment agreements between Member States and Third Countries" (the "Regulation") (Regulation establishing transitional arrangements for bilateral investment agreements between Member States and Third Countries, 7 July 2010, COM(201) 344 final, available here).

The situation remains however more opaque for Intra-EU BITs, since on 30 November 2012, an ICSID tribunal held that EU law trumped the Energy Charter Treaty in the matter opposing Electrabel to Hungary (Electrabel S.A. v. the Republic of Hungary, ICSID Case No. ARB/07/19 (Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012) (Veeder, Kaufmann-Kohler, Stern)), thus confirming a general trend in this direction.

Extra-EU BITs

Prior to the entry into force of the Lisbon Treaty, the European Union and Member States held parallel competences with respect to investment. While the EU pursued the liberalization of foreign direct investment, in particular through its trade agreements with non-EU countries, the Member States remained free to enter into Bilateral Investment Treaty with these countries.

The Lisbon Treaty aims at bringing both elements together under the cover of a single EU common investment policy. However, it does not contain a transitional provision in order to guide the transfer of competences from the Member States to the EU. In order to fill this gap, the European Commission proposed the Regulation which has now been adopted by the European Parliament and Council, proposing a transitional regime regarding the situation of existing Member States BITs.

The Regulation provides certainty for investors in that it confirms that all Extra-EU BITs entered into prior to the entry into force of the Lisbon Treaty, on 1 December 2009, are maintained in force until they are replaced by an investment agreement entered into by the EU (so-called "replacement system"). For Extra-EU BITs that were entered into after 1 December 2009, Member States are authorized to enter into bilateral negotiations to e bring the BITs in compliance with EU law. Member States are also authorized, under certain circumstances, to enter into new BITs as long as certain conditions set forth by the Commission are met.

Intra-EU BITs

Intra-EU BITs are typically BITs that were entered into between Member States and third countries who later on became Member States themselves. This is particularly the case for former socialist states (Hungary, Slovakia, Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovenia).

The Commission, considering that the existence of Intra-EU BITs would lead to an unacceptable difference in

treatment between investors nationals of a Member State who has a BIT with another Member State, and investors nationals of a Member State who does not, has taken the position that all Intra-EU BITs are unacceptable under EU law and thus must be eliminated or left unapplied.

This situation constitutes an obvious threat for investors, because Member States can adversely impact investments by relying on an application of EU law which would reduce the investment protections provided by BITs, question the jurisdiction of an arbitral tribunal constituted pursuant to the dispute resolution provision of a BIT relying on the argument, often advanced by the Commission, that the ECJ is solely competent, or argue, relying on the position advocated by the Commission, that their accession to the EU implicitly terminated a BIT.

The latter argument had precisely been advanced by the Czech Republic in Eastern Sugar v. Czech Republic (Eastern Sugar B.V. v. The Czech Republic, SCC No. 008/2004, UNCITRAL (Partial Award of 27 March 2007) (Karrer, Volterra, Gaillard)), where this Member State argued that the BIT had been terminated with its accession to the EU. The arbitral tribunal rejected this argument, holding that Intra-EU BITs were not automatically terminated by a State's accession into the EU, and that neither the Europe Agreement nor the Accession Treaty or the BIT itself provided expressly that the BIT would be terminated. Moreover, the arbitral tribunal held that it was not bound by the opinion of the European Commission, who considered that the BIT was automatically superseded by EU law.

However, arbitral tribunals have increasingly recognized that EU law might take precedence over BITs or international treaties. This was the case in the dispute opposing AES Summit to Hungary (AES Summit Generation Limited and AES-Tisza ErömU Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22 (Award of 23 September 2010) (von Wobeser, Stern, Rowley)), as well as in the dispute opposing Electrabel to Hungary.

Both cases concerned the termination by Hungary of power purchase agreements following concerns, raised by the European Commission, that these agreements were violating the EU regulations on prohibition of state aid. In both cases, investors filed claims under the Energy Charter Treaty ("ECT") (these decisions are nevertheless important for Intra-EU analysis because they oppose an investor of a Member State to another Member State).

In AES, the tribunal did not render a decision on whether EU law took precedence over the ECT, but noted that a decision taken by Hungary with a view to addressing the Commission's state aid concerns would have constituted a rational public policy measure (AES Summit Generation Limited and AES-Tisza ErömU Kft. v. Republic of Hungary, ¶ 10.3.16).

In Eureko v. The Slovak Republic, the arbitral tribunal held that it had jurisdiction under the BIT and that this jurisdiction extended to the application of EU law, both as a matter of international law and as a matter of German law. The tribunal also held that the BIT was fully valid and had not been terminated by the Slovak Republic's accession to the EU (Eureko B.V. v. The Slovak Republic, PCA Case No. 2008-13, UNCITRAL (Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010) (Vaughan Lowe, van den Berg, Veeder)). Annulment proceedings have been brought by the Slovak Republic against this award before a court in Frankfurt, who rejected all its claims. An appeal is pending before the German Supreme Court (for more information on this award, see Stephan Balthasar's Blog of 28 August 2012, available here).

In Electrabel, the tribunal held that Hungary did not breach the ECT when it terminated a power purchase agreement following a preliminary decision by the European Commission requiring Hungary to suspend any state aid in order to comply with EU law. The power purchase agreement as entered into between Electrabel and Hungary was deemed unlawful state aid by the Commission.

Interestingly, despite the fact that arbitral tribunals increasingly recognize the precedence of EU law over BITs, the jurisdiction of these tribunals is constantly called into question by the Commission itself, which makes a point of intervening in everyone of these cases and contest the competence of the tribunal. But arbitral tribunals have, rightly, rejected the argument that the ECJ is solely competent for the application and interpretation of EU law (Eureko v. Slovak Republic, PCA Case No. 2008-13, UNCITRAL (Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010), ¶ 283, conf'd by the Frankfurter Higher Regional Court on 10 May 2012; Electrabel S.A. v. the Republic of Hungary, ¶4.166).

Conclusion

These two major events, the adoption of the Regulation and the rendering of the Electrabel award, underline an significant difference of treatment between investors relying on Extra-EU BITs and investors relying on Intra-EU BITs. While investors relying on Extra-EU BITs can rely on the Regulation and count on the fact that questions of compatibility with EU law will not threaten their rights, the situation is much different for Intra-EU BITs. In sum, the respect of the legitimate expectations of EU investors within the European Union might not be assured.

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