THE EFFECTS OF THE PRIMACY OF THE EU LAW ON THE INVESTOR-STATE DISPUTE RESOLUTION MECHANISM

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Abstract[2]

This paper highlights the existing conflict between EU law and the provisions contained in Bilateral Investment Treaties with respect to the arbitration clause. In the context of the post-Lisbon, the European Union has exclusive competence in the area of investment is the only entitled to conclude investment treaties with third countries. However, many Member States continue to maintain in force bilateral treaties signed pre-Lisbon and jurisdiction clauses which conflict with European law. This paper will analyze the case law and doctrine in the field and will try to find solutions to avoid possible bottlenecks that may arise when a Member State is in a position to choose between compliance with European law and the rest of its international obligations.

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JEL Classification: *K33, K23*

1. Introduction

With the accession of Romania to the European Union arises the increasingly serious problem of possible incompatibilities that may exist between an international treaty to which a Member State became part prior to its Accession and its obligations under European rules and regulations. The most obvious case for some Member States, including Romania, proved to be the existence of treaties on the protection and promotion of foreign investment in pre-accession agreements with the European Union member states already. Treaties concluded before the entry into force of the Lisbon Treaty remained in force under certain conditions. This prompted doubts concerning jurisdiction regarding disputes arising between investors and host states of investments, given the existence of conflict of laws between the European provisions and investment treaties regarding the arbitration clause.

In several cases in which the question of jurisdiction arose, arbitration courts, after examining in detail the provisions of European and international law, and have held the inexistence of obstacles in exercising their jurisdictions considering that there is no incompatibility between the provisions of the EU treaties and BITs. Next, we shall consider the pros and cons regarding this legal dilemma.

2. General regulations in the field

State dispute settlement clauses are common to most investor bilateral investment treaties. The reason for the inclusion of such provisions lies in the speed and flexibility of arbitration in relation to legal proceedings (before the court) and in reducing the risk of politicization 'internal' to such disputes, affecting the impartiality of the courts. Today it is considered that the development of global trade and capital investment is largely due to the accelerated growth of free trade and investment treaties. These legal instruments have brought more clarity, more stability to trade relations and encouraged investment flows from capital-exporting to capital importing countries.

Following the reform of the European Union which resulted in the Treaty of Lisbon, the Union has acquired exclusive competence for the negotiation and conclusion of investment treaties. However, in a statement[3] annexed to the Treaty, was reviewed expressly rule of law in relation to

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[3] Declaration 17 on the primacy of European Law "..in accordance with settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States "

European law and international regulations. This position was previously stated by the Court of Justice of the European Union[4] and the European Commission invoked it asamicus *curie* on the part of Member States[5]. However, it should be noted, that the Declaration is not an integral part of the Treaty, which means it lacks binding power[6].

3. Romanian legislation on the issue of primacy of EU law

Article 148 of the Romanian Constitution, paragraphs 2 and 4, states:

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(4). The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

As one can see, Romania's fundamental law expressly states the primacy of European law over domestic law. This article should be read in conjunction with Article 11 which assimilates the rights and obligations assumed by Romania through international treaties, including the promotion and protection of investment law, to domestic law. Lately, there have been many criticisms of Article 148 of the Constitution. Through consistent jurisprudence[7], the Court held that it has no jurisdiction to "examine whether a provision of national law comes in conflict with the Treaty on the Functioning of the European Union (TFEU) in terms of art. 148 of the Constitution. Such competence, namely to determine whether there is a contrariety between national law and EU law, belongs to the court, which, in order to reach a fair and lawful conclusion, ex officio or at the request of the parties, may submit a question to the ECJ for the purposes of art. 267 of TFEU. If the Constitutional Court was considered competent to rule on the conformity of national legislation with the European one, it could spark a possible conflict of jurisdiction between the two courts, which, at this level, is inadmissible. "Since the Constitutional Court is neither positive legislature nor a court with jurisdiction to interpret and apply European law in disputes concerning subjective rights of citizens without reconsidering previous jurisprudence, the Court[8] noted that the use of a EU norm in the constitutional review as the reference standard, involves, pursuant to art. 148. (2) and (4) of the Constitution, a cumulative compliance: on the one hand, this rule shall be sufficiently clear, precise and unequivocal in itself or its meaning has been clearly established by the Court of Justice of the European Union and, on the other hand, the rule should apply to a certain level of constitutional relevance, so its normative content might entail a possible breach of the Constitution by national law - the only legal basis for a constitutional review. In such a case, the Constitutional Court's approach is distinct from the mere application and interpretation of the law, where jurisdiction belongs to courts and administrative authorities, or any matters of legislative policy promoted by the Parliament or Government.

In light of a cumulative set conditionality, is up to the Constitutional Court, in the application of constitutional review of the Court of Justice's decisions or the formulation of questions towards the latter, to determine the content of the European norms. Such an attitude

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[4] Flaminio Costa v ENEL [1964] Case 6/64, ECR 585

[5] PCA Case No.2008-13 Eureko v Slovak Republic, ICSID Case No.ARB / 07/19 Electrabel vs Hungary, the decision on jurisdiction, admissibility and applicable law

[6] Ion Galea, EU treaties Europene- Comments and explanations, CH Beck, 2008, p.126

[7] Constitutional Court Decision no. 1249 of 7 October 2010, published in the Official Gazette of Romania, Part I, no. 764 of 16 November 2010, the Constitutional Court Decision no. 137 of 25 February 2010, published in the Official Gazette of Romania, Part I, no. 182 of 22 March 2010, the Constitutional Court Decision no. 1596 of 26 November 2009, published in the Official Gazette of Romania, Part I, no. 37 of 18 January 2010.

[8] Decizia Constitutional Court no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011, the Constitutional Court Decision no. 669 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 524 of 26 July 2011.

relates to cooperation and judicial dialogue between ECJ and national constitutional courts without the establishment of a hierarchy between these courts[9].

The ambiguities of Romanian and European legislation in the field became apparent in the case Micula vs Romania (2013) under the ICSID Convention, where the primacy of European law was unsuccessfully invoked, with the aim to prevent incompatibility between European regulations regarding State aid and obligations arising from international treaties on investors rights[10].

4. Relevant international jurisprudence

A series of litigations in front of arbitration tribunals involving disputes between investors and Member States is relevant case law on the matter. These differences were born as a result of failure by the States concerned the European provisions on State aid which led to the breach of promises made to investors, and therefore, violation of provisions of bilateral investment treaties concluded between EU Member States (known and in the appointment of intra-bits). In their pleadings, the Member States, as defendants, and the Commission, as intervener, cited sunset of such clauses in terms of art. 344[11] and 351[12] of (TFEU). The first refers to the exclusive jurisdiction of the European Court of Justice concerning the interpretation or application of the Treaties, Member States commit themselves not to submit disputes to any method of settlement other than those provided for by the fundamental treaties. In the view of the European *fora,* the scope this article also covers bilateral investment treaties concluded between Member States. As shown in the ECJ case *MOX Plant[13]*, international treaties in force between Member States can not alter their obligations under EU law. Moreover, given that some bilateral treaties were concluded before the Accession some states, the European authorities have relied on the provisions of the Vienna Convention on the Law of Treaties addressing those situations where successive treaties (BIT, TFEU) regulate the same legal issue, namely the rights of investors. Under Article 30 of the Convention, if states are parties to successive treaties that have the same object, provisions contained in the earlier treaty will apply only to the extent that they do not contradict those contained in the subsequent treaty[14], ie, in this case, the provisions of the TFEU.

In practice, tribunals have rarely acquiesced to the line of thought put forth by member states and the Commission. In the case *Eureko vs Slovakia[15]*, the Tribunal decided that there is no incompatibility between the provisions contained in the Slovakia- Netherlands BIT and Union law, saying that it contains more extensive and detailed clauses that improve the standard of protection afforded to investors. A similar reasoning was played in court cases arbitral tribunals *Eastern Sugar vs The Czech Republic[16]* and *Electrabel vs Hungary[17]* considering art. 344 TFEU irrelevant in disputes between a Member State and an investor of another Member State and there is a risk that by resorting to international arbitration to undermined the European judicial system

Article 352 TFEU refers to the compatibility or incompatibility of treaties concluded by Member States with EU law. In a narrow interpretation given on its scope and application, the article shall only cover investment treaties concluded by Member States with countries outside the 28 nation block[18]. However, in its interventions in support of Member States, the Commission has given a broad interpretation of the Article, stating that its provisions cover also the obligations arising from intra-BIT. This has opened the possibility to raise legal arguments concerning the

[9] Constitutional Court Decision no. 157 of 19 March 2014, published in the Official Gazette of Romania, Part I, nr.296 of April 23, 2014

[10] M icula vs Romania, ICSID Case No.ARB / 09/08, Decision on Jurisdiction and Admissibility, paras. 42-49

[11] Treaty on the Functioning of the European Union (TFEU), signed at Lisbon, 13 December 2007, art. 344

[12] Ibid, Article 351, also known as the *grandfathering clause*

[13] C-459/03 Commission v Ireland (MOX plant) ECLI EU 2006 C 345, p 123

[14] Vienna Convention on the Law of Treaties, 1978, United Nations Treaty Series, vol.1155, 331

[15] PCA Case No.2008-13 Eureko v Slovak Republic, para.250-273

[16] Ibid, para.276-277

[17] ICSID Case No.ARB / 07/19 Electrabel vs Hungary, the decision on jurisdiction, admissibility and applicable law, nov.2012 30, para.4.151

[18] Ion Galea, EU treaties Europene- Comments and explanations, CH Beck, 2012, p.525

discrimination of investors from other Member States not party to a particular investment treaty. The latter would find a clear disadvantage to the investors from the states parties to the BIT, breach of Article 18 TFEU[19] which provides for the principle of non-discrimination traders operating on the internal market of the Union. As expected, arbitral tribunals were quite reluctant to hold that compliance with international obligations would constitute a violation of fundamental principles of Community law. In *Eureko* the arbitral tribunal conceded that the protection afforded by bilateral investment treaties may be discriminatory in relation to Community law, but considered that this is not a strong enough reason for investors BIT states that have signed pre-accession Links to be prohibited degree of protection afforded by them, including the jurisdiction clause[20].

5. Conclusion

The compatibility of provisions contained in investment treaties with European norms and regulations is a pressing issue that unresolved will continue to create difficulties for both Member States and investors. The situation is not limited to the provisions of substantive law but includes also the enforcement of arbitration awards within the territory of Member States. Many consider the current system of investor-state dispute settlement outdated in light of the new realities of regional and sub-regional integration. However, international arbitration remains the most flexible, rapid and impartial way through which investors can protect their rights and prevent abuses by the authorities. Redesigning a balance between the need to protect investors and compliance with EU rules and regulations is therefore essential that the fundamental interests of all parties are met and the economic future of a United Europe is assured.

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[19] Ibid, p.166, noting that in the view the Commission violations also occurs with respect to art. 18, 49, 55, 63 to 66 of TFEU
[20]PCA Case No.2008-13 Eureko v Slovak Republic, para. 266,