

EU LAW-VERSUS-BILATERAL INVESTMENT TREATY LAW AND PUBLIC INTERNATIONAL LAW: IMPACT ON INTERNATIONAL RELATIONSHIP OF STATES AND EU SOLIDARITY

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ABSTRACT

European Union (EU) is an association of European states having international legal personality and is therefore a subject of Public International Law. According to the provisions of the Treaty on European Union (TEU) 1992, EU was established to undertake and implement some common political, economic and social policies for the member states. For the sake of attaining this goal EU binds its member states by the Treaty of Accession and all other European Commission (EC) Directives from the moment any European state signs for the membership of EU. There are some instances in which EU member states after signing EU Accession Treaty have brought changes to domestic policies or legislations resulting into a breach of the norms of Public International Law and in some cases the provisions of previously executed Bilateral Investment Treaties (BIT). When such breaches were complained before international judicial forums, European Commission (EC) and European Court of Justice (ECJ) have actively tried to establish that in case of any clash between EU Law and Public International Law or BIT provisions, norms of EU Law will prevail. This work tries to expose this conflict of hierarchy between two sets of legal norms and how it may affect the international relationship of modern states.

INTRODUCTION

Attracting foreign investment and expansion of trade and business is one of the most important reasons for which modern states maintain international relationships. The common practice in the world of foreign investment particularly in American and European countries is the execution of well negotiated bilateral

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treaties between host and investing states before the foreign state undertakes any massive scale investment initiative.¹ Bilateral Investment Treaties (BIT) is designed to secure fair and equitable treatment of foreign investment in the territory of the host state and to ensure a minimum standard of treatment.² The creation of the European Union (EU)³, an association of European States having international legal personality⁴ has brought forward a new problem of competition between the norms of two legal systems namely EU norms and BIT norms and in some instances this competition of priority attempted to oust the provisions of bilateral investment agreements between states.⁵ This issue is significant to discuss because this legal issue may have an extensive impact on the international relation between EU member states and other states concerning trade and investment. This competition of priority is not limited to bilateral investment treaties and EU law. Rather, EU law in some cases has taken conflicting position with the Public International Law at large.⁶ And there have been questions as to the hierarchy of norms and as to which norm will prevail in case of such conflict.⁷ In general, Public International Law is binding upon all the states irrespective of any regional demarcation.⁸ EU treaties are nowadays clearly treated as part of public international law.⁹ At the same time, bilateral investment treaties are also part of

¹ United Nations Centre on Transnational Corporations and International Chamber of Commerce (UNCTC) on *Bilateral Investment Treaties: 1959-1991*, UN Publication Sales No. E.92.ILA.16, ST/CTC/138, at p. iii, (February, 1992).

² *Id.* Also see, Neumayer, Eric and Spess, Laura, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, LSE Research Online, (February 2006), Available at: [eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf), (Last retrieved on December 6, 2013).

³ By Article 1 of the Treaty on European Union (TEU), (1992), Text available at: www.eurotreaties.com/lisbontext.pdf, (Last retrieved on December 6, 2013).

⁴ Article 47 of Consolidated Version of the Treaty on European Union, Official Journal of EU, OJ C83/01 (2010).

⁵ *Eastern Sugar B.V. v Czech Republic* (Ad hoc arbitration under UNCITRAL rules), Partial Award, (March 27, 2007). Text available at: <http://ita.law.uvic.ca/documents/EasternSugar.pdf>, (Last retrieved on 26/11/13).

⁶ *P. Kadi and Al Barakat International Foundation v. Council and Commission*, Case C-402/05 P and C-415/05 ECR I-6351 (2008).

⁷ De Burca, *The European Court of Justice and the International Legal Order After Kadi*, 51 *Harvard Int'l LJ* 1, (2010).

⁸ Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, *Harvard Law Review*, Vol. 122, No. 7, pp. 1791-1868 (2009).

⁹ European Union e-justice portal, Available at: https://e-justice.europa.eu/content_international_law-10-en.do, (Last retrieved on December 6, 2013). European Union e-justice portal defines Public International Law as follows: "Public international law: it governs the relationship between states and international organizations, dealing

public international law as these are treaties executed between two sovereign states. However, there is no possibility of conflict between Public International Law and bilateral investment treaties as the BITs are supposed to be interpreted according to the norms of Public International Law.¹⁰ But this is not the case when EU law comes in conflict with BITs or Public International Law. This is because, European Union has always aimed to establish an autonomous legal system for achieving some common goals¹¹ and the instruments creating EU does not mention anything as to the hierarchy of legal norms though in Article 216(2) of Treaty on the Functioning of the European Union (TFEU)¹² and Article 3(5) of TEU¹³, the EU acknowledges that they will be bound by International Law. In some instances, European Commission and European Court of Justice (ECJ) both being representative bodies of EU have tried to establish that in case of any conflict of EU law with BITs or Public International Law, EU law will prevail.¹⁴

with areas such as human rights, treaty law, the law of sea, international criminal law and international humanitarian law”. This portal mentions about the relationship of EU law with Public international law as, “Although EU law may be regarded as a specific form of international law, the main body of EU law has some particular features which usually do not appear in international law: in particular, citizens can invoke rights guaranteed by EU law before courts in the EU Member States, whereas international law usually needs to be transposed into national law before citizens can plead it. Also, EU law often prevails over the law of the EU Member States.”

¹⁰ Burgstaller, Markus; *European Law Challenges to Investment Arbitration*, in Michael Waibel et. al. (ed.), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn : Kluwer Law International, pp. 455-482. (2010).

¹¹ *Id.*

¹² Article 216 of the Treaty on the Functioning of the European Union (TFEU), the Consolidated Version of Treaty on the Functioning of the European Union (TFEU), Official Journal of European Union, Official Journal of the European Union C 115/47, (2008). This Article provides that, “(1) The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provided or where the conclusion of an agreement is necessary in order to achieve within the frameworks of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union Act or is likely to affect common rules or alter their scope. (2) Agreements concluded by the Union are binding upon the institutions of the Union and on its member states.”

¹³ Article 3(5) of the Consolidated Version of the Treaty on European Union, Official Journal of the European Union, OJ C83/01 (2010). This Article provides that, “In relation with the wider world the Union shall uphold and promote its values and interests and contribute to the protection of its citizens... as well as to strict observance and the development of international law including respect for the principles of United Nations Charter”.

¹⁴ The cases of *Eastern Sugar* and *Kadi*, *Supra* note 5 and 6.