



**KIEV ARBITRATION DAYS 2013:  
THINK BIG!**  
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# ***EU LAW AND ENERGY DISPUTES***

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# Scope of Review

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1. *EU's Competences after the Lisbon Treaty*
2. *EU Law v. International Investment Law*
3. *EU Law and State - to - State Energy Disputes*
4. *EU Law and Investor - State Energy Disputes*
5. *EU Law and Enforcement of Arbitral Awards*
6. *Instead of a Conclusion*

# 1. *EU's Competences under TFEU*

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## ENERGY

### Article 194

- “1. *In the context of the establishment and functioning of the internal market ... Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
- (a) ensure the functioning of the energy market;*
  - (b) ensure security of energy supply in the Union;*
  - (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
  - (d) promote the interconnection of energy networks ....”*

### EU Decision 994/2012

- EU MS submitted all existing IGA with non – EU MS in the field of energy to the Commission for assessment of compatibility with EU law on 17/2/2013
- All new IGA in the field of energy must be submitted to Commission

# 1. *EU's Competences under TFEU*

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## FDI

- Exclusive competence with respect to common commercial policy [Art. 3(1)(e)]
- According to the Commission above article in conjunction with Art. 206 and 207 means that EU now has exclusive competence in FDI
- EU Regulation 1219/2012
  - EU MS notified BITs and FTAs to Commission for assessment of compatibility with EU law in 3/2013
  - Going forward, as a general rule Commission will negotiate BITS and FTAs

## 2. *EU Law v. International Investment Law*

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### BIT

Free transfer of capital  
Fair and equitable treatment  
Indirect expropriation  
Full security and protection  
Free transfer of capital  
Arbitration Clause

### EU Law

Free movement of capital  
Prohibition of discrimination  
Freedom of establishment  
Freedom of establishment  
Free movement of capital  
Damage claim against the state  
before national courts

- EU law re. legitimate expectation, non-discrimination etc **IS NOT THE SAME AND, IN FACT, MAY BE INCOMPATIBLE** with rights accorded to investors under IIA ( See *VEWM, Slovakia* and Extra-BITs cases, C149/96 *Portugal v. Council* )
- See also *Eureko* case and *Electrabel* case ?)
- Review of law of ECHR also suggests difference between human rights law and international investment law

### 3. *EU Law and State to State Disputes*

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#### Intra – EU State Disputes

- Article 344 TFEU

*“ MS undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”*

**Mox Plant** case [ECJ, Case C-459/03]

#### **Facts:**

- Mox Plant located in designed to spent fuel from nuclear power station
- Ireland commenced arbitral proceedings against UK under OSPAR and UNCLOS for *inter alia* failure to carry out a proper EIA and failure to consult it in respect of an EIA
- Commission commenced infringement proceedings against Ireland

### 3. *EU Law and State to State Disputes*

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#### Held:

- MS are required to submit any dispute with another MS which concerns the interpretation of EU law to the Court
- Pursuant to [Art. 191 TFEU] the EU and the MS share competences in respect of preserving, protecting and improving the quality of the environment
- UNCLOS is a mixed agreement to which EU, Ireland and the UK are parties
- EU's declaration at time of signing treaty provided

*“Community has exclusive competence [in respect of marine pollution] only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof **affect common rules** established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the MS have competence, without prejudice to the competence of the Community to act in this field”.*

- Carefully examined whether Community rules existed and were affected by the provisions of UNCLOS invoked by Ireland in the arbitration proceedings

### 3. ***EU Law and State to State Disputes***

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- Community rules existed (EIA Directive listed in Annex to declaration)
- Arbitral proceedings are a method for the settlement of disputes pursuant to Article 344 “*inasmuch as... the decisions delivered by such a tribunal **are final and binding** on the parties to the dispute*”
- Provided that a “*significant part of the dispute ... related to the interpretation and application of Community law*” a submission by an MS of such dispute to arbitration is a breach of Article 344. Commission is entitled to commence infringement proceedings

**TNT** Case C-533/08 TNT [2010]

“*[It is] settled case - law that conventions concluded by Member States with non-member countries cannot, **in relations between the Member States**, be applied to the detriment of the objectives of European Union law.*”



# 3. ***EU Law and State to State Disputes***

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## **Other Types of Disputes**

- EU MS v. non - EU MS
- EU v. non - EU MS
  
- **Energy Charter Treaty**
  - All EU MS are party
  - EU is a party since 1998
  - State-to-State Arbitration
  
- What is clear from *Mox Plant* case is that Article 344 TFEU only concerns *intra* EU MS disputes
  
- Future friction: EU law v. international law in respect of IGAs in the field of energy which Commission finds incompatible to EU law

## 4. *EU Law and Investor - State Disputes*

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### Types of Disputes

- Intra EU Investor-State Disputes
- Extra EU Investor – State Disputes

### INTRA- EU Disputes: Recent Arbitral Awards

- *Vattenfall v. Germany* (ECT) March 2011 (settled)
- ***Eureko v. Slovak Republic***
- *AES v. Hungary* (ECT)
- ***Electrabel v. Hungary*** (ECT)
- *AVN v. Macedonia* (Energy Community, settled)
  
- ***Numerous other cases pending***

## 4. *EU Law and Investor - State Disputes*

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### Commission's position

- Intra-EU BITs amount to an “*anomaly within the EU internal market*”
- At the very least, partial overlap between intra-EU BITs and the internal market provisions of the EU
- In the EU judicial system, the Luxembourg courts have exclusive jurisdiction (i) to determine whether EU MS have fulfilled their EU law obligations, and (ii) to give preliminary rulings on questions of EU law as requested by EU domestic courts and tribunals
- Invoking (wrongly) the *Mox Plant* case

## 4. ***EU Law and Investor - State Disputes***

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### **Jurisdictional objection raised in *Eureko* case:**

- BIT terminated as per international law and EU law upon Slovakia's accession to the EU as per Article 59 of VCLT
- BIT as earlier treaty concerning the "same subject matter is only applicable to extent compatible with latter treaty as per Article 30 of VCLT
- **As a matter of EU law, the Tribunal lacks jurisdiction because the arbitration clause is incompatible with Article 344 of TFEU**
- Matter non-arbitrable under German law as *lex loci arbitri*

## 4. *EU Law and Investor - State Disputes*

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Held in *Eureko* case:

- **BIT establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law**
- The protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law
- CJEU has no interpretative monopoly in interpreting EU law
- **The uniform application of EU law is safeguarded by national courts in exercise of their competence to set aside or refuse to enforce arbitral awards** and in their capacity to submit preliminary questions to the CJEU

## 4. *EU Law and Investor - State Disputes*

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*Electrabel v. Hungary*, ECT (ICSID, November 2012)

### Facts:

- MVM, a Hungarian state-owned entity entered into PPA with Dunamenti, a Hungarian generator
- Capacity fee payable until 2010 (extended to 2015)
- Electrabel acquired shares in Dunamenti over 1995-2001 period
- Hungary joined EU May 2004
- Commission started investigating PPAs as providing state aid in 2005/ issued decision in 2008
- Hungary reintroduced regulated prices in 2006
- MVM terminated PPA in 2009
- Dunamenti brought a claim against Commission in CJEU (case still pending)

## 4. ***EU Law and Investor - State Disputes***

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Electrabel's claim:

- Against Hungary only
- Termination of PPA breach of FET + expropriation under ECT
- Change in PPA pricing breach of FET and expropriation under ECT

**Jurisdictional Challenge re. EU Law:**

- Commission submitted *amicus curia* brief challenging jurisdiction
  - CJEU sole jurisdiction to determine claims concerning EU law
  - [Wrongly] invoked Art. 344 TFEU
- **Tribunal rejected Commission's submission**

## 4. *EU Law and Investor - State Disputes*

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### EU law and Applicable law:

- EU law a question of fact
- Claim made by Hungary that EU competition law is part of international public order and that therefore termination of PPA cannot be treated as a violation of ECT
- Tribunal held in accordance with Article 26 of ECT and Article 42 of ICSID Convention, the applicable law is that of “*ECT and applicable rules and principles of international law*”
- In respect of intra-EU cases EU law is part of international law as regional international law



## 4. *EU Law and Investor - State Disputes*

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### Merits and EU law:

- Tribunal noted there is a special relationship between EU and the ECT and that therefore *“ECT should be interpreted, if possible, in harmony with EU law”* [?]
- *“ECT is largely a product of EU external political... policy... It is meant to integrate the former Communist countries ... anti –chamber to EU accession”*
- Foreign investors have not acquired legitimate expectations that ECT would shield it from EU law regarding anti-competitive behaviour
- *“Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts.”*

## 5. *EU Law and Enforcement of Arbitral Awards*

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*Eco Swiss China Time Ltd v Benetton International NV.* (ECJ Case C-126/97)

### Facts:

- Market sharing agreement
- Dutch law and arbitration in the Netherlands
- Neither party invoked that the licencing agreement was contrary to Art. 101
- Annulment proceedings brought in Dutch courts

### Held:

- Power of MS courts to annul an award for breach of mandatory rule of EU law
- Articles 101 and 102 TFEU mandatory rules of EU law

## 5. ***EU Law and Enforcement of Arbitral Awards***

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***Asturcom*** (ECJ, Case C-40/08)

**Held:**

Art. 6(1) of Unfair Contractual Terms Directive is a mandatory provision of EU law  
*“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer ....”*

***Ingmar*** (ECJ, Case C-381/98)

**Facts:**

- Ingmar appointed as Eaton's commercial agent in UK
- Laws of California as applicable law

**Held:** indemnity provision is mandatory; Article 19 of Directive 86/653

*“[T]he parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires”.*

## 6. *Instead of a Conclusion*

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- Commission is taking aggressive approach in challenging jurisdiction of arbitral tribunals to resolve BIT/ECT claims particularly re. intra- EU claims on grounds that it firmly opposes the outsourcing of disputes involving EU law to arbitral tribunals
- Arbitral Tribunals have so far rejected Commission's position
- CJEU has acknowledged that EU law can result in breach of investor's rights (*Commission v. Slovakia* (C-264/09))
- Confusion on EU as applicable law
- No doubt that EU clearly agreed investor could arbitrate disputes under ECT in declaration made under Art. 26(3)(b)(ii)
- **BUT beware EU is not a signatory to ICSID**

## 6. *Instead of a Conclusion*

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- BIT shopping should future tribunal's follow the approach taken in *Electrabel* case rather than *Eureko* case
- Consider inserting stabilisation clauses into energy contracts in EU
- ICSID preferred choice for arbitrations with EU MS
- Future areas of friction between EU law and international investment law:
  - EU's Third Energy Package (TEP)
  - EU Competition Law
- Future areas of friction: EU law v. international law: IGAs in the field of energy which Commission finds incompatible to EU law