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Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations

August REINISCH*

In a number of recent investor-state arbitrations on the basis of intra-EU bilateral investment treaties (BITs), respondent states, supported by the EU Commission, have argued that their accession to the EU has rendered existing BITs with old EU Member States obsolete. This argument is mainly based on Articles 30 and 59 of the Vienna Convention on the Law of Treaties, dealing with the effect of subsequent treaties addressing (partly) the same subject matter. This contribution discusses the treaty law implications and explains why, so far, investment tribunals have rejected the idea that BITs and the EU treaties address the same subject matter or would be so far incompatible that BITs have become obsolete.

1 INTRODUCTION

The relationship between investment law and EU law has given rise to a number of legal issues over the last years. Especially since the adoption and entry into force of the Lisbon Treaty, numerous questions concerning the actual scope of the new Union competence over foreign direct investment (FDI) have been discussed.¹ In spite of the shift of powers from the members to the Union in the

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¹ See M. Bungenberg, 'Centralizing European BIT Making under the Lisbon Treaty', draft paper to be presented at the 2008 Biennial Interest Group Conference (Washington, DC, 13–15 Nov. 2008); M. Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon', in *European Yearbook of International Economic Law*, 1st edn, ed. C. Hermann & J.P. Terhechte (2010), 123–151; M. Bungenberg, 'Außenbeziehungen und Außenhandelspolitik', *EuR Beiheft* (2009): 195–218; J. Ceysens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of Economic Integration* 32 (2005): 259–291; A. Dimopoulos, 'The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?', *Croatian Yearbook of European Law and Policy* 4 (2008): 101–131; C. Herrmann, 'Bilaterale und regionale Handelsabkommen als Herausforderung des multilateralen Handelssystem (WTO)', in *Rechtsfragen internationaler Investitionen*, ed. D. Ehlers, H.-M. Wolffgang & U. J. Schröder (2009), 217–236; C. Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag

case of investment treaties with third countries, a draft union regulation² proposed that members should continue to apply and even enter into new bilateral investment treaties (BITs) with third states.

While the field of external EU BITs appears to be dominated by a political process of seeking a smooth transition from Member State BITs to genuine EU BITs,³ the area of the so-called intra-EU BITs, that is, BITs between EU Member States, has proven to be much more controversial in practice. In fact, the EU Commission repeatedly attempted to challenge the validity of such intra-EU BITs in the course of investment cases in support of respondent state submissions. The core public international law argument in these cases is based on the specific *lex posterior* rules contained in Articles 30 and 59 of the 1969 Vienna Convention on the Law of Treaties (VCLT).⁴ This article will analyse the reaction of investment tribunals to such challenges.

von Lissabon', *EuZW* (2010): 207; J. Griebel, 'Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon', *Recht der Internationalen Wirtschaft* 55 (2009): 469–474; J. Karl, 'The Competence for Foreign Direct Investment: New Powers for the European Union?', *Journal of World Investment and Trade* 5 (2004): 413–448; M. Klamert & N. Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law', *European Foreign Affairs Review* 13 (2008): 493–513; M. Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?', *Common Market Law Review* 42 (2005): 91–127; N. Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in *International Investment Law in Context*, ed. A. Reinisch & C. Knahr (2008), 73–92; A. Reinisch, 'The Division of Powers Between the EU and Its Member States "After Lisbon"', in *Internationaler Investitionsschutz und Europarecht*, ed. M. Bungenberg, J. Griebel & S. Hindelang (2010), 99–111; W. Shan, 'Towards a Common European Community Policy on Investment Issues', *Journal of World Investment and Trade* 2 (2001): 603–625; Ch. Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon', *Beiträge zum Transnationalen Wirtschaftsrecht* 83 (2009); Ch. Tietje, 'Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts', *Beiträge zum Transnationalen Wirtschaftsrecht* 104 (2011).

² Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Brussels, 7 Jul. 2010, COM(2010)344 final, 2010/0197 (COD).

³ See, however, the Commission's successful challenges to some existing third country BIT provisions that were held to be incompatible with EU law: Case C-205/06 *Commission v. Austria* [2009] ECR I-1301; Case C-249/06 *Commission v. Sweden* [2009] ECR I-1335; Case C-118/07 *Commission v. Finland* [2009] ECR I-10889; see also A. Reinisch, 'European Court of Justice: *Commission of the European Communities v. Austria and Sweden* (3 Mar. 2009) Introductory Note', in *ILM* 48 (2009): 470–472; E. Denza, 'Bilateral Investment Treaties and EU Rules on Free Transfer: Comment on *Commission v. Austria*, *Commission v. Sweden* and *Commission v. Finland*', *European Law Review* 35 (2010): 263–274; N. Lavranos, '*Commission v. Austria*. Case C-205/06. Judgment; *Commission v. Sweden*. Case C-249/06. Judgment', *American Journal of International Law* 103 (2009): 716–722; P. Koutrakos, 'Annotation on Case C-205/06, *Commission v. Austria* and Case C-249/06, *Commission v. Sweden*', *Common Market Law Review* 46 (2009): 2059–2076.

⁴ Vienna Convention on the Law of Treaties, 1155 UNTS 331.

2 EASTERN SUGAR AND EUREKO, THE TWO MOST PROMINENT CASES ADDRESSING THE EFFECT OF EU ACCESSION ON INTRA-EU BITS

The intra-EU BIT obsolescence argument was first addressed in *Eastern Sugar v. Czech Republic*⁵ and *Binder v. Czech Republic*.⁶ As one of its major jurisdictional defences in these arbitrations, the Czech Republic contended that the 1991 Czechoslovakia/Netherlands BIT as well as the 1990 Germany/Netherlands BIT were no longer applicable as a result of the Czech Republic's EU accession in 2004.⁷ It specifically invoked Article 59 VCLT and relied on a Commission letter expressing the view that the principle of the primacy of EU law would imply that BIT provisions contrary to EU law could not be applied.⁸ The *Eastern Sugar* tribunal, however, regarded the Commission letter as a non-binding statement. While the tribunal was willing to enter into the intra-EU BIT debate and address the 'novel argument'⁹ of automatic treaty termination pursuant to Article 59 VCLT, it rejected it on the merits, holding that the BIT between the Czech Republic and the Netherlands and EU law did 'not cover the same precise subject-matter'.¹⁰ Similarly, the *Binder* tribunal rejected the automatic lapse of intra-EU BIT argument, which it addressed only in a very cursory fashion, holding that there was no indication that the parties intended the BIT's termination upon Czech accession to the EU or that there was any substantive conflict with EU law.¹¹ Though the jurisdictional decision in *Binder* was initially set aside by a Prague court,¹² it was upheld on appeal.¹³ Both court decisions focused on the nationality of the investor argument, however, and did not address the intra-EU BIT argument at length. Since the Czech Republic prevailed on the merits of the case in an unpublished award, the jurisdictional challenge was apparently not pursued any further.¹⁴ Also in its submissions in the case of

⁵ *Eastern Sugar BV v. Czech Republic*, 27 Mar. 2007, SCC Case 088/2004, Partial Award. See also Ch. Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty', *Journal of International Arbitration* 24 (2007): 455–468.

⁶ *Rupert Joseph Binder v. Czech Republic*, 6 Jun. 2007, Award on Jurisdiction.

⁷ *Eastern Sugar v. Czech Republic*, para. 97.

⁸ EC Letter of 13 Jan. 2006, quoted in *Eastern Sugar v. Czech Republic*, para. 119.

⁹ *Eastern Sugar v. Czech Republic*, para. 155.

¹⁰ *Ibid.*, para. 160.

¹¹ See Luke Eric Peterson, 'Details Surface of Jurisdiction Holdings in *Binder v. Czech Republic*; UNCITRAL Tribunal Saw No Conflict between BITs and EU Law', 28 Feb. 2009, Investment Arbitration Reporter, <www.iareporter.com/articles/20090924_8>.

¹² See Luke Eric Peterson, 'Czech Court Overturns Jurisdictional Decision in BIT Arbitration', Investment Arbitration Reporter, <www.iareporter.com/articles/20091008_2>, 2 Sep. 2009.

¹³ Municipal Court Prague, 18 CO 164/2010-183, 2 Jul. 2010.

¹⁴ See Luke Eric Peterson, 'Efforts to Set-Aside Intra-EU BIT Award Likely To Be Abandoned, as Government Claims Victory in Arbitration', Investment Arbitration Reporter, <www.iareporter.com/articles/20110907_6>, 7 Sep. 2011.

Nepolsky v. Czech Republic,¹⁵ the latter argued that the Germany/Czech Republic BIT was automatically terminated as a result of its incompatibility with EU law. Since the arbitration proceedings were discontinued before a decision on jurisdiction could be rendered, the *Nepolsky* tribunal did not have an opportunity to rule on this matter.¹⁶

More recently, an UNCITRAL tribunal in the *Eureko v. Slovakia* case¹⁷ had the opportunity to address the issue of the continued validity of an intra-EU BIT at length. It came to the same conclusion as the *Eastern Sugar* tribunal with regard to a BIT concluded by the Slovak Republic before its accession to the EU. It dismissed the 'intra-EU jurisdictional objection', holding that the BIT provisions have 'not been displaced by EU law' as a result of Article 59 VCLT¹⁸ nor have they been 'disapplied by EU law' as a result of Article 30 VCLT.¹⁹ In this arbitration, the EU Commission had filed lengthy submissions on the EU law implications as *amicus curiae*.²⁰ The case concerned a dispute about Slovakia's measures in regulating the health insurance business in alleged violation of BIT guarantees.²¹ Two other investment cases, which equally arose from the Slovak regulatory changes in the health insurance sector, were initiated: *HICEE v. Slovakia*²² and *Euram v. Slovakia*.²³

¹⁵ See Luke Eric Peterson, 'Tribunal Constituted to Hear Water Extraction Dispute between German Investor and Czech Republic', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20090725_5>, 27 May 2009.

¹⁶ See Luke Eric Peterson, 'Water Extraction Claim Dries Up in Absence of Funds; Claimant Ordered to Cover Half of State's Expenses in UNCITRAL Arbitration', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20100616_7>, 16 Jun. 2010.

¹⁷ *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010.

¹⁸ *Ibid.*, para. 265.

¹⁹ *Ibid.*, para. 277. See also Luke Eric Peterson, 'Arbitrators Uphold Jurisdiction over Investor Claim against Slovakia; Dispute over Health Insurance Investments Not Derailed by Slovak Accession to the European Union', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20101105_1>, 4 Nov. 2010.

²⁰ See Luke Eric Peterson, 'Arbitrators Ask European Commission to Weigh in on Intra-EU BIT Validity as States Continue to Plead that Such Treaties Lapsed upon EU Entry', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20100701_1>, 27 Jun. 2010.

²¹ See Luke Eric Peterson, 'Eureko Settles One Claim with Poland, but Quietly Pursues a Separate Health Insurance Suit against the Slovak Republic', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20091021>, 14 Oct. 2009.

²² See Luke Eric Peterson, 'Arbitrators Selected in Billion Dollar UNCITRAL Claim against Slovak Republic', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20091124_11>, 13 Nov. 2009.

²³ See Luke Eric Peterson, 'Third BIT Claim Arises after Health Policy Reversal; State Rebuffed in Proposal to Publish Earlier Award under Same Treaty', *Investment Arbitration Reporter*, <www.iareporter.com/articles/20100410_7>, 9 Apr. 2010.

3 THE EU PERSPECTIVE: THE PRIMACY OF EU LAW ARGUMENT

In a letter of DG Internal Market submitted in the *Eastern Sugar* case, the EU perspective becomes particularly evident. Referring to the principle of primacy of EC law, the Commission suggested that, with the date of accession to the EU, Article 307 TEC was no longer applicable. Thus, the treaties mentioned therein could no longer precede EU law. The Commission concluded:

For facts occurring after accession, the BIT is not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic representation, expropriation and eventually investment promotion, would appear to remain in question.

Therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the non-conforming BIT provisions.²⁴

According to the Commission, the EU principle of primacy would entail that BIT provisions contrary to primary or secondary EU law could no longer be applied. The extension of this principle to treaty provisions would follow from ECJ jurisprudence. While the *Eastern Sugar* tribunal did not specify the relevant case law, the tribunal in *Eureko v. Slovakia* listed a few pertinent cases.²⁵ In its submission in the *Eureko* case, the Commission then concluded:

[A]s a result of the supremacy of EU law vis-à-vis pre-accession treaties between Member States, conflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the inverse approach is possible, namely interpretation of the BIT norms in the light of EU law. The foregoing has implications as regards the ability of private parties (investors) to rely on provisions of an intra-EU BIT that are in conflict with EU law. Under EU law, a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law. This includes resort to judicial settlement mechanisms that conflict with the EU judicial system. Furthermore, in the EU legal system, national legislation of an EU Member State that is incompatible with EU law does not become 'invalid'; it merely cannot be applied where it conflicts with EU law. The same applies in the Commission's view, to existing intra-EU BITs that contain provisions that are incompatible with EU law: neither the BIT as such nor the conflicting provisions become 'invalid'; but they cannot be applied where they conflict with EU law.²⁶

However, in both submissions, the Commission acknowledged that the EU primacy principle would not entail an automatic termination of intra-EU BITs

²⁴ EC Letter of 13 Jan. 2006, quoted in *Eastern Sugar v. Czech Republic*, para. 119.

²⁵ *Eureko BV v. The Slovak Republic*, para. 180, fn. 149: 'Case C-235/87, *Matteuci v. Communauté française of Belgium et. al.*, Judgment of 27 Sep. 1988, [1988] ECR 05589, para. 22; Case 3/91, *Exportur SA v. Lor SA and Confiserie du Tech SA*, Judgment of 10 Nov. 1992, [1992] ECR I-5529, para. 8; Case 10/61, *Commission v. Italy*, Judgment of 27 Feb. 1962.'

²⁶ European Commission Observations, 7 Jul. 2010, quoted in *Eureko BV v. The Slovak Republic*, para. 180.

on the international level. Rather, the EU members concerned would have to terminate these BITs.²⁷ This implies recognition that the question of the intra-EU BITs' validity and applicability needs to be determined according to the rules of treaty law.

4 THE VCLT RULES ON SUCCESSIVE TREATIES IN ARTICLES 30 AND 59

The debate on the continued validity of intra-EU BITs²⁸ centres around two provisions of the VCLT on the effect of successive treaties concerning the same subject matter: Articles 30 and 59. Since Article 59 is the more fundamental conflict rule and since it was more broadly discussed by the *Eastern Sugar* and *Eureko* tribunals, it is properly addressed first and in more detail here.²⁹

Article 59 VCLT provides as follows:

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

²⁷ EC Letter of 13 Jan. 2006, quoted in *Eastern Sugar v. Czech Republic*, para. 119: 'However, the effective prevalence of the EU *acquis* does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non-application of all their provisions. Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Such termination cannot have a retroactive effect.' European Commission Observations, 7 Jul. 2010, quoted in *Eureko BV v. The Slovak Republic*, para. 182: 'Eventually, all intra-EU BITs will have to be terminated. Commission services intend to contact all Member States again, urging them to take concrete steps soon'.

²⁸ See M. Burgstaller, 'European Law and Investment Treaties', *Journal of International Arbitration* 26 (2009): 181–216; M. Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States', in *Internationaler Investitionsschutz und Europarecht*, ed. M. Bungenberg, J. Griebel & S. Hindelang (2010), 113–138; T. Eilmansberger, 'Bilateral Investment Treaties and EU Law', *Common Market Law Review* 46 (2009): 383–429; N. Lavranos, 'The New Interaction between International Investment Law and EU Law Post Lisbon Treaty', *European Law Reporter* 11 (2010): 356–371; P. Manzini, 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law', *European Journal of International Law* 12 (2001): 781–792; Söderlund, *supra* n. 5; Ch. Tietje, 'Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts', *Kölner Schrift zum Wirtschaftsrecht* 2 (2011): 128–135; H. Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', *International and Comparative Law Quarterly* 58 (2009): 297–320; H. Wehland, 'Schiedsverfahren auf der Grundlage bilateraler Investitionsschutzabkommen zwischen EU Mitgliedsstaaten und die Einwendung des entgegenstehenden Gemeinschaftsrechts', *SchiedsVZ* 5 (2008): 222–234; M. Wierzbowski & A. Gubrynowicz, 'Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions', in *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, ed. C. Binder et al. (2009), 544–560.

²⁹ The ensuing discussion of Art. 30 VCLT, *infra* text at fn. 81, will focus on differences between the two VCLT articles.

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

A proper interpretation of this treaty provision that does not appear to have given rise to any substantive practice requires addressing a number of distinct aspects: (a) can it lead to automatic termination, (b) what level of sameness is required to characterize two treaties as relating to the ‘same subject matter’, and (c) how does one determine incompatibility of such treaties.

4.1 AUTOMATIC OBSOLESCENCE OR GROUND FOR TERMINATION OR SUSPENSION?

The wording of Article 59(1) VCLT (‘A treaty shall be considered as terminated [...]’) appears to suggest indeed that, if the substantive criteria under subparagraphs a) and b) are fulfilled, the earlier treaty is automatically terminated. This assumption is supported by a textual comparison of other treaty termination and suspension grounds, which often expressly refer to the need to invoke such termination or suspension,³⁰ thus implying that automatic termination would be excluded. It is thus not surprising to see that the respondent states in both the *Eastern Sugar* and the *Eureka* case invoked this argument.³¹

Its main weakness lies in ignoring the contextual and systematic interpretation required of Article 59(1) VCLT. Like other grounds for treaty termination, Article 59 VCLT is subject to a specific termination procedure pursuant to Article 65 VCLT.³²

³⁰ Cf. Art. 60(1) Termination or suspension of the operation of a treaty as a consequence of its breach: ‘A material breach of a bilateral treaty by one of the parties *entitles* the other *to invoke* the breach as a ground for terminating the treaty or suspending its operation in whole or in part’. Art. 61(1) Supervening impossibility of performance: ‘A party may *invoke* the impossibility of performing a treaty as a ground for terminating or [...]’. Art. 62(1) Fundamental change of circumstances: ‘A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, *may not be invoked* as a ground for terminating or withdrawing from the treaty unless [...]’ (Emphasis added).

³¹ *Eureka BV v. The Slovak Republic*, para. 94; *Eastern Sugar v. Czech Republic*, para. 117.

³² Only if the other party/parties does/do not object, it may proceed with the termination or suspension of the treaty. See also M. Prost, ‘Article 65’, in *The Vienna Convention on the Law of Treaties. A Commentary*, ed. O. Corten & P. Klein (2011), 1490, who states that ‘Part V [of the Vienna Convention which runs from Article 42 to Article 72] gives parties the right to lodge a claim on one of the listed grounds. The right, however, is not a right arbitrarily to pronounce the treaty terminated.’

Article 65 of the VCLT, which the ICJ has regarded as reflecting customary international law,³³ provides in relevant parts as follows (emphasis added):

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must *notify* the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore [...]

5. [...] the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

It is the specific procedural requirement that a party invoking ‘a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim’, which ensures that treaty parties do not have a unilateral ‘exit’ ticket. With regard to Article 59 VCLT, following the procedure prescribed by Article 65 VCLT will guarantee that the substantive preconditions for the ‘implied’ termination of the earlier treaty are indeed fulfilled. As is evidenced in the case of intra-EU BITs, the contracting parties of such treaties may have diametrically opposing views whether the conclusion of subsequent treaties in the form of EU accession had such a terminating effect.

The ‘automatic termination of the BIT’ argument was rejected by the *Eureko* tribunal³⁴ and the *Eastern Sugar* tribunal.³⁵ In fact, the two investment arbitration decisions that deal with this question at some length have unanimously rejected the respondent’s suggestion that a BIT termination under Article 59 VCLT can take place automatically.

But even the EU Commission observations made in the context of the *Eureko* case acknowledge this. There, the Commission clearly said that with regard to:

³³ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, at 66, para. 109: ‘Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith’.

³⁴ See *Eureko v. Slovakia*, para. 235: ‘In the view of the Tribunal, it is therefore clear from the text of the VCLT that the invalidity or termination of a treaty must be invoked, according to the Article 65 procedure. The VCLT does not provide for the automatic termination of treaties by operation of law (with the exception of treaties that conflict with rules of *jus cogens*)’.

³⁵ *Eastern Sugar BV v. Czech Republic*, Partial Award, 27 Mar. 2007, para. 172: ‘The Arbitral Tribunal is of the view that EU Law has not automatically superseded the BIT as a result of the accession of the Czech Republic to the EU. It follows that the BIT including its arbitration clause is still in force’.

[...] existing intra-EU BITs that contain provisions that are incompatible with EU law: neither the BIT as such nor the conflicting provisions become ‘invalid’ [...].³⁶

Also the Commission’s concluding remark that ‘[e]ventually, all intra-EU BITs will have to be terminated’³⁷ demonstrates that the Commission did not consider that the EU accession of the Czech Republic and Slovakia would have led to an ‘automatic’ termination of their pre-accession intra-EU BITs. The Commission agreed that ‘the entire Dutch-Slovak BIT has not been implicitly terminated or suspended by virtue of Article 59(1) of the Vienna Convention’.³⁸

Equally, the subsequent conduct of some EU Member States like the Czech Republic indicates that they did not maintain the view defended in some investment cases that their intra-EU BITs were automatically terminated. In summer 2009, it was reported that the Czech government requested that various EU Member States agree to terminate their bilateral treaties with the Czech Republic. While some states like Denmark apparently reacted positively, others rejected such demands.³⁹ Both these reactions and the initial Czech request demonstrate, however, quite clearly the need for treaty action and that EU accession itself was not sufficient to lead to an automatic termination of BITs.

Although technically speaking this procedural finding could have ended the Article 59 debate, both tribunals continued to address the substantive preconditions under this VCLT provision.

4.2 SAME SUBJECT MATTER?

It is an essential precondition for either terminating or suspending a treaty under Article 59 VCLT that the successive treaties are ‘relating to the same subject matter [...]’. Evidently, it is crucial for any court or tribunal having to decide this issue what kind of ‘same subject matter’ test it will apply: whether it should rather follow a fairly strict identity requirement or whether the ‘sameness’ criterion should already be considered fulfilled if different rules or sets of rules

³⁶ European Commission Observations, para. 30, cited in *Eureko v. Slovakia*, para. 180.

³⁷ European Commission Observations, para. 38, cited in *Eureko v. Slovakia*, para. 182.

³⁸ European Commission Observations, cited in *Eureko v. Slovakia*, para. 187: ‘With respect to the BIT in this arbitration, the Commission states that “both EU Member States should terminate this type of bilateral agreement”. However, the Commission acknowledges that neither party appears to have taken any decisive step formally to terminate this BIT. The Commission does not discern in the 2003 Act of Accession any intention of the parties to abrogate earlier intra-EU BITs. The Commission thus agrees that “the entire Dutch-Slovak BIT has not implicitly terminated or suspended by virtue of Article 59 (1) of the Vienna Convention”’.

³⁹ See Luke Eric Peterson, ‘Denmark and Czech Rep to Terminate BIT; but Not All EU Members Agree with Czech View that Intra-EU BITs Are Unnecessary’, *Investment Arbitration Reporter*, <www.iareporter.com/articles/20090719_2>, 17 Jul. 2009.

are invoked in regard to the same factual situation.⁴⁰ Here, one is reminded of the famous statement of the WTO Appellate Body in the *Japanese Alcoholic Beverages Case*, according to which the ‘concept of “likeness” is a relative one that evokes the image of an accordion’.⁴¹ Consequently, WTO panels were able to identify different concepts of likeness in different GATT provisions.⁴² This consideration is echoed in the *Eureko* decision on jurisdiction where the tribunal noted that the concept of sameness contained in Article 59 VCLT differs from that referred to in Article 30.⁴³ Since Article 59 presupposes a level of sameness that may give rise to incompatibility, which implies that ‘the two treaties are not capable of being applied at the same time’, it seems plausible not to require identity or strict overlap. Nevertheless, it seems clear that the overlap must be more than minor or incidental.⁴⁴ Thus, a substantive similarity between the two successive treaties is the first requirement to consider a potential termination or suspension of a treaty under Article 59 VCLT.

⁴⁰ Cf. ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission’, UN Doc A/CN.4/L682, 13 Apr. 2006 (ILC Fragmentation Report).

⁴¹ WT/DS8,10,11/AB/R *Japan – Taxes on Alcoholic Beverages* (‘Japan-Alcoholic Beverages II’), adopted by the DSB on 1 Nov. 1996, at 6: ‘The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of “likeness” is meant to be narrowly squeezed’.

⁴² See, e.g., WT/DS 135/AB/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, adopted by the DSB on 5 Apr. 2001, para. 99: ‘we conclude that the scope of “like” in Article III:4 is broader than the scope of “like” in Article III:2 first sentence. [...] Nonetheless, we note, once more, that Art III:2 extends not only to “like products”, but also to products which are “directly competitive or substitutable” and that Article III:4 extends only to “like products”. [...] we do conclude that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994’.

⁴³ *Eureko v. Slovakia*, paras 239, 240: ‘While the notion of “sameness” may be common to those two instances, the manner in which the overlap between the treaties is approached is manifestly not common. This is evident from the roles accorded by the VCLT to Articles 30 and 59. Article 59 is concerned only with the termination of *the entire treaty*. Article 30, in contrast, is concerned with the priority between *particular provisions* of earlier and later treaties relating to the same subject-matter. While Article 30 is, therefore, focused on particular provisions, the question under Article 59 is whether the entire treaty should be terminated by reason of the adoption of a later treaty relating to the same subject-matter. The very fact that these situations are treated separately in the VCLT points to the need under Article 59 for a broader overlap between the earlier and later treaties than would be needed to trigger the application of Article 30’.

⁴⁴ *Eureko v. Slovakia*, para. 242: ‘Nothing in Article 59 requires that the two treaties should be in all respects coextensive; but the later treaty must have more than a minor or incidental overlap with the earlier treaty’.

Regardless of the precise test to be applied, in practice, litigants before investment tribunals, not surprisingly, differed sharply in their assessment regarding the BIT and the EU Treaty.

According to the respondents in *Eastern Sugar* and *Eureko*, the respective BIT as well as the TEU, to which they acceded, regulated the same subject matter. They compared TEU provisions with those of the BIT with regard to the standard of protection of investor rights and argued that the promotion and admission of investments as well as some transfer provisions in the BIT corresponded to the prohibition of restrictions on capital and payment movements pursuant to Article 56 TEC (now Article 63 Treaty on the Functioning of the EU (TFEU)). Similarly, the fair and equitable treatment standard as well as the prohibition of unreasonable and discriminatory measures of the BIT would be guaranteed by the equivalent device of the prohibition of discrimination pursuant to Article 12 TEC (now Article 18 TFEU), as would be full protection and security as well as the prohibition of uncompensated expropriations by general principles of EU law.⁴⁵ In *Eureko Slovakia* even argued that the BIT and EU law offered the same legal remedies since – after *Francovich*⁴⁶ – EU law also granted a right to be compensated by states.⁴⁷

A closer look at the different BIT and TEU standards reveals, however, that a broad characterization of the treaties' subject matters as identical or merely broadly similar was not convincing to the tribunals. A BIT contains very specific protection standards for admitted investments, which may ultimately be enforced through direct investor-state arbitration. EU law, however, aims at liberalizing trade and investment between Member States in order to create a comprehensive economic union. The liberalization guarantees of EU law comprised in the so-called four freedoms (of goods, persons, services and capital) primarily aim at access to other Member State markets, which is, in investment law, called the 'pre-establishment phase', while most intra-EU BITs contain guarantees in the post-establishment phase once an investment has been made. This fact further reduces the potential overlap between EU law and applicable BITs.

In fact, the intra-EU BITs and the EU accession treaties of new members do not relate to the 'same subject matter'. The EU accession treaty made EU law

⁴⁵ *Eureko v. Slovakia*, para. 69.

⁴⁶ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italian Republic* [1991] ECR I-5357.

⁴⁷ Vgl. *Eureko v. Slovakia*, para. 71: 'Finally Respondent argues that both the BIT and EU law provide the same system of remedies where investments have been impaired as a result of state action. Under EU law, investors pursue their claims before national courts with involvement of the ECJ via a preliminary ruling procedure; and under the BIT investors can have their dispute heard before an arbitral tribunal. Both mechanisms aim at the same objective, namely the protection of investments. Under both mechanisms, investors may seek compensation for damages from States for unlawful conduct (a right confirmed by the ECJ in 1991 in the case of *Francovich v. Italian Republic* ("*Francovich*")).'

applicable to them. It provides for a highly integrated economic union based on a customs union and is enriched by a vast set of additional common policies, whereas the BITs provide for a limited number of very specific investment protection standards, which may be enforced, among others, but most importantly, by direct investor–state arbitration.

While there may be some partial overlap between BITs and EU law, this cannot change the fact that they are addressing different subject matters. A certain degree of overlap may exist with regard to some economic freedoms enshrined in the EC Treaty, now the TFEU. For instance, the free transfer obligations of BITs⁴⁸ may be partially covered by the free movement of capital provisions of EU law,⁴⁹ and in some cases, the market access provisions found in some BITs may be viewed as amounting to a functional equivalent to the free movement of capital and the freedom of establishment.⁵⁰ However, the free movement of capital pursuant to Article 63 TFEU (ex Article 59 TEC) clearly exceeds the standard usually contained in European BITs.⁵¹ There is no right to admission under the Czechoslovakia/Netherlands BIT; its Article 2 contains only the usual rules on admission, leaving the actual decision on admission of foreign investors to the rules of the host state.⁵² However, Dutch and Czech investors can derive such a right from the TFEU's capital liberalization as well as the freedom of establishment.

Similarly, some aspects of fair and equitable treatment⁵³ may be reflected in the EU's non-discrimination rules. However, most aspects of the fair and

⁴⁸ See, e.g., Art. 4 Czechoslovakia/Netherlands BIT: 'Each Contracting Party shall guarantee that payments related to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively: (a) profits, interests, dividends, royalties, fees and other current income; (b) funds necessary i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or ii. for the development of an investment or to replace capital assets in order to safeguard the continuity of an investment; (c) funds in repayment of loans; (d) earnings of natural persons; (e) the proceeds of sale or liquidation of the investment.'

⁴⁹ Article 63 TFEU: '(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. (2) Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited'.

⁵⁰ S. Hindelang, 'The EC Treaty's Freedoms of Capital Movement as an Instrument of International Investment Law?', in *International Investment Law in Context*, ed. A. Reinisch & Ch. Knahr (2008), 43–72.

⁵¹ See R. Dolzer & Ch. Schreuer, *Principles of International Investment Law* (2008): 81; A. Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection', in *Standards of Investment Protection*, ed. A. Reinisch (2008), 10.

⁵² Article 2 Czechoslovakia/Netherlands BIT: 'Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and shall admit such investments in accordance with its provisions of law'.

⁵³ See, e.g., Art. 3(1) Czechoslovakia/Netherlands BIT: 'Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not

equitable treatment standard as well as of the full protection and security standard of the BIT exceed the guarantees under EU law. EU law basically obliges Member States to abstain from any measures that openly or indirectly discriminate between EU nationals or burden intra-EU movement of goods, persons, services and capital. It does not contain any equivalent to the far-reaching transparency, predictability, and stability of obligations or the duty to respect legitimate expectations contained in the fair and equitable treatment obligation.⁵⁴ That these guarantees exceed the EU's non-discrimination rules was clearly recognized by the *Eureko* tribunal. It said:

The Tribunal does not accept the submission that the protection afforded by the BIT provision on fair and equitable treatment is entirely covered by a prohibition on discrimination. Respondent does not allege that there is any principle of EU law that specifically forbids treatment that is not fair and equitable. The Tribunal does not consider that any such principle, independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law.

Treatment might be unfair and inequitable even if it is imposed on everyone regardless of nationality or, indeed, of any other distinguishing characteristic. [...].⁵⁵

Furthermore, the fair and equitable treatment as well as the full protection and security standards in BITs are typically provided for without any restrictions. BITs rarely contain express limitations or permit so-called non-precluded measures. This is one of the reasons why tribunals often have to fall back on the general grounds precluding wrongfulness contained in the rules on state responsibility.⁵⁶ EU law, on the other hand, contains – next to express treaty

impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors'.

⁵⁴ See only Ch. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', *The Journal of World Investment and Trade* 6 (2005): 357; C. Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', in *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives*, ed. OECD 73 (2005); United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment, Studies on Issues in International Investment Agreements* (1999).

⁵⁵ *Eureko v. Slovakia*, paras 250, 251.

⁵⁶ See, among others, Ch. Binder, 'Changed Circumstances in International Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis', in *International Investment Law in the 21st Century. Essays in Honour of Christoph Schreuer*, ed. C. Binder et al. (2009), 608; A.K. Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure', in *Oxford Handbook of International Investment Law*, ed. P. Muchlinski, F. Ortino & C. Schreuer (2008), 495; W. Burke-White & A. von Staden, 'Investment Protection in Extraordinary Times: Interpreting Non-Precluded Measures Provisions', *Virginia Journal of International Law* 48 (2007): 307; A. Reinisch, 'Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?', *Journal of World Investment and Trade* 8 (2007): 191; St. Schill, 'International Investment Law and the Host State's Power to Handle Economic Crises', *Journal of International Arbitration* 24, no. 3 (2007): 265.

derogations – the implicit limitations developed by the ECJ as mandatory requirements in cases like *Cassis de Dijon*⁵⁷ and *Gebhard*.^{58,59}

Furthermore, EU law does not contain any limitation of the Member States' right to expropriate comparable to the specific rules contained in intra-EU BITs.⁶⁰ Quite to the contrary, EU law expressly leaves the regulation of property including the right to expropriate outside the scope of the treaties.⁶¹ This is unaffected by the ECJ jurisprudence invoked by respondents.⁶² It is correct that the European Court of Justice has developed an EU fundamental rights protection, which was incorporated into the EU Treaty by the Treaty of Lisbon, making the EU Charter of Fundamental Rights an integral part of the EU primary law⁶³ and specifically covering also the protection of property rights as confirmed in *Hauer*⁶⁴ and *Kadi*.⁶⁵

However, as expressly stated in the Fundamental Rights Charter, its provisions 'are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.⁶⁶ Outside the area of implementation of EU law, the Member States' fundamental rights obligations remain covered by the 1950 European Convention on Human Rights (ECHR)⁶⁷ and do not result from EU law. If, for instance, an EU Member State expropriates a national of another Member State, this may give rise to a complaint before the European Court of Human Rights as a potential violation of the First Additional Protocol to the

⁵⁷ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

⁵⁸ Case C-55/94 *Gebhard* [1995] ECR I-4165.

⁵⁹ See also Tietje, *Beiträge zum Transnationalen Wirtschaftsrecht* 104 (2011), at 13.

⁶⁰ Cf. Art. 3(2) Czech Republic/Netherlands BIT: 'Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants'.

⁶¹ Cf. Art. 345 TFEU (ex Art. 295 TEC): 'The Treaties shall in no way prejudice the rules in Member States governing the system of property Ownership'.

⁶² The Czech Republic and Slovakia particularly invoked the *Hauer* and *Kadi* case, *infra* nn. 64 and 65.

⁶³ See Art. 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 Dec. 2000, as adapted at Strasbourg, on 12 Dec. 2007, which shall have the same legal value as the Treaties'.

⁶⁴ Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

⁶⁵ Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Court of First Instance, 21 Sep. 2005 [2005] ECR II-3649, 45 ILM 81 (2006); Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, European Court of Justice, 3 Sep. 2008 [2008] ECR I-6351, 47 ILM 923 (2008).

⁶⁶ Article 51 Charter of Fundamental Rights of the European Union.

⁶⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 Nov. 1950, 213 UNTS 221, entered into force 3 Sep. 1953 (ECHR).

ECHR.⁶⁸ However, the affected person cannot challenge this expropriation before the Court of Justice of the EU on the basis of EU law since the Court's jurisdiction over actions by private parties is limited to challenges against acts of the EU institutions. The same considerations apply with regard to general principles of EU law, developed by the ECJ, such as legitimate expectations, due process and transparency. Even to the extent that they overlap with principles derived from fair and equitable treatment,⁶⁹ they can only be invoked against EU measures and do not provide an independent basis for EU nationals to challenge acts of Member States.

This additional benefit is also particularly evident on the level of procedural protection. EU law does not provide for any mechanism whereby investors from one Member State could directly access an international dispute settlement body in order to claim violations of any of the above-mentioned substantive guarantees by another Member State. Private parties do not have any standing before the EU courts against Member States. The jurisdiction of the EU courts over claims by private parties is limited to annulment actions directed against 'acts' of the EU institutions and is made conditional upon the additional hurdle that such acts must be of 'direct and individual concern' to them.⁷⁰ Actions against Member States can be brought only by other Member States or by the Commission.⁷¹ Finally, the 'indirect' control mechanism of preliminary rulings⁷² only allows the Court to interpret and rule on the validity of EU law. While such interpretation may have implications for the EU conformity of national law the procedure largely depends upon the willing cooperation of national courts.

Thus, it appears correct when the *Eureko* tribunal concluded that this difference was crucial in finding that Article 59 was inapplicable:

The third main reason for rejecting the jurisdictional challenge based on VCLT Article 59 may be stated simply. An essential characteristic of an investor's rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to

⁶⁸ First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, signed 20 Mar. 1952, ETS No. 9, entered into force 18 May 1954: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

⁶⁹ See *supra* n. 58.

⁷⁰ Article 263(4) TFEU.

⁷¹ Articles 258 and 259 TFEU.

⁷² Article 267 TFEU.

bring legal proceedings before the national courts of the host state; and, moreover, the *locus standi* of an investor under the BIT, with its broad definition of ‘indirect’ investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State.⁷³

Similarly, the tribunal in *Eastern Sugar* had already stated:

[...] the fact that the European Union does not provide for a possibility for an investor to *sue a host state directly*, and that *in international BIT arbitration* this is an essential feature of most bilateral investment treaties, is in itself sufficient to reject the Czech Republic’s equivalence argument.⁷⁴

Even if one would assume a broad overlap indicating that the BIT and EU law related to the same subject matter, this alone would not imply that the BIT had to be terminated or suspended. Pursuant to Article 59 VCLT, one of the further requirements would have to be fulfilled. Either it must be established ‘that the parties intended that the matter should be governed by [the later] treaty’⁷⁵ or ‘the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time’.⁷⁶

4.3 THE INTENTION OF THE PARTIES THAT THE MATTER SHOULD BE GOVERNED BY THE LATER TREATY

With regard to Article 59(1)(a) VCLT, there is nothing in the Slovak EU Accession Treaty or elsewhere in EU law that indicates any intent of the parties that the matters covered by Slovak intra-EU BITs should be henceforth governed by EU law. Thus, the *Eureko* tribunal stated:

There is, however, no evidence of any intention that the provisions of EU law should result in the termination of the entire BIT. Nothing in the text of the EU treaties produces that result; and the necessary intention is not established by extraneous evidence. Indeed, such evidence as there is indicates that there was no or, at least, no clear intention that the BIT should be terminated by any of the CSFR Association Agreement, the Association Agreement, the Accession Treaty or the Lisbon Treaty.⁷⁷

Concerning a potential intention manifested otherwise (*argumento* ‘or is otherwise established that the parties intended’), the tribunal noted that given the different scope of obligations such an intention could not be presumed:

[...] EU law does not provide substantive rights for investors that extend as far as those provided by the BIT. There are rights that may be asserted under the BIT that are not

⁷³ *Eureko v. Slovakia*, para. 264.

⁷⁴ See also *Eastern Sugar v. Czech Republic*, para. 165.

⁷⁵ Article 59(1) a) VCLT.

⁷⁶ Article 59(1) b) VCLT.

⁷⁷ *Eureko v. Slovakia*, para. 244; similar *Eastern Sugar v. Czech Republic*, para. 147.

secured by EU law. Consequently, it cannot be said that it is implicit in the text of the EC Treaties that Respondent and the Netherlands intended that it should supplant the BIT.⁷⁸

It appears that these conclusions are corroborated by the subsequent practice of EU Member States that are also parties to intra-EU BITs. Both with regard to approaches from countries like the Czech Republic that intended to terminate such BITs, a number of them reacted negatively, preferring the continuance of such treaties, and in the context of EU Commission concerns, many expressed their preference of maintaining existing intra-EU BITs.⁷⁹

4.4 THE POTENTIAL INCOMPATIBILITY OF BIT PROVISIONS AND EU LAW

With regard to Article 59(1)(b) VCLT, the two treaties are not ‘so far incompatible’ that they are not capable of being applied at the same time. As regards the incompatibility standard enshrined in Article 59 VCLT, its wording suggests that it must be impossible to apply both treaties at the same time.⁸⁰ Already the VCLT’s Drafting Committee suggested that a mere difference of treaty provisions would not yet imply incompatibility⁸¹ and that the broader rights conferred in an earlier treaty may well continue to apply, in case a later treaty contains only more restrictive ones.⁸²

The fact that a BIT offers more rights than EU law does not necessarily mean that such rights are in conflict with EU law. Thus, the *Eastern Sugar* tribunal opined:

If the EU Treaty gives more rights than does the BIT, then all EU Parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give to other EU countries and

⁷⁸ *Eureko v. Slovakia*, para. 262.

⁷⁹ Cf. under the heading of ‘Intra-EU bilateral Investment Treaties’ December 2008 EU Economic and Financial Committee Report, Brussels, 17363/08, ECOFIN 629, MDC 2, available at <<http://register.consilium.europa.eu/pdf/en/08/st17/st17363.en08.pdf>>, 17 Dec. 2008, para. 17: ‘Most Member States did not share the Commission’s concern in respect of arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements’.

⁸⁰ Cf. F. Dubuisson, ‘Article 59 Convention of 1969’, in *The Vienna Convention on the Law of Treaties. A Commentary*, ed. O. Corten & P. Klein, Vol. II (2011), 1341.

⁸¹ See also Drafting Committee, Official Records, 2nd session, 91st meeting, 253, para. 37; cited in Dubuisson, 1342.

⁸² *Ibid.*: ‘If a small number of States concluded a consular convention granting wide privileges and immunities, and those some States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted regime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force’.

investors, it will be for those other countries and investors to claim their *equal rights*. But the fact that these rights are unequal does not make them incompatible.⁸³

Similarly, the *Eureko* tribunal held:

Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.⁸⁴

To conclude, there may be overlaps between the content of EU law and BITs but, where they exist, they are not contradictory obligations in the sense that they contain guarantees for investors/market participants against host states/other EU Member States. While EU law by far transgresses the subject matter of BITs, in some respects, BITs provide more protection than EU law (e.g., rules on expropriation, access to arbitration). In the latter case, the BIT standards complement the guarantees under EU law, but they are not incompatible with them.

5 ARTICLE 30 VCLT

In addition to 59 VCLT, the respondents in *Eastern Sugar* and *Eureko* also invoked Article 30. Article 30 VCLT provides in its relevant part as follows:

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

[...]

Article 30 VCLT thus leads to the inapplicability of single treaty provisions in case of their incompatibility with provisions of a subsequent treaty. This possibility was particularly invoked by the Commission in its written submissions. While it conceded that there was no termination according to

⁸³ *Eastern Sugar v. Czech Republic*, paras 168–170, especially para. 170.

⁸⁴ *Eureko v. Slovakia*, para. 263.

Article 59 VCLT, it argued that there was an incompatibility in the sense of Article 30 VCLT. The Commission said:

There are some provisions of the Dutch-Slovak BIT that raise fundamental questions regarding compatibility with EU law. Most prominent among these are the provisions of the BIT providing for an investor-State arbitral mechanism (set out in Art. 8), and the provisions of the BIT providing for an inter-State arbitral mechanism (set out in Art. 10). These provisions conflict with EU law on the exclusive competence of EU courts for claims which involve EU law, even for claims where EU law would only partially be affected. The European Commission must therefore ... express its reservation with respect to the Arbitral Tribunal's competence to arbitrate the claim brought before it by *Eureko B.V.*⁸⁵

Relying on its earlier findings on Article 59, the *Eureko* tribunal found that the case did not give rise to any Article 30 incompatibility as well. It said:

It has already been explained that in the view of the Tribunal there is no incompatibility in circumstances where an obligation under the BIT can be fulfilled by Respondent without violating EU law. That conclusion is not affected by the principles of supremacy, direct effect or direct application of EU law.

More importantly, it is difficult to see how Article 30 could deprive the Tribunal of jurisdiction based upon the Parties' consent derived from Article 8 of the BIT (whether operating the first stage, second stage or both), even if there may be circumstances in which a true incompatibility between the BIT and EU law arises. Any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.⁸⁶

With regard to the alleged incompatibility between investor-state arbitration and EU law, the tribunal could not find any norm of EU law that would prohibit such dispute settlement.⁸⁷ Rather, it stated:

Far from it: transnational arbitration is a commonplace throughout the EU, including arbitrations between legal persons and States; and the European Court of Justice has given several indications of how questions of EU law should be handled in the course of arbitrations, including important questions of public policy. It cannot be asserted that all arbitrations that involve any question of EU law are conducted in violation of EU law. The argument that the availability of arbitration for some but not all EU investors would amount to discrimination in violation of EU law was addressed above, where it was decided that the answer is to extend rights and not to cancel them.⁸⁸

In conclusion, there may be some overlap between the guarantees contained in EU law, in particular, the so-called four freedoms, and the investment standards contained in the BIT, but there is no incompatibility of such BIT provisions

⁸⁵ European Commission Observations, 7 Jul. 2010, quoted in *Eureko BV v. The Slovak Republic*, para. 193.

⁸⁶ *Eureko v. Slovakia*, paras 271, 272.

⁸⁷ *Eureko v. Slovakia*, para. 274.

⁸⁸ *Ibid.*

with EU law. Rather, '[t]he rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law'.⁸⁹

6 JURISDICTIONAL ISSUES: DISCRIMINATION AND EXCLUSIVE ECJ JURISDICTION

In most intra-EU BIT cases, respondents and the Commission also raised a special discrimination issue. The fact that a BIT provides for investor-state arbitration was considered by the EU Commission to lead to preferential treatment prohibited by the principle of non-discrimination under Article 12 of the EC Treaty. The tribunals in *Eastern Sugar* and *Eureko* found that such discrimination did not necessarily stem from the application of BITs. Rather, they found that any potential discriminatory effect could be avoided by extending the option of investor-state arbitration to investors from other EU Member States.⁹⁰

What is relevant for purposes of triggering Article 59 VCLT is that 'the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time'.⁹¹ This requires a comparison of the relevant treaty provisions. Only if investor-state dispute settlement under BITs cannot be applied at the same time as dispute settlement under EU law, such an incompatibility may arise. Since EU law does not provide for any direct dispute settlement between investors from one EU Member State and another Member State (be it in the form of investment arbitration or before the European Court of Justice), there is no overlap, and thus there can be no incompatibility between BITs providing for investor-state arbitration and the dispute settlement provisions of the TFEU.

In addition to the discrimination issue stemming from investor-state arbitration clauses in intra-EU BITs, the existence of mixed investment arbitration has also been challenged under the principle of exclusive ECJ

⁸⁹ *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 263.

⁹⁰ See *Eureko BV v. The Slovak Republic*, para. 267: 'There is moreover no reason, legal or practical, why an EU Member State should not accord to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors of its EU bilateral investment treaty partners'; see also *Eastern Sugar BV v. Czech Republic*, para. 170: 'If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their *equal rights*'.

⁹¹ Article 59(1)(b) VCLT.

jurisdiction over matters concerning EU law. Relying on the *MOX Plant* case⁹² it was argued that Article 344 TFEU (ex Article 292 TEC) and the EU principle of loyalty would imply that the ECJ had exclusive jurisdiction over disputes between two Member States.⁹³ This exclusivity argument was rejected by the *Eureko* tribunal, which stressed that the *MOX Plant* ruling was ‘concerned with disputes between the BIT Contracting Parties, the ruling is not applicable to disputes under Article 8, which are not disputes between Contracting Parties but investor-state disputes’.⁹⁴

7 CONCLUSION

In recent intra-EU BIT arbitrations, respondent states have repeatedly asserted that their accession to the EU has rendered their BITs with other EU Member States ineffective both as a matter of EU law and according to treaty law. In this regard, they regularly received the EU Commission’s support, which intervened either as formal *amicus curiae* or in more informal ways. Their treaty law arguments that EU accession as the ‘posterior’ treaty act rendered intra-EU BITs ineffective as a result of Articles 59 and 30 VCLT were not convincing to investment tribunals so far. Nevertheless, they can be regarded as an expression of increasing hostility of some states and, in particular, on the part of the EU Commission towards the existence of investment protection treaties in force between EU Member States.

⁹² Case C-459/03, *Commission v. Ireland* [2006] ECR I-4635.

⁹³ *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 276.

⁹⁴ *Ibid.*

