

# Investment Protection, Transit and the Energy Charter Treaty



BITs, the ECT and the EU

*Christer Söderlund, Vinge, Stockholm, Sweden*

Brussels, 23 October 2009

# Implications of EU law for investment arbitration

- The treatment of mandatory norms - such as prohibition on agreements restricting competition as tantamount to international public policy (Eco Swiss)
- The assumption that intra-EU BITs are incompatible with, “unnecessary” for, or superseded by the European legal order?
- The clash between investor protection and EC prohibition of state aid (Electrabel S.A., AES Summit Generation Ltd, and EDF, respectively, v Hungary)
- The duty to eliminate incompatibility between the EC Treaty and international agreements with third states (Art. 307 EC) (Commission v Austria (Case C-205/06, v Sweden (Case C-249/06) and v Finland (Case C-118/07))

## BITs - the Swedish Example

<b>Country</b>	<b>Date of signature</b>	<b>Entry into force</b>	<b>Accession to the EU</b>
<b>Bulgaria</b>	19 April 1994	1 April 1995	2007
<b>Czech Republic</b>	13 November 1990	23 September 1991	2004
<b>Estonia</b>	31 March 1992	20 May 1992	2004
<b>Hungary</b>	21 April 1987	21 april 1987	2004
<b>Latvia</b>	10 March 1992	6 November 1992	2004
<b>Lithuania</b>	17 March 1992	6 November 1992	2004
<b>Malta</b>	24 August 1999	1 January 2000	2004
<b>Romania</b>	25 May 2002	1 April 2003	2007
<b>Slovakia</b>	13 November 1990	23 September 1990	2004
<b>Slovenia</b>	10 November 1978	21 November 1979	2004

No one of the EU countries having acceded up to 1995 ("old EU Member States") have concluded BITs with Sweden.

# The special case of the Energy Charter Treaty

- The European Communities are signatories
- Signatories are Member States (27) as well as non-Member States (24)

## Points of contact between the ECT and the EC Treaty

- Anti-competitive behaviour, Art. 81 EC
- Abuse of dominant position, Art. 82 EC
- State aid prohibition, Art. 87 EC

## Art. 133 of the Lisbon Treaty (Article 207(1) in the consolidated text)

”The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action” (emphasis added).

# BITs, the ECT and the EU

*Chair: Christer Söderlund*

- Markus Burgstaller
- Richard Happ
- Robert Volterra
- Esa Paasivirta

# The Energy Charter Treaty

## Part I

### Definitions and purpose

#### ARTICLE 1 DEFINITIONS

As used in this Treaty

[---]

(6) "**Investment**" means every kind of asset, owned or controlled directly or indirectly by an Investor [---]

[---]

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Character efficiency projects" and so notified to the Secretariat.

# The Energy Charter Treaty

## Part I

### Definitions and purpose

#### ARTICLE 1 DEFINITIONS

As used in this Treaty

[---]

(7) "**Investor**" means:

- (a) with respect to a Contracting Party:
  - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
  - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

[---]

# The Energy Charter Treaty

- ARTICLE 2
- PURPOSE OF THE TREATY

This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

[---]

# The Energy Charter Treaty

- ARTICLE 6
- COMPETITION

(1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.

[Etc.]

- ARTICLE 14
- TRANSFERS RELATED TO INVESTMENTS

- (1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party **guarantee the freedom of transfer** into and out of its Area, [---]
- (2) Transfers under paragraph (1) shall be effected **without delay** and (except in case of a Return in kind) in a Freely Convertible Currency.

[---]

# The Energy Charter Treaty

- ARTICLE 16
- RELATION TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty.

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty.

**where any such provision is more favourable to the Investor or Investment.**

# Streamline investor protection

- EU Model BIT for FDI
- Let things remain as they are
- Intra-EU investment protection?
- EU Investment Treaty or Investment Chapter intra-EU (modelled on NAFTA?)

# The State Party's Argument

1. Intra-EU investment matters are governed by EC Law
2. The BIT is superseded by EC law
3. Intra-EU investor-state arbitration is inconsistent with the EC legal order
4. Application of Article 59 of the Vienna Convention
5. The Czech Republic's request for the stay of the proceedings and for preliminary ruling

## The essence of a State Party's position [exerpts]

[--]

The BIT was no longer applicable since the day the Czech Republic became a Member State of the European Union on 1st May 2004.

[---]

... the Czech Republic's offer to arbitrate was no longer valid at that date, as the consequence of the inapplicability of the BIT.

[---]

Does the present system of investment arbitration serve as a custodian of international public policy?

- De-politicized
- Impervious to lobbying
- Devoid of vested interests
- Non-aligned
- Sovereignty neutral

An Internal Note of the ECOFIN figured predominantly in the State Party's pleadings

[---]

In a Note to the Economic and Financial Committee ("ECOFIN") dated 6 November 2006, the Internal Market and Services DG notes that:

[---]

*"...it is strongly recommended that Member States exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements (...)"*.

Partial Award rendered on 27 March, 2007 between Eastern Sugar B.V. (Netherlands) and the Czech Republic in *ad hoc* arbitral proceedings

- Neither the EC Treaty nor the Accession Treaty provide expressly *that the BIT is terminated* (para 143).
- To this day, no notice of termination of the BIT was given by the Czech Republic or the Netherlands.
- The EC Treaty and the BIT do not cover the *same subject matter* (para 159).

## Partial Award rendered on 27 March, 2007 (cont'd)

- “[A]n international arbitral tribunal, independent from the host state is the best guarantee”.
- No common intent of the Czech Republic and the Netherlands that the EC Treaty should supersede the BIT (para. 167).
- The BIT and the EC Treaty are not incompatible. Free movement of capital and protection of the investment are different but complementary things (para 168).

Award on jurisdiction rendered on 6 June 2007 in *ad hoc* arbitral proceedings between a German investor and the Czech Republic under the Czech-German BIT

#### The Tribunal's conclusions

- The status of the Czech-German BIT was not regulated in the Accession Treaty in connection with the Czech Republic becoming a Member State of the EU on 1 May 2004.
- The Czech-German BIT has not been terminated pursuant to Article 13(2) of the BIT.

Irrespective of the above-stated, the Tribunal found:

- The acts complained of took place before the accession of the Czech Republic to the EU

## Award on jurisdiction of 6 June 2007 (cont'd)

Additionally,

- Article 13(3) of the Czech-German BIT provides for continued protection during a 15 year period after the termination of the Treaty.
- There is no conflict between the substantive protections afforded by the Czech-German BIT and EU law. So the question of primacy of EC law does not arise.
- The question whether intra-EU BITs should be terminated has not been finally settled even as a policy matter at the time of the award on jurisdiction.

## Award on jurisdiction of 6 June 2007 (cont'd)

- As for the specific investor state dispute resolution mechanism offered by the Czech-German BIT, the fact that the national remedy is supplemented by an international arbitration mechanism does not constitute discrimination or is otherwise incompatible with EC rules and principles.

Consequently, the Tribunal held that:

- The relevant provisions of the Czech-German BIT cannot consider in themselves incompatible with EC law. So, no basis to find that they are automatically inoperative.

*Note: The Czech Republic has challenged the Tribunal's jurisdictional decision before the competent Court in Prague.*

## Are intra-EU BITs incompatible with the “European Legal Order”? (1)

Award of 27 March 2007 between Eastern Sugar B.V. (Netherlands) and the Czech Republic:

[---]

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.

173.

Several *additional* reasons, each of which is sufficient by itself, lead to the result that the Arbitral Tribunal has jurisdiction in any event.

[---]

## Are intra-EU BITs incompatible with the “European Legal Order”? (2)

Award on Jurisdiction of 6 June 2007 between a German investor and the Czech Republic (not published):

[---]

65. The Arbitral Tribunal does not find either that Article 10(2) of the Czech-German BIT, which provides for a specific procedural protection in the form of an arbitration between the investor and the host State, is in conflict with EC law. [---]

66. Consequently, the Arbitral Tribunal considers that the relevant provisions of the Czech-German BIT cannot be considered in themselves incompatible with EC law. Consequently, there is no basis for finding that they have become automatically inoperative in application of the principle of the priority of EC law.

[---]