

Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty

The Energy Charter Treaty as a Mixed Agreement: A Model for Future European Investment Treaties?

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The ECT as a Mixed Agreement

- Article 41 ECT: open for states and Regional Economic Integration Organizations
- The European Communities and all 27 Member States are Contracting Parties to the ECT
- The ECT was concluded on the basis of Article 44(2), the last sentence of Article 47(2), Articles 55, 57(2), 87, 93, 95, 133, 175(1) and 308, in conjunction with the second sentence of Article 300(2) and the second subparagraph of Article 300(3) EC Treaty
- Mixed agreements have to be ratified by the European Communities and all Member States

No Community Competence for Investment

- Article 133(1) EC Treaty: The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
- In the EC Treaty, exclusive external Community competence for trade, but not for investment

BIT Infringement Proceedings

- Proceedings against Austria as to BITs with, *inter alia*, China, Korea, Malaysia, Russia and Turkey
- Proceedings against Sweden as to BITs with, *inter alia*, China, Hong Kong, Indonesia, Malaysia, Pakistan and Vietnam
- Commission: BITs impede possible restrictions on movements of capital and payment
- Under Articles 57(2), 59 and 60(1) EC Treaty the Council of EU may adopt such restrictions
- By not taking steps to eliminate incompatibilities, Member States violate Article 307(2) EC Treaty

ECJ Judgment of 3 March 2009

- To ensure effectiveness, restrictive measures must be capable of being applied immediately
- Incompatibility in case there is no REIO clause or international law mechanism
- Possible renegotiation, suspension or denunciation are incompatible with effectiveness
- The incompatibilities are not limited to the defendant Member States in these cases
- Member States must assist each other to eliminate incompatibilities
- Austria and Sweden violate EC Treaty

Consequences of ECJ Judgment

- ECJ did not indicate consequences of failure to fulfil obligations under Article 307(2) EC Treaty
- Article 307 EC Treaty includes an obligation to denounce incompatible prior treaties
- Austria and Sweden may have to denounce the BITs at issue, even if denunciation is *ultima ratio*
- Numerous Member States BITs without REIO clause violate EC law
- Such BITs of all Member States may be challenged by the Commission

Opinion of AG Sharpston of 10 Sep 2009

- Infringement proceedings against Finland
- The mere possibility that an [...] arbitral tribunal might interpret the [clause] in that way does not suffice to discharge Finland's obligations.
- Because restrictive measures are generally temporary in character, definitively terminating the existing treaties would be disproportionate.
- The Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State [...].

Lisbon Treaty: Union Competence for FDI

- Signed by all Member States on 13 December 2007
- 24 Member States have ratified but all 27 need to ratify
- Article 207(1) TFEU: The common commercial policy shall be based on uniform principles, particularly with regard to [...] the conclusion of tariff and trade agreements [...], and the commercial aspects of intellectual property, *foreign direct investment* [...].
- Article 2(1) TFEU: When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Limitation of Union Competence to FDI

- Forms of investment other than FDI are not covered by the exclusive Union competence
- FDI defined neither in EC nor in Lisbon Treaty, but EC secondary legislation suggests broad interpretation
- Basic features of an investment are
 - Certain duration
 - Certain regularity of profit and return
 - Assumption of risk
 - Substantial commitment
 - Significance for the host State's development

Further limitations: Expropriation Covered?

- Parallelism clause in Article 207(6) TFEU:
 - Exercise of competences [...] shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation [...] insofar as Treaties exclude such harmonisation.
 - Article 345 TFEU (= Article 295 EC): Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.
 - ECJ: *Kadi and Al Barakaat*: Member States may not decide expropriation conditions
 - Conclusion: Union competence covers expropriation

Conclusion: Scope of Union Competence

- Union competent to conclude comprehensive investment treaties
- Competence covers
 - Market access
 - Pre- and post-establishment standards of treatment
 - Performance requirements
 - Investor-State dispute settlement provisions
 - Conditions under which expropriation may take place
- Major limitation: Union competence limited to FDI; portfolio investments not covered
 - Limitation mitigated by broad interpretation of FDI

Consequences of Union Competence I

- Investment treaties that cover all forms of investments have to be mixed agreements
- Upon entry into force of the Lisbon Treaty, Union competence for FDI will be exclusive
- Member States will not be competent anymore to conclude, amend and uphold their BITs
- Member States BITs remain valid under international law
- Unlike in the case of the entry into force of the Common Commercial Policy no transition period

Consequences of Union Competence II

- Policy arguments in favour of Union competence
 - Strengthening of bargaining power
 - Linkages of trade and investment
 - Efficiency gains
 - Removal of distortions
 - Transparency
- Policy arguments against Union competence
 - ICSID Convention not open for signature for the Union
 - Confusion among treaty partners
 - Problems with mixed agreements

No Declaration of Competence in the ECT

- The Communities and the Member States will [...] determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party.
- Determination will be made within 30 days
- WTO: Community internationally responsible for the implementation of not only the GATT, but also the entire GATS and TRIPS
- Community tends to assume lead responsibility for all WTO disputes

Lessons Learned

- An *ex ante* Declaration of competence will indicate where the balance lies and may provide a degree of legal certainty
- Practice shows that such Declarations do not answer all questions
- There is judicial support for an approach based on joint and several liability where there is no *ex ante* Declaration
- A claim for international responsibility against the Community has never failed because it has been brought against a "wrong party" in the context of mixed agreements

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