

# **Executive Training Programme for Young Energy Leaders**

*Rising to the Energy Security Challenges of Tomorrow by  
Applying Effective Investment Protection Strategies Today*



## ***EU AND ECT***

**Ana Stanič**

**English Solicitor Advocate  
Honorary Lecturer at Centre for Energy Petroleum and  
Mining Law and Policy, University of Dundee**

**29 October 2013**

# ***Scope of Review***

---

1. EU Institutions' new competences
2. Role of International Law in EU Law
3. Relationship between EU law and International Investment Law
4. EU and ECT
5. EU law and ECT: Approach of CJEU
6. EU law and ECT: Recent Arbitral Awards
7. Possible New Grounds for Friction
8. Instead of a Conclusion

# 1. *EU's New Competence in Energy*

---

- **Article 194 TFEU**
- **Present and Future IGAs in the field of energy [EU Decision 994/2012]**
  - As of 17/2/2013 EU MS required to submit all existing IGA to Commission + Commission to assess their compatibility with EU law
  - New IGA must be submitted to Commission for assessment of their compatibility

# 1. *EU's New Competence in FDI*

---

- **Article 3(1)(e) TFEU:** EU has exclusive competence with respect to common commercial policy
- According to Commission above article in conjunction with Articles 206 and 207 TFEU means that EU now has exclusive competence in FDI
- **Present and Future BITs and FTA [EU Regulation 1219/2012]**
  - By 8/2/2013 EU MS required to notify BITs and FTAs + Commission will assess their compatibility with EU law
  - Going forward, as a general rule Commission will negotiate BITs and FTAs

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

---

### 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. *Role of International Law in EU Law*

---

- Art. 216 (2) TFEU: “ *Agreements by the Union are binding upon institutions of the Union and on its MS.*”
- International agreements concluded by the Community have primacy over secondary Community legislation, *Intertanko* [C-308/06]
- ECJ will only examine the validity of secondary Community legislation with regard to an international agreement where ‘*the nature and broad logic of the latter do not preclude this, and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise*’, *Fiamm* [C-120/06 P and C-121/06]
- Since (i) Community was not party to MARPOL 73/78 (all MS were), (ii) MARPOL not CIL, (iii) UNCLOS has no direct effect, the invalidity of Community secondary legislation cannot be assessed by reference to either international agreement, *Intertanko* [C-308/06]
- CJEU will examine the legality of EU law in light of WTO rules only if EU legislation intends to implement a particular WTO obligation or when legislation expressly refers to a particular WTO provision, *Portugal v. Council* [C-149/96]

## 4. *EU and ECT*

---

- EU is a member of ECT since 16 April 1998
- Declaration under Art. 26(3)(b)(ii) EU clearly agreed investor could arbitrate disputes re. breach of its rights under ECT by European Institutions
- EU is not a signatory to VCLT
- EU is not a signatory to ICSID
- Commission is taking aggressive approach in challenging jurisdiction of arbitral tribunals to resolve BIT/ECT claims particularly, intra- EU claims on grounds that it firmly opposes the outsourcing of disputes involving EU law to arbitral tribunals.
- In Electrabel the Commission challenged the ability of EU investor to bring a claim against MS under ECT

## 5. *EU and ECT - Approach of CJEU*

---

*C-264/09 Commission v. Slovakia*, 15 September 2011

### **Facts:**

- In 1997 ATEL, a Swiss company, entered into a contract with a Slovak State-owned network operator
- ATEL paid over half of the construction costs of the yet-to-be-constructed Lemesany-Krosno transmission line from Poland to Slovakia, in return for priority access to the line for a non-renewable period of 16 years
- Contract governed by Austrian law, ICC arbitration in Paris
- Slovakia joined the EU in 2004
- Since 1 January 2008 ATEL no longer has priority access to the network and obtains all its capacity at auction

### **Issue:**

What is the relationship between Slovakia's obligations (i) to ensure non-discriminatory access to the electricity transmission network pursuant to Directive 2003/54/EC and (ii) to protect investments pursuant to Swiss/Slovak BIT/ECT?



## 5. *EU and ECT - Approach of CJEU*

---

Commission's position:

- By failing to ensure non-discriminatory access to the electricity transmission network Slovakia failed to fulfil its obligations pursuant to SEP
- No investor can legitimately expect the regulatory framework to remain immutable. An informed investors knew, or ought to have known, that the legal repercussions of Slovakia's accession to the EU would be significant

Slovakia's position:

- Breach of ECT and Swiss/Slovak BIT and, in particular, the right to F&E treatment and right to no expropriation

Advocate General's observation:

- Failure to include a stabilisation clause may lead to conclusion that an investor has taken a calculated risk to accept risk of possible change in the law

## 5. *EU and ECT - Approach of CJEU*

---

### Held:

- Preferential access granted to ATEL is an “investment”
- “monetary claims and rights to any performance having an economic value” as per Article 1(2)(c)
- Purpose of Article 351(1) is to make clear, in accordance with the principles of international law (Article 30(4)(b) of VCLT), that EU law does not affect the duty of MS to respect the rights of non-member countries under a prior agreements.
- Assuming preferential access granted to ATEL is not compliant with Directive 2003/54, it is protected by the first paragraph of Article 351
- Article 351 “does not impose the obligation to achieve a specific result in the sense of requiring them, regardless of the legal consequences and political price, to eliminate the incompatibility”.

## 5. *EU and ECT - Approach of CJEU*

---

- Denunciation only required where it is clear that the third country does not wish to renegotiate the agreement
- Slovakia cannot modify the terms or effects of the contract at issue by its legislation, or deprive that contract of legal effects
- Even if Slovakia declared the privileged access to the transmission system invalid and inapplicable, SEPS would remain bound by the contract at issue
- Only way for Slovakia to comply with its obligation would be to enact legislation which targets SEPS, BUT THAT would be tantamount to an **INDIRECT EXPROPRIATION** of ATEL's right of transmission

## 6. *EU law and ECT: Recent Arbitral Awards*

---

*AES v. Hungary* (ICSID, 23 September 2010)

### **Facts:**

- AES, a UK company, bought a power station during privatisation process and concluded a PPA with state owned entity in 1996
- AES alleged ECT breach of F&E treatment, expropriation and NT and MFN Treatment by re-introduction of administrative pricing by Price Decrees in 2006 and 200 after administrative prices had been abolished as of 1 January 2004
- Commission started investigating PPA breach of EU state aid rules

## 6. ***EU law and ECT: Recent Arbitral Awards***

---

Article 26(6) of the ECT provides that “*a tribunal established under paragraph (4) shall decide the issue in dispute in accordance with [ECT] and applicable rules and principles of international law*”

Hungary’s arguments:

- EC state aid law must be taken into account due to legitimate expectations of investors
- Hungary can never comply with both sets of obligations as an ICSID award would require Hungary to breach EC state aid law

Commission’s argument:

- EU law provides equivalent procedural and substantive protection as ECT
- Presumption of compliance with ECT if EU MS complies with EU law

## 6. *EU law and ECT: Recent Arbitral Awards*

---

**Applicable law:** Is EU law a question of fact or applicable law?

- EU law part of internal law of MS therefore question of fact
- Neither party argued that it is also “regional” international law and thus applicable law

**Held:**

- No legitimate expectation at time investment made that prices would not be regulated
- NO stabilisation clause
- Perfectly valid and rational policy objective for a government to address “luxury” profits
- Reasonable rate of return based on WACC for electricity sector as a whole, action not unreasonable or discriminatory

## 6. *EU law and ECT: Recent Arbitral Awards*

---

*Electrabel v. Hungary* (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)

## 6. ***EU law and ECT: Recent Arbitral Awards***

---

Electrabel's claim:

- Against Hungary only
- Termination of PPA breach of FET + expropriation
- Change in PPA Pricing breach of FET and expropriation (separate claim under PPA)

### **Jurisdictional objections:**

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



## 6. *EU law and ECT: Recent Arbitral Awards*

---

### Applicable law:

- EU law as a question of fact
- EU law as part of applicable law
- 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 that 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 the international law as regional international law

## 6. *EU law and ECT: Recent Arbitral Awards*

---

### Relationship between EU law and ECT

- ECT and EU law do not share the same subject matter
- Tribunal did not accept that there is a general principle of international law compelling the harmonious interpretation of different treaties
- However, noted that there is a special relationship between EU and the ECT and that therefore “*ECT should be interpreted, if possible, in harmony with EU law*” [para. 4.130]
- “*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 investor have not acquired LE that ECT would shield them from EU law regarding anti-competitive behaviour
- [NB. ECT does not contain provisions of state aid- Art. 6]
- “*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.*”

# 7. *Possible New Grounds for Friction*

---

5.1 EU's Third Energy Package (TEP) adopted July 2009

- i. Effective unbundling of Transmission System Operator (TSO)
- ii. Exemptions for major new gas infrastructure
- iii. Certification procedure

5.2 EU Competition Law

## 7. *Energy Community Treaty and EU Law*

---

- EU, Former Yu Republics, Ukraine, Moldova
- TU, Armenia, GO are observers
- GO applied for membership in Jan. 2013
  
- **Key Provisions:**
  - ▶ SEP by original members of EC was implemented by 1/7/2007
  - ▶ SEP implemented by Moldova (MD): 3/12/2009, and UA by 1/1/2012
  - ▶ TEP to be adopted by all EC Countries by 1/1/2015
    - ❖ Effective unbundling by 1/6/2016
    - ❖ Certificates for TSO from Third Countries 1/1/2017
  - ▶ Exception: MD re. effective unbundling by 1/1/2020

## 8. *Instead of Conclusion*

---

- Relationship between EU law and ECT
  - Jurisdiction
  - Applicable Law
  - Legitimate Expectations
- Compare *National Grid Plc v. Argentina* (BIT, 2008) to *Electrabel* and *AES* cases
- Avoid escalation of disputes
- EU and ECT: Friends or Foes?