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Intra-EU BIT Investment Protection and the EC Treaty

by C. Söderlund

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Memo 23 April 2007

Intra-EU BIT Investment Protection and the EC Treaty

By Mr Christer Söderlund, Partner, Vinge law firm, Sweden

Introduction

Having regard to the main role of BITs being facilitators of investment in emerging economies, it is nothing but to be expected that BITs are normally entered into between technologically advanced economies, on the one hand, and not-so-developed economies eager for infusions of technology-boosting investment on the other. So, normally, BITs have been concluded into between industrialized countries and among them, often by the “old” EU Member States, and third-world countries.

Consequently, it is only in a few exceptional cases that BITs have been concluded *between* “old” EU Member States. The figure of those BITs is quite negligible. A swift glance seems to indicate that presently there are only two BITs concluded between EU Member States, and that it between Germany on one side, and Greece and Portugal on the other side. However, these BITs were both entered into before Greece and Portugal acceded to the EU (1980 and 1986, respectively), and they have not at any time, as far as the record shows, been invoked by any investor to bring an investment claim.

The recent accession of five new Member States has significantly changed the situation. If we take Sweden as an example, one may note that it has concluded BITs with all of them, i.e. Poland, Estonia, Latvia, Lithuania and the Czech Republic. The number of intra-EU BITs will further increase when the next contingent of EU candidates join the fray, i.e. Romania and Bulgaria (both of which Sweden, to use this country as an example again, has signed BITs with).

What are the implications of EU accession for intra-EU BITs?

It has happened in a number of cases recently that at least one new member state, faced with an investment claim based on something which has now become an intra-EU BIT, has forcefully argued that the states accession to the EU implies that the relevant BIT can no longer be invoked by an investor in an intra-EU perspective.

Have intra-EU BITs become moot?

So, the question is if the application of BITs, which are now existing between what is now Member States of the European Union is affected.

The opinion expressed in this paper is that the intra-EU effects of BITs have not in any way been affected or amended by a state's membership in the EU.¹

EU measures with respect to intra-EU BITs to date

The matter of intra-EU BITs has attracted scant attention within the EU up to the present time. A consultative body, the Economic and Financial Committee, subordinated to the EU Council, has opined in its 2006 Report that EU should approach its Member States during the course of 2007, inviting them to "review the need for such BITs agreements (*sic*)". However, this project has not proceeded to date (April 2007).

Is jurisdiction or arbitrability an issue?

A fundamental question of primary importance is whether any view concerning the standing, scope and effects of EU law can, under any circumstances, bring into issue the *jurisdiction* of an arbitral tribunal constituted on the basis of an intra-EU BIT. May any conflict with the EC Treaty – if it existed – vitiate the standing *offer* of a state, accepted by an investor, to submit an investment dispute to international arbitration? It would not seem that this dispute resolution mechanism may be compromised by any purportedly higher legal order such as the EC Treaty. This applies even if one or more of the BIT's substantive provisions would present a conflict with non-derogatory principles laid down in the EC Treaty.

Neither may the EU element, in the opinion of this writer, make the dispute brought to arbitration inarbitrable – even if it would engage any key issue of EU law. The state party would certainly be at liberty – as far as the merits are concerned – to submit any argument or premise in support of a substantive defense, based on EU law, for the Tribunal's review. But that is something quite different from disqualifying the arbitration agreement, constituted by the State's offer and the Investor's acceptance, as such.

The temporal aspect

In this context also the temporal aspect of existing BITs must be taken into account. In a BIT (whether intra-EU or not) the contracting states have extended a standing offer to a certain category of persons ("Investors", as defined in the BIT) to submit disputes to international arbitration in respect of a certain range of issues ("Investments" as defined in the BIT). Reasonably,

¹ It should be disclosed that the writer represents an investor in a case where this issue has been pleaded.

this offer must remain in force for the duration of the BIT according to the terms thereof. Potential disputing investors are third parties, who must be deemed to have been notified of their entitlement to international arbitration by the publication of the Treaty. They have a right to rely on that promise until it has been duly terminated according to the terms of the BIT itself. A state cannot unilaterally withdraw its offer to submit to arbitration, once the investor has made or maintained its investment in (constructive) reliance on the availability of this promise.

On what premises – if any – could an argument on the inapplicability of an Intra-EU BIT be based?

Harmonisation vis-à-vis third states as a term of the relevant Accession Treaty

Arguments which have been forwarded in support of the proposition, that intra-EU BITs would become moot upon a country's accession to the EU, can be sorted into three main postulates.

- Intra-EU investment matters are governed by EC law
- The BIT is superseded by EC law
- Intra-EU investor state arbitration is inconsistent with the EC legal order

In the opinion of this writer, no one of these three propositions will pose a threat to the survival of the intra-EU BIT. Intra-EU investment matters are not governed by EC law (but by the internal legislation of the Member States), the BIT is not superseded by EC law (as the BITs, despite the supremacy of EC law, do not come into conflict with EC law or are even addressed by EC law) and intra-EU investor/state arbitration can hardly be said to be inconsistent with the EC legal order (investor-state arbitration is not addressed by EC law, and the EC legal order has not offered a substitute to investor-state arbitration).

The reaches of the EU's common commercial policy

For the purpose of illumination, the following account of the status of foreign investment policy as it currently stands in the EU and its Member States may be provided.

The scope of the common commercial policy of the EU, as it stands today (Art. 131-134 EC), is limited to external trade. It does not extend to investment. In its Opinions 1/94 and 2/92, the European Court of Justice (ECJ) has adopted a narrow interpretation of what the EU's common commercial policy is about. In its opinion on the WTO's General Agreement on Trade in Services (GATS), which covers, among other, the supply of services by way of a "commercial presence", it stated that only economic

cross-border relations consisting of trade in goods and closely related activities fall within the scope of that policy, while the EC Treaty's specific chapters apply to the free movement of natural and legal persons. As foreign investment is characterized by a lasting establishment in the host state rather than cross-border economic trade, it follows from the reasoning of Opinion 1/94 that FDI does not fall within the remit of the current common commercial policy of the EU. This is confirmed by Opinion 2/92, where the ECJ ruled that Art. 133 EC does not provide a sufficient legal basis for the EU to conclude the OECD National Treatment Instrument, a voluntary code granting national treatment to foreign investors from other OECD countries. Although the Treaties of Amsterdam and Nice have extended the competences of EU, affecting in particular investment in the services sector, these changes do not extend to policies directed at FDI in general.

The EU has a limited role in shaping foreign investment policy. As a consequence, it falls within the ambit of the Member States to deal with matters of foreign investment. The most common instruments used by Member States for the promotion and protection of foreign investments are – exactly – BITs.

Unrestricted movement of capital

It cannot be disputed that the free movement of capital is one of the basic pillars of the EU. However, the principle of freedom of movement of capital is not at odds with, but, on the contrary, consonant with Member States' international obligations in that it has not assured the investor of minimum standards of protection under international law, specifically in affording the investor, *inter alia*, fair and equitable treatment.

The investor protection afforded under the investment protection treaties enhance capital movements and promotes the policy objective enunciated by Articles 43 and 56 of the EC Treaty. The EU does not offer any alternative means of obtaining redress for international wrongs committed by a Member State as an alternative to international arbitration under the BIT dispute resolution mechanism.

What may happen to intra-EU BITs in a long-term perspective?

It might be interesting to speculate on which may happen to intra-EU BITs in a more distant future.

It cannot be excluded that the role of intra-EU BITs in a more extended time perspective will be subject to re-assessment. If this will happen, it will depend,

inter alia, on the various positions taken by the Member States and the frequency with which investment disputes will occur in the nearest future.²

It can, however, easily be foreseen that a whole-sale abrogation of the present system of a densely-knit network of bilateral BITs in place within the EU and yonder, will present many complex issues, which will not lend themselves to easy resolution. As examples may be mentioned the resultant inequality between intra-EU and non-EU investors (to the benefit of the latter category), the implication of most-favoured-nation clauses in different BIT constellations, the impact on the rights of Member States to shape their own investment policies, the maintenance or abrogation of the investor-state dispute resolution mechanism (which has proved itself an efficient instrument in enhancing standards of corporate transparency and governance in public affairs), the disentanglement of EU itself from investment treaties, to which it is itself a signatory (the Energy Charter Treaty) and the implications for various economic integration investment agreements (so-called EIIA:s), which it has entered into with other Regional Economic Investment Organisations (REIOs). Further, complexities will arise from the existing investor-state dispute mechanism: Can it be removed, prior to its earliest termination date under the relevant BIT in view of the reliance placed on this mechanism by third parties/investors? And, should it be removed? Should it be replaced by another investor-State dispute resolution mechanism of a bi- or multilateral nature? How can situations where controlling shareholders – in addition to the investment vehicle itself – qualify as “Investors” under the relevant BIT, and these “Investors” are located inside/outside the EU, respectively, be resolved? How will the matter of export insurance and export guarantees – which regularly require the existence of a BIT between the investor state and the host state be dealt with?

In the writer’s view, considering these and other complex issues, there will be no significant change in the present form of BIT-based investment protection within any foreseeable future (if ever).

² Presently, there is an unknown, but in any event not negligible, number of investment arbitrations either recently concluded or presently pending, involving EU states such as the Czech Republic, Slovakia, Poland, Latvia, Lithuania and Estonia.