

Bilateral investment treaties and the EU

Prior to the accession of twelve Central and Eastern European countries into the European Union, bilateral investment treaties (“BITs”) were one of the factors attributed to the CEE region’s popularity as an investment destination. According to statistics from the United Nations Committee on Trade and Development (“UNCTAD”), foreign direct investment in Hungary increased from US\$13.282 billion in 1996 to US\$81.76 billion in 2006 and from US\$2.046 billion to US\$30.327 billion over the same period in Slovakia¹. So why, with effect from 1 May 2009, did the Czech Republic and Italy mutually consent to terminate the BIT that existed between them?

What are BITs?

A BIT is an agreement between two countries that aims to promote and protect foreign investments by guaranteeing investors a certain standard of treatment and providing a flexible dispute resolution mechanism. BITs are common in substance, rather than form, and most provide for:

- fair and equitable treatment;
- protection from expropriation without compensation;
- protection from treatment less favourable than that offered to nationals; and
- provision of full protection and security to investments.

Why are BITs important?

BITs help to alleviate investors’ concerns about the risks associated with investment. For example, protection under a BIT is extra-contractual and most provide for disputes to be resolved in a neutral forum by means of international arbitration. Additionally, awards granted in such arbitrations are normally enforceable under the New York Convention, a factor that can help to discourage such actions at the outset and/or serve as a powerful negotiating tool.

BITs and the EU

Although BITs did exist between the older Member States, the accession of the “EU-12” has made intra-EU BITs significantly more common and, in the opinion of the European Commission, this has given rise to two specific complications:

1. Superseding of intra-EU BITs by Community law

In a note to the Economic and Financial Committee in 2006, the Commission expressed concern that “there appears to be no need for agreements of this kind in the single market” because “it would appear

¹ UNCTAD, World Investment Report 2007 : Transnational Corporations, Extractive Industries and Development

that most of their content is superseded by Community law”², a defence that was unsuccessfully invoked in *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC No. 088/2004. In that case, the tribunal rejected the argument that all of the Czech Republic’s BITs with other EU Member States had been implicitly terminated on accession to the EU and made a partial award in favour of Eastern Sugar³.

2. Potential for discrimination between investors

The European Commission has also cautioned that, “investors could try to practice forum shopping by submitting claims to BIT arbitration instead of – or additionally to – national courts. This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome”⁴.

Nevertheless, the majority of Member States are of the opinion that existing treaties should be maintained. The one exception to this is the Czech Republic, which reportedly plans to terminate all of its intra-EU BITs.

In light of the current economic situation, and the fact that BITs aid the flow of investment capital between countries, this seems to be a surprising course of action to pursue. Although there is some uncertainty surrounding the interaction of BITs and EU law, a degree of comfort is important for investors because of the high stakes involved. Therefore, given the fact that UNCTAD’s World Investment Prospects Survey 2008-2010 recently ranked CEE as the fourth most preferred destination for foreign direct investment⁵, now might be an opportune moment for the Czech Republic to reassess its plans.

² “EU members review intra-European BITs in light of potential overlap with EU law”, *Investment Treaty News*, 30 June 2007

³ *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC No. 088/2004, page 32

⁴ “EU Member States reject the call to terminate intra-EU bilateral investment treaties”, *Investment Treaty News*, 10 February 2009

⁵ UNCTAD, *World Investment Prospects Survey 2008 – 2010*, page 31