



**CAN A PARTY FROM AN E.U. MEMBER STATE INVOKE A B.I.T.
AGAINST ANOTHER E.U. MEMBER STATE?**

(Eastern Sugar B.V. v. Czech Republic - SCC case no.088/2004)

RESEARCH PAPER

presented by

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TABLE OF CONTENTS

| | |
|--|----|
| 1. <u>PRELIMINARY REMARKS</u> | 3 |
| 2. <u>THE INTERTWINE BETWEEN THE EU AND BIT REGIMES</u> | 3 |
| 3. <u>FINDINGS OF THE TRIBUNAL</u> | 5 |
| (a) <u>Automatic termination</u> | 5 |
| (b) <u>Incompatible dispute settlement mechanism</u> | 6 |
| (c) <u>Referral to the ECJ</u> | 7 |
| (d) <u>Post-accession claims</u> | 8 |
| 4. <u>COMMENT ON THE DECISION</u> | 8 |
| (a) <u>Automatic termination</u> | 8 |
| (b) <u>Incompatible dispute settlement mechanism</u> | 10 |
| (c) <u>Referral to the ECJ</u> | 12 |
| (d) <u>Post-accession claims</u> | 13 |
| 5. <u>CONCLUSION</u> | 13 |
| | |
| <u>ANNEX TO THE PAPER - RELEVANT LAW AND CASE LAW</u> | 15 |
| ▪ <u>LAW</u> | 15 |
| ▪ <u>SOFT LAW</u> | 19 |
| ▪ <u>CASE LAW</u> | 20 |

1. PRELIMINARY REMARKS

1. Before the accession, in 2004, of the ten new eastern Members, the European Union (EU; for the purpose of the present research meaning both the Union and the Economic Community), never experienced the problem of internal Bilateral Investment Treaties (BIT) potentially conflicting with the European Community law (EC-law).

2. This because the project of economical and political integration that started from ‘The Six’¹ in 1951 substantially involved, by 1986, the entire western portion of the European continent. Here, the Communitarian concepts of ‘single market’ and ‘equality of treatment’ among *all* the Member States prevented the institution of privileged commercial partnerships between some of them².

3. The situation changed when the eastern European bloc of countries was made able to re-orient its economy toward the market system, since 1989. While all such countries applied for membership in the European Union, under the pressure of the foreign flow of investments they also signed BITs with states from all over the world – including those already Members of the European Union.

4. Hence, the ‘transition phase’ between 1989 and 2004 determined the creation of around 150 intra-EU BITs, between the ‘Old’ and the ‘New’ Europe.

5. One of these is the 1991 BIT between the Kingdom of the Netherlands (the Netherlands) and the Czech Republic – which is the basis for the claims of Eastern Sugar B.V. (Eastern Sugar) against the Czech Republic, in a dispute over inadequate treatment of the investor in connection with the new domestic sugar regulatory regime.

2. THE INTERTWINE BETWEEN THE EU AND BIT REGIMES

6. The critical dates of the case are the following:

- a. On December the 12th, 2003, Eastern Sugar initiated the ‘amicable settlement’ process *ex* Article 8.1 of the BIT;

¹ Germany, France, Italy, and the Benelux (i.e., the Netherlands, Belgium and Luxembourg).

² Only exceptions were the BITs concluded by Germany with Spain, Portugal and Greece, due to the later accession of these states to the Union.

- b. On May the 1st, 2004, pursuant to the Accession Treaty of April the 16th, 2004, the Czech Republic *acceded to the European Union*;
- c. On June the 22nd, 2004, Eastern Sugar filed its notice of Arbitration.

7. All the critical elements of the dispute in object pivot around the contrast eventually created by two different legal orders, that is to say, that one of the European Union and the BIT special regime between two of its Member States.

7bis. Within the European Union it is an established principle, in fact, that European regulations either *automatically supersede* (i.e., ‘self-executive’ regime) or, in any case, *tend to supersede* (e.g., compulsorily requiring the prompt introduction of new domestic norms) national legislations. Consequently, any domestic norm (either prior or subsequent) contrary to EC regulations becomes *non-applicable* (yet, not abrogated; i.e., *non-applicability* regime)³.

8. In the same way, in relation to international obligations between Member States, provisions of the EC Treaty (and of any Treaty of Accession for each new Member; see below section 3) establish that any obligation between Member States whose subject-matter falls under Community competence, if inconsistent with the Treaties and legislation of the Union, is to be considered automatically non-applicable. Such automatic ‘supersession’⁴ is based on one of the cornerstones of the EC legal system: the so-called principle of non-discrimination.

9. *In continuum* with these principles, in the present case the Czech Republic maintained the argument that, with the accession to the European Union, the European regulatory regime automatically superseded the previous -privileged and concurrent, thus incompatible- agreement with the Netherlands, which was no more to be considered into effect.

10. Framed in jurisdictional terms and in relation to the Arbitral Tribunal – appointed following the procedure *ex* Article 9 of the BIT – the Czech Republic argued:

- (a) That, with the accession to the European Union, the entire BIT regime had been *automatically superseded* by the EU regime. Consequently, the Arbitral Tribunal was not even supposed to be constituted; or

³ Non-applicability is more in line with an international regime (such as that one of the EU is, not being a state nor an official federation of states): States do not formally lose their regulatory sovereignty in relation to the international obligations assumed, they simply accept not to legislate in contrast with it and to suspend the application of those norms already existing but incoherent with the accepted super-national regime. Such contrasting norms, in fact, could come again in force whether the State decides to withdraw from that international regime, therefore avoiding eventual gaps in the internal juridical order.

⁴ For the purpose of the present paper, the concept of supersession is used as synonym of non-applicability (being the former the concrete outcome of the latter), unless otherwise specified.

- (b) That, even if the BIT were to be found still in force, it would operate in a regime of partial validity only. In fact, the BIT's dispute settlement clause was superseded by the dispute settlement regime of the Union, not only because of the Czech's accession to it but also because *incompatible* with its fundamental principles. The proper *fora* for disputes of any kind, within the EU, were the domestic courts, with the eventual *referral* to the European Court of Justice (ECJ) – mechanism instead traditionally unavailable to arbitral panels. Hence, the Arbitral Tribunal was invited to find not to have jurisdiction to hear the dispute; in the alternative
- (c) That, were the previous jurisdictional arguments of (a) and (b) rejected, then the ECJ could have been argued as open to a referral from the Arbitral Tribunal, in order to have a preliminary ruling on (a) and/or (b). The matter should then have been referred and the arbitral proceeding stayed;
- (d) That, in any case, any claim arisen *after* the 1st of May 2004 was not in the jurisdiction of the Arbitral Tribunal, because of the material Czech's accession to the Union and the subsequent prevalence of the new dispute settlement regime and legislation. Therefore, the Arbitral Tribunal lacked jurisdiction over such claims *ratione temporis*.

3. FINDINGS OF THE TRIBUNAL

(a) Automatic termination

11. Admittedly, the same words of the Commission – the instance eventually entitled to provide for a clear reading in favor of automatic termination – confirmed what already appeared very conceivable: the provisions of the BIT, the EC Treaty and the Vienna Convention all plainly provide that the BIT *per se* is still in force, pending some action for its formal termination by the States involved.

12. The absence of an absolute incompatibility between the BIT regime and the EC obligations was moreover demonstrated, in the Tribunal's view, by the material inaction of both Member States and Communitarian institutions towards the problem, before or right after the accession. In fact, nor the Commission had ever started an infringement proceeding against any of the States members of intra-EU BITs, nor a complaint was ever filed by any Member States to the

Commission concerning failure to properly terminate such agreements. In this respect, the underlying reasoning of the Tribunal seems to be that, in the sea of regulatory paperwork the acceding states have to comply with, if the matter of ‘duplicity of jurisdiction’ possibly created by 150 intra-EU BITs is not preemptively considered, then there must not be a problem of absolute incompatibility.

13. The problem was, then, to ascertain to what extent the BIT’s discipline was compatible with the EC regulatory framework and which part of it had instead been automatically superseded by the primacy of the EC-law.

(b) Incompatible dispute settlement mechanism

14. The core of the problem shifted, therefore, to establish whether the EC-law primacy had superseded the BIT’s arbitral clause, as a dispute settlement mechanism incompatible with the EC regime. The latter, in fact, is based on the principle of *mutual trust* in the domestic court system of each Member State, and the eventual referral to the ECJ for preliminary rulings on the interpretation of the EU Treaties in connection with the application of domestic laws.

15. To rule on that, the Tribunal firstly needed to exercise its kompetenz-kompetenz in order to establish its legitimacy to hear and decide on such issue. Therefore, through a reading to some extent strained of the words of the Commission⁵, the Panel found that ‘...the answer to the questions raised must be given by judicial authorities, which clearly excludes the European Commission, and, admittedly less clearly, includes an arbitral tribunal such as the Arbitral Tribunal in the present arbitration’⁶. The Tribunal, therefore, considered itself a proper ‘judicial authority’⁷.

16. Subsequently, on the validity of the arbitral clause, the Panel framed the issue firstly within the wider context of the general validity of the entire BIT. In fact, once resolved the argument of termination (see (a) above) the Panel ‘circumvented’ the problem of the supremacy of the EC Treaty by *rejecting the assumption that the BIT and the EC Treaty may be understood as competing legal frameworks addressing the same subject-matter* – where the latter alone would find applicability.

17. Through a rather convoluted phrasing, the Panel held that the European Union system ‘...guarantees the free movement of capital...’ and ‘the right to invest’ in the Czech Republic to

⁵ EC letter, above.

⁶ §124, emphasis added.

⁷ As a consequence, for any reading that could be given of the Commission’s words, these were to be considered *opinions not binding for the Arbitral tribunal*, at best having persuasive force (§§ 123 and 125).

non-Czech investors from other EU Member States on a par with any Czech investor⁸. Also, ‘...the investor may take out profits and even the investment as such out of the host country’⁹. The BIT, instead, is found to provide for ‘...fair and equitable treatment of the investor *during* the investor’s investment ... prohibits expropriation and guarantees full protection and security and the like’¹⁰. It is in this view that arbitration can be framed as that ‘special procedural protection’ that is ‘the most essential provision’ of the BIT itself, providing for ‘international arbitral tribunals independent from the host state’¹¹. In the Panel’s view, the possibility to sue a host-state directly is something that, instead, the EC-law does not provide for.

18. However, it is in paragraph 170 of the partial award that the Arbitral Tribunal, moving to a (very) brief reflection on the consequences of holding for non-incompatibility, expresses the core of its reasoning:

‘If the EC Treaty gives more rights than does the BIT, then all EU parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give to other EU countries and investors, it will be for those other countries and investors to claim their *equal rights*. But the fact that those rights are unequal does not make them incompatible’.

19. With these words, the Panel ruled for the *complete compatibility and autonomy* of the Czech-Dutch BIT and the EU legal framework. Consequently, the arbitral clause was deemed valid and the Panel itself found to have full jurisdiction to hear and decide the dispute.

(c) Referral to the ECJ

20. On the Czech’s request for a stay of the arbitral proceeding and the referral to the ECJ for a preliminary determination on (a) and (b) above, the Panel answered again in the negative.

21. The Tribunal recalled that, in principle, ‘...the possibility of a referral to the European Court of Justice ... is a route not open to an arbitral tribunal even if it has its seat in the European Union...’.

22. To this foreseeable reasoning - based on previous case-law - the Czech Republic tried to oppose the argument that, with its last decision on the matter¹², the ECJ partially modified its earlier

⁸ §161.

⁹ §163; this is considered to be the eventually sole material argument in favor of the BIT regime. It is, however, irrelevant in the case at stake.

¹⁰ §164; on the appropriateness and punctuality of the expression ‘and the like’, in a context as such, see Section 5.

¹¹ §165 and 180.

¹² *Denuit v. Transorient* (see above).

position on arbitration instances. In fact, through the *a contrario* reading of that ruling, it could be now argued that if the parties were *under the obligation* to refer their dispute to arbitration (such as per the BIT in object) the arbitral tribunal *may* file a request for a preliminary ruling, as any court of a Member State.

23. The Tribunal, however, did not buy such logic. Firstly, it denied that the parties were ‘under an obligation’ to resort to arbitration. Secondly, given that the proposed reading would have posed, in any case, a possibility and not an obligation on the Tribunal, this saw ‘...no reason to make a referral in a case where the answer is not difficult’¹³. It consequently denied staying the arbitration, also considering that ‘nobody else has referred the matter to the ECJ’¹⁴.

(d) Post-accession claims

24. Having rejected already the arguments of automatic termination of the BIT after the accession to the EU and the exclusive jurisdiction of the ECJ to hear the dispute, the Tribunal found the post-accession damages claimed by Eastern Sugar to be arbitrable and within its jurisdiction.

4. COMMENT ON THE DECISION

25. The present case is one of those -eventually- few instances where the chance for a good decision able to set a strong precedent has gone undoubtedly lost.

26. It is uneasy to find something, in fact, to which it is possible to share the conclusion of the Tribunal in this partial award. Following the order of the claims:

(a) Automatic termination

27. Firstly, it is only to be partially shared the general finding that the BIT has not ceased to exist because of the Czech’s accession into the EU. It is indeed true, in fact, that the formal procedure for termination of the investment treaty was not followed, nor the provisions of the EC Treaty required termination before or with the accession.

27bis. However, an argument in favor of an at least ‘implicit suspension’ is found possible, and not particularly improbable. The second paragraph of Article 59 of the Vienna Convention

¹³ §137.

¹⁴ §139.

(rubricated as ‘termination or suspension of the operation of a treaty implied by conclusion of a later treaty), states:

‘the earlier treaty shall be considered suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties’ (emphasis added).

27ter. It is here believed that the Panel, in its taking, underweighted the character of the intention of the parties. It ignored the intention of the Netherlands, founding member of the European Union, which did not veto the accession of the Czech Republic, nor it abstained from voting, but explicitly consented to it. A consent to enter the Communitarian regime, where no BIT existed because clearly incompatible with the logic of the single market and its basic rules. On its part, from 1989 to 2004, the Czech Republic followed the agenda of reforms dictated by the Union, with the specific objective to become part of it. Again, part of that same regime where no BIT existed. This is believed to be a rather strong argument showing *per se* a clear intention of the parties as implying a suspension of the BIT – besides and before any consideration on whether the two treaties relate to the same subject-matter, they are only competing regime or they are independent and autonomous one from the other.

28. In any case, the ‘accessory’ reasoning of the Panel on termination (above, §12), shows some consistent imprecision towards the Communitarian system. In fact, the Panel seems not to take into account that the European Commission can base its action on concrete violations only¹⁵. Even rejecting (or not considering) the argument for implied suspension above, it is hard to imagine that the Commission would start any infringement procedure against two Member States bound by a BIT only because they have not yet terminated it. It would be like opening an infringement procedure for excess of deficit on a Member State based solely on mid-year projections, without waiting for the end of the year (i.e.; for the breach to materialize). Besides, as mentioned before, the problem was new to Communitarian institutions.

29. *A fortiori*, it is inconsistent the argument that, since nor the Czech Republic nor the Netherlands filed a complaint to the Commission for failure to comply with the EC-law (by not terminating the BIT), this somehow proved the valid survival of the BIT itself. Besides the convolution of such reasoning (believed a machination, if compared to the ‘implied intention’ argument above), if the aim was to show that the two States were still exploiting alleged advantages procured by the BIT only (arguably existing), then the Panel did not consider that it would have

¹⁵ In any other case it can issue, at most, recommendations or opinions (as it did).

been rather incoherent (and unnecessary) for any of them to challenge the existence of an agreement that kept providing for advantages for both sides.

(b) Incompatible dispute settlement mechanism

30. It is under the analysis of the validity of the BIT's arbitral clause that the Panel, though, did not convince at all. While it is true that it found itself in the uncomfortable position to extend the exercise of the kompetenz-komptenz principle not only to verify the mere validity of the arbitral clause but of the whole BIT against the EC Treaty (a situation, indeed, exceptional), it is also true that such analysis resulted, at best, tortuous and ultimately defective.

31. In fact, the Panel promptly found itself to be a 'proper judicial authority', right after having affirmed that such finding could not be other than 'admittedly unclear'. No more words are spent to justify such (rather fundamental) finding¹⁶.

32. The Panel then added that the words of the Commission's note and letter were '...for the most part diplomatic or ambiguous...' ¹⁷. Moreover, having already found itself to be a 'proper judicial authority', the Panel quickly disqualified such words as, at best, opinions not binding on it (as indeed prescribed by the same EC-law¹⁸).

33. However, it seems that the following words of the Commission are anything but ambiguous:

'...the dispute should be decided on the basis of Community law (which indirectly also follows from Article 8(6) first bullet point in the agreement between the Czech Republic and the Netherlands). However, it may be argued that the private investor could continue to rely on the settlement procedure provided for in the agreement until formal termination of the BIT if the dispute concerns fact occurred before accession. The primacy of Community law should in such instance be considered by the arbitration instance'. [emphasis added]

34. It is believed that the above words synthetically exhaust most of the Panel's problems: the Commission openly 'surrendered' to the use of arbitration, while it implicitly suggested that in order to have an award enforceable in the Union, this should well take into account the principle of primacy of the EC-law, both for procedural as well as substantial matters.

¹⁶ §§120 (last two lines) and 124.

¹⁷ §120.

¹⁸ This finding, in connection with the following refusal to apply the EC-law to the case, leads the entire reasoning, to put in gently, to a hardly acceptable opportunistic perspective, for which the Panel uses EC-law only when it is comfortable to its thesis. The non-binding character of the European Commission's words is obviously intended for those judicial authorities that actually take into account EC-law, or at least that can refer eventual dilemmas to the supreme judicial body of the Union (i.e., the European Court of Justice), which is something the Panel will say it believes not possible nor something it would do anyway.

35. Unfortunately, the Panel refused *in toto* such approach. In fact, it pursued a reasoning which was not limited to secure the validity of the BIT's arbitral clause only, while attempting to coordinate the prevalence of the EC legislation over those incompatible BIT's provisions. The Panel aimed, instead, at saving the BIT regime in its entirety, through a contort phrasing which indeed failed to draw a proper distinction of scope and rationale between the EU single market regime and the BIT (distinction which is actually believed not possible, if not for *de minimis*, irrelevant for the case; see §17 above).

35bis. The European Community, in fact, has been established with the specific scope to protect and promote what are now commonly defined 'the four fundamental freedoms': the freedom of movement of persons, goods, capital and services. It is intuitive how two, if not three, of them, directly comprise any possible meaning the term 'investment' may be attributed¹⁹. In any case, it is clear that no privileged partnership among some Members may be maintained in respect of the four fundamental freedoms the EU intends to promote and protect, without provoking a critical violation of the principle of non-discrimination.

35ter. Regrettably, the Panel did not consider – at least explicitly – anything of the above. It did not limit its action to a – still arguable but eventually understandable – rejection of the assumption that the BIT and the EC Treaty were competing legal frameworks *addressing the same subject-matter*. With not much delicacy, the Panel completely rejected the idea that the two orders were competing at all, and if they were, that was eventually a problem of the other Member States, or the Commission – certainly not of the Panel itself.

36. In fact, the Panel shown its perspective regarding the problem with the following words:

‘If the EC Treaty gives more rights than does the BIT, then all EU parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give to other EU countries and investors, it will be for those other countries and investors to claim their equal rights. But the fact that those rights are unequal does not make them incompatible’. [emphasis added]

37. The above paragraph is believed to represent a failed syllogism. The underscored text is a finding which is in blatant contrast not only with the first premise, but also with the EC legal theory and its fundamental constitutional principles – which are those ones that hold together the EU single market. In fact, not only the Panel completely ignores the principle of non-discrimination and the prohibition of privileged commercial partnerships among selected Member States, but it

¹⁹ The essential character of investments for the Union is also shown, for instance, in article 74 of the Czech Accession Treaty (above, section 3).

also put in charge of the effectiveness of the non-discriminatory system the same Member States and Communitarian institutions, while incomprehensibly excusing the ‘proper judicial authority’ (as it found itself to be just some time before) from any finding as such. It is right because ‘those rights are unequal’ that they are incompatible with the EU system, and therefore shall be deemed inapplicable. Any other finding in this respect would render the enforceability of the award at least questionable in the territory of the Union.

38. Still, the complete lack of analysis on the ‘direct applicability’ of the EC legislation in connection with the case – or, either, the complete lack of mention of the locution ‘non-applicable’ in the entire award –, are believed to show, again, the perspective of the Panel toward the problem.

39. Thus, instead to hold for a compromising ‘compatibility with some adjustments’, the Panel preferred the path of the substantial *complete autonomy* between the two regimes. If this were to cause problems for the European Union, those will be eventually fixed at a later stage by some other body.

40. A finding as such, perhaps, indirectly provided for a wider (yet unnecessary) basis for the Panel’s jurisdiction. However, to hold that the EU single market is something *different and indifferent* to the BIT of two of its Member States – and to refuse any compromise between the two regimes – seems to be, to put it gently, a radical misstatement.

(c) Referral to the ECJ

41. Even with regard to this aspect, the Panel adopted a rather narrow perspective, incoherent indeed with its same prior findings. In fact, a number of considerations may lead to think the try of a referral to the ECJ appropriate, in this case.

42. First of all, recalling the previous considerations, the dubious way in which the Panel established jurisdiction (admittedly not clear) and the self-qualification of ‘judicial authority’ (without any explanation) may have well moved the Panel to give some more credit to the Czech’s reasoning.

43. This, in fact, started from the last ruling²⁰ of the ECJ in relation to a deferral made by an arbitral tribunal (indeed, rejected):

‘Under the Court’s case-law, an arbitration tribunal is not a ‘court or tribunal of a Member State’ within the meaning of Article 234 EC *where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration* and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration

²⁰ Denuit v. Transorient (see above).

nor required to intervene of their own accord in the proceedings before the arbitrator’

44. Moving from the phrasing ‘the parties are under no obligation ... to refer their dispute to arbitration’, the Czech Republic noted how, on the basis of the BIT’s provisions, arbitration was the only mean established for the settlement of disputes. Therefore, it argued that there was an obligation undertaken by the parties to resort to arbitration for the resolution of BIT-related disputes. Consequently, the Panel could consider itself having the possibility to refer the dispute to the ECJ for a preliminary ruling.

45. Not only. The Arbitral Tribunal in object was not contract-based, but Treaty-based. Hierarchically speaking, a referral for a preliminary ruling in this case could have been intended as a peer-to-peer request for clarification (eventually to be manifested even through the rejection of that same request by the ECJ). The parties involved were, directly or indirectly, two Member States, the subject matter was the core of the European Union’s functions and regulations. Therefore, the BIT-Tribunal found itself in the position to clarify, in cooperation with the Court of the allegedly competing Treaty, the relationship between the two Treaties and, by extension, to provide certainty for the other 150 BITs still not terminated between the ‘Old’ and the ‘New’ Member States.

46. It is believed that, given the subject of the dispute, the ECJ would have probably accepted the Czech reasoning (which actually represents that kind of thinking – prone to specific exceptions to general rules when needed – very typical of European courts). Even if it had not, always taking into account the relevance of the subject-matter, it would have very probably dropped sufficient hints for the Tribunal in order to strengthen the following arbitral decision to set a strong precedent for any subsequent similar situation.

47. Unfortunately, though, we only have a partial award.

(d) Post-accession claims

48. With regard to the claims arisen after the accession of the Czech Republic to the European Union, once established that the BIT is still in force and the arbitral mechanism is valid, it is probably to be agreed that such claims fall in the competence of the Panel, especially if they arise in connection with a pre-accession situation.

5. CONCLUSION

49. The ‘transitional arbitral regime’, generated by the non-termination of the BITs with or before the accession to the European Union by the European contracting parties, has come to determine an hybrid situation which this partial award does not seem to help clarifying.

50. The Arbitral Panel either could have supported the idea of implied suspension (§§ 27bis-27ter above) or that one of an eventual referral to the ECJ (§§ 41-47 above), given the specific circumstances of the case. Unfortunately, it found not sufficiently demonstrated the underlying intention of the parties to implicitly suspend the BIT, and rejected the idea of referral as useless.

51. In the whole of its reasoning, the Panel did not show much institutional sensitivity. It did not give the minimum weight to the evident political will of both the Netherlands and the Czech Republic to be part of the European Union – and therefore of its normative system –, while it required a different and higher threshold of evidence to determine the parties’ will in order to limit the application of the BIT only to those provisions compatible with the EU regime²¹.

52. The Panel neither considered consulting the ECJ on a peer-to-peer basis, as the reciprocal ‘guardians’ of their respective Treaties. The absolute rejection of referral, considered useless by the Panel (which saw ‘...no reason to make a referral in a case where the answer is not difficult’), resulted in the support for a dual system of independent and autonomous EC-Treaty and BIT regimes, which is hardly logically comprehensible within the frame of the European Economic Community.

53. In the end, it is believed the present arbitral vicissitude a lost occasion to produce an at least less uncertain framework to regulate the prospective long co-existence of the two different regimes, consisting, on one side, of the EC Treaty and legislation, and on the other, of the over 150 intra-EU-BITs still in force – and their ‘survival clauses’. In fact, even if terminated today, most of those BITs – if not all of them – provide for the continued protection of the investments initiated under the BIT for an extra 10-years period at least.

54. To conclude, a tip of sarcasm: if you had to leave the coherent development of the EC-law framework within the Union, would you ever entrust a Panel chaired by a Swiss national and sided by a British?²²

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²¹ §167.

²² When asked to comment a few passages of the present ruling, the third arbitrator (well-renowned and French), took a deep breath and said: ‘it was a compromise’. Anyway, while he disagreed with some phrasing and, to certain extent, to some considerations (or lack thereof) on the EC-law, he supported the argument of the complete autonomy of the BIT against the EU regime.

ANNEX TO THE PAPER

RELEVANT LAW AND CASE LAW

[all emphases and square brackets added]

In order to facilitate the understanding, for those non-EC-law used, of the issues related to the present case, a brief list of the relevant provisions from the EU Treaties, the Vienna Convention and the Czech-Dutch BIT is deemed appropriate, together with the relevant passages of case-law analyzed by the Panel in its reasoning.

LAW

- **Bilateral Investment Treaty between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic**

- Article 3 – [*EC anti-MFN clause: protecting the single market from improper extensions of its privileges to other countries (e.g., the Czech Republic before accession)*]

...

3. The provisions of this Article shall not be construed so as to oblige either Contracting Party to accord preferences and advantages to investors of the other Contracting Party similar to those accorded to investors of a third State

- (a) By virtue of a membership of the former of any existing or future customs union or economic union, or similar institutions; or

...

- Article 8 – [*Arbitral clause; choice of the Panel's relevant law*]

...

5. The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- *the law in force* of the Contracting Party concerned;
- the provisions of this Agreement, *and other relevant Agreements between the Contracting Parties*;
- the general principles of international law;
- *the provisions of special agreements relating to the investments.*

...

- Article 13 – [*Termination procedure; continued effect for investments made prior termination*]

...

- (b) Unless *notice of termination* has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
- (c) In respect of investments made before the date of termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.

- **Vienna Convention on the Law of Treaties**

- Article 30 - Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to the successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*

...

- Article 42 - Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. *The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.*

- Article 59 - Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and :
 - (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
 - (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

- Article 70 - *Consequences of the termination of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
 - (a) Releases the parties from any obligation further to perform the treaty;
 - (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

...

- **Czech Association Agreement (aka Europe Agreement)**

- Article 74 – [*for the analysis on the automatic termination of the BIT and its compatibility with the EU legal framework*]

1. Cooperation shall aim to establish a favorable climate for private investment, both domestic and foreign, which is essential to economic and industrial reconstruction in the Czech Republic.
2. The particular aims of cooperation shall be
 - To improve the institutional framework for investment in the Czech Republic,
 - The extension by the Member States of agreements for the *promotion and protection of investments*,
 - To implement suitable arrangements for the transfer of capital,

...

- Article 118 – [*idem; to be read in connection with Article 12 TEU (below)*]

The Agreement shall not, until *equivalent rights* for individuals and economic operators have been achieved under this Agreement, affects rights assured to them through existing agreements binding one or more Member States, on the one hand, and the Czech Republic, on the other.

- **Consolidated version of the Treaty on the European Union**

- Article 12 – [*principle of non-discrimination among nationals of the EU (i.e., anti-intra-EU MFN regime)*]
Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, *any discrimination on grounds of nationality shall be prohibited.*

- Article 267 (in the case, mentioned with the old reference as Article 234 TEC) – [*Jurisdiction of the ECJ*]

The Court of Justice of the European Union shall have jurisdiction to give *preliminary rulings* concerning:

- (a) the *interpretation of the Treaties*;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a *question is raised before any court or tribunal* of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

...

- Article 292 – [*binding jurisdiction of the ECJ*]

Member States undertake *not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided* for therein.

- Article 307 – [*for the analysis on the automatic termination of the BIT and its compatibility with the EU legal framework*]

The *rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession*, between one or more Member States on the one hand, and one or more third countries on the other, *shall not be affected by the provisions of this Treaty*²³.

To the extent that such agreements are not compatible with this Treaty, the Member State or *States concerned shall take all appropriate steps to eliminate the incompatibilities* established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (aka **Brussels Regulations** 2000)

In relation to the exclusion of arbitration from the operative ambit of the Regulations. In the eyes of the Tribunal, this seems to consequently imply that arbitration does not violate the EU principle of *mutual trust* into Member States' courts. Non-inclusion, read as non-regulation and thus legitimization, seems to be equated to non-supersession of the BIT's arbitral provision by the EC-regime. In support of this view the Panel underlined how arbitration is instead included, in principle, in Article 293 of the European Community Treaty (Nice consolidated version; 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards').

²³ On this, see the following EC letter, first bullet point.

SOFT LAW

- **EC letter** (January 13, 2006, to the Czech Deputy Minister of Finance)

Relevant parts:

- Based on ECJ jurisprudence, *Article 307 EC is not applicable once all parties of an agreement have become Member States. Consequently, such agreements cannot prevail over Community law.*
- For facts occurring after accession, *the BIT is not applicable to matters falling under Community competence.* Only certain residual matter, such as ... expropriation and eventually investment promotion, would appear to remain in question.
- ...where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions [i.e., those falling under Community competence] – or should the EU adopt such rules in the future – *Community law will automatically prevail* over the non-conforming BIT provisions.
- ...the application of intra-EU BITs could lead to a more favorable treatment of investors and investments between the parties covered by the BITs and consequently discriminate against other Member States, a situation which would not be in accordance with the relevant Treaty provisions.
- The Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence.
- ...the effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non application of all their provisions.
- Without prejudice to the primacy of Community law, *to terminate these agreements, Member States would have to strictly follow the relevant procedure* provided for this in regard in the agreements themselves. Such *termination cannot have a retroactive effect.*
- *Community law, including the jurisdiction of the Court of Justice, in principle prevails from the date of accession.* However, the transitional situation until the BITs are formally terminated may result in complex questions of interpretation with regard to the jurisdiction in particular with regard to pending arbitration procedure²⁴ but also in relation to rules such as Article 13 in the BIT between the Czech Republic and the Netherlands, which provides for an extended application of the agreement in a certain period after termination.
- ...if the dispute concerns an investor-to-state claim under a BIT, the legal situation is more complex. Since community law prevails from the time of accession, *the dispute should be decided on the basis of Community law (which indirectly also follows from Article 8(6) first bullet point* in the agreement between the Czech Republic and the Netherlands). *However, it may be argued that the private investor could continue to rely on the settlement procedure provided for in the agreement* until formal termination of the BIT if the dispute concerns fact occurred before accession. *The primacy of Community law should in such instance be considered by the arbitration instance.*

²⁴ As the present case could be extensively considered, being the settlement iter started before the Czech's accession and having the Czech Republic contributed to it.

- The primacy of EC-law and its definite interpretation by the European Court of Justice would not necessarily preclude a legal instance (arbitration) in another jurisdiction arriving at a different conclusion, even in an international agreement between two Member States.
- **EC note** (November 2006; to the Economic and Financial Committee)
 - ...it would appear that most of their [i.e., the BITs] content is superseded by Community law upon accession ... ***the risk remains that arbitration instances ... proceed with investor-to-state dispute settlement without taking into account that most of the provisions of such BITs have been replaced by provisions of Community law. Investors could try to practice 'forum shopping' by submitting claims to BIT arbitration instead of – or additionally to – national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome.***
 - In order to avoid such legal uncertainties and unnecessary risks for Member States, 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.

CASE LAW

- *[non-discrimination]* **Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium** (Judgment of the ECJ, 27 September 1988; Case 235/87; European Court reports 1988 Page 05589):

...

§19. The Italian Government's argument must be accepted. Article 5 of the Treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty. *If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law.*

...

- *[EC Treaty prevalence over intra-EU bilateral agreements]* **Exportur v. LOR SA and Confiserie du Tech SA** (Judgment of the European Court of Justice, 10 November 1992; European Court reports 1992 Page I-05529):

...

§8. As a preliminary point, it should be observed that the national court rightly considered that *the provisions of a convention concluded after 1 January 1958 by a Member State with another State could not, from the accession of the latter State to the Community, apply in the relations between those States if they were*

found to be contrary to the rules of the Treaty. It is therefore necessary to determine whether the provisions of the Franco-Spanish Convention are compatible with the rules of the Treaty on the free movement of goods.

...

- **Mox Plant** (Ireland v. United Kingdom)

On the *stay* of the arbitral proceeding pending decision of the European Commission on the interpretation of the agreement.

- [*On the unavailability of the ECJ to arbitration*] **Denuit v. Transorient** (ECJ Judgment, 27 January 2005 ; Case C-125/04)

...

§13. Under the Court's case-law, an arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 'Nordsee' *Deutsche Hochseefischerei* [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 34).

...

- **Commission v. Italy** (ECJ Judgment, ?; ?)

Affirming the principle that a Member State may not exercise rights granted under an earlier agreement to the extent that such exercise conflicts with obligations under the EEC treaty.