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Will ECJ look at intra-EU bilateral investment treaties next?

Luke Eric Peterson (Investment Arbitration Reporter) · Friday, March 6th, 2009

This week, many are talking about the long-awaited European Court of Justice judgments which have held Sweden and Austria in breach of their European Community Law obligations. (A third case against Finland has been delayed slightly, but will likely be resolved in the same way by the ECJ).

According to the ECJ, Austria and Sweden failed to eliminate certain "incompatibilities" between a number of their bilateral investment treaties and certain terms of EC law.

(For background on the dispute, see this earlier report on a 2008 ruling by the Advocate-General in the two cases).

Of course, the ECJ's ruling pertains only to a group of investment treaties signed with non-EU countries – and concluded prior to the accession of Sweden and Austria to the EU. The Luxembourg-based court was not asked to address the elephant in the room: the many BITs in place between various EU member-states.

However, the European Commission – which has long coveted the legal competence to negotiate investment agreements on behalf of EU member-states – has expressed annoyance with all of these intra-EU BITs. Various concerns have been raised by the Commission, including that the patchwork of intra-EU treaties creates an uneven playing field, where some European companies can enjoy special protections and a special dispute settlement mechanism (arbitration) denied to other EU counterparts.

Certainly, these intra-EU treaties are giving rise to an unclear – but sizable – number of intra-EU investor state arbitrations in recent years.

Indeed, in the aftermath of the CME-Czech Republic saga, lawyers have reached for one such treaty – the Netherlands-Czech Republic BIT – so frequently that it is beginning to look rather tattered around the edges.

Mind you, Central European Governments are also feeling a bit tattered around the edges – as they grapple with the growing number of investor-state arbitrations.

Lately, the Czech Republic has taken to arguing in some (but, strangely, not all) of its cases that these intra-EU BITs were effectively – if not explicitly – terminated upon the Republic's accession to the EU.

It's an argument that has gained little traction with arbitral tribunals to date – at least based on publicly available information. But, even if arbitrators don't give much credence to this line of argument, it might get a far different hearing from the European Court of Justice.

To date, the Court has not been asked to weigh in on intra-EU BITs. However, either the European Commission or an EU member-state could trigger such a process.

The smart money is on the Czech Republic, which has already initiated a domestic legal process in Prague that could lead to a referral to the ECJ. The Czech Government is seeking to overturn the June 2007 jurisdictional decision in the Binder v. Czech Republic arbitration.

Another possible candidate is the Republic of Poland – which may wish to short-circuit one or more arbitral claims that are pending – including the high-stakes Vivendi v. Poland arbitration, where the frustrated French telecoms investor is accusing Poland's courts of a denial of justice contrary to the France-Poland bilateral investment treaty.

Rumour has it that Poland is toying with the same kinds of arguments raised by the Czech Republic.

One way or another, we are likely to see the ECJ handed the opportunity to offer its view as to whether EU members can retain their bilateral investment treaties with one another.

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