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## The European Advocate General Supports BIT Obligations in EC v. Slovakia Case

Lisa Bench Nieuwveld (Conway & Partners) · Tuesday, April 12th, 2011

On March 15, 2011 the Advocate General (“AG”) issued its opinion on an interesting matter which considers the relationship between EU law, a contract preceding the Republic of Slovakia’s accession into the EU and the Energy Charter Treaty and Investment Arbitration Agreement (essentially, a bilateral investment treaty applicable here).

The dispute involves a contract dated back to 1997 between a Swiss company (“ATEL”) and a State-owned network operator in Slovakia (“SEPS”). Pursuant to the contract, ATEL paid a considerable amount of construction costs for a line from Poland to Slovakia which had not yet been constructed. In return it would receive priority access to the line for a non-renewable period of 16 years. Slovakia itself was not a party to the contract and the party actually concluding the contract was SEPS’ predecessor.

This agreement and its application caught the European Commission’s (“EC”) attention on April 10, 2006; three years after Slovakia’s accession date of April 16, 2003. The EC sent a formal notice to Slovakia and a reasoned opinion shortly thereafter. The EC initiated action against Slovakia claiming that pursuant to a Directive (Articles 9(e) and 20(1) of Directive 2003/54), the contract in question was contrary to Slovakia’s obligations. Essentially, the EC argued that the contract granted ATEL discriminatory access to the transmission system involved.

The AG went through a set-by-step analysis considering the application of EU law as well as the Energy Charter Treaty and the applicable BIT, namely the Investment Protection Agreement. After considering the EU Law, the AG did conclude that the contract was discriminatory, but considered whether this discriminatory behavior fell under an allowed exemption.

The AG only briefly discussed the relevancy of the Energy Charter Treaty, rather quickly dismissing its relevance, but spent quite a bit of time interpreting the applicable provisions of the Investment Protection Agreement. In doing so, the AG considered the relationship between this BIT and the EU laws. The relevant treaty provision of the EC (Article 307) was determined to be applicable and the Investment Protection Agreement’s provisions were interpreted in light of its application.

Article 307 EC addresses the relationships between the pre-accession rights of third countries and remedying the “incompatibilities with the EU Treaty to which they might give rise on the other by the virtue of the obligation that Member States have to take all appropriate steps to eliminate

incompatibilities between pre-accession agreements and EU obligations.” (See para. 72 AG’s Opinion).

The AG pointed out that Article 307 EC effectively codifies the old international law principle that a “subsequent treaty that conflicts with an earlier one cannot legally affect the rights of a State that is a party only to the earlier treaty.” (See para. 73 AG’s Opinion). By reaching this conclusion, the AG went on to conclude that since the pre-accession treaty rights of Slovakia are not affected by its subsequent accession into the EU, that Slovakia would have a defense against the discrimination claim.

The AG finally concluded, “This may lead to the conclusion that there is an international obligation within the meaning of Article 301(1) EC and that Slovakia cannot force SEPS not to follow the terms of the contract without infringing its obligations under the Investment Protection Agreement. The consequence of this is that such an obligation concluded before the entry into force of the Treaty, cannot be affected by the Treaty, and as such Slovakia cannot be held to be in breach of its obligations under Articles 9 and 20 of Directive 2003/54.” (See para. 107-8 AG’s Opinion).

Ultimately, this is an interesting example of the growing pains that the EU is undergoing as it re-considers the relationship BITs may have within its Member States. This may have addressed a third-party contract, but it also involved a Member States’ BIT obligations versus EC obligations. In this case, the loophole seems to be pre-accession and contracts pre-dated EC obligations.

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