CZECH EXPERIENCE WITH BILATERAL INVESTMENT TREATIES: SOMEWHAT BITTER TASTE OF INVESTMENT PROTECTION

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Abstract: The legal protection of international investments has a relatively short history in the Czech Republic; in fact it has begun to develop only after year 1989. Nevertheless, the protection of investments has played quite important role in local affairs since then and the Czech Republic has gained considerable, though perhaps unwanted practical experience in this field. Today the Czech Republic occupies the third place in total number of investment arbitrations worldwide, while investment arbitration against the state keeps to be considered by more and more investors. The aim of this article is to introduce the Czech experience with international investment agreements – in particular to describe the situation and conditions under which these agreements were being negotiated, to provide a brief overview of investment disputes the Czech Republic has been a party to and to follow up with information on recent development in this field, which is closely connected to accession of the Czech Republic to the European Union and to the complicated relation between law of the EU and international investment law. The emphasis should be given to overall context and interconnections between the respective issues.

Resumé: Mezinárodně právní ochrana investic má v České republice relativně krátkou historii, která se začala psát po roku 1989. Za toto období zde ovšem sehrála poměrně významnou roli a Česká republika získala v této oblasti bohaté praktické zkušenosti, o které pravděpodobně ani příliš nestála. V dnešní době je Česká republika třetím nejčastěji žalovaným státem na světě, přičemž arbitrážemi hrozí stále další investoři. Cílem tohoto článku je přiblížit českou zkušenost s mezinárodními dohodami o ochraně investic – zejména uvést situaci a podmínky, za kterých byly tyto dohody sjednávány, podat stručný přehled investičních sporů, které byly proti České republice vedeny a v návaznosti na to představit nejnovější vývoj v této oblasti, který je úzce spjat se vstupem České republiky do Evropské unie a s problematikou složitého vztahu práva EU a mezinárodně právní ochrany investic. Důraz je přitom kladen na celkový kontext a vzájemné souvislosti jednotlivých dílčích otázek.

Key words: bilateral investment treaties, BIT, investment protection, international investments, investment arbitration, renegotiation, Czech Republic, EU law.

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1. Introduction

It has been almost twenty years since the former Czechoslovakia concluded its first bilateral investment treaty. The Agreement on Mutual Promotion and Protection of Investment between the Czech and Slovak Federative Republic and the Republic of France entered into force on the 27th of September 1991. In the busy times of political and economic transformation, this event drew very little attention from the public, if any. No more than ten years later, investment protection started to regularly find its way into the headlines of nationwide newspapers and the issue has been keeping politicians, officials and lawyers busy and continues to do so at present.

The Czech experience with bilateral investment treaties can be regarded as unique, mainly due to the exceptionally high number of investment arbitrations the country has faced during this period. While this circumstance has increased awareness of international investment protection within the Czech public, it is no real surprise that the concept of investment arbitrations is often faced with a lack of understanding or with mistrust, mainly as a result of the huge amounts of compensation that have been paid to foreign investors. The system of investment protection, the goals it should pursue, the ways to pursue them as well as the interests it should consider are all issues that are currently being reconsidered by scholars and officials throughout the world. The Czech experience can serve as a valuable source of inspiration in this regard.

This article cannot analyze in detail all of the issues related to investment protection in the Czech Republic. It will instead attempt to provide an overview of this relatively short history and to find connections between various aspects of the problem – to show interactions between treaty-making, investment arbitrations and investment policy decisions made by the Czech Republic recently. In pursuing this aim, the first part of the article will introduce the circumstances under which the most important bilateral investment treaties (BITs) were concluded and will describe how the Czech Republic was developing its foreign investment policy over the course of time. The second part will briefly discuss the investment disputes the Czech Republic has been party to. The third part will deal with the recent developments that have followed the accession of the Czech Republic to the European Union. The conclusion will summarize the information contained in the article and will try to put them into a common context.

2. Negotiating bilateral investment treaties

The history of real foreign investment protection in Czech Republic started in the year 1989. There is not much to talk about as concerns foreign investment protection during the communist era. The state-driven economy, strongly suppressing any form of private ownership, did not leave any space for foreign private investments. Thus,

there was also no need to promote or protect foreign capital by any special instrument of international law.[1] Moreover, the idea of an independent international forum settling the claims of private persons against the state based on international law could hardly be found consistent with the notion of state sovereignty as understood by socialist legal doctrine. The existence of bilateral investment treaties was also largely ignored by socialist scholars. There is hardly any mention of international investment law to be found in the relevant "pre-November 1989" legal literature.

Surprisingly enough, the first Czechoslovak BIT, the agreement with the Belgium-Luxembourg Economic Union on mutual promotion and protection of investments, was signed in April 1989, *i.e.* more than half a year before the "velvet revolution" overthrew the communist regime.[2] But the most significant augmentation of bilateral investment treaties occurred shortly after the change of the regime. It seems that the country's conclusion of BITs at that time was the result of the initiative of the counterparties.[3] But Czechoslovak officials did not mind. The transforming economy urgently needed a massive inflow of foreign capital and due to their simple achievability compared to lengthy reforms of the domestic legal system, bilateral investment treaties with capital exporting countries appeared to be an ideal tool to instantly raise the credit of the local environment in the eyes of foreign investors. In a very short time, Czechoslovakia concluded a series of BITs with the majority of western developed economies. In 1991, BITs with Finland, France, Austria, Spain, Sweden and Switzerland entered into force. In 1992, BITs with Canada, the above-mentioned Belgium-Luxembourg Economic Union, Germany, Netherlands, Norway, Greece, USA and the United Kingdom followed. The extremely short time period needed for the conclusion and ratification of these agreements indicates how much attention was probably paid by Czechoslovak officials, at that time having only a small amount of experience with treaties of this kind, to their content and possible impacts. The situation can be demonstrated by the materials presented to the Federal Assembly, the former Czechoslovak Parliament, whose approval was required for

[1] The only legal instruments that contained some principles resembling today's BITs were so-called compensation agreements, concluded with several western capitalist countries. Under these agreements, Czechoslovakia was to pay a lump-sum amount of compensation to the other contracting states, which was supposed to settle all potential claims of nationals of that state for nationalization measures adopted by Czechoslovak authorities after the year 1945. However, the details about these agreements and about their real performance are largely unknown as the texts of these agreements still have not even been published.

[2] In its last days, the struggling communist regime was finding ways to revive its declining economy. In 1985, a Government resolution for the first time allowed joint ventures of domestic and foreign enterprises to conduct business activities on the territory of Czechoslovakia. This form of cooperation was later instituted by the 1988 Act on Enterprises with Foreign Equity Contribution. However, western countries did not find the guarantees provided by this act to be sufficient and sought to conclude bilateral investment treaties with Czechoslovakia. See: Government proposal to the Federal Assembly of Czech and Slovak Federative Republic for approval of Agreement between Czechoslovak Socialist Republic and the Belgium-Luxembourg Economic Union on mutual promotion and protection of investments, signed in Brussels on 2 April 1989. Explanatory memorandum. Available in Czech at www.psp.cz.

[3] See supra note 2 and explanatory memorandums to other BITs.

entry of international agreements into force. The proposal of the Government to the Federal Assembly for approval of the BITs with Denmark, Netherlands, Norway and Greece, which was presented in a single document, can serve as an example.[4] The explanatory memorandum to the material contained three quite short articles. The first article stressed the necessity of inflow of foreign capital and assumed that concluding the presented BITs may stimulate inward investments into Czechoslovakia. The second article briefly described (in 12 sentences) the content of all 4 treaties. The dispute settlement mechanism was not mentioned at all. The third article concluded that the treaties did not require changes to the legal order, that they were compliance with other international obligations and would have no budgetary implications. The whole explanatory memorandum is barely one and half pages long. Another example is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) acceded to by the Czech Republic on the 22nd of April 1993, which was introduced similarly briefly and in the same trivializing manner. The Explanatory memorandum for the Parliament states: "With the expected increase in the number of foreign investors in the CSFR, the possibility of a dispute between a foreign investor and our state cannot be excluded. In these cases, which we assume will occur only rarely, the ICSID Convention will apply."[5]

It is of course not the intention of the author to blame the representatives of the state for entering into investment treaties from the early 1990's. At that time, BITs were an instant and cost-effective tool to improve the image of the underdeveloped legal and judicial system of the country and a tool to attract foreign investors. On the other hand, when considering that for instance the BIT with the Netherlands, which was approved by the Parliament in the above-mentioned "package" together with three other investment treaties, later gave basis to 6 investment arbitrations against the Czech Republic, resulting in an obligation to pay billions of CZK as compensation

4 Government proposal to the Federal Assembly of Czech and Slovak Federative Republic for approval of Agreement between Czech and Slovak Federative Republic and the Kingdom of Denmark on mutual promotion and protection of investments, signed in Prague on 6 March 1991, Agreement between Czech and Slovak Federative Republic and the Kingdom of the Netherlands on mutual promotion and protection of investments, signed in Prague on 29 April 1991, Agreement between Czech and Slovak Federative Republic and the Kingdom of Norway on mutual promotion and protection of investments, signed in Oslo on 21 May 1991 and Agreement between the Government of Czech and Slovak Federative Republic and the Government of Hellenic Republic on mutual promotion and protection of investments, signed in Prague on 3 June 1991. Explanatory memorandum. Available in Czech at www.psp.cz.

5 Government proposal to the Federal Assembly of Czech and Slovak Federative Republic for approval of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, agreed upon in Washington on March 18, 1965. Explanatory Memorandum. Available in Czech at www.psp.cz. A substantial part of the Memorandum is devoted to an enumeration of the fees payable to the Centre, such as the fee for application for conciliation or for an arbitration in the amount of USD 100, a fee for one working day of an arbitrator in the amount in the amount of USD 850, translation fees, etc. and it concludes that should Czechoslovakia be subject to conciliation or arbitration proceedings, it would entail the aforesaid expenses.

or by virtue of settlement, one can only hardly doubt that the parliamentary deputies at that time did not have a clear idea of what they were approving.

After the conclusion of BITs with the most perspective capital exporting countries, attention was turned to other promising contracting parties.[6] By the end of 1996, BITs with most Central and Eastern European counties had entered into force, alongside with BITs with other potentially important commercial partners such as Russia, Portugal, Australia, China or South Korea. After 1996, it is hard to see any clear, deliberate, regionally-aimed BIT policy. It seems that the Czech Republic was seeking to conclude BITs with countries where at least some economic interactions could have been expected, as well as with other countries that just showed interest. To date, the Czech Republic is party to 77 BITs presently in force, with various contracting partners, ranging from the most developed countries, such as the USA or most EU Member States, to the least developed ones having only negligible economic relations with the Czech Republic, such as Yemen or Cambodia.[7]

With the number of concluded BITs, the Czech Republic has also been developing its own model BIT for negotiations. The first visible sign of a coherent foreign investment policy (as far as the substance of regulation is concerned) appeared at the beginning of 1993, shortly after the splitting-up of Czechoslovakia. In January 1993, the Government passed a resolution approving the BIT with Hungary. The resolution contained a clause stating that BITs negotiated in the future that would not diverge substantially from the principles of the BIT with Hungary can be submitted to the Government after they have already been signed, compared to the ordinary procedure requiring the approval of Government prior to the signing of an international agreement.[8] In other words, the text of the Hungarian BIT should have been followed in future negotiations if possible. Thus, the BIT with Hungary served as the first official Czech model BIT.

The next model BIT was expressly adopted by the Government in 1999[9] and it is still probably being used today. The text of the model forms the annex to the Government resolution and is not publicly available. However, it is not too difficult to derive its content at least in broad terms by comparing the various treaties the Czech Republic has concluded since that time. Especially the agreements with the countries not in a particularly strong negotiating position show regular common features. A typical Czech BIT contains the following provisions:

- A broad asset based definition of investment, comprising every kind of asset invested by an investor of one contracting party in the territory of the other

[6] It is worth mentioning that most BITs with the original EU15 countries, as well as the BIT with the USA, were concluded by the former Czechoslovakia. After the splitting-up of the Federation, both the Czech Republic and the Slovak Republic succeeded to those agreements.

[7] For the list of Czech BITs, see Annex 1 to the Article.

[8] Resolution of the Government of the Czech Republic No. 12 dated 6 January 1993, paragraph I/2. Available in Czech at www.vlada.cz.

[9] Resolution of the Government of the Czech Republic No. 303 dated 7 April 1993. Available in Czech at www.vlada.cz.

contracting party. The definition is accompanied by a non-exhaustive list of examples including movable and immovable property, shares, stocks and debentures, claims to money, intellectual property rights and any right conferred by laws or under any licenses and permits pursuant to laws. The structure of the definition provides for protection of both direct and portfolio investments (the definition does not operate with the criterion of investor's control over investment, while it expressly enumerates shares and stocks as kinds of investment). On the other hand, the definition used excludes protection of investments indirectly controlled by nationals or companies of a contracting party through an investor of a third state. The BITs with the USA and with Canada, as well as those with some "old" EU Member States, form an important exception in this regard.

- Definition of investor, including both natural and legal persons. As far as legal persons are concerned, the incorporation model is used, recognizing entities incorporated or constituted under the laws of a contracting party as its investors. Some agreements also require legal persons to have their registered or real seat in the country of incorporation. No requirements for control (linked to the nationality of shareholders or excluding publicly controlled entities) are usually prescribed.
- Commitment to encourage favourable conditions for investors to invest in the host country and to admit such investments in accordance with domestic laws and regulations. The wording of the provision indicates that the pre-establishment stage is regulated merely in the form of soft law. The agreement with the USA regulating also market access is an isolated exception.
- Standards of fair and equitable treatment and full protection of security, accorded to both investors and their investments.
- Most favoured nation and national treatment clauses concerning both investors and investment. These are complemented by regional integration organizations (REIO) exceptions for customs, economic or monetary union, a common market or a free trade area. The latest BITs contain extended REIO exceptions (see below). Another exception concerns treatment accorded by virtue of an international agreement relating to taxation.
- Commitment to compensate losses owing to exceptional situations (such as war, armed conflict, state of emergency etc.) in a manner no less favourable than compensation accorded to domestic investors. However, the obligation to compensate is absolute (amounting to just and adequate compensation) if the losses result from requisitioning of property by forces or authorities of the contracting party or by their acts in excess.
- Commitment not to expropriate investors and investment, except for a public purpose (public purpose is not defined by BIT). In that case, the expropriation shall be carried out under due process of law, on a non-discriminatory basis and the host state shall pay to the investor prompt, adequate and effective compensation, amounting to the value of the investment. Indirect expropriation, in terms of measures having effect equivalent to expropriation, is also covered.

- Guarantee of free transfer of payments and returns related to investment in a freely convertible currency, without any restriction and undue delay.
- Obligation of the host state to accept subrogation of an investor's rights under the BIT to other contracting party or its designated agency under a guarantee provided by that party.
- Investor-to-state dispute settlement, entitling investors to submit the dispute under the treaty to either the domestic court of the host state, to ICSID or to an *ad hoc* arbitration tribunal established under UNCITRAL rules, usually after 6 months of unsuccessful negotiations. Some BITs also provide for the sources of law to be considered by the tribunal, usually in following sequence: 1. Provisions of BIT and other agreements between the contracting parties, 2. the domestic law in force, 3. special agreement relating to investment and 4. the general principles of international law.
- State-to-state dispute settlement by means of *ad hoc* arbitration.
- A clause expressly allowing investors to benefit from more favourable treatment than the treatment provided for in the treaty, if it is accorded by another international agreement or by domestic law.
- Czech BITs only rarely contain umbrella clauses. These can be found in some agreements concluded in early 1990's, such as the BITs with Germany, Netherlands or the USA. The concept of umbrella clauses was clearly relinquished with the new "Hungarian" 1993 model.[10]
- As regards temporal applicability, most BITs apply to future investment as well as to investments existing at the date of entry into force of the agreement. However, the applicability of many BITs concluded in the early 1990's limits the protection only to investments made after a certain specified year (usually 1950) in order to exclude the responsibility of the Czech Republic for nationalization acts of the communist regime. In the case of unilateral termination of the agreement, most BITs provide for an additional period of 10 years during which the investments remain protected under the terminated BIT.
- The most recent BITs contain also the "EU" clauses (see below).

Of course, the specific content of various BITs differs as a result of negotiations between contracting parties. This is foremost the case of the BIT with the USA, which is based on the US model treaty and differs substantially from most other BITs concluded by the Czech Republic. To a lesser extent it is also the case for BITs

[10] As far as newer agreements are concerned, an umbrella clause was contained for instance in the BIT with Kuwait. However, the Kuwaiti BIT has been recently renegotiated in order to be put into accordance with EU law. In the course of negotiations, the Parties, based on a proposal of the Czech Republic, also agreed on the deletion of the umbrella clause. This indicates that it is the policy of the Czech Republic not to have umbrella clauses in BITs. See: Government proposal to the Parliament of the Czech Republic for approval of the Protocol between Czech Republic and State of Kuwait on the amendments to the Agreement between the Czech Republic and the State of Kuwait for the Promotion and Reciprocal Protection of Investment, signed on the 31st of October 2010 in Kuwait (6th electoral term, Parliamentary printing no. 186). Explanatory memorandum. p. 4-5. Available in Czech at www.psp.cz.

with original EU Member States concluded in the early 1990's. The most likely explanation is that at that time the Czech Republic was more or less accepting the models put forward by its stronger and more experienced counterparties. However, the differences are not substantial here – these agreements are mostly based on the European model of a BIT as is the Czech model. Apart from specific wording, substantial differences concern mainly the protection of indirect investors, the presence of umbrella clauses and a more vague formulation of the obligations to be found in some of these agreements. When comparing the texts of various BITs currently in force, it seems that the Czech model has not changed much since the BIT with Hungary was approved as the first model and the differences are to be found only in some details and in the "EU" clauses that will be discussed below. It is also interesting to observe that since the Czech Republic developed its own model, it has apparently been able to negotiate a significant number of BITs based thereon, many of the agreements showing a considerable degree of similarity.

3. Investment disputes against the Czech Republic

Contrary to any expectations that may have been associated with the early 1990's BITs at the time of their conclusion, the Czech Republic has since then become one of the world's leaders in the number of investment disputes initiated by investors against a host state. According to a report published by UNCTAD, by the end of 2010 the Czech Republic had been a defendant in 18 investment disputes, ranking the country at the 3rd position worldwide, behind only Argentina and Mexico.[11] Taking other Central European countries with a similar economic and political position as a reference, Poland had been during the same period party to 11 disputes, while Hungary and Slovakia to 6 disputes each.[12] It is estimated that the Czech Republic has so far paid to investors an amount of around CZK 15 billion (approximately EUR 600 million at today's exchange rate) as either compensation awarded by investment tribunals or under settlement agreements bringing an end to already started proceedings, with related legal fees and expenses. One may ask what the reasons behind these statistics are – why is the number of investment disputes the Czech Republic had to face one of the highest in the world and why is it considerably higher in comparison with other Central European countries?

An in-depth analysis of each investment dispute would greatly exceed the scope of this article. It would also be limited factually as a considerable number of awards remains undisclosed to the public and the authorities are pursuing a restrictive information policy. Therefore, the cases will be only shortly overviewed. Two cases, which gave basis to three separate arbitration proceedings, seem to be a particularly important part of the Czech experience and should be mentioned here. The first case concerns the investment of the Dutch company CME Czech Republic N.V.

[11] UNCTAD: Latest Developments in Investor– State Dispute Settlement. IIA Issues Note, N° 1, March 2011. For an overview of investment disputes against the Czech Republic, see Annex 2 to this article.

[12] *ibid.*

and its major stakeholder, US citizen Mr. Lauder, into Czech private TV station TV NOVA. The second concerns the privatisation of one of the Czech major banks, IPB, by Japanese banking group Nomura and the subsequent events leading to the imposition of forced administration on the bank.

3.1 CME and Nomura – the most significant investment disputes

The facts of the first case can be briefly summarized as follows. During 1992 and 1993, a company called CEDC, a German subsidiary of international media group CME, was negotiating with its Czech partners (including Czech national Mr. Železný) and with the Media Council, the public authority responsible for TV and radio broadcasting in the Czech Republic, on the issuance of a broadcasting license necessary for the operation of a TV station. Due to reservations of some political representatives towards direct participation of a foreign investor in the broadcasting license, the Media Council disapproved a direct shareholding of CEDC in a company holding the license. Therefore a form of joint venture was agreed between all parties. CET 21, a company with exclusively Czech shareholders was designed to act as the license holder, while the newly created company ČNTS with a major stake held by CEDC (which was later replaced by CME Czech Republic, another company of the group) was formed for the purpose of operating the broadcasting. According to the association documents, CET 21 as a minor shareholder in ČNTS contributed to the company an "unequivocal and exclusive" right to use the broadcasting license. The contractual and corporate framework was developed in close cooperation with the Media Council. TV NOVA soon became the Czech Republic's most popular TV station, generating considerable profits. In the meantime, the Media Law as well as the composition of the Media Council changed. The new representatives became concerned that the situation at TV NOVA violated the law. ČNTS was the only real broadcasting operator, while CET 21, the formal holder of the license, was a shell company performing virtually no activities. This led to a suspicion among Media Council members that the license granted to CET 21 was *de facto* transferred to ČNTS. After certain interactions between the Media Council and CET 21 (including administrative proceedings initiated against CET 21 threatening as *ultima ratio* a revocation of the license), the legal framework of the joint venture was changed by agreement of the involved parties in 1996 so that the cooperation between CET 21 and ČNTS became based on a Service Agreement, effectively weakening the contractual position of ČNTS and its major shareholder CME in the joint venture. The situation was later fully utilized by Mr. Železný, at that time in control of CET 21, who used the first convenient opportunity to terminate the Service Agreement and replaced ČNTS by other service providers, making the ČNTS broadcasting services idle and in fact taking over the whole business connected with TV NOVA.

In its substance, the case of TV NOVA was primarily a commercial dispute between CME and Mr. Železný. This commercial dispute has been subject to various proceedings before Czech courts and the arbitral tribunal of ICC. However, CME also

used the opportunity to sue the Czech Republic for the actions of the Media Council, which allegedly deprived CME of its investment, such legal actions being initiated under two different bilateral investment treaties. One arbitration was initiated by the Dutch company CME Czech Republic B.V. under the BIT with the Netherlands. Another arbitration was initiated by Mr. Lauder, the indirect controlling stakeholder of CME Czech Republic B.V., under the BIT with the USA. Both arbitrations were based on the same factual basis. Multiple investment proceedings were formally possible as the U.S. BIT additionally provides for protection of "indirect" investors controlling the investment through entities based in third states.[13]

Such already strange situation, with two different investment tribunals dealing with *de facto* the same case, was crowned by the tribunals themselves. On the 3rd of September 2001, the tribunal in Lauder case issued its award. It observed that the Czech Republic took a discriminatory and arbitrary measure against Mr. Lauder at the initial stage of the investment, by not allowing direct participation in the license by a company with foreign shareholding.[14] However, this breach was considered by the tribunal as too remote to the alleged damage incurred by the claimant, which was primarily caused by acts of CET 21 and Mr. Železný. Subsequently, the tribunal rejected the argument that any further action of the Media Council constituted a breach of the Treaty.

The real surprise then came 10 days later, when an award in the CME case under the Dutch BIT was rendered. Under the same factual background, the tribunal (with the strong dissent of the arbitrator appointed by the respondent) decided that the Czech Republic had violated all provisions of the Netherlands BIT alleged by the claimant.[15] The basic breach was perceived in the amendment of the legal framework of the joint venture in 1996, which had been in the view of the tribunal coerced by the actions of the Media Council. The Council's actions and omissions in 1999 compounded and completed the Council's part in the destruction of CME's investment.[16] In the final award issued later, the Czech Republic was ordered to pay to CME compensation in the amount of USD 269 814 000.[17]

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[13] Article I. of the BIT between Czechoslovakia and USA provides: "*For the purposes of this Treaty, investment means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party…*".

[14] *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration. Final award (2001), para 222. It is worth noting that the tribunal may have observed such a breach of the Treaty because, unlike most other Czech BITs, the BIT with the USA contains binding regulation of market access.

[15] According to the tribunal, the Czech Republic had breached namely the following obligations:
a. The obligation of fair and equitable treatment;
b. the obligation not to impair investments by unreasonable or discriminatory measures;
c. the obligation of full security and protection;
d. the obligation to treat foreign investments in conformity with principles of international law, and
e. the obligation not to deprive Claimant of its investment.

[16] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration. Partial Award (2001), para. 601.

[17] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration. Final Award (2003), The Arbitral Tribunal's Decision.

Without it being intended here to favour the decision of one tribunal or the other, the case of Lauder/CME fully revealed the weaknesses of international investment law consisting of thousands of mutually inconsistent bilateral investment treaties, each containing its own dispute settlement mechanism. It is not merely one of the most explicit examples of forum and treaty shopping. The possibility of instituting different investment proceedings before different forums leading to totally different results, without the possibility of judicial review, casts serious doubts on the legitimacy and sustainability of the current system of international investment protection as such, as it is clearly not designed to respect basic principles of law such as *lis pendens* or *res iudicata*. Another problem that has also been pointed out regarding the CME award is that the tribunal in this case largely failed to take into account the provisions of Czech law, although the Dutch BIT expressly mentions the law of the host state as one of the sources of law to be considered.[18] It is only to be regretted that the circumstances of this case, which resulted in the highest compensation the Czech Republic has ever paid to an investor and which had a significant influence on further developments, were so controversial.

Another crucial investment dispute was initiated by the Dutch company Saluka Investments B. V., a special purpose vehicle of Japan-based international banking group Nomura. The dispute was connected with an investment made by Nomura[19] into the Czech bank IPB (Investiční a poštovní banka), at that time one of four major Czech banks,[20] and concerned events that occurred in the 1999-2001 period and led to the imposition of forced administration and the subsequent transfer of the bank to a new owner. The four major banks were successors of the former State Bank of Czechoslovakia and in the mid 1990's the state still owned controlling stakes. The banks were fully privatized during the 1998-2001 period. At that time all four major banks were facing a serious "bad debt" problem as a large part of their portfolios consisted of non-performing debts, mainly as a result of the previous transformation policy of the Czech Government. IPB was the first of the four banks to be privatized – during the 1996-1998 period, the state-owned stake in the bank was sold to Nomura, which gained about a 46% shareholding in IPB. Nevertheless, despite the factual effective control over the bank, Nomura was stressing during the arbitration that it had always intended to be only a portfolio investor in IPB rather than a strategic partner.

At that time, the Czech banking system was in serious difficulties. The Government decided to also fully privatize the other three major banks. However, the banks were viewed as an unattractive proposition for any investor unless they would be cleaned-up of bad assets. Therefore, the entry of strategic investors into these banks was

[18] Šturma, P. *Mezinárodní dohody o ochraně investic a řešení sporů*. 2nd Edition. Prague : Linde, 2008, p. 142.

[19] While Saluka as a registered shareholder of IPB was actually the claimant in the case, it was de facto a shell company fully controlled by Nomura group. In unofficial speech it is therefore more appropriate to talk about Nomura as the party to the dispute.

[20] Alongside with Československá obchodní banka (ČSOB), Komerční banka (KB) and Česká spořitelna (ČS).

preceded by massive state assistance, mainly in the form of purchases of non-performing loans by a special state agency designated for that purpose and by the provision of state guarantees. On the other hand, requests made by the already-privatized IPB for further state aid were constantly being refused on the grounds that IPB was regarded to be a private institution whose fate was a matter for its private shareholders.

By the beginning of 2000, IPB found itself a in critical position and it became clear that it could not survive without a substantial increase of capital. Nomura was unsuccessful in its search for a strategic investor for IPB as no private investor was willing to take over the bank without additional state aid. In the meantime, information about the situation in IPB leaked to the public and two runs on the bank occurred in the first half of 2000. In June 2000, the Czech Central Bank put IPB into forced administration. Consequently, IPB was by the actions of the forced administrator effectively transferred to ČSOB, the other major Czech bank, pursuant to a previous agreement between ČSOB and the Government. ČSOB was not required to pay any consideration for acquiring the enterprise of IPB and was moreover provided with a state guarantee and promise of indemnity for any future loss connected with IPB's assets.

Saluka, the formal shareholder of IPB, subjected the 1998 – 2001 events to investment arbitration in 2001 on the basis of the bilateral investment treaty between Czechoslovakia and the Netherlands. The partial award was issued in March 2006. The Tribunal decided that the Czech Republic had violated the fair and equitable treatment obligation towards Saluka. It found that by providing substantial financial assistance to other major banks (which were according to the Tribunal in a sufficiently comparable situation) without doing so with respect to IPB, the Czech Republic has accorded IPB different treatment without reasonable justification, thus frustrating the legitimate expectations of Nomura/Saluka.[21] Such differential treatment had according to tribunal created an environment impossible for the survival of IPB.[22] Moreover, the fair and equitable treatment obligation was found to have been violated also by the way in which the Government handled the good faith efforts of Saluka to resolve the bank's crisis,[23] as the dealings of the Czech Government with Nomura lacked consistency, transparency and at the end of the crisis the Government refused to communicate with Nomura in an adequate manner at all and instead pursued the solution involving ČSOB. The other claims based on expropriation and on the standard of full protection of security were rejected.

The Tribunal, however, did not have an opportunity to issue a final award and to decide on *quantum*. The events related to the fall of IPB have been subject to various claims before various courts and arbitral tribunals raised by Nomura, the Czech Republic and ČSOB against each other.[24] Having known the investment tribunal's

[21] *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration. Partial Award (2006), para. 498.

[22] *Ibid.*, para. 347.

[23] *Ibid.*, para. 499.

[24] One noteworthy dispute around IPB was so the called "České pivo" (Czech beer) affair. At the time

position on merits, Nomura and the Czech Republic concluded a settlement agreement in November 2006 whereby the parties waived all mutual claims and the Czech Republic undertook to pay Nomura a compensation to be determined on the basis of an expert valuation of IPB's assets, adjusted by the formula set out in the settlement. The amount of compensation that the Czech Republic had to pay was later set as the amount of CZK 3.6 billion, including interest (Nomura had originally claimed approximately CZK 40 billion).[25]

3.2 Is the Czech Republic unable to defend itself in arbitration proceedings?

The impact of the two above-mentioned cases was massive. Due to several factors, such as public recognition and the importance of the undertakings concerned (the most popular TV station and one of the country's major banks), the political background of the cases, occasional dramatic events (seizure of IPB's premises by armed police forces) and the huge amounts claimed by investors, the Czech media found both causes very attractive. The public was informed daily about the latest developments and investment arbitration soon became one of the hottest issues for public discussion. Not surprisingly, as the factual and legal background of the cases was too complex even for informed persons to follow, simplified explanations often prevailed, especially after the awards in favour of investors had been issued. The main message of the debate in the media regarding the investment arbitrations that one could have noticed was that the Czech Republic was not able to defend its interests in arbitrations against foreign investors, that it was losing one dispute after another and that it was an easy target for various foreigners and multinational corporations to claim compensation from.[26,27]

In the meantime, an increasing number of foreign investors started to threaten to initiate investment arbitrations against the state for wrongdoings they had allegedly faced and several of them have pursued their claims to the arbitration stage. Shortly after the final award in the CME case was rendered, the Czech Republic won the case

when a controlling stake in IPB was acquired by Nomura, IPB has indirectly controlled Pilsner Urquell breweries – this stake was identified by Nomura as the bank's most valuable strategic holding (Partial Award, para. 68). After the entry into IPB, Nomura managed by a series of complicated transactions to acquire IPB's stake in Pilsner Urquell breweries and to sell it afterwards for a price greatly in excess of the amount originally paid by Nomura.

[25] ČSOB, however, refused to participate in the settlement and some of the disputes concerning IPB have not been finished yet.

[26] This fact was commented also by Czech scholars. See Balaš, V. *Investiční spory vedené Českou republikou a jejich mediální obraz.* Právní fórum, 2004, No. 3

[27] Some media did not hesitate to choose the most ridiculous forms of informing on the matter. For example, in 2005 the "exclusive opinion poll" of one agency showed that the majority of the Czech population (77 per cent) was of the opinion that the state was not prepared well enough for arbitration proceedings and was not defending the interests of the Czech Republic with due diligence. Due to a lack of confidence in ability of the state to defend its interests at international forums, the vast majority of respondents found it reasonable to quickly and acceptably settle the Czech Republic's dispute with Nomura. See: Průzkum: stát hájí zájmy ČR v arbitrážích špatně. Published at www.novinky.cz on 6 October 2006.

against British citizen William Nagel, who intended to apply for a GSM network operator license, for alleged deprivation of certain contractual rights. In 2006, the partial award in the Saluka arbitration, as discussed above, was issued. In 2007, the Czech Republic lost two other arbitrations. In the dispute against the Dutch company Eastern Sugar B.V., claiming discriminatory treatment in the allocation of sugar production quotas, the Czech Republic was ordered in the award to pay compensation of EUR 25.4 million. A few months later the Czech Republic was found to have violated its obligations in a dispute against Croatian national Pren Nreka by terminating a lease contract for the premises where his company was running a pizzeria. Although the termination was legal under Czech law according to the Czech courts, it was not found to satisfy the standards of the BIT with Croatia by the tribunal. Mr. Nreka was later awarded compensation of USD 1.5 million. In commenced arbitration instituted by another Dutch company K+ Venture Partners, the facts of the case were probably so clear (unpaid contractual premium for administration of certain public funds despite achieving the agreed results) that the state instead elected to settle and agreed to pay to the investor an undisclosed amount (the investor was originally claiming CZK 140 million). A settlement also ended a dispute with ArcelorMittal, which had claimed discriminatory treatment in the privatization of the Vítkovice Steel ironworks.

However, in recent years the situation has changed and the Czech Republic seemed to have more luck on its side, achieving favourable awards in several of its latest arbitrations. Most notably, it won the arbitration against the Dutch company Invesmart B. V., which had claimed USD 7 billion for the actions of the state connected with the bankruptcy of the Czech bank Union Banka in which the claimant held a majority stake (final award issued in 2009).[28] Other unsuccessful claimants were, for instance, the Luxembourg company European Media Ventures in a case concerning (again) a broadcasting license for the operation of a TV station (2009) or the Canadian enterprise Frontier Petroleum Services in a case connected with a failed investment into a bankrupt aircraft company, where the Czech courts refused to recognize the award of the Swedish arbitral tribunal adjudicating the commercial dispute (2010).

One may ask whether the results of arbitrations are only a matter of coincidence, or whether there is an observable development. It is very hard to draw any reliable conclusions in this regard as most arbitrations have been conducted in a strictly confidential manner and many recent awards have not been published. It is sometimes argued that by being a party to numerous arbitrations, the state's officials have gained a certain amount of experience and that nowadays they are better prepared to defend the state in dealings with foreign investors claiming a breach of investment treaties. Even though this may have played a certain role, in the opinion of the author, this factor should not be overemphasized.[29] One should rather look to the substance

[28] The facts of this case were not unlike those of the case of Nomura/Saluka.

[29] Particularly the representatives of the Ministry of Finance, the office in charge of investment disputes, like to stress in their comments to the press that the recent successful arbitrations are the result of

and the nature of the claims that were raised by investors recently. It particular, it seems that an increasing number of investors, encouraged by the success of their predecessors, are seeking to sue the state at international forums with more or less unfounded or speculative claims. The recent case of the Israeli company Phoenix Action Ltd., the only investment dispute against the Czech Republic that has ever been heard before ICSID, can serve as one rather extreme example.

The central person of the Phoenix case was Mr. Beňo, a Czech national. Mr. Beňo indirectly (though shareholding stakes owned by his family members – his wife and his daughter) controlled two Czech companies (Benet Praha and Benet Group), involved in trading ferroalloys. In 2001, both companies were facing serious difficulties virtually paralyzing their activities – Benet Group was involved in a lengthy civil dispute against a former commercial partner over some key assets and Benet Praha was engaged in a dispute with the police and the public prosecutor regarding a freezing of its funds and seizure of the company's accounting documents due to a suspicion of tax and customs evasions. Mr. Beňo himself, at that time the executive of the latter company, was arrested in connection with a criminal investigation, but he managed to escape the police and fled to Israel. There he incorporated a company called Phoenix Action Ltd. In 2002, Phoenix purchased 100% of the shares in both Benet Group and Benet Praha for a price corresponding to their nominal value (in fact, holding the shares in these two companies was the only business activity Phoenix ever had). Shortly afterwards, Phoenix submitted a request for arbitration to ICSID claiming that its investment (consisting of the companies Benet Group and Benet Praha) was not treated by the Czech Republic in accordance with the provisions of the BIT between the Czech Republic and Israel.[30]

During the proceedings, the Czech Republic strongly opposed the jurisdiction of the tribunal to hear the dispute. The main argument of the respondent was that Phoenix was nothing more than an *ex post* creation of an Israeli entity by a Czech national to create diversity of nationality.[31] The respondent stressed that should the tribunals accept the jurisdiction in this and similar cases, any domestic dispute would always be reviewable by an ICSID tribunal if the ultimate owner of the domestic company simply incorporates a foreign entity which then buys the shares of the domestic company embroiled in the dispute.[32]

"a new aggressive approach" of the Ministry towards investors. Such proclamations should be of course regarded as a way of political self-presentation. It is, however, regrettable that this kind of language is also being used in official statements. See, for instance, the press release to the final award in the Frontier case (excerpt translated by the author): … *"I am glad that the vigorous approach to international arbitrations which I have been pursuing since my first day at the Ministry, is paying off for the Czech Republic", said the minister of finance Miroslav Kalousek. "This approach saves billions of crowns of the taxpayers", added the minister.* Press release, 15 November 2010. Cited from the website of the Ministry of Finance (www.mfcr.cz).

[30] Phoenix informed the Czech Republic of the existence of the investment dispute little more than two months after the acquisition of its investment.

[31] Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5. Award (2009). para 34.

[32] *Ibid.*, para 43.

The tribunal in its jurisdictional analysis focused on the question of whether the shareholding of Phoenix in the two concerned companies may constitute an investment under both the ICSID Convention and the Czech-Israeli BIT. It found that the "investment" of Phoenix did actually meet five out of six requirements for an investment to benefit from the international protection of ICSID.[33] However, it did not meet the sixth criterion – it was not a *bona fide* investment. The tribunal was convinced that the claimant made an "investment" not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic.[34] It regarded the claimant's initiation and pursuit of the arbitration as an abuse of the system of international ICSID investment arbitration.[35] Therefore the tribunal concluded that the claimant's purported investment did not qualify as a protected investment and therefore the tribunal lacked jurisdiction over the claimant's request.

Of course, it would be odd to generalize that all disputes that emerged recently are of a character similar to the Phoenix case. Conversely, no other dispute has been turned down on jurisdictional grounds so far.[36] However, to a certain extent it may show the increasing attractiveness of investment arbitration among various entrepreneurs as an alternative to the domestic judicial system and as a tool to wholly circumvent the domestic legal order. Another worrying trend may also be noted in this regard. It appears that investment arbitration is increasingly being used by Czech nationals, who may enjoy BIT protection as the ultimate beneficiary owners of foreign corporate structures.[37] Under current international investment law, such a possibility is generally accepted, unless the specific wording of the BIT to be applied provides otherwise (and unless the foreign element is created *ex post* as in the case of Phoenix).[38] Reportedly, there is even a new area of legal counselling developing which focuses on optimization of international holding structures with respect to the protection of investment under

[33] These six criteria were the following (as a kind of modified Salini test): 1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in host state; 5 – assets invested in accordance with the laws of the host state; and 6 – assets invested *bona fide*.

[34] *Supra note* 31, para 142.

[35] *Supra note* 31, para 144.

[36] One may wonder whether the outcome of the Phoenix dispute would be different if it had been heard by an *ad hoc* tribunal instead of ICSID. It is known that ICSID has been developing its notion of investment that has to be fulfilled in every case as a prerequisite for the Centre to have jurisdiction over a dispute. *Ad hoc* tribunals appear to be less concerned with jurisdictional issues and they generally seem to be interpreting their competence more broadly.

[37] See, for example, the interview with Radek Šnábl from the Ministry of Finance: *Ptali jste se na arbitráže, které hrozí Česku*. Published at www.ihned.cz on 11 January 2011. Apart from the Phoenix case, this was also the case of claimant Georg Nepolsky (although in a slightly different sense, as Mr Nepolsky is a dual national of both Germany and the Czech Republic). As far as is known, it also appears to be the case of claimants that have not lodged arbitration requests as yet – the Cypriot company Forminster Enterprises and Washington Investment Company, registered in the USA.

[38] Decision on Jurisdiction in the ICSID case *Tokios Tokelés v. Ukraine* is often cited as a precedent confirming admissibility of such practice.

BITs.[39] One may wonder whether such a utilization of international dispute settlement mechanisms is still consistent with the original purpose of bilateral investment treaties. But it is perhaps needless to say that such questions should be addressed by policymakers and arbitrators rather than by the private sector.

3.3 The future is in solar energy?

There is no reason to expect that the number of investment disputes against the Czech Republic will decline substantially in the near future. Several investment disputes are pending at the moment, while a number of other investors have notified the state of an investment dispute, or have made it known that they are considering international arbitration. It would not make sense at this point to introduce every potential claimant. However, I consider one specific case to be worth mentioning here – the case of the solar energy sector.

In the last two years the Czech Republic has unwillingly become a European solar "superpower". In order to support renewable energy sources, in 2005, Czech legislation set down a system of compulsory state subsidies for renewable energy production. While the price of solar components has fallen significantly in the meantime, the inflexible legislation did not allow for appropriate adjustments to guaranteed subsidies, and newcomers to the industry were able to generate considerable profits that could be regarded as economically unreasonable. This resulted in a real solar boom – overall installed power has risen from 3.40 MWe in 2008 to an unbelievable 1952.70 MWe in 2011.[40] It became apparent that a further increase in installed power under the same conditions would be unsustainable for the state budget, while concerns about the impact of solar plants on the stability of the grid also emerged.

Throughout 2010, in a panic-like atmosphere the Parliament adopted a package of measures that should provide for setting realistic subsidized prices for new installations and should subject the construction and connection of new installations to stricter conditions. That is well understandable. However, the package also contains a special levy (amounting to 26 percent of income from the sale of electricity p/a) to be paid by the owners of installations that were connected to the grid in 2009 and 2010 during the next three years, allegedly to prevent a dramatic increase in electricity prices for end customers. The element of retroactivity of the measure is apparent. This of course raised fierce opposition from the investors. The act is currently being challenged at the Constitutional Court, but investors, many of them with foreign ownership stakes, have made it clear that they are prepared to initiate investment arbitrations in a short time.[41]

[39] See the interview with the prominent Czech international investment attorney Ondřej Sekanina: *ČR je arbitrážní velmocí. A bude hůř.* Lidové noviny, 12 December 2009.

[40] Source: Energy Regulatory Office of the Czech Republic (www.eru.cz).

[41] Investors in the Solar sector have, in addition to BITs, the possibility to sue the state under the Energy Charter Treaty. This option may be preferable for these claimants as the Energy Charter Treaty allows class actions of investors.

Even though it is not certain at the moment whether the solar levies will result in international arbitrations and therefore it would be premature to predict the outcome of such arbitrations, there is a specific reason why this case is mentioned here – its nature differs in a sense from the factual basis of the other disputes the Czech Republic has faced so far. All of those can be attributed more or less to individual failures, to economic transformation, lack of experience and expertise, the incidental effects of faulty legislature etc. By contrast, the measures in the solar sector are the product of a deliberate state policy, involving in full the highest executive and legislative bodies – these measures were – proposed by the Government,[42] adopted by Parliament and approved by the President, while each of them must have been aware of the potential consequences. The explanation given by the officials is not very convincing given that the original bad decision of the state is being remedied by an exceptional measure at the expense of an entire class of private parties which, regardless of the fact that they would otherwise generate economically unreasonable profits, have been conducting their business activities in accordance with valid rules. Considering the experience of the Czech Republic with investment arbitrations, these findings are somewhat disappointing.

4. Investment protection and the EU

The relationship between EU law and the bilateral investment treaties concluded by EU Member States is a very complex one. These two legal systems interact with each other in many ways and no satisfactory and comprehensive explanation of this relationship has thus far been established by doctrine or by the practice of the parties involved.[43] Various overlaps and incompatibilities had already emerged before the Treaty of Lisbon entered into force in December 2009. Under the Treaty of Lisbon, the Union gained an explicit and exclusive competence for foreign direct investments, which now fall under the common commercial policy, further complicating the matter.

Basically, the question of the relationship between BITs and EU law is twofold. The first problem concerns Member States' BITs with third countries. Although they had always been recognized as valid international agreements concluded without the involvement of the EU, it has been submitted quite recently that certain provisions contained therein may violate EU law. The second problem concerns so-called intra-EU BITs, i.e. the BITs concluded by the Member States with each another,

[42] Although the levies were not included in the original Governmental proposal to the Parliament, they were supported by agreement of coalition parties' leaders and no member of cabinet has shown any kind of reservation to this proposal.

[43] For a theoretical analysis of the issue, see, for instance: Elimansberger, T. *Bilateral Investment Treaties and EU Law*. Common Market Law Review, 46/2009, p. 383-429; Wehland, H. *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?* International and Comparative Law Quarterly, 58/2009, p. 297-320; Söderlund, Ch. *Intra-EU BIT Investment Protection and the EC Treaty.* Journal of International Arbitration 24(5)/2007, p. 455-468; Radu, A. *Foreign Investors in the EU—Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law.* European Law Journal, Vol. 14, No. 2, March 2008, p. 237-260.

particularly the question of their validity and desirability. These questions have had quite an important impact on Czech investment protection practice and have influenced Czech foreign investment policy perhaps more than has been the case of other Member States so far.

4.1 BITs with third countries

For newly acceding EU Member States, the obligation to put their international obligations into accordance with EU law ensues from Article 351 TFEU (former Article 307 EC Treaty). According to this Article, treaties entered into before accession are not affected by the EC Treaty/TFEU, but the Member State is obliged to take all necessary steps to eliminate potential incompatibilities with EU law. Already during pre-accession negotiations, the Commission found the commitments of eight candidate countries from Central and Eastern Europe (including Czech Republic) contained in their BITs with the USA to be inconsistent with their future obligations as EU Member States. As a result of negotiations with the US representation, with the assistance of the Commission, a Memorandum of Understanding was signed in 2003 between the parties concerned regarding the interpretation of some sensitive clauses of US BITs in the light of EU law.[44] The Czech Republic and the USA have later, concluded an Additional Protocol to their BIT, which amended the treaty accordingly in a binding form.

After the accession of the Czech Republic to the EU in May 2004, the compatibility of other BITs with EU law came into question. Already during the pre-accession consultations, the Commission expressed certain reservations with regard to the new Member States' BITs concluded with third countries.[45] However, the Commission apparently did not find the incompatibilities as serious as in the case of the US BIT and did not qualify them as an impediment to the Czech Republic's accession to the EU. In the course of consultations, the Commission pointed out the following incompatibilities:[46]

- Provisions guaranteeing free transfers of capital and payments that do not allow implementation of a decision of the Council restricting the free movement of capital from and to third countries in accordance with Articles (former) 57, 59 and 60 of the EC Treaty;
- BITs do not allow adoption on the basis of Articles (former) 60 and 301 EC of measures protecting essential security interests of the EU;

[44] For more details on the US Memorandum, see: Radu, A. *op. cit. supra note* 43.

[45] Government proposal to the Parliament of the Czech Republic for approval of the Protocol between the Government of the Czech Republic and the Government of the Socialist Republic of Viet Nam on the amendments to the Agreement between the Government of the Czech Republic and the Government of the Socialist Republic of Viet Nam for the Promotion and Reciprocal Protection of Investment, signed on the 21st of March 2008 in Hanoi. Explanatory memorandum. p. 1. Available in Czech at www.psp.cz.

[46] *Ibid.*

- Too narrow a regional integration organization (REIO) exception from the most favoured nation and national treatment clauses.

The reservations of the Commission concerned virtually all BITs that the Czech Republic had entered into with third countries. These reservations on the one hand implied a duty to include "EU clauses" in any future negotiations on new BITs. However, the question of conflicting BITs already in force was more complicated. A decision was to be made at the national level whether to take the relevant steps to remove alleged incompatibilities in existing treaties, or let them be and risk potential infringement proceedings. Several pragmatic arguments would favour the second option. At that time, the problem was of a rather hypothetical nature – the incompatibilities were asserted by the Commission but they had never been subject to a decision or an opinion of the European Court of Justice, the only body competent for a final and binding interpretation of EU law. Moreover, the problem did not concern the Czech Republic or new Member States only – virtually all BITs concluded by Member States with third countries, including the BITs of the original EU 15, would be incompatible with EU law in the sense presented by the Commission. But there were no reports of any other Member State taking relevant steps aimed at solving the incompatibilities. But the most discouraging factor concerned the practical implications of the solution. The problematic BITs could either be unilaterally terminated, or amended by mutual consent of the contractual parties. The first approach would seem to be quite inopportune and could the damage political and economic interests of the state. The second approach – the renegotiation of all existing BITs – would theoretically seem more appropriate, but its implementation would be excessively burdensome, while the final outcome would be difficult to foresee.

Regardless of the practical difficulties, the consensual approach was adopted. In 2005 the Czech Republic sent diplomatic notes to all concerned contracting countries with a proposal to renegotiate the existing BITs in order to put them into compliance with EU law.[47] Since then several successful negotiations have taken place in order to fulfil this "Sisyphean task" and to date the Czech Republic has managed to sign amendments or new agreements putting the respective BITs into compliance with EU law with regard to 22 countries.[48] But it is becoming clear that especially countries with a strong negotiating position are not interested in accepting any amendments of their BITs that are in their essence favourable to the proposing party.

The standard clauses inserted in the BITs by the amendments are the following:

- An extended REIO exception for the most favoured nation and national treatment. Standard REIO exception excludes extension of advantages based upon membership in REIO to the investors of the other contracting party by virtue of MFN and NT standards. The extended REIO exception expressly

[47] *Ibid.*

[48] See Annex 1 to this article.

excludes application of MFN and NT also to advantages based on agreements of the REIO with other countries.[49]

- Exception to free transfer of payments, allowing the Czech Republic to implement the measures of the Council, restricting the capital movements between the EU and third countries, adopted on the basis of Articles 64, 66 and 75 TFEU. To that end, the BIT article on transfers is usually introduced by the sentence *"Without prejudice to measures adopted by the European Community… "*.[50]
- Essential security clause, allowing the implementation of measures based on Article 215 TFEU that sets the procedure for interruption or reduction of economic and financial relations with a third country by the EU, based on a decision made under the scope of the EU's Common Foreign and Security Policy. The respective clause in BITs provides that the parties are not prevented from taking any actions for protection of their essential security interests listed therein, while it further specifies, that essential security interests include interests deriving from membership in REIO. Thus, unlike the exception to transfer, this exception can be referred to by both contracting parties and it need not to be used exclusively in connection with the actions of REIO, but also for protection of the security interest of the state itself.

The exact wording varies in some agreements, probably as a result of negotiations with the respective counterparties.

The correctness of the Czech approach was fully confirmed in March 2009, when the European Court of Justice rendered two identical judgements in infringement proceedings against Austria and Sweden.[51] The ECJ concluded, that it was the duty of Member States to eliminate incompatibilities of the international agreements concluded prior to accession to the EU, and that "…by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with… */the enumeration of contracting parties/* …, the Republic of Austria / the Kingdom of Sweden have failed to fulfil its obligations under the second paragraph of Article 307 EC."[52] A similar judgement was delivered later in infringement proceedings against Finland.[53] It is now therefore clear that Member States maintaining the *status quo* are in breach of EU law.[54]

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[49] Taking the EU as an example, the application of MFN and NT to advantages accorded to Norwegian investors under the EEA Agreement to other investors by virtue of a BIT would be excluded by such a clause.

[50] The contractual imbalance of such provision is obvious. Therefore, the BITs with some countries contain modified wording, allowing reciprocal restriction to the same effect.

[51] Case C-205/06 *Commission v. Republic of Austria* [2009]; Case C-249/06 *Commission v. Kingdom of Sweden* [2009].

[52] *Supra note* 51, para. 1 (both).

[53] Case C-118/07 *Commission v. Republic of Finland* [2009].

[54] However, it should be noted that the question of incompatible international agreements entered into by a Member State after its accession to the EU, relevant for most "old" Member States, is a bit more complicated as literal wording of Article 351 TFEU does not seem to cover such agreements.

4.2 Intra-EU BITs

The situation with respect to intra-EU BITs is even more complicated. Before ten new members acceded to the EU in 2004, there were only two BITs concluded between Member States in force[55] and they had never evoked any notable controversy. After two enlargement rounds in 2004 and 2007, the number of intra-EU BITs suddenly rose to about 190.[56] Soon, the status of these agreements, in particular their validity, applicability and political desirability, became widely discussed.

The issue of intra-EU BITs is quite sensitive from a political point of view, especially as these agreements have been the basis for many investment arbitrations against host states. This fact is an important determinant shaping the positions of the parties concerned. From the beginning, intra-EU BITs have been faced with the animosity of the European Commission. In November 2006, the European Commission sent a Note to the Economic and Financial Committee (ECOFIN), where it wrote that *"there appears no need for agreements of this kind in the single market and their legal character after accession is not entirely clear".*[57] According to the Commission, most of their content was superseded by community law upon accession. Furthermore, there was a risk of arbitrations taking place without taking proper account to EU law, circumventing the interpretative role of ECJ. Therefore the Commission recommended to the Member States to formally terminate such agreements.[58]

However, the Commission's initiative has not elicited a positive reaction from all Member States, especially as far as the "old" Member States are concerned, even though the Commission has been regularly repeating its appeal. The position of the parties concerned on the matter has been so far mostly formed by a mixture of legal arguments and pragmatic reasons. So was the case of the Czech Republic. In the landmark investment arbitration *Eastern Sugar v. Czech Republic*, which took place shortly after its accession to the EU, the Czech Republic based its jurisdictional defence on an EU law objection, arguing that after accession, the BIT with the Netherlands was no longer applicable.[59] However, the tribunal rejected the Czech Republic's arguments entirely and accepted its jurisdiction. According to the tribunal, the BIT had neither been terminated by the parties expressly, nor had it been implicitly superseded by *acquis communitaire*. Considering the provision of Article 59 of the Vienna Convention on International Treaties, the tribunal found that (i) the EC Treaty and the BIT do not cover same subject matter, (ii) a common intention of the Czech Republic and the Netherlands to supersede the BIT had not been established and (iii) the EC Treaty and the BIT are not incompatible with each other.[60] Although the reasoning of

[55] BIT between Germany and Greece and BIT between Germany and Portugal. However, these agreements were concluded before Greece and Portugal respectively acceded to the EC.

[56] Wehland, H. *op. cit. supra note* 43.

[57] *Eastern Sugar B.V. v. Czech Republic*, UNCITRAL Arbitration. Partial Award (2007), para. 126.

[58] *Ibid.*

[59] *Ibid.*, para. 97.

[60] Fort the tribunal's reasoning on jurisdiction, see *supra note 57*, paras. 114-181.

the tribunal in *Eastern Sugar* was not comprehensive, it has been often cited in literature as proof of the validity and applicability of intra-EU BITs. The conclusion upholding the validity of these agreements has been affirmed, since the Eastern Sugar award, also by investment tribunals in other cases.[61] Therefore, it should be safe to say today that the validity and applicability of intra-EU BITs, at least from the perspective of public international law, is supported by established case-law of international arbitration tribunals.[62]

Anyway, political considerations may produce different conclusions than considerations made under international law. Having experienced painful arbitrations, while others were still in progress, the need to maintain BITs with EU Member States was being seriously reconsidered by the Czech Republic and its officials. After the stabilization of the domestic legal and judicial system and particularly after the accession of the country to the EU, the positive effect of BITs on inflow of foreign investments was put in doubt. On the other hand, the budgetary implications of lost arbitrations were measurable quite precisely. Encouraged by the supportive standpoint of the Commission, a decision was made by the Czech Government to terminate the existing BITs with EU Member States. After some discussions between the involved Governmental departments,[63] in July 2008 the Government finally approved the procedure for terminating BITs with EU Member States[64] and in December 2008 it authorized the Minister of Foreign Affairs to conclude termination agreements by an exchange of verbal notes.[65] A consensual solution, based on termination by mutual consent of the parties to the agreements, was adopted instead of unilateral termination, probably for two main reasons. First, unilateral termination, although possible under all BITs, might be perceived as a rather unfriendly act by other Member States. Second, all BITs provide for a safeguard period in case of termination (usually 10 years) – during this period, investments are still protected although the BIT itself has been terminated, entailing the possibility of arbitrations. Therefore, at the beginning of 2009, the Czech Republic approached EU Member States with a proposal to terminate the BITs by consent of the parties.[66] The verbal notes also

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[61] A similar conclusion was reportedly reached in a partial award in case *Binder v. Czech Republic*, and recently in case *Eureko v. Slovak Republic*, where the tribunal provided comprehensive reasoning on the issue.

[62] On the other hand, should the question be decided by the CJEU, primarily taking account of EU law, the result may be very different.

[63] To the best of the author's knowledge, the idea of termination of intra-EU BITs was supported by the Ministry of Finance, responsible for foreign investments agenda, while the Ministry of Foreign affairs was slightly hesitant to agree with such solution.

[64] Resolution of the Government of the Czech Republic No. 853 dated 8 July 2008. Available in Czech at www.vlada.cz.

[65] Resolution of the Government of the Czech Republic No. 1529 dated 1 December 2008. Available in Czech at www.vlada.cz.

[66] Government proposal to the Parliament of the Czech Republic for approval of the Agreement between the Czech Republic and the Kingdom of Denmark on Amendment and Termination of the Agreement between the Czech and Slovak Federative Republic and the Kingdom of Denmark on Promotion and Reciprocal Protection of Investments signed on 6 March 1991 in Prague, concluded by exchange of

included a proposal to expressly exclude the applicability of the safeguard period provided for in the respective BIT.[67] The official reasoning for termination refers to EU law aspects and to the position of the Commission.[68] But the intention to disengage from the burden of further investment arbitrations as the main motivating factor behind this initiative can hardly be unnoticed.[69]

Although the consensual approach may be well reasoned, it entails similar disadvantages as the renegotiation of third countries' BITs, as discussed above. To date, the Czech Republic has managed to terminate BITs with Italy, Denmark, Slovenia, Malta and Estonia, while the termination of the BIT with Ireland is in the process of ratification. However, the termination of some intra-EU BITs is apparently not going to proceed that smoothly. This may concern in particular the capital exporting countries, which find the current regime of BIT protection advantageous for their investors (or for special purpose companies established there). For instance, the position of the Netherlands, the seat of many holding companies administering investments elsewhere in the world, as recently expressed in arbitration proceedings in case *Eureko v. Slovak Republic*, is significant in this regard.[70] It seems likely that without a more active involvement of the Commission or the CJEU, the phenomenon of intra-EU BIT protection is not going to disappear in a short time.[71]

4.3 Treaty of Lisbon and beyond

Despite some problematic issues, the competence of Member States to enter into investment protection agreements with third countries as such had never been seriously disputed.[72] The situation, however, changed significantly with the entry of the Treaty of Lisbon (*ToL*) into force in December 2009. Under ToL, the EU gained

verbal notes (5th electoral term, Parliamentary printing No. 797). Explanatory memorandum. Available in Czech at www.psp.cz.

67 *Ibid.*

68 *Ibid.*

69 Although the officials try to be careful in their statements and are speaking only about the "redundancy" of intra-EU BITs, but it is usually in the context of debate about arbitrations against the Czech Republic and about disadvantageous BITs from early 90's. See for instance. *Supra note* 37; Vláda vypoví smlouvy o ochraně investic, Hospodářské noviny, 28 August 2008; TV discussion at TV station Z1, Téma Z1 byznys a politika, 7 December 2009, transcript available at www.mfcr.cz.

70 The Dutch Government presented a series of arguments to support the validity and applicability of the BIT between the Netherlands and Slovakia. See: *Eureko B.V. v. Czech Republic*, Permanent Court of Arbitration Case No. 2008-13. Award on Jurisdiction, Arbitrability and Suspension (2010), paras. 155-166

71 It is noteworthy that the Commission, although verbally strongly disfavouring the existence of intra-EU BITs, has so far failed to take any action against non-cooperative Member States comparable to the infringement proceeding against Austria, Sweden and Finland in the case of incompatible BITs with third countries.

72 Nevertheless, in past few years, the EU has been gradually attempting to develop its own foreign investment policy on the basis of its internal competences, particularly concerned with investment liberalization and market access (i.e. the pre-investment phase), by inserting the respective provisions in free trade and association agreements with third countries. These provisions have, however, not concerned investment protection in a strict sense and can be regarded as complementary to Member States' BITs (i.e. the post-investment phase).

explicit competence in the field of foreign direct investments, which now fall under common commercial policy.[73]

Interpretation of the new competence is not entirely clear and raises several questions, which cannot be discussed in detail here.[74] The competence in matters of common commercial policy is exclusive – Member States are no longer allowed to act in this field, except for cases when they are expressly authorized by the EU. However, it is at the very least doubtful whether the new competence clearly covers the entire scope of Member States' BITs currently in force. First, it is limited to *direct* investments, commonly understood as investments over which the investor exercises decisive control.[75] By contrast, BITs regularly protect *portfolio* investments as well, the Czech Republic not being an exception. Second, the new external competence does not correspond to the internal powers of the Union. Paragraph 6 of Article 207 TFEU provides that the exercise of the competences under common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation. In this regard, especially standards of fair and equitable treatment, full protection and security, as well as the rules on expropriation, the cornerstones of every BIT, might seem problematic to be externally regulated by the Union on an exclusive basis. One may ask how the Union can effectively enforce internal observance of its international commitments if it probably lacks the respective internal competence and is not allowed to harmonize the law of Member States by virtue of external action. Third, the issue of division of responsibility between the Union and Member State under the investor-to-state dispute mechanism will have to be resolved. So far, most investment disputes against EU Member States have resulted from actions and omissions of states that had nothing to do with EU law and it is unlikely that the Union would be willing to accept responsibility for such wrongdoings, even though it would be based on investment agreements concluded under its exclusive competence. All these uncertainties lead to the conclusion that should the investment agreements concluded by the EU contain typical standards of treatment and investor-to-state dispute settlement mechanisms, providing a level of protection comparable to current BITs, they will most likely have to be concluded as mixed agreements, with

[73] Article 207 (ex Article 133), paragraph 1 of the Treaty on Functioning of the European Union provides: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies…" (*emphasis added*).

[74] For a comprehensive analysis of new competence see: Ceyssens, J. *Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution.* Legal Issues of Economic Integration 32(3), 2005. p. 259-291.

[75] As opposed to direct investments, portfolio investments that are understood to include equity securities and debt securities in the form of bonds and notes, money market instruments and financial derivatives such as options. See: IMF Balance of Payments Manual. 1993 Edition. p. 91.

the participation of Member States. Of course, the possibility of a different factual development of affairs cannot be excluded.

To provide a basic idea about its intentions, in July 2010 the Commission published a communication titled "Towards a comprehensive European international investment policy" (the Communication).[76] It is clear from the document that the Commission plans to craft a policy that should integrate investment liberalization and investment protection in the form of binding commitments under international law. The substantive rules of new agreements should, according to the Commission, follow the practices of the Member States' BITs and should include standards of non-discrimination, fair and equitable treatment, full security and protection, rules for expropriation and, as a matter of effective enforceability, also the investor-to-state settlement mechanism. However, while revealing ambitious plans, the Communication comes up somewhat short in tackling the problematic issues of division of competences and international responsibility, what may indicate that EU officials are also struggling in their search for a satisfactory in-depth explanation of the new competence.

The question still remains what is going to happen to the existing third countries' BITs. It is clear that these agreements are in no way compatible with the new delimitation of external competences, while their immediate termination, leading to an erosion of investors' rights, would also not be desirable. Therefore, the Commission presented, together with the above-mentioned Communication, the Proposal for a Regulation establishing transitional arrangements for BITs between Member States and third countries (the Draft Regulation).[77] The Draft Regulation provides for a grandfathering regime under which the Member States are authorised to maintain in force bilateral agreements relating to investment that have been notified to the Commission. However, the Commission has reserved for itself a competence to withdraw the authorization in specified cases, most notably if an agreement conflicts with EU law other than as concerns the incompatibilities arising from the allocation of competence between the Union and its Member States. The Draft Regulation also maintains the possibility of Member States to amend existing BITs or conclude new ones, subject to authorization by the Commission. This procedure should in particular allow Member States to renegotiate the existing agreements in order to bring them into compliance with EU law (meaning, of course, provisions other than those allocating external competences).[78] The existing Member States' BITs should be gradually replaced by investment agreements concluded at the EU level.

The implications of the new regime for the Czech Republic, as well as for other Member States, are significant. Although the Regulation has not yet entered into

[76] Communication from the Commission to the council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a comprehensive European international investment policy. COM(2010)343 final.

[77] Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries. COM(2010)344 final.

[78] *Supra note* 77. Explanatory memorandum, p. 2.

force, the Commission can be expected to be applying its principles already. It is obvious that the Czech Republic will now need an express authorization to take any relevant step concerning foreign investments, such as negotiation or signing of a BIT with a third country or amending it. Apparently, the Commission is supportive to continuing renegotiations of third countries' BITs that are inconsistent with rules on free movement of capital – this follows not only from the documents presented by the Commission, but it seems to be confirmed by practice, as several "EU" amendments of existing BITs have been submitted to the Czech Parliament recently.

It remains to be seen whether the Commission will let Member States conclude new BITs in their own capacity. Such an idea might turn out to be more realistic than it seems. Immediate development of an EU foreign investment policy can hardly be expected – the development of a coherent EU investment policy will certainly take some time, while in the short and medium term the investment negotiations will concentrate on the EU's strategic partners, such as China, Russia, India or Mercosur.[79] It may prove to be unwise to let the relations with other countries stay "frozen" at the current level until it is their turn to negotiate with the EU. This might be an area for Member States to negotiate their own investment deals, given their higher flexibility. Anyway, the Commission can be expected to play an active role in any such negotiations, asserting that the interests of the EU be fully respected.

While revealing its ambitious plans, the Commission steered clear of intra-EU BITs, keeping silent on the matter.[80] Anyway, if the Commission wants to craft a consistent foreign investment policy, it will probably not be able to avoid tackling this issue. The parallel existence of an investment agreement concluded by the EU with third countries and international agreements on same subject matter concluded between its Member States is hardly sustainable over a longer term. The Czech Republic has continued in its effort to terminate intra-EU BITs even after the entry of ToL into force. But it is becoming apparent that consensual termination of some BITs will be not achievable without more tangible support from EU bodies. It will be interesting to see whether the Commission will finally decide to employ a more stringent approach towards the Member States not listening to its appeals and whether it will be capable of making them abandon the intra-EU BIT protection of their investors.

5. Conclusion

During the last twenty-year period the Czech Republic has experienced a very turbulent development of international investment protection on its territory, entailing the conclusion, renegotiation and termination of BITs, as well as a number of successful and unsuccessful investment arbitrations. There are probably not many

[79] *Supra note* 76, p. 7.

[80] To avoid any eventual doubt, the Communication and Draft Regulation expressly state, that they do not concern intra-EU BITs.

other countries where bilateral investment treaties played such an important role and had such a significant impact on public affairs.

The basis for this development was laid down in early 90's, when the former Czechoslovakia in a very short time concluded number of BITs with developed countries. Negotiation and approval of these agreements was accompanied by virtually no serious public debate and the Czechoslovak negotiators were at that time probably more or less only accepting the models put forward by the counterparties. However, it would be inappropriate to criticize such treaty practice from today's perspective. After the change of the political and economic system, an immediate inflow of foreign capital was vital for the transforming economy and BITs appeared to be a quick and cost-effective solution. Moreover, in the early 1990's the possibility of investment arbitrations was generally not perceived as a real threat. According to available sources, there had been only one investment arbitration award issued worldwide before 1990. Considering this circumstance, the utilization of dispute settlement under BITs by investors was perceived as a somewhat hypothetical possibility which, at that time, could have been reasonably expected to occur only rarely. There is an often-raised argument that the agreements concluded were disadvantageous for the Czech Republic and that negotiators should have paid more attention to protection of state interests. Although one may concur with this argument to a certain extent, one may question the practical feasibility in the early 1990's, given the lack of any experience with these kinds of agreements and the weaker negotiating position of the former Czechoslovakia with regard to developed countries. As far as the investment arbitrations that occurred subsequently are concerned, it seems quite doubtful that the Czech Republic would have been more successful if the respective BITs had been negotiated more carefully.

It may seem surprising that the negative experience with investment arbitrations apparently did not lead to any substantial adjustment of the Czech model BIT in order to make it more considerate to the interests of the host state. This may be probably explained by the fact that the position of the Czech Republic in negotiations of new BITs has changed. Compared to the situation in the early 1990's, most BITs have been currently concluded with developing countries. In these negotiations, the Czech Republic is in the position of a capital exporting country, whose aim is of course to provide its own investors and their investments abroad with the widest possible protection.

A crucial part of the Czech experience with BITs and an important factor shaping the Czech foreign investment policy were the investment arbitrations the Czech Republic faced during the past years. The most obvious observation to be made in this regard is that number of disputes against Czech Republic is one of highest in the world and considerably higher than in the case of countries in a comparable position. It is not easy to find a reliable explanation for this fact. Maybe no explanation can be found at all. The current number of closed investment disputes (18) is high in relative terms when compared to other countries. But it does not seem to be that high in absolute terms, especially when considering the openness of the Czech economy

and the number of foreign investors operating in the country. Statistics show that the substantial increase in investment disputes has been an overall trend observed worldwide in past few years, indicating that investors have "discovered" previously neglected investment arbitration as an effective tool for pursuing their claims against host states. It should also be borne in mind that the investment environment in the Czech Republic was impacted by the process of economic, political and legal transformation. This process, alongside with the inexperience and immaturity of officials and politicians and their individual failures, often produced results that were incompatible with the strict standards stipulated in investment treaties. This was apparently the case of the first "big" arbitrations in the cases of CME and Nomura, as well as some others. However, not all disputes can be attributed to the effects transformation, and today, more than 20 years after the change of regime, this factor seems to have little relevance while the number of investment claims against the state does not seem to be decreasing. Moreover, the factor of transformation does not give a satisfactory explanation for the higher number of arbitrations in comparison with other transition economies in the region, having been in similar position as the Czech Republic.

It is submitted in this article that one of the decisive factors behind the relatively high number of investment disputes against the Czech Republic were the large cases of CME and Nomura and the way they had been presented to the public. The success of the claimants in these cases and the large amounts they were able to get from the state ultimately seem to have encouraged other claimants by showing them that investment arbitration can be an effective way to seek compensation from the state outside its jurisdiction, or a way to at least strengthen their negotiating position in order to achieve settlement. The number of arbitrations grew rapidly after the CME award. While some of these claimants were successful, the state has been able to achieve more favourable awards recently. It would not be appropriate to generalize and talk about a "trend", as the circumstances of each case are specific. Nevertheless, the recent development indicates that regardless of the exceptional nature of investment arbitration, claimants feeling aggrieved by the state tend to increasingly approach investment tribunals with kinds of cases that are more or less speculative or unfounded under bilateral investment treaties.

Anyway, there is no reason to expect a significant decrease in investment claims in the near future despite the fact that cases involving a manifest violation of investors' rights are less likely to occur today. Investment arbitration in its current form seems to have developed in the eyes of investors from an exceptional mechanism into a regular, if not preferable alternative to the domestic judicial system. While ten years ago investment tribunals were solving exceptional cases of large enterprises involved in complicated relations with the state, today's claims generally concern more ordinary situations, such as unsuccessful tender applications, administrative permits, course of bankruptcy proceedings or commercial relations with state institutions. In addition, investor-state dispute settlement mechanisms appears to be no longer accessible for large enterprises only, but may be attractive also for smaller claimants, as seen on

the example of Pren Nreka, an innkeeper who was able to win his investment claim worth roughly USD 1.5 million.

The experience with investment arbitrations is closely related to initiatives recently taken by the Czech Republic on the international level, especially to its "EU-conformity" positions. Most significant in this regard is the effort to terminate the BITs concluded with other EU Member States. Although the official reasoning refers to the incompatibility of these agreements with EU law, the officials can hardly hide their main intention to get rid of unwanted arbitration clauses. One would sympathize with this effort. At this stage, the Czech Republic is generally perceived as a standard democracy with a favourable investment climate. Today, intra-EU BITs can hardly be expected to attract any additional foreign investors, except for investment protection optimized structures. Moreover, the existence of such agreements within the single market, especially as regards the possibility of intra-EU investment arbitrations, produces deficiencies that are not acceptable under the principles of EU law and is untenable long-term also from a political perspective. However, a critical remark is suggesting itself at this point concerning the recent case of solar energy subsidies, as discussed above. This case has so far indicated that the Czech Republic has not learnt much from its experience, putting the question of the legitimacy of intra-EU BITs in a slightly different light.

In any case, the days when the Czech Republic was deciding on its own foreign investment policy are coming to an end. Any future development in this area will in the longer term depend on the European Union, which has under the Treaty of Lisbon gained exclusive competence for foreign direct investments. It will certainly take some time until the scope of this competence is clarified and until a common European investment policy is fully developed. It is possible that for some time the Commission will leave a certain degree of freedom to Member States for their own activities. However, greater involvement of the EU can be expected in every investment-related matter, until the Union ultimately takes over the foreign investment agenda completely.

ANNEX 1: List of bilateral investment treaties concluded by the Czech Republic[81]

A. BITs in force

Contracting state	Signed	Force
Austria	1990	1991
Albania	1994	1995
Argentina	1996	1998
Australia	1993	1994
Bahrain	2007	2009
Belgium-Luxembourg	1989	1992
Belarus	1996	1998
Bosnia and Herzegovina	2002	2004
Amendment	*2009*	*2010*
Bulgaria	1999	2000
Cambodia	2008	2009
Canada	1990	1992
Costa Rica	1998	2001
Croatia	1996	1997
Amendment	*2008*	*2009*
Cyprus	2001	2002
Egypt	1993	1994
Finland	1990	1991
France	1990	1991
Georgia	2009	2011
Germany	1990	1992
Guatemala	2003	2005
Greece	1991	1992
Hungary	1993	1995
Chile	1995	1996
China	2005	2006
India	1996	1998
Amendment	*2010*	*2011*
Indonesia	1998	1999
Ireland	1996	1997
Israel	1997	1999
Jordan	1997	2001
Amendment	*2009*	*2010*
Kazakhstan	1996	1998
Kuwait	1996	1997
Latvia	1994	1995
Lebanon	1997	2000
Lithuania	1994	1995
Macedonia	2001	2002
Amendment	*2009*	*2010*
Malaysia	1996	1998
Mauritius	1999	2000
Mexico	2002	2004
Moldova	1999	2000
Mongolia	1998	1999

Contracting state	Signed	Force
Montenegro	1997	2001
Morocco	2001	2003
Netherlands	1991	1992
Nicaragua	2002	2004
Norway	1991	1992
Panama	1999	2000
Paraguay	1998	2000
Peru	1994	1995
Philippines	1995	1996
Poland	1993	1994
Portugal	1993	1994
PRK	1998	1999
Amendment	*2008*	*2010*
Romania	1993	1994
Amendment	*2008*	*2009*
Russia	1994	1996
Salvador	1999	2001
Saudi Arabia	2009	2011
Serbia	1997	2001
Amendment	*2010*	*2011*
Singapore	1995	1995
South Africa	1998	1999
South Korea	1992	1995
Spain	1990	1991
Sweden	1990	1991
Switzerland	1990	1991
Syria	2008	2009
Tajikistan	1994	1995
Thailand	1994	1995
Tunisia	1997	1998
Turkey	1992	1997
Ukraine	1994	1995
Amendment	*2008*	*2010*
United Arab Emirates	1994	1995
United Kingdom	1990	2011
Uruguay	1996	2000
USA	1991	1992
Amendment	*2003*	*2004*
Uzbekistan	1997	1998
Amendment	*2009*	*2011*
Venezuela	1995	1996
Vietnam	1997	1998
Amendment	*2008*	*2009*
Yemen	2008	2009
77 bilateral investment treaties in total		

[81] Source: Ministry of Finance of the Czech Republic (www.mfcr.cz), as of 27 March 2011.

B. Signed agreements not yet in force

Contracting state	Signed	Note
Albania	2010	Amendment
Canada	2009	New agreement
Guatemala	2009	Amendment
Kazakhstan	2010	Amendment
Kuwait	2010	Amendment
Lebanon	2010	Amendment

Contracting state	Signed	Note
Montenegro	2010	Amendment
Moldova	2008	Amendment
Morocco	2010	Amendment
Turkey	2009	New agreement
Uruguay	2009	Amendment

C. Terminated / to be terminated agreements

Contracting state	Termination date
Denmark	18 Nov 2009
Estonia	20 Feb 2011
Ireland	not yet ratified
Italy	30 Apr 2009

State	Termination date
Malta	30 Sep 2010
Slovakia*	1 May 2004
Slovenia	13 Aug 2010

* The BIT with Slovakia is a special case; its validity had been subject to disagreement between the contracting parties.

ANNEX 2: Overview of investment disputes against the Czech Republic (by claimant)

A. Finished

1. Ronald S. Lauder

BIT: *USA* **venue/rules:** *UNCITRAL* **claimed amount:** *unspecified*

Grounds: *Actions of the Media Council concerning the broadcasting license for private TV station (TV NOVA). Media Council allegedly coerced investor to give up the legal framework protecting its investments, allowing the former partner of the investor to deprive the investment of its economic value.*

Outcome: *Claim rejected on merits (2000)*

2. CME Czech Republic

BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *USD 500 million*

Grounds: *Actions of the Media Council concerning the broadcasting license for private TV station (TV NOVA). Media Council allegedly coerced investor to give up the legal framework protecting its investments, allowing the former partner of the investor to deprive the investment of its economic value.*

Outcome: *Violation of the Treaty by the respont, compensation of USD 270 million awarded (2003)*

3. William Nagel

BIT: *United Kingdom* **venue/rules:** *SCC* **claimed amount:** *USD 30 million*

Grounds: *Claimant was interested in license for operation of a GSM network and concluded a cooperation agreement with Czech Radio Communications. The Ministry of Economy then changed the policy and chose another applicant; the agreement with the claimant was terminated.*

Outcome: *Claim dismissed as not concerning an investment (2003)*

4. Saluka Investments

BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 40 billion*

Grounds: *Non-provision of state aid to IPB, one of four major Czech banks, and further events leading to imposition of forced administration and sale of the bank.*

Outcome: *Partial award – violation of the Treaty by the respondent (2006). Parties later settled for the amount of CZK 3.6 billion.*

5. Eastern Sugar

BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *EUR 96 million*

Grounds: *Alleged discrimination towards the claimant's daughter company in allocation of sugar production quotas.*

Outcome: *Violation of the Treaty by the respondent, compensation of EUR 25 million awarded (2007).*

6. K+ Venture Partners

BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 140 million*

Grounds: *Unpaid contractual bonuses for management of public funds aimed at supporting small and medium enterprises.*

Outcome: *Parties settled, conditions undisclosed (2007).*

7. Pren Nreka
BIT: *Croatia* **venue/rules:** *UNCITRAL* **claimed amount:** *unknown*
Grounds: *Invalidity of lease contract between the company of the claimant and a state educational organization invoked by the latter and confirmed by Czech courts.*
Outcome: *Violation of the Treaty by the respondent, compensation of approx. USD 1.5 million awarded (2008)*

8. Mittal Steel
BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 30 billion*
Grounds: *Alleged discrimination during privatization of Vítkovice Steel ironworks by imposing condition that applicant shall not be party to any dispute against the state nor against the privatized company.*
Outcome: *Parties settled, the state sold to the claimant its stake in another company (2008)*

9. European Media Ventures
BIT: *Belgium-Luxembourg Economic Union* **venue/rules:** *UNCITRAL* **claimed amount:** *USD 45 million*
Grounds: *Failure to transfer the TV broadcasting license to the company owned by the claimant.*
Outcome: *Claim rejected on merits (2009)*

10. Phoenix Action
BIT: *Israel* **venue/rules:** *ICSID* **claimed amount:** *CZK 951 million*
Grounds: *Length of civil court proceedings in a commercial dispute, freezing of funds in connection with criminal investigation.*
Outcome: *Claim dismissed on jurisdiction (2009)*

11. Invesmart
BIT: *Netherlands* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 7 billion*
Grounds: *Refusal to provide state aid to bank Union Banka, further events leading to bankruptcy of the bank.*
Outcome: *Claim rejected on merits (2009)*

12. Georg Nepolsky
BIT: *Germany* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 970 million*
Grounds: *Alleged discrimination of the claimant, who bought a certain part of land with an intention to extract and marked mineral water located there, but failed to obtain a permit from water authorities.*
Outcome: *Claimant withdrew the claim (2010)*

13. Frontier Petroleum Services
BIT: *Canada* **venue/rules:** *UNCITRAL* **claimed amount:** *USD 20 million*
Grounds: *Failed investment in a bankrupt aircraft company, refusal of Czech courts to enforce foreign commercial arbitration award in Czech Republic.*
Outcome: *Claim rejected on merits (2010)*

B. Pending[82]

14. Rupert Joseph Binder

BIT: *Germany* **venue/rules:** *UNCITRAL* **claimed amount:** *CZK 2.3 billion*
Grounds: *Alleged illicit practices of Czech customs authorities impeding the business of the claimant's company providing assistance with customs clearance proceedings, leading to its bankruptcy.*
Outcome: *Partial award issued – tribunal accepted jurisdiction (2007). Further proceedings pending.*

15. ECE Group

BIT: *Germany* **venue/rules:** *unknown* **claimed amount:** *CZK 1.8 billion*
Grounds: *Lengthy and inconsistent conduct of construction authorities towards a property development company which was intending to build a shopping centre.*
Outcome: *Pending*

16. Peter Franz Vöcklinghaus

BIT: *Germany* **venue/rules:** *ICC* **claimed amount:** *CZK 982 million*
Grounds: *Claimant owned 50% of the company V.P. Cihelny, building a golf course. The company went bankrupt and the golf course was auctioned off to a third party, allegedly fraudulently and for a fraction of its value.*
Outcome: *Pending*

17. InterTrade

BIT: *Germany* **venue/rules:** *unknown* **claimed amount:** *USD 20 million*
Grounds: *Alleged discrimination of claimant's daughter company CE WOOD in a tender for cutting the wood in state owned forests.*
Outcome: *Pending*

18. Konsortium Oeconomicus

BIT: *Switzerland* **venue/rules:** *unknown* **claimed amount:** *CZK 710 million*
Grounds: *The claimant advanced a loan to a company called Eco Gaia for the construction of an incineration plant, but the debtor went bankrupt. The claimant alleges that the loan was guaranteed by the state.*
Outcome: *Pending*

[82] Several other investors have notified the Czech Republic of the existence of investment disputes, but have not lodged a request for arbitration thus far.