The current status of protection scope: outlook on the future

Introduction

After the region of the former socialist countries begun to change at the end of 1980´s (eighties) and during the nineties, the Czech Republic begun to open its economy in order to attract foreign direct investment (FDI) into the country.

In accordance with the statistics of the United Nations Conference on Trade and Development (UNCTAD), developed countries continued to attract more than four fifths of world-wide foreign direct investment inflows in 1990. The European Community, Japan and the United States accounted for 70 per cent of world-wide inflows.

Central and Eastern Europe was also likely to assume an increasing importance as a host region for foreign direct investment. The number of joint ventures and wholly-owned affiliates registered in this region doubled between the beginning of 1991 and January 1992 reaching a total of over 34,000, involving foreign equity commitments of over $9 billion. The amounts actually invested, however, remained small. With improvements in political and economic conditions, cumulative foreign direct investment flows to the region could have raised to exceed $50 billion during the 1990s, an estimate based on standards of foreign direct investment flows to Brazil, Mexico and Portugal in the 1980s – the countries with similar per capita levels of gross domestic product as the Central and Eastern European region.

The growth of global foreign direct investment was four times faster than domestic output during the second half of 1980s, twice as fast as domestic investment, two-and-a half times as fast as exports and one-and-a-half times as fast as technology payments (measured by royalties and licence fees).[1]

Historical Overview

In the early 1960s, developed countries embarked upon a process of gradual investment liberalization. The creation and growth of the European Economic Community (as it was then called), established in 1957, initiated a movement towards

[1] UNCTAD,World Investment Report 1992, Transnational Corporation as Engines of Growth, United Nations, Geneva and New York, p. 5 -7.

regional economic integration, which has considerably affected the situation of foreign direct investment.

On a worldwide basis The one successful effort was directed at investment protection. This was achieved at the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in 1965, under auspices of the World Bank. The ICSID Convention has currently 157 signatory States. Of these, 147 States have also deposited their instruments of ratification, acceptance or approval of the Convention. [2]

By the end of the 1970s, the developed countries had fully recovered from the "oil shock". The debt crisis in the developing countries, including several of the oil-producing ones, made foreign direct investment more desirable: it also did not burden the country as much with debt, and brought additional contributions to the host economy, in terms of know-how, technology, skills, and access to markets.

In the 1980s, the national and international policy on foreign direct investment tended to establish international rules on the subject.
Since the end of the 1990s, the national and international policy has been focusing on the most efficient ways of attracting foreign direct investment and gaining benefits from it.

The period from 1991 to 2003 had been a time of investment liberalization, promotion and protection: of the 1,885 national foreign direct investment policy changes identified for, 94 per cent went in the direction of creating a more favourable climate for foreign direct investment. ..[3]

[2] http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home

[3] INTERNATIONAL INVESTMENT AGREEMENTS:KEY ISSUES Volume I, UN, New York, Geneve, 2004, page 5

Czech Republic has dismantled restrictions on foreign direct investment and now offers guarantees, both national and international, against measures seriously damaging the investors' interests in order to attract investments.

While the BITs are by no means identical in their scope and language, they are by and large fairly similar in their import and provide important partial elements of the existing legal framework. An extensive network of bilateral investment protection treaties has come into existence, which are standardized but they are able to be adapted to special circumstances. Restrictions on the operations of foreign affiliates are considerably eliminated; investors are fully allowed to transfer freely their profits and capital out of the country.

The entry regulations imposed earlier have been eliminated.

The host country accepted the international arbitration for resolving conflicts between investors and the host Government.

At the same time the Czech Republic has changed the climate of protection of foreign direct investment, the multinational levels have not yet reached such policy in general multilateral instruments.

General context of BIT with the international law

The international legal frameworks for foreign direct investment consist of many kinds of national and international rules and principles. The structure depends on the interchange and mutual affect of customary international law and national laws while the substance relies on a multitude of international investment agreements and other legal instruments, specifically on bilateral investment treaties.

The term “international investment agreement” is broader than “bilateral investment treaty” (BIT), and encompasses a number of regional or multilateral instruments on investment in addition to standard bilateral treaties. Although more than 98 per cent of known international investment agreements will be bilateral investment treaties, the

term international investment agreement is used because it is typically the small number of regional or multilateral instruments which offer special and differentiated treatment.[4]

From the perspective of international law, the national legislation may be understood as being founded on customary law principles, on what they allow or forbid. From the viewpoint of international law, it is from this principle that flows the power of the State to admit or exclude aliens (whether physical persons or companies) from its territory, to regulate the operation of all economic players, and to take the property of aliens in pursuit of public purposes.

On the one hand, the principle of territorial sovereignty establishes that States exercise their exclusive jurisdiction over persons and property in its territory. On the other hand, the principle of nationality recognizes that each State has an interest in the proper treatment of its nationals and their property abroad (i.e. by and within other States) and may, through the exercise of diplomatic protection, invoke the rules concerning the responsibility of States for injuries to aliens and their property in violation of international law[5].

The exact contents of customary rules and principles are not clear and definite, and at the same time no national norm can be understood, nor its effects defined, without express or implied reference to the international law background.

They are the most effective means for developing and applying international norms, with respect to foreign direct investment as in other areas. These norms are the ground of international economic (investment) law.

Thus the modern international economic (investment) law is largely based on international agreements, at the first range the BIT. Their contents reflect the agreed positions of more than one State; they are legally binding, and States are under a duty to conform to their provisions.

---

[4] Bilateral Investment Treaties and Development Policy-Making, Luke Eric Peterson, International Institute for Sustainable Development, November 2004, (see footnote 14)

[5] Sornarajah, M. (1986a). "State responsibility and bilateral investment treaties", Journal of World Trade Law, Vol. 20, pp. 79-98.

With respect to foreign direct investment, no international convention dealing with foreign direct investment exists, because various ones have not yet met with success.

Some of the multilateral agreements in existence deal with broader issues that are important for foreign direct investment i.e. the international conventions concerning intellectual property, within the framework of the World Intellectual Property Organization (WIPO). The World Trade Organization (WTO) serves also the purpose of protection of foreign direct investment. The treaty 1995 General Agreement on Trade in Services (GATS) covers the multilateral trading system to service sector. All members of the WTO are signatories to the GATS. The basic WTO principle of most favoured nation applies to GATS as well. However, upon accession, Members may introduce temporary exemptions to this rule.

Other multilateral agreements, although not dealing with the foreign direct investment process in its entirety, address important aspects of it. Thus, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), concluded under the auspices of the World Bank and administered by it, provides a comprehensive framework for the settlement of disputes. It is complemented by other agencies dealing in particular with international commercial arbitration.

Bilateral investment treaties

The expanding BIT network has developed principles directly concerned with the treatment and protection of foreign direct investment due to the fact that the foreign investors are often sceptical toward the quality of the domestic institutions and the enforceability of the law in host countries.

BITs are a principal element of the current framework for foreign direct investment in the host country. Their principal focus has been the wider context of policies that favour and promote foreign direct investment: the protection of investments against nationalization or expropriation and assurances on the free transfer of funds and provision for dispute-settlement mechanisms between investors and host States.

What is the practice of protection by the Czech Republic based on the most frequent treaties in the arbitration — specifically those concluded between the Czech Republic and Belgium-Luxembourg[6], Canada[7], Croatia[8], Germany[9], Israel[10], Netherlands[11], the United Kingdom[12] and the United States[13], and with Austria, China, France, Korea and Switzerland among others.

A reason for the conclusion of BITs by the Czech Republic has been the stimulation of new investment flows between the signatory countries. Assuming that foreign direct investment can contribute to economic development, it remains questionable whether BITs play a major role in stimulating those desired flows.

The World Bank's 2003 Report on the Global Economic Prospects of the Developing Countries concluded that "Even the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries."[14] The Bank relies upon a 2002 study by Mary Hallward-Driemeier of 20 years of data, which indicates that "Countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact."[15]

---

6 European Media Ventures SA (EMV) v. Czech Republic, UNCITRAL

7 *Frontier Petroleum Services (FPS) v. Czech Republic*, UNCITRAL (Canada/Czech Republic BIT)

8 *Pren Nreka v. Czech Republic*, UNCITRAL (Croatia/Czech Republic BIT)

9 *Binder v. Czech Republic*, UNCITRAL (Germany/Czech Republic BIT), *Georg Nepolsky v. Czech Republic*, UNCITRAL (Germany/Czech Republic BIT)

10 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Israel/Czech Republic BIT)

11 *CME Czech Republic B.V. v. Czech Republic,* UNCITRAL (The Netherlands/Czech Republic BIT); *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004 (Netherlands/Czech Republic BIT) *Invesmart v. Czech Republic*, UNCITRAL (Netherlands/Czech Republic BIT) *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, (Dutch/Czech BIT)

12 *Nagel v. Czech Republic*, SCC Case 49/2002 (UK/Czech Republic BIT).

13 *Lauder v. Czech Republic*, UNCITRAL (United States/Czech Republic BIT).

14 "Global Economic Prospects and the Developing Countries 2003," World Bank, p. xvii.

15 Ibid, 11

Purpose and object of BITs

Dealing with the purpose and object of BIT the conclusion might be that the preambles of the Czech BITs are drafted in terms for enhancing economic cooperation (development of economic relations) and the creation of a favourable investment climate (conditions) and stimulation for business initiative.

For instance, the preamble of the 1991 Czech/Netherlands BIT sets out (a desire) "*to extend and intensify the economic relations with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party and* (…) *(the stimulation of) the flow of capital and technology and the economic development and (…) stressing (the desire of) fair and equitable treatment and taking note of the 1975 Final Act of" the Conference on Security and Cooperation in Europe*".[16]

On the other hand the preamble of the BIT between the Government of the Czech Republic and the Government of Canada stipules that "the promotion and the protection of investments (...) will be conductive to the stimulation of business initiative and to the development of economic cooperation" between the contracting Parties. [17]

There are many variations of such language, and it is hard to generalize regarding its actual role and importance.

Generally speaking the narrow preamble's language might have an important impact upon interpretation of the treaty provisions, and the treaty's application in the context of disputes between foreign investors and host states.[18]

The balanced preambles might help to ensure that tribunals do not view it as "*legitimate*" to resolve uncertainties in treaty interpretation so as to favour investor interests. Any interpretation of a treaty must be made in accordance with the "*effet utile*"

---

[16] ibid. 10

[17] ibid 10 *see* Czech Republic/Canada, signed on Feb. 3, 1997; entered into force Jan. 30, 2001, *available at http://www.unctadxi.org/templates/docsearch.aspx?id=779*

[18] *see* Bilateral Investment Treaties and Development Policy-Making, Luke Eric Peterson, International Institute for Sustainable Development, November 2004 ,p. 24

principle of each of its provisions – if the BIT were interpreted in any other ways, the Treaty would contain superfluous and useless words. Only an *effet utile* interpretation principle would give full force and effect to all clauses of the BIT.

The tribunal, in a claim against Chile, interpreted a treaty provision "in the manner most conducive to fulfil the objective of the BIT to protect investments and create conditions favourable to investments."[19]

The BITs between the Czech Republic and other State include provisions concerning

- relative standards of treatment (particularly fair and equitable treatment and full protection and security);
- absolute standards of treatment (national treatment and most-favoured nation);
- protections against expropriation or nationalization; and
- recourse to dispute-settlement (state-to-state and investor-to-state).

These BITs include provisions allowing for transfer of monies and returns which according to 1990 Czech/Canada BIT means "all amounts yielded by an investment and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, fees and other current income." [20]

Generally, the Czech BITs provisions will only apply to investments once they have been established in the host state, even though the 1990 Czech/Germany BIT and 1990 Czech/Austria BIT and 1990 Czech/Netherlands BIT shall apply to any investment made (…) after 1st January 1950 and the 1990 Czech/Canada BIT after 1st January 1955.[21]

---

[19] *see* MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Decision on Jurisdiction, at para 104.

[20] *see* Czech/Canada BIT, Art. 1(c)., http://www.unctadxi.org/templates/DocSearch.aspx

[21] *see* Czech Republic/Netherlands BIT *available at* http://www.unctadxi.org/templates/DocSearch.aspx?id=779&PageIndex=4&TextWord='Czech%20Republic',%20''%20.1&CategoryBrowsing=False&syear=, Czech Republic/Canada, signed on Feb. 3, 1997; entered into force Jan. 30, 2001, *available at http://www.unctadxi.org/templates/docsearch.aspx?id=779*

BIT might ensure that foreign direct investment in the host state will contribute to domestic development and impose certain responsibilities on investors or the investor's home country. The research on recent BITs discovered that such "*development obligations*" of investors and home states showed that such measures are not given in any of the BITs. Nevertheless, the investor should contribute to the host economy as far as the BIT in question does stipulate the investor's contribution as a clear obligation because this obligation does not be a part of customary international law.

The subject matter provisions

The subject matter scope of any BIT is determined by the definition of two terms in particular: "*investment*" and "*investor*".

Investor

Recent Czech BITs have opted for a broad definition of the term "*investor*", encompassing both nationals and companies of the parties.

National is any natural person possessing the citizenship of other contracting party (for instance under the Czech/Canada BIT also "*permanently residing in a Contracting party*"). Company must be "legally (duly) constituted in accordance with the laws (and regulations) of a party". The definition of companies relies merely on the criteria of incorporation, not on seat and control. Although this would not appear to be the general rule, some recent BITs may also continue to offer two definitions, one relating to one Party and the other relating to the second Party, in particular the Czech/UK BIT, Art. 1(c).

Investment

The Czech BITs usually define investment in a broad and comprehensive manner seeking to promote foreign direct investment by safeguarding the investors' interests. Therefore, definitions tend to be broad, in order to cover as many as possible of the investor's assets.

Such definitions include traditional property rights, interests in companies ("*share of companies or other kinds of interest in companies*"), claims to money used to create an economic value and titles to performance having an economic value ("*rights to money and any performance under contract having a financial value*"), intellectual property rights and business concessions under public law, including concessions to search for, extract and exploit natural resources ("*business concessions conferred by law or under contract, including concessions for mining and oil exploitation*").

For instance a broad definition of investment can be found in 2005 Czech/China BIT as follows, which is a standard BIT wording:

1. The term „*investment' means every kind of asset invested in connection with economic activities by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particularly, though not exclusively, includes:*

(a) Movable and immovable property and other property rights such as mortgages, pledges and liens;

(b) Shares, debentures, stocks or any other form of participation in a company;

(c) Claims to money or to any other performance having an economic value associated with an investment;

(d) Intellectual property rights which mean trade-marks, patents, industry designs, technical processes, know-how, trade secrets, trade names and good-will associated with an investment;

(e) Business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Any change in the form in which assets are invested does not affect their character as investments."[22]

It is important to remember in this context that the ultimate effect of an investment agreement results from the interaction of the definition provisions with the operative provisions. The BIT should have sufficient flexibility in the definition to ensure the achievement of developmental objectives.[23]

---

[22] see Czech/China BIT

[23] INTERNATIONAL INVESTMENT AGREEMENTS:

Treatment of investor and investment

BITs include measures for restrictions or of a regulatory nature when they attempt to enter a market, which are in process of making an investment or are already established in a home country. The restrictions may apply to all of these phases or alternatively to some of them.
At the heart of these measures lie issues related to Most-Favoured-Nation treatment and National Treatment.

Special and differential treatment

So-called special and differential treatment might manifest itself in a treaty through differentiated obligations. The special and differential treatment appears rarely in the general run of bilateral investment treaties.[24]

The Czech BITs tend to be reciprocal — that is, standard treaty provisions will apply to home and host countries alike.

However, the 1991 Czech/USA BIT includes an annex where the parties have excluded existing and/or future measures in designated sectors (e.g., among others “ownership of real property, mining on the public domain, maritime services and primary dealership in US government securities”) from the reach of the national treatment obligation.

Treatment after admission

The BITs have been fully liberalized on post-establishment treatment.

KEY ISSUES, Volume I, UNCTAD, UNITED NATIONS New York and Geneva, 2004
p. 120
[24] UNCTAD, Flexibility for Development, p. 36.

As already noted, the MFN standard is by now generally accepted in this context, while the national treatment standard has gained considerable strength, although it certainly is not universally accepted.

Standards of treatment

The principle that foreign investors are not discriminated against relative to other foreign investors (Most-Favoured-Nation treatment, or MFN) or domestic counterparts (National Treatment) is central to investor protection.

Most favoured nation clause (MFN) is a standard of treatment, not a customary rule of international law, and thus an MFN obligation exists only when a treaty clause creates it. In the absence of a treaty obligation, nations retain the possibility to discriminate between foreign nations in their economic affairs.

Every BIT of the host state contains a MFN.

The most common standards of treatment in BITs in use are the "*most-favoured-nation*" (MFN) standard and the standard of "*fair and equitable*" treatment.

The two are known as relative (or contingent) standards, because they do not define expressly the contents of the treatment they accord but establish it by reference to an existing legal regime, that of other aliens in the one case and that of host State nationals in the other. The legal regime to which reference is made changes over time, and the changes apply to the foreign beneficiaries of MFN or national treatment as well.

The national treatment standard is qualified as "*absolute*" (or non-contingent), because it is supposed itself to establish, through its formulation, its unchanging contents.

While the distinction between the two kinds of standards is not in fact all that clear and rigid, it does point to an important characteristic of the two. They are meant to ensure not uniformity of treatment at the international level but non discrimination, as between foreign investors of differing origins -- from different (foreign) countries -- in the case of

the MFN standard, and as between foreign and domestic investors, in the case of the national treatment standard. This is the approach of the BITs in question.

The formal definitions of these two standards refer not to equal or identical treatment but to "treatment no less favourable" than that accorded to the "*most-favoured*" third nation, in the one case, and to the nationals (and products) of the host country, in the other.

The precise interpretation of the two relative standards, when applied to concrete circumstances, raises a number of problems. Since they are, by definition, comparative in character, their actual content depends on the extent to which the legal situation of other aliens or nationals can be determined with any degree of clarity.

Even though the BITs trend towards utilization of both the MFN and national treatment standards, the national treatment standard is by no means universally granted although generally accepted.

The example of such treatment is granted in Art. 3(1) of the Czech/China BIT as follows: "1. *Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable*." The same has been agreed upon BIT with France, Germany, Israel, Korea, Switzerland, UK and USA. On the other hand the national treatment is not granted to the investors and investments from and in Austria, Belgium-Luxembourg, Canada and Netherlands.

For instance the text of Article 3(1) Czech/Austria BIT stipulate: "*Each contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments."*[25]

[25] ibid

MFN treatment under this BIT means that an investor from a party to an agreement, or its investment, should be treated by the other party "*no less favorable*" with respect to a given subject matter than an investor from any third country, or its investment.

This BIT, like many MFN clauses in other treaties, contains specific restrictions and exceptions which exclude certain areas from its application. Such areas may include *inter alia* regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. Depending on the way these exceptions are drafted, the fact that these limitations are specifically mentioned could be a factor in deciding whether certain other matters are within the scope of an MFN clause.

Thus, Article 3(2) of the Czech/Austria BIT states as follows: "*The provisions of para. 1 above, however, shall not apply to present or future benefits and privileges granted by one Contracting Party to investors of a third state or their investments in connection, with a) any membership in an economic or customs union, a common market, a free trade zone or an economic community; b) an international agreement or a bilateral arrangement or national laws and regulations concerning matters of taxation; c) a regulation to facilitate border traffic."*[26]

It might be obvious that Article 3 of the BIT expressly states that the MFN obligations are not enlarged. Article 3(2) concerns "*present or future benefits and privileges*", not "*treatment*". The simple fact that these restrictions limitations are specifically mentioned could not be a factor to grant certain other MFN treatment within the scope of an MFN clause.

If MFN clause is to be interpreted, the text of the MFN clause, its context, and the object and purpose of the treaty containing it need to be considered. Any other standard of the protection cannot be imported into the BIT under object and purpose in connection with the MFN clause. Thus, the rights of the beneficiary with respect to the subject matter are limited in two ways: firstly by the clause itself, which refers to a certain matter, and secondly by the rights conferred by the granting State on the third State.

[26] ibid

The beneficiary State and/or the "*investor*" may directly claim MFN treatment only for the category of persons or things that receives or is entitled to receive certain treatment or certain favour under the right of a third State.

The category of persons or things and the relationship of the Claimant are defined by the BIT provided that the persons or things in respect to which the MFN treatment is claimed must be in the same relationship with the beneficiary State, as are the comparable persons or things with the third States. In addition, the persons or things in respect of which most-favoured nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third State (nationals, residents in the country, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).[27].

The Treaty stipulates plainly that "*treatment that is no less favorable*" shall be accorded to "*investors*" and to their "*investments*" than that which it accords to its own investors or to investors of any third states and their investments. If the alleged investments cannot be shown to be "*in the territory*" of Respondent, they are not covered by MFN clause.

An extension to subject matters not covered by the MFN clause is excluded. If both, neither "*fair and equitable treatment*" nor "*full protection and security*" are a part of MFN obligation, the MFN provision does not apply to them nor can the (alleged) investor legally rely on such an MFN obligation. Any other standard of the protection cannot be interpreted into the BIT under MFN clause.

Taking of property

The principal measures against which investors seek protection are expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors.

[27] Report of the International Law Commission on the work of its thirtieth session 8 May-28 July 1978, document A/33/10, p. 53, Yearbook of the International Law Commission (YILC)-1978, vol. II(2)

In the classical international law of State responsibility for injuries to aliens, a sharp distinction was made between measures affecting the property of aliens and those dealing with their rights from contracts with the State.

The BITs have met the requirements established in classical international law: the measures have to be taken in the public interest, they should not be discriminatory, and they should be accompanied by full compensation. They allow that appropriate compensation should normally be paid, stipulating that any conditions or prerequisites for property takings within a country's territory are to be determined by the Czech and are subject to the review by the "*judicial or other independent authority of the Party*" (Czech/Austria, Canada, Germany, Israel, Korea, the UK and the USA BITs) or the international arbitration (ad hoc, ICSID or SCC or ICC) in accordance with the Belgium-Luxembourg, France, the Netherlands and Switzerland BITs).

These provisions, however, assure investors not of indemnification in all cases, but of non-discrimination in the award of compensation.

Art. III(1)(2) of the Czech/USA BIT typically stipulates:
"*Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)*.
Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.
2. *A national, or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such*

expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law."

Transfer of funds and related issues

A major category of investment protection provisions in the recent BITs consists of measures that seek to address concerns that are specific to foreign investors, because, their investment crosses national borders, their base of operations and profit centres are in another country, their managerial personnel is often foreign, etc. The main such provisions are those concerning the transfer of funds (profits, capital, royalties and other types of payments) by the investor outside the host country and the possibility of employing foreign managerial or specialized personnel without restrictions.

These matters fall within the broad area of the regulation of movement of capital and payments, on the one hand, and persons, on the other.

Settlement of disputes

Investor-to-State disputes are normally subject to the jurisdiction of the host State's courts. Recent BITs allow that alternative means of dispute settlement are preferable and help better to protect investments, on the basis of existing international arbitration mechanisms.

Most recent international investment agreements contain also provisions on dispute settlement. Among recent regional and interregional instruments, the Energy Charter Treaty covers the possibilities of investor-to-State arbitration.

BITs address the issue by stipulating the settlement of dispute towards facilitating the execution of eventual arbitral awards. This is the task that the 1958 New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards has performed with considerable success.

The arbitration clauses under recent BITs give the investor the possibility to sue the host state upon the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States as a permanent machinery and binding procedures for arbitration (and conciliation) of investment disputes. Other instruments and institutions that could deal with disputes between investors and host state are also available. This is the case with the institutional machinery of the International Chamber of Commerce and the Stockholm Chamber of Commerce and with the ad hoc arbitration under the 1976 UNCITRAL Arbitration Rules (revised in 2010).

As reported by UNCTAD in a 2010 report on "*Latest Developments in Investor-State Dispute Settlement*", of the total 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility, 91 under the United Nations Commission on International Trade Law (UNCITRAL) Rules, 19 with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in The Hague, five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far.

Termination of BITs

In accordance with Article 24 of 1969 Vienna Convention on the Law of Treaties (VCLT) „*A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree*.“ *Under Article 54 „The termination of a treaty or the withdrawal of a party may take place (a) in conformity with the provisions of the treaty*; *or (b) at any time by consent of all the parties after consultation with the other contracting States*.“

The Czech Republic concluded all of 80 recent BITs after 1990 (see the attached list of BITs).

On the other hand the Czech Republic has terminated investment protection treaties with other European Union member states by consent of the parties in such a way that the agreements appear to no longer provide residual protection to existing investments.

The Czech Republic terminated BITs with Denmark, Slovenia, Malta, Estonia and Italy (see the table).

For instance, Article 16.1 of the Czech-Denmark BIT set forth a process whereby a single party could provide notice of termination to the other party. Article 16.2 further prescribed that: "*In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 10 shall remain in forces for a further period of ten years from that date*." The treaty was silent, otherwise, as to what would happened when *both* treaty-parties terminated the BIT, including any residual protections.

The report of the United Nations Conference on Trade and Development (UNCTAD) cautions that *"… the termination of a BIT is of little immediate significance since the State continues to be bound by it for the period of the survival clause*." This report should obviously presume a unilateral termination by one party, and does not seem the possibility that two state parties might terminate a treaty by mutual agreement.

The mutual agreement seems to neutralize any further protections i.e. ensuring longer-term protection even after termination of a treaty – for 10 or 15 further years.

The BIT with Slovakia was terminated in 2004. The termination with Ireland is being ratified.

Outlook on the future

In considering current trends concerning the BITs, it is important to pay particular attention to their impact on development. The objective of the developing countries might seek foreign direct investment in order to promote their economic development. Thus, the States seek by concluding BITs and more generally participating in

international investment agreements and through national legislation, to establish a legal framework that would reduce obstacles to foreign direct investment, strengthen positive standards of treatment and ensure the proper functioning of markets, while also assuring foreign investors of a high level of protection for their investments.

At the same time, BITs and international investment agreements, like all international agreements as a part of international law in accordance with Art. 38 of the Statute of the International Court of Justice. The BITs limit to a certain extent the freedom of action of the States party to them, and thereby limit the policy options available to decision makers for pursuing development objectives.

The Czech Republic as a host country will face a challenge: how to link the goal of creating a stable, predictable and transparent foreign direct investment policy framework that enables foreign investors to advance their objectives on the one hand, with that of retaining a freedom necessary to pursue their national development objectives, on the other.

In the Czech laws relating to foreign direct investment, the trends towards liberalization and increased protection have gathered in the 1990s. Non discriminatory treatment after admission is becoming the rule; guarantees of non-expropriation and of the free transfer of funds are given at bilateral level while the international legal framework given by international investment agreements for direct investment is fluid, apparently because, despite recent developments, there is no established, clear policy consensus on the subject and its many facets. As a result, there is no comprehensive global instrument. Existing multilateral instruments are partial and fragmentary.

The actual situation in international law and policy with respect to investment lacks coherence and clarity, and the exact relationship among legal actions and measures at the various levels is unclear, since many developments in question are relatively recent and little actual practice and even less case law, judicial or arbitral, has had the chance to crystallize.

The opinion of one of the most prominent academics and practitioner in the field of the international investment arbitration Prof. Gabrielle Kaufmann-Kohler says that "*Investment law is in its early stages of development and thus requires consistency. . . . we need consistency for the sake of the development of the rule of [investment] law*.")[28]

While foreign direct investment as a means to achieve growth of the host economy in the Czech Republic the BITs remain to have the potential to reduce the overall decline in cross-border direct investment flows. They must contain effective and operational provisions on investment promotion and continuation of international cooperation.

The international investment agreements universe is expanding rapidly, with over 5,900 treaties at present (on average four treaties signed per week in 2009). This system is rapidly evolving as well, with countries actively reviewing and updating their IIA regimes, driven by the underlying need to ensure coherence and interaction with other policy domains (e.g. economic, social and environmental). Global initiatives, such as investment in agriculture, global financial systems reform, and climate change mitigation are increasingly having a direct impact on investment policies.[29]

Thus BITs as a form of international investment agreements and the IIA themselves that effectively promote foreign direct investment are needed today more than ever.

The future of Czech BITs depends on the legal standard and the policy of the European Union after the Treaty of Lisbon entered into force. The "*intra-EU*" BITs seem to come to their end because of aim to non-discrimination of investors within EU States and the "*extra-EU*" BITs seem to be developed under auspices of the European Union.

[28] G. Kaufmann-Kohler, "Is Consistency a Myth?," [in:] IAI Series on International Arbitration No. 5, Precedent in International Arbitration 137, Y. Banifatemi ed., Juris Publishing, 2008, p. 144

[29] World Investment Report 2010: Investing in a Low-Carbon Economy, p. 1-3

I. List of valid BITs

-

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
Albania	27.06.1994 08.10.2010	07.07.1995 28.05.2011	• 183/1995, 49/2011 http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54239.html
Argentina	27.09.1996	23.07.1998	• 297/1998 http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54073.html
Australia	30.09.1993	29.06.1994	• 162/1994 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54377.html
Azerbaijan	17.05.2011		http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54377.html
Bahrain	15.10.2007	11.12.2009	• 117/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54240.html
Belgium (and Luxembourg)	24.04.1989	13.02.1992	• 574/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53842.html
Belarus	14.10.1996	09.04.1998	• 213/1998 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54587.html
Bosnia-Herzegovina Protokoll to BIT (changing BIT)	17.04.2002 09.06.2009	30.05.2004 03.06.2010	• 74/2004, 54/2010 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53645.html
Bulgaria	17.03.1999	30.09.2000	• 103/2000 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53646.html
Montenegro	13.10.1997	29.1.2001	• 103/2000 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_58255.html
China	08.12.2005	09.01.2006	• 89/2006

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			• http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54378.html
Egypt	29.05.1993	04.06.1994	• 128/1994 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54012.html
Philippines	05.04.1995	04.04.1996	• 141/1996 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53644.html
Finland	06.11.1990	23.10.1991	• 478/1991 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53933.html
France	13.09.1990	27.09.1991	• 453/1991 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53844.html
Georgia	29.08.2009	13.03.2011	• 18/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_61171.html
Guatemala	08.07.2003 20.08.2009	29.04.2005 04.05.2011	• 86/2005, 61/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54237.html
Chile	24.04.1995	05.10.1996	• 41/1997 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54238.html
Croatia Protokoll to BIT (changing BIT)	05.03.1996 08.09.2008	15.05.1997 31.08.2009	• 155/1997, 113/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53643.html
India Protokoll to BIT (changing BIT)	11.10.1996 08.06.2010	06.02.1998 24.3.2011	• 43/1998, 20/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54241.html
Indonesia	17.09.1998	21.06.1999	• 156/1999 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53642.html
Ireland	28.06.1996	01.08.1997	• 226/1997

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			• http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53641.html
Israel	23.09.1997	16.03.1999	• 73/1999 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53735.html
Yemen	20.03.2008	04.09.2009	• 65/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54242.html
South Africa	14.12.1998	17.09.1999	• 294/1999 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54011.html
Jordan Protokoll to BIT (changing BIT)	20.09.1997 6.4.2009	25.04.2001 28.1.2010	• 62/2001, 94/2010 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53736.html
Cambodia	12.05.2008	23.10.2009	• 104/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53640.html
Canada x)	15.11.1990	09.03.1992	• 333/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54588.html
Kazakhstan	08.10.1996	02.04.1998	• 217/1999 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54071.html
South Korea	27.04.1992	16.03.1995	• 125/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53638.html
North Korea Protokoll to BIT (changing BIT)	27.02.1998 17.12.2008	10.10.1999 10.01.2010	• 250/1999, 2/2010 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_58262.html
Costa Rica	28.10.1998	05.03.2001	• 68/2001
Kuwait	08.01.1996	21.01.1997	• 42/1997 • http://www.mfcr.cz/cps/rde/xchg/mfcr/

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			xsl/ochrana_investic_54243.html
Cyprus	15.06.2001	25.09.2002	• 115/2002 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53637.html
Lebanon	19.09.1997	24.01.2000	• 106/2001 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54246.html
Lithuania	27.10.1994	12.07.1995	• 185/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53934.html
Latvia	25.10.1994	01.08.1995	• 204/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53935.html
Luxembourg (and Belgium)	24.04.1989	13.02.1992	• 574/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53842.html
Hungary	14.01.1993	25.05.1995	• 200/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54589.html
Macedonia Latvia	21.06.2001 5.5.2009	20.09.2002 29.10.2010	• 116/2002, 95/2010 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53636.html
Malaysia	09.09.1996	03.12.1998	• 296/1998 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53635.html
Morocco	11.06.2001	30.01.2003	• 15/2003 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53953.html
Mauritius	05.04.1999	27.04.2000	• 62/2000 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54013.html
Mexico	04.04.2002	13.03.2004	• 45/2004 • http://www.mfcr.cz/cps/rde/xchg/mfcr/

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			xsl/ochrana_investic_54124.html
Moldavia	12.05.1999	21.06.2000	• 128/2000 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54070.html
Mongolia	13.02.1998	07.05.1999	• 104/1999 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53634.html
Germany	02.10.1990	02.08.1992	• 573/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53954.html
Nicaragua	02.04.2002	24.02.2004	• 51/2004 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54123.html
Netherland	29.04.1991	1.10.1992	• 569/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53952.html
Norway	21.05.1991	06.08.1992	• 530/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53728.html
Panama	27.08.1999	20.10.2000	• 96/2005 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54122.html
Paraguay	21.10.1998	24.03.2000	• 38/2000 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54074.html
Peru	16.03.1994	06.03.1995	• 181/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54072.html
Poland	16.07.1993	29.06.1994	• 181/1994 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53831.html
Portugal	12.11.1993	03.08.1994	• 96/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			xsl/ochrana_investic_53832.html
Austria	15.10.1990	01.10.1991	• 454/1991 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53813.html
Romania Protokoll to BIT (changing BIT)	08.11.1993 22.01.2008	28.07.1994 30.07.2009	• 198/1994, 60/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53648.html
Russia	05.04.1994	06.06.1996	• 201/1996 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54069.html
Greece	03.06.1991	30.12.1992	• 102/1993 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53633.html
El Salvador	29.11.1999	28.03.2001	• 34/2001 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54236.html
Saudi Arabia	18.11.2009	13.03.2011	• 15/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_61177.html
Singapore	08.04.1995	08.10.1995	• 57/1996 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54244.html
United Arab Emirates	23.11.1994	25.12.1995	• 69/1996 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54247.html
United States of America Protokoll to BIT (changing BIT)	22.10.1991 10.12.2003	19.12.1992 10.08.2004	• 187/1993, 102/2004 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54590.html
Serbia Protokoll to BIT (changing BIT)	13.10.1997 04.06.2010	29.01.2001 16.03.2011	• 23/2001, 21/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53727.html
Sri Lanka	28.03.2011		
Syria	21.11.2008	14.08.2009	• 62/2009

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			• http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_54245.html
Spain	12.12.1990	28.11.1991	• 647/1992 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53956.html
Sweden	13.11.1990	23.09.1991	• 479/1991 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53936.html
Switzerland	05.10.1990	07.08.1991	• 459/1991 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53631.html
Tajikistan	11.02.1994	06.12.1995	• 48/1996 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53957.html
Thailand	12.02.1994	04.05.1995	• 180/1995 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53632.html
Tunisia	06.01.1997	08.07.1998	• 203/1998 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53630.html
Turkey	30.04.1992	01.08.1997	• 187/1997 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53812.html
Ukraine Protokoll to BIT (changing BIT)	17.03.1994 16.09.2008	02.11.1995 17.05.2010	• 23/1996, 42/2010 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53821.html
Uruguay	26.09.1996	29.12.2000	• 10/2001 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53958.html
Uzbekistan Protokoll to BIT (changing BIT)	15.01.1997 24.08.2009	06.04.1998 16.02.2011	• 202/1998, 16/2011 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53959.html
Great Britain	10.07.1990	26.10.1992	• 646/1992

Contracting Party	Signature	Entry into force	• Publication in Statute-book (Sb. a Sb.m.s.)*a*
			• http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53811.html
Venezuela	27.04.1995	23.07.1996	• 99/1998 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53955.html
Vietnam Protokoll to BIT (changing BIT)	25.11.1997 21.03.2008	09.07.1998 21.09.2009	• 212/1998, 66/2009 • http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/ochrana_investic_53629.html

II. BITs which have not yet been ratified by both contracting parties

Contracting Party	Signature	Note
Azerbaijan	17.05.2011	new BIT
Montenegro	03.06.2010	Protokoll to BIT (will substitute the recent BIT) CR has ratified
Canada	06.05.2009	new BIT (will substitute the recent BIT) CR has ratified
Kazakhstan	25.11.2010	Protokoll to BIT (will substitute the recent BIT) CR has ratified
Kuwait	31.10.2010	Protokoll to BIT (will substitute the recent BIT) CR has yet ratified
Lebanon	20.03.2010	Protokoll to BIT (will substitute the recent BIT) CR has ratified
Morocco	19.03.2010	Protokoll to BIT (will substitute the recent BIT) CR has ratified
Moldavia	02.09.2008	Protokoll to BIT (will substitute the recent BIT) CR has ratified
Sri Lanka	28.03.2011	new BIT
Turkey	29.04.2009	new BIT (substitute the recent BIT) CR has ratified
Uruguay	15.05.2009	Protokoll to BIT (substitute the recent BIT) CR has ratified

III. BITs which are in course of termination or which have been terminated

Contracting Party	Date of termination	Publication in Statute-book (Sb. a Sb.m.s.)	Note
Denmark	18.11.2009	109/2009	
Estonia	20.02.2011	11/2011	
Ireland			in course of ratification
Italy	30.04.2009	37/2009	
Malta	30.09.2010	89/2010	
Slovakia	01.05.2004	105/2009	
Slovenia	13.08.2010	73/2010	