

OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 15 March 2011¹**I — Introduction**

to Slovakia's accession to the EU on 1 May 2004.³

1. This case concerns the relationship between Slovakia's EU law obligations to ensure non-discriminatory access to the electricity transmission network pursuant to Directive 2003/54/EC ('Directive 2003/54')² and its obligations to protect investments pursuant to an agreement on the promotion and reciprocal protection of investments ('the Investment Protection Agreement') signed on 5 October 1990 and concluded with Switzerland prior

2. At the centre of the dispute is a private law contract ('the Contract') concluded on 27 October 1997, between a Swiss company (Aare-Tessin AG für Elektrizität ('ATEL')) and a State-owned network operator in Slovakia (known as Slovenské elektrárne a.s. at the time, and subsequently as Slovenská elektrizačná prenosová sústava a.s. ('SEPS')). Pursuant to the Contract ATEL paid over half of the construction costs of the yet-to-be-constructed Lemesany-Krosno line from Poland to Slovakia, in return for priority access to the line for a defined and non-renewable period of 16 years.

1 — Original language: English.

2 — Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37). Directive 2003/54 was preceded by Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 027, p. 20) ('Directive 96/92'). Directive 2003/54 has recently been repealed and replaced by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55) ('Directive 2009/72').

3. The Commission now asks the Court to declare that by not ensuring non-discriminatory

3 — The agreement was between the Czech and Slovak Republics and the Swiss Confederation. No issues regarding the State succession of Czechoslovakia and the applicability of the Investment Protection Agreement in relation to Slovakia after it becoming independent have been raised.

access to the electricity transmission network, Slovakia has failed to fulfil its obligations pursuant to Articles 20(1) and 9(e) of Directive 2003/54. Although the Commission does not expressly ask the Court to declare that Slovakia should annul the Contract, in its observations to the Court it states that Slovakia is not obliged to keep that contract in force. It further contends that a mere non-application of the Contract would be insufficient to remedy the alleged infringement. In this respect, the Court has implicitly been invited by the Commission to consider whether Slovakia should be obliged to annul the Contract.

II — Legal framework

A — *International law*

1. Vienna Convention on the Law of Treaties⁴

5. Article 31 of the Vienna Convention of the Law of the Treaties, entitled ‘General rule of interpretation’, states:

‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

...

4. A special meaning shall be given to a term if it is established that the parties so intended.’

4. Slovakia, on the other hand, submits that the Contract is protected as an investment under the Energy Charter Treaty and that Directive 2003/54 should be interpreted in conformity with the EU’s obligations under the Energy Charter Treaty.

⁴ — Done at Vienna on 23 May 1969, which entered into force on 27 January 1980, UN Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969) (‘the Vienna Convention’). Both countries are parties to the Vienna Convention, Slovakia by virtue of State succession.

2. Energy Charter Treaty⁵

7. Article 13 of the Energy Charter Treaty deals with expropriation. It states in the relevant part:

6. Article 10(1) of the Energy Charter Treaty states:

‘(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

(a) for a purpose which is in the public interest;

‘Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.’

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.’

— The Investment Protection Agreement

5 — The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Slovakia, Switzerland and the EC were all signatories of the Energy Charter Treaty at the relevant time.

8. Article 1 of the Investment Protection Agreement, entitled ‘Definitions’, states in the relevant part:

‘(2) The term “investments” shall include every kind of assets and particularly:

...

(c) claims and rights to any performance having an economic value;

...’

9. Article 3 of the Investment Protection Agreement, entitled ‘Promotion, admission,’ states:

‘(1) Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

...’

10. Article 4, entitled ‘Protection, treatment,’ states:

‘(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments ...

(2) Each Contracting Party shall ensure fair and equitable treatment within its territory of

the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors or than that granted by each Contracting Party to the investments within its territory by investors of the most favoured nation, if this latter treatment is more favourable ...’

11. Article 6, entitled ‘Dispossession, compensation,’ states:

‘(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation ...’

12. Article 9, which is entitled ‘Disputes between a contracting party and an investor of the other contracting party,’ states:

‘(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting

Party and without prejudice to Article 10 of this Investment Protection Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

under this Article may, upon request of the investor, as an alternative to the procedure mentioned in paragraph 2 of this Article, be submitted to the International Centre for Settlement of Investment Disputes.

(2) If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal. Such arbitral tribunal shall be established as follows:

...

(a) The arbitral tribunal shall be constituted for each individual case. ...

(5) Neither Contracting State shall pursue through diplomatic channels a dispute submitted to arbitration, unless the other Contracting State does not abide by or comply with the award rendered by an arbitral tribunal.'

(b) If the periods specified in paragraph (a) of this Article have not been observed, either party to the dispute may, in the absence of any other arrangements, invite the President of the Court of Arbitration of the International Chamber of Commerce in Paris to make the necessary appointments. ...

13. Article 10, entitled 'Disputes between contracting parties,' states:

'(1) Disputes between Contracting Parties regarding the interpretation or application of the provisions of this Investment Protection Agreement shall be settled through diplomatic channels.

(c) Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall ensure the recognition and execution of the arbitral award. ...

(2) If both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) In the event of both Contracting Parties having become members of the Convention of Washington of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes

...

(7) The decisions of the tribunal are final and binding for each Contracting Party.’

States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

14. Article 11 is entitled ‘Observance of commitments’. Its relevant parts state:

‘Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.’

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

...’

B — EU law

2. Directive 2003/54

1. The EC Treaty⁶

16. Article 9 of Directive 2003/54, entitled ‘Tasks of Transmission System Operators’, states in the relevant part:

15. Article 307 EC states:

‘1. The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member

‘Each transmission system operator shall be responsible for:

⁶ — Since the present infringement action was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

(e) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings’

17. Article 20 of Directive 2003/54, entitled ‘Third party access’, states:

‘1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 23 and that these tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

2. The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.’

18. The derogations set out in Article 26 of Directive 2003/54 do not apply in the present case.

19. Article 29 of Directive 2003/54 repeals Directive 96/92 with effect from 1 July 2004, without prejudice to the obligations of Member States concerning the deadlines for transposition and application of that directive.

20. Under Article 30 of Directive 2003/54, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive no later than 1 July 2004.

21. According to Article 31, Directive 2003/54 was to enter into force on the twentieth day following its publication in the *Official Journal of the European Union*, which occurred on 15 July 2003.

3. Regulation 1228/2003⁷

22. Article 7 entitled ‘New interconnectors’ states in the relevant parts:

‘1. New direct current interconnectors may, upon request, be exempted from the

7 — Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ 2003 L 176, p. 1).

provisions of Article 6(6) of this Regulation and Articles 20 and 23(2), (3) and (4) of [Directive 2003/54] under the following conditions:

- (a) the investment must enhance competition in electricity supply;
 - (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;
 - (c) the interconnector must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that interconnector will be built;
 - (d) charges are levied on users of that interconnector;
 - (e) since the partial market opening referred to in Article 19 of Directive 96/92/EC, no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector;
 - (f) the exemption is not to the detriment of competition or the effective functioning of the internal electricity market, or the efficient functioning of the regulated system to which the interconnector is linked.
- ...
3. Paragraph 1 shall apply also to significant increases of capacity in existing interconnectors.
4. (a) The regulatory authority may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2. However, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State its opinion on the request for an exemption. This opinion shall be published together with the decision.
- ...
5. The exemption decision shall be notified, without delay, by the competent authority to the Commission, together with all the information relevant to the decision. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision.
- ...
- Within two months after receiving a notification, the Commission may request that the regulatory authority or the Member State

concerned amend or withdraw the decision to grant an exemption. The two months period may be extended by one additional month where additional information is sought by the Commission.

re-calculated every couple of years pursuant to a formula set out in the Contract. The parties are entitled to transfer their rights and obligations under the Contract to a successor provided that the latter is capable of fulfilling the obligations thereunder.

...

25. The Contract, drafted in German, is an act of private law, governed by Austrian law. It states that disputes between the parties shall be subject to arbitration pursuant to the rules of the International Chamber of Commerce in Paris.

III — Facts and Procedure

23. On 27 October 1997, ATEL and SEPS' legal predecessor concluded the Contract whereby SEPS granted ATEL the right to transmit 300 MW on a 400 kV electricity transmission line. The line in question was the yet-to-be-constructed Lemesany-Krosno transmission line between Poland and Slovakia. The right to transmit would be permitted for a period of 16 years ending on 31 September 2014. Slovakia was not a party to the Contract. It was expected that the transmission line would be in use from 1 October 1998. ATEL was entitled to withdraw from the Contract if the line was not in use by 1 October 1999 at the latest.

24. In exchange for this transmission capacity ATEL was to make a one-off payment of a lump sum amounting to over 50% of the costs required for the construction of the Lemesany-Krosno transmission line in Slovakia, and a transmission fee which was to be

26. On 16 April 2003 Slovakia signed the Treaty of Accession. Shortly after this, on 26 June 2003, Directive 2003/54 was published. On 1 May 2004 Slovakia joined the EU.⁸ As a Member State, it is required to comply with all obligations stemming from the EC Treaty. Since the implementation period for Directive 2003/54 ended in June 2004, that directive was not part of the *acquis communautaire* that Slovakia was expected to implement at the date of accession. Furthermore, no conditions were laid down as regards the application of Directive 96/92 to Slovakia in the Act of Accession.⁹

8 — Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17).

9 — According to the Commission, Slovakia should have asked for a transitional arrangement in its Act of Accession confirming its right to continue to reserve transmission capacity to ATEL. I'll analyse the relevance of this argument below.

27. On 10 April 2006 the Commission sent Slovakia a letter of formal notice, followed by a reasoned opinion on 15 December 2006. In its application to the Court the Commission alleges that the priority access granted to ATEL pursuant to the Contract is contrary to Slovakia's obligations under Articles 9(e) and 20(1) of Directive 2003/54, which concern non-discriminatory access to the transmission system.

the Energy Charter Treaty or by virtue of Article 307(1) EC.

A — Preliminary issues

28. According to the Court's case-law, the appreciation of whether there is an infringement should be based on the situation prevailing at the end of the period laid down in the reasoned opinion, that is, two months after 15 December 2006.¹⁰

30. Two preliminary issues arise in this case: (i) whether SEPS' conduct can be attributed to Slovakia, and (ii) whether the Court can force Slovakia to terminate a private law contract in order to correct its infringement.

IV — Analysis

29. In analysing this case I will first consider some preliminary issues, followed by an analysis of whether Slovakia's treatment of ATEL amounts to discrimination contrary to Directive 2003/54. If it does, I will go on to analyse whether such treatment is saved by

31. As to the first point, even though neither party has raised the issue of SEPS' ownership it seems that Slovakia owns 100% of the shares in SEPS.¹¹ As a result, its conduct can be attributed to Slovakia since acts of State-owned undertakings are attributable to the Member States.¹²

32. As to the second point, according to Slovakia's defence the Slovakian energy regulation body (URSO) gave a negative view concerning the priority access granted to ATEL,

10 — Case C-200/88 *Commission v Greece* [1990] ECR I-4299, paragraph 13; Case C-362/90 *Commission v Italy* [1992] ECR I-2353, paragraph 10; and Case C-29/01 *Commission v Spain* [2002] ECR I-2503, paragraph 11.

11 — http://www.sepsas.sk/seps/en_Clanok012.asp?kod=128

12 — See, for example, C-87/94 *Commission v Belgium (Walloon Buses Case)* [1996] ECR I-2043.

which prompted a change in the practice of granting access to the network. According to letters annexed to Slovakia's defence from the President of URSO and the President of SEPS, both dated 10 July 2009 and written in view of the present proceedings, ATEL no longer has priority access to the network but, since 1 January 2008, obtains all its capacity at auction.

33. The Commission submits that this is not sufficient to remedy the infringement as the Contract between ATEL and SEPS is still in existence. For this proposition it relies on the fact that the Court has stated that an administrative practice is not enough to correct the infringement.

34. In *Commission v Greece* the Court held that a mere administrative practice, which, by its nature, is capable of being altered at the whim of the authorities, does not release the Member State from the duty to remove the legislative provisions contrary to Community law.¹³ According to that case-law only a modification of the law itself can ensure an end to the infraction.

35. In the present case, however, the infringement stems from a private law contract governed by Austrian law between two undertakings, not from a legislative or regulatory enactment. Therefore, it is not clear what legal measures Slovakia should be required to undertake as a Member State in respect of the Contract to correct the alleged infringement. As such, *Commission v Greece* cannot be transposed to the present case.

36. The present situation therefore brings up interesting questions on whether the Member State also has a duty to annul a private law contract not governed by its laws in order to correct an infringement. The discussion of whether a Member State is obliged to annul a contract when the Court finds an infringement has mainly been discussed in the public procurement field.¹⁴ In my view this case-law is of limited relevance here since the very point of public procurement law is to regulate how contracts are made and awarded by public entities or using public funds. This is not the case in the electricity distribution field.

37. Outside the public procurement area, it seems doubtful that the Member State should

13 — Case 38/87 *Commission v Greece* [1988] ECR 4415, paragraphs 9, 10, 12 and 16.

14 — Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, and Case 328/96 *Commission v Austria* [1999] ECR I-7479.

be required to annul a valid private law contract. Indeed, such an action would be contrary to the principle of legal certainty and would risk punishing innocent third parties in respect of a breach committed by a Member State. The Principles of European Contract Law state that only in exceptional cases will the breach of law automatically lead to the invalidity of a contract. For that to occur there must be a sufficiently serious breach of a general principle of law or of a mandatory rule of law.¹⁵

an undertaking amounts to granting a privileged position to one user to the detriment of others, which in turn amounts to discrimination between different undertakings seeking access to the network. For this proposition it relies on *VEMW*, where the Court held that Directive 96/92 precluded measures granting preferential capacity for the cross-border transmission of electricity where such measures were not authorised by the derogation set out in Article 24 of that directive.¹⁷

38. It should be noted that even if Slovakia were a party to the Contract, it would, in my understanding, not have a right to withdraw from the Contract without ATEL's consent. It appears from the file that ATEL has insisted on its right to rely on the Contract.¹⁶

40. Slovakia argues that since ATEL made important contributions towards the construction of the Lemesany-Krosno transmission line, it is in a different position from other users and treating it differently will not amount to discrimination.

B — Is there discrimination pursuant to Directive 2003/54?

39. The Commission argues that a reservation of a part of the transmission capacity to

41. It is settled case-law that the general principle of equal treatment requires that similar situations are not treated differently and

15 — Articles 15:101 and 15:102. See http://frontpage.cbs.dk/law/commission_on_european_contract_law/Skabelon/pecl_engelsk.htm

16 — There is no explanation in the file as to why the Contract is no longer applied between the parties. As ATEL is not party to these proceedings it is impossible to know its view on the matter. In my view there might be valid economic or legal reasons for ATEL to simultaneously not require the application of the contract but not renounce its rights under it either.

17 — Case C-17/03 *VEMW* [2005] ECR I-4983.

different situations are not treated alike unless such treatment is objectively justified.¹⁸

42. Priority access to 300 MW of transmission capacity on the Lemesany-Krosno transmission line constitutes a difference in treatment between ATEL and the other undertakings seeking access to the network. The question therefore arises whether ATEL is in a similar situation compared to these other undertakings.

1. Does priority access always amount to discrimination? – the logic established in *VEMW*

43. *VEMW* concerned the reservation of a portion of capacity of the cross-border system for the importation of electricity into the Netherlands in favour of a former monopoly (Samenwerkende Elektriciteits Productiebedrijven NV, which subsequently became known as Nederlands Elektriciteit Administratiekantoor BV ('SEP/NEA')). SEP/NEA was charged with performing tasks of general

economic interest the object of which was to ensure electricity supply in the Netherlands for the purposes of resale at reasonable prices. In view of this SEP/NEA had concluded, prior to the entry into force of Directive 96/92, various international contracts for the importation of electricity and thus required the capacity that had been reserved for it. On this basis it argued that it was in a different position to other operators, and that there was therefore no discrimination.

44. The Court implicitly rejected this argument, stating that since SEP/NEA was no longer entrusted with that task, as a result of the entry into force of Directive 96/92 and the relevant national law transposing that directive, it was in a similar position to the other operators.

45. The Court then proceeded to consider the question of whether the differential treatment was justified,¹⁹ concluding that it was not. In doing so, it referred to Article 24 of Directive 96/92, which provided for the right of a Member State to derogate from the general provisions of that directive. The Court stated that Member States could not unilaterally apply differing treatment to electricity importers on grounds that were capable of amounting to a derogation under Directive

18 — Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569, paragraph 79 and case-law cited there. See also Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 58 and case-law cited there; Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 126; Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-292/97 *Karlsson* [2000] ECR I-2737, paragraph 39; and Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49.

19 — *VEMW*, cited in footnote 17, paragraph 54.

96/92,²⁰ since that would endanger the *effet utile* of both Article 24 and the directive itself.²¹ Therefore the Court essentially seemed to conclude that discrimination can never be justified under the directive unless a derogation had been granted.²²

force of Regulation No 1228/2003 (namely, 1 July 2004) might be exempt from the discrimination provisions, whilst investments made between those dates would not be. It has been pointed out, with reason, that this is a strange result.²³

46. It has been suggested that interpreting this case as setting down a general principle whereby priority access will always amount to discrimination unless there has been a derogation, as the Commission argues, is too wide as well as undesirable.

47. The first criticism is aimed at the treatment of situations where derogation is not possible. Technically the *VEMW* logic cannot apply to situations where a derogation is not possible, thus creating a gap in time and leading to discriminatory treatment between investors depending on the time that the investment was made. Thus, investments made prior to the expiry of the derogation provision in Directive 96/92 (namely, 20 February 1998) and those made after the entry into

48. The second criticism relates to the fact that there may be good reasons to treat independent investors differently from other undertakings seeking access to electricity transmission lines. Investments are important in the energy sector, as that sector requires the construction of new transmission lines as well as developments of existing technologies.²⁴ The undertaking of such projects is also very costly.²⁵ Since electricity networks are natural monopolies²⁶ it is desirable from a market liberalisation point of view that private undertakings invest in the networks as this will also help the breaking-up of former monopolies. Furthermore, the Commission has already held that capacity reservations made in order to secure investment are not

20 — *VEMW*, cited in footnote 17, paragraph 61.

21 — *VEMW*, cited in footnote 17, paragraphs 58, 61, 62 and 63.

22 — That is how the Commission seems to have interpreted the *VEMW* judgment. See Commission staff working document on the decision C-17/03 of 7 June 2005 of the Court of Justice of the European Communities SEC(2006) 547, 26 April 2006.

23 — Talus, K., 'Role of the European Court of Justice in the Opening of Energy Markets', *ERA Forum* (2007) 8, p. 435.

24 — See, for example, the European-wide 10-year investment plan set out in Regulation No 1228/2003.

25 — Talus, K. and Wälde, T., 'Electricity interconnectors in EU law: energy security, long term infrastructure contracts and competition law', *European Law Review* (2007) Vol. 32, No. 1, p. 133.

26 — Helm, D., *Energy: the State and the Market – British Energy Policy since 1979* (OUP, 2003), p. 407.

anti-competitive under Article 81 EC and that they do not contravene Article 82 EC either.²⁷

investments in the energy sector,³⁰ as this is particularly important in ensuring the security of supply in the EU.³¹

49. Whilst I share these concerns, in my view the logic adopted in *VEMW* fits better within the logic of the whole system of market liberalisation that the legislature is pursuing in the field of energy policy.

50. The aim of EU energy policy is the opening up of markets, increase competition and the create a level playing field by no longer giving preferential treatment to former monopolies.²⁸ The principle of equal access is crucial in achieving this aim.²⁹

51. The aim of liberalisation must, however, be balanced against the need to encourage

52. In my view, the aim of encouraging investments is not jeopardised by the decision in *VEMW* or by Directive 2003/54, since they do not amount to a total prohibition on discrimination.³² Indeed, the legislature took into account the need to protect investments in certain circumstances under Directive 2003/54.³³ Thus, Article 7 of Regulation No 1228/2003 provides that new interconnectors may, upon request, be exempted from the provisions of Article 20 of Directive 2003/54 under the conditions stated in that article. For the purposes of that regulation, interconnectors are defined as transmission

27 — Case COMP/E-3/37.921 — *Viking Cable*, OJ 2001 C 247, p. 11. See also Commission, XXXIIIrd Report on Competition Policy (2003), p. 202.

28 — Recitals 1 to 5 of Directive 2003/54. See also Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 38, and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraph 31.

29 — See Opinion of Advocate General Stix-Hackl in *VEMW*, cited in footnote 17, point 58.

30 — See, inter alia, the Commission's Green Paper 'A European Strategy for Sustainable, Competitive and Secure Energy', 08.03.2006, COM(2006) 105 final, where the Commission states that EU energy policy seeks to establish an internal energy market that is integrated, sustainable, competitive and secure.

31 — Thus, Directive 2005/89/EC of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ 2006 L 33, p. 22) has the specific aim of ensuring sufficient investment in electricity generation capacity to ensure an adequate balance between supply and demand.

32 — It is also interesting to note that Directive 2009/72, the new directive which repeals Directive 2003/54, contains express provisions for the advancing of coordination of investment planning in the EU between Member States (see Commission communication to Parliament 2007/0195 COD).

33 — Article 7 of Regulation No 1228/2003 which applies from 1 July 2004.

lines which cross a border between Member States.³⁴

protect investments, and is what the legislature intended.

53. Thus, the system allows for differential treatment in certain instances, albeit within a framework which is under the ultimate control of the Commission. Under the procedure set out in Article 7 of Regulation No 1228/2003 the regulatory authority may, on a case-by-case basis, decide to grant an exemption from Article 20 of Directive 2003/54 in case of investments in new direct current interconnectors. In addition, Member States may provide that those regulatory authorities submit for formal decision, to the relevant body in the Member State, its opinion on the request for an exemption.³⁵ The exemption decision is then notified to the Commission, so that it may examine it. Having examined the notification, the Commission may request that the regulatory authority of the Member State amends or withdraws its decision to grant an exemption.³⁶

54. In view of the above, the general rule that priority access is not allowed unless permitted by a corresponding derogation is, in my view, a sound way of balancing market liberalisation with the need to attract and

2. The case of ATEL and independent investors

55. As a result, Slovakia's argument that investors are in a different situation cannot succeed.

56. This is so even though this conclusion has more serious consequences for the company in the present case than in *VEMW*. In that case, SEP/NEA could sell the electricity it had undertaken to purchase under the international contracts outside the Netherlands,³⁷ whilst ATEL cannot reasonably dispose of its contractual priority access rights in the present case because they would have become worthless.

57. However, allowing investors to be treated differently would amount to permitting a small group of undertakings to buy priority

³⁴ — Article 2(1) of Regulation No 1228/2003.

³⁵ — Article 7(4)(a) of Regulation No 1228/2003.

³⁶ — Article 7(5) of Regulation No 1228/2003.

³⁷ — *VEMW*, cited in footnote 17, paragraph 83. The Court also referred to the possibility of the national operator to seek compensation from the authorities for the reason that it had not sought derogation pursuant to Article 24 of Directive 96/92 (see paragraph 86).

access, which is against the very aims of Directive 2003/54 and of EU energy policy in general.

58. ATEL is simply another undertaking seeking access to the network for the purposes of the transmission of electricity to its customers. As such, it is in competition with a variety of other potential sellers of electricity, so must be viewed as being in a comparable situation as them.

59. Therefore, in my view, the priority treatment in the present case amounts to discrimination within the meaning of Directive 2003/54 and it is necessary to consider whether such treatment is justified.

Charter Treaty.³⁸ Moreover, the Energy Charter Treaty being a mixed agreement, the EU is legally bound by the obligations of the fair and equitable treatment and non-expropriation contained in it and resembling the substantive provisions of the Investment Protection Agreement.

61. However, in my opinion, the detailed provisions contained in Directive 2003/54 and interpreted in detail in *VEMW* cannot be overridden by the more general provisions contained in the Energy Charter Treaty.³⁹ This is even truer for an interpretation that seeks to establish a retroactive exemption to the non-discrimination provisions that Directive 2003/54 does not allow.

62. There then remains the question of the obligations that the EU directly has as a contracting party to the Energy Charter Treaty.

C — Justification

1. The Energy Charter Treaty

60. Slovakia's main defence to the privileged access afforded to ATEL are the obligations stemming from the Energy Charter Treaty. It states, correctly, that Directive 2003/54 should be interpreted in accordance with the EU's obligations stemming from the Energy

Charter Treaty. In my view, the Energy Charter Treaty does not offer more protection to the investor than the Investment Protection Agreement. EU energy law as it stands under Directive 2003/54 and Regulation No 1228/2003 cannot be considered as failing to achieve the standards required by the Energy Charter

38 — Case C-61/94 *Commission v Germany* [1996] ECR I-3898, paragraph 52.

39 — Case C-136/96 *Scotch Whisky Association* [1998] ECR I-4571, paragraph 47.

Treaty insofar as investments that fall into the *ratione temporis* of those legislative acts are concerned. Moreover, with respect to the enjoyment and protection of investments, the general level of the protection of fundamental rights provided by EU law affords protection to investors, which fulfils the obligations resulting from Articles 10(1) and 13(1) of the Energy Charter Treaty.⁴⁰

64. In the present case, since the Contract is protected by Article 307(1) EC, as I will show below, the EU is not acting contrary to its obligations under the Energy Charter Treaty in relation to ATEL. Therefore, it does not seem necessary to analyse further the interpretation of the Energy Charter Treaty.

66. In my view, however, Slovakia cannot have been expected to negotiate a derogation for a provision whose status was not certain under EU law. It was not clear at the time of accession that priority treatment would amount to discrimination within the meaning of Directive 2003/54. First, at the time when the Accession Treaty was being negotiated the *VEMW* judgment had not been issued.⁴¹ Furthermore, in *VEMW* the Netherlands, French and Finnish Governments as well as the Commission took the view that the priority access measures at issue in that case did not amount to discrimination.⁴² In addition, in its annual Competition Report for 2003 the Commission seems to have taken the position that pre-liberalisation contracts were valid, even though they raised competition concerns.⁴³ It is doubtful whether Member States and the Commission would have agreed to a derogation for a candidate State in the accession negotiations if that derogation would have adopted an interpretation of the *acquis communautaire* they did not at that point share.

2. Derogation

65. The Commission argues that Slovakia should have negotiated a derogation in relation to the Contract in its Act of Accession.

67. On the other hand, if the Contract is protected under Article 307(1) EC, then the speculation relating to the accession

40 — As to the protection of ATEL's investment, I do not think that there would be such a succession of obligations between Slovakia and the EU that the latter would have specific obligations under the Energy Charter Treaty towards an investor who has made the investment in a contracting party's territory before it acceded to the EU.

41 — The Accession Treaty, which includes the Act of Accession, was signed in Athens on 16 April 2003. *VEMW* was pronounced by the Grand Chamber on 7 June 2005.

42 — Paragraph 39.

43 — Commission, XXXIIIrd Report on Competition Policy (2003), p. 202.

negotiations would become irrelevant because in that case Slovakia would not have needed an exemption.

D — Article 307 EC: International obligations contracted prior to accession

68. The Commission submits that there is no obligation arising from a pre-accession agreement within the meaning of Article 307 EC, and that this cannot therefore amount to a justification for the discriminatory treatment afforded to ATEL.

1. Is the Contract an investment which may be protected under the Investment Protection Agreement?

69. The Investment Protection Agreement applies to investments, defined as ‘every kind of asset’, and a non-exhaustive list of possible other examples of what might constitute an investment, which includes ‘claims and rights to any performance having an economic value.’⁴⁴

⁴⁴ — Article 1(2)(c) of the Investment Protection Agreement.

70. In the present case ATEL acquired a right to transmission of a defined amount of capacity on the Lemesany-Krosno line by paying over half of the costs of construction as well as a transmission fee at a price to be calculated pursuant to the provisions of the Contract. In return, SEPS is required to grant this capacity to ATEL when it so requires, that is, it must provide a transmission system operator service on a preferential basis. This right that ATEL has acquired has an economic value since it guarantees the access to the Slovak transmission network that it needs in order to be able to sell electricity from/via Hungary to Poland.

71. It can therefore be considered to be an investment within the meaning of Article 1(c) of the Investment Protection Agreement.

2. Does the Investment Protection Agreement give rise to an obligation within the meaning of Article 307 EC?

72. Article 307 EC aims to strike a balance between, on the one hand, the pre-accession rights of third countries (under Article 307(1) EC), and remedying the incompatibilities with the EU Treaty to which they might give rise on the other by virtue of the obligation that Member States have to take all appropriate

steps to eliminate incompatibilities between pre-accession agreements and EU obligations (under Article 307(2) EC).⁴⁵ The most recent case-law of the Court has dealt with this latter duty found in Article 307(2) EC.⁴⁶ The present case, however, focuses solely on Article 307(1) EC, as the Commission has not pleaded Article 307(2) EC.

74. Although Article 307(1) EC mentions only obligations of the Member States, it would not achieve its purpose if it did not also imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement.⁴⁹

75. Furthermore, Article 307(1) EC does not have the effect of conferring upon individuals who rely upon a pre-accession agreement rights which the national courts of the Member States must uphold and it does not adversely affect the rights which individuals may derive from such an agreement either.⁵⁰

73. Under Article 307(1) EC, the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty.⁴⁷ Hence that provision resolves the conflict between the two incompatible obligations in favour of the earlier obligation, and thus codifies the international law principle that a subsequent treaty that conflicts with an earlier one cannot legally affect the rights of a State that is a party only to the earlier treaty.⁴⁸

76. In the present case it is clear that Slovakia has obligations towards Switzerland pursuant to the Investment Protection Agreement to protect investments made by Swiss investors in Slovakia. In addition, the Investment Protection Agreement clearly also gives rights under international law to investors,

45 — Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, paragraph 50.

46 — See for example Case C-205/06 *Commission v Austria* [2009] ECR I-1301; Case C-249/06 *Commission v Sweden* [2010] ECR I-1335; and Case C-118/07 *Commission v Finland* [2009] ECR I-10889.

47 — See also Case C-205/06 *Commission v Austria* [2009] ECR I-1301, paragraph 33 and cases cited there (Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215, paragraph 53; and Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145).

48 — Article 34 of the Vienna Convention.

49 — *Burgoa*, cited in footnote 47, paragraph 9.

50 — *Burgoa*, cited in footnote 47, paragraph 10. The principle of 'non-inference' was clearly stated by Advocate General Capotorti in his Opinion (p. 2) when he found '... that the first paragraph of Article 234 adds nothing to the original juridical standing of the rights and obligations flowing from earlier agreements between Member States and non-member countries and that such rights and obligations remain completely foreign to Community law. In the final analysis, even had the provision under consideration not been inserted in the Treaty, the pre-existing legal position of relations with non-member countries would have remained equally unaffected.'

who are entitled to invoke the arbitration clause contained in it against a contracting party independently of the legal effects that the Investment Protection Agreement has in the domestic legal orders of the contracting parties and without a need to seek diplomatic protection under public international law.

force pursuant to the Investment Protection Agreement. It says that the termination of the contract will not amount to (i) a breach of the fair and equitable treatment of the investment provision in the Investment Protection Agreement or (ii) expropriation under the Investment Protection Agreement.

77. Since the rights of private parties resulting from a pre-accession international agreement are not affected, if Slovakia has obligations pursuant to the Investment Protection Agreement in relation to ATEL which cannot be fulfilled if Slovakia applies Directive 2003/54 as interpreted by the Court in *VEWM*, then Slovakia has a defence under Article 307(1) EC, and the discriminatory treatment is thereby justified.

79. As a general proposition, the Court is not competent to interpret the Investment Protection Agreement. This task falls exclusively within the competence of the arbitration tribunals to be settled by a contracting party and an investor of another contracting party pursuant to Article 9 of the Investment Protection Agreement or by the contracting parties pursuant to Article 10. The same applies to the interpretation of the Contract. Furthermore, the arbitration clauses of the Investment Protection Agreement and the Contract also create a risk that the conclusions reached by a competent arbitration tribunal analysing those provisions will be different to those that the Court comes to.

78. The Commission claims, first, that there is no conflict between EU law and the Investment Protection Agreement itself because there is nothing in the Investment Protection Agreement that is incompatible with EU law. Moreover, the Commission denies that there is such an obligation arising from the Investment Protection Agreement, since Slovakia is not obliged to keep the Contract in

80. For the purposes of these infringement proceedings, however, the Court must adopt a certain 'interpretative reconstruction' of the elements of the legal situation created by these undertakings, in order to determine whether there is an obligation within the

meaning of Article 307(1) EC.⁵¹ Nevertheless, for the Court these legal elements appear as facts relating to the alleged infringement, not as legal norms to be interpreted by the Court.

by an arbitral tribunal established according to the procedure set out in the Investment Protection Agreement or by submitting disputes to ICSID.⁵² Although in arbitral proceedings there is no distinct doctrine of binding precedence, arbitral tribunals usually make reference to decisions of other tribunals in their findings.

81. When the Court is required to interpret international agreements it does so in accordance with Article 31 of the Vienna Convention. Pursuant to Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith, in accordance with the meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In that respect, account is to be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties.

82. According to Article 31(4) of the Vienna Convention, in interpreting the provisions of an international agreement it is also important to consider any special meaning that the parties intended to give to a term. In the present case it is clear that the parties to the Investment Protection Agreement intended to give the words in the Investment Protection Agreement the meaning that has been attributed to them by arbitral tribunals and by the International Centre for Settlement of Investment Disputes ('ICSID') since the Investment Protection Agreement makes an express reference for the settlement of disputes

83. The object and purpose of the Investment Protection Agreement, as stated in its preamble, is to create and maintain favourable conditions for investments, as well as to promote and protect such investments. In addition, Article 3 of the Investment Protection Agreement expressly states that contracting parties shall promote investments in their territory.

84. Article 4 of the Investment Protection Agreement states how investments shall be treated and protected, once they are admitted. Related to the protection of investments are the provisions concerning cases of dispossession, as found in Article 6 of the Investment Protection Agreement. I shall consider each of those articles in turn.

51 — See Case C-158/91 *Levy* [1993] ECR I-4287 where the Court held that in order to determine whether a Community rule may be deprived of effect by a pre-Community agreement 'it is necessary to examine whether the agreement imposes on the Member State concerned obligations whose performance may still be required by non-member countries which are parties to it' (paragraph 13). See also Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 57, and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 60.

52 — Article 9(3) of the Investment Protection Agreement.

(a) 'Fair and equitable treatment' under Article 4 of the Investment Protection Agreement

in December 1999 that Slovakia was invited to start negotiations for joining the EU. This was later than the date when the first group of candidate States who acceded to the EU at the same time as Slovakia were invited to join negotiations.⁵⁴

85. In relation to Article 4 of the Investment Protection Agreement, the Commission states that ATEL did not have a legitimate expectation that the legal framework would remain unchanged. In particular, it should have been aware that Slovakia was about to join the EU, since it had already concluded the European agreement and presented its request for accession.

88. This chronology may suggest that in 1997 an investor could not be sure or anticipate whether and at what date Slovakia would join the EU, since its position was still uncertain.

86. Slovakia argues that at the time of making the investment in 1997, ATEL could not predict the date at which Slovakia would join. In any case it did not expect to be deprived of its investment, especially since EU policy at the time indicated its desire to develop electricity transmission capacities, including outside Europe, as a result of Directive 90/547/ECC.⁵³

89. Despite this, should ATEL nonetheless have expected that the legal framework would remain unchanged?

87. It is true that Slovakia's chronology of accession was different from that of the other countries which joined at the same time. Slovakia signed the Association Agreement on 4 October 1993, and the Slovakian Prime Minister committed the application to the EU at the European Council Meeting in Cannes on 27 June 1995. However, it was only during the Helsinki European Council

90. The literal wording of Article 4 of the Investment Protection Agreement indicates that in protecting investments the host State must not impair the investments by taking unreasonable or discriminatory measures. Furthermore, it requires that the host State treat the investments fairly and no less favourably than investments made by its own investors.

53 — Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids (OJ 1990 L 313, p. 30).

54 — The Luxembourg European Council decided in December 1997 that negotiations on accession be started with six candidate countries (Czech Republic, Cyprus, Estonia, Hungary, Poland and Slovenia) in 1998. Presidency Conclusions — Luxembourg European Council, 12-13 December 1997: Council of the European Union, 16.04.2004, SN400/97. Available at <http://ue.eu.int/en/info/eurocouncil/>.

91. The level of protection that Article 4 affords as a whole does not, in my view, indicate that the legal and business framework will never be altered, but simply that alterations should not be arbitrary, and should not affect the foreign investor in an unreasonable and discriminatory way compared to the national investors making investments in the territory.

including a stabilisation clause or some other provision protecting it against unwelcome changes. A failure to do so might lead to the conclusion that an investor has taken a calculated business risk to accept that it faces a possible change in the law which may be or is likely to be, detrimental to its interests and investment.⁵⁷

92. This conclusion seems to be supported by arbitral practice. In general, there is an obligation not to alter the legal and business environment in which the investment has been made.⁵⁵ However, in the context of investments in a country going through a transition from its communist past, arbitral tribunals have held that the investor has no legitimate expectation that the laws would remain unchanged.⁵⁶ In such situations the investor might be expected to mitigate his exposure to the unstable legal environment by

93. From those cases it appears that the changes of laws must be made specifically to prejudice the investment,⁵⁸ unless a contrary promise was made by the State which induced the investor to invest.

94. However, in spite of this, I am not convinced that the change in the legal framework that ATEL is faced with is not unreasonable, since it is faced with the threat of a complete destruction of the consideration given for its investment.

95. To give an example of a legal framework change against which a private investor is not protected one could mention a situation

55 — See, for example, *Occidental Exploration and Production Company v The Republic of Ecuador*, Final Award, London Court of International Arbitration Administered Case No. UN 3467.

56 — In *Parkerings-Compagniet v Republic of Lithuania* (ICSID Arbitration Case No. ARB/05/8) the relevant facts took place between 1991 and 1999 'following Lithuania's gradual transition between 1991 and 1997 from a Soviet Republic to a candidate for EU membership and a market economy' (paragraph 51 of the award). In *Eastern Sugar v Czech Republic* (SCC No. 088/2004) the arbitral tribunal found that the mere introduction of a sugar regime similar to the EU Sugar Regime in view of the Czech Republic's accession to the EU did not constitute a violation of the fair and equitable treatment standard, but there was a violation when the legislation unfairly and inequitably targeted the particular company in question (paragraphs 271 to 274, 284 to 287, and 333 to 338). See also *Genin v Estonia* (ICSID Case No. ARB/99/2) (paragraph 356).

57 — *Parkerings*, paragraph 336.

58 — See for example *Parkerings*, paragraph 337, and *Eastern Sugar*, paragraph 335.

where a foreign travel agency participates in the financing of a holiday resort in exchange for having a right to use up to 20 % of its bed capacity for 20 years. The attraction of the holiday resort is based on its vicinity to a nature protection area. If the holiday resort loses its rentability because of new regulations that prohibit access for tourists to the protected area it cannot be claimed that the investor's legitimate expectation would have been infringed unless the State concerned has directly or indirectly participated in the deal or otherwise made promises concerning the continuation of the status quo. On the other hand, if the State, in order to promote equal access to the protected area, introduces new regulations according to which all travel agencies have to be on an equal footing regarding the use of the bed capacity of the new resort, the situation must be evaluated differently. An investor does not have to anticipate regulatory interventions that turn a legally made private investment into a common good and, consequently, worthless to him.

96. Hence, even if ATEL should have expected changes to the regulatory framework it is doubtful that it should have anticipated a regulatory change that deprives it of a

possibility to enjoy a privileged use of property it has acquired as a result of the investment.⁵⁹

(b) Expropriation under Article 6 of the Investment Protection Agreement

97. Article 6 of the Investment Protection Agreement states that the contracting parties shall not take, directly or indirectly, measures of expropriation or other measures having the same nature or the same effect against the investments. That is subject to measures being taken in the public interest, on a non-discriminatory basis, under due process of law, and provided that effective and adequate compensation is paid.

98. The Commission argues that Article 6 of the Investment Protection Agreement does not amount to an international obligation to keep the Contract in force, since the breach of the Contract would not amount to

59 — It seems to me that the right ATEL has on the basis of the Contract might amount to a property right within the meaning of Article 1 of the first additional protocol to the European Convention on Human Rights. For the wide notion of 'possessions' protected under Article 1 of the First Protocol to the European Convention of Human Rights see Harris, D., *Law of the European Convention on Human Rights*, pp. 656 to 662. Concerning the case-law relating to investments see, for example, *Stran Greek Refineries and Stratis Andreadis v. Greece* (Application No. 13427/87), judgment of 9 December 1994.

expropriation. It argues that it is rare that a State's interference in a contractor's investment rights is such that it amounts to indirect expropriation.

wording of Article 6 of the Investment Protection Agreement it is clear that Slovakia's action of terminating the Contract will interfere with ATEL's rights: it will be deprived of the *only* return it has in respect of the investment.⁶¹

99. Slovakia argues that such a situation would amount to indirect expropriation. According to it, expropriation is State action that influences in a negative manner the management, enjoyment and value of the investment, and will arise if the public measure is irreversible, permanent, and affects the investment in such a way that part of the investment disappears.⁶⁰

100. Article 6 of the Investment Protection Agreement is worded broadly. It does not only include direct and indirect expropriation, but also measures having the same effects. It therefore seems to envisage a broad protection of investments.

102. The Commission argues that expropriation is not illegal, since Article 6 of the Investment Protection Agreement provides for compensation to be paid in cases of expropriation. Thus, according to it, there is no obligation not to expropriate, but an obligation not to expropriate *without compensation*. The Commission submits that to view this as a condition capable of justifying discriminatory treatment would amount to accepting that an argument invoking a financial burden

101. In the present case, based on that meaning of expropriation as well as the broad

60 — *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24).

61 — It is interesting to note that the need for compliance with EU law will not necessarily justify measures taken by a host country that are inconsistent with a bilateral investment treaty. Thus, the arbitral tribunal in *ADCIADMC v Hungary* did not accept that compliance with EU law (ground handling at Budapest Airport had to be harmonised with EU Directive 96/97 and air traffic control had to be separated from airport operation services pursuant to EU law) mandated the measures taken by the host country against the foreign investor. These measures were found to constitute expropriation and thus contrary to Hungary's obligations in the bilateral investment treaty under investigation. See *ADCIADMC v Hungary*, ICSID Case No ARB/03/16.

is acceptable, which is contrary to the Court's case-law.⁶²

public interest and in full respect of human and fundamental rights.

103. In my view, this argument puts the remedy before the right. Article 6 encapsulates a right to compensation as a result of the investor's right not to be expropriated being breached. This right to compensation does not deny that there is a right not to be expropriated, and thus an international obligation within the meaning of Article 307 EC on Slovakia not to expropriate the investment unless the conditions of Article 6, of which compensation is only one amongst others, are fulfilled.

104. In my view, lawful expropriation is not an ad hoc policy measure targeted against a known investor, albeit mitigated with compensation, but it consists of the application of a pre-existing legal framework in predefined situations characterised by an overriding

105. This conclusion is supported by an analysis of what Slovakia would be expected to do in order to achieve what the Commission sees as the legal situation under Directive 2003/54. It is not Slovakia that is a party to the Contract but SEPS, who has no right to withdraw from it. The Contract is to be construed pursuant to Austrian law, so Slovakia cannot change its terms or its effects by its legislation, or deprive it of legal effects. A Slovakian law that declared contracts providing for privileged access to transmission networks invalid and inapplicable in Slovakia would not change the fact that SEPS would remain legally bound by the Contract. Therefore, the only conceivable way for Slovakia to comply with its obligation in the present case is to pass legislation which targets SEPS and prevents it from implementing the Contract. In my opinion that is likely to amount to expropriation, or a measure having the same effect, and moreover is likely to be at odds with the requirement of fair and equitable treatment.

106. Furthermore, since EU law currently allows derogations from the principle of non-discriminatory access to electricity transmission networks, it cannot be said that expropriation of ATEL's investment is required in the public interest. In addition, it cannot be said to take place on a non-discriminatory basis since there is a gap between the end of the derogation period allowed under Article 24 of Directive 96/92 and the

62 — Case 309/84 *Commission v Italy* [1986] ECR 599, paragraph 17. I observe that there is no indication in the file that ATEL would have been offered compensation for the new situation. Furthermore, financial relief granted to an investor as compensation for the loss of value of a prohibited discriminatory advantage might be problematic from a State aid point of view. On that point see, for example, Eilmansberger, T., 'Bilateral Investment Treaties and EU law' [2009] 46 *Common Market Law Review* 383, at page 423 and footnote 171.

entry into force of Article 7 of Regulation No 1228/2003. This gap means that some investments may be subject to a derogation whilst others cannot, which in turn means that the measure cannot be said to take place on a non-discriminatory basis.

to be in breach of its obligations under Articles 9 and 20 of Directive 2003/54.

107. This must lead to the conclusion that there is an international obligation within the meaning of Article 307(1) EC and that Slovakia cannot force SEPS not to follow the terms of the Contract without infringing its obligations under the Investment Protection Agreement.

109. In coming to this conclusion I do so not without some hesitation. Even though the application of Article 307 EC justifies such an outcome it seems to sit at odds, at first glance, with the idea of market liberalisation that Directive 2003/54 aims to promote. However, in reaching the conclusion I am persuaded by the fact that this solution is not incompatible with the derogation provisions set out in Article 24 of Directive 96/92 and Article 7 of Regulation No 1228/2003, which allow investments in the electricity field to exceptionally be granted temporary privileged access.

(c) Conclusion on international obligation

108. The consequence of this is that such an obligation, concluded before the entry into force of the Treaty, cannot be affected by the Treaty, and as such Slovakia cannot be held

110. Furthermore, the present case does not pose a threat to market liberalisation since ATEL is a third country company, not an incumbent monopoly, with a right that was acquired prior to Slovakia's accession, fixed in time and not renewable after that time period.

V — Conclusion

111. As a result of what precedes I propose that the Court dismiss the action and condemn the Commission to pay the costs.