Trends in International Energy Arbitration: Can ECT Claims be Arbitrated? Some Initial Considerations in the Light of the CJEU’s Ruling in Achmea

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1 Introduction

One of the more recent and most incisive trends in international energy disputes is the availability of regional and international investment treaty frameworks that cater for the resolution of such disputes by arbitration. Bi- and multi-lateral investment arbitration practice has taken off significantly since the 1990ies, following discovery by investors of investor-State arbitration.

Investor-State arbitration allows individual investors to proceed in arbitration directly against a host State, i.e. the beneficiary of the underlying investment, in the event that the host State fails to comply with the investment protections provided under the applicable investment treaty. The investment treaty in turn contains a standing offer to arbitrate on the part of the host State, which the individual investor is entitled to trigger in the event that the host State defaults.

This form of arbitration has generally become known as “arbitration without privity” (2) given that it does not require the existence of a separate arbitration agreement between the investor and the host State but operates on the basis of the State’s unilateral offer to arbitrate. The host State’s execution of the underlying bi-lateral or multi-lateral investment treaty is sufficient to bind it to the obligation to arbitrate disputes brought against it by an individual investor under that treaty.

The attractiveness of arbitration within this context can hardly be over-stated, it having been – since the early 1990ies – a significant driver in the substantial increases of foreign direct investment in a number of industries worldwide, in particular in developing economies. Unsurprisingly, one of the main beneficiaries has been the energy sector, which is at the heart of a nation’s economic development and requires significant resources and external investment to take off the ground.

According to the late Professor Thomas Wälde, who was a pioneer and great defender of arbitration in the energy sector,

*investment treaties’ first significance to oil, gas and energy investors is that they provide an international arbitral jurisdiction even if the investor had been unable to negotiate one in the first place by contract. In that sense, they are of greatest benefit to junior companies with less international experience and bargaining leverage. Large international oil companies traditionally have been less interested in investment arbitration as they thought they could fend for themselves and negotiate contract-based arbitration clauses themselves.* (3)

2 The ECT

Foreign direct investment in the energy sector in particular has benefited from the Energy Charter Treaty, in shorthand the ECT. The ECT was signed in 1994 and entered into force in April 1998. It has since increased its membership to over 50 countries, including countries from Europe, the Middle East, Africa, Canada and the US. The ECT endeavours to “promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources” (4). It contains the main investment protections common to investment treaties of this kind, including protection from expropriation as well as national and most-favoured nation treatment.

That said, the single most important safeguard for an energy investor’s rights under the ECT is the ready access to arbitration that it offers. More specifically, Clause 26 of the ECT provides for investor-State arbitration in the event that amicable settlement between the parties fails.

3 The ECT Arbitration Mechanism: Compatible with EU Law?

To the great disappointment of the international energy investor community, more recent developments have placed under scrutiny the enforceability of the ECT arbitration
mechanism within the context of arbitrations brought under the ECT against a European Union (EU) Member State. The main question that has arisen is whether the ECT arbitration mechanism is compatible with EU law.

3.1 The EU Legal System

The EU, formerly the European Economic Communities, is a self-contained, autonomous supranational economic and legal system. It is based on the concept of the so-called internal market, which in turn is built around the cornerstones of the four freedoms: The free movement of goods, services, persons and capital.

Importantly, the European Commission together with the Court of Justice of the European Union (CJEU) (and its General Court) police proper compliance by European citizens and businesses with EU policies and laws. The EU Member State courts, more specifically, are bound by EU law and must comply with the objectives of the Union by virtue of their obligation of sincere co-operation under Art. 4(1) of the Treaty on European Union (TEU). As a result, when seized of an application for enforcement, EU Member State courts routinely scrutinize arbitral awards for their compliance with EU laws. Within this context, some EU laws, such as EU competition law, have been elevated to the status of public policy under Art. V(7)(b) of the New York Convention (5) by virtue of the CJEU’s landmark ruling in Eco Swiss (6). In order to ensure the proper application of EU law, EU Member State courts may make so-called preliminary references to the CJEU for an interpretation of controversial points of EU law by virtue of Art. 267 of the Treaty for the Functioning of the European Union (TFEU).

It is within this supranational context that a number of recent arbitration claims brought under the ECT (7) have come under scrutiny for the compatibility of the ECT arbitration mechanism with EU law.

3.2 Positioning: EU Commission v. ECT Tribunals

Importantly, the European Commission, which participated in these proceedings as amicus curiae, pleaded in favour of incompatibility. The thrust of the Commission’s argument was that by virtue of Art. 344 TFEU, pursuant to which EU “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for herein [i.e. the CJEU]”, the CJEU has exclusive competence over matters of Treaty interpretation. Intra-EU investment tribunals go against the explicit prohibition in Art. 344.

By contrast, each ECT tribunal vetoed the arguments advanced by the European Commission and found in favour of the compatibility of the ECT arbitration mechanism with EU law. The main arguments raised by each ECT tribunal in favour can briefly be summarised as follows: (8)

(i) None of the references gave rise to claims contending for the substantive law provisions of the ECT being inconsistent with and as such in violation of EU law. (9)

(ii) In none of the references, Art. 344 TFEU was in issue: None of the references involved any disputes between EU Member States. There was no rule of EU law prohibiting EU Member States from submitting their disputes with investors from other Member States to arbitration. (10) There was also no rule under EU law prohibiting the application of EU law by arbitration tribunals. (11) To the contrary, one may add, since Eco Swiss (12), tribunals have been under an obligation to raise EU law issues ex officio and to apply EU law as appropriate to issues before them, having afforded each party a sufficient opportunity to be heard. (13) As poignantly stated by the tribunal in Electrabel (14):

The ECI’s monopoly is said to derive from Article 292 EC (now Article 344 TFEU) which grants to the ECI exclusive jurisdiction to decide disputes amongst EU Member States on the application of EU law. […] However, as is well known and recognised by the ECI, such an exclusive jurisdiction does not prevent numerous other courts and arbitral tribunals from applying EU law, both within and without the European Union. Given the widespread relevance and importance of EU law to international trade, it could not be otherwise. (15)

(iii) EU law could be presumed not to conflict with the provisions of the ECT, why otherwise would the EU have acceded to the ECT without any reservations? (16) As the tribunal stated in Eastern Sugar v. Czech Republic, “free movement of capital and protection of investment are different but complementary things.” (17)

3.3 The CJEU’s Ruling in Achmea

Despite the consistently positive conclusions drawn by the individual ECT tribunals in favour of the compatibility of the ECT arbitration mechanism with EU law, the CJEU’s recent ruling in Achmea (18) may ring the death knell for the future of arbitration of investment claims against an EU Member State under intra-EU investment treaty frameworks. In that
ruling, the CJEU found that a traditional arbitration mechanism contained in the BIT between The Netherlands and the Czech and Slovak Federative Republic was not compatible with EU law.

The main planks of the CJEU’s argument in rejecting the compatibility were the following:

(i) An intra-EU investment tribunal was not bound by Art. 267 TFEU and hence called into question the uniformity of EU law in proceedings before it. (19)

(ii) An intra-EU tribunal was not bound by the obligation of sincere co-operation under Art. 4(1) TEU and hence called into question the relationship of mutual trust between the EU Member State courts. (20)

(iii) As a result, an intra-EU investment tribunal could not ensure the full effectiveness of EU law in situations where there was a requirement to apply and interpret EU law. (21)

(iv) In those circumstances, an intra-EU investment tribunal would “have an adverse effect on the autonomy of EU law”. (22)

In concluding against compatibility, the CJEU emphasized the difference between an international commercial arbitration tribunal and an intra-EU investment arbitration proceedings of the kind concerned here:

Whilst [the former] originate in the freely expressed wishes of the parties, the latter derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts […] disputes which may concern the application or interpretation of EU law. […] (23)

4 Conclusion

In my view, there is no tangible difference between the exercise of the parties’ will in terms of the appointment of arbitrators in an individual reference (irrespective of whether we are dealing with a corporate individual or a State party). The key is the competence of the individual arbitrator and his or her ability to adequately apply EU law to the extent required. Importantly, the safeguard of an EU Member State court’s scrutiny remains in place for infra-EU enforcements. Legitimate systemic concerns could possibly only arise within the context of ICSID awards that are immune from scrutiny at the Member State court level by virtue of Art. 53 of the ICSID Convention, which requires immediate execution of ICSID awards by Convention courts. (24)

In addition, the CJEU’s conclusions against compatibility were premised on the fact that the intra-EU tribunal was constituted under “an agreement [(i.e. the Czech-Slovak BIT)] which was concluded not by the EU but by [EU] Member States.” (25) In other words, the CJEU’s conclusions are not intended to extend to agreements, like the ECT, to which the EU is a party.

If this interpretation were to be correct (and there is no reason why it should not be given the fact – as has been seen before – that the EU’s membership of the ECT should be indicative of the compliance of the provisions of the ECT, including its arbitration mechanism, with EU law), the ECT arbitration mechanism would not be caught by the CJEU’s ruling and remain valid and enforceable for now. (26)

That said, the enforceability of investment arbitration agreements within the intra-EU context is presently under threat and only the CJEU will be able to tell the way ahead.

Gordon Blanke, Trends in International Energy Arbitration: Can ECT Claims be Arbitrated?

Summary

This article discusses the enforceability of arbitration agreements and more specifically of the arbitration mechanism contained in the Energy Charter Treaty (ECT) under EU law given the prime role played by arbitration as a means of resolving energy disputes internationally. The discussion focuses on the recent ruling of the Court of Justice of the European Union (CJEU) in C-284/16 – Sławiański Republika (Slovak Republic) v. Achmea BV, Judgment of the Court of 6 March 2018, which raises concerns about the compatibility with EU law of obligations to arbitrate entered by Member States within the framework of bilateral investment treaties (BITS) for infra-EU investment. The article explores whether the ruling extends to the operation of the ECT arbitration mechanism or whether – given the EU’s membership of the ECT – it remains unaffected by the CJEU’s findings for now.
References

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1) This article is based on a presentation on “Trends in International Energy Arbitration” given by the author at the 50th UNCITRAL and 60th New York Convention Anniversaries Celebration Conference held in Abuja, Nigeria, 14 – 15 June, 2018.
5) On the recognition and enforcement of foreign arbitral awards, done at New York, 10 June 1958.
8) See also Norvenergia, at paras 457 et seq.
9) See Charenne, at para. 448; and Eiser, at para. 199.
11) Ibid.
12) Cited supra.
13) “[Arbitral tribunals not only have the power, but the duty, to apply EU law.”: Isolux, at para. 654; and Masdar Solar, at para. 339.
14) Cited supra.
16) See Blusun, at para. 286; also Electrabel v. Hungary, at para. 7.79 and 4.158; Charenne, at para. 4.45.
18) Case C-284/16 – Slowakische Republik (Slovak Republic) v. Achmea BV, Judgment of the Court of 6 March 2018.
19) Achmeo, at paras 37, 43, 49 and 58.
20) Achmeo, at paras 34 and 58.

21) Achmeo, at para. 56.
22) Achmeo, at para. 59.
24) See, however, the Tribunal’s recent ruling in ICSID Case No. ARB/13/35 - UP and C.D Holding Internationale v. Hungary, Award, 24 September 2018, at paras 252 et seq., which appears to discard this proposition.
26) Most recently, this conclusion has also been drawn by an ICSID Tribunal in ICSID Case No. ARB/12/12 – Vattenfall AB et al. v. Federal Republic of Germany, Decision on the Achmea Issue, 29 August 2018, relying – correctly in my view – on a literal interpretation of Arts 16 and 26 ECT. For comment, see G. Blanke, “The Achmea issue and ECT claims: Where do we stand?”, Practical Law Blog, Thomson Reuters, 7 January 2018.