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The Future of Intra-EU ECT Claims in the Face of EC Opposition: Boom or Bust?

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Reliance on the investor-state dispute resolution (ISDS) mechanism of the Energy Charter Treaty (ECT) is booming, with at least ten new cases registered in the past year alone. Notably, nine of these ten cases – and almost 60% of all publicly reported cases initiated to date – have been brought by an investor from a Member State of the European Union (EU) against another EU Member State. Not everyone, however, shares the enthusiasm for such "intra-EU ECT claims" – most importantly, the European Commission. In almost all recent cases, the EC has filed *amicus curiae* submissions attempting to persuade the arbitral tribunal to refuse jurisdiction on the basis that the ECT cannot give rise to intra-EU disputes. The EC concedes that, unlike more than 20 other treaties to which the EU (or its predecessor the EEC) is a party, the ECT does not contain an explicit "disconnection clause" providing that, in the case of conflict, EU rules prevail. Nonetheless, the EC has argued that an implied disconnection clause must be read into the ECT. The EC has also argued that because the EU is a signatory to the ECT, investors from one Member State do not have standing to bring arbitration claims against a fellow Member State, as they are essentially nationals of the same contracting party (i.e., the EU). The question is: Will the EC be successful at shutting off the flow of intra-EU ECT claims, or will the boom continue?

Recent developments

The past 18 months have brought a number of setbacks to the EC's attempt to end investor-state arbitration proceedings arising under the ECT. At least five published decisions have flatly rejected the EC's arguments. Listed in chronological order, these are: *Charanne v. Spain*, SCC Case No. V062/2012 (21 January 2016); *REEF v. Spain*, ICSID Case No. ARB/13/30 (6 June 2016); *Isolux v. Spain*, SCC Case V2013/153 (17 July 2016); *Blusun v. Italy*, ICSID Case No. ARB/14/3 (27 December 2016); *Eiser Infrastructure v. Spain*, ICSID Case No. ARB/13/36 (4 May 2017). Each successive award has not only solidified the pro-intra-EU ECT claims position, but also shed more light onto the reasons behind it.

Already the *Charanne v. Spain* tribunal found that "although the EU is a party to the ECT, EU Member States also remain contracting parties to the ECT", and therefore,

both the EU and its Member States "can have legal standing as respondents." The tribunal in *Eiser v. Spain* expanded on this point, explaining that because there is no translational body of European law regulating the organization of corporate entities, for the purposes of the ECT, "there can be no 'EU' investors", only investors of the individual Member States. Thus, the diversity requirement imposed by ECT Art. 26(1) and (2) is plainly satisfied in a dispute brought by an investor from one Member State against another Member State.

The tribunal in *REEF v. Spain* rejected the possibility for an implied "disconnection clause" by reference to the fundamental *pacta sunt servanda* principle of customary international law. This principle entails that states that enter into multilateral agreements with the intention that certain provisions not apply must either make a reservation or insert an "unequivocal" disconnection clause. The tribunal noted that the attempt to construe an implicit disconnection clause into Article 26 of the ECT is particularly "untenable", given that the ECT already contains other express exceptions to the submission of disputes to arbitration. Subsequent panels have followed this line of reasoning, with the *Eiser* tribunal adding that because treaties must be interpreted in good faith, "hidden meanings" and "sweeping implied exclusions" – such as a disconnection clause – cannot be read into the ECT.

Finally, on 16 May 2017, the EC's position suffered a further blow – this time from the Court of Justice of the European Union (CJEU). In its *Opinion 2/15*, the CJEU rejected the notion that the EU has exclusive competence over Investor-State Dispute Settlement (ISDS) mechanisms, finding that this competence is shared between the EU and the Member States.

Thus, the current state of play may be summarized as follows: First, the ECT (and specifically its ISDS provision) is a so-called mixed agreement, covering subject-matter over which the EU enjoys only shared competence together with its Member States. Second, according to the EU's long-standing practice, where it intended for EU laws to trump treaty provisions in mixed agreements, it has included an explicit disconnection clause saying so. Third, there is no explicit disconnection clause in the ECT. Fourth, arbitral tribunals have unanimously and unambiguously rejected the EC's argument that the ECT cannot give rise to intra-EU investment arbitration proceedings.

The EC's remaining options

Against the backdrop of these recent developments, it seems very unlikely that the EC's strategy of intervening in arbitration proceedings to contest jurisdiction will produce any positive results. Yet, it is equally unlikely that the EC will abandon its opposition to intra-EU ECT claims. The question is then whether there are any other measures the EC could take which might have a greater impact.

With regard to the closely-related issue of intra-EU BITs, the EC has already experienced some success. Ireland and Italy ended all of their intra-EU BITs in 2012 and 2013, respectively. When other Member States were hesitant in following suit, in June 2015, the ECT initiated infringement proceedings against Austria, Finland, France, Germany and the Netherlands. In April 2016, the delegations of these five

countries presented a "non-paper" to the EU Council's Trade Policy Committee suggesting the possibility of "phasing-out of existing intra-EU BITs". Thus, while the process is still ongoing and the ultimate outcome remains unclear, there appears to be a significant prospect that the end of intra-EU BITs as we know it may be near.

However, this approach is unlikely to be replicated with regard to intra-EU ECT claims. First, it is not possible for EU Member States alone to amend the ECT to exclude the application of its ISDS provision *inter se*. Under ECT Art. 42, any amendment to the treaty requires the consent of three quarter of the contracting parties – and EU Member States make up only 54% of the contracting parties. As pointed out by the *REEF v. Spain* tribunal, the fact that Art. 46 ECT forbids reservations "tends to confirm the intent of the contracting parties to have the ECT unconditionally and integrally applied by all Parties" and there is no reason to expect non-EU contracting parties to change this approach as a favor to the EC.

Although the EC could theoretically work to persuade all EU Member States to withdraw from the ECT entirely, it is not likely to do so. Indeed, the EC was reportedly unhappy when Italy became the first (and thus far, only) Member State to announce its withdrawal from the ECT in early 2015 (effective 1 January 2016). Despite the EC's opposition to intra-EU ECT claims, this reaction is understandable, considering that the EC assumed a leading role in negotiating the ECT, aiming to extend an EU-comparable level of protection in energy investment and trade to non-EU Eurasian nations. Moreover, a third of all ECT claims registered to date have been brought by an investor of an EU Member State against a non-EU Contracting Party. Should all EU Member States withdraw from the ECT, their investors would no longer have recourse to ISDS protection for its energy investments in non-EU, ECT member countries – and of course, would also not have the protection of EU law. Given the nature of the energy business in many of the non-EU ECT member countries, this would be a serious loss for EU-based energy companies, as the EC is surely aware.

The final tool in the EC's current arsenal is fighting enforcement of any intra-EU ECT award on the basis that it constitutes illegal state-aid, as it is currently doing in the *Micula* enforcement proceedings. Yet, even if this approach is successful in *Micula* (which is far from certain), it would likely be of relatively limited application going forward, confined to those cases where the EU provisions on state aid came into play on the merits.

Prediction

Making predictions is always a dangerous business. Nonetheless, at least in the short-term, the EC looks unlikely to be able to end the intra-EU ECT boom. Indeed, the EC itself seems to have recently reached this conclusion. On 25 July 2017, it announced a new initiative designed to promote mediation for intra-EU investment disputes, with an eye particularly on the energy sector. Whether any proposed non-binding mediation mechanism will prove fruitful remains to be seen. It will in any case serve merely to supplement – and not replace – the possibility of bringing intra-EU claims under the ECT.

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