A New, BLEU-based Objection to Intra-EU Energy Charter Treaty Claims

Kluwer Arbitration Blog
November 19, 2017

Danilo Ruggero Di Bella (Bottega Di Bella)

Please refer to this post as: Danilo Ruggero Di Bella, 'A New, BLEU-based Objection to Intra-EU Energy Charter Treaty Claims', Kluwer Arbitration Blog, November 19 2017,
http://arbitrationblog.kluwerarbitration.com/2017/11/19/new-bleu-based-objection-intra-eu-energy-charter-treaty-claims/

Currently, several dozen arbitral claims have been lodged by investors from an EU Member-State against another EU Member-State based on the Energy Charter Treaty (ECT). These so-called intra-EU ECT-based arbitrations seem to be increasing, despite attempts by the European Commission to halt them. So far, neither the Respondent-States nor the Commission (as *amicus curiae*) have succeeded in convincing an arbitral tribunal of intra-EU jurisdictional problems with such claims.

This post argues a new potential objection to intra-EU ECT-based claims based on is the parallelism between the ECT and the Belgo-Luxembourg BITs, or in other words, between the superseded European Economic Community (EEC) and the Belgo-Luxembourg Economic Union, coupled with the principle of systematic integration. To understand this comparison, it is first necessary to recall the background of these treaties.

The 1957 Treaty of Rome set forth in article 210 the international legal personality of the EEC and granted the Commission competence to conclude treaties in name of the EEC. In 1991, the Commission signed, on behalf of the EEC (and also the ECSC and the EURATOM), the European Energy Charter – the treaty establishing

the ECT's political foundations – whose signature is a precondition for joining the Energy Charter Conference and acceding to the ECT. In 1993, following the entering into force of the Maastricht Treaty, the European Union (EU) was established and the European Economic Community became the European Community (EC) to reflect its new wider scope of action. Consequently, in 1994 the ECT was signed as a mixed agreement by the Commission on behalf of the back then European Communities – the ECSC, the EURATOM, and the EC – and by the Member States, falling the Energy Charter Conference related areas within the mixed competence. Once the Treaty on the Functioning of the EU (TFEU) entered into force in 2009, the EU replaced and succeeded the EC by amending the EEC Treaty and relabeling it as the TFEU. Nowadays, of the three Communities that signed the ECT in 1994, only EURATOM is still operating and is a Contracting Party to the ECT just as the EU is.[fn]BALTAG Crina, The Energy Charter Treaty: The Notion of Investor, Kluwer, 2012, p.57-63.[/fn] All the way from the drafting of the European Energy Charter to the negotiation of the ECT, the role of the European Commission has been crucial to the ECT's adoption and entrance into force in 1998. The three European Communities, on one hand, as well as, the EU and EURATOM, on the other, when signed and entered into the ECT, respectively, did so as a Regional Economic Integration Organisation (REIO) pursuant to article 38 of the ECT, which allows REIO to become a Contracting Party to that treaty. Simultaneously, the EU Member-States signed and ratified the ECT (the value of these signatures and ratifications will be put in perspective down below through the lens of the Belgo-Luxembourg BITs).

Let us turn now to the intriguing Belgo-Luxembourg Economic Union (BLEU). The BLEU was constituted in 1922 by the entrance into force of the 1921 Convention establishing an Economic Union between Belgium and Luxembourg. This Convention established a Regional Economic Integration Organisation primarily based on a common external trade-investment policy and customs-excises union – *where the territories of the Member-States are to be considered as forming one single territory* –, and on a monetary association, too. Overtime the 1921 Convention has been adapted to the new circumstances – such as the founding of the Benelux Economic Union, the EEC and, later, the EU – through Protocols up to the negotiation of a new Convention, which entered into force in 2005. The new Convention confirmed and strengthened the preferential relations between Belgium and Luxembourg within the legal framework of the BLEU[fn]SOMERS Eduard, Belgium-Luxembourg Economic Union, Max-Planck.[/fn] This preferential

relation is acknowledged by the Benelux and the EU in Article 94 of the Benelux Treaty and Article 350 of the TFEU, respectively. The EU recognizes so much the special bound between Belgium and Luxembourg that at times it considers the Belgo-Luxembourg Economic Union as a single Member-State (e.g., the "whereas (2)" of the EC Regulation No. 2771/1999). As regards the institutions of this Economic Union, they closely recall the structure of the EU itself for their functions as well as their names. The BLEU is, indeed, administered by the Mixed Administrative Commission, that is entrusted with tasks similar to those of the European Commission, being the executive arm of the Economic Union and ensuring on a permanent basis the application of the Convention and a regular liaison between the Governments of the two Member-States. Whereas the Council of the European Union closely resembles the BLEU's Committee of Ministers, which is regularly summoned to adopt legal instruments, and coordinate common policies, just as the Ministers do in the Council. And just like the EU Commission proposes the legislation to be adopted by the Council of the EU and the EU Parliament as well as supervises its application, the BLEU Commission prepares proposals to be submitted to the Committee of Ministers for decision making, and oversees the implementation of the Convention.

It is noteworthy that, long before the EU, the BLEU has guaranteed nationals of its Member-States – both natural and juridical persons – freedom of movement and establishment, equal treatment in respect of the exercise of professional occupations and salaried employments.

As the similarities highlighted above make clear, although it is well-known that the Benelux is presumably the forerunner of the European Economic Community, the true forerunner of the Benelux (and consequently of the EEC, the EC and the EU) is the Belgo-Luxembourg Economic Union itself.

Investment protection is one of the BLEU's areas of action, conducted through a peculiar bilateral investment treaty model, that is usually offered to the prospective third High Contracting Party for its acceptance (a third Party with respect to the Union). On behalf of the Economic Union, the BLEU has entered into approximately 100 BITs. Now, these Belgo-Luxembourg BITs concluded by the BLEU share many of features with the ECT concluded by the EU, primarily for two reasons:

1) the EU and the BLEU are both Regional Economic Integration Organizations

(undoubtedly, as illustrated above, with a lot in common, as one inspired the other);

2) the way these treaties have been negotiated, signed and ratified by the Parties (as explained below).

Due to the mixed nature of the competences necessary to authorize its entrance into force, the ECT was negotiated, signed and ratified by the EU Commission on behalf of the EU, by each EU Member-State and, of course, by third State Parties. Curiously enough, BLEU BITs are no exception to it, and not only vis-a-vis Luxembourg. Again, because of the very same reason (the mixed nature of the competences necessary to authorize their entrance into force), BLEU BITs are signed not only by the representative of the Economic Union, but also by representatives of Luxembourg, Belgium, and by representatives of each Belgian region. The fact that a region of Belgium signs a BIT does not give that region an independent legal standing under that treaty, of course. After the signature, Luxembourg and Belgium are each responsible to ratify the BIT to ensure its implementation. Hence, in our parallelism, the signature of the representative of the Economic Union is comparable to the EU Commission's signature in the ECT, whereas the signature of the representative either of Walloon Region or Luxembourg is equivalent to the signature of Italy or Spain representatives on the ECT.

So, if it is clear that a Belgian investor cannot rely on a BLEU BIT to file an arbitration against Luxembourg, why is it not equally clear that a French investor may not resort to the ECT to launch an arbitration against Italy? It flows from the above mentioned analogy that this ought not to happen. After all the BLEU has significantly influenced the shape of the EU and its activities, so why should this influence have been absent during the drafting and signing of the ECT? That's why it is sensible to suggest that the ECT should be read in the light of the older and consolidated BLEU BITs tradition to prevent intra-EU arbitrations just like intra-BLEU arbitrations.

Avoiding inconsistencies in international law – resulting from allowing intra-EU arbitrations while denying intra-BLEU arbitrations – calls for cross-applying the principle of systematic integration to Economic Integration Organizations in investment arbitrations. Tribunals have frequently construed the particular international investment agreement (IIA) at issue based on other IIAs in a manner

that brings coherence to the system of investment law. The weight accorded to other treaties in understanding the applicable IIA may be seen as proportionate with the degree of similarity among equivalent texts. Accordingly, given the high affinity between the ECT and the BLEU-BITs, when interpreting the *status* of the EU or its Member-States under the ECT, BLEU BITs may offer interpretative guidance as to the legal standing of an Economic Integration and its Contracting Parties to an IIA by contextualizing and redefining their peculiar contours.