Is the Court of Justice of the EU the Ultimate Judge of the ECT?

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No doubt, the Energy Charter Treaty (ECT) has become the hottest topic in the investment treaty arbitration world. Not only are EU Member States the most frequent respondent in ECT disputes – for example, the Netherlands has recently received its first ECT claim – but the ECT itself is currently in the middle of a major overhaul of its core provisions. More specifically following the *Achmea* judgment, the EU and most of its Member States have indicated an objective of excluding the application of the ECT for intra-EU ECT disputes. While it is too early to predict when the ECT modernization process will be concluded, the most recent developments demonstrate that it might actually be the Court of Justice of the EU (CJEU) which – sooner rather than later – will prejudge the outcome by declaring the investor-State dispute settlement (ISDS) provisions of the ECT to be inapplicable in intra-EU ECT disputes.

Indeed, in a recent opinion [not yet available in English] in the *République de Moldavie* case, Advocate General Szpunar opined that the investor-state arbitration system under the ECT is incompatible with EU law. Some months before, another Advocate General in a different case also noted in passing that the ECT arbitration provisions are incompatible with EU law. Clearly, these opinions illustrate that the prevailing view within the CJEU seems to be that the *Achmea* judgment is also applicable to intra-EU ECT disputes. Considering the fact that in the vast majority of cases, the Court follows the opinions of its Advocate Generals, it seems likely that the Court will indeed decide that the investment treaty arbitration provisions

cannot be relied upon by European investors against EU Member States or the EU.

Whereas this view is in line with the political Declaration issued by a majority of Member States shortly after the *Achmea* judgment was rendered, the fact remains that the *Achmea* judgment does not refer with a single word to the ECT.

So, the question arises: how is it possible that the CJEU could declare the ISDS provisions of the ECT inapplicable for intra-EU ECT disputes whereas the case at hand is completely unconnected with EU law?

The Facts of the Case are Completely Unconnected with EU Law

In short, the facts of the case are as follows. The Cour d'Appel de Paris has asked several questions to the CJEU regarding the ECT. These questions arose following a dispute between a Ukrainian energy producer and Moldova regarding the failure to fulfil the contractual obligations of paying for the delivery of electricity.

The dispute between the Ukrainian company and Moldova resulted in an arbitral award against Moldova. In response, Moldova initiated proceedings before the Paris court requesting the setting aside of the arbitral award by claiming that there was no investment by the investor and thus no basis for rendering the award under the ECT.

The Paris court requested the CJEU to clarify whether an "investment" within the meaning of the ECT took place. To be clear, the Paris court did not ask any questions as to the applicability of the ECT within the EU, which is logically, since the underlying dispute did not involve a European investor and neither a EU Member State.

The CJEU Superimposes Itself on the ECT

Thus, despite the fact that this case has nothing to do with EU law and did not involve any EU Member State as Respondent, the Advocate General argued that this case nonetheless provides the CJEU with an excellent opportunity to rule for the first time on the relationship between the ISDS provisions of the ECT and EU law. In this context, it is important to note that while the Paris court has been

asked to set aside the award, this would only be on the basis of a lack of an investment but not because of the non-applicability of the ISDS provisions of the ECT or their incompatibility with EU law.

First, the Advocate General determined that the CJEU has jurisdiction to answer the questions of the Paris court – despite the fact that there is no link with EU law – simply because the outcome of this case may be relevant for the EU and its Member States. In particular, the Advocate General argued that the question as to whether the conditions of an "investment" within the meaning of the ECT are fulfilled could also be relevant in the context of intra-EU ECT disputes. Therefore, the creation of a uniform interpretation of the ECT – that is at least for the EU Member States – by the CJEU justifies the jurisdiction of the CJEU.

That may be so from the perspective of EU law, however, this is a multilateral investment agreement, which does not grant the CJEU any jurisdiction to develop and impose a certain interpretation of ECT provisions on the Contracting Parties of the ECT. Indeed, Article 26 ECT offers the investor the choice between domestic courts of a Contracting Party or international arbitration under ICSID, the UNCITRAL Arbitration Rules or under the Arbitration Rules of the Stockholm Chamber of Commerce for resolving any disputes. However, there is no mentioning of the CJEU in this respect.

Consequently, it is up to the arbitral tribunals established under Article 26 ECT to develop a –preferably uniform – jurisprudence of the ECT provisions. Clearly, from the perspective of the ECT, there is no role for the CJEU in this respect.

Accordingly, claiming that the CJEU needs to render a binding judgment in a case that is entirely unconnected with EU law simply because it may be relevant for the EU Member States in intra-EU ECT disputes is undoubtedly going beyond the jurisdiction of the CJEU and trespasses on the powers of arbitral tribunals.

The AG Opinion Addresses a Question that was not Asked

Subsequently, the Advocate General – without this being necessary for answering the questions of the Paris court – spent a considerable amount of ink on the question of whether the investor-state arbitration system contained in the ECT is compatible with EU law.

Despite the fact that the *Achmea* judgment concerned a BIT between two EU Member States rather than the multilateral ECT, the Advocate General argued that since the CJEU ruled in *Achmea* that the investor-state arbitration system as contained in many intra-EU BITs is incompatible with EU law, naturally, the same conclusion must be reached for the similar system contained in the ECT.

In support of this conclusion, the Advocate General referred to the above-mentioned political Declarations of the Member States. Intriguingly, he also referred to the recently signed termination agreement in which most Member States agreed to terminate their intra-EU BITs. However, this is rather misleading since the termination agreement explicitly does *not* apply to the ECT. Instead, the EU and the Member States agreed to deal with the ECT in the context of the currently ongoing modernisation process of the ECT.

In short, despite the significant factual and legal differences between the *Achmea* case and this case, the Advocate General took the opportunity to conclude in rather sweeping terms that the investor-state arbitration system is incompatible with EU law in so far as disputes between European investors and EU Member States – intra-EU ECT – are concerned.

Again, it is important to recall, that this was not a question the Paris court has raised with the CJEU and neither is it relevant for answering the question which the Paris court did ask.

Indeed, recently, a Swedish court decided that it will request a preliminary ruling from the CJEU exactly on the issue of possible incompatibility of the ECT with EU law. Thus, the CJEU is now confronted within the context of a suitable intra-EU ECT dispute with the appropriate question as to the compatibility of the investment arbitration system with EU law. This means that sooner rather than later the CJEU will express its views on the compatibility of the ECT arbitration rules with EU law.

Replacing the Arbitral Tribunal's View

Subsequently, the Advocate General turned to the substantive question – which the Paris court actually had raised – i.e., whether a contractual claim can be qualified as an "investment" within the meaning of the ECT.

However, from the outset, the question must be asked whether the CJEU – not being an arbitral tribunal within the meaning of the ECT and – is at all competent to answer this question, in particular in the context of an investment dispute between two non-EU parties, which does not involve any point of EU law?

In the humble view of this author, that is clearly not the case. However, in the event that one nonetheless assumes that the CJEU is competent to answer this question, it would be required to follow the prevailing ECT jurisprudence on this point in order to preserve maximum consistency and uniformity of the ECT jurisprudence.

Despite the fact that the ECT contains a very broad and unlimited definition of "investment", the Advocate General concluded that the contractual claim cannot be qualified as an investment within the meaning of the ECT.

This is an unusually restrictive interpretation, which is also not in line with the broad wording of the ECT nor with the jurisprudence of ECT arbitral tribunals, including the arbitral tribunal which rendered the award in this case. The latter arbitral tribunal concluded in this case that "the ECT provides that an "investment" means "every kind of asset, owned or controlled directly or indirectly by an Investor", while individual categories of investments enumerated in the ECT constitute only concrete examples of some kinds of assets". It also said that its conclusion "follows from a rather broad definition of the term "investment" accepted under the ECT and supported by authoritative researchers, and also sustained in the whole range of arbitral awards in investment disputes, where under quite similar circumstances the presence of jurisdiction to resolve such disputes was accepted" (paras. 226, 227).

Notwithstanding the arbitral tribunal's clear conclusion, the Advocate General's opinion significantly deviates from the generally accepted ECT jurisprudence regarding the broadly understood definition of "investment". Indeed, this view creates more confusion and less uniformity, i.e., exactly the opposite result than the one it was used as a justification for overstretching the jurisdiction of the CJEU.

All Eyes on the CJEU

This opinion must be seen in the wider context of the increasing tension between

EU law and the ECT. The European Commission, the CJEU and the EU Member States are apparently all aligned against the ECT. Thus, this opinion of the Advocate General provides further arguments for the EU Member States to claim that the ISDS provisions of the ECT are incompatible with EU law. If the CJEU were to follow the Advocate General – which is very likely – this would indeed lead to the immediate inapplicability of the ECT arbitration provisions within the EU. This could even also potentially affect the recognition and enforcement of already rendered intra-EU ECT awards – at least within the EU.

In short, a judgment by the CJEU to that effect would be an elegant way out of the ECT for the EU and its Member States. Indeed, recently Belgium has requested the CJEU to give its opinion on the compatibility of the ISDS provisions of the ECT with EU law. Thus, the CJEU now has multiple opportunities to answer the question of whether or not the ISDS provisions of the ECT are compatible with EU law.

In sum, the CJEU will be able to soon place itself at the apex of the ECT as the final judicial authority – at least as far as the EU and its Member States are concerned.