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ECT Modernisation Perspectives: The Energy Charter Treaty and EU Law – A Cherry-Picking Relationship?

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The Energy Charter Treaty (ECT) has recently become a household name, moving from the oblivion of the 1990s, when the treaty was drafted, to one of the most hotly debated topics in legal (and other) circles nowadays. Some have demonized it as an instrument for the corporate usurpation of democratic functions, such as the host state's right to regulate its energy and environmental policies, while others have defended it as a unique regime promoting the rule of law in international energy relations. Against this background, this post reflects upon the increasingly complex relationship between EU law and the ECT and the treaty's transformation from a bed of roses strewn by the hands of the EU, when it pioneered the ECT in the 1990s, to a thorny marriage in the past few years. Ever since the ECT backfired leading to a wave of intra-EU claims, i.e. claims brought by EU investors against EU member states, the EU and its Member States have launched themselves into a cherry-picking exercise about which aspects of the ECT to apply, which ones to discard, and those that need reform.

The EU's cherry-picking approach to the ECT has been manifesting itself in different fronts: in the internal negotiations between the EU member states; in courts around the world, including the *amicus curiae* submissions of the European Commission in ECT investor-State arbitrations; in arbitration proceedings, including the first ever claim against the EU itself (brought by Nord Stream 2); and in the negotiations between all the ECT contracting parties on the modernization of the treaty. In this context, an important question that arises, with wider implications for international law, is: has the EU been acting consistently and in a way that promotes legal certainty and respect for the international rule of law with regard to its (evolving) relationship with the ECT? Or, on the contrary, has its cherry-picking approach been creating legal uncertainties and potential threats to the international rule of law?

The EU's Perspective on the ECT: One Voice or Many?

In each of these settings, the EU does not appear as a united front speaking with one voice in its external relations as regards the applicability of the ECT within the EU.

First, the ECT was the main point of contention and differentiation among Member States in the political declarations they issued in January 2020 on the legal consequences of the Achmea judgment. In the Declaration of the Member States of 15 January 2019 on the legal consequences

of the Achmea judgment and on investment protection, 22 Member States declared that "international agreements concluded by the Union are an integral part of the EU legal order and must therefore be compatible with the Treaties". They further stated that, if the arbitration clause included in the ECT were to be interpreted as applicable between Member States it "would be incompatible with the Treaties and thus would have to be disapplied". Consequently, the majority of the Member States declared that they will "inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in all pending intra-EU investment arbitration proceedings brought either under bilateral investment agreements concluded between Member States or under the Energy Charter Treaty".

It is not clear what the effects of such an information obligation are under international law – apart from the risk of interference with the rule of law, as Gabrielle Kaufmann-Kohler had noted in the context of the Interpretative Powers of NAFTA's Free Trade Commission. Moreover, any legal effects of this political declaration are weakened by their unilateral nature, as they do not represent a unanimous EU position (or even a unanimous interpretation by the relevant treaty parties). Such effects are further weakened by the fact that Sweden and four other Member States issued a counter-declaration, which refrained from taking any position on the ECT's arbitration clause noting that several arbitral tribunals have interpreted the clause as applicable in intra-EU disputes. The counter-declaration also states explicitly that, since this interpretation was contested before a Member State's national court, Member States should allow for due process and not interfere with the judiciary. Hungary took a more affirmative position by declaring its view that the *Achmea* judgment was silent on the arbitration clause in the ECT and was of no consequence to any pending or prospective arbitration proceedings under the ECT.

Interestingly, the majority declaration, according to which a treaty should be interpreted "as an integral part of the EU legal order and as compatible with the Treaties" does not seem to differ much from Russia's arguments on the supremacy of its Constitution in the Yukos case. Subjecting the interpretation of an international treaty to the internal legal order without any explicit provision in the text of the treaty itself can create legal uncertainty and run counter to Article 27 of the Vienna Convention on the Law of Treaties, which precludes states from invoking their internal legal orders to bypass their international-law obligations. As EU law (including the allocation of EU competences) evolves much more rapidly than international investment treaties – especially older ones such as the ECT – the legal uncertainty about the relationship of EU law with the ECT increases.

The 5 May 2020 agreement for the termination of intra-EU bilateral investment treaties that followed the above declarations has not provided any further clarity on the future for intra-EU ECT arbitration. Despite the explicit link that the European Commission has drawn between the Member States' political declarations of January 2020 and the termination agreement, the latter excludes the ECT from its scope. In particular, the agreement states in its Preamble that it does not cover intra-EU proceedings that have been filed on the basis of Article 26 of the ECT.

Notably, the agreement was not a bolt out of a clear sky but was the culmination of a process that the European Commission initiated in 2018, following the CJEU's judgment in *Achmea*. Given the duration and intensity of the negotiations and the exclusion of the ECT from its scope, it is rather surprising that the agreement still does not represent a uniform position: five member states have refrained from signing the termination agreement.

It Takes Two to Tango: Whither the EU – ECT Relationship?

Unanimity and legal certainty about the relationship of EU law with the ECT, and particularly its investor-state dispute resolution mechanism, have thus not been achieved in the context of the negotiations within the EU. As such, the question is what – if any – progress has been made in the context of the EU's negotiations with the other ECT contracting parties as part of the ECT modernization process.

The EU's position in the negotiations on the modernization of the ECT appears to be reserved and defensive on the question of the relationship between EU law and the ECT. In the recent EU proposal for modernizing the ECT, the EU contented itself in stating that it aims at the reform of the ECT's investor-State arbitration mechanism in line with the EU's work in the ongoing multilateral reform process in the United Nations Commission on International Trade Law (UNCITRAL). It also said that any amendments to the ECT do not affect the Commission's view that the ECT's arbitration clause does not apply to intra-EU disputes, as expressed in the Communication on the Protection of Intra-EU Investments.

Member States have therefore disagreed on the relationship between EU law and the ECT, internally, while also abstaining from discussing the matter externally. What is, then the forum where the relationship between EU law and the ECT will actually be debated? It appears that the "battlefield" has moved to the judicial arena with activism in the courts substituting transparent and constructive policy making. Notably, the European Commission's numerous *amicus curiae* submissions both to arbitral tribunals and domestic courts (within and outside the EU) largely reflect the position that most – but not all – Member States took in the declaration of 15 January 2020.

Questions thus arise in this context as to the legal value (or even political weight) of *amicus curiae* submissions that do not represent a solid, unanimous EU position agreed upon by all Member States. Apart from the risk of their interference with due process and the creation of legal uncertainty, they can also be considered as poor substitutes of necessary and urgent policy discussions. The ECT modernization process should not just be about continuous, wearing damage control; on the contrary, the ECT remains the only multilateral investment treaty currently dedicated to the energy sector. It is, thus, indispensable to link the discussions about its future with the EU's ambitious Green Deal and energy-transition targets. Further delaying an open and transparent debate about the relationship of EU law, including the EU's energy and climate ambitions, with the ECT can pose risks not only to the international rule of law but also to the very objectives that the rapidly evolving EU energy law – and the ECT itself – aims to achieve.

To read our coverage of the ECT Modernisation process to date, click here.

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