Kluwer Arbitration Blog

Belgium Seeks CJEU's Opinion on the Future Interaction between a Modernised ECT and EU law

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On 3 December 2020, Belgium announced the submission of a request to the Court of Justice of the European Union ("CJEU") for an opinion on whether the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty ("ECT") are compatible with the EU Treaties. Belgium indicated that the purpose of its request is "to provide clarity and legal certainty" and that it puts the question to the Court "in a neutral manner", without taking a stand on the issue.

Are the CJEU's *Achmea* findings applicable to intra-EU disputes under the ECT?

With respect to the ECT as currently in force, the European Commission takes the position that the CJEU's *Achmea* judgment also applies to the arbitration mechanism under Article 26 of the ECT, in case of disputes between EU Member States under that treaty. As is well known to the readers of this blog, in *Achmea* the CJEU had found the investor-State dispute settlement ("ISDS") mechanism contained in the (intra-EU) 1991 Netherlands-Slovakia bilateral investment treaty ("BIT") to be incompatible with EU law. However, arbitration tribunals (such as the Vattenfall tribunal) have been undeterred by the Commission's position, rendering awards on the merits in intra-EU cases under the ECT. Last October, in the Joined Cases C?798/18 and C?799/18, Advocate General Saugmandsgaard Øe opined in a footnote that the CJEU's decision in *Achmea* applies to the ECT and that the treaty may thus be "entirely inapplicable" to intra-EU investment disputes. Advocate General opinions are not binding on the CJEU but often followed in practice.

While most EU Member States terminated their intra-EU BITs in the wake of the *Achmea* judgment, they have not yet agreed on an approach regarding the ECT. Some of them have already sought to obtain, in the context of preliminary rulings, an answer from the CJEU. Last October, for instance, the Svea Court of Appeal (Sweden) refused a request by Spain to consult the CJEU before deciding whether to set aside the *Greentech* ECT award in favour of renewables investors (see here, as well as here and here for similar earlier decisions by the same court in regard to the *Novenergia* ECT award). A number of Member States, including Spain, also intervened at a recent hearing before the CJEU in *Moldova v. Komstroy*, requesting the Court to take a stand on the application of *Achmea* to intra-EU disputes under the ECT, despite the intra-EU issue not formally being relevant to the dispute (see more in this previous post).

The European Commission's proposal for the modernisation of the ECT

Strictly speaking, Belgium's request does not concern the current version of the ECT, but the future version of the treaty whose modernisation process was initiated in November 2017 (while the negotiation rounds started in July 2020; see more in these previous posts and on the ECT's website). The opinion procedure under Article 218(11) of the Treaty on the Functioning of the European Union ("TFEU") is a preventive mechanism that allows Member States to obtain the opinion of the CJEU as to whether an envisaged agreement is compatible with the Treaties. It does not, however, allow for review of treaties already in force.

On 27 May 2020, the European Commission presented its own ECT modernisation proposal, while stating that such proposal does not affect its position that the "*ECT does not contain an investor-to-state arbitration mechanism applicable to investors from one EU Member State investing in another*".

The Commission presents its proposal as having three main goals:

> "*Firstly, to bring the ECT's provisions on investment protection in line with those of agreements recently concluded by the EU and its Member States.*
>
> *Secondly, to ensure the ECT better reflects climate change and clean energy transition goals and facilitates a transition to a low-carbon, more digital and consumer-centric energy system, thus contributing to the objectives of the Paris Agreement and our decarbonisation ambition.*
>
> *Thirdly, to reform the ECT's investor-to-state dispute settlement mechanism in line with the EU's work in the ongoing multilateral reform process in the United Nations Commission on International Trade Law (UNCITRAL)*".

The Commission indicated on 2 December 2020 that if its core objectives are not attained within a reasonable timeframe, it may consider proposing other options, "including the withdrawal from the ECT".

Belgium's previous request on the compatibility with EU law of CETA's Investment Court System

As we developed in a previous post, in September 2017, Belgium already requested the opinion of the CJEU on the compatibility with EU law of arbitration provisions in another international treaty, namely the Investment Court System ("ICS") provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA"). In its Opinion 1/17 of 30 April 2019, the CJEU answered positively, concluding that this mechanism for the settlement of investor-State disputes was compatible with the EU Treaties and the EU Charter of Fundamental Rights.

In a nutshell, the Court concluded that the principle of autonomy of EU law would only be

breached if the CETA Tribunal could (i) interpret and apply EU rules other than the provisions of the CETA or (ii) issue awards having the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. By contrast with the conclusion it reached for the ISDS mechanism of the Netherlands-Slovakia BIT in *Achmea* in regard to the intra-EU issues raised in that case, the CJEU was satisfied that this was not so in the context of CETA in regard to the extra-EU protection of investments between Canada and the EU as well as its Member States.

In Opinion 1/17, the Court rendered its opinion around 20 months after Belgium's request. It remains to be seen whether the CJEU will answer a preliminary ruling reference on the compatibility with EU law of applying the current version of Article 26 ECT to intra-EU disputes, before rendering its opinion on the ISDS mechanism of the revamped version of the treaty.

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