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Does the Advocate General's Opinion Provide Clarity on the Validity of Intra-EU ECT Investor-State Arbitral Awards?

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Since *Achmea* there has been much debate on whether its reasoning invalidates ECT intra-EU investor state clauses as a matter of EU and international law. The recent AG's Opinion in Cases C?798/18 and C?799/18 does not provide an answer to this question as a matter of EU law. A review of CJEU case law in any event dispels any uncertainty as it establishes that it is very likely that the CJEU will find that intra-EU ECT disputes are incompatible with Article 344 TFEU, the autonomy of EU law, and the principle of sincere cooperation as set out in Article 4(3) Treaty of the EU (TEU).

Background

Much has been written in the recent years including here on the relationship between EU law and the Energy Charter Treaty (ECT), the growing schism between EU law and international investment law, and the rising uncertainty for investors seeking to make investments in the EU in capital-intensive sectors such as energy.

In particular, in the wake of the *Achmea* judgment (C-284/16) there has been much debate on whether the reasoning of the Court of Justice of the EU (CJEU) invalidates Article 26 of the ECT insofar as concerns intra-EU investments, both as a matter of EU law and/or international law. With roughly 90 intra-EU investor-State disputes currently pending under the ECT, the financial implications are significant both for States and investors.

Different views concerning validity under EU law

As a matter of EU law, the European Commission has, unsurprisingly, argued that the CJEU's reasoning in *Achmea* 'equally applies to' intra-EU ECT investor-State disputes. It has further contended that the 'fact that the EU is also a party to the ECT Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States'. Twenty-two EU Member States (MS) who signed the Declaration of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection agree with the European Commission.

However, those favouring a narrow reading of *Achmea* have pointed to its concluding paragraph in which the CJEU said that

> 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.'

Presumably, in view of this, Luxembourg, Malta, Slovenia, and Sweden adopted a more circumspect position on the issue in their separate Declaration on the enforcement of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union of 16 January 2019, noting that '[i]t would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra-EU application of the Energy Charter Treaty'. Hungary, presumably in view of the ongoing ICSID case which MOL (the state-owned energy company) has brought under the ECT against Croatia, on the other hand, has declared in its Declaration of 16 January 2019 that *Achmea* concerns only intra-EU BITs and not any pending or future intra-EU ECT claims.

The Advocate General's Opinion does not provide clarity

Given the uncertainty regarding the validity of intra-EU ECT claims, some have hailed the opinion of Advocate General Saugmandsgaard Øe in Joined Cases C?798/18 and C?799/18 delivered on 29 October 2020 as providing the needed clarity. In these cases, the Regional Administrative Court of Lazio in Italy sought a preliminary ruling from the CJEU pursuant to Article 267 Treaty on the Functioning of the European Union (TFEU) in proceedings brought inter alia by operators of photovoltaic installations in Italy against the Italian Ministry of Economic Development and Gestore dei servizi energetici, a company owned by the Italian Ministry of the Economy and Finance, due to the reduction in the incentives payable to photovoltaic energy operators in Italy adopted by the Italian legislature in 2014.

However, the Advocate General's Opinion does not provide such clarity for two reasons. First, the Advocate General simply asserts in footnote 55 of his Opinion that "inasmuch as Article 26 of the Energy Charter, which is headed 'Settlement of disputes between an investor and a Contracting Party', provides that such disputes may be resolved by arbitral tribunals, that provision is not applicable to intra-Community disputes", without giving any reasons other than that the above-mentioned twenty-two EU Member States reached the same conclusion. Second, his Opinion on this issue is *obiter dictum*: his above-mentioned assertion is prefaced by the following statement "[w]hile emphasising that it is unnecessary to resolve this issue in the present cases". This is because the preliminary reference concerned a purely domestic case of Italian investors bringing claims against the Italian state. In other words, the case before him was not an intra-EU dispute.

In view of its case law the CJEU is very likely to find that intra-EU ECT disputes invalid

There have been lots of calls by the Commission and MS for the Court to rule on the point including at the recent hearing in Case C-741/19 (albeit the case does not concern an intra-EU ECT dispute). With Belgium submitting a request to the CJEU last week on the compatibility of intra-EU investor-State provisions of the revamped ECT with EU law it will not be long until the Court pronounces itself on the point.

But, arguably, a careful review of CJEU case law already dispels all uncertainty. In particular, a careful reading of *Achmea* and, in particular of paragraph 55 thereof, in light of the CJEU's decisions concerning the duty of sincere cooperation in cases such as *Inland Waterways*[1)] and *Commission v. Sweden* (Case C-246/07) highlights the inherent difficulty the CJEU has with any attempt by EU MS to remove any disputes between them 'from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second sub-paragraph of Article 19(1) TEU requires them to establish in the fields covered by EU law'. In *Inland Waterways*, the ECJ went so far as to hold that Germany and Luxembourg had breached their obligation of sincere cooperation and endangered the unity and coherence of EU external action simply by seeking to conclude agreements with third countries without coordinating their action with the European Commission.

Furthermore, the reasoning of the CJEU in Opinion 2/13 concerning the European Convention of Human Rights (ECHR) can be applied by analogy to the ECT. In paragraph 194 thereof the CJEU explained why the EU could not accede to the ECHR, notwithstanding an express provision in the TEU (Article 6(2)) envisaging such accession, as follows:

> '[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law'.

And in paragraphs 205–213 it further explained that the very existence of the possibility that Article 33 of the ECHR could apply to disputes between MS themselves, or between MS and the EU, in circumstances where EU law will be in issue undermined Article 344 TFEU.

This reasoning can be applied to the ECT to which the EU and MS are a party and which contain State-State and investor-State clauses for resolving any disputes concerning breaches of its terms.

In view of this case law, it is considered very likely that the CJEU will find that intra-EU investor-State provisions of the ECT are incompatible with Article 344 TFEU, the autonomy of EU law, and the principle of sincere cooperation as set out in Article 4(3) Treaty of the EU (TEU).

Investors to opt to bring investment arbitral proceedings and enforce arbitral awards outside

EU to minimise risk

Clarity as a matter of EU law, however, does not mean the end of the debate as a matter of international law since to date arbitral tribunals sitting in investment treaty cases have not considered themselves bound by *Achmea.* Nor are they likely to consider themselves bound by any CJEU decision on the validity of intra-EU ECT investor-state clauses in the future. What is sure is that the selection of the seat of arbitration and the place of enforcement of arbitral awards outside the EU will become standard practice for investors.

References

?1 Case C-266/03, *Commission v. Luxembourg*, para. 60, Judgment of the Court of 2 June 2005 (2005) ECRI-04805; Case C-433/03, *Commission v. Germany*, para. 66, Judgment of the Court (Second Chamber) of 14 July 2005 (2005) ECR I-06985 (together these two cases are known as the '*Internal Waterways*').

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