Kluwer Arbitration Blog

2023 Washington Arbitration Week Recap: ECT Modernization or Collapse?

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The Fourth Edition of the Washington Arbitration Week ("WAW") took place from 27 November to 1 December 2023. This post presents the panel on "ECT Modernization or Collapse?". Jose Antonio Rivas, SJD (WAW/Xtrategy), introduced the panel with a remark that, while the Energy Charter Treaty ("ECT") modernization process was ongoing, new ECT awards surfaced, and their enforcement proceedings were ongoing before different national courts. The panel was moderated by Patrick Pearsall (Allen & Overy), joined by Alexandre de Gramont (Dechert LLP), Nikos Lavranos (European Federation for Investment Law and Arbitration), Christopher Weil (Mintz Group) and Dorieke Overduin (Sovereign Arbitration Advisors).

The Road From EU Accession to the ECT Modernization

The ECT modernization process was a complex endeavor from its inception. As Ms Overduin explained, the ECT is a multi-party treaty adopted in 1994 which comprises as Contracting Parties the European Union ("EU") itself, all 27 EU Member States, and other non-EU countries. From an EU law perspective, the ECT is a mixed agreement, meaning the agreement is concluded both by the EU and by the EU Member States where there is a shared competence (Article 4, Treaty of the European Union ("TEU")). However, the application of the investor-State dispute settlement ("ISDS") under Article 26 became contentious after the Central Eastern European ("CEE") countries' accession to the EU. What used to be extra-EU investment protection vis-a-vis the CEE countries' pre-accession became intra-EU protection. The accession waves highlighted an apparent conflict between the hierarchy of norms within the EU's internal market and the protections offered by the ECT to intra-EU investors. Yet, this hierarchy of norms has been a part of the EU's internal market foundation as created since the Treaty of Rome. Within this space, the EU Member States have a duty of loyal cooperation and a duty to comply with the EU treaties (Article 5, Treaty of Rome, Article 3(4), TEU). Consequently, any incompatibility between the EU Member States' national law or their international obligations under the EU treaties had to be removed. The Court of Justice of the EU ("CJEU") has consistently addressed the role of EU law in relation to the EU Member States' international obligations (see here). Ms Overduin highlighted that the CJEU renders obligatory decisions for the EU Member States as an integral part of EU law.

Ms Overduin explained the role of the CJEU in interpreting international treaties that might come

in conflict with the EU law. She recalled the CJEU's ruling in *Achmea*, the first judgment in which the CJEU ruled on the application of ISDS within the EU, where the CJEU held that (i) an arbitral award rendered by an international investment tribunal which is not the court of an EU Member State (ii) infringed the principle of autonomy of EU law because (iii) the respective arbitral tribunal interpreted EU legal norms without any ex-post control from the national courts of the EU Member States. This ruling was confirmed in *PL Holdings*, in *Komstroy*, and later in *Micula* concerning the enforcement of an award rendered by a tribunal of the International Centre for Settlement of Investment Disputes ("ICSID"). The Court affirmed that any international obligation of an EU Member State must be aligned with the EU treaties. Otherwise, it cannot be applied.

Modernization or Destabilization? The ECT Modernization Melt-Down

The ECT modernization process developed from 2020 until June 2022 (for a summary of the process since 2017, see here) and finalized with an Agreement in Principle agreed by all the ECT Contracting Parties. Prof Lavranos explained that an incentive for the modernization was the increase of intra-EU ECT cases, as well as the public debate in Germany around the Vatenfall case and *Uniper* and *RWE* cases against The Netherlands. He also mentioned how the European Commission leveraged *Achmea* and *Komstroy* (issued during the modernized ECT negotiations) in introducing a disconnection clause prohibiting intra-EU disputes.

Even though the the EU Commission and all the EU Member States agreed that the "Agreement in Principle" was compliant with the Paris Agreement in September 2022, the ECT melt-down started rather unexpectedly. Since then, nine EU Member States announced their withdrawal intentions on the basis that the modernized ECT was not sufficiently aligned with the Paris Agreement. After a significant number of EU Member States indicated that they would not sign the modernized ECT text, the European Commission concluded that the only solution left was to announce a proposal for a common withdrawal in July 2023 (see also here). Until now, only Poland, France, Germany, and Luxembourg have formally announced their withdrawal from the ECT.

As Prof Lavranos stated, investors are still filing claims against ECT parties (here, here, and here). However, investors face many uncertainties with respect to the old and pending ECT cases. Currently, the EU relives the ongoing regime clash between EU law and international investment treaty law obligations, which continue to bind the EU and its Member States until their withdrawal.

Commenting on the future of the ECT, Ms Overduin pointed to what might be the scope and purpose of the ECT in its current version after the withdrawal waves. On the other hand, Prof Lavranos considered that the modernized ECT would still be fit for purpose if investments and investors could still be protected, despite the narrower language of the protection standards.

Achmea's Impact on Enforcement Actions Across Jurisdictions

Mr de Gramont questioned the CJEU's general approach which impedes the EU Member States from offering arbitration to an intra-EU investor. He pointed out that many of the EU Member States made arbitration offers before becoming EU Member States.

Against this backdrop (see for instance *Novenergia*'s award annulment by the Svea Court of Appeals confirmed in July 2023 by the Supreme Court), investors started to look outside the EU to enforce their awards in jurisdictions like the US, UK, and Australia.

Mr de Gramont presented some enforcement success stories. For instance, *Antin*'s effective enforcement before the High Court of Australia (the sovereign immunity waiver in Australia's Foreign States Immunities Act discussed here was found to be "*unmistakeable*" (at para. 29 of the judgment)) and before the UK High Court (see here). Both courts dismissed Spain's arguments based on *Achmea* and *Komstroy*. In the US, in March 2023, one judge of the DC District Court rejected Spain's arguments in *9REN* and *NextEra*, holding that an arbitration agreement existed and Spain waived its sovereign immunity when it made the arbitration offer. However, in April 2023, in the enforcement of the *Blasket* award, a different judge from the same DC District Court held that, under EU law, Spain never gave a valid agreement to arbitration. This judge held that after *Achmea* and *Komstroy*, the arbitration agreement was invalid. These three cases will be jointly heard before the DC Circuit Court of Appeals in 2024. Moreover, as commented here, in March 2023, the District Court of Amsterdam dismissed Spain's interim relief to stay the enforcement of *Blasket* in the US as a *prima facie* violation of the New York Convention holding that Spain used the interim relief as an attempt to open a new and non-existent forum.

The Show Must Go On in US Courts and Beyond

The *Achmea* aftermath also forced asset tracers to "*dance the same dance on a different song*" as commented by Mr Christopher Weil. Suddenly, the enforcement focus shifted from the EU Member States to third countries where the enforcement became more strategic and disruptive than solely looking for highly monetizable assets. In view of this new paradigm, investors may start simultaneously multiple enforcement proceedings in different jurisdictions to collect their obligations instead of focusing on a single jurisdiction.

Mr de Gramont clarified that in the enforcement phase, at least before the US courts, EU law is not binding at all. Therefore, these judges do not have to consider at all, the saga from the other side of the Atlantic. Regarding the interplay between enforcement and the rule of law, Mr Weil highlighted investors' uncertainty in finding a nexus in other jurisdictions, i.e. lack of assets in the enforcement jurisdiction.

Conclusion

The "elephant in the room" was whether the EU will remain a gatekeeper of the international rule of law. The panel stressed that despite *Achmea* and *Komstroy*, the EU Member States still have investment treaties with third countries, and the EU is still concluding trade agreements with investment chapters. As explained by Ms Overduin, all EU investors enjoy the highest level of protection within the EU and are all considered "nationals" without any discrimination within the EU. After all, the CJEU prescribes that the EU treaties offer free movement of capital and establishment, among other protections, under the oversight of both the EU Member States' domestic courts and the CJEU itself. Hence, there is no necessity to have an additional layer of protection or a need for a different legal avenue as included in investment treaties. On the other hand, Mr de Gramont cautioned that these EU protections seem aspirational if one considers the

concrete and practical differences between the judicial systems of the EU Member States in their willingness to implement those protections. Lastly, Prof Lavranos cautioned that the CJEU might, one day, reconsider the distinction it made between investment and commercial arbitration in *Achmea* (paras 54 and 55), based on public policy, in the looming spectre of the 1999 *Eco Swiss* and 2016 *Genentech* decisions.

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