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Achmea in America: The United States' Amicus Brief Offers Spain Half-hearted Support

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On February 2, 2024, the United States filed an *amicus* brief (the "Amicus") responding to a request from the United States ("US") Court of Appeals for the DC Circuit to provide the US' position regarding the enforcement of three "intra-EU" investment arbitration awards issued under the Energy Charter Treaty ("ECT") against the Kingdom of Spain.

Before the District Court for the District of Columbia (the court of first instance), Spain moved to dismiss the investors' petition to enforce the awards—two ICSID and one ad hoc Swiss-seated—on the theory the Court of Justice of the European Union ("CJEU") in *Achmea* and *Komstroy* had retroactively vitiated Spain's consent to arbitration with investors from other member states, under both bilateral investment treaties and the multilateral ECT, as incompatible with European Union ("EU") law. Spain contended that, as a result, the CJEU placed enforcement proceedings outside the scope of the exception to sovereign immunity recognized under US law when a State agrees to arbitrate. One federal district court judge rejected Spain's intra-EU arguments and enforced the two ICSID awards in *9REN* and *NextEra* while also enjoining Spain from pursuing anti-suit injunctions against the creditors before courts in the Netherlands and Luxembourg. But another district court judge accepted the argument, dismissing the petition to enforce the award in *Blasket Renewable*, on the theory that Spain had not consented to arbitrate. All three cases are now before the DC Circuit.

The Appellate Court's request for the US' views is unsurprising in a case concerning the US' treaty obligations under the ICSID and New York Conventions as well as the immunity claims of a friendly foreign government. The Court's solicitation placed the US in a position to balance its interest in maintaining friendly relations with a key ally with its treaty obligations under the ICSID and New York Conventions to enforce international arbitral awards. (Amicus at 1).

Media accounts widely reported the US' Amicus as supportive of Spain. But the Amicus is more significant for what it does not say than for what it does. Crucially, the Amicus *never* expresses a position on the core issue of the enforceability of "intra-EU" awards after the CJEU's controversial decisions.

The US instead limited itself to three narrow and non-determinative points: (i) that the US Foreign Sovereign Immunities Act ("FSIA") requires a court presented with a "self-contained" ICSID award nevertheless to determine for itself that an arbitration agreement existed between the parties; (ii) that a foreign state does not waive its sovereign immunity to an action to enforce an award

simply by adhering to the ICSID or New York Conventions; and (iii) opposing the District Court's antisuit injunctions as unjustified on the facts. Indeed, the US position can be read as completely consistent with enforcement of all three awards before the Court—and may even offer backhanded support for their enforcement.

The United States Argues that the District Court Must Determine that an Arbitration Agreement Exists.

First, the Amicus argues that a US court must make "its own determination that an arbitration agreement exists" as a "threshold" matter of determining its jurisdiction under FSIA. (Amicus at 10, 16). To the extent that it insists that the court "must make an independent determination… and cannot treat the arbitrator's decision on the question as dispositive," the US endorses the procedural premise of Spain's argument that the District Court must conduct a *de novo* review of whether an arbitration agreement exists as part of determining whether it has jurisdiction over the petition to enforce an award under the FSIA. (Amicus at 13).

Importantly, however, the Amicus at no point endorses Spain's argument as to whether a valid arbitration agreement existed between the parties in light of *Achmea* and *Komstroy*. Interestingly, the US cites, as examples of cases which apply the correct standard, DC Circuit case law which has enforced awards against states. These include *Belize Social Development Ltd v. Government of Belize* (rejecting a State's defense that it had not entered into an arbitration agreement); and *Chevron Corp. v. Republic of Ecuador* (rejecting Ecuador's argument that its offer of investor-state arbitration had not encompassed contract claims). The Amicus further highlights *Micula v. Government of Romania*, which notably affirmed the District Court's rejection of Spain's *Achmea/Komstroy* argument, as a decision where the court took the correct approach in determining whether an arbitration agreement existed for purposes of establishing jurisdiction under the FSIA.

The Amicus' description of the ECT could also prove problematic for Spain's argument. Spain contended that, despite the clear language of the ECT, it never agreed to arbitrate "intra-EU" disputes because the CJEU *retroactively* determined those disputes must be resolved in European courts. That position belies the text of ECT, which has both a clear agreement to arbitrate and a mechanism for states to withdraw from the treaty, and fundamental principles of public international law.

Unfortunately for Spain, the Amicus is silent on Spain's critical arguments. Instead, the Amicus highlights that "most members of the EU (including Luxembourg, Spain, and the Netherlands) [and] the EU itself…are parties" and that "the ECT provides that parties give their 'unconditional consent' to the submission of a dispute to international arbitration." (Amicus at 4). At the same time, the Amicus is also silent about the EU framework treaties that supposedly preempt intra-EU arbitration and the *Achmea*/*Komstroy* decisions. And the Amicus further ignores the Vienna Convention on the Law of Treaties, which prohibits (in Articles 26 and 46) states from using internal law to invalidate treaty provisions, just as Spain seeks to do here. Rather than address the critical inquiries on appeal, the Amicus focuses on whether the District Court made the necessary threshold finding of "the existence of an arbitration agreement, an arbitration award and a treaty governing the award." (Amicus at 9).

To be sure, the Amicus heavily implies that the District Court failed to provide a *de novo* review of whether an arbitration agreement exists. But a cursory reading of the *NextEra* District Court's decision reveals that the Amicus attacks a strawman. The District Court *did* exactly what the Amicus argues that it should have done. The District Court noted that "the existence of an arbitration agreement, an arbitration award and a treaty governing the award must be established." After describing "whether an agreement to arbitrate existed between Spain and NextEra" as "the key issue," the District Court analyzed for numerous pages whether an arbitration agreement existed before concluding that one did—under the same authorities cited with approval in the Amicus.

The United States Argues that A Foreign State Does Not Waive Sovereign Immunity by Becoming a Party to the ICSID or New York Convention

Second, the US argues that Spain did not waive its immunity to suit under the FSIA solely by becoming a party to the ICSID or New York Conventions. This proposition is dubious, especially with respect to the ICSID Convention, which (as we argued before the DC Circuit on behalf of our amici) has *erga omnes* obligations on all member states to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State" under Article 54(1). In this regard, ICSID's self-contained review and enforcement provisions are clear immunity waivers that states accept when they become ICSID members. Courts (such as *Mobil Cerro Negro v. Bolivarian Repub. Venezuela*) have thus found these obligations sufficient to satisfy the FSIA "waiver" exception.

Ultimately, the DC Circuit can sidestep this issue because (i) a finding that an arbitration agreement exists suffices to establish jurisdiction over Spain under the FSIA; and (ii) without an agreement to arbitrate there would be nothing to enforce. The US recognizes as much in its Amicus, noting that "[t]he existence of an agreement to arbitrate is a necessary prerequisite under both the waiver and arbitration exceptions and would suffice on the facts of this case to establish jurisdiction under the latter." (Amicus at 24). While the US' position supports an argument made by Spain in its briefing, the reality is that the court need not resolve this issue if it concludes that the District Court had jurisdiction under the FSIA arbitration exception—an issue (as discussed above) that the Amicus never reaches.

The United States Opposes the District Court's Antisuit Injunctions on Comity Grounds

Third, the US argues that "[e]njoining a foreign sovereign from bringing suit in a foreign court is an extraordinary remedy that would rarely (and possibly never) be justified." (Amicus at 25). The brief, which leans heavily on the comity concerns that an antisuit injunction against a foreign sovereign suggests, further highlights the grievances that the US Department of State has received from Spain, the Netherlands, and the European Commission regarding the District Court's antisuit injunction. (Amicus at 29).

The US' position on antisuit injunctions against a friendly foreign sovereign is the section of its Amicus most directly supportive of Spain's position before the court. It is not entirely surprising although at odds with the US' position in previous cases. For example, in the *PT Pertamina v.*

Karaha Bodas Company dispute, the US took the position that a district court was correct to enjoin the Indonesian government-owned judgment debtor from sabotaging the enforcement of an award by filing a lawsuit in the judgment creditor's home jurisdiction. Regardless, the US' characterization of the equities at stake in the injunction is of dubious merit. Although the Amicus describes the European antisuit proceedings enjoined by the District Court as having been about "complex questions of treaty interpretation—under a treaty to which the US is not a party—and the application of EU law to member states and their citizens," the reality is that these cases in fact concern an asserted conflict between those European treaties (the Treaties on European Union and on the Functioning of the European Union) and rights arising under *other treaties to which the US is a party and under which it has obligations*—specifically the ICSID and New York Conventions.

In another curious passage, the Amicus further argues that "subjecting a foreign state to an antisuit injunction that purports to control its conduct outside of the United States runs afoul of the basic principle of 'the perfect equality of nations.'" (Amicus at 26). This argument invites the response that the principle of the "perfect equality of nations" favors enforcement of an ICSID award against Spain, lest the US end up in the position of enforcing investor-state awards only against some States and not others. This danger was highlighted by the group of *amici curiae* international law scholars.

Conclusion

Although it was widely reported in the international arbitration press as supporting Spain's position—likely its intended effect—the US Amicus concerning enforcement of intra-EU awards trod a very careful path. With oral argument in the *9REN*, *NextEra* and *Blasket* cases scheduled for February 28, the Court will likely give the US respectful consideration on the issues it actually addressed. At the same time, the Court of Appeals is likely to notice the dog that did not bark: the US' Amicus submission does not express any support for Spain's core argument that it never validly consented to investor-state arbitration under the ECT.

The authors are counsel to a group of scholars and practitioners of international law and investment arbitration submitted a brief supporting enforcement of intra-EU investor-state awards in 9REN and NextEra. The amici include Prof. Dr. Crina Baltag, Prof. Dr. Diane Desierto, Dr. Richard Happ, Prof. Charles Kotuby, Prof. Veronika Korom, Prof. Dr. Nikos Lavranos, Prof. Loukas Mistelis, Prof. Dr. Christoph Schreuer, Ben Love, Prof. Frédéric Sourgens, Prof. Dr. Christian Tietje, and Dr. Claus von Wobeser. The authors gratefully acknowledge the assistance of Stephen Benz, associate at BakerHostetler LLP, in preparing this article.

While finalizing publication of this article, the NextEra and 9Ren Claimants responded to the Amicus on 16 February 2024, raising many of the same points in this article.

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