Georgetown International Arbitration Month

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The Energy Charter Treaty and its future (after the Spanish cases in renewables)
THE ISSUE: CAN A EUROPEAN INVESTOR SUBMIT TO ARBITRATION A CLAIM AGAINST A EUROPEAN MEMBER STATE UNDER THE ENERGY CHARTER TREATY?
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THE ISSUE: CAN A EUROPEAN INVESTOR SUBMIT TO ARBITRATION A CLAIM AGAINST A EUROPEAN MEMBER STATE UNDER THE ENERGY CHARTER TREATY?

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1.- THE OBJECTIVES OF THE ECT, ITS SUBSTANTIVE PROTECTIONS AND THE PARTIES TO THE TREATY
**The International Energy Charter**

**Consolidated Energy Charter Treaty**

Signatories / Contracting Parties to the Energy Charter Treaty

Afghanistan, Albania, Armenia, Australia*, Austria, Azerbaijan, Belarus*, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, North Macedonia, Norway*, Poland, Portugal, Romania, Russian Federation*, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Yemen

* did not ratify the Energy Charter Treaty, but applies it provisionally

* did not ratify the Energy Charter Treaty
THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY

Part III: Investment Promotion and Protection

Article 10: Promotion, Protection and Treatment of Investments

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe
THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY

Article 26: Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
2.- THE IMPACT OF THE ACHMEA JUDGMENT (ECJ) ON THE SCOPE AND VALIDITY OF ARTICLE 26 OF THE ECT
ACHMEA ECJ JUDGMENT OF MARCH 6, 2018

(Request for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany) in the case of Slovak Republic v. Achmea BV under the Netherlands Czech and Slovak BIT

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.

[Signatures]
Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344
(ex Article 292 TEC)

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
THE INTERNATIONAL ENERGY CHARTER
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(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
Vienna Convention on the law of treaties (with annex).
Concluded at Vienna on 23 May 1969

SECTION 3. INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.
Vienna Convention on the law of treaties (with annex).
Concluded at Vienna on 23 May 1969

SECTION 1. OBSERVANCE OF TREATIES

Article 26. "PACTA SUNT SERVANDA"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 41. AGREEMENTS TO MODIFY MULTILATERAL TREATIES
BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) The possibility of such a modification is provided for by the treaty; or
   (b) The modification in question is not prohibited by the treaty and:
       (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
       (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.
THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY

Article 16: Relation to Other Agreements

[DECISION] With respect to the Treaty as a whole

In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.]57

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.
3.- THE APPROACH OF THE EUROPEAN COMMISSION
“The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter 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.” (p.3)
V. Conclusion
EU investors cannot invoke intra-EU BITs, which are incompatible with Union law and no longer necessary in the single market. They cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty. However, the EU legal system offers adequate and effective protection for cross-border investors in the single market, while ensuring that other legitimate interests are duly and lawfully taken into account. When investors exercise one of the fundamental freedoms such as the freedom of establishment or the free movement of capital, they act within the scope of application of Union law and therefore enjoy the protection granted by that law.
4.- THE APPROACH OF MEMBER STATES
ALL MEMBER STATES

EXCEPT FOR Finland, Sweden, Malta, Luxembourg, Slovenia, and Hungary

By the present declaration, Member States 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 treaties concluded between Member States or under the Energy Charter Treaty.

Beyond actions concerning the Energy Charter Treaty based on this declaration, Member States together with the Commission will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty.
8. Hungary further declares that in its view, the Achmea judgment concerns only the intra-EU bilateral investment treaties. The Achmea judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty (hereinafter: „ECT”) and it does not concern any pending or prospective arbitration proceedings initiated under the ECT.

9. Against this background, Hungary underlines the importance of allowing for due process and considers that it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT. The ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States.
FINLAND,
SWEDEN,
MALTA,
LUXEMBOURG,
SLOVENIA

The Achmea case concerns the interpretation of EU law in relation to an investor-state arbitration clause in a bilateral investment treaty between Member States. The Member States note that the Achmea judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty. A number of international arbitration tribunals post the Achmea judgment have concluded that the Energy Charter Treaty contains an investor-State arbitration clause applicable between EU Member States.\(^7\) This interpretation is currently contested before a national court in a Member State\(^8\). Against this background, the Member States underline the importance of allowing for due process and consider that it 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.

8. The Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019. They will inform each other and the Secretary General of the Council of the European Union in due time of any obstacle they encounter, and of measures they envisage in order to overcome that obstacle.
5.- A SUMMARY OF ARBITRAL AWARDS RENDERED AFTER ACHMEA
List of Cases (I)

Pre-achmea

Spanish cases


• *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016 (tribunal: Alain Pellet, Pedro Nikken, Robert Volterra)

• *Isolux Netherlands, BV v. Spain*, SCC Case V2013/153, Award, July 17, 2016 (tribunal: Yves Derain, Guido Santiago Tawil, Claus Von Wobeser)

• *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l v. Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017 (tribunal: John R. Crook, Stanimir A. Alexandrov, Campbell McLachlan QC)

Post-achmea

• *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain*, SCC Case No. 2015/063, Award February 15, 2018 (tribunal: Johan Sidklev, Antonio Crivellaro, Bernardo Sepúlveda-Amor)

• *Masdar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018 (tribunal: John Beechey CBE, Gary Born, Brigitte Stern)
List of Cases (II)

Post-achmea

Spanish cases

- *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018 (tribunal: Christopher Thomas QC, Francisco Orrego Vicuña, Eduardo Zuleta)


- *Cube Infrastructure Fund SICAV and others v. Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability, February 19, 2019 (tribunal: Vaughan Lowe, James Jacob Spigelman, Christian Tomuschat)


- *SolEs Badajoz GmbH v. Spain*, ICSID Case No. ARB/15/38, Award, July 31, 2019 (tribunal: Joan E. Donoghue, Giorgio Sacerdoti, Sir David A R Williams KNZM, QC)
List of Cases (III)

Post-achmea

Spanish cases

- *InfraRed Environmental Infrastructure GP Limited and others v. Spain*, ICSID Case No. ARB/14/12, Award, August 2, 2019 (tribunal: Stephen L. Drymer, William W. Park, Pierre-Marie Dupuy) [Not public]

- *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain*, ICSID Case No. ARB/15/36, Award, September 6, 2019 (tribunal: Karl-Heinz Böckstiegel, August Reinisch, LL.M., Philippe Sands, Q.C)

- *Stadwerke München GmbH, RWE Innogy GmbH, and others v. Spain*, ICSID Case No. ARB/15/1, Award, December 2, 2019 (tribunal: Jeswald W. Salacuse, Kaj Hobér, Zachary Douglas QC)


- *Watkins Holdings S.à r.l. and others v. Spain*, ICSID Case No. ARB/15/44, Award, January 21, 2020 (tribunal: Cecil W.M. Abraham, Michael C. Pryles, Hélène Ruiz Fabri) [not public]
List of Cases (IV)

Post-achmea

Other recent cases (2019)


• *CEF Energia BV v. Italian Republic*, SCC Case No. 158/2015, Award, January 16, 2019 (tribunal: Klaus Sachs, Klaus Reichert, S.C, Giorgio Sacerdoti)

• *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, August 6, 2019 (tribunal: Yves Derains, Bernard Hanotiau, José Carlos Fernández Rozas)

• *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019 (tribunal: Gabrielle Kaufmann-Kohler, Stanimir A. Alexandrov, Inka Hanefeld)
Summary of arguments of the arbitral awards rendered after Achmea

• “Tribunal’s jurisdiction exclusively derives from the ECT, the Tribunal needs not to determine the hierarchy between the ECT and EU law” (Novenergia ¶463)

• “EU law is not incompatible with the provision for investor-State arbitration contained in Part V of the ECT, (…) only the ECT deals with investor-State arbitration; and nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention” (Masdar ¶340)

• “The ECT does not contain a disconnect clause. (…) The Tribunal observes that it is not aware of a single award that has found “intra-EU” disputes to be excluded from the scope of Article 26(1) ECT.” (Greentech ¶¶ 207 and 221, Antin ¶¶ 215 and 225, Cube ¶126)

• “The ECJ’s judgment in Achmea does not extend to the ECT, a multilateral treaty to which both EU Member States and the EU are signatory parties, including (especially) Article 26 of the ECT” (9REN ¶173, NextEra ¶333, Antin ¶ 224, Cube ¶141)
Summary of arguments of the arbitral awards rendered after Achmea

- “This Tribunal’s jurisdiction and its exercise in the present case rests upon the ECT (with international law as the applicable law) and not EU law” (9REN ¶173, Antin ¶ 224, Cube ¶141, Watkins ¶223, CEF Energia ¶67)

- “EU law does not modify Spain’s obligations under the ECT, including Article 26 of the ECT” (9REN ¶173, Greentech ¶221, Infrared ¶262, Eskosol ¶123)

- “There was and is no material conflict between the ECT and EU law (including the EU treaties, particularly the Treaty of the European Union (“TEU”) and TFEU)” (9REN ¶173, Cube ¶¶ 141-144, SolEs ¶250)

- “This Tribunal is not an institution of the European Union” (SolEs ¶250)

- “The Tribunal cannot, however, overstate the importance of the long record of recent arbitral awards or partial awards which disposed of the intra-EU jurisdictional objections and maintained the jurisdiction of the respective ECT tribunals” (Infrared ¶260, Novenergia ¶263, Antin ¶214, Greentech ¶221, NextEra ¶333, Infrared ¶274, Operafund ¶380, Stadwerke ¶142, BayWa ¶282)
Summary of arguments of the arbitral awards rendered after Achmea

• “If this dictum were to be applied to the ECT, it would authoritatively establish, as between Germany and Spain, that the TFEU modifies Article 16 of the ECT on an inter se basis” (BayWa ¶282)

• “The CJEU was discussing “an agreement which was concluded not by the EU but by Member States”, whereas the ECT was concluded also by the EU and its terms are opposable to the EU” (BayWa ¶282, Belenergia ¶340)

• “As the CJEU did not elaborate on this precise legal instrument and the Achmea judgment is silent on the case of ECT-based arbitration, the Tribunal cannot infer the position of the CJEU dealing with this scenario” (Watkins ¶221)

• “As the ordinary meaning of Article 26 of the ECT confers jurisdiction on the Tribunal, any exclusion of intra-EU disputes would have to be express and clear, especially given that the EU is a party to the treaty.” (Watkins ¶222)
Summary of arguments of the arbitral awards rendered after Achmea

• “Tribunal’s conclusion that EU law is not part of the ECT’s applicable law, and particularly not for determining the scope of the Tribunal’s jurisdiction under Article 26 of the ECT” (Eskosol ¶123 and 174)

• “The decisions of the CJEU with respect to EU law are not binding on an international investment tribunal empaneled under a different legal order” (Eskosol ¶178, Magyar ¶208)

• “As a matter of international law, a court judgment of any scope or authority cannot without more automatically invalidate a treaty or an individual provision of a treaty” (Eskosol ¶187)

• “no EU Member State considers that its intra-EU BITs or the ECT have automatically been terminated by virtue of either the Achmea Judgment or the January 2019 Declaration itself” (Eskosol ¶227, Magyar ¶221)
6.- FUTURE UNCERTAINTIES
UNCERTAINTIES

• Why are the US Courts reluctant to enforce ICSID and non ICSID awards under the ECT?

• What if any Court of one Member State request a preliminary ruling to the ECJ about the validity of article 26 ECT?

• Do the investors have all economic resources to continue fighting?

• Is the EC going to authorize the payment of awards? If any, what type of settlements are feasible?

• Will a potential failure of the ECT system prevent new investments?
Este documento es meramente expositivo y debe ser interpretado conjuntamente con las explicaciones y, en su caso, con el informe elaborado por Cuatrecasas sobre esta cuestión

This document is merely a presentation and must be interpreted together with any explanations and opinions drafted by Cuatrecasas on this subject

Este documento é uma mera exposição, devendo ser interpretado em conjunto com as explicações e quando seja o caso, com o relatório/parecer elaborada pela Cuatrecasas sobre esta questão