Debevoise In Depth

Investor-State Tribunal Dismisses EU Law Jurisdictional Objections, Interpreting for the First Time EU Member State Declarations to Terminate BITs

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On 7 May 2019, the Tribunal in *Eskosol v Italy* (ICSID Case No. ARB/15/50) dismissed Italy's jurisdictional objections that the Energy Charter Treaty ("ECT") does not provide for arbitration between an EU Member State and an investor of another EU Member State.[1]

The decision fits the long-standing trend of Tribunals rejecting challenges to their jurisdiction on the basis that they have been asked to adjudicate a dispute between two parties with EU identity. This trend has been unaffected by the Court of Justice of the European Union's ("CJEU") March 2018 judgment in *Slowakische Republik v Achmea B.V.* (the "*Achmea* Judgment"). The *Achmea* Judgment held that a clause "such as" Article 8 of the Netherlands-Slovak Republic BIT (the dispute resolution clause at issue in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13) was not compatible with EU law.

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The Eskosol decision is the first known decision to consider the jurisdictional effect of the declaration signed by 21 EU Member States in January 2019, including Belgium and Italy (the "Declaration"). The Declaration (as well as the two distinct declarations signed by the other six Member States) indicated the Member States' intention to terminate bilateral investment treaties concluded with fellow EU Member States by 6 December this year (as previously reported by us here). Italy filed a termination request based on the nature and contents of the Declaration—a request that the Eskosol Tribunal rejected.

DISMISSAL OF THE EU LAW JURISDICTIONAL OBJECTION

Italy objected to the Tribunal's jurisdiction on the grounds that the arbitration provisions of the ECT cannot apply to disputes between an EU Member State and investors of another EU Member State. In line with arguments recently advanced by many EU Member States, Italy argued that the *Achmea* Judgment "sealed the debate", confirming that ECT arbitration is "unavailable when an EU company sues an EU host

[1] Italy has objected to jurisdiction on other grounds that remain pending.

State". In this particular arbitration, Eskosol—the subsidiary of a Belgian entity—invoked the protections of the ECT against Italy.

As every known investor-State Tribunal to consider the argument has done, the Eskosol Tribunal rejected the argument advanced by Italy that "the progressive development of the EU Treaties—and in particular the adoption of the Lisbon Treaty in 2009—requires the exclusion of intra-EU disputes from the ECT's scope."

The Tribunal found that the *Achmea* Judgment did not strengthen Italy's argument, for the following reasons:

CJEU Decisions Are Not Binding on an International Investment Tribunal

The Eskosol Tribunal emphasised that it is not bound by the CJEU's decision. It operates in a "different legal order" from the CJEU and recalled that there is "no precise hierarchy" between the various sub-systems of international law. Each system is governed by its own applicable norms. Rather, the Tribunal emphasised its "right" and "duty" to exercise its ECT jurisdiction, which requires it "to operate in the international legal framework of the ECT and the ICSID Convention, outside the EU and the dictates of EU law". In analysing the applicable law to determine jurisdiction, the Tribunal had earlier concluded that EU law is not part of the ECT's applicable law, which incorporates the ECT "and applicable rules and principles of international law". Notably, the Tribunal went a step further in saying that this conclusion does not mean that an ECT tribunal could not consider EU law "as a *matter of fact* if potentially relevant to the merits of a dispute, just as an ECT tribunal may consider a State's domestic law as part of the factual matrix of a case."

No Basis for Finding that the *Achmea* Judgment Extends to ECT Disputes

The Eskosol Tribunal noted that the *Achmea* Judgment is silent on the ECT. It considered the CJEU's concern in the *Achmea* Judgment to guard against a situation in which an arbitral tribunal "may be called on to interpret or indeed to apply EU law"—an extant risk that the CJEU had identified from Article 8 of the Netherlands-Slovak Republic BIT—but concluded that it was inappropriate to extend a hypothetical risk to a "blanket ban on all investment arbitration, even under different scenarios where no equivalent risk arises". The Eskosol Tribunal explained its opinion that it would be "particularly surreal to interpret the CJEU as already having decided that the arbitral mechanism is contrary to EU law", when the mechanism in question "did not actually command the application of EU law", and therefore "does not pose the particular risk that the CJEU identified as its basis for concern".

The *Achmea* Judgment Does Not Invalidate the ECT or Its Provisions

The Eskosol Tribunal concluded that the *Achmea* Judgment "cannot be considered as a matter of international law to automatically invalidate", for any EU Member State, "either the ECT as a whole or the consent to arbitration reflected in Article 26 of the ECT". The Tribunal determined that none of the invalidation grounds and procedures invoked by Italy was satisfied. In particular, the Tribunal found that the purported incompatibility between the ECT and the Treaty on the Functioning of the European Union could not invalidate its consent to the ECT because it was not "manifest" (Article 46(1) Vienna Convention on the Law of Treaties ("Vienna Convention")). The Tribunal also found that, though Italy has given notice of its intent to withdraw from the ECT, it had not pursued the procedures established by the ECT for declaring its consent invalid, and so—even if the treaty had been terminated—the 20-year sunset provision continued to apply.

The *Achmea* Judgment Does Not Vitiate Consent to Arbitrate

Finally, the Eskosol Tribunal considered that, even if the *Achmea* Judgment could be said to invalidate the ECT or any of its provisions, its operation did not operate retroactively to invalidate Italy's consent to ECT arbitration given before the *Achmea* Judgment was rendered. The Tribunal considered that this held true even if the *Achmea* Judgment is considered under EU law to operate retroactively to the date of ECT ratification ("*ex tunc*"). The Tribunal considered Italy's obligation to perform treaties in good faith and concluded that "[i]t was not until the CJEU actually issued the *Achmea* Judgment that, at the very *earliest*, given persisting debate about whether that Judgment even reaches the ECT, it could be said that investors were placed on notice about the risks of relying on Member States' apparent consent to arbitration in Article 26 of the ECT."

DISMISSAL OF THE TERMINATION REQUEST

Italy also requested an immediate termination of the arbitration based on the Declaration, the first known request of its kind. As we reported previously, the Declaration interpreted the *Achmea* Judgment as confirming as contrary to EU law investor-State arbitration between two parties with EU identity, and included a statement of intent to terminate bilateral investment treaties concluded between them (so-called "intra-EU BITs"). The Declaration also asserted that the *Achmea* Judgment applies equally to intra-EU investor-state arbitration under the ECT and committed the declaring States to discuss with the European Commission any steps necessary to ensure a uniform application of the consequences of the *Achmea* Judgment.

Italy argued that the Declaration is "a binding instrument emanating from sovereign States", which settled the debate regarding the interpretation of the *Achmea* Judgment for intra-EU arbitration under the ECT. According to Italy, the Declaration had the "consequence of prohibiting any pending or future arbitration procedure concerning the ECT." Italy further considered that the Declaration was to be applied by the Eskosol Tribunal either as a "subsequent agreement" or "an instrument made…in connection with the conclusion of the treaty" under the Vienna Convention. Italy did not consider such application of the Declaration to represent a retroactive withdrawal of consent; instead, it characterised the Declaration as a confirmation of "how the ECT should have always been interpreted in their understanding."

The Tribunal dismissed Italy's arguments about the nature and effect of the Declaration. The Tribunal considered that the Declaration reflects the "signatories' own interpretation of the further "legal consequences of the [*Achmea* Judgment]"", rather than reflecting the *Achmea* Judgment itself, and it noted that the Declaration contained no supporting analysis of international law. The Tribunal also noted that the signatories to the Declaration had undertaken that they would (in the future tense) take steps to terminate intra-EU BITs, suggesting that they "do not believe the intra-EU BITs already have been terminated for invalidity of the underlying consent".

As regards the Vienna Convention, the Tribunal decided that "the Declaration is more a statement of current political will" and does not qualify as a subsequent agreement or an instrument made in conjunction with the signing of the treaty within the meaning of the Vienna Convention. The Tribunal was also concerned with notions of certainty and fairness. It could not accept that the Declaration should be applied retroactively to require the termination of a pending arbitration, "initiated in good faith by an investor years before the Declaration was issued". Ultimately, to allow a signatory State to "non-suit an investor part-way through a pending case" based on an interpretative Declaration would be inconsistent with "acquired rights under international law".

Finally, the Tribunal considered the argument raised by Italy that it should refuse to exercise jurisdiction because any resulting award would be unenforceable. The Tribunal noted the distinct character of an ICSID award from that rendered by a tribunal seated in an EU country. It rejected Italy's argument that an award it issued would necessarily be unenforceable: "a tribunal has not rendered an "unenforceable award" simply because its award may prove challenging to enforce, or is capable of enforcement only in certain jurisdictions but not in others", and concluded that it has a duty to exercise "the jurisdiction it has found to exist" in respect of the remaining issues in the case.

As noted, this decision is the first of its kind insofar as it contains an interpretation of the ramifications of the Declaration on the jurisdiction of an intra-EU investor-State tribunal—in this case under the ECT. It remains to be seen whether these developments

will prompt further jurisdictional objections, as well as the effect they may have on the enforcement of intra-EU investor-State arbitration awards.

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Please do not hesitate to contact us with any questions.

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