

ICSID ARBITRATION TRIBUNAL REJECTS ACHMEA OBJECTION IN VATTENFALL NUCLEAR PHASE-OUT CASE

In one of the most prominent and politically contentious arbitration proceedings concerning Germany's energy turnaround (the so-called "*Energiewende*"), an ICSID arbitration tribunal has recently held that EU law does not operate as a barrier to its jurisdiction. It explicitly rejected the argument that the Energy Charter Treaty is not applicable between EU member states following the *Achmea* decision of the European Court of Justice.

BACKGROUND: VATTENFALL V GERMANY

In 2011, in the aftermath of the Fukushima accident Germany decided to accelerate its phase-out of nuclear energy. Following an administrative order and a law enacted by parliament, Vattenfall's Brunsbüttel and Krümmel nuclear power plants had to be shut down immediately without any compensation.

Against this background, Vattenfall is now claiming damages of some EUR 4.7 billion from Germany on the basis of the Energy Charter Treaty ("**ECT**"). The ECT contains both provisions on energy-related investment protection and access to international arbitration in case of disputes between an investor and a contracting party to the ECT. Contracting parties include the European Union ("**EU**") as well as its member states. The proceedings are conducted under the auspices of the World Bank's International Center for Settlement of Investment Disputes ("**ICSID**") and will be decided by an arbitral tribunal on the basis of the ECT.

The proceedings were initiated some years ago and the tribunal was close to rendering an award, when the European Court of Justice ("**ECJ**") issued its decision in the *Achmea* case.

THE ECJ DECISION: SLOVAK REPUBLIC V ACHMEA

Earlier this year, the ECJ issued a ruling in an investment protection case between Slovakia and a Dutch insurance company. The proceedings dealt with the enforcement of an arbitral award rendered on the basis of the bilateral investment treaty between the Slovak Republic and the Netherlands, two EU member states.

Key issues

- Energy Charter Treaty is applicable between EU member states also following the *Achmea* decision of the European Court of Justice
- This decision of the ICSID tribunal may have an impact on the other pending intra-EU proceedings under the Energy Charter Treaty
- In the context of enforcement proceedings concerning intra-EU investment arbitration decisions, national courts will likely soon be asked to address the relevance of EU law

The ECJ decided that the arbitration clause in the Dutch-Slovak treaty violate Art. 267 and 344 of the TFEU. The ECJ *inter alia* held that tribunals might have to interpret EU law, but were, at the same time, prevented from referring questions to the ECJ in order to obtain a preliminary ruling, as this was seen as a violation of the principle of mutual trust and sincere cooperation between EU member states.

THE TRIBUNAL'S PRELIMINARY DECISION IN VATTENFALL V GERMANY

In the Vattenfall case, Germany submitted the *Achmea* decision to the tribunal arguing that the *Achmea* reasoning also holds true for a multilateral treaty providing access to arbitration in investment protection matters such as the ECT.

The arbitral tribunal, however, found that Article 26 ECT, the arbitration clause contained in the ECT, is also applicable in the intra-EU context. Its decision is based on the following arguments:

- EU law and the *Achmea* decision do not as such apply to disputes under the ECT. They therefore cannot be used as a means to interpret Article 26 ECT. An interpretation applying EU law, as suggested by Germany, would result in rejecting investment protection to investors in intra-EU circumstances. According to the tribunal, this interpretation would depart "*radically from the ordinary meanings of the terms of that Article*". The tribunal underlines that the term in question, "Contracting Party", does not draw a distinction based on EU membership or the lack thereof.
- Even if EU law were to be applied to determine jurisdiction under Article 26 ECT, Article 16 ECT would prevail as the more specific rule (*lex specialis*). In the eyes of the tribunal, Article 16 ECT precludes an interpretation that distinguishes between intra-EU and other disputes. It prohibits any exemptions from the arbitration clause, which would deprive an investor of its access to arbitration.
- The tribunal also emphasizes that the contracting states of the ECT include parties that are not EU member states that it does not contain a "disconnection clause". Such a clause, which is often included in international treaties by the EU, ensures that parts of a treaty do not apply between EU member states. The tribunal emphasizes that such a disconnection clause is not contained in the treaty, the consequence being that both the EU and EU member states are subject to all provisions of the ECT even in intra-EU disputes.

OUTLOOK

The decision by the arbitral tribunal is one of the first after the *Achmea* decision. As a significant number of other intra-EU proceedings are currently pending, we do expect more decisions to be handed down in the coming months. In addition to arbitral tribunals, national courts will likely soon be asked to address the relevance of EU law for intra-EU investment arbitration proceedings in the context of enforcement proceedings.

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