IMPACT OF EUROPEAN JUDGEMENTS ON INVESTMENT ARBITRATION IS UNCLEAR

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There is uncertainty about the impact of the issuance of the Decision of the European Commission of 10 November 2017, on Spain's State aid SA.40348 (2015/NN) support for electricity generation from renewable energy sources, cogeneration and waste (the "EC

Decision") as well as the impact of the judgement of the European Court of Justice (the "CJEU"), of 6 March 2018, in Slovak Republic v. Achmea B.V. (the "Achmea Judgment") on the on-going and future investment arbitration proceedings under the Energy Charter Treaty (the "ECT") on the renewal energy scheme amended by the new legislation enacted by the Kingdom of Spain.

The EC Decision confirmed any compensation an arbitration tribunal were to grant an investor on the basis that Spain has modified the previous premium economic scheme would constitute state aid.

Arbitration tribunals are not competent to authorise the granting of state aid, which is an exclusive competence of the EC. If they award compensation or were to do so in the future, this compensation would be notifiable state aid to the EC pursuant to Article 108(3) 267 of the Treaty on the Functioning of the European Union ("TFEU") and therefore, it would be subject to the standstill obligation provided therein.

But before concluding the above, the EC also considered in their decision that any arbitration clause that provides for investor-state arbitration between two Member States is contrary to EU Law. First, EU Law provides for a complete set of rules in investment protection, and member states are hence not competent to conclude bilateral or multilateral agreements between themselves because by doing so, they may affect common rules or alter their scope. Second, according to the case law from the CJEU, an arbitration tribunal is not entitled to make references to the CJEU as it is not a court or a tribunal.

Does the above mean that no arbitration tribunal would be competent to rule on arbitration proceedings started by a member state under any intra-EU bilateral or multilateral investment treaty? The last judgment of the CJEU issued on the field is the Achmea Judgment which is of that opinion, but exclusively relating to an intra-EU bilateral investment treaty (BIT) concluded between two member states concerning the insurance industry. The CJEU concluded that the arbitration clause included in the BIT was incompatible with the EU law and, in particular, contrary to Article 267 of the TFEU. According to the CJEU, the consequence of a tribunal set up by member states being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU. However, the CJEU did not pronounce on the compatibility of arbitration clauses included under multilateral agreements where the EU is a member, as the ECT.

Impact of the EC Decision and the Achmea Judgment on ongoing investment arbitration proceedings under the ECT

In May 2017, the first arbitration award against Spain was issued in the case Eiser v Spain, where the World Bank's ICSID ruled in favour of the involved investors and granted them compensation. Notwithstanding that the award was emitted prior to the enactment of the EC Decision, Spain had already alleged within the above arbitration proceedings that an arbitration tribunal was not the competent authority to rule in investment disputes between two member states of the EU essentially based on the same reasoning later on defended by the EC. On the contrary, the arbitration tribunal that decided on the case considered that there is no limitation included in the ECT related to intra-EU member states disputes, and therefore, that the arbitration clause contained in Article 26 of the ECT was applicable.

However, Eiser has not yet enforced the above award against Spain since the latter filed an annulment action before the ICSID which is pending. In February 2018, and despite the previous enactment of the EC Decision, the arbitration centre of the Stockholm Chamber of Commerce (SCC) declared its own competence to rule on a new case against Spain under the ECT (Novenergía v

Spain) and decided, again, in favour of the investor against Spain. The arbitration tribunal considered the EC Decision "entirely irrelevant" as the tribunal was not applying EU Law to solve the dispute and thus, they were of the opinion that the decision was not binding.

However, the Swedish Svea Court of Appeals subsequently decided to stay the enforcement of the above award. Spain is alleging that the arbitration clause included under Article 26 of the ECT is incompatible with EU law and, therefore, that the tribunal lacked jurisdiction based on the same reasoning in the Achmea Judgment. In parallel, Spain has requested that the Swedish court requests the CJEU to confirm the compatibility of the ECT with EU law and the application of the same reasoning in the Achmea decision to the ECT.

In May 2018, the ICSID ruled, again, against Spain in the case Masdar v. Spain. The award also rejected the jurisdiction objections of Spain, as it considered EU law not incompatible with the arbitration clause of Article 26 ECT. This resolution also sustained that the Achmea Judgment "has no bearing upon the present case" as it cannot be applied to multilateral treaties, such as the ECT, to which the EU itself is a party.

Conclusion

For the time being, arbitration tribunals are not applying the EC Decision nor the Achmea Judgment but it is expected international arbitrators will be certainly reluctant to accept that EU Law is applicable to arbitration disputes where EU Law is not applied at any rate for the resolution of the case.

The next word will be the one from the courts of the member states and the Svea Court of Appeals on the Novenergía v Spain case, which will be the first but not the last one to pronounce, since it will follow very soon the enforcement of the Masdar v Spain case and the very recent award ruled in the Antin v Spain case, again against Spain, in June (and not published yet).

Only time (and CJEU) will tell whether the EC Decision and Achmea Judgement mean the end of investment arbitration under the ECT between member states.

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