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The Impact of ECJ Judgments on Investment Arbitration Under the 1994 Energy Charter Treaty: A Particular reference to the ECJ ruling on Achmea Case of March the 6th of 2018

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المجلة الدولية للفقه والقضاء والتشريع
المجلد ٣ ، العدد ١ ، ٢٠٢٢

أثر أحكام محكمة العدل الأوروبية على التحكيم الاستثماري بموجب معاهدة ميثاق الطاقة لعام ١٩٩٤: إشارة خاصة إلى قرار محكمة العدل الأوروبية بشأن قضية Achmeaفي ٦ مارس ٢٠١٨

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الصفحات ٩٣-١٠٩

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نسق توثيق المقالة: محمد أبو بكر عبد الهادى ، عبد الله الحبيب المحجوب ، أثر أحكام محكمة العدل الأوروبية على التحكيم الاستثماري بموجب معاهدة ميثاق الطاقة لعام 1994: إشارة خاصة إلى قرار محكمة العدل الأوروبية بشأن قضيةAchmeaفي 6 مارس 2018 ، المجلة الدولية للفة والقضاء و التشريع ، المجلد ٣ ، العدد ١ ، ٢٠٢٢ ، صفحات (٩٣-١٠٩)

Abstract

The 1994 Energy Charter Treaty (ECT) is a unique multilateral investment and trade treaty that was developed to provide a suitable framework for the stimulation of multilateral energy cooperation. It is one of the frequently invoked trade treaties in multinational arbitration cases. As a result, numerous landmark judicial decisions on investment arbitration have been made, including the Achmea Case decision of March the 6th of 2018. Nevertheless, most of these rulings, including the Achmea Case decision, tend to uphold European laws at the expense of the Energy Charter Treaty (ECT), thereby raising questions on the relevance of the treaty in European arbitration frameworks. Consequently, these judgments are likely to be having a considerable impact on energy cooperation and investment between State parties. This study however, aims to discuss the existence of any possible impacts of the European Court of Justice judgments on the question of investment arbitration under the ECT, with particular reference to the effects of the Achmea Case decision as well as its implications on the future trade and investment agreements.

Keywords: Investor-State dispute, Energy Charter Treaty, Intra-EU treaties, Investment arbitration.

الملخص

من المعاهدات التجارية التي كثيرًا ما يتم الاحتجاج بها في قضايا التحكيم متعددة الجنسيات. قدمت معاهدة ميثاق الطاقة لوائح طاقة جديدة جعلت الاتحاد الأوروبي هو المنظم الرئيسي للطاقة في الدول الأعضاء في الاتحاد. وقد أعطت تفويضًا للاتحاد الأوروبي لاتخاذ إجراءات تشريعية لضمان الأداء السليم لأسواق الطاقة، ولتعزيز أمن الطاقة وكفاءتها، ولتعزيز تنمية شبكات الطاقة عبر الدول الأعضاء، وتعد معاهدات الاستثمار الثنائية أحد هذه الإجراءات التي توفر الحماية للاستثمارات الأجنبية من المعاملة غير العادلة التي قد يواجهها في البلد المضيف، حيث تحتوي هذه المعاهدات على بنود تسمح للمستثمرين الأجانب بالسعي لحل النزاعات عند ظهور خلافات بينهم وبين الدول المضيفة عن طريق التحكيم. ونتيجة لذلك، تم اتخاذ العديد من القرارات القضائية البارزة بشأن التحكيم الاستثماري، بما في ذلك قرار قضية Achmea الصادر في السادس من مارس ٢٠١٨. ومن الملاحظ أن معظم هذه الأحكام، بما في ذلك قرار قضية Achmea، تميل إلى دعم القوانين الأوروبية على حساب معاهدة ميثاق الطاقة، مما يثير تساؤلات حول أهمية المعاهدة في أطر التحكيم الأوروبية. ونتيجة لذلك، فمن المرجح أن يكون لهذه الأحكام تأثير كبير على التعاون في مجال الطاقة والاستثمار بين الدول الأطراف. تهدف هذه الدراسة إلى مناقشة الآثار القانونية المحتملة لأحكام محكمة العدل الأوروبية على مسألة التحكيم الاستثماري بموجب معاهدة ميثاق الطاقة، مع الإشارة بشكل خاص إلى آثار قرار قضية Achmea، وأثر ذلك على التجارة المستقبلية والاتفاقيات الاستثمارية.

الكلمات المفتاحية: الكلمات المفتاحية: النزاع بين المستثمر والدولة، معاهدة ميثاق الطاقة، المعاهدات داخل الاتحاد الأوروبي، التحكيم الاستثماري

Introduction

The European Union (EU) energy treaties emerged out as continual integration efforts that began in 1951 by the establishment of the European Coal and Steel Community. A step which was followed by the conclusion of the 1957 Rome Treaties that formed the European Economic Community and the European Atomic Energy Community. In this line of developments, the 2009 Lisbon Treaty was concluded, which emphasized the solidarity among the EU countries for ensuring constant and continual supply of energy to the region. All those European efforts in energy sector aimed to achieve economic integration towards one energy market in Europe. By virtue of such arrangements, member states were urged to harness their resources, to ensure their infrastructural development, and to negotiate with a single voice with other states that are not members of EU.[(1)] The Energy Charter Treaty (ECT) introduced a new energy regulations that positioned the Union as the main energy regulator for the EU member states. It gave the EU mandate to take legislative measures to ensure proper functioning of the energy markets, to enhance energy security and efficiency, and to promote the development of energy networks across the EU member states.[(2)]

The laws governing energy sector in the EU are enacted through defined law making process including guidelines and directives. While the regulation of gas and electricity sectors took place earlier as far as the 1990s, the regulation of energy sector took place later as far as the year of 2009. On this line of developments, other arrangements were made for ensuring efficiency in energy market including the field of Trans-European Energy Networks development in the years of 2011 and 2013. By the year of 2015 another initiative was launched to promote consistency and proper coordination in the Energy Union owing to the increase of the engagements in the energy sector. Such initiative was as a result of fears resulting from the existence of other laws of the EU member states that might jeopardize the integration efforts since the such laws may be applied in different and contradictory way by states.[(3)]

The EU continued its efforts for integration process through new legislations and regulations. Then the EU has begun to focus on external dimensions in order to respond

[(1)]Tomas Maltby, 'European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism' (2013) 55 Energy Policy., p.443

[(2)]Ernesto Bonafé and Gökçe Mete, 'Escalated Interactions Between EU Energy Law and The Energy Charter Treaty' (2016) 9 The Journal of World Energy Law & Business., 174-188. https://doi.org/10.1093/jwelb/jww011

[(3)]Andrei Belyi, 'New Dimensions of Energy Security of the Enlarging EU and Their Impact On Relations with Russia' (2003) 25 Journal of European Integration., 351-369, DOI: 10.1080/0703633032000163193

to new challenges that the energy sector faced. Since the Union gets a larger percentage of its energy from Non-EU countries, there were calls to adopt external policies to govern the relationship between the EU state member and other nations, a method which would provide a regulatory framework between the EU and potential outside partners and other energy corridors.[(4)] With these policies in place, the EU hopes to speak with a single voice on matters concerning energy in the global realm, especially on issues regarding agreement between its member states and third party.[(5)]

The events following the fall of the Berlin Wall in 1989 led to the establishment of an international cooperation arrangements between the Western and Eastern European countries in which the 1994 ECT aimed to provide investment protection and guidelines on environmental issues concerning the use of energy.[(6)] Other type of arrangements are the Bilateral Investment Treaties (BITs), which offers also protection to foreign investments against unfair treatment that might face by the host country. The BITs contains clauses that allow the foreign investors to seek dispute resolution when disagreements arise between them and host states. In addition, there are also Inter-Governmental Agreements (IGAs) between the EU member states as well as with third party countries.[(7)]

Energy regulation in the EU is multifaceted because of the various laws adopted at various levels with the sole purpose of securing energy including the EU law, national legislations, and international treaties such as the ECT, IGAs, and BITs.[(8)] Although such arrangements were sharing a common purpose to enhance and improve major operations in energy markets, they could not achieve their goal due to many challenges arising from certain difficulties concerning the implementation of their provisions.[(9)]

The ECT is currently one of the commonly used instruments in many investment arbitration cases, but most of the rulings that have been made in such cases tend to uphold the EU laws at the expense of the ECT. The Achmea Case ruling standing as a good example in this instance where the ECT being excluded from application, a matter that raised many questions relating to the relevance of the treaty in the EU arbitration systems. It is argued however, that these rulings will have a considerable impact on investments and energy cooperation among the EU member states and other third parties. They may jeopardize future efforts to settle arbitration cases under the ECT.

[(9)]Oana Poiană, 'An Overview of the European Energy Policy Evolution: From The European Energy Community to The European Energy Union' (2017) 22 On-line Journal Modelling the New Europe., p.177

This study examines the possible impacts of these new developments on investment arbitration under the ECT with special reference to the Achmea Case ruling. This is in order to show how such rulings can negatively impact the future of investment agreements and cases of investment arbitration by highlighting the challenges that might be faced in dispute resolution in the European union under the application of the EU laws and the intra-state agreements.

The most important issues that will be under consideration in this work are: The ECT and its role in investment arbitration; challenges that might face dispute resolution under the existing laws and treaties on the light of the ruling of Achmea Case bythe ECJ; and the impacts of Achmea judgment on the EU investment arbitration mechanisms. This study ends with a conclusion which contains the main results of the research as well as recommendations for the improvement of dispute resolution in the energy sector according to the ECT.

1- The 1994 Energy Charter Treaty

The ECT of 1994 has been considered to be the most prominent multilateral framework for ensuring cooperation in energy sector among its parties, and for the establishment of an energy market free from discrimination open for all. It is one of the most prominent treaties that promotes and protects investments in the energy sector.[10] The ECT has witnessed a series of transformations as its parties try to assign it a central role with regard to the energy sector regulation. It brings together the 1991 European Energy Charter, the 1994 Energy Charter Treaty(ECT) and the 2015 International Energy Charter (IEC). It has been concluded by its parties due to the need of encouraging investments in the energy industry in Eastern Europe following the repercussions of the Cold War that ended by the late decade of the last century. The main aim of establishing this kind of arrangement was to ensure the continuous co-operation in energy sector and to promote integration between Eastern and Western European nations based on mutual and complementary benefits.[11]

Discussions on energy have been recently accelerated as the international community showing an increase interest in the development and cooperation in energy sector. Issues such as energy efficiency, the need for stronger multiple energy markets, and collaboration among countries, have become major areas of modern economic development as being considered

[10]Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, And Investor-State Disputes' (2018) 24 Global Governance., 453

[11]Orsat MiljeniĆ, 'Energy Charter Treaty – Standards of Investment Protection' (2018) 24 Croatian International Relations Review., p.53

as major factors that lead to economic growth. Continued infrastructural development has being viewed by many countries as one of the primary issues in their policy in developing energy sector through projects that can be shared with or solely carried out through foreign investments.[12] In their pursuit of development opportunities in investing overseas they usually look for places providing high level standards of investment protection including well-established legally-binding frameworks. Thus, the ECT came up as an important instrument that would encourage uniformity providing legal mechanisms in investment protection through arbitration.[13]

1.1 Dispute Resolution Under the ECT

Decision making by states relating to investment depends on the availability of investment protection mechanisms including dispute resolution, which are largely being a subject of the relevant ECT. On this matter, the ECT contains many provisions providing guidelines for investment protection, some of which relating to fair treatment of investors, transparency, and others. In commenting on such provisions, Anna[14] noted that "these provisions have been weakened by the very nature of the existing mechanisms for dispute resolution". It has been identified that some of such articles covering dispute resolution between an investor and the host government are either weak or offering unsatisfactory mechanisms for addressing such cases. Irrespective of such criticism however, the ECT still playing a major role in the arbitration of energy investment cases. For instance, some of its provisions offer a formidable protection against expropriation providing appropriate approaches of compensation that would be acceptable to many of the international investors. In addition, major issues that foreign investors often worried about such as unfair taxation are also covered under its various provisions.[15]

The mechanism for dispute resolution between foreign investor and a contracting entity is provided under the terms of Chapter/Article 26 of the ECT. Such legal provision currently stands as the most effective components of the concerned instrument. It is one of the most significant developments in international arbitral treaties in terms of the number of options

[12]Justin D'Agostino and Oliver Jones, 'Energy Charter Treaty: A Step Towards Consistency in International Investment Arbitration?' (2007) 25 Journal of Energy & Natural Resources Law., p.230

[13]Kamal Gadiyev, 'Arbitration of Energy-Related Disputes Under the Energy Charter Treaty' (2008) 8 Global Jurist., PP. 1-18.

[14]Anna Bilanová and Jaroslav Kudrna, 'Achmea: The End of Investment Arbitration as We Know It?' (2018) 3 European Investment Law and Arbitration Review., PP. 279.

[15]Christian Tietje, 'The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals Vs. EU Member States' (2010) SSRN Electronic Journal. Available at SSRN:http://dx.doi.org/10.2139/ssrn.1625323

that have been offered to foreign investors.[16] It covers also the situations where various regulations might be breached contrary to that stated in Chapter III of the Treaty, which contains legal provisions relating to the fair treatment of investors, expropriation of their properties and compensation. Above all in situations where the host nation has failed to meet its obligations as agreed upon with the foreign investor, the two parties can seek arbitration through a previously agreed upon legal procedure of their choice that meets standards of international law[17] .

1.2 Challenges Facing Investment Arbitration in the European Union

Investment arbitration in the EU has recently gained a considerable attention as persons of both public and private sectors continue to discuss the future of the dispute resolution process. The original plan of the bilateral investment treaties was to provide a mechanism through which investments in the emerging economies can be protected to promote foreign direct investment and stable economic growth in the nations concerned.[18] However, investment arbitration is facing many challenges and criticism, Some of them originated from the ways in which investment arbitration can be undertaken including the cost and the time taken to settle the cases. In addition, it is always felt that there is a lack of consistency in issuing arbitral decisions regarding the complains, which further raises more questions on the mechanisms used.[19] Some reports have indicated that the arbitrators should also be reformed due to the lack of impartiality and independence among them.[20] The European Union is also involved in discussions of these challenges relating to the investment arbitration in energy sector since they have been viewed as an European affair following the coming into force of the Lisbon Treaty. The EU member states are often disadvantaged as they are forced to phase out their bilateral investment treaties in favor of those being negotiated by the EU which also can be represented as a respondent in the cases involving arbitration cases.[21]

2. The Achmea Case Ruling of March the 6th of 2018

[16]Thomas Roe, Matthew Happold and James Dingemans, Settlement of Investment Disputes Under the Energy Charter Treaty (Cambridge University Press 2011)., p.45

[17]Graham Coop, 'Energy Charter Treaty and The European Union: Is Conflict Inevitable?' (2009) 27 Journal of Energy and Natural Resources Law., p.406

[18]José R. Mata Dona and Nikos Lavranos, International Arbitration and EU Law, (Edward Elgar Publishing 2021). PP. 322-323.

[19]Murilo Otávio Lubambo de Melo, 'Host States and State-State Investment Arbitration: Strategies and Challenges' (2017) 14 Revista de Direito Internacional., p.86.

[20]B. Legum, 'Trends and Challenges in Investor-State Arbitration' (2003) 19 Arbitration International.PP. 143-147.

[21]Ibid.

The judgment of the of the Grand Chamber of the European Court of Justice (ECJ) on the Achmea Case (C-284/16) dated March the 6th of 2018 is of immense importance. It is mainly concerned a preliminary reference by the German Federal Court of justice over whether the EU law precluded the application of an arbitration clause in BIT between EU member States (Slovakia and NL).

During the preliminary hearing of the case by the German Court, Slovakia raised concerns on the Jurisdiction of the court, and maintained that the provisions of the Inter-state dispute settlement (ISDS) embodied in BIT between the two concerned countries were not compatible of the EU Law. At the same line of argument was the opinion of the EU commission, which argued that arbitral tribunals based on IBT may fail to consider judicial review by the ECJ when applying the EU law.

However, the case referred to the ECJ in order to decide whether the Inter-state dispute settlement channel (arbitration clause in Article 8 of the 1991 IBT agreed upon between NL and Slovakia) is compatible with the EU law or not in regard to articles 18, 267 and 344 of the TFEU.

The ruling of Achmea case by the ECJ was considered to be the most recent judgement on investment arbitration cases. It is a clear indication of the strained relationship of the European Union with the existing investment arbitration mechanisms.[22]. The European Commission support of the ruling was based on its believe that all the Intra-State BITs ought to be phased off arguing that intra-state BITs are all under EU competences.[23]

When the case being considered by the ECJ Slovakia maintained that ISDS was not compatible with Article 18 (1) of the 1912 Treaty on Functioning of the European Union (TFEU), which calls upon the ECJ give its preliminary rulings on cases requiring prior interpretation of the EU law. Irrespective of such article which being dismissed by the Court, Slovakia also raised the question of whether ISDS was in line with Article 344 of the TFEU which preventing the EU member states from referring disputes concerning the interpretation or adoption of the EU law to any other mechanism or system of arbitration other than the ones recommended as per the EU Treaties. Therefore, the German Court asked the ECJ to determine whether the ISDS provision under the Intra-EU BIT between

[22]Emmanuel Gaillard and Hélène Ruiz Fabri, EU Law and International Investment Arbitration., (JurisNet, LLC. 2018).p.234

[23]Antonia Cavedon and Simon Weber, 'Digging Deeper: Summary of The Hearing Before The CJEU in The Achmea Case' (2018) 3 European Investment Law and Arbitration Review., 231.

Netherlands and Slovakia was in line with the EU Law. So the ECJ has to determine whether the articles 267 and 344 of the TFEU in particular precluding the provisions of the ISDS.[24]

The ECJ ruled that the articles 267 and 344 of the TFEU precluding the ISDS because the tribunal court has the mandate to preside over arbitration cases by interpreting and applying the EU law a matter which exclusively reserved to the EU[25].In determining the applicability of the said articles on the Achmea case, the ECJ argued that article 344 of the TFEU could not even be applied in settling disputes between different states, and that the issue under consideration did not concern the EU treaties, but the applicability of the BITs. The European Court further argued that any private or special tribunal established outside the EU through an international consensus does not contravene the EU law as such as long as it does not have any negative effects on the autonomy of the EU legal system. The Advocate General's ruling also supported these rulings and further indicated that arbitral tribunal met all the criteria for setting up a tribunal because its formation was based on law, and that it followed the rule of law when conducting its activities.[26]

Most of the elements that gets consideration by the ECJ in the case at hand are the principle of the EU autonomy[27] and the question of the EU legal system as provided under Article 344 of the TFEU. The EU law derives its autonomy from many factors most of them its independent making process, which make it to be regarded as superior over other municipal laws of the EU member states. The ECJ stressed on three fundamental elements that strengthen the relationship among the EU member states, including a) the autonomy of the EU law, b) the European shared values, and c) the mutual trust. The Court then

[24]Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration After the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 European Constitutional Law Review., p.790.

[25]Article 267: "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: "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".

[26]Mads Andenas, Cristina Contartese, A. Court of Justice EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea', (2019), 56, Common Market Law Review, Issue 1, pp. 157-191, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/56.1/COLA2019007

[27]Jean-Claude Najar, 'Inside Out: A User's Perspective On Challenges in International Arbitration' (2009) 25 Arbitration International. PP.515–528, https://doi.org/10.1093/arbitration/25.4.515

emphasized on the crucial role that played by the EU's judicial system for protecting and preserving the EU's autonomy.[28]

The European Court asserted that a tribunal established upon BITs to address a given problem may be required to adopt only the provisions of the EU law on matters concerning fundamental freedoms like those relating to the free movement of capital. In determining the case between Slovakia and the Dutch company of Achmea, the relevant laws of the concerned parties that used in drafting the agreement between them should not be dismissed.[29] However, it should be noted that the agreements between Slovakia and Achmea were based on EU treaties and the TFEU, which all of them are parts of international law. It follows that the case between the concerned disputed parties relating to the EU law, especially on matters that concerning the fundamental freedoms. Again, the Court went further to determine whether the Achmea tribunal met all the requirements to fall within the EU judicial system. On this point, the court ruled that since the tribunal was not common to the judicial systems of either the Dutch or Slovakia, it therefore alien to the EU judicial system. Thus, the arbitral tribunal was not obliged to refer its case to the court for preliminary ruling because it was not established under the EU judicial system.[30]

On the question of whether the Achmea decision could be subjected to a judicial review presided over by a tribunal or a court of any of the EU member states in which would then can be decided to refer the case to the ECJ for preliminary ruling for purposes of uniform interpretation and application of the EU law, the ECJ ruled that national law may limit the judicial review of such rulings as offered by courts of the EU member states.[31] In addition, the ECJ asserted that the provisions of ISDS could not guarantee full and effective application of the EU law on issues required. The court then proceeded to distinguish between some essential issues surrounding the Achmea Case relating to the differences between arbitration that between investor and state based on bilateral treaty, and that being based on agreement between the two disputed parties which is purely a commercial arbitration. The ECJ ruled that the commercial arbitration is compatible with the EU law if its legal provisions providing the national courts the ability to refer the case to the ECJ for preliminary ruling. In regard

[28]Jens Hillebrand Pohl, P.R., p.780

[29]Anastasios Gourgourinis, 'After Achmea: Maintaining The EU Law Compatibility of Intra-EU BITS Through Treaty Interpretation' (2018) 3 European Investment Law and Arbitration Review., p.301

[30]Dorieke Overduin, 'Turning Tides: The Landmark Decision in The Achmea Case – The Ecosystem of EU Law Means the End of Intra-EU BITS' (2018) 3 European Investment Law and Arbitration Review., p.252

[31]Dorieke Overduin, 'Turning Tides: The Landmark Decision in The Achmea Case – The Ecosystem of EU Law Means the End of Intra-EU BITS', p.255

to the Achmea Case the court argued that arbitration concerned involving involves involved investor-State arbitration and fell under intra-EU BIT as opposed to an investment Treaty formulated by the EU.[32]

2.1 Implications of the Achmea Ruling

The ECJ preliminary ruling rendered the Achmea arbitration incompatible with the EU law. The Court ruled that the arbitration process that was conducted between Slovakia and the Dutch Achmea company using the intra-state BITs is in contrary with the TFEU provisions. The Achmea decision mainly focused on the incompatibility of the inter-state BITs with Articles 18, 267 and 344 of the TFEU, thereby failing to address the issues concerning ISDS mechanisms under the ECT. However, a deeper analysis into the Achmea decision reveals that the case also may be used to describe the current relationship between the ISDS mechanisms under the ECT and the EU law. Various commentators from countries inside and outside the EU have noted that the Achmea decision can be applied as well to the ECT.[33]

2.2 The Impacts of the Achmea Ruling on Investment Arbitration Under the ECT

It is argued that the effectiveness of the ECT in settling intra-EU disputes is partly affected because of its contradiction with the TFEU. The Achmea rulingthat might impact other arbitral decisions reveals this view as illustrated by the Novenergia case. In this case Spain took an action against the decision to offer an arbitral award in the case, based part of its decision on the Achmea ruling and its perceived relevance to the ECT to render the arbitral tribunal's ruling invalid and to question its jurisdiction. Spain requested the Svea Court to get preliminary ruling from the ECJ on the matter.[34] Some writers argue that if the Svea Court could have referred the case to the ECJ, then the case could have been determined on the same lines as that of Achmea.[35]

Analysts argue that the implications of the Achmea ruling on the ECT based claims have been a subjected to hotly contested debates because of the feeling that it has significant

[32]J Robert Basedow, "The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration", (2020) 23, Journal of International Economic Law, PP. 271–292, https://doi.org/10.1093/jiel/jgz025

[33]Antonia Cavedon and Simon Weber, P.R., P. 233.

[34]Novenergia v. Spain, SCC Case No. 063/2015, Final Award, 449(Feb. 15, 2018) (italaw 2018), https://www.italaw.com/cases/6613.

[35]Maria Fanou, 'Intra-European Union Investor–State Arbitration Post-Achmea: RIP? An Assessment in The Aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of 6 March 2018, EU:C:2018:158' (2019) 26 Maastricht Journal of European and Comparative Law., p.320

consequences to the pending of the ECT based cases. The European Commission has since argued that intra-EU ECT claims might be barred by the Achmea rulings. The issues surrounding the Achmea tribunal also points to the deeply rooted uneasy relationship between the investment treaties and EU law. Some cases, such as the Masdar Solar v Spain Case, have not been opened again despite the requests by one of the parties on the grounds that the Achmea decision did not address matters concerning the relationship between the ECT and EU law.[36]

Intra-EU arbitration with respect to ECT further received another setback on January the 15th of 2019 when twenty-one EU state member jointly declared that provisions under the ISDS with respect to the existing Intra-EU BITs contravene the EU law, and are therefore inoperable. These states also asserted that these sentiments apply to the ISDS provisions in the Energy Treaty Charter. In making this declaration, such States further said that they would urge all the courts in the respective countries to desist from enforcing arbitral rulings using the provisions Intra-EU BITs. Surprisingly, the European Commission endorsed these assertions, thereby jeopardizing the future of arbitration under ECT.[37]

Although many of the EU member states maintain that the Achmea ruling may have implications for arbitrations carried out under ECT, others still assert that the decision did not address intra-EU arbitrations under the ECT maintaining that the issue of applicability of the Achmea decision to the ECT is still being reviewed. However, until this matter is determined, arbitral tribunals and courts are free to avoid the application of Achmea decision to the intra-EU arbitration cases under the ECT.[38]

The European Commission together with the majority of the EU state member have been vocal about the ECT and its relation to the EU law. The ECJ has not explicitly expressed its opinion on the question of the ISDS provisions under ECT. The Court stressed on the supremacy of the EU law over other areas and showed that it can play an active role in protecting its jurisdiction in interpreting and applying the EU law. It follows that the ECJ or the European Commission has the power to change the rules governing the ISDS.

While the issue of intra-EU arbitration under ECT is still in its developing stages, the

[36]SkovgaardPoulsen, Lauge N., Politics of Investment Treaty Arbitration (2017). Forthcoming in Oxford Handbook of International Arbitration, 2018, ed. Thomas Schultz and Federico Ortino., Available at SSRN: https://ssrn.com/abstract=2955166 or http://dx.doi.org/١٠,٢١٣٩/ssrn.٢٩٥٥١٦٦

[37]Eirik Bjorge, 'Eu Law Constraints On Intra-Eu Investment Arbitration?' (2017) 16 The Law & Practice of International Courts and Tribunals., p83

[38]Lauge N. Skovgaard Poulsen, P.R. Available at SSRN: https://ssrn.com/abstract=2955166 or http://dx.doi.org/١٠,٢١٣٩/ssrn.٢٩٥٥١٦٦

Achmea decision is a clear indication of the absolute authority of the ECJ in determining the incompatibility of the ISDS provisions under ECT with the EU law.[39]

Currently, the direction that the intra-EU ISDS in the ECT remains unclear and remained unsettled, despite the fact that a large number of the EU states as well as the European Commission maintaining that the Achmea decision can be used to determine the incompatibility of the provisions of ISDS under ECT with the EU law.[40] Since the EU has the final say with regards to investment regulations and protection, it can use its treaties to give directions on the ECT future existence. To illustrate, the Lisbon Treaty gives the EU the power to regulate foreign investments. In addition, Article 3 (1) also gives the Union exclusive competence over matters concerning commercial policies such as controlling Foreign Direct Investment (FDI). The EU can express this competence through its major institutions such as the ECJ and the Commission. This shows that EU States must always take instructions from the European Commission on matters concerning intra-EU disputes under ECT. This will probably be the case when the ECJ later or one day will determine the issue concerning the ECT's incompatibility with the TFEU.[41]

Amidst the challenges facing arbitration under ECT, it is argued that the ECT still a major dispute resolution mechanism that can be invoked during investor-state arbitration cases. According the to the UN Conference on Trade and Development (UNCTAD), it is estimated that nearly 20% of arbitrations across the world invoking the ECT, in which a total of 113 arbitration cases that involved the ECT. In addition, around 76% of all the energy related claims have been handled under the legal provisions of the ECT since 2014. Thus, the ECT still plays an important role in ECT claims especially for the EU investors, but, at the same time, around 78% of such claims involved complaints about the EU member countries. The majority of all the 121 cases that has been invoking the ECT are mainly intra-EU disputes. Considering that the intra-EU ECT related arbitrations are frequent with regard to the challenges existed, the renegotiating of the terms of ECT may be vital to the ECT future existence with its legal provisions concerning investment arbitration.[42]

[39]Anastasios Gourgourinis, P.R., P. 303.

[40]Cees Verburg and Nikos Lavranos, 'Recent Awards in Spanish Renewable Energy Cases and The Potential Consequences of the Achmea Judgment for Intra-EU ECT Arbitrations' (2018) 3 European Investment Law and Arbitration Review., p.212.

[41]Ernesto Bonafé and Gökçe Mete, P.R., https://doi.org/10.1093/jwelb/jww011

[42]OskariVaaranmaa, The Energy Charter Treaty, Frivolous Claims and the Looming Threat of Investor-state Dispute Settlement: Any Hope from the EU's Modernisation Proposal?, (2021) 8, International law: Open issue, https://doi.org/10.21827/GroJIL.8.2.270-287.

2.3 Impacts of the Achmea Ruling on the Future of the Investment Agreements in the EU

This analysis reveals that the contentious issue surrounding the intra-EU arbitrations under ECT has divided commentators into two camps. There are those who opine that the Achmea decision does not apply to ECT, including various arbitral tribunals that do not see its applicability in the ECT claims. The other camp feels that the Achmea decisions can also be adopted in determining the incompatibility of ECT ISDS provisions with the EU law. These tensions have various implications that do not only stop at the strained relationship between the arbitral courts and the CJEU or the EC, but also extends to the investors, national courts, and host nations due to the uncertainty that it creates. Arguably, investors that have been offered arbitral awards, or those that will receive the same in future, are or will be at a disadvantage because it will be hard for them to enforce such awards in the 28 states forming the EU. These investors will have to look for other avenues to enforce the awards, which will result in additional costs and more time spent in pursuing such cases even without being guaranteed success.

The situation also jeopardizes national courts, because the EU courts would be obliged to make tough decisions on whether to adopt the legal provisions under the EU law or consider those under their investment agreements. If they choose to use the legal provisions under the AU law, then it will force the outside countries to object the awards offered under those laws. This situation will expose foreign investors to a strained relationship with the EU member states. Furthermore, the courts also find it hard to decide on whether to challenge the jurisdiction of the provisions of the intra-EU agreements, or to continue with the cases as per the agreements. At the same time, if the courts decide to enforce the arbitral wards, they would be violating the EU law and risk being charged with infringement.[43]

Conclusion

Under this conclusion the main results of this work and recommendations will be under consideration.

Results

The Achmea Case ruling in March of 2018 is considered to be one of the landmark decisions in the investment arbitration long way history in the European Union. It has various

[43]Bilanová AJ Kudrna, P.R., P. 266.

implications for the 1994 Energy Charter Treaty as well as other inter-state BITs used in investment dispute resolution between States. The ECT plays a significant role in multilateral arbitration cases due to the reliable framework through which the cases are handled that offered. The arbitral clauses provided by the ECT and other inter-state BITs being used to make various landmark rulings such as that of Achmea Case decision. Irrespective of the aims of the ECT as well as other European instruments and the plans being put forward in ensuring cooperation and development in the energy sector in the EU, there are still a lot of challenges in implementing the such instruments. Most of the EU State members invoking the EU law to challenge the investment arbitral decisions even under the ECT provisions as being incompatible. This might result in a strained relationship between the EU and other states outside the Union. Although the relevance of the ECT seems to be dwindling, it still plays a major role in the investment arbitration cases as its provisions can still be invoked by various parties. However, the stressed relationship between the EU law and the ECT is likely to jeopardize investment relationships between the EU member states and countries outside the body, a matter which needs to adopt certain measures to solve the issue before it creates more tension.

Regarding the future of the IBT between the EU Countries in Energy Sector according to the ECT one can conclude that there is a fear that the dispute settlement mechanism contained in Article 26 of the ECT may be contrary to the TFEU (Articles 267 and 344), and therefore the agreements concluded in the field of energy that adopt a the same mechanism such as that approved by the Dutch-Slovak IBT would be contrary to the law of the European Union and that its fate will be the same that of Achmea company where the arbitral ruling could not be implemented. Some specialists believe that such fear is not justified for two reasons: The first reason relating to the limited scope of application of the ECJ ruling concerning Achmea Case. Second reason relating to the status of the EU as party to the ECT and therefore non recognition of the mechanisms mentioned in article 26 (Dispute Resolution) of the ECT will make the European Union in breach of its international obligations. In balancing the two said views and as a conclusion it seems to be important to reconsider the Article 26 of the ECT to be in accordance with the TFEU. In such consideration state parties to the ECT should not be given the right to resort to arbitration mechanism that would be against the TFEU (Article 267).

Recommendations

As long as the future of investment arbitration under the ECT remains disputed, there is a need to come up with an effective approach to end the stalemate. And since the majority of the EU Member States have already declared that the intra-EU BITs under the ECT are incompatible with the EU law, thus the future of investment arbitration under the ECT is currently in jeopardy. On the light of this, one of the ways possible forward to solve the problem is to amend the ECT terms regarding dispute resolution to be in be in a harmony with the European legal system or law. This option has being already addressed as a question by ECT States parties.[(44)]

There is a desperate need for matters concerning the ECT and its compatibility with the EU law to be clear. Such clarity seems to be difficult to be made without amendment of the ECT, a matter which requires a political will by the ECT States parties to take action. In this regard, it will be worthy to note that the Energy Charter Conference (The ECT governing body) has already welcomed the idea of decision modernizing the ECT. The EU Commission has been mandated by the EU Council to participate in the negotiations for helping to attain the main of the EU to amend the legal provisions of the ECT in order to conform with the recently concluded agreements under the EU law in one hand, and to ensure that the ECT is in line with the EU investment arbitration mechanisms on the other. From this view, the modernization or modification agenda could be seen as a possible way of making the ECT more attractive to other States outside the European Union including the emerging energy powers.

[(44)]J. Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 Journal of International Economic Law.