**Investor-state dispute settlement and its impact on International Investment Law**

## OC - (ILA-14176) - ENERGY CHARTER TREATY'S FAILED ATTEMPT TO PROVIDE REGULATORY STABILITY: THE CASE OF STATES' SUBSIDIES IN THE RENEWABLE ENERGY SECTOR WITHIN EUROPEAN UNION

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**Abstract**

The issue of the interactions between the law of the European Union (**EU law**) and international investment law (**IIL**), Energy Charter Treaty (**ECT**) is uncontestably among the "hot" topics within

the field of IIL. This is evidenced, among others, by the ever growing body of case law and intergovernmental decisions related to this issue, as well as in the considerable amount of scholarly output. The lion's share thereof, however, seems to be revolving around the subjects related to the treaty conflicts. The aim of this paper, however would be to somewhat broaden the perspective, and make an inquiry into how do these controversies play out from the angle of the ECT's alleged beneficial contribution to the regulatory stability in the energy sector within EU and, thus, how do they affect the legitimacy of the whole system. As I shall try to demonstrate, the somewhat unclear situation created in the result of the controversies concerning the relationship between ECT and EU law indeed would indicate that the ECT has little if any beneficial effects for the stability in the energy sector.

I shall begin with analysing the premises upon which the ECT was founded. Among them, a prominent role was played by the overall goal of creating a predictable and stable regulatory framework for international investment in the energy sector. This promise of regulatory stability, along with the hope improving the domestic institutional framework, leading to creation of a better climate for investment has served as one of the main rationales for the whole system, including the investor-state dispute settlement mechanism (**ISDS**), allowing the investors to enforce their rights against certain states. This broader, functional perspective taking account of broader spectrum of interests than these of the investor, will serve me as the point of reference.

Moving to the issue of the mutual relationship between EU law and ECT, despite the latter being the "brainchild" of the EU, a certain tension between the Charter and EU law was present from the very beginning, particularly in the practice of arbitral tribunals (**ATs**; notably in the context of EU accessions, and the adjustment of national regulatory frameworks to the *acquis*, as exemplified by the case *Electrabel v Hungary*). It was not until the breakdown of state support schemes for renewable energy in Italy, Spain and Czechia, however, that the problem became evident. All of these cases concerned situations in which the respondent states acted within the scope of application of EU law (state aid rules and regulations of energy market), in every one of them the objection regarding incompatibility of ECT with EU law (and, thus, the inapplicability of the former) was raised (**intra-EU objection**), sometimes by the European Commission (**EC**) acting as *amicus curiae*. Nonetheless, in all the cases ATs upheld their jurisdiction. Moreover, in some of them ATs eventually decided on merits against the Member States, which resulted in awards rendered by ATs whose jurisdiction was allegedly established in violation of EU law. These events have been accompanied by parallel developments on part of EU law (related to ECT or intra-EU BITs) countering ATs decisions: Commission state-aid decisions related to Czech and Spanish renewables support schemes prohibiting payment of the arbitral awards; breaking CJEU judgment in *Achmea* case and the Commission communication on intra-EU investment. All these resulted in Member States staying before conflicting and mutually exclusive obligations.

One could discuss who is to blame for this split, EU or ATs. Regardless of one's views on the matter, I shall try to demonstrate that for EU Member States EU law enjoys *de facto* priority before the IIL. This conclusion is based on general principles of EU law and, equally, on the legal practices of Member States' courts setting aside or rejecting enforcement of arbitral awards rendered on the basis of intra-EU investment agreements and the Declarations of the Member States related to the legal effects of the *Achmea* judgment. Moreover, in light of the jurisprudence, there is little if any doubt that the Member States' courts would have to reject enforcement of ECT awards conflicting with the Commission's state-aid decisions. Consequently, these are strong *indicia* that in case of a conflict between two international frameworks Member States do prefer to give the priority to their EU obligations. The importance of this conclusion is related to the fact, that due to the formulation

of ECT and EU Treaties in practice solution of this treaty conflict by means of changing the treaties would not be practically possible within reasonable time horizon.

In such circumstances the attitude of ATs vis-à-vis these developments is rather deplorable. Faced with the conflict, they tend to ignore the will of the parties and the possible consequences of their decisions to further fragmentation of the legal order. In particular more judicial decisions in cases *Vattenfall v. Germany* and *Eskosol v. Italy* strongly suggest that ATs would have nothing against living in two mutually exclusive parallel universes of EU law and IIAs. Regardless of whether such viewpoint would be defendable from strictly legal point of view, one has to ask the question whether it contributes to one of the main goals of ECT, namely regulatory stability. The answer is rather simple: no. Furthermore, these decisions arguably in the longer perspective, contribute further undermine the legitimacy of ATs, whose rulings would be unenforceable within EU as contradicting EU law. Consequently, the readiness of authorities on the national level (even supposing that there had been any) to take into account IIL as interpreted by ATs in conducting the domestic policies shall further diminish.

Consequently, as I shall argue the recent jurisprudence of ATs ECT disputes, upholding their jurisdiction to hear energy disputes related to issues falling within the scope of application of EU law against all odds should be understood as leading to effects blatantly contradicting the central premises of the ECT, namely creation of a stable and predictable regulatory framework in the energy sector.

**Palavras-chave : EU law, Energy Charter Treaty, ISDS legitimacy**