Vattenfall v. Germany: Tribunal Subtly Avoids Applying Achmea Judgment and Finds that Article 26(6) ECT Does Not Apply to Jurisdiction Issues

On 31 August 2018, the ICSID tribunal in *Vattenfall v. Germany* issued a decision addressing the consequences, for this case, of the *Achmea* judgment handed down by the Court of Justice of the European Union (the ***CJEU***) on 6 March 2018 (see previous analysis of the *Achmea* judgment here and here).

The case at hand is a well-known investment dispute whereby a Swedish investor (***Vattenfall***) initiated arbitral proceedings against Germany seeking compensation for damages incurred following Germany's decision to shut down all the nuclear power plants on its territory and to replace them with green energy alternatives. Vattenfall, which owned such nuclear power plants, argued that such decision amounted to an expropriation which violated the Energy Charter Treaty (the ***ECT*** – a multilateral agreement to which both Germany and

Sweden were parties to, together with all other EU Member States, the European Union and several third countries (including Japan, and Central Asian countries)).

In the *Achmea* judgment, the CJEU ruled that an intra-EU investment arbitration case between two EU parties, a Dutch investor and Slovakia, violated EU law. However, in stark difference with the *Vattenfall* case (where the underlying basis for arbitration was the ECT's investor-State dispute resolution clause provided for in Article 26), the basis for the jurisdiction of the arbitral tribunal in *Achmea* was the Czechoslovakia-Netherlands bilateral investment treaty (***BIT***).

Based on that judgment, and since the *Vattenfall* case also involved EU parties (*i.e.*, a Swedish investor against an EU Member State), Germany argued that the arbitral tribunal in *Vattenfall* lacked jurisdiction since the findings of the CJEU in *Achmea* were "*not limited to BITs between EU Member States, but must also be applied to multilateral agreement to which EU Member States are party, such as the ECT*".

Germany relied, more precisely on Article 26(6) ECT (according to which "[a] *tribunal* […] *shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*") and Article 42(1) ICSID. According to Germany, those provisions imply that the tribunal in *Vattenfall* had to determine its jurisdiction in accordance with the ECT and "*applicable rules and principles of international law*". Since EU law and the judgments of the CJEU have to be regarded as part of international law, the findings of the CJEU judgment in *Achmea* also apply to the case and thus prevent the tribunal from hearing that claim.

In its decision of 31 August 2018, the arbitral tribunal rejected the jurisdictional objection made by Germany and found that:

- Article 26(6) ECT applied only to the merits of the

dispute. It did not apply to issues or questions relating to the tribunal's jurisdiction. Consequently, the argument that Article 26(6) ECT brought EU law and the *Achmea* judgment into *application* in the assessment of the tribunal's jurisdiction failed (para. 121);

– However, the tribunal agreed that the assessment of its jurisdiction was to be made in light of Article 26 ECT *interpreted* in accordance with international law (para. 125);

– Although the tribunal agreed that EU law and the CJEU judgments constitute part of international law (paras 146, 148 and 150), they should not be taken into account for the purposes of interpretation of Article 26 ECT since this would potentially allow for different interpretations of the same ECT provision (para. 155) (*e.*, A non-EU country which is also a member of the ECT would not be able to rely on EU law and CJEU judgments in investment disputes).

The tribunal also dismissed an argument put forward by Germany and the European Commission according to which the ECT could not be invoked as a basis for intra-EU investment dispute. Germany and the European Commission relied, in particular, on an express reservation made at the time of ratification of the ECT according to which "[the European Union] *and the Member States will* […] *determine among them who is the respondent party to arbitration proceedings initiated by an Investor of* ***another*** *Contracting Party*" (emphasis added). According to the European Commission the use of the term "another", restricted the offer to arbitrate in the ECT to investors from non-EU Member States.

The tribunal, however, rejected this argument and found that there was "*no carve-out from ECT's dispute settlement provisions concerning their applicability to EU Member States* inter se, *in particular regarding the opportunity for an EU*

investor to pursue arbitration against an EU Member State" (para. 207). If such carve-out had really been contemplated, "[i]*t would have been a simpler matter to draft the ECT so that Article 26 does not apply to disputes between an Investor of one EU Member State and another EU Member State as respondent. That was not done; and the Tribunal has been shown no indication in the language of the ECT that any such exclusion was intended*" (para. 187).

Finally, the tribunal found that regardless of the meaning of Article 26 ECT, EU law did not prevail over the ECT and that there was no conflict between EU law and the ECT.

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I was very surprised with the findings of the tribunal according to which Article 26(6) ECT only applied to the merits of a dispute.

Indeed, the choice of law clause in Article 26(6) ECT applies to all "*issues in dispute*", so in my view, that necessarily includes issues of jurisdiction which might precisely be "*in dispute*". The fact that Article 26(6) ECT does not make any explicit distinction between disputes on jurisdiction or on the merits and the fact that other tribunals have previously applied Article 26(6) ECT to jurisdictional disputes (see, for instance, *Electrabel v. Hungary*) reinforce my belief.

In fact, those findings seem to suggest that the tribunal was looking for a subtle way to dismiss Germany's jurisdictional objection and disregard the judgment of the CJEU in *Achmea* without having to enter into the complicated debate of whether this judgment applied (or not) to intra-EU investment disputes based on the ECT. Had the tribunal found that Article 26(6) ECT applied to jurisdictional issues, and since the *Achmea* judgment could likely be considered as part of the "*applicable rules and principles of international law*" under that Article,

it would have been more difficult for the tribunal not to take account of that judgment.
