TWENTY ESSEX

Investment treaty claims and climate change

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Can measures taken to fight climate change be challenged under investment treaties? The question is of some importance. Over 180 states are parties to the Paris Agreement, which recognises "the urgent threat of climate change."[1] However, the risk of investment claims, potentially for billions of dollars, could deter states from doing what is needed to address that threat.

The question arises in a dispute that is brewing between Uniper, a German energy company, and the Netherlands. This article considers Uniper's possible claims in the light of *Philip Morris v Uruguay* (ICSID Case no. ARB/10/7), which concerned an attempt to challenge tobacco control measures.

Background

In 2016 the coal-fired Maasvlakte Power Plant 3 opened in Rotterdam. Uniper's investment, made in 2007, was over one billion euros. In December 2019 the Netherlands passed a law banning the use of coal in the production of electricity ("the Coal Law"). The plant must now stop using coal by 2030 and convert to another fuel. Otherwise it will have to close.[2]

According to media reports Uniper is contemplating a claim against the Netherlands under the 1994 Energy Charter Treaty ("the ECT").[3] The ECT is intended to promote cooperation in the energy sector and includes provisions on investment protection. There are over 50 parties to the ECT, including the Netherlands.

On 18 December 2019 Uniper wrote to the Dutch government seeking an "amicable settlement".[4] On 21 May 2020, during a virtual AGM, chief executive Andreas Schierenbeck reserved "legal possibilities".[5]

The specifics of the claim are not known.[6] Possible grounds are breach of the fair and equitable standard under Article 10[7] of the ECT and indirect expropriation under Article 13.[8]

Indirect expropriation

The *Philip Morris* case

In *Philip Morris v Uruguay* the claimants had invested in cigarette brands in Uruguay. They brought proceedings under the Switzerland-Uruguay Bilateral Investment Treaty ("the BIT") challenging Uruguay's tobacco-control measures. In an award dated 8 July 2016 the Tribunal dismissed all of the claims.[9]

One claim was for indirect expropriation under Article 5(1) of the BIT.[10] The Tribunal held that it should be dismissed, inter alia, because the measures were "a valid exercise of the State's police powers". Accordingly, Uruguay had a complete defence to a claim of indirect expropriation and the obligation of compensation contained in Article 5(1) of the BIT was excluded (Award, paras 287-290).

The Tribunal's starting point was the general requirement to interpret treaties in the light of "any relevant rules of international law applicable in the relations between the parties."[11] These rules included the police powers doctrine, as a part of customary international law (Award, paras 287-301).

1. See Paris Agreement dated 12 December 2015, preamble, paragraph 4.
2. https://www.climatechangenews.com/2020/05/21/uniper-uses-investment-treaty-fight-netherlands-coal-phaseout/
3. Ibid.
4. Ibid.
5. Ibid.
6. The Uniper dispute could also raise the question of the validity of the ECT arbitration provision, following the judgment of the European Court of Justice in *Slovak Republic v Achmea BV* (Case C-284/16). That question is not addressed in this article.
7. Article 10(1) of the ECT includes an obligation to "accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."
8. Article 13(1) of the ECT provides that investments "shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation."
9. The members of the Tribunal were Judge James Crawford, Mr Gary Born and Professor Piero Bernardini as President.
10. Article 5(1) of the BIT was in similar (but not identical) terms to Article 13 of the ECT.
11. See Article 31(3) of the Vienna Convention on the Law of Treaties.

The Tribunal held that the police powers doctrine extends beyond matters such as enforcement of the law and maintenance of the public order. It reviewed earlier investment treaty decisions and concluded that "measures of a Party that are designed and applied to protect legitimate public welfare objective, such as health, safety and the environment, do not constitute indirect expropriations," provided that they are "*bona fide* for the purpose of protecting the public welfare, . . . non-discriminatory and proportionate" (Award, paras 197, 287-301, 305).

On the facts the Tribunal found that Uruguay's tobacco control measures had been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health. These included the 2003 WHO Framework Convention on Tobacco Control, which "guarantee[ed] the human right to health" and was "of particular relevance . . . being specifically concerned to regulate tobacco control" (Award, paras 302-305).

Furthermore, Uruguay's measures were taken *bona fide* to protect public health, were non-discriminatory and proportionate. As regards proportionality, the Tribunal considered that the measures were "potentially" effective means of protecting public health and it was unnecessary to prove the individual impact of the measures in isolation (Award, paras 302-306).

Discussion

A similar analysis could be applied under Article 13 of the ECT to the Coal Law. In particular, the Netherlands could argue that the Coal Law seeks to protect the public welfare objectives of health, safety and the environment by combatting climate change and fulfilling its national and international legal obligations. Those obligations include the following.

First, at the national level, the Dutch Climate Act of July 2019 obliges the Dutch government to reduce its greenhouse gas emissions by 49% from 1990 levels by 2030. The Coal Law is part of the strategy to meet that target.

Second, the Netherlands is party to the 1992 United Nations Framework Convention on Climate Change ("the UNFCC") and subsequent treaties concluded under the UNFCC. These include the 2015 Paris Agreement, under which each party agreed the aim of "holding the increase in the global average temperatures to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Article 2(a)); and undertook to communicate successive "nationally determined contributions" reflecting "its highest possible ambition" and to pursue "domestic mitigation measures to achieve the objectives of those contributions" (Articles 3, 4, 9, 10, 11 and 13).

Third, the Netherlands has human rights obligations, including under the European Convention on Human Rights ("the ECHR"). On 20 December 2019, in the landmark case of *State of Netherlands v Urgenda*, the Dutch Supreme Court held that Article 2 of the ECHR (the right to life) and Article 8 (the right to respect for private and family life) oblige the Netherlands to reduce the emission of greenhouse gases originating from its territory.[12]

The Court considered that Articles 2 and 8 were engaged because climate change poses a "real and immediate risk" to people's lives and welfare.

Fourth, the ECT itself imposes obligations in relation to the environment. In particular, Article 19(1) requires the Netherlands "In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is a party" to "strive to minimise . . . harmful Environmental Impacts . . ." and also to "strive to take precautionary measures to prevent or minimise environmental degradation."[13]

Fair and equitable treatment

The *Philip Morris* case

In *Philip Morris* the claimants also alleged that, in breach of the fair and equitable standard in Article 3(2) of the BIT,[14] the tobacco control measures undermined their "legitimate expectations"; were inconsistent with "a reasonably stable and predictable legal system"; and were "arbitrary" (Award, paras 340 to 350).

The Tribunal dismissed all of these claims. It referred to "the State's sovereign authority to legislate" and held that changes to the law are not precluded if they do not exceed "the exercise of the host State's normal regulatory power in the pursuance of a public interest" and do not modify the legal framework relied upon by the investor beyond "the acceptable margin of change" (Award, paras 422-423).

12. Thus the Court concluded that the Netherlands was obliged to reduce, by 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990.

13. Furthermore the preamble of the ECT "recalls" the UNFCC and "recognises" the "increasingly urgent need for measures to protect the environment".

14. Article 3(2) of the BIT included an obligation of "fair and equitable treatment", in similar terms to that contained in Article 10 of the ECT.

Furthermore, "legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment" (Award, para 426). On the facts, the Tribunal found that there was no specific undertaking by the State and "on the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products" (Award, para 430).

The Tribunal was split on the issue of whether the measures were "arbitrary". The majority held that none of the measures was "arbitrary". It reasoned that the State is entitled to a "margin of appreciation" for claims arising under BITs (at least in contexts such as public health) and accordingly the question was whether there was "a manifest lack of reasons for the legislation" (Award paras 398-420).

However, one of the arbitrators[15] considered that the concept of "margin of appreciation" belongs to the European Convention of Human Rights and should not be applied to investment treaties. He accepted that national authorities are entitled to "a substantial measure of deference" but held that there must be "a minimum level of rationality and proportionality" between the measure and a legitimate objective. On the facts he found that one of the impugned measures was arbitrary as it was "inescapably unrelated to its only articulated object" (Concurring and Dissenting Opinion, esp paras 138-139; 172-191).

15. Mr Gary Born.

Discussion

Again, a similar analysis could be applied to the Coal Law under Article 10 of the ECT. Three broad points may be made.

First, the Netherlands could argue that the Coal Law seeks to achieve public welfare objectives, as outlined above.

Second, a claim based on "legitimate expectations" would require proof of a specific undertaking by the Netherlands that it would not change the regulatory framework and evidence that Uniper was induced to invest accordingly. It may be added that when the investment was made in 2007, there were already "widely accepted articulations" of concern about greenhouse gas emissions (eg the 1992 UNFCC and the 1997 Kyoto Protocol). Accordingly, it may be said, the expectation could only have been of progressively more stringent regulation of coal powered electricity generation.

Third, an argument that the Coal Law is "arbitrary" would face difficulties, whether on the "margin of appreciation" approach taken by the majority in *Philip Morris*, or on the "substantial deference" approach of the dissenting opinion. It would be difficult to argue that the Coal Law is "inescapably unrelated" to the objective of combatting climate change.

Conclusion

In conclusion, the Netherlands would have some good arguments on the merits in response to a claim by Uniper, at least based on the analysis in the *Philip Morris* case and on the limited facts that are available.

However, the law on investment treaties and the right to regulate is not entirely settled, as shown, for example, by the disagreement mentioned above concerning the "margin of appreciation". In relation to climate change, further clarity may emerge as the issue is litigated or even as the ECT and other investment agreements are amended by the parties.[16]

This will take time. Unfortunately, in the context of climate change, time is a luxury in short supply.

This article does not constitute, and should not be relied upon as, legal advice. The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

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Sudhanshu practices commercial, arbitration and public international law, including the law of investment treaties. His current cases includes a claim against Australia in the United Nations Human Rights Committee, challenging Australia's record on fossil fuel emissions and seeking remedies to protect the Torres Strait Islands from rising sea levels. The case has attracted worldwide media coverage and was hailed on CNN as a "landmark."

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16. For example, the European Commission has recently proposed to strengthen the "right to regulate" in the ECT to take account of the Paris Agreement on climate change.