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EU Energy Law: Increased Regulatory Risk and Ways to Reduce It

E&A Law Limited

Ana Stanič



This chapter discusses regulatory risks energy companies doing or wanting to do business in the EU presently face and the possible ways to reduce such risk.

Section 1 describes by way of background the powers accorded to the EU in 2009 under the Lisbon Treaty in the fields of energy and FDI. The recent EU energy-related legislation and the arising uncertainty concerning the EU regulatory and investment framework are reviewed in Section 2. Uncertainties concerning the interpretation of the provisions of EU energy law and the length of time taken by the Commission to issue decisions relating to energy projects are examined in Section 3. The implications of the increasingly fraught relationship between EU law and international investment law for energy investments are analysed in Section 4. Uncertainties concerning EU law as the governing law in energy contracts and the enforcement of arbitral awards in the EU are analysed in Section 5. Finally, the possible contractual mechanisms for managing the identified regulatory risks of doing business in the EU are set out in Section 6.

1 Lisbon Treaty Accorded the EU New Powers in the Field of Energy

The EU was granted express competence in the fields of energy and foreign direct investment (“FDI”) for the first time in the Lisbon Treaty in 2009. In particular, Article 194 (1) Treaty on the Functioning of the European Union (“TFEU”) provides that “Union policy on energy shall aim ... to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks”. In addition, the EU has argued that Article 3(1)(e) TFEU, when read in conjunction with Articles 206 and 207 TFEU, accords it exclusive competence in respect of FDI.

Invoking these new powers in respect of these two areas the European Council at the Summit on 4 February 2011 called for the Europeanisation of energy policy and signalled a new and more robust EU energy policy going forward. It also called for greater coordination and coherence in the EU’s external energy policy and relations to ensure that Member States (“MS”) act for the benefit of the EU as a whole in their bilateral energy relations with key EU partners as well as during multilateral negotiations concerning energy matters.

In a further step in the process of the Europeanisation of energy law, the European Commission (the “EC”) adopted the Framework Strategy for a Resilient Energy Union with a Forward-Looking

Climate on 25 February 2015. It announced that “the goal of a resilient Energy Union with an ambitious climate policy at its core is to give EU consumers – households and businesses – secure, sustainable, competitive and affordable energy” and that “achieving this goal will require a fundamental transformation of Europe’s energy system”. The EC’s vision “is of an Energy Union where Member States see that they depend on each other to deliver secure energy to their citizens, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs”.¹

An ambitious legislative agenda for the creation of the Energy Union has been adopted by the EC for the years 2015 and 2016. It includes: (i) an amendment to the Regulation on the security of supply of electricity; (ii) an amendment to the Third Energy Package (“TEP”) to, *inter alia*, strengthen the powers of the Agency for Cooperation of Energy Regulators; (iii) the issuance of guidelines on regional cooperation and strengthening coordination of the energy policies of MS; (iv) the adoption of a new list of major energy infrastructure which will be considered as Projects of Common Interest (“PCI”) and thus eligible for EU funding; and (v) the preparation of a comprehensive strategy on liquefied natural gas and its storage.

2 Key Recent Legislation

This Section briefly outlines the two recent pieces of legislation adopted by the EC impacting energy companies: (i) the Decision 994/2012/EU establishing an information exchange mechanism with regard to inter-governmental agreements (“IGAs”) between Members and third countries in the field of energy² (the “Decision”); and (ii) the Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between MS and third countries³ (the “Regulation”).

Key provisions of the Decision

For the first time, the Decision gave the EC the power to review existing and future inter-governmental agreements relating to the supply of energy from outside the EU. In particular, Article 3(1) required MS to submit all existing IGAs they had entered into with non-EU countries in the field of energy for assessment of their compatibility with EU law to the EC by 17 February 2013. The obligation extended to all other agreements, including host government agreements typically entered into between an energy company and the MS in respect of a large energy investment, which were referred to in the IGAs and “contain[ed] elements which have an impact on the functioning of the internal energy market or on the

security of energy supply in the [EU]”. As a concession to energy companies, agreements between private entities did not have to be disclosed.

Going forward, Article 3(3) requires MS to submit all newly ratified IGAs in the field of energy to the EC for an assessment of their compatibility with EU law. While MS are not required to notify the EC of the commencement of negotiations of IGAs with non-EU states they run the risk that a ratified IGA will be considered by the EC as incompatible with EU law.

Considering the above-discussed powers as inadequate, the EC is planning to revise this Decision in 2016 to accord, *inter alia*, itself the power to assess the compatibility of IGAs before their terms are finalised and the right to be involved in the negotiations of IGAs.

Key provisions of the Regulation

The Regulation sets out the framework for the conclusion of new bilateral investment treaties (“BITs”) and free trade agreements (“FTAs”) with non-EU countries and introduces a transitional arrangement for BITs currently in force. At the time of writing this article, EU MS are parties to over 1,300 BITs. Invoking Article 3.1(e) TFEU, the Regulation confirms that it will be the EU that will, going forward, conclude BITs with non-EU states. MS wishing to enter into negotiations to amend an existing or to conclude a new BIT will need to be authorised to do so by the EC. The conditions under which the EC will grant authorisation are set out in Articles 8 to 11 of the Regulation.

MS were required to inform the EC of all BITs and other agreements which they signed before 1 December 2009 that accord investment protection. The EC can bring infringement proceedings against MS whose BITs it considers as incompatible with the EU *acquis* pursuant to Article 258 TFEU. It has in fact already done so back in 2009 even before the Regulation was adopted, and its argument that rights granted to investors to free transfer of capital under BITs to which Finland, Sweden and Austria were party breached EU law was upheld by the European Court of Justice.

Finally, the Regulation also makes clear that BITs entered into by MS with non-EU states “will be progressively replaced by agreements of the Union relating to the same subject matter”.

Outside the framework of the Regulation, the EC would like intra-BITs (being BITs signed between two EU MS) to be terminated without replacing them with any similar investment protection agreements.

Implications for existing and future energy investments

These two pieces of legislation and the EC’s related actions have significant implications for existing and future energy projects. First, the EC’s failure to make public the findings of its review of the compatibility of IGAs under the Decision over two years after it has completed its review means that uncertainty continues to hang over agreements currently in force concerning important infrastructure and energy supply contracts in the EU. Second, the fact that the EC reviewed the compatibility of agreements which were concluded before the Lisbon Treaty entered into force, and in some cases even before a MS acceded to the EU, undermines the legal certainty and stability of the investment framework within the EU. Third, any finding that an IGA is incompatible with EU law will put MS in a difficult position where an attempt to comply with EU law is likely to cause it to breach the terms of the IGA and breach the provisions of the Energy Charter Treaty (“ECT”) and any applicable BIT. This further undermines the stability of EU’s investment framework particularly

in relation to energy projects given their long-term nature since it is not clear which route a MS would take in such a situation. Fourth, the EC’s goal of terminating intra-BITs in the medium-term, while having their provisions circumscribed by the provisions of EU law in the short term, has increased risks associated with cross-border EU investments.

The South Stream pipeline project was the first to fall foul of the new provisions. In August 2013, the EC notified a number of Central and Eastern European countries that it considered that their IGAs with Russia relating to the South Stream pipeline project were incompatible with EU law. A number of regulators from these MS claim they had obtained informal clearance from the EC prior to the conclusion of such IGAs. The EC started infringement proceedings against Bulgaria in June 2014 alleging that its South Stream IGAs breached provisions of EU law. Since then the South Stream pipeline project has been abandoned. The Bulgarian government alleges that over 1bn euros had been invested in Bulgaria alone in this project.

3 Uncertainties Relating to the Interpretation and Application of EU Energy Law

In this Section, two examples of uncertainties regarding the interpretation and application of EU energy law that have arisen will be highlighted. The first example concerns the interpretation of the scope of the exemption from, *inter alia*, third party access which may be obtained under Article 36 of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas⁴ (the “Gas Directive”) by newly constructed gas pipelines or existing pipelines whose capacity will be significantly increased. Article 36 makes clear that such an exemption can only be accorded to gas pipelines which fall within the definition of an “interconnector”. Article 2(17) of the Gas Directive defines an “interconnector” as a “transmission system line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States”. Despite the requirements that the transmission system line must “cross or span the borders” of two MS and be built for the “sole purpose”, the Trans-Atlantic Pipeline (“TAP”) was granted an exemption even though it does not meet these requirements. In particular, TAP spans the border of Greece and Albania and then Albania and Italy. Since Albania is not a member of the EU, the EC, in granting the pipeline an exemption, concluded that the term interconnector should be interpreted to mean “gas pipelines which span the borders of (at least) two MS, regardless as to whether the territory of a non-EU MS is crossed in between”.⁵ The fact that the TAP pipeline will also supply gas to Albania and thus its purpose is not solely to connect the transmission systems of Greece, Albania and Italy was not addressed in the EC’s decisions despite this being a key element of the definition of the interconnector. Attempts by other project sponsors to seek an exemption or to be listed as PCI by invoking the TAP exemption as a precedent have so far been rejected by the EC.

The second example concerns the length of time it has taken the EC to issue a decision concerning Socar’s acquisition of DESFA, the Greek gas transmission system operator. Socar had been encouraged by the EC to purchase DESFA back in December 2013. Since then Socar has been waiting for the EC to officially approve the purchase. Pursuant to Articles 9 and 11 of the Gas Directive, change of control in a transmission system operator must be notified and compliance with requirements of the TEP confirmed. Since Socar is a vertically integrated company – that is, it is a company involved in the production, transmission and supply of gas – it cannot, pursuant to the terms of Article 11, own shares in a transmission

system operator unless it, *inter alia*, accepts not to be a majority shareholder and does not exercise voting rights. Since Socar has sought to purchase 66% of the shares in DESFA, it seems clear that the EC could only approve such a purpose if these conditions were satisfied. Although the Gas Directive and the Regulation require a decision under Article 9 to be taken within four months of the request being made in December 2013, as of November 2015 no official decision has been issued by the Greek regulatory authority due to the failure of the EC to issue its decision. The failure of the EC to comply with express timeframes provided in the TEP in this case is just one of an increasing number of such examples (its failure to issue a decision regarding the request to use the unused capacity in the OPAL pipeline being another). Moreover, the fact that the EC is expected to invoke competition law, rather than the failure to comply with Article 11 as the basis for requiring Socar to retain only 49% share in DESFA, has increased uncertainty as to the nature and meaning of Articles 9 and 11 of the Gas Directive and the process of certification.

4 Uncertainties Due to Increasingly Fragile Relations Between EU Law and International Investment Law

As noted above, EU MS are party to over 1,300 BITs. They and the EU are parties to the ECT. The ECT is the first multilateral treaty to provide rules regarding investment protection specifically for the energy sector. The key rights accorded to investors under the ECT and BITs are: (i) the right to fair and equitable treatment (“FET”); (ii) the right to national treatment, being the right to treatment no less favourable than that which the MS/EU accords to its own investors; (iii) the right to most favoured nation treatment, being the right to treatment no less favourable than that accorded by MS/EU to investors from other states; (iv) the right to compensation in case of expropriation and nationalisation or an act tantamount to expropriation or nationalisation; and (v) the right to commence arbitration in the event of a breach of the above-mentioned rights.

It is increasingly clear that there is a difference in the nature and scope of the rights granted to investors under EU law on the one hand and under the BITs, the ECT and international law on the other.

In *Eureko B.V. v The Slovak Republic* (the “*Eureko Case*”)⁶, the tribunal compared the nature and scope of the rights accorded to investors under EU law and the Dutch/Slovak BIT. It concluded that “[t]he protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State). It produced the following table in para. 247 of its award comparing the rights accorded to investors under international and EU law.

BIT	EU Law
Free transfer of capital	Free movement of capital
Fair and equitable treatment	Prohibition of discrimination
Indirect expropriation	Freedom of establishment
Full security and protection	Freedom of establishment
Arbitration Clause	Damage claim against the state before national courts

In respect of the FET standard accorded to investors under BITs, the *Eureko* tribunal observed that no “such principle, independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law”. The correctness of this finding is clear when one compares the decision of the Court of Justice of the European Union (or the European Court of Justice as it was known at the time, the “Court”) in *Vereniging voor Energie, Milieu en Water and Others v Directeur*

*van de Dienst uitvoering en toezicht energie*⁷ (the “*VEMW Case*”) with investment treaty arbitral awards which concern breaches of the FET.

The *VEMW Case* concerned contracts under which certain Dutch companies reserved a portion of capacity on the cross-border system for the importation of electricity into the Netherlands. At the time the contracts were concluded, they fully complied with Dutch and EU law. In fact, the preferential treatment regarding access to capacity granted under the contract was expressly referred to in the relevant Dutch law in force at the time. A number of years later the first EU energy package was adopted prohibiting “[all discrimination] between system users or classes of system users” regarding allocation of capacity on electricity grids. Ignoring arguments that laws should not apply retrospectively, the Court held that the principle of the protection of legitimate expectations, although “one of the fundamental principles of EU law”, could not be invoked by a “prudent and circumspect trader [who] could have foreseen that the adoption of a Community measure is likely to affect his interests”. How an electricity company was expected to have foreseen this when even the Dutch law at the time the contracts were entered into expressly permitted such preferential treatment was not discussed by the Court. This reasoning contrasts starkly with the approach taken by arbitral tribunals in investment treaty cases. For example, the tribunal in *Técnicas Medioambientales Tecmed, S.A. v Mexico* held that FET requires a state “not to affect the basic expectations that were taken into account by the foreign investor to make the investment”⁸.

Turning to the protection accorded to investors against expropriation, the tribunal in the *Eureko Case* observed that this right was “by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it”.

Unsurprisingly, the tribunal also noted that the right of an investor to commence arbitral proceedings against a MS and/or the EU for breaches of its rights under the BIT or the ECT is not the same as the right to bring proceedings before national courts or the Court, not least because of the difference in the interpretation of the investor’s substantive rights discussed above.

In *European Commission v Slovak Republic* (ECR I-08065 (ECJ 2011, C-264/09)) the Court acknowledged that the rights accorded to investors under BITs and ECT are not the same as those under EU law. In a case factually similar to the *VEMW Case*, the Court held that Slovakia had not breached EU law by failing to declare the contract granting priority access to an electricity transmission line to a Swiss investor as invalid under EU law. In line with its reasoning from the *VEMW Case*, the Court found that such contract breached non-discrimination provisions of the second energy package. However, given the terms of the BIT, the Court acknowledged that the preferential access granted to the Swiss investor under the contract was “a monetary claim and right to any performance having an economic value” and therefore an “investment” under Article 1(2)(c) of the BIT between Slovakia and Switzerland. Relying on Article 351(1) TFEU, the Court thus noted that in accordance with the principles of international law as set out in Article 30(4) (b) of the Vienna Convention on the Law of the Treaties, EU law does not “affect the duty of MS to respect the rights of non-member countries under agreements which these countries entered into prior to becoming members of the EU”. Consequently, the Court concluded that the rights of the Swiss investor under the BIT (unlike those of the Dutch companies in the *VEMW Case* under EU law) had to be protected. Any attempt by Slovakia to modify the terms or effects of the contract by its legislation would, the Court said,

be tantamount to an indirect expropriation of the investor's right of transmission and accordingly a breach of the BIT and the ECT. The Court thus concluded that Slovakia had not breached its obligation under EU law, and that, in turn, the right to priority access granted to the investor under the contract was protected.

The Court's decision in this case goes some way to allay the fears of investors by clarifying that BITs which MS entered into before acceding to the EU will be upheld. However, uncertainty remains about the protection accorded to investors under BITs that MS entered into after they had acceded to the EU. Many BITs to which MS are party to were concluded many decades ago. There was no suggestion that these BITs were incompatible with EU law until as recently as 2006. In fact the anti-BIT approach was only adopted by the EC since the Regulation was adopted in 2012. Since EU and non-EU energy companies made investments in the EU relying on the protection accorded to them under BITs and the ECT, there is now great uncertainty over whether their rights will be upheld by the Court. This uncertainty as to the relationship between EU and international law is also deterring future investments in the energy sector.

The sense of uncertainty has been further heightened by the recent actions taken by the EC. In March 2014, the EC sought to prevent Romania from complying with its obligations of the International Convention on the Settlement of Disputes (the "ICSID Convention") to enforce the arbitral award in the case of *Ioan Micula, Viorel Micula, S.G. European Food S.A. et al v Romania*.⁹ The ICSID Convention is a multilateral treaty that has been for over four decades, the cornerstone of the international investment framework. Pursuant to Article 54 (1) of the ICSID Convention, an ICSID arbitral award is automatically enforceable. In other words, the enforcement of an ICSID arbitral award cannot be refused on the ground of national public policy or any of the other grounds set out in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Accordingly, the EC's decision that compliance with the terms of an arbitral award would in itself amount to illegal state aid under EU law has created uncertainty about the readiness of the EU to comply with its, and to allow MS to comply with their, international law obligations. Whatever the outcome of Micula's challenge of the EC's decision in the Court, what is clear is that investors, whether within or outside the EU, face considerable uncertainty as to whether their rights under BITs will be protected under EU law and whether arbitral awards will be able to be enforced in the EU.

Investors, particularly from outside the EU, view the EC's call on 15 September 2015 for an investment court to replace the existing investor-state arbitral mechanism for resolving disputes under BITs and the ECT with suspicion, which has further eroded investor confidence in the stability of the EU investment framework.

5 Uncertainties Regarding EU Law as the Governing Law

Another area of uncertainty for investments in the energy sector relates to EU law as the governing law. In particular, there is uncertainty whether (i) the fact that EU law is the applicable law can be the basis for denying jurisdiction to an investment treaty tribunal, (ii) EU law can be used as a defence to avoid liability under a BIT and/or ECT, and (iii) EU law as applicable law can be a ground for refusing to enforce arbitral awards on the grounds of public policy.

These three uncertainties will be considered in turn by reference to the facts of *Electrabel S.A. v Republic of Hungary* (the "*Electrabel Case*").¹⁰ The case concerned an ECT claim by Electrabel, a Belgian company, against Hungary for the alleged breach of its right to FET and against expropriation. The key facts giving rise to the claim are

as follows. MVM, a Hungarian state-owned entity entered into a power purchase agreement ("PPA") with Dunamenti, a Hungarian generator in October 1995, under which the capacity fee payable was initially fixed until 2010 and then subsequently extended to 2015. As part of the Hungarian government's privatisation of the energy sector, Electrabel acquired shares in Dunamenti in the period from 1995 to 2001. A year after Hungary joined the EU in 2004, the EC started investigating whether the PPA amounted to state aid. Having come under significant public pressure domestically to reduce prices, the Hungarian government reintroduced regulated electricity prices in 2006. In 2008 the EC issued a decision that the payments made under the PPA amounted to state aid and as such breached Article 107 TFEU. In light of the EC's decision, the Hungarian Parliament decided that the PPA should be terminated with effect from 1 January 2009.

(i) EU law as a basis for denying jurisdiction

The first source of uncertainty for investors is whether the fact that EU law is the applicable law of a contract can be a basis for denying a tribunal jurisdiction under a BIT and/or ECT. In the *Electrabel Case*, as in the *Eureko Case*, the EC and Hungary sought to deny the arbitral tribunal's jurisdiction on the basis that EU law was the applicable law.

In its *amicus curiae* brief the EC argued that the Court has exclusive competence to determine issues of EU law. Invoking the decision of the *Court in Commission of the European Communities v Ireland* (the "*Mox Plant Case*"),¹¹ the EC argued that in the EU judicial system the Luxembourg courts have exclusive jurisdiction (i) to determine whether MS have fulfilled their EU law obligations, and (ii) to give preliminary rulings on questions of EU law as requested by EU domestic courts and tribunals and that consequently, the Court has exclusive competence to determine issues of EU law.

The EC's reasoning is flawed. First, the EC wrongly relies on the *Mox Plant Case* since this case concerned a dispute between two MS and not a dispute between an investor and a MS. Second, although under Article 344 TFEU MS are obliged "not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein" this obligation applies *inter se* and does not oblige investors to resolve their disputes with MS in the Court (nor could it).

The good news for investors is that tribunals both in the *Eureko Case* and the *Electrabel Case* have rejected the EC's submissions and confirmed that they have the jurisdiction to determine issues relating to EU law.

(ii) Invoking EU law as a defence

The second source of uncertainty for investors is whether EU law can be invoked as a defence to a breach of BIT and/or ECT. In the *Electrabel Case*, submissions were made by both parties and the EC on whether EU law was relevant to determining whether Hungary had breached its obligations under the ECT. Since the case was heard by an ICSID tribunal, the key matter which had to be resolved was whether EU law constituted applicable rules and principles of international law as per Article 42(1) of the ICSID Convention. Electrabel argued that Hungary's action had to be assessed by reference to international law as set out in the ECT and that EU law, being Hungary's internal law, was a question of fact only. Since the PPA was lawful when it was entered into in 1995 (before Hungary joined the EU), it argued this meant that Hungary could not rely on changes in its internal law, arising as a result of EU law, to justify a breach of international law. Hungary, on the other hand, argued that "no logical reason exists to disregard the EC Treaty as an international treaty providing for rules of international law". It further argued that in any event, EU competition law is part of international public order, and therefore termination of PPA cannot be treated as a violation of the ECT.

The Tribunal did not agree with the submissions of either party. It held that in respect of intra-EU cases, EU law is part of international law as regional international law. In a surprising finding, the Tribunal concluded that EU law was both a question of fact and a question of law. It asserted that there is a special relationship between the EU and the ECT and that, consequently, if possible, the ECT should be interpreted “in harmony with EU law”. Ignoring the fact that the ECT contains no provisions regarding state aid, the Tribunal noted that due to this special relationship, “[f]oreign investors in EU Member States, including Hungary, cannot have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU law as regards anti-competitive conduct”. In any event, the Tribunal held that EU law on state aid is an EU mandatory rule and a rule of international public policy and that, as such, it overrode the provisions of the PPA.

This decision has rung alarm bells particularly with non-EU investors for the following reasons. First, the tribunal seems to be saying that investments made by investors are denied protection which they would otherwise have under the ECT because the special relationship between the ECT and the TFEU means that the ECT should be read in harmony with EU law, thus permitting the EU and a MS to rely on changes in their law to avoid being in breach of the ECT. Second, the tribunal considered EU state aid rules as a rule of international *ordre public* and thus concluded that the termination of the PPA did not amount to a breach of the ECT.

(iii) EU law as a ground for refusing enforcement of arbitral awards

The third area of uncertainty concerns whether EU law can be invoked as a ground to refuse the enforcement of international arbitral awards. As discussed above, the tribunal in the *Electrabel Case* held that EU law on state aid was a mandatory provision of EU law and a provision of international *ordre public*. The implications are two-fold. First, that under international law a MS is not in breach of its obligations under a BIT or the ECT for complying with a provision of international *ordre public*. Second, that the courts in a MS may, invoking the discretion accorded to them under Article V(2)(b) of the New York Convention, refuse to enforce an arbitral award which had not found that EU state aid was international *ordre public* and had consequently awarded damages against a MS or the EU.

As discussed in Section 4 above, the EC issued a decision in March 2014 ordering the Romanian courts to refuse the enforcement of the award on the grounds that the arbitral award itself amounted to illegal state aid even though ICSID awards are automatically enforceable. To date the Court has adopted a very broad approach to defining what is a mandatory rule of EU law and EU *ordre public* to include not only treaty provisions such as competition law provisions, but also provisions of regulations and even directives which it regards as essential for the accomplishment of tasks entrusted to the EU including the raising of the standard of living and quality of life (see *Eco Swiss China Time Ltd v Benetton International NV*,¹² *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*¹³ and *Ingmar GB Ltd v Eaton Leonard Technologies Inc*¹⁴).

Recalling the wording of the provisions of the first and second energy package which the Court reviewed in the *VEMW Case* and the *Slovakia Case* and applying the reasoning of the Court in *Eco Swiss* and the other above-mentioned cases it is likely that the Court and MS's national courts will consider the provisions concerning non-discriminatory access to pipelines, as well as many other provisions of the TEP, as mandatory. This in turn is likely to result in many arbitral awards in the field of energy, particularly international investment treaty awards being refused enforcement on public policy grounds by courts of MS invoking Article V of the New York Convention whether on the EC's instructions or otherwise. Accordingly, there is at present yet another uncertainty surrounding energy projects in the EU.

6 Ways to Manage Risks

This section outlines the five key ways in managing and minimising the uncertainties identified in this article. The **first** and most important way to try to manage these risks is to, wherever possible, choose a law other than the law of an EU MS to govern a contract, thereby insulating it from the changes in EU law and the above-mentioned risks. **Secondly**, is to provide for arbitration as a mechanism to resolve disputes arising under a contract and to select a place outside the EU as the seat of any arbitral proceedings. Choosing a place outside the EU as the seat of arbitration will reduce the possibility of EU law applying to the contract through the back door as the procedural law of the seat of the arbitral proceedings. **Thirdly**, by including stabilisation or change of law clauses in the contract. There are different types of stabilisation clauses to choose from ranging from clauses which prohibit any changes to the law applicable to the contract after the contract has been signed to clauses which require the terms of the contract to be renegotiated after a change in the law occurs. The **fourth** way to manage these risks is, should a dispute arise, opt to commence an ICSID investment treaty arbitration and thereby ensure, to the extent possible, the automatic enforcement of any favourable arbitral award. As discussed in Section 5 above, MS courts are able under Article V of the 1958 New York Convention to refuse enforcement of non-ICSID arbitral awards on *inter alia* grounds of public policy. Since ICSID arbitral awards cannot be refused enforcement by invoking the New York Convention, commencing ICSID arbitral proceedings will reduce risks associated with enforcement of awards. The **fifth** way to minimise risks after a dispute has arisen is to, wherever possible, bring arbitral proceedings against both the EU and the MS. This approach will ensure that the situation which *Electrabel* found itself in the *Electrabel Case* is avoided. In that case the tribunal held that “[w]here Hungary is required to act in compliance with a legally binding decision of an EU institution ... [this] cannot (by itself) entail international responsibility for [it]”. Under international law, Hungary can be responsible only for its own wrongful acts. The tribunal considered that it “would be absurd if” Hungary could be liable under the ECT for doing precisely that which it was ordered to do by the EU.¹⁵

Endnotes

1. Communication “A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy”, COM(2015) 80 final, at 1.
2. Decision (EU) No 994/2012/EU [2012] OJ L 299/130.
3. Regulation (EU) No 1219/2012 [2012] OJ L 351.
4. [2009] OJ L 211.
5. Para. 55 of Commission decision of 26 May 2013 on the exemption of TAP, available at https://ec.europa.eu/energy/sites/ener/files/documents/2013_tap_decision_en.pdf.
6. PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, Oct. 26, 2010).
7. ECR I-04983 (ECJ 2005, C-17/03).
8. ICSID Case No. ARB (AF)/00/2, Final Award, 29 May 2003.
9. ICSID Case No. ARB/05/20, Final Award, December 11, 2013.
10. ICSID Case No. ARB/07/19, Decision on Jurisdiction, November 2012 (Applicable Law and Liability).
11. ECR I-04635 (ECJ 2006, C-459/03). This case is known as the “*Mox Plant Case*”.
12. ECR I-03055 (ECJ 1999, C-126/97).
13. ECR I-09579 (ECJ 2009, C-40/08).
14. ECR I-09305 (ECJ 2000, C-381/98).
15. *Electrabel Case*, at para. 6.72.

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