BSF | BOIES SCHILLER FLEXNER

SCC Tribunal Upholds Intra-EU Objection in Spain ECT Solar Claim

Green Power Partners K/S and SCE Solar Don Benito APS v. The Kingdom of Spain

By Tim Foden, David Hunt, Ben Love, and Sagar Gupta

In a first after the *Achmea* and *Komstroy* judgments of the Court of Justice of the European Union, an investor-State arbitral tribunal denied jurisdiction based on the intra-EU objection. The impact of this award remains to be seen, especially in the context of non-EU seated investor-State proceedings.

Background

The arbitration was commenced by two Danish investors (the "**Claimants**") against Spain under the Energy Charter Treaty (the "**ECT**") relating to certain investments in the solar energy market. Following the investments being made by the Claimants between 2008 and 2011, the Spanish government altered the regulatory framework including rolling back the feed-in tariff (FiT) scheme based on state subsidies. The Claimants sought compensation of EUR 74 million for the alleged expropriation and breach of ECT investment protection standards. The arbitration was seated in Sweden and governed by the Arbitration Rules of the Stockholm Chamber of Commerce (the "**SCC Rules**").

The arbitration was commenced in 2016 and the June 16, 2022 award by the tribunal (the "**tribunal**" or the "***Green Power* tribunal**") is the latest in a long line of arbitration claims under bilateral investment treaties and the ECT against Spain for its renewable energy policies. However, it is the first known decision where a tribunal has denied jurisdiction based on the intra-EU character of the dispute.

Since 2018, the Court of Justice of the European Union (the "**CJEU**") has held that: (i) an investor-State arbitration clause in an intra-EU bilateral investment treaty (*Achmea*); (ii) an intra-EU investor-State arbitration under the ECT (*Komstroy*); and (iii) an intra-EU ad-hoc arbitration proceeding (*PL Holdings*), were incompatible with EU law. Other than the dissenting opinions in two arbitration proceedings (Marcelo Kohen in *Adamakopoulos* v. *Croatia* and Lazar Tomov in *Raifeisen Bank* v. *Croatia*), investor-state arbitral tribunals have largely been unsympathetic to the intra-EU objection.

Jurisdictional objections

In the aftermath of *Achmea*, the *Green Power* tribunal heard jurisdictional objections in a bifurcated proceeding. Spain advanced jurisdictional objections similar to other Spanish renewable energy cases, which included:

- Article 26 ECT does not apply as the Claimants do not originate from the territory of another ECT Contracting Party as both Denmark and Spain are member states of the European Union (the "**EU**") (*ratione personae*); and

- Article 26 ECT does not apply due to the primacy of EU law, which makes its offer to arbitrate under Article 26 ECT inapplicable and prevents the dispute from being submitted to arbitration (*ratione voluntatis*).

Whilst the European Commission (the "**EC**") submitted an *amicus curiae* brief supporting Spain's objections, in light of the *kompetenz-kompetenz* principle the tribunal decided its jurisdiction *ex-officio* considering all relevant considerations. The *Green Power* tribunal reiterated the view of other arbitral tribunals that a non-disputing party cannot raise jurisdictional objections.

Law applicable to the determination of jurisdiction

The tribunal considered the text of Article 26(6) ECT which provides for the application of "applicable rules and principles of international law". It held that this provision is limited in its application to the merits of the dispute. The SCC Rules also did not provide any guidance on the applicable law on jurisdiction.

In the absence of an express or implied choice by the parties on the applicable law on jurisdiction, the tribunal held that there are various sources of law that it might employ in this inquiry: (i) Article 26 ECT; (ii) other provisions of the ECT and international law, and (iii) the applicable law of the seat of arbitration (*lex arbitri*). Whilst it is arguable that the *lex arbitri* should be limited to the Swedish arbitration law only, the tribunal held that the selection of Sweden as the arbitral seat also attracts the application of EU law as EU law is the law in force in Sweden.

The tribunals' findings

Jurisdiction ratione personae

The tribunal rejected the ratione personae objection on the basis that the fact that the EU was a party to the ECT "did not affect the reality that Denmark and Spain are also Contracting Parties to the ECT in their own right". The dismissal of the jurisdictional challenge on the ground of diversity of nationality follows several other ECT tribunals (*Kruck/Renergy/STEAG*).

Jurisdiction ratione voluntatis

The tribunal denied jurisdiction and accepted Spain's arguments on the grounds of *ratione voluntatis*. In light of the "complex network of legal relations" between intra-EU states, the jurisdictional inquiry must focus on the particular circumstances of the case rather than "rigid categories" of applicable legal systems. The tribunal therefore considered the jurisdictional question through the lens of both the ECT and EU law.

Applying the interpretative rules codified in the Vienna Convention on the Law of Treaties, the tribunal held that the arbitration agreement in Article 26 ECT did not prohibit an intra-EU arbitration. However, it was deemed essential to confirm this meaning considering the factual context and the object and purpose of the treaty text. In the absence of a specific "disconnection clause" and the Regional Economic Integration Organisation ("**REIO**") carve-out in Article 25 ECT, the tribunal considered the "relevance of certain provisions of EU law for matters governed by the ECT [to be] expressly acknowledged and incorporated by the text of the ECT". Contrary to other ECT tribunals, the *Green Power* tribunal held that the declarations made by EU and EC at the time of ratification of the ECT and post-*Achmea* in 2018 render the EU legal system

the "natural means" of resolving intra-EU investor-State disputes. As the tribunal found that the interpretation of the ECT without resorting to EU law was inconclusive, the tribunal relied on EU law to determine the jurisdictional question.

The tribunal held that it lacked jurisdiction as a result of the "autonomy and primacy of the EU legal order". It held that the judgments of the CJEU in *Achmea and Komstroy* are applicable to the arbitration. Consequently, the tribunal held that Spain's unilateral offer to arbitrate under the ECT is invalid under EU law. According to the tribunal, EU law has primacy over the ECT as it is a "*lex superior*".

Conclusions

The *Green Power* award is a departure from the current stream of arbitral decisions on the intra-EU objection. Here are a few practical observations on the award and its broader context:

- The treatment of EU law in the investment treaty framework has received divergent treatment from tribunals. Given this, further inconsistency in arbitral practice is not unforeseeable. It of course remains to be seen whether other tribunals in arbitrations seated in EU countries use the law of the seat to import EU law to the jurisdictional inquiry.
- The *Green Power* tribunal distinguished between ICSID and other arbitrations on the basis that the former is delocalized and national law does not apply to any part of an ICSID arbitration. This may increasingly lead to claimants in intra-EU arbitrations opting for an ICSID arbitration under treaties such as the ECT which provides a choice of forum to overcome the intra-EU objection.
- Similarly, the tribunal's reliance on the law of the seat raises questions about how non-ICSID tribunals adjudicating intra-EU investor-State disputes but seated outside the EU might approach the intra-EU objection.
- For EU investors with assets in other EU member States, now is the time to reconsider how best to structure prospective and restructure existing intra-EU investments through non-EU jurisdictions to ensure treaty protection is still available for those investments.

Interestingly, on June 24, 2022, the Contracting Parties to the ECT met for the Ad Hoc Meeting of the Energy Charter Conference, the governing and decision-making body established by the ECT. At this meeting, the Energy Charter Conference confirmed the agreement in principle on the modernization of the ECT culminating the five-year review process commenced in 2017. The changes include the introduction of an article that clarifies that investor-state dispute settlement under Article 26 ECT shall not apply among Contracting Parties that are members of the same REIO in their mutual relations – thereby giving effect to the *Komstroy* judgment of the CJEU and codifying the intra-EU objection. It remains to be seen whether the exclusion of intra-EU investor claims will be prospective or retrospective in its operation. Nonetheless, this development would end the debate between ECT tribunals on the intra-EU objection going forward.

CONTACTS

David Hunt
Partner, London
+44 203 908 0733
dhunt@bsfllp.com

Timothy L. Foden
Partner, London
+44 203 908 0731
tfoden@bsfllp.com

Ben Love
Partner, New York
212 446 2308
blove@bsfllp.com