

## ICSID Tribunal Declines Reconsideration of Jurisdiction Ruling in Spain ECT Renewables Claim

---

### *Sevilla Beheer B.V. and others v. The Kingdom of Spain*

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

Recently, an ICSID tribunal denied Spain's request to reconsider its previous jurisdictional ruling where it had rejected the intra-EU jurisdiction objection. The denial of the reconsideration request signals that intra-EU investor-State arbitration may continue to be a viable option to protect affected investors, though not completely without jurisdictional risk.

#### Background

The [Sevilla Beheer arbitration](#) is part of the series of investment claims against Spain under the Energy Charter Treaty (ECT) arising out of regulatory changes including the rollback of the feed-in tariff (FiT) scheme for renewable energy producers. The lead claimants – Sevilla Beheer B.V. and Cordoba Beheer B.V. – were incorporated in the Netherlands and sought compensation for the alleged expropriation and breach of ECT investment protection standards.

The arbitration was commenced in 2016 under the aegis of the International Centre for Settlement of Investment Disputes (ICSID). The *Sevilla Beheer* tribunal rendered its [decision](#) on jurisdiction, liability, and principles of quantum on February 11, 2022, rejecting Spain's intra-EU jurisdictional objection.

The ruling comes after two separate decisions by the Court of Justice of the European Union (CJEU) holding intra-EU investment arbitration to be incompatible with EU law: [Slovak Republic v. Achmea BV](#) (2018) and [Republic of Moldova v. Komstroy LLC](#) (2021). In *Komstroy*, the CJEU held that an intra-EU investor-State arbitration under the ECT is incompatible with EU law. Notably, *Sevilla Beheer* was the first arbitration to consider the applicability of the *Komstroy* judgment in the jurisdictional phase.

#### *Sevilla Beheer*

The *Sevilla Beheer* tribunal rejected Spain's intra-EU jurisdiction objection on three bases:

- **Applicability of EU law:** The tribunal held that Spain's offer to arbitrate under Article 26 of the ECT is not vitiated due to the intra-EU character of the dispute. The tribunal expressly rejected the application of EU law as part of international law to jurisdictional questions. Further, the tribunal found that there is no conflict between the ECT and EU law. Even in case of such a conflict, the tribunal held that the ECT would prevail over EU law.
- **Impact of CJEU's *Achmea* judgment:** The tribunal held that the *Achmea* judgment had limited application in the *Sevilla Beheer* proceeding as the ECT (unlike the Netherlands-Slovakia BIT in the

case of *Achmea*) was not an intra-EU bilateral investment treaty, but a multilateral treaty with contracting parties outside the EU.

- Impact of CJEU's *Komstroy* judgment: The tribunal held that it was not bound by the *Komstroy* judgment as it could rule on its own jurisdiction. On substance, the tribunal noted that it was not persuaded by the reasoning of *Komstroy* as it did not provide any analysis of Article 26 of the ECT or its alleged inapplicability in an intra-EU context from the perspective of international law. Further, as the CJEU's finding on the incompatibility between Article 26 of the ECT and EU law was not set out in the operative paragraph of the judgment, the tribunal considered those observations to be of no precedential value.

### ***Green Power***

In *Green Power*, the Stockholm-seated SCC tribunal denied jurisdiction based on the intra-EU character of the dispute on June 16, 2022. As we discussed in an [earlier post](#), *Green Power* was an exception to a long line of arbitral awards rejecting the intra-EU objection in intra-EU investment claims.

In light of the “complex network of legal relations” between intra-EU states, the *Green Power* tribunal considered the jurisdictional question through the lens of both the ECT and EU law. The determinative factor for the tribunal's deference to the CJEU's decision in *Komstroy* was that the *Green Power* arbitration was seated in Stockholm and, as such, attracts the application of both Swedish national arbitration legislation and EU law.

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* were applicable to the arbitration. Consequently, the tribunal held that Spain's unilateral offer to arbitrate under the ECT was invalid under EU law.

### **Way forward**

*Green Power* was [celebrated](#) and hailed as a “landmark decision” by Spain “for sure to be followed by new ones”. Within a couple of weeks of the *Green Power* award, Spain filed a request for reconsideration of the *Sevilla Beheer* tribunal's decision of February 11, 2022. On August 11, 2022, it was [reported](#) that the tribunal had denied Spain's request for reconsideration.

As the *Sevilla Beheer* proceeding was an ICSID arbitration governed by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, it is delocalized and thus unencumbered by the national law of any particular arbitral seat. Therefore, the tribunal appears to have considered that its applicable law analysis was not affected by the *Green Power* award. While the tribunal's decision of August 11, 2022 is not yet in the public domain, it is not inconceivable that the tribunal relied on the difference between ICSID and non-ICSID arbitrations to deny Spain's request.

As foreshadowed in our [earlier post](#), to overcome the intra-EU objection, claimants in intra-EU arbitrations might be minded to opt for an ICSID arbitration under treaties such as the ECT, which provides a choice between ICSID and non-ICSID arbitration. However, as part of the ECT modernisation programme, an amendment is likely to be introduced codifying the intra-EU objection and excluding intra-EU investment

claims from the ambit of the ECT. Accordingly, intra-EU investors may consider restructuring their investment holdings to ensure protection from other available investment treaties.

## CONTACTS

---



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



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



**Ben Love**  
Partner, New York  
+1 212 446 2308  
blove@bsfilp.com



**Sagar Gupta**  
Associate, London  
+44 203 908 0752  
sgupta@bsfilp.com