

Intra-EU Disputes under the Energy Charter Treaty: Quo Vadis?

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The tendency of arbitral tribunals constituted under the Energy Charter Treaty (ECT) to reject intra-EU jurisdictional objections, despite contrary views expressed by most EU member states, was recently continued in the case of Landesbank Baden-Württemberg (LBBW) and others v. Kingdom of Spain (ICSID Case No. ARB/15/45).[fn]Decision on the Intra-EU Jurisdictional Objection, dated 25 February 2019, Landesbank Baden-Württemberg, and others v. Spain (ICSID Case No. ARB/15/45).[fn] The decision made by an ICSID tribunal over a claim brought under the ECT was made in February 2019 but has only recently come to light. It joins the ranks of previous decisions under the ECT made in the wake of the Achmea judgment by the Court of Justice of the European Union (CJEU), as discussed in previous posts, and comes at a time when efforts by the European Commission to reform the ECT are garnering widespread strength.

The LBBW Case

The LBBW case was brought by a group of German banks against Spain under the ECT and concerns reforms to Spain's renewable energy sector. It is one of a total 43 investor-state arbitrations pending against Spain under the ECT regarding the state's reforms to its renewable energy sector. In the 1990s, Spain established a special regime for renewable energy production with the intention to promote foreign investment in the sector. Spain provided a guarantee to investors that renewable energy plants would be able to sell their electricity to the Spanish electricity grid at a fixed price for the entire lifetime of the plants.

In the LBBW Case, the Claimants argue that, in reliance on Spain's commitments, they financed 78 renewable energy plants with loans totaling a combined €1.76 billion, until Spain substantially changed the regime before eventually abolishing it in its entirety. According to the claimants, Spain's actions violated its obligations under both Article 10(1) of the ECT, which guarantees fair and equitable treatment of investments, and Article 13 of the ECT, which protects investments against expropriation.

Spain's principal argument was that Achmea constitutes a definitive ruling that investor-state arbitration provisions in intra-EU cases are incompatible with EU law. Therefore, such provisions cannot afford a basis for jurisdiction where an EU member state is taken to arbitration by an investor from another EU member state. According to Spain, this also applies to cases brought under the ECT, regardless of the fact that Achmea concerned an intra-EU BIT and not a multilateral treaty such as the

ECT, to which both EU and non-EU states are signatories.

The tribunal found that, particularly in light of *Achmea*, the relationship between the provisions of the ECT and EU law gives rise to important questions which Spain was entitled to raise as a jurisdictional objection. However, the tribunal flatly refused Spain's arguments that the tribunal lacks competence and that the proceedings are to be considered as a state-to-state arbitration as the Claimants are largely owned by German federal states. Likewise, it rejected both parties' respective arguments that the issue was already "settled law". According to Spain, *Achmea* conclusively decided the matter, and according to the banks, arbitral tribunals have consistently rejected the objection. The tribunal found that it must make its own analysis of the issue and arrive at its own conclusions, particularly since the case's circumstances were different than in *Achmea* and the decisions cited in favour of the tribunal's jurisdiction. It went on to rule that a provisional interpretation of Article 26 of the ECT appears to constitute an offer of arbitration by each EU member state to investors from all other contracting parties without any limitations regarding intra-EU disputes.

The Effect of *Achmea*

The interpretation was, however, provisional as the tribunal had yet to consider the effect of *Achmea*. With regards to *Achmea*, the tribunal noted that it had to ascertain whether the logic of the reasoning of the CJEU, although made in relation to a BIT, was also applicable to Article 26 of the ECT insofar as that provision was invoked in an intra-EU dispute. It found that the differences between the tribunal's situation, as a tribunal established under Article 25 of the ICSID Convention and Article 26 of the ECT, and that of the tribunal in *Achmea* outweighed the similarities between them.

The tribunal particularly emphasised the nature of the ECT as a multilateral treaty. Since the ECT was concluded both by the EU and by its member states, there is no doubt of the possibility of a tribunal established under Article 26 of the ECT having been provided for without the knowledge of the EU. It further involves reciprocal obligations by all contracting parties and thus is more than just a network of bilateral relationships as is the case with a BIT. Furthermore, issues of EU law might also arise in proceedings between one EU member state and another contracting party, and nevertheless could not be referred to the CJEU for a preliminary ruling. Furthermore, the reasoning of the CJEU in *Achmea* regarding the role of a national court was inapplicable in the *LBBW* case, as it was to be decided by an ICSID tribunal, deriving its authority from Article 25 of the ICSID Convention, that has no national seat and is not subject to the jurisdiction of any national court. Lastly, it found that the CJEU had not ruled out the possibility of a court established by an international agreement and thus rooted in public international law, such as the European Court of Human Rights, to rule on a dispute involving an EU member state while taking EU law into account.

In sum, the tribunal in *LBBW v Spain* arrived at the same conclusion as the tribunals in *Vattenfall, Masdar and Greentech*,^[fn] *Masdar Solar & Wind Cooperatief U.A. v Spain* (ICSID Case No. ARB/14); *Vattenfall AB and others v Germany* (ICSID Case No. ARB/12/12); *Greentech Energy Systems A/S and others v Italy* (SCC Arbitration V 2015/095).^[/fn] namely that EU law does not preclude arbitration of intra-EU investment disputes under the ECT. It also found that even if EU law were to prohibit Spain from making an offer of arbitration under Article 26 of the ECT, the tribunal must still accord priority to the ECT as it does not operate under EU law but under international law and the ECT.

Reforming the ECT

The decision in the LBBW case was made public just days before the Council of the EU announced that it has awarded a mandate to the European Commission to begin negotiations on the modernisation of the ECT. The “new” ECT should explicitly reaffirm the states’ “*right to regulate*”, i.e. the right of the contracting parties to take protective measures with regards to, *inter alia*, health, safety and environment objectives. However, the mandate also included bringing the ECT provisions on investment protection in line with recently concluded agreements by the EU and its member states and ensuring that a future multilateral investment court applies to the ECT.

This is in line with the political declaration issued by 22 EU member states in January 2019, in which they not only stated that investor-state arbitration clauses contained in BITs concluded between EU member states are contrary to EU law and thus inapplicable, but also noted that the investor-state arbitration clause in Article 26 of the ECT is incompatible with EU law.

Conclusion

The tribunal in LBBW v Spain was unperturbed by the European Union’s efforts to put a halt to Intra-EU investment arbitration. While the tribunal acknowledged that the European Commission (and most EU member states) argue for the disapplication of Article 26 of the ECT in intra-EU cases, it rejected all arguments put forward in support thereto. However, the LBBW tribunal’s findings did not come much as a surprise, as the decision closely follows the observations made by the tribunal in Vattenfall, which appears to have set the new standard against applying the principles of Achmea to intra-EU disputes brought under the ECT. Although there is of course no doctrine of binding precedent in international law, respondent states will have a difficult time arguing against what has now become a series of consistent cases.

As of today, more than two-thirds of of all ECT investor-state arbitrations are intra-EU disputes. It remains to be seen how the non-EU signatory states of the ECT will react to the Commission’s proposals on a reform of the treaty and in particular its dispute settlement provisions. Further, it will not be long before the CJEU will have to concern itself with this issue. While the Swedish Court of Appeals recently rejected a request for a preliminary ruling by Spain in an ECT case, Spain has already brought another request for a preliminary ruling to the CJEU in the context of an ECT arbitration. In the meantime, it is to be expected that more ECT tribunals will reject the intra-EU objection, thereby adding further fuel to the fire.