VAN BAEL & BELLIS

Stockholm SCC Tribunal declines jurisdiction in ECT arbitration based on intra-EU objection

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For the first time ever, on 16 June 2022, an arbitral tribunal in *Green Power Partners K/S SCE and SCE Solar Don Benito APS v The Kingdom of Spain* (SCC Arbitration V (2016/135) ("***Green Power***") held that it had no jurisdiction to hear the claims of two Danish investors against Spain based upon the intra-EU jurisdictional objection.

Yet, whilst undoubtedly a landmark decision, the *Green Power* award turns upon the fact that the arbitration was an SCC arbitration (rather than an ICSID arbitration) seated within an EU Member State. The outcome of this case may well have been different if it had been brought under the ICSID Arbitration Rules. It is therefore by no means certain that this award in itself marks a decisive turning point in the treatment of the intra-EU jurisdictional objection or that, as a result, intra-EU investment arbitration is finally dead.

THE INTRA-EU JURISDICTIONAL OBJECTION

Although the intra-EU jurisdictional objection can be traced back as early as 2007-2008 (raised in the *Eastern Sugar* and *Electrabel* cases), it found its definitive statement in the March 2018 judgment of the Court of Justice of the European Union (the "**CJEU**") in the case of *Slovak Republic v Achmea BV* (CJEU Case C-284/16) ("***Achmea***") (which was extended to apply to intra-EU disputes under the Energy Charter Treaty ("**ECT**") in *Republic of Moldova v Komstroy LLC* (CJEU Case C-741/19) of 2 September 2021 ("***Komstroy***")).

In *Achmea*, the CJEU accepted that an arbitration agreement in a bilateral investment treaty ("**BIT**") entered into by two EU Member States was incompatible with EU law because the arbitration of any disputes which arose would impair the primacy and autonomy of EU law and would be contrary to Articles 267 and 344 of the Treaty on the Functioning of the European Union. As a result, any such arbitration agreement was to be treated as invalid and could not found the basis for a tribunal's jurisdiction.

Yet, notwithstanding the position taken by the CJEU in its judgments and by the EU Member States in the termination agreement (under which most of the EU Member States agreed to terminate intra-EU BITs), arbitral tribunals established under BITs and under the ECT declined to follow the approach of the CJEU in Achmea (with a few notable dissenting opinions being the exception).

For example, in *Vattenfall v Germany* (ICSID Case No. ARB/12/12, Decision of 31 August 2018) ("***Vattenfall***"), the tribunal rejected Germany's *Achmea*-based jurisdictional objection and upheld jurisdiction. The tribunal did not regard EU law as representing principles of international law which could be used to interpret Article 26 ECT. The tribunal was also concerned that upholding Germany's *Achmea*-based objection would lead to different interpretations of the same ECT provision, and an "*incoherent and anomalous result and inconsistent with the object and purpose of the ECT*". The decision in *Vattenfall* served as a blueprint for investor-State tribunals that subsequently had to decide *Achmea*-based jurisdictional objections, with all such tribunals upholding jurisdiction to decide the merits claims before them.

THE *GREEN POWER* CASE

The facts

In 2016, two Danish companies, Green Power Partners K/S and SCE Solar Don Benito APS (the "**Claimants**"), issued arbitration proceedings under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC**"). The seat of the arbitration was fixed as Stockholm, Sweden.

The claims related to the Claimants' investments in the Spanish solar power sector between 2008 and 2010, which were subsequently affected by Spain's later changes to its incentives regime for renewables. The Claimants alleged that Spain's measures had violated the ECT.

Spain challenged the jurisdiction of the Tribunal and the admissibility of certain claims by the Claimants on various grounds, including that Article 26 ECT did not apply due to the primacy of EU law. According to Spain, there was no jurisdiction *ratione voluntatis*.

The Tribunal declines jurisdiction

In determining whether there had been consent to its jurisdiction, the Tribunal (chaired by Professor Hans van Houtte) first considered the question of the law applicable to determine its jurisdiction. It concluded that, in the absence of any agreement by the parties, the law of the seat was the law applicable to determine jurisdictional matters. Since the arbitration was seated in Sweden, the applicable law was therefore Swedish law which included EU law.

Taking Article 26 ECT as the starting point for its analysis of its own jurisdiction, the Tribunal sought first to interpret Article 26 ECT in accordance with the principles of interpretation set out in the Vienna Convention on the Law of Treaties. The Tribunal observed that, whereas the ordinary meaning of Article 26(3)(a) ECT suggests that the offer to arbitrate is unqualified by any carve-out for intra-EU investment arbitration and thus unconditional, in the context of intra-EU cases, Article 26 ECT could be interpreted differently. The Tribunal's conclusion was therefore that interpreting Article 26 ECT without resorting to EU law was inconclusive and that Article 26 ECT needed to be interpreted in light of relevant norms of EU law (since the seat of arbitration was Sweden, an EU Member State).

The Tribunal then considered the relevance of the CJEU's judgments in *Achmea* and *Komstroy*, concluding that both judgments were fully relevant and led to a clear answer, namely that "*Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations and hence there is no offer of arbitration that the Claimants could accept*". Applying the CJEU's reasoning in *Achmea* (and the clear answer which it yielded) to the present case, the Tribunal concluded that Spain's jurisdictional objection was sustained and that the Tribunal did not have jurisdiction to hear the Claimants' claims.

WHAT DOES THE *GREEN POWER* AWARD MEAN FOR INTRA-EU INVESTMENT ARBITRATION?

Whilst the *Green Power* award is undoubtedly a landmark decision (being the first time ever that an arbitral tribunal has accepted the intra-EU jurisdictional objection), the impact of the award should not be overstated, particularly in relation to ICSID proceedings. It is likely that the recent agreement in principle on the modernisation of the ECT will have far greater implications for intra-EU ECT arbitration than this individual decision.

As explained above, the Tribunal's decision in *Green Power* largely turns upon the fact that the arbitration was an SCC arbitration seated in an EU Member State (Stockholm, Sweden). The Tribunal's reasoning does not necessarily extend easily to an arbitration seated outside of the EU or to an ICSID arbitration (which operates within a closed system).

Whilst it cannot be ruled out that some tribunals may be inclined to adopt the Tribunal's approach in *Green Power*, it is more likely that tribunals (particularly those seated outside of the EU or established under ICSID) will be reluctant to follow the *Green Power* approach. Although this award may mean that investors can no longer rely on the fact that no arbitral tribunal sustained the intra-EU objection, it is unlikely that *Green Power* marks a decisive turning point in the BIT jurisprudence on this issue.

In fact, if there are any recent developments which are likely to have a significant impact on investment arbitration, it is the recent adoption by the contracting parties to the ECT of an agreement in principle for the modernisation of the ECT. Although a revised text of the treaty is yet to be finalised and agreed, the current plans to modernise the ECT include a carve-out provision explicitly excluding the application of Article 26 ECT in relation to the mutual relations of any members of a Regional Economic Integration Organisation. This means that arbitration of any intra-EU disputes under the ECT is expressly excluded. If adopted as proposed, the modernised ECT will expressly preclude intra-EU ECT arbitration.

Thus, whilst the *Green Power* award may at some level suggest that intra-EU ECT arbitration is not entirely dead and that investors still contemplating intra-EU ECT arbitration might still have some prospects by electing ICSID arbitration (or arbitration seated outside of the EU), the recent agreement in principle on the modernisation of the ECT signals clearly that EU investors in the EU may not for long have a treaty upon which they can rely. In order to gain investment treaty protection under the ECT (or another BIT) investors should be thinking how their investments in the EU can be structured outside of the EU through a non-EU jurisdiction.

Lawyers to contact

Nicholas A. Lawn
Partner
nlawn@vbb.com

Tetyana Payosova
Senior Associate
tpayosova@vbb.com

Adriana Pérez-Gil
Associate
aperezgil@vbb.com

Helin Laufer
Associate
hlaufer@vbb.com

VAN BAEL & BELLIS

BRUSSELS
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels, Belgium
Phone : +32 (0)2 647 73 50
Fax : +32 (0)2 640 64 99

GENEVA
26, Bd des Philosophes
CH-1205 Geneva
Switzerland
Phone : +41 (0)22 320 90 20
Fax : +41 (0)22 320 94 20

LONDON
5, Chancery Lane
EC4A 1BL London
United Kingdom
Phone : +44 (0)20 7406 1471

www.vbb.com