Review of the Award in *Green Power Partners K/S and SCE Solar Don Benito APS v the Kingdom of Spain*[1]

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Danish renewable energy investors Green Power Partners K/S and SCE Solar Don Benito APS ('Claimants') started arbitration proceedings against the Kingdom of Spain ('Respondent') in 2016 under Article 26 of the Energy Charter Treaty ('ECT').[2] The arbitration proceedings were brought before the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC')[3] and were seated in Stockholm.[4] The tribunal analysed and upheld Respondent's *ratione voluntatis* objection (i.e., Respondent did not consent to intra-EU arbitration) and declared it lacked jurisdiction to hear the dispute.[5]

1 SCC Arbitration No 2016/135.
2 ECT, Lisbon, 17 December 1994. It entered into force for both Respondent and Denmark on 16 April 1998.
3 ECT, Art 26(4)(c).
4 Pursuant to Art 20(1) of the SCC 2010 arbitration rules, the board of directors decides the seat. *Green Power Partners K/S and SCE Solar Don Benito APS v. Spain*, SCC case No V 2016/135, Award, 16 June 2022, para 12 ('Award').
5 Award, para 478.

This is the first award after *Achmea*[6] and *Komstroy*[7] in which an arbitral tribunal upheld an intra-EU jurisdictional objection. Despite being an ECT-based arbitration, the tribunal relied on EU law, which it stressed applied to the case either as the domestic law of the *lex arbitri* – as part of the applicable law under Article 26 of the ECT – or simply as international law. However, in a carefully worded award, the tribunal refrained from opining on the nature of EU law and instead simply stated that EU law is to be taken into account as part of any of the potentially applicable laws.

This article provides a blueprint on the tribunal's reasoning in the Award and highlights the consequences of applying EU law.

EU law as the *lex arbitri*

One of the main points on which the parties disagreed was whether EU law could be applied to decide jurisdictional matters.[8] The tribunal referred to the *Electrabel v. Hungary*[9] award, in which EU law was deemed to apply as part of both international and domestic law, and highlighted that there is 'no relevant inconsistency between EU law, the ECT and the ICSID Convention.'[10] We note, however, that *lex fori* and domestic law played a limited role in *Electrabel v. Hungary* as the arbitration was conducted under the auspices of the International Centre for Settlement of Investment Disputes ('ICSID').

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Articles 26(6) of the ECT and 22 of the 2010 SCC arbitration rules contain a choice of law rule for the merits of the dispute, but they do not refer to the law applicable to the arbitration agreement.[11] The tribunal observed that Stockholm was the seat of the arbitration,[12] thus the Swedish Arbitration Act applied,[13] and consequently, EU law had to be taken into account when analysing jurisdictional objections.

The tribunal observed that EU law is an international legal regime but also part of the national legal order of every EU Member State, such as Sweden.[14] It also stated that the application and relevance of EU law was 'inescapable, regardless of whether such law is characterised as part of international law or as part of domestic law.'[15]

6 Court of Justice of the European Union ('CJEU'), Case C284/17, *Slovak Republic v. Achmea BV* [2018], ECLI:EU:C:2018:158. The consequences of *Achmea* have been covered in previous issues of the Investment Arbitration Outlook: see, for example, A. López de Argumedo & J. Saracho, *The fate of BITs between EU States after Achmea,* Issue 3; J. Lamas de Mesa, *The Achmea decision: significant uncertainties linger,* Issue 4.

7 CJEU, case C741/19, *Republic of Moldova v. Komstroy LLC* [2021], ECLI:EU:C:2021:655.

8 Award, para 170.

9 *Electrabel S.A. v. Republic of Hungary*, ICSID case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012

10 Award, para 171.

11 Award, paras 157–158.

12 Award, para 12.

13 Swedish Arbitration Act, s 48.

14 Award, para 171.

15 Award, para 170.

The agreement to arbitrate: Article 26 of the ECT

The tribunal's starting point to address jurisdiction was Article 26 of the ECT, which regulates investor-State arbitration. The tribunal referred to Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT')[16] to interpret Article 26 of the ECT.[17]

The tribunal acknowledged that the ordinary meaning of the words used in Article 26 (Article 31(1) of the VCLT) is that each Contracting Party to the ECT provided an 'unconditional' offer to arbitrate[18] and, together with the investor's consent,[19] they create a valid agreement to arbitrate.

16 Vienna Convention on the Law of Treaties at Vienna on 23 May 1969.
17 Award, paras 337 and following.
18 ECT, Art 26(3)(a) and Award, para 341.
19 ECT, Art 26(5)(a).

When interpreting an international treaty, international tribunals must focus on the meaning of its terms:

> The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoire*s, or any predilections based on presumed intention).[20]

As many other investment tribunals have concluded,[21] the tribunal found that the ordinary meaning of Article 26 ECT is not

20 *Wintershall Aktiengesellschaft v Argentina*, ICSID case No ARB/04/14, Award, 8 December 2008, para 78 (footnotes omitted).
21 *Cube Infraestructure Fund SICAV and others v Kingdom of Spain*, ICSID case No ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, paras 122 and following, among many others.

The application and relevance of EU law 'is inescapable, regardless of whether such law is characterised as part of international law or as part of domestic law'

that there is a need for distinct consent for EU Member States and non-EU Member States. Instead, the tribunal seemingly departed from this principle of treaty interpretation and prioritised other instruments outside the ECT.

In terms of context, the tribunal assessed whether the unilateral offer to arbitrate was valid between a Contracting Party (Respondent) and an investor of another Contracting Party (Claimants), despite there being another agreement between the Contracting Parties (the Treaty on the Functioning of the European Union, 'TFEU')[22] that prevents them from making that offer.[23] The tribunal first analysed the text of the ECT, underscoring that it expressly recognises that a group of Contracting Party states, such as EU Member States, belong to a special legal framework that applies among them: EU law. It thus binds EU Member States to the decisions rendered by the supervisory bodies of that network, such as the CJEU.[24]

In particular, the ECT refers to those networks with special legal relations such as Regional Economic Integration Organisations ('REIO'), which it defines in Article 1(3) as: 'an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.'

Moreover, the tribunal endorsed Claimants' understanding of Article 25 and considered that this Article is a 'carve-out for economic integration agreements'.[25] Article 25 of the ECT establishes that the treatment of an economic integration agreement cannot be extended via a most favoured nation clause to another Contracting Party of the ECT that is not party to that economic integration agreement. As a result, the tribunal considered that what Article 26 means is placed 'in a different light' and asserted that 'the special situation of EU Member States is clearly taken into account' by the ECT.[26]

The tribunal also analysed an EU statement made when the ECT was ratified, as a contemporaneous instrument with the execution of the treaty,[27] in which the EU proclaimed that

22 Award, para 348.
23 Award, para 354. TFEU, Arts 108 and 344.
24 ECT, Arts 1(2), 1(3), 1(10) and 25 and Award, paras 350 and following.
25 Award, para 352.
26 Award, para 352.
27 VCLT, Art 31(2)(b).

EU law continues to be the *lex superior* within the EU legal system that all EU Member States must apply in their reciprocal relations within the EU legal system. The ECT is an EU law treaty, but the tribunal fails to acknowledge that it is also an open international multilateral agreement signed not only in the context of the EU, but also by non-EU Member States, thus making it subject to general international law

'the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration.'[28] The tribunal understood that, since the EU (and all EU Member States) did not give its unconditional consent to arbitration, the agreement to arbitrate under Article 26(3)(a) of the ECT is not supposed to apply within the EU.[29]

Interestingly, the tribunal addressed the EU Members States' declaration of 15 January 2019,[30] in which they affirmed that the ECT's dispute settlement clause in intra-EU disputes 'would have to be disapplied.'[31] The tribunal deemed this to be a faithful interpretation by State parties to be read into the ECT for its interpretation[32] and concluded 'that the effect of the declaration [...] provides an additional indication of how Spain and Denmark understood and understand their legal relations under the ECT and EU law.'[33] In light of this declaration and 'prior indications' of the interpretation EU Member States have conveyed,[34] the 'disapplication' of Article 26 of the ECT applied from the date the ECT entered into force. Consequently, the tribunal rejected that this declaration was a retroactive attempt to modify what Article 26 really means.

Finally, Article 31(3)(c) of the VCLT requires that Article 26 of the ECT be systemically integrated into any applicable rules of international law. The tribunal explained that EU law is 'indeed' one of the international rules to take into account when interpreting the ECT as a whole.[35] Therefore, according to the tribunal, Article 31(3)(c) of the VCLT confirms that EU law must be taken into account when reading the ECT.

As a result, the tribunal concluded that the context of Article 26 of the ECT proves that EU Member States 'intended' to maintain their relations 'in a special manner, including Spain and Denmark.[36] Thus, it understands that EU law must be used to interpret Article 26 of the ECT,[37] opening the door to 'disapplying' the Spanish offer to arbitrate.

EU law as *lex superior* and international law

The tribunal addressed the conflict of rules between EU law and the applicable law under Article 26 of the ECT – the Treaty and 'applicable rules and principles of international law.' It assessed Article 16 of the ECT, which provides that the ECT does not derogate any other international agreements that two or more parties may have entered into or vice versa. The Award noted that applying such regulation would require dismissing 'norms that are unquestionably recognised as *lex superior,* such as the peremptory norms of international law....' between the Contracting States involved (Spain, Denmark and Sweden).[38]

The ECT is a carefully negotiated agreement between States that includes rules to protect foreign investment and dispute settlement mechanisms.[39] Under public international law, a tribunal established in accordance with Article 26 of the ECT is bound to settle the dispute in accordance with the applicable law on which the Contracting States agree.[40] Applying a different legal text would clearly exceed their powers.

The tribunal addressed Articles 107 and 344 of the TFEU with the *Achmea* reasoning in mind.[41] The former grants the European Commission exclusive power to grant State aid to private undertakings, including arbitral awards. The latter determines that every EU Member State must refrain from submitting 'a dispute concerning the interpretation or application of the [TFEU, among other agreements] to any method of settlement other than those provided for therein.' Read together, the provisions prove that EU Member States cannot consent to arbitration under intra-EU investment agreements.[42]

The CJEU long ago established that EU law has supremacy over the domestic law of EU Member States.[43] Furthermore, in *Kadi,* the CJEU stated that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system.'[44] As the tribunal correctly observed, EU law

28 Transparency Document, Annex ID, p.6; Award, para 360.
29 Award, paras 360–361.
30 Award, paras 365–387. See also VCLT, Art 31(3)(a)-(b).
31 Declaration of the Representatives of the Governments of Member States of 15 January 2019, p 2. See also, Award, paras 372–375.
32 Award, para 379, citing the *Kasikili/Sedudu* Judgment, International Court of Justice.
33 Award, para 383.
34 Award, para 380.
35 Award, paras 393, 396.
36 For the tribunal's reasoning on other interpretative tools, see Award, paras 405, 411.
37 Award, para 412.
38 Award, para 470.
39 ECT, Art 26(3).
40 E. De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP: 2014), p 31.
41 Award, para 378.
42 Award, para 454.
43 Case 6/64, *Flaminio Costa v Enel* [1964] ECR, paras 585, 593.
44 Cases C-402 and 415/05 *Kadi & Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 282.

is to EU Member States 'superior and overriding with respect to some other norms,[45] thus being the *lex superior* in their mutual relations and derogating any international law rules that clash with its autonomy.

Finally, the tribunal concluded that Spain was precluded from consenting to the submission of a dispute under Article 26. The tribunal sustained Spain's general jurisdictional objection *ratione voluntatis* and rejected jurisdiction to hear and decide the investors' claims. A similar *rationale* is being applied by domestic courts in other ECT-based cases.[46]

45 Award, para 469.

46 For instance, recently the Higher Regional Court of Cologne, in Germany, has declared inadmissible two ECT-based ICSID arbitrations brought by two German claimants, RWE and Uniper, against the Kingdom of the Netherlands based on their intra-EU nature. In this regard, see 'RWE and Uniper: '(German) Courts Rule on the Admissibility of ECT-based ICSID Arbitrations in Intra-EU Investor-State Disputes, Kluwer Arbitration Blog, available at: <http://arbitrationblog.kluwerarbitration.com/2022/11/03/rwe-and-uniper-german-courts-rule-on-the-admissibility-of-ect-based-icsid-arbitrations-in-intra-eu-investor-state-disputes/> accessed 4 November 2022.

Does this represent the end of intra-EU investment arbitrations under the ECT?

EU law continues to be the *lex superior* that all EU Member States must apply in their reciprocal relations within the EU legal system. The ECT is an EU law treaty, but the tribunal fails to acknowledge that it is also an open international multilateral agreement signed not only in the context of the EU, but also by non-EU Member States, thus making it subject to general international law.

Moreover, the tribunal failed to observe that the EU has also addressed the legal conflict under international law. On 29 May 2020, most of the EU Member States signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, which terminates intra-EU BITs. Under this agreement, the EU Member States expressly excluded the termination of the ECT and observed that '[t]he European Union and its Member States will deal with this matter at a later stage.'[47] This passage might suggest that the EU had acknowledged the existence of the ECT dispute settlement clause and the need to take action. In this regard, the Spanish Environmental and Energy Minister has recently asserted that Spain has begun the process of withdrawing from the ECT.[48]

47 'Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29> accessed 27 October 2022.

48 In any event, according to Article 47 of the ECT, its provisions will continue to apply to Spain for 20 years after it notifies its withdrawal in writing.

After the Award was handed down on 16 June 2022, the EU Directorate-General for Trade announced that negotiations on modernising the ECT had concluded, and that the new text would 'confirm that an investor from a Contracting Party that is part of a regional economic integration organisation (REIO), like the EU, cannot bring an investor-State dispute settlement ('ISDS') claim against another Contracting Party member of the same REIO.'[49] Although new intra-EU claims may still be filed under the ECT, a new text needs to be urgently approved to bring intra-EU cases under this international treaty to a definitive end, and thus to protect the EU's legal autonomy.

49 European Commission, Agreement in principle reached on Modernised Energy Charter Treaty, 24 June 2022, available at: <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> accessed 27 October 2022.