



The European Arbitration Review

2019

Energy Arbitrations

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of ‘Full Compensation’, as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union’s judgment in *Slovak Republic v Achmea in Energy Arbitrations*, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

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Energy Arbitrations

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INTRODUCTION

This is the third year that the authors have contributed a chapter on energy arbitrations to this publication. It would be an understatement to suggest that 2016 and 2017 were volatile years in this respect. However, 2018 not only followed that pattern, but represented one of the most seismic periods for the practice of European investor–state arbitration.

In 2016, the first award against Spain, in respect of dozens of claims it faces concerning changes to legislation regarding its renewable power industry between 2010 and 2012, was seen in *Charanne BV and Construction Investments SARL v Kingdom of Spain* (Arbitration No. 062/2012). While Spain was successful in that case, the respite was short as 2017 brought with it a defeat in *Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain* (ICSID Case No. ARB/13/36) (although Spain succeeded in defeating a similar claim in *Isolux Netherlands, BV v Kingdom of Spain* (SCC Case V2013/153)). The past year has brought yet more awards in respect of the long list of claims Spain faces and we summarise the findings of tribunals in those arbitrations below, together with a review of another award rendered in respect of a separate EU state – the Czech Republic.

However, perhaps the biggest event of 2018 came in the form of the Court of Justice of the European Union's (the CJEU) judgment in *Slovak Republic v Achmea* (Case C-284/16). This decision shook the arbitration community to its core and will have significant ramifications for energy arbitrations and beyond. Since *Achmea*, both the European Commission (EC) and tribunals constituted under the Energy Charter Treaty (ECT) (and hearing intra-EU disputes) have had their say on its effect. We look at both sides of the divide on *Achmea* below before posing the question – where will European energy arbitration (especially under the ECT) go next?

LITTLE RESPITE FOR SPAIN IN 2018

Before delving into developments in respect of the numerous arbitration claims that Spain faces, for background we summarise the position as things were left following the 2018 edition of this article.^[1]

In the mid-2000s, to comply with the EC's objectives under Directive 2001/77/EC, many EU nations legislated to encourage foreign investors to establish renewable power generation capacity. In countries such as Spain (as well as Italy and the Czech Republic – see below), the focus was on solar power.

Between 2007 and 2008 Spain developed a 'Special Regime' to promote solar energy, offering investors a specified feed-in tariff for 25 years, following which certain generators would benefit from 80 per cent of the feed-in tariff, entitlement to distribute all energy generated to the Spanish national grid and no limitation on generation hours.

Spain's promotional drive was successful in attracting investment but this, coupled with the effect of the global financial crisis on the Spanish economy, led Spain to reform the Special Regime in 2010. RD 1565/2010 removed the applicability of the feed-in tariff to generators after the 26th year of the solar plant's life (subsequently increased to 30 years) and added the requirement that certain plants install mechanisms to protect the electricity grid from voltage dips. RD 1614/2010 together with Royal Decree-Law (RDL) 14/2010 introduced a limit on the operating hours subject to the feed-in tariff and a charge of €0.5/MW for access to the transmission grid.

In spite of these measures, the Spanish government became increasingly concerned by the growing tariff deficit.^[2] Following elections in 2011, the new government implemented a number of additional legislative measures.

- Law 15/2012 – imposed a 7 per cent tax on the value of all energy fed into the National Grid. This was adopted without prior notice to solar power producers.
- RDL 9/2013 – repealed RD 661/2007 and eliminated the entire regime in respect of fixed tariffs and premiums. In its place a system was adopted based upon specific remuneration measured against hypothetical ‘standard’ costs per unit of installed power, plus ‘standard’ amounts of operating costs.
- Law 24/2013 – superseded the previous 1997 Electricity Law and removed the distinction between the ordinary and special regimes.
- RD 413/2014 – replaced the Special Regime with a regime based upon investors receiving a set ‘reasonable return’ based upon a further hypothetical, this time in the form of a hypothetical ‘efficient’ photovoltaic plant.
- Ministerial Order IET/1045/2014 – set out the specific remuneration parameters to be applied to the new regime.

These legislative changes, conducted between 2013 and 2014, applied retrospectively and investors complained that these changes undermined or even destroyed the profitability of schemes that had gone ahead on the basis of the existing Special Regime. Consequently, many investors claimed under the ECT.

Charanne BV And Construction Investments SARL V Kingdom Of Spain (Arbitration No. 062/2012)

The first of these ECT cases to be decided was *Charanne* in 2016, in which the claimants alleged that the 2010 amendments breached articles 10(1) and 10(12) (fair and equitable treatment (FET)) and article 13(1) (expropriation) of the ECT. However, the majority of the tribunal held that the ‘legal order in force at the time’ (ie, the Special Regime) was not capable of creating ‘legitimate expectations’ that the legislative framework would not change during the course of the regulatory life of the plants, since there was no specific promise to this effect.

Accordingly, the claim was dismissed.

Eiser Infrastructure Limited And Energia Solar Luxembourg Sarl V Kingdom Of Spain (ICSID Case No.ARB/13/36)

While similarly asserting breaches of articles 10(1) and 13(1) of the ECT, significantly the claimants in *Eiser* diverged from those in *Charanne*, and complained about the 2013–14 amendments to the Special Regime. The claimants argued that, at the time of deciding to invest, they held reasonable expectations of a stable regulatory framework (based upon their own expert advice and Spain’s promotional materials). As a result they had leveraged their investments with substantial non-recourse loans.

The *Eiser* tribunal (as in *Charanne*) rejected the claimants’ contention that the Special Regime provided them with unalterable economic rights. However, it indicated that the 2010 measures complained of in *Charanne* ‘had far less dramatic effects than those at issue’ in *Eiser* – ie, the 2013–2014 measures. The tribunal decided that article 10(1) entitled the claimants to expect that Spain would not suddenly revise the regulatory regime upon

which their investments had been based to such an extent that all value in them was lost. Those (legitimate) expectations were considered by the tribunal to be based upon not only the initial 2007 legislative framework, but also Spain's further actions between 2010 and 2011 that had confirmed that the claimants' plants would continue to receive the original favourable regulatory treatment. The tribunal held that the later amendments were a 'total and unreasonable change', which implemented an entirely new regime based upon assumptions different to those provided for in the 2007 legislation. Significantly, for the purpose of the tribunal's determination, that new regime had retroactive effect and was intended to significantly reduce subsidies paid to existing plant owners.

The tribunal awarded the claimants damages of €128 million, determined to be the reduction in the fair market value of the investments, pursuant to what it considered to be the current value of the past and present cash flows that had been lost on account of the 2013–14 measures.

Spain has applied to annulment of the award, alleging a failure to state reasons and a manifest excess of power, based upon the finding of a breach of article 10(1) in circumstances where the tribunal held that Spain had a sovereign right to amend its legislation and had made no commitments as to a stable regulatory environment.^[3]

Isolux Netherlands, BV V Kingdom Of Spain (SCC Case V2013/153)

The claims in *Isolux* were similar to those in *Eiser*, ie, breach of article 10(1) on the basis of the 2013–14 measures. However, the tribunal in *Isolux* determined that those same measures that constituted a breach in *Eiser* did not amount to a breach in this case.

As in *Charanne*, the tribunal held that in determining an investor's legitimate expectations, a crucial factor is the information which the investor ought reasonably to have known prior to investing.

The tribunal held that the date upon which the claimants' legitimate expectations arose in this case was not the date of the decision to invest (June 2012, when the Spanish and Canadian parent companies decided to relocate the Spanish solar assets to the Dutch entity which became the claimant), but the date upon which the restructuring actually took place (ie, October 2012). That was only weeks before Spain passed a law imposing a 7 per cent tax on electricity production.

Consequently, the tribunal determined that, as at that date, the claimant could not have possessed legitimate expectations that the original Special Regime would not be subject to substantial change – the tribunal pointed to the fact that the Spanish Supreme Court in 2009 had held that the only limit on the government's powers to amend the original Special Regime was to ensure that 'reasonable returns' could be achieved by investors.

It was held (by the majority of the tribunal) that this was the only legitimate expectation that could be attributed to the claimant at the time of investing, and as at October 2012, all investors in the Spanish solar energy industry knew or ought to have known that the abolition of the Special Regime was a real possibility. The claims were dismissed.

Hence, as last year's article went to press, the score was two-to-one in favour of Spain. Sadly for Spain, the three awards rendered in the last 12 months have not preserved this ratio. We summarise these decisions below.

Novenergia II – Energy & Environment (SCA) (Grand Duchy Of Luxembourg), SICAR V The Kingdom Of Spain (SCC Case No. 2015/063)

In February 2018, the tribunal in *Novenergia* ordered Spain to pay €53 million to the claimant, a Luxembourg fund which had invested in photovoltaic plants in Spain. Significantly, the tribunal took a more expansive approach to investor claims than in the previous cases detailed above (including *Eiser*).

Novenergia's claim related to the same 2013–2014 reforms as in *Eiser* and *Isolux*. Consistently with those awards (and *Charanne*), the tribunal confirmed that article 10(1) of the ECT does not create an independent obligation to provide stable investment conditions. The key question is whether the investor has legitimate expectations of stability.

Contrary to *Charanne*, however, the tribunal held that such expectations 'arise naturally from undertakings and assurances' given by the state. The tribunal determined that these are not required to be specific undertakings or contractual stabilisation clauses; on the contrary, state conduct and statements which objectively create such expectations (irrespective of whether the state intended to) are sufficient. The tribunal found that the claimant was entitled to form legitimate expectations as to the original 2007 Special Regime based on statements by officials to Spain's Congress of Deputies, as well as Spain's marketing documents which, the tribunal said, constituted 'bait'.

As in *Eiser*, the tribunal held that Spain's 2013–2014 reforms were a 'radical and unexpected' departure from the original regime. At the time of its investment decision, Novenergia had a legitimate expectation that the 2007 regime would remain relatively stable.

While Novenergia's investments had not been destroyed by the 2013 reforms,^[4] the tribunal, going further than *Eiser*, held that it was sufficient that Novenergia could show 'quantifiable prejudice' compared with its position when it initially made its investment. The tribunal found that the latter reforms had a 'significant damaging economic effect' on Novenergia's plants, decreasing revenues by 24–32 per cent, and awarded damages of €53.3 million.

Of particular interest in this case was the fact that the tribunal determined that a review of the FET standard was a 'balancing exercise'^[5] and that '[d]estruction of the value of the investment is . . . but one of several factors to consider when determining whether a state has breached article 10(1) of the ECT'.^[6] In doing so, the tribunal disagreed with Spain in its contention that for the purpose of a breach of the FET standard, the measures in issue must have destroyed the value of the claimant's investment.^[7] Spain had contended that this was the view of the *Eiser* tribunal; in making its own comments the *Novenergia* tribunal specifically indicated that it disagreed with the earlier tribunal (although it did not indicate with whether it concurred with Spain that this was, in fact, the *Eiser* tribunal's position). Irrespective of whether the *Eiser* tribunal did actually consider the destruction of the value of an investment to be necessary for the purpose of a breach of article 10(1) ECT, the *Novenergia* tribunal's views could spell trouble for Spain (and other respondent states) if followed by future tribunals.

Antin Infrastructure Services Luxembourg Sàrl And Antin Energia Termosolar BV V Kingdom Of Spain (ICSID Case No. ARB/13/31)

In May 2018, the tribunal in *Antin* ordered Spain to pay the sum of €112 million in respect of a breach of article 10(1) of the ECT.

By way of background, in 2011, the two claimants (owned and controlled by a French company) bought shares in Spanish companies owning two operational concentrated solar power (CSP) plants in Granada, which used natural gas to boost power-generation capacity. The claimants brought claims against Spain under the ECT, alleging a breach of the FET standard on the basis that Spain's 2013 legislative measures completely 'wiped out' the previous original Special Regime, which they had legitimately expected to continue.^[8]

Given that *Antin* made its investments in 2011 (by which point the guaranteed feed-in tariff scheme had already been partially reformed), one might have expected that investors could not have formed legitimate expectations about the stability of the incentive regime. Indeed, this was the determination in *Isolux*. However, the tribunal in *Antin* found that, at the time of the claimants' investments, the most significant changes to Spain's solar incentive regime only affected PV installations, not CSP-based projects. It also noted that the claimants undertook thorough due diligence before investing, which had concluded that 'there was strong government support for the CSP sector'.^[9] The claimants had therefore reasonably concluded that there were significant differences between the PV and CSP sectors and the CSP regime was unlikely to be significantly changed.

The tribunal noted that ensuring stability of conditions for investors 'is a leitmotiv in . . . the ECT'.^[10] The tribunal referred approvingly to the award in *Charanne*, pointing out that a state was certainly entitled to exercise its sovereign power to amend its regulations to respond to changing circumstances in the public interest. However, it went on to assert that such changes must be 'consistent with the assurances on stability of the regulatory framework provided by the state and required by the ECT'.^[11]

Adopting reasoning similar to *Eiser*, *Isolux* and *Novenergia*, the tribunal held that investors' legitimate expectations must be assessed objectively at the time the investment was made. Such expectations must originate from some 'affirmative action of the state' – either specific commitments or representations, which could derive from 'features of a regulation aimed at encouraging investments in a specific sector'.^[12] In this regard, the tribunal found that Spain had repeatedly emphasised the stability of its renewable incentive regime in reports, press releases and the preamble of its royal decrees, government plans and advertising material. Therefore, the claimants had legitimate expectations that the legal framework for CSP plants would remain stable and predictable.

The tribunal rejected Spain's argument that Antin could only have a legitimate expectation of a reasonable return on their investment (which the modified framework guaranteed). The tribunal held that for Spain's reformed regime to comply with ECT's requirements for stable and predictable conditions for investment, the payment due to CSP installations must be based on 'identifiable criteria'.^[13] However, Spain did not identify the parameters by which it identified the 'standard installation' on which the reasonable return was based; nor did it explain how the revision of the 'reasonable rate' would be calculated.

The tribunal, therefore, held that Spain's:

violation of the ECT resulted due to the entire elimination and replacement of the entire Original Regime, and not from the elimination or modification of certain features of the Original Regime.^[14]

While *Antin* could not recover historic losses (allegedly arising from measures preceding the June 2014 elimination of the original regime), it could recover damages based upon projected future cash flows over a 25-year lifespan of the plant.

Masdar Solar & Wind Cooperatief UA V Kingdom Of Spain, ICSID Case No. ARB/14/1

May 2018 turned out to be a particularly bad month for Spain as a further award was rendered against it, this time from the tribunal in *Masdar*.

As with the majority of the cases against Spain, this case concerned the extent to which the investors' investment was made on the legitimate expectation that it would benefit from the Special Regime for the entirety of its lifetime. The claimants once again asserted a breach of article 10(1) of the ECT (breach of FET).

On liability, the tribunal's reasoning broadly followed that found in *Eiser* and *Novenergia*, in that it held that the ECT's fair and equitable treatment standard protected the legitimate expectations of an investor that the legal framework in which its investment was made would not be subject to 'unreasonable or unjustified modification', or changed contrary to specific commitments made. The tribunal found that specific commitments had been made to Masdar, including in certificates registering its investment, as well as letters from Spain's Ministry of Industry, Tourism and Business explicitly confirming that Masdar's solar installations would be entitled to compensation for their entire operational lifetime.

The tribunal, by a majority, awarded damages of €64.5 million to the claimants.

Both *Antin* and *Masdar* are noteworthy not only for their determinations against Spain, but for the fact that both awards were rendered following the CJEU's judgment in *Achmea*. We consider *Achmea* below together with both the EC's response to the same and the reaction of these specific tribunals to the judgment.

ECT CLAIMS AGAINST OTHER EU STATES

As noted in the previous edition of this article, Spain is not the only EU state facing ECT claims arising out of its renewable energy industry.

We previously commented on the case of *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic* (ICSID Case No. ARB/14/3) in which Italy successfully defeated the investor's claims.^[15] In May 2018, an award was released in the case of *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic* (PCA Case No. 2014-01), which similarly provided a victory for the respondent state.

The claimants brought the arbitration under both the ECT and the Germany–Czechoslovakia bilateral investment treaty (BIT) concerning measures introduced by the Czech government in order to encourage investment in its solar sector. The first was the introduction of a 26 per cent levy that would apply for three years on all electricity generated by solar plants commissioned in 2009 and 2010. At the end of the applicable three-year period, the levy was reduced to 10 per cent and its application limited to plants commissioned in 2010.

The second was the abolition of an income tax exemption for all renewable energy producers and removal of a right to accelerated depreciation of solar energy equipment. While reporting on the award could constitute an article in itself, for brevity, the authors focus below on the tribunal's analysis of the concept of legitimate expectations in the context of an alleged breach of the FET standard.

The entirety of the tribunal acknowledged that legitimate expectations could be inferred from domestic legislation, or even from official statements. Specifically, it concluded that the Czech government did originally actively promote its new legislative and regulatory framework ‘in terms of a guarantee or promise of stability’.^[16] However, the tribunal noted that there was no doubt that ‘investors such as the claimants would have been well aware of’^[17] significant concerns regarding the ‘solar boom’ (the country had gone from 28 solar plants in 2007 to 2,230 by August 2009). This culminated in statements by the government regarding the intention to reduce incentives during the course of 2009 and 2010.

The state asserted that the claimants were, like many similar entities (both domestic and foreign), no more than opportunistic investors who sought to take advantage of the delays in implementing reforms in order to invest massively in the closing months of 2010.^[18] The majority of the tribunal agreed with this contention, holding that the claimants ‘should have been aware, that dealing with the solar boom was a fast-moving and controversial political issue’.^[19] Of potential relevance to future cases concerning the FET standard and legitimate expectations, the majority also noted:

[t]he investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, ‘pile in’ to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type. In the words of the Respondent, the Claimants had ‘a speculative hope – as opposed to an internationally-protected expectation’.-
^[20]

As noted in the last edition of this article, the *Charanne*, *Eiser* and *Isolux* awards all made clear that the recording of the basis of an investment decision (and its financing) is critical in respect of an FET claim. Such action ought to enable the fixing of a date upon which legitimate expectations of a specifically attainable return on the investment arose. In *Antaris*, the claimants admitted that they had not carried out any specific due diligence and this appears to have been relevant in respect of the majority’s determining that:

Investors know that the legislative framework may change and evolve in the light of circumstances and of political developments. It is not every change which gives rise to a claim.^[21]

These findings in respect of the investors’ legitimate expectations were not shared by the third arbitrator, Gary Born, who produced a dissenting opinion in the case. On the facts of the case, Mr Born disagreed that the investors could not have had legitimate expectations that the regulatory framework would not change. He focused on two aspects. First, in respect of the statements made by the Czech government and the majority’s view that these ought to have been heeded by the investors, Mr Born contended that the evidence was such that statements made specifically relating to the changes complained of post-dated the investments.^[22]

Second, and of potential significance in other similar cases, Mr Born took issue with the majority’s position in respect of the investors’ due diligence. He asserted that ‘it is not the role of the tribunal to pass abstract judgment on the quality of [the investors’] due diligence’^[23] and that ‘an investor is under no abstract duty to conduct due diligence’^[24] as a condition to

investment protection as a matter of international law. In this respect, Mr Born differentiated the impact of an investor's due diligence between cases in which such work would have contradicted asserted expectations, on the one hand, and scenarios where such efforts would have merely confirmed what the investor claimed, on the other.

As previously noted, the impact of an investor's due diligence has been a battleground in a significant number of energy arbitrations during the past three years. It will be interesting to see the extent to which Mr Born's dissenting opinion in *Antaris* is utilised by investors in the future.

2018 – THE YEAR THAT THE EUROPEAN COMMISSION LOST PATIENCE WITH INTRA-EU INVESTMENT ARBITRATION

In the 2017 edition of this article, we detailed the attempts made by the EC to intervene in a significant number of arbitrations concerning intra-EU disputes (*Charanne, RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux SARL v Kingdom of Spain* (ICSID Case No. ARB/13/30) and *Iaon Micula, Viorel Micula, SG European Food SA et al v Romania* (ICSID Case No. ARB/05/20)). The EC had faced consistent defeat in its efforts to assert that the courts of member states and the CJEU had exclusive jurisdiction over intra-EU investment disputes. In the face of this pattern, we noted that the 'EC appear[ed] to be losing the war on the jurisdictional question, but shows no sign of surrender'. To say the EC continued fighting in 2018 would be an understatement.

EC Decision Of 26 December 2017

In December 2014, and following the 2013–2014 amendments to its Special Regime, Spain formally (and belatedly) notified the EC of the reformed scheme. This prompted an EC investigation into the scheme's legality.

On 26 December 2017, the EC published its decision (the Decision) on the reformed scheme. The Decision found that the 2012–2014 reforms were compatible with EU law. That it did so is no significant surprise, however, the Decision went on to attack the ECT claims brought by investors against Spain (and other EU states) and represented the first of three significant statements on the part of the EU.

The EC indicated that it had considered submissions made by investors to the EC investigation (and to the ECT tribunals) that Spain had, in making the reforms, breached EU law principles of legal certainty and legitimate expectations. These were essentially the same arguments as raised and decided in the *Charanne*, *Eiser* and *Isolux* cases.

Regarding legitimate expectations, the Decision pointed out that Spain had established the Special Regime, and reformed it, without obtaining prior approval from the EC. That constituted the granting of state aid without first notifying the EC, and EU law provided that in such circumstances, investors could not form any legitimate expectations with regard to such state aid schemes. Given that these were claims by investors from one EU state against another EU state, the applicable law of the dispute must be EU law; and since 'the principle of fair and equitable treatment [in the ECT] cannot have a broader scope than the [EU] law notions of legal certainty and legitimate expectations in the context of a state aid scheme', no investor could have a legitimate expectation with regard to the Special Regime and its reforms.

The Decision went on to strongly criticise the very concept of the ECT claims, indicating that:

any provision that provides for investor-State arbitration between two Member States is contrary to [European] Union law Union law provides for a complete set of rules on investment protection Member States are hence not competent to conclude bilateral or multilateral agreements between themselves.

The Decision concluded that '[f]or those reasons, ECT does not apply to investors from other member states initiating disputes against another member states'.

Finally, the Decision stated that if an arbitral tribunal awarded an investor compensation in respect of losses caused by Spain's reform of the Special Regime, that would constitute state aid; and thus if Spain paid such an award, it would require EC approval. For good measure, the Decision pointed out that:

this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply Union law. The exclusive forum for challenging its validity is [sic] the European Courts.

Slovak Republic V Achmea (Case C-284/16)

Three months after the Decision, on 6 March 2018, the CJEU's judgment in *Achmea* shook the world of investment arbitration to the core. The CJEU held that an arbitration clause in the Slovakia–Netherlands BIT – and, essentially, all intra-EU BIT arbitration – was incompatible with EU law.

A significant amount of commentary has already been released in respect of *Achmea*. In the context of this article, we set out the determination of the CJEU below, before considering how the EC has interpreted that judgment and its potential impact upon existing and future intra-EU energy arbitrations.

As readers are likely already aware, in September 2017, Advocate General Wathelet delivered an opinion in which he advised that the arbitration clause did not violate the autonomy of EU law and was not discriminatory. In its judgment, the CJEU framed the issue in the following way:

do Articles 267 and 344 TFEU^[25] preclude a provision in an international agreement between EU Member States under which an investor from one member state may bring proceedings against the another Member State before an arbitral tribunal, whose jurisdiction that Member State has undertaken to accept?

The CJEU departed from the Advocate General's opinion and held that the arbitration clause was incompatible with EU Law. Its reasoning, in summary, was as follows.

- Article 8(6) of the BIT (similar to many arbitration clauses in BITs) provides that the arbitral tribunal shall take account of the law in force of the contracting party concerned, and international law principles. That would include EU law.
-

Therefore, the tribunal may be called on to interpret and apply EU law, particularly provisions concerning freedom of establishment and free movement of capital which are closely related to the substantive BIT provisions.

- Article 19 Treaty on European Union (TEU) provides that it is for the national courts and tribunals of member states and the CJEU to ensure the application of EU law in member states. Key to this is the preliminary ruling procedure in article 267 of the Treaty on the Functioning of the European Union (TFEU), which enables the courts of a member state to refer questions on the interpretation and application of EU law to the CJEU, so as to ensure uniformity and consistency.
- An arbitral tribunal constituted under article 8 of the Netherlands–Slovakia BIT is not a court or tribunal of a member state within the meaning of article 267 TFEU. Moreover, the award rendered by such a tribunal is subject to very limited judicial review, the extent of which is determined by national law depending on the seat of the arbitration.
- Member states cannot enter into treaties that affect the allocation of powers created by the EU's constitutional treaties, including the TFEU, so as to detract from the autonomy of the EU legal system. Article 344 TFEU, in particular, provides that member states may not submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in the treaties.
- It follows that the arbitration agreement in article 8 of the Netherlands–Slovakia BIT has an adverse effect on the autonomy of the EU legal order and is incompatible with EU law.

While the CJEU recognised that it has previously held commercial arbitration agreements compatible with EU law, it distinguished such agreements because they originate in the 'freely expressed wishes of the parties', whereas BIT arbitrations derive from a treaty by which member states agree to remove from the jurisdiction of their own courts a dispute which may concern the application or interpretation of EU law. Accordingly, the CJEU found that this violates their obligations under article 344 TFEU and article 19(1) TEU.

European Commission's Communication COM (2018) 547/2 Of 19 July 2018

The *Achmea* judgment did not find that the intra-EU BITs themselves were contrary to EU law; nor did it explain how EU investors could avail themselves of the protections in the BITs. Moreover, the judgment did not address the question of whether an arbitration provision in a multilateral treaty to which the EU is party, such as the ECT, would also contravene EU law.

Given the significant amount of debate about how EU investors could protect their investments in the European Union, the EC sought to address these issues by way of Communication COM (2018) 547/2 of 19 July 2018 (the Communication). The Communication sought to address these issues, as well as 'the perception that EU law does not provide for adequate substantive and procedural safeguards for intra-EU investors'.

Broadly, the Communication set out the Commission's views that EU law provides a comprehensive, and exclusive, system for the protection of intra-EU investments in respect of expropriation, measures having equivalent effect to expropriation, and unfair, inequitable or discriminatory treatment.

The Communication noted that, if investments are affected by member state action, the investor can sue the member state in the national courts which have jurisdiction. Those courts must apply EU law so as to uphold the protections granted by the EU's founding treaties even if that conflicts with domestic law. EU law also requires member states' national courts to be independent, efficient and provide effective enforcement of EU laws.

Finally, the Commission expressed its view that intra-EU BITs themselves are contrary to EU law in that they are discriminatory (they apply only as between the two countries which are party to the BIT) and, by incorporating arbitration clauses, they 'take away from the national judiciary litigation concerning national measures and involving EU law . . . [entrusting this] to private arbitrators, who cannot properly apply EU law' as they cannot make references to the CJEU.

Although the Communication is not legally binding, it provides clarification of the Commission's views of the implications of *Achmea*. It confirms the EC's view that *Achmea* correctly held that arbitration provisions in intra-EU BITs are contrary to EU law. Therefore, any tribunal constituted under an intra-EU BIT or the ECT (see below) lacks jurisdiction and ' . . . national courts are under an obligation to annul any arbitral award rendered . . . and to refuse to enforce it'. The Communication specifically asserted that *Achmea* applies equally to ECT arbitrations: 'given the primacy of [European] Union law,' article 26 ECT (providing for investor-state arbitration) is 'inapplicable'. The Communication states that the EU's participation in the ECT only 'created rights and obligations between the EU and third countries'.

For energy investors, *Achmea* and the Communication are clearly of significant concern in respect of investment protection.

First, bringing a claim for breach of the rights established by the TFEU and the Charter of Fundamental Rights is somewhat different from bringing an arbitral claim for breach of a specific protection conferred by a BIT or the ECT (eg, the FET requirement). The latter is generally a narrower issue, whereas there is scope for argument about the breadth of protection conferred by the general freedoms, save perhaps where the CJEU has pronounced on a particular topic. Perhaps of more practical significance is the fact that such a claim would be to challenge a government regulation or, even more problematically, national legislation. While the Communication emphasises their obligation to do so, courts of member states might be loath to strike down a domestic act or regulation, or to award damages to someone affected by it. Indeed, domestic law within a member state might not even recognise such a right, meaning that the investor's claim would necessarily have to amount to challenge to the member state's legal system for failing to provide an adequate remedy for a breach of EU law.

Second, there are significant practical drawbacks to an investor falling back upon domestic courts. One of the key attractions of arbitration, in general, is that a dispute is considered by independent and impartial arbitrators whom the investor has had some say in appointing. This is obviously not the case with domestic litigation. In addition, while lengthy timescales are a familiar complaint in relation to investor-state arbitration, the courts of certain EU member-states can take much longer to finally dispose of a claim than others. For example, the average time for an ICSID claim from request for arbitration to final award is just under four years; in Italy, the average time for a civil case is in excess of eight years.

While a communication has no legal effect; practically, it is unlikely that judges of the CJEU and member state national courts would be unaware of, or would ignore, the Communication when considering cases related to its subject-matter. Indeed, in May 2018, Spain applied to the Svea Court of Appeal in Sweden to set aside the award rendered against it in *Novenergia*. As part of this application, Spain has requested the court to seek a preliminary ruling from the CJEU on the compatibility of the ECT with EU law in light of *Achmea*. When the CJEU hears this case, it will answer for once and for all whether intra-EU ECT claims violate EU law.

However, whether arbitrators constituted under either the ECT or a specific BIT will do so, is an entirely different matter. We look at this issue in the next section of this article.

HAVE INTRA-EU INVESTMENT TRIBUNALS TAKEN HEED OF ACHMEA AND THE COMMUNICATION?

Perhaps unsurprisingly, given the determinations on the same issues by previous tribunals, *Achmea* has had little impact on the tribunals subsequently hearing intra-EU ECT claims.

In each of the awards rendered following *Achmea*, tribunals have either refused to be briefed on *Achmea* (*Antaris*) or dismissed the state's objections in reliance thereon (*Antin* and *Masdar*).

Masdar was the first ECT claim against Spain decided after *Achmea*, and it specifically addressed the question of whether, in light of the arguments adopted therein, article 26 ECT applied to claims between an investor from one EU member state and an EU member state.

The tribunal decided that it had jurisdiction to hear the claim, reasoning the following:

- The ECT contains no provision carving out intra-EU disputes, though it does for other treaties.
- The ECT treats signatory states as separate sovereign entities, not subsumed by the European Union. Consequently, intra-EU claims fulfil the requirement that the investor must be of different nationality than the host state.
- Article 16 ECT provides that where signatory states entered into preceding treaties that concern the same subject matter as the ECT, nothing in the preceding treaty shall derogate from the protections in the ECT where such protection is more favourable to the investor. The EU founding treaties make no provision for investors to sue a state directly, whereas, more favourably to the investor, the ECT does. Otherwise, there is no conflict between investors' rights under the ECT and EU law.
- Correctly interpreted, the EU founding treaties' prohibition on EU member states agreeing to refer questions of EU law to a tribunal other than the CJEU or a national court only applies to disputes between member states regarding the interpretation of the founding treaties.
- Finally, *Achmea* cannot be applied to multilateral treaties, such as the ECT, to which the European Union itself is a party, as the EU thereby consented to the possibility of investor-state arbitration.

The *Antin* tribunal dismissed Spain's objections to jurisdiction, adopting similar arguments to those in previous ECT claims. [\[26\]](#) Moreover, the tribunal refused Spain's attempts to reopen argument on jurisdiction by reference to EC Decision C (2017) 7384 and *Achmea* judgment. The tribunal concluded that nothing in the ECT suggests that 'a development in [European

Union law] could be employed to undermine the prior consents to submit to arbitration under the ECT given by each of the EU member states and the EU itself'.^[27]

THOUGHTS ON THE FUTURE – WILL INTRA-EU ENERGY ARBITRATION UNDER THE ECT REMAIN AVAILABLE TO INVESTORS?

The past three years have demonstrated that trying to predict the future in respect of intra-EU energy arbitrations is folly. At the time of writing, possibly more than ever, the future of intra-EU energy arbitration and even the ECT itself is uncertain.

It is impossible to reconcile the position of the EC and CJEU on the one hand, in respect to the primacy of EU law, and the exclusive jurisdiction of the courts of member states, with the position of tribunals hearing disputes in intra-EU investment arbitrations, on the other. Ultimately, the question will come down to issues of enforcement. If unsuccessful respondent member states are stuck between the rock of failing to satisfy an award and the hard place of breaching EU state aid rules, will successful investors actually obtain the sums awarded? Successful claimants in arbitrations against Spain have begun the process of seeking to enforce their awards outside of the European Union. Whether non-EU courts will have regard to the European Union's views is yet to be seen.

However, the EC appears now to be taking a stronger approach to these issues; one that is certainly more stick than carrot. The Commission has formally requested Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their existing intra-EU BITs. Indeed, the Communication states that 'the Commission will monitor progress in this respect and, if necessary, may decide to further pursue the infringement procedures'.

In addition, the EU is replacing traditional investor-state arbitration provisions in its free trade agreements with investor-state courts (eg, the EU-Vietnam free trade agreement and the EU-Canada Comprehensive Economic and Trade Agreement). These agreements have first-instance tribunals and appeal tribunals formed from standing panels of judges, who are appointed by the court president (not the parties) on a random rotational basis. The EU is also proposing a multinational investment court along similar lines.

In respect to the ECT itself, discussions are under way in respect of potential reforms. Again, it will be interesting to see how this plays out, but the authors believe that the issues set out in this article will surely play a role in that process. Could we see a carve-out of the availability of intra-EU investor-state arbitration? We suspect that this must, at the very least, be a distinct possibility.

Notes

^[1] For a more detailed review of the background to Spain's arbitral challenges and the awards in *Charanne*, *Eiser* and *Isolux*, see the 2017 and 2018 editions of

The European Arbitration Review.

^[2] ie, the difference between the costs of the subsidies paid to the renewable energy producers and the incoming revenue from energy sales.

^[3] Spain's application also alleges that the claimant's nominated arbitrator breached his obligation of independence and impartiality by failing to disclose a long-standing relationship with the claimants' valuation experts. In a further development, on 14 November 2017, a New York court set aside confirmation of the award (a preliminary step to enforcement) on a procedural technicality.

^[4] In fact, they were still achieving a reasonable rate of return.

^[5] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Award, paragraph 657.

^[6] *Ibid.*, paragraph 694.

Ibid, paragraph 693.

[7] Ibid, paragraph 693.
 [8] *Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, paragraph 147.
 Ibid, paragraphs 132, 376 and 384.

[9] Ibid, paragraph 526.

[10] Ibid, paragraph 555.

[11] Ibid, paragraph 538.

[12] Ibid, paragraph 562.

[13] Ibid, paragraph 667.

[14] At the time of writing, the claimants' application for annulment of the award is yet to be determined.
 [15]

[16] *Antaris Solar GmbH and Dr Michael Göde v Czech Republic* (PCA Case No. 2014-01), Award, paragraph 500.

Ibid, paragraph 368.

[17] Ibid, paragraph 418.

[18] Ibid, paragraph 431.

[19] Ibid, paragraph 435.

[20] Ibid, paragraph 437.

[21] Ibid, paragraph 437.
 [22] *Antaris Solar GmbH and Dr Michael Göde v Czech Republic* (PCA Case No. 2014-01), Dissenting Opinion of Mr Gary Born, paragraphs 65–71.

Ibid, paragraph 73.

[23] Ibid, paragraph 74.

[24] Treaty on the Functioning of the European Union.

[25] See 'Energy Arbitrations'.

[26] *The European Arbitration Review 2017*

[27] *Antin* award, paragraph 224.

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