

Green Power v. Spain: How A Successful Objection Could Change the Course of Clean Energy in the EU

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I. Introduction

In 1994, the Energy Charter Treaty (ECT) was signed for the purpose of developing a roadmap for energy cooperation in Europe.¹ As a part of this roadmap, the Treaty detailed energy efficiency goals with environmental impact at the forefront of these goals.² Investors in the European Region invested in energy related projects under the energy efficiency framework described in the ECT.³ As well as providing for the types of energy projects desired to minimize environmental impact, the Treaty provided protection for the investors.⁴ Under the ECT, investors in projects that fell into the energy framework of the Treaty were protected via an arbitration provision that provided a vehicle to resolve disputes with participating states.⁵

Over time, the energy policies of the 1994 Treaty became outdated and in conflict with the clean energy goals that our present-day world requires.⁶ This conflict has not made for smooth sailing by the European Union (EU) member states that are contracting parties to the ECT.⁷ These states are predominantly facing two options to handle the need to move away from the current ECT policies.⁸ They can either negotiate a modernization of the ECT to bring it in line with modern clean energy goals, or they can abandon the ECT and leave the Treaty altogether.⁹ In 2022, a modernization of the ECT seemed promising, but ultimately failed and left the EU with one option—leave.¹⁰ In July, 2023, the European Commission officially called for the withdrawal of the EU from the ECT.¹¹

II. Article 26 and the Intra-EU Objection

The pending departure from the outdated ECT means many investments made under its wing are in danger of no longer being protected, leaving a slew of unhappy investors in its wake. While these investors, largely in the fossil fuel industry, are undoubtedly less than thrilled to see this transition to a clean energy future, it would appear that they have a remedy to their problem under the ECT.¹² Article 26 of the ECT provides guidance for the resolution of disputes between investors and member states.¹³ It is this provision in the ECT that has become the target of investors seeking to arbitrate disputes against the EU member states preparing to withdraw from the Treaty.¹⁴ The weaponization of this arbitration provision by investors amidst widespread withdrawal from the ECT has been unpopular with EU member states, giving way to the intra-EU objection, illustrated in the example below.¹⁵ EU member states have made the intra-EU objection as a jurisdictional challenge to the arbitration brought by investors under Article 26 of the ECT, arguing that international tribunals do not have the jurisdiction to rule on intra-EU disputes that involve the interpretation and application of EU law.¹⁶ For example, a German power company

may choose to bring an action against France under Article 26 of the ECT. France would then challenge the jurisdiction of the international tribunal on the grounds that this is an intra-EU dispute and the tribunal does not have the jurisdiction to interpret and apply EU law. The Court of Justice of the European Union (CJEU) has solidified the validity of the intra-EU objection through its decisions in *Slowakische Republik v. Achmea BV*, *République de Moldavie v. Komstroy LLC*, and *Republiken Polen v. PL Holdings Sàrl*.¹⁷ These three cases found that treaty arbitration provisions, in treaties involving EU member states, were at odds with the application of EU law and in conflict with Articles 267 and 344 of the Treaty on the Functioning of the European Union.¹⁸ While the CJEU has drawn a clear line in the sand with respect to the intra-EU objection, the ECT arbitral tribunals have been reluctant to hear the intra-EU objection.¹⁹ This reluctance remained until *Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain*.²⁰

III. *Green Power v. Spain*

Spain has played a prominent role in the EU member states' withdrawal from the ECT.²¹ As a result, Spain has become a major target under the Article 26 arbitration provision.²² One such dispute under Article 26 involved Green Power, a Danish renewable energy company.²³ Between 2008 and 2011, Green Power made investments in energy projects located in Spain that were intended to be profitable based on the energy regulations provided for by the ECT.²⁴ For a number of reasons, including the changing environment and a drive for clean energy, Spain adopted new energy regulations that coincidentally made Green Power's investment economically unviable.²⁵ Green Power claimed that this action by Spain was a violation of the ECT and that it was entitled to compensation through an arbitration proceeding under Article 26.²⁶

During the arbitration, which took place in an arbitral tribunal sitting in Sweden, Spain raised the intra-EU objection.²⁷ Spain claimed that because both Denmark and Spain are member states of the EU, Article 26 does not apply, and the arbitral tribunal did not have jurisdiction to hear the dispute.²⁸ In making this argument, Spain contended that "EU Treaties prevail over the ECT by virtue of articles 30 and 59 [of the Vienna Convention on the Law of Treaties]" and "Article 344 [of the Treaty on the Functioning of the European Union]," thus preventing intra-EU arbitration under the ECT in accordance with EU law precedence.²⁹ The Swedish tribunal agreed, noting that the "primacy of EU law has been clearly recognized in all the foregoing cases and . . . precluded the unilateral offer to arbitrate in Article 26 [of the] ECT because [it was] inconsistent with the autonomy and primacy of EU law."³⁰ This decision was the first time that an ECT arbitral tribunal had ruled on the intra-EU objection in a manner consistent with the CJEU and in favor of the EU member state.³¹

IV. Impact on the EU Clean Energy Future

The decision in *Green Power* is an indication of the strengthening and recognition of the intra-EU objection among international tribunals and a weakening of the Article 26 arbitration provision of the ECT.³² Investor protections under the framework of the ECT are no longer as strong when that protection exists under a treaty provision that is in conflict with EU law. The weakening of intra-EU investor protections under the ECT has the potential to significantly influence the European transition to clean energy.

A weakening of or significant change to the ECT is necessary for the European transition to clean energy.³³ Prior to the withdrawal signals from a number of EU member states, the goal was to update the ECT.³⁴ When it became clear that a modernization of the Treaty was no longer an option, the only viable alternative was to withdraw from the Treaty entirely.³⁵ The reason for withdrawal as the only viable alternative is the EU's new energy framework under the European Green Deal.³⁶ The policies under the European Green Deal, like zero net emission of greenhouse gases by 2050, are not reconcilable with the outdated energy framework of the ECT.³⁷

The withdrawal decision for EU member states was made more difficult by the looming mountain of arbitration that would be brought against them by investors with a stake in energy projects made under ECT incentives.³⁸ This threat of arbitration under Article 26 was only made more significant by an investor's ability to bring an action for up to twenty years following a member's withdrawal from the Treaty.³⁹ However, the strengthening of the intra-EU objection in *Green Power* may have reduced protections for investors under the ECT energy framework and enhanced protections for EU member states looking to update their energy policies in alignment with the European Green Deal.⁴⁰ The reduced threat of arbitration from European investors and

freedom for EU member states to construct and contract in a new energy treaty is likely a positive step toward a clean energy future in Europe.

While the reduced investor protections under the ECT likely signify a step towards clean energy with respect to an improved renewable energy framework, the shift in investor protections may pose an issue when it comes to future investment.⁴¹ While the ECT and investments made under its umbrella seem to be on the way out, there will no doubt be energy investments made in the future under the umbrella of a newer, cleaner energy framework. Investors that participate in this new energy framework will expect the level of protection afforded to investors under the ECT prior to the *Green Power* decision. Ultimately, the decision has the potential to negatively impact investor trust in the future.

A degradation in investor trust in the European region likely has two consequences. First, investment in clean energy under a future energy framework will be stunted.⁴² Investors in the EU will be wary when beginning projects in other EU member states out of concern for a lack of protection in the future when the energy framework will inevitably require an update.⁴³ Second, clean energy investment in EU member states will be restructured with future disputes in mind.⁴⁴ The degradation in investor trust within the EU has the potential to shift investment that may have traditionally been sourced from an investor within an EU member state to an investor from a country outside the EU, like the United States.⁴⁵ The incentive to push EU energy investment beyond the boundaries of the EU will negatively impact development of clean energy technologies in the EU region. As the challenge to achieve a clean energy future remains a global crisis, the lack of incentive to develop clean energy technologies in such an influential and populated region of the world is undoubtedly a blow to a green future.

V. Conclusion

The transition to a clean energy future remains a global problem and one the EU is in the midst of tackling with its handling of the ECT. While EU member states are set to move on from the ECT toward a clean energy future, investors remain determined to weaponize the Treaty against these states through its arbitration clause. The *Green Power* decision dealt a blow to the strength of the Article 26 arbitration clause and has the potential to provide EU member states with the protection they need to move on. The weakening of the arbitration clause is likely a step in the right direction, providing EU member states with the freedom to adopt a modernized clean energy framework. However, the blow to Article 26 may come with a price. The diminished investor protections under the *Green Power* decision have the potential to degrade investor trust and reduce clean energy investment in the EU region under a new clean energy framework. The outsourcing of new energy investment may lead to a stunted clean energy industry in the EU. As EU member states move on from the outdated ECT, they should consider an effort to reassure clean energy investment protections as a way to not only achieve clean energy goals, but also maintain a strong, growing clean energy industry in the EU.

Endnote

¹ See generally The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S 100 (establishing the overall energy framework in the EU specifically energy incentives and related dispute resolution) [hereinafter ECT].

² *Id.* at 103.

³ See *id.*

⁴ See *id.* at 109-10.

⁵ See *id.* at 121-22.

⁶ See *Energy Charter*, EUROPEAN COMMISSION: ENERGY, CLIMATE CHANGE, ENVIRONMENT (last visited Oct. 7, 2023), https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en [<https://perma.cc/3SS8-DXRE>].

⁷ See Joseph Bentley and Olivia Fox, *English Courts reject Spain's challenge to enforcement of an ICSID award, asserting primacy of UK law in the context of intra-EU claims under the Energy Charter Treaty*, NORTON ROSE FULBRIGHT (June 2023), <https://www.nortonrosefulbright.com/en/knowledge/publications/83eb6069/english-courts-reject-spains-challenge-to-enforcement-of-an-icsid-award> [<https://perma.cc/7XZ7-5YCS>].

⁸ See *Energy Charter*, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Directorate-General for Energy, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, EUROPEAN COMMISSION: ENERGY, CLIMATE CHANGE, ENVIRONMENT (July 7, 2023), https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en [<https://perma.cc/C2XY-3DP2>].

¹² ECT, *supra* note 1, at 121-22.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ See Louise Woods and Sophie Freelove, *Intra-EU Disputes Under the ECT, What Next?*, VINSON & ELKINS (Sept. 8, 2021), <https://www.velaw.com/insights/intra-eu-disputes-under-the-ect-what-next/> [<https://perma.cc/TC5T-8VSS>].

¹⁶ See Deivid Mustafa, *The issue of intra-EU objection: has it become a failed dialogue? An example from Infracapital v Spain*, CORAX FOUNDATION (Feb. 22, 2022), <https://coraxfoundation.com/2022/02/22/the-issue-of-intra-eu-objection-has-it-become-a-failed-dialogue-an-example-from-infracapital-v-spain/> [<https://perma.cc/7A7Y-YF9V>].

¹⁷ See generally Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018) (holding that the arbitration clause contained in the Netherlands-Slovakia BIT of 1991 was incompatible with EU law); see generally Case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:164 (Sept. 2, 2021) (holding that the arbitration mechanism contained in the ECT was not applicable to intra-EU disputes); see generally Case C-109/20, *Republiken Polen v. PL Holdings SÁrl*, ECLI:EU:C:2021:875 (Oct. 26, 2021) (holding that the arbitration clause in the Poland-BLEU BIT was in conflict with EU law).

¹⁸ See Nathalie Colin, Carsten Wendler, Alexandra van der Meulen and Gregorio Pettazzi, *Green Power v Spain: the first decision to ever uphold the intra-EU objection. Is this a turning point for ECT arbitrations?*, FRESHFIELDS BRUCKHAUS DERINGER (June 28, 2022), <https://riskandcompliance.freshfields.com/post/102hrqe/green-power-v-spain-the-first-decision-to-ever-uphold-the-intra-eu-objection-is> [<https://perma.cc/26NH-7YDR>].

¹⁹ See *id.*

²⁰ See generally *Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Arbitration Award (June 16, 2022) (holding that the arbitration provision of the ECT is incompatible with EU law) [hereinafter *Green Power*].

²¹ See Bentley and Fox, *supra* note 7.

²² *Id.*

²³ Green Power, *supra* note 20, at ¶ 1.

²⁴ *Id.* at ¶ 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at ¶¶ 197-232.

²⁸ *Id.* at ¶ 232.

²⁹ *Id.* at ¶ 229.

³⁰ *Id.* at ¶ 476 (referencing the CJEU holdings in *Achmea*, *Komstroy*, and *PL Holdings*).

³¹ Colin, *supra* note 18.

³² See Green Power, *supra* note 20, at ¶ 476.

³³ See *Energy Charter*, *supra* note 6.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *A European Green Deal: Striving to be the first climate-neutral continent*, EUROPEAN COMMISSION (last visited Oct. 7, 2023), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en [<https://perma.cc/79G3-6M5S>].

³⁷ *Id.*

³⁸ Colin, *supra* note 18.

³⁹ ECT, *supra* note 1, at Art. 47(3).

⁴⁰ See Dr. Sebastian Seelmann-Eggebert, Shreya Ramesh and Ram Mashru, *Green Power and the Protection of Intra-EU Energy Investment*, LATHAM & WATKINS (Aug. 18, 2022), <https://www.latham.london/2022/08/green-power-and-the-protections-of-intra-eu-energy-investment/#:~:text=The%20tribunal%20in%20Green%20Power,under%20the%20Energy%20Charter%20Treaty.> [<https://perma.cc/8KUJ-MYNF>].

⁴¹ See Tim Foden, David Hunt, Ben Love and Sagar Gupta, *SCC Tribunal Upholds Intra-EU Objection in Spain ECT Solar Claim*, BOIES SCHILLER FLEXNER 1, 3 (2022), <https://www.bsflp.com/images/content/4/7/v6/4789/2022.07.01-Green-Power-Client-Alert.pdf> [<https://perma.cc/WCF5-Q2PZ>].

⁴² See *The protection of investments in the energy section: Recent developments with the Energy Charter Treaty*, LINKSLATERS (last visited Oct. 7, 2023), <https://www.linklaters.com/en-us/insights/publications/2022/december/the-protection-of-investments-in-the-energy-sector> [<https://perma.cc/7CRW-JCF9>].

⁴³ See *id.*

⁴⁴ See Seelmann-Eggebert, *supra* note 40.

⁴⁵ See *id.*