

Questions Continue To Swirl Around Intra-EU Treaty Claims

By **Caroline Simson**

Law360 (June 13, 2018, 8:10 PM EDT) -- An arbitral tribunal has ruled that a monumental decision from Europe's highest court does not preclude a claim brought against Spain by a Dutch investor, but experts say that doesn't mean that other European investors with similar claims should believe that a path to victory has been cleared.

The European Court of Justice decided earlier this year in a case involving the Dutch insurer Achmea BV that an arbitration agreement in a Dutch-Slovak investment treaty was invalid because it improperly allows arbitral tribunals to interpret European Union law.

An International Centre for Settlement of Investment Disputes tribunal last month rejected arguments that this decision barred an arbitration proceeding brought against Spain by the Dutch renewable energy investor Masdar Solar & Wind Cooperatief UA, concluding the Achmea decision has limited applicability.

Even with this finding, however, experts say that questions linger on the impact of Achmea and how it might affect the intersection of EU and international law.

"There's going to be more battles to come in the next months, or even years, on the jurisdictional front, and whether the Achmea decision can be extended to the [Energy Charter Treaty] or not," said Mayer Brown LLP partner Alejandro Lopez Ortiz. "There's definitely a situation of uncertainty."

Since being issued in March, the Achmea decision has triggered many questions about the future of investment arbitration initiated by EU investors against another EU member state.

The argument that the Achmea decision invalidates the arbitration clause in the ECT — a multilateral treaty signed not only by nations throughout Europe, but also by the EU itself and by countries in the Asia-Pacific region — is one that's been made several times by various European nations. The issue is a critical one for investment arbitration in Europe: In a report released on Tuesday, two European research organizations found that more claims have been filed under the treaty than any other trade and investment agreement in the world.

It's a particularly important question for Spain, which in 2015 alone was hit with 15 separate ECT claims at ICSID over its revocation of certain renewable energy subsidies.

In its May 16 award, the tribunal in Masdar concluded that the Achmea decision "has no bearing" on the case because it applies specifically to the Dutch-Slovak investment treaty and, more generally, to other similar treaties between EU member states.

But the ECT is not such a treaty because the EU itself has signed it, the tribunal concluded. According to Linklaters LLP attorney Clément Fouchard, the tribunal's reasoning is almost exclusively based on opinion issued last fall by a top legal adviser for the ECJ, Advocate General Melchior Wathelet.

Orrick Herrington & Sutcliffe LLP partner Charles Kaplan, a highly specialized arbitration lawyer based out of the firm's Paris office, told Law360 that the Masdar tribunal's decision on the ECT question wasn't all that surprising.

"[The tribunal] decided in a way that a number of people, including me, have predicted it would decide," he said, adding that he expects other tribunals considering the issue to adopt similar findings.

Still, arbitral tribunals hardly have the last word on the topic. Awards issued by tribunals outside of the ICSID system, such as the Stockholm Chamber of Commerce or United Nations Commission on International Trade Law, can be set aside by national courts where the arbitration was conducted.

It's in the context of one of these set-aside proceedings that Spain has now set its sights on having the ECJ rule directly on the validity of the ECT arbitration clause in light of its decision on Achmea. It's raised the question as it challenges a €53.3 million (\$62.8 million) award issued by an SCC tribunal to the Luxembourg renewable energy investor Novenergia II-Energy & Environment SCA.

As for ICSID awards, while they can only be annulled by an ICSID committee, they can still be refused for enforcement by national courts. And it's there where EU investors are likely to run into trouble.

"I think the hurdle at the enforcement level is a reality when dealing with enforcement with the EU," said Lopez Ortiz.

In the Novenergia case, Spain has asked a Swedish appeals court to refer the question of whether the ECT's arbitration clause is invalid under the Achmea decision to the ECJ. While the court hasn't yet decided on the request and it's unclear how it will rule, Lopez Ortiz said that the question is nevertheless likely to be referred to the ECJ eventually.

Any such case before the ECJ will be closely watched given that international law precludes nations that have signed and ratified a treaty from arguing that the treaty violates their own domestic law, according to Kaplan.

Fouchard noted that it's unfortunate the Masdar tribunal did not provide a more in-depth analysis on the fact that the EU has itself signed the ECT, given that the issue is likely to be considered by the ECJ. Masdar Solar & Wind Cooperatief argued in the underlying arbitration that the arbitration provisions in the ECT are binding on the EU, and that the ECT grants an investor the right to bring international arbitration against signatory nations, including the EU. That means that the arbitration mechanism cannot be incompatible with EU law, the company argued.

The argument raises "interesting questions" regarding the hierarchy of EU law and international law in treaties the EU has entered into, Fouchard said.

"Like any other international subject, one could indeed argue, just as Masdar, that the EU's highest court, the CJEU, could not rule that an obligation pursuant to an international treaty undertaken by the EU is incompatible with EU law," he said.

It also raises questions about EU courts' obligations under EU and international law. If the ECJ rules that the arbitration clause in the ECT is invalid, it could put those courts in an awkward situation, Lopez Ortiz said.

"They have to give priority to the decisions of the European Court of Justice, but at the same time, if they deny enforcement of an ICSID award they would be in breach of the ICSID Convention," he said. "That could give rise to international responsibility for the state involved. It's a new scenario."

--Editing by Pamela Wilkinson and Breda Lund.