

Legality of the solidarity contribution under international law – Klesch Group & Raffinerie Heide v. Germany

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1. Introduction

The introduction of a temporary solidarity contribution, also known as a windfall profits tax, imposed on energy sector companies under the [Regulation on an Emergency Intervention to Address High Energy Prices \(2022/1854\)](#), has triggered debates concerning both the legitimacy of the Regulation itself, as well as the specific domestic measures adopted by Member States in compliance with the Regulation. Questions have arisen regarding the compatibility of these measures with EU primary law, and with the constitutional principles of the Member States.

In addition, it has been disputed whether the solidarity contribution violates international law by undermining the protection of investments granted under international investment agreements.

This note discusses a case in which the legality of the solidarity contribution imposed by Germany was challenged under the [Energy Charter Treaty](#) (ECT). It also highlights possible implications of this case for other investors established in countries that are parties to the ECT.

2. The solidarity contribution – A controversial crisis measure

In response to the energy crisis of 2022 caused by the Russian invasion of Ukraine, the European Union swiftly adopted a package of measures to “[mitigate the impact of high electricity prices and protect consumers, while preserving the benefits of the internal market and a level-playing field](#)”. Among these measures, the mandatory temporary solidarity contribution caused most controversies regarding its legitimacy.

In a nutshell, under this measure, qualifying taxpayers in the fossil fuels sector must be subject to tax of at least 33% on excess profits derived in 2022 and/or 2023. Excess profits are defined as those that exceed the average yearly taxable profits of 2018, 2019, 2020 and 2021 by more than 20%. The Member States were required to implement the solidarity contribution (in accordance with the requirements of articles 14 -18 of Regulation 2022/1854), unless they had already enacted equivalent national measures.

Given the extraordinary nature of the measures and their significant impact on the industry, it is not surprising that their legitimacy has been contested under various legal frameworks.

One such challenge was initiated in October 2023 by Klesch Group Holdings Limited through international arbitration proceedings brought against the European Union (ICSID Case No. [ARB\(AF\)/23/1](#)), Germany (ICSID Case No. [ARB/23/49](#)) and Denmark (ICSID Case No. [ARB/23/48](#)). These cases were brought together before the International Centre for Settlement of Investment Disputes (ICSID), with claims that the solidarity contribution imposed on the Danish and German subsidiaries of the Klesch Group violates the protections granted under the ECT.

The ECT is a multilateral investment agreement, signed in 1994, with the aim of promoting cooperation in the energy sector (*this note does not discuss the implications of the withdrawal from the ECT by the European Union on 27 June 2024 and by several other signatories. Generally, investments made in the territory of the withdrawing contracting party before the withdrawal becomes effective remain protected under the “sunset clause” for another 20 years, according to article 47(3) of the ECT*). Among other measures, the ECT has set up an arbitration mechanism allowing investors to initiate international arbitration proceedings against contracting parties for violation of the rights protected under the ECT.

While the arbitration proceedings were still ongoing, the solidarity contribution imposed on the German subsidiary of the Klesch Group, Raffinerie Heide, became due by 31 July 2024. To prevent immediate enforcement of the levy, the claimants (i.e. the Klesch Group and Raffinerie Heide) requested the ICSID for a provisional relief to suspend the collection of the contribution by Germany. It is worth noting that Denmark, unlike Germany, has voluntarily suspended the collection of the solidarity contribution pending the final decision of the tribunal.

Below, the tribunal's decision on claimants' application is presented.

3. Klesch Group v. Germany – Tribunal grants provisional relief

In response to the application, on 23 July 2024, the ICSID tribunal issued a decision on provisional measures granting the requested relief. This decision effectively suspended the claimants' obligation to pay the contribution until the end of the arbitration.

The tribunal relied on article 47 of the [ICSID Convention](#), which allows for “any provisional measures which should be taken to preserve the respective rights of either party”. In reaching its decision, the tribunal evaluated several relevant principles. In the context of assessing the legality of the solidarity contribution, the tribunal's reasoning in interpreting the following principles is particularly interesting:

- whether the tribunal had prima facie jurisdiction over the dispute; and
- whether the claimants had a prima facie case on the merits.

Regarding the prima facie jurisdiction, the tribunal dismissed Germany's arguments that the solidarity contribution is excluded from the scope of the ECT under the tax carve-out provision of article 21 of the ECT. The tribunal clarified that satisfying the prima facie test for jurisdiction “does not require the Tribunal to decide whether the solidarity contribution is a tax”. It is sufficient, at this stage, to establish the tribunal's “jurisdiction at a ‘first sight’ level”.

As for the prima facie case on the merits, the tribunal applied a low threshold, stating that it is sufficient to determine that “a reasonable case has been made”. In particular, the tribunal did not examine any claims made by the Klesch Group concerning Germany's alleged violation of the ECT provisions through the introduction of the solidarity contribution.

4. What happens next? – Potential implications of the tribunal's decision

The tribunal's decision on provisional measures is not the final resolution in the debate on the legality of the mandatory temporary solidarity contribution imposed pursuant to the EU Regulation. While this decision could potentially encourage other affected investors to challenge its legality under the ECT, the final outcome of the arbitration proceedings still remains uncertain, and so do its broader implications.

Primarily, it is yet to be determined whether the ICSID tribunal will rule that imposing the solidarity contribution by Germany resulted in a breach of its obligations under the ECT. As explicitly stated in paragraph 74 of the decision, "recommendation of provisional measures in this case does not 'presuppose' the outcome of this arbitration". One of the key issues that the tribunal will have to resolve is whether the tax carve-out clause applies, and, consequently, whether it excludes this case from the ambit of the ECT.

Furthermore, the prospects of challenging the legality of the solidarity contribution under the ECT may vary for investors established in EU Member States compared to those from non-EU Member States. This is because the applicability of the ECT to intra-EU disputes, i.e. where an investor from one EU Member State challenges measures imposed by another Member State, has been a contentious issue (*this also extends to disputes under bilateral investment agreements*). Although the analysis of this issue is beyond the scope of this note, it is pertinent to refer to the ECJ case law (the [Achmea](#) case, Case C-284/16 and the [Komstroy](#) case, Case C-741/19), as later reaffirmed in the [EU declaration](#) of 26 June 2024. Essentially, the declaration asserts that the arbitration clause in article 26 of the ECT does not apply to intra-EU arbitration proceedings (*this concern is not applicable to the case initiated by the Klesch Group Holdings against the European Union, Germany and Denmark, as Klesch Group Holdings is incorporated outside the European Union, in Jersey*).

In conclusion, the ICSID tribunal delivered a significant decision on provisional measures on 23 July 2024, effectively suspending the investor's obligation to pay the solidarity contribution until the end of the arbitration. However, questions on the legality of the contribution under the ECT are still pending. Similarly, the actual impact of the final decision on other investors, particularly in intra-EU disputes, remains uncertain.

IBFD references:

- ... EU tax law developments are reported on the daily IBFD [Tax News Service](#) page.
- ... Implementation of windfall taxes across the globe is tracked in the IBFD Tax Dossier on [Windfall Profit Taxes](#).
- ... Windfall contributions for the energy sector are described in IBFD [Country Tax Guides](#).
- ... K. Matikonis & C. Garavan, [Post-Brexit Legislation: Windfall Taxes in the United Kingdom and the European Union](#), 63 Eur. Taxn. 12 (2023), Journal Articles & Opinion Pieces IBFD.
- ... M. Alvarado, [Windfall Profit Taxes Across Europe: Have They Proved to be Effective for Taxing Windfall Profits in the Energy Sector?](#), 63 Eur. Taxn. 10 (2023), Journal Articles & Opinion Pieces IBFD.