BULLETIN MAY 2024

EDF Energies Nouvelles v Spain: Swiss Supreme Court confirms jurisdiction of Swiss-seated arbitral tribunals over intra-European investment disputes

I. INTRODUCTION

In a landmark decision published on May 2, 2024 (case number 4A_244/2023 dated April 3, 2024), the Swiss Supreme Court confirmed that arbitral tribunals seated in Switzerland have jurisdiction over intra-EU investment disputes.

Radically departing from the Court of Justice of the European Union (**CJEU**)'s position, the Swiss Supreme Court is of the opinion that (i) the 'unconditional consent' to the submission of a dispute to arbitration pursuant to Art. 26(3)(a) of the 1994 Energy Charter Treaty (**ECT**) does apply to intra-EU disputes and that (ii) entering into such an arbitration agreement is not incompatible with EU law as the dispute resolution mechanisms of the Treaty on the Functioning of the European Union (**TFEU**) do not take precedence over those of the ECT. After a brief summary of facts (*infra* II.), we will analyze the legal considerations that enabled the Swiss Supreme Court to reach this groundbreaking conclusion (*infra* III.).

II. FACTS

A French investor acquired and developed twelve photovoltaic installations in the Kingdom of Spain. These were governed by two royal decrees promulgated in 2007 and 2008, which provided for attractive feed-in tariff (**FIT**) for qualified photovoltaic installations. Between 2010 and 2013, the Kingdom of Spain modified the financial support measures set out therein, claiming that it wanted to combat its energy tariff deficit. In 2013 and 2014, it repealed both royal decrees and adopted a new legislative arsenal aimed at replacing the fixed FIT for photovoltaic installations with a remuneration intended to provide investors with a reasonable rate of return.

In 2016, the French investor, relying on Art. 26 ECT, initiated arbitration proceedings against the Kingdom of Spain. The investment dispute was submitted to an *ad hoc* three-member arbitral tribunal seated in Geneva, Switzerland. In the course of the arbitration proceedings, the Kingdom of Spain raised a jurisdictional objection, arguing that the arbitration clause contained in Art. 26 ECT is incompatible with EU law due to the intra-EU nature of the dispute. It mainly relied on the *Achmea*[1] and *Komstroy*[2] case law. In April 2023, the arbitral tribunal rejected this jurisdictional objection, which led the Kingdom of Spain to challenge this award before the Swiss Supreme Court based on Art. 190(2)(b) of the Swiss Private International Law Act.

III. DECISION

In the present case, the arbitration agreement is anchored in the ECT, which is a multilateral treaty designed to create

[1] Judgment of the CJEU (Grand Chamber) of March 6, 2018, *Slovak Republic v. Achmea BV*, Case C-284/16.

[2] Judgment of the CJEU (Grand Chamber) of September 2, 2021, *République de Moldavie v Komstroy LLC*, Case C-741/19.

a framework to stimulate economic growth and liberalize international investment and trade in the energy sector.

Part V of the ECT addresses the resolution of investment disputes between a contracting party and an investor of another contracting party. Pursuant to Art. 26(1) ECT, if the dispute is not settled amicably within three months following either party's request to settle a dispute amicably, the investor can choose between (i) the courts or an administrative tribunal of the contracting party to the dispute, (ii) any applicable, previously agreed dispute settlement procedure, or (iii) international arbitration or conciliation as specified in the ECT. By signing the ECT, a contracting party provides its *'unconditional consent'* to submit disputes arising with an investor of another contracting party to international arbitration in accordance with Art. 26 ECT. The ECT further requires an investor to provide its written consent to submit its dispute to arbitration, which is usually contained in its request for arbitration. The jurisdiction of an arbitral tribunal thus relies on the mutual consent of the parties to arbitrate. The Swiss Supreme Court had previously ruled that the dispute resolution mechanism set forth in Art. 26 ECT constitutes a formally valid arbitration agreement[3].

In its reasoning, the Swiss Supreme Court first criticized EU for having waged a crusade against the possibility to settle intra-EU disputes through arbitration for years. In the *Achmea* case, the CJEU had ruled that an arbitration clause contained in an intra-EU bilateral investment treaty (**BIT**) is incompatible with EU law, with the consequence that all investor-state arbitration clauses in intra-EU BITs are inapplicable and thus any arbitral tribunal established on the basis of such clauses lacks jurisdiction. In the *Komstroy* case, the CJEU extended this reasoning to intra-EU investment arbitrations under the ECT. The CJEU further held that setting the seat of arbitration on the territory of an EU Member State entails the application of EU law and that national courts are obliged to ensure compliance therewith.

The Swiss Supreme Court took note of this case law, but observed that such obligation does not apply to courts in non-EU states for which EU law is *a res inter alios acta*. Moreover, non-EU Member States cannot submit a question to the CJEU for a preliminary ruling on the interpretation of EU law, as could a court of an EU Member State. In relation to the *Komstroy* case, the Swiss Supreme Court finally questioned the CJEU's impartiality, underlying that the Court may have proceeded to a *pro domo* interpretation of the law. Hence, the decisions of the CJEU, in particular the *Komstroy* judgment, are not binding on a national court called upon to rule on an appeal against an award made by an arbitral tribunal sitting in Switzerland.

Having disregarded the CJEU's case law, the Swiss Supreme Court further reached the conclusion that a Swiss-seated arbitral tribunal has jurisdiction over an intra-EU investment dispute under the ECT on the following grounds. When interpreted in good faith, Art. 26(3)(a) ECT does not allow the *'unconditional consent'* to the submission of disputes to international arbitration to be interpreted as excluding those of an intra-EU nature. In this context, recourse to the supplementary means of interpretation under Art. 32 of the 1969 Vienna Convention on the Law of Treaties (**VCLT**) is not necessary as the mere application of the principles of interpretation laid down in Art. 31 VCLT does not lead to a manifestly absurd or unreasonable result. Looking at negotiating history of the ECT, the Swiss Supreme Court also noted that the EU attempted to introduce a disconnection clause according to which EU law rather than the ECT should govern intra-EU trade and investment relations. The fact that this clause did not become part of the final ECT text is a further argument in favor of the possibility of submitting intra-European disputes to arbitration in accordance with Art. 26(3)(a) ETC. It is also no coincidence that, when the draft modernized ECT was adopted in June 2022, the parties attempted in vain to introduce a new provision specifying that Art. 26 ECT would not apply between Member States of the same Regional Economic Integration Organization.

Interestingly, the Swiss Supreme Court also denies the existence of a conflict between Art. 26 ECT and the EU treaties. Even assuming that Art. 26 ECT is incompatible with EU law, there are no grounds to conclude that the rules of the TFEU should take precedence over those of the ECT. This conclusion is in line with the rules of conflict between international treaties laid down in Art. 30 VCLT. In particular, the TFEU cannot take precedence over the ECT by virtue of the principle of *lex posterior derogat priori* expressed in Art. 30(3) VCLT. Moreover, if the parties to the ECT had really wished to establish a special regime for EU Member States, by specifying that the dispute resolution mechanism provided for under EU law should take precedence over Art. 26 ECT, they could and should have explicitly mentioned this in the text of the ECT. As the parties failed to do so, Art. 26 ECT takes precedence over the dispute resolution mechanism provided for in the TFEU, giving the investors the possibility of submitting the disputes opposing them to an EU Member State to the jurisdictional authority of their choice (state courts or arbitral tribunals).

[3] BGE/ATF 149 III 131, rec. 6.4.3; BGE/ATF 141 III 495, rec. 3.4.2.

IV. CONCLUSION

By this landmark decision, the Swiss Supreme Court confirmed for the first time, despite the case law of the CJEU, that arbitral tribunals seated in Switzerland have jurisdiction to hear intra-EU disputes based on the ECT. It is now clear that investors wishing to bring an intra-EU dispute before an arbitral tribunal – whether under the ECT or under an intra-EU BIT – are well advised to opt for the seat of the arbitral tribunal to be in Switzerland. Should investors nevertheless choose to bring such dispute before an arbitral tribunal seated in an EU Member State, they will most likely face a jurisdictional objection on the grounds that the arbitration clause contained therein is void as incompatible with EU law.

YOUR CONTACTS

Arnaud Nussbaumer-Laghzaoui, Partner
arnaud.nussbaumer@jslegal.ch
+41 22 716 96 96

Constantin Khovrin, Associate
constantin.khovrin@jslegal.ch
+41 22 716 96 96

Louise Dobrzynski, Associate
louise.dobrzynski@jslegal.ch
+41 22 716 96 96

OUR OFFICE

Jacquemoud Stanislas
Place des Philosophes, 10
P.O. Box
1211 Geneva 4, Switzerland
Telephone +41 22 716 96 96
jslegal.ch

LEGAL NOTICE

This Bulletin expresses general views of the authors at the date of the Bulletin, without considering the facts and circumstances of any particular person or transaction. It does not constitute legal advice. This Bulletin may not be relied upon by any person for any purpose, and any liability for the accuracy, correctness or fairness of the contents of this Bulletin is explicitly excluded.