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The Swiss Supreme Court Upholds an Intra-EU Award Under the ECT

Alec Ray (LALIVE) · Thursday, May 23rd, 2024

In a judgment dated 3 April 2024, the Swiss Supreme Court (the "SSC") rejected Spain's challenge of an arbitral award rendered in an intra-EU arbitration under the Energy Charter Treaty (the "ECT"). This post addresses the most salient point of this decision, i.e. the SSC's rejection of the *Achmea* and *Komstroy* judgments of the Court of Justice of the European Union (the "CJEU").

Facts

In 2007 and 2008, Spain adopted a series of measures to encourage investments in renewable energies. Under this regime, EDF Energies Nouvelles S.A. ("EDF") – a French power company – acquired twelve solar installation through Spanish subsidiaries. In 2013 and 2014, Spain abrogated these measures and replaced them with regulations providing less benefits to investors.

As a consequence, EDF started arbitration proceedings against Spain in 2016 under the ECT. The Geneva-seated arbitral tribunal issued its final award in April 2023. It found that it had jurisdiction over the dispute and ordered Spain to pay EUR 29.6 million plus interest for breach of the ECT's fair and equitable treatment standard.

The arbitral tribunal had affirmed its jurisdiction over Spain on the basis of Article 26 ECT, which notably provides that "[s]ubject only to subparagraphs [26(3)](b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration".

Spain challenged the jurisdiction of the tribunal in front of the SSC. In relation with the intra-EU character of the award, Spain argued that:

1. its consent to arbitration under the ECT did not extend to intra-EU disputes; and
2. Article 26 ECT was incompatible with EU law, which prevails over the ECT.

The SSC Disregards *Achmea* and *Komstroy*

Prior to addressing Spain's arguments, the SSC had to determine the weight that it should give to *Achmea* and *Komstroy*. As the SSC recalled, the jurisprudence of the CJEU only binds the courts

of EU member states. Since Switzerland is not a part of the EU, the SSC did not have an obligation to follow CJEU decisions.

This usually does not prevent the SSC from drawing from the jurisprudence of the relevant local courts when interpreting foreign law. In this case, however, the SSC held that EU institutions have been leading a "crusade" against intra-EU investment arbitration. Examining *Komstroy*, the SSC considered that the CJEU reached its decision based on the autonomy and "specific characteristics" of EU law rather than on the basis of international law and the rules of treaty interpretation. According to the SSC, the CJEU – as the highest court of the EU – might have been tempted to make EU law prevail over the ECT, thus making *Komstroy* a *pro domo* pleading. Therefore, the SSC decided that it would not give any particular weight to *Achmea* and *Komstroy*.

Article 26 ECT Encompasses Intra-EU Disputes

To determine whether Spain had consented to arbitrate intra-EU disputes, the SSC sought to interpret Article 26 ECT with reference to Article 31 of the Vienna Convention on the Law of Treaties, i.e. "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The SSC first remarked that the language of Article 26 ECT was clear and did not leave any room for a carve-out of intra-EU disputes. Indeed, the consent of the ECT parties to arbitration was "unconditional" save for the exceptions exhaustively contained in the ECT – none of which concerned intra-EU disputes.

The context and other provisions of the ECT were of no help to Spain either. The SSC rejected Spain's argument that Articles 1(3) and (10) and Article 25 ECT excluded from the scope of the ECT the matters over which EU member states had transferred competencies to the EU, including in relation to the internal electricity market and investment treaties.

The SSC further held that the object and purpose of the ECT was to promote international cooperation and investments in matters of energy, without regard to the origin of the investors. Preventing EU investors from resorting to arbitration against EU member states would thus be incompatible with this aim.

The SSC equally rejected Spain's contention that the 1997 Statement of the European Communities under Article 26(3)(b)(ii) ECT resulted in an exclusion of intra-EU arbitration. In the SSC's view, this statement only ruled out arbitration in the case where the investor had already resorted to another method of dispute resolution under the fork-in-the-road clause contained in Article 26(2) ECT. In any event, the SSC noted that the statement applied to the European Communities themselves, not its member states.

Nor could Spain rely on the Declaration of the Member States [of the EU] of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection to argue that the parties to the ECT had reached an agreement or established a practice to exclude intra-EU arbitration from their consent to arbitrate under Article 26 ECT. The SSC observed that this declaration had not been signed by all EU member states, not to mention by all parties to the ECT. There was thus no basis for the conclusion of an agreement or the emergence of a practice. Furthermore, the declaration was adopted three years after EDF had commenced arbitration against Spain and could not apply retroactively to Spain's consent to arbitrate.

Referring to the *travaux préparatoires* of the ECT (see, e.g. item 27.18 of the draft basic agreement of 12 August 1992), the SSC further remarked that the European Communities had sought to include a disconnection clause which would have excluded the provisions of the ECT in intra-EU disputes. According to the SSC, the absence of this clause from the final text of the ECT evidenced the absence of an intra-EU exception in the ECT. Accordingly, the SSC held the ECT did not contain a carve-out of intra-EU disputes.

Article 26 ECT is Compatible with EU Law

Spain's alternative argument was that Article 26 ECT conflicted with EU law, which – according to Spain – prevailed over the provisions of the ECT. The SSC rejected this argument both on the merits and on procedural grounds.

On the merits, the SSC held that:

1. With reference to *Vattenfall v. Germany* and *Mercuria v. Poland*, the EU's exclusive competence in matters of investments treaties established with the 2007 Treaty of Lisbon did not make prior investment treaties incompatible with EU law. Nor did the jurisdiction of the CJEU over acts of EU institutions – including treaties entered into by the EU – exclude the jurisdiction of other bodies such as investment tribunal.
2. The CJEU only had exclusive jurisdiction over the interpretation of the Treaty on European Union and the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon), not the ECT. Furthermore, this exclusive jurisdiction only bound EU member states, not nationals from these states. There was thus no conflict between the ECT and EU law.
3. Even assuming that the ECT was incompatible with EU law, EU law would not prevail over the ECT. On the contrary, Article 16 ECT provided that other treaties could not derogate to the ECT to the disadvantage of the investors.

The SSC also rejected parts of Spain's arguments on procedural grounds because Spain had failed to invoke in its appeal brief some of the provisions on which it relied, and only raised them in the second round of briefs.

The SSC's Judgment Increases the Divide Resulting from *Achmea*

The SSC's judgement follows a follows a series of decisions as to the jurisdiction of intra-EU investment tribunals under the ECT and other investment treaties. In particular, it echoes the January 2023 judgment of the UK High Court in *Infrastructure Services Luxembourg v. Spain*, which rejected a similar intra-EU objection from Spain. The SSC's decision thus increases the divide between EU and non-EU jurisdictions as to the possibility to arbitrate intra-EU investment disputes.

This gap is confirmed by the Svea Court of Appeal's annulment on 27 March 2024 of the final award in *Triodos v. Spain*, an intra-EU arbitration under the ECT. This case is particularly interesting in comparison to *EDF v. Spain* because the two arbitrations proceeded in parallel. Both arbitral tribunals had the same president and had to address Spain's intra-EU objections, which they decided using partly identical language. However, the *Triodos* tribunal was seated in Sweden

(Stockholm) rather than in Switzerland. Referring to *Achmea* and *Komstroy*, the Svea Court of Appeal found that the *Triodos* award was manifestly incompatible with Swedish policy given the intra-EU character of the dispute. Although this judgment was not surprising given that the Swedish Supreme Court had set aside the award in *PL Holdings v. Poland* on intra-EU grounds, it provides a sharp contrast with the SSC's decision in *EDF v. Spain.*

Even if intra-EU investment awards under the ECT are confirmed by the relevant supervisory courts, enforcement thereof will remain challenging in the EU since the New York Convention allows local courts to refuse enforcement on the basis of public policy and absence of jurisdiction.

Spain Confirmed Its Withdrawal From the ECT

Spain confirmed its withdrawal from the ECT shortly after the publication of the SSC's decision, with effect on 17 April 2025. It is thus the latest state to announce its exit from the ECT after France, Germany, Poland, Slovenia and Luxembourg. The Netherlands, Denmark, Ireland and the UK also have expressed their intention to denunciate the treaty. The EU is similarly contemplating a withdrawal from the ECT. However, it is worth noting that Article 47(2) ECT provides that withdrawals only becomes effective one year after the notice of withdrawal, while Article 47(3) ECT extends protection of existing investments for a period of 20 years after withdrawal. Thus, it remains to be seen how each exiting party will deal with the sunset clause of the ECT, which extends the duration of the treaty after the withdrawal of a party.

This entry was posted on Thursday, May 23rd, 2024 at 8:05 am and is filed under CJEU, ECT Withdrawal, Energy Charter Treaty, EU Law, European Court of Justice
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