Swiss Federal Supreme Court dismisses Spain's a ppeal against final award in investment treaty arbit ration (PV Investors v The Kingdom of Spain)

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Arbitration analysis: The Swiss Federal Supreme Court (SFSC) dismissed an appeal brought by the Kingdom of Spain against the final award rendered in the investment treaty arbitration PCA Case No 2012-14, ordering Spain to pay various amounts to certain claimant investors totaling more than €91m. The SFSC held that the award neither violated Spain's right to heard nor the procedural public policy. As to Spain's appeal, it should have, at least in part, been directed against a procedural order which, in substance, constituted a decision on jurisdiction. In its appeal against the procedural order, Spain could have raised grounds for appeal which it raised in its appeal against the final award. As to preliminary awards, which settle preliminary questions of substance or procedure, the SFSC clarified that they do not enjoy the authority of res judicata, but are nevertheless binding on the tribunal from which they originate.

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Swiss Federal Supreme Court Decision 4A_187/2020

What are the practical implications of this case?

When filing an appeal against an international arbitration award rendered by a tribunal seated in Switzerland, it is worth keeping in mind the particularities of the appeal proceedings before the SFSC, the following being relevant with regard to the decision discussed here:

- the appeal must be filed within 30 days from the date of notification of the award
- the SFSC can set aside an international arbitration award based on the grounds listed exhaustively in article 190(2) let a-e of the Swiss Federal Private International Law Act (PILA):
  - (a) where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted
  - (b) where the arbitral tribunal wrongly accepted or denied jurisdiction
  - (c) where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims
  - (d) where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated
  - (e) where the award is incompatible with public policy
- as to preliminary awards (such as eg an award on jurisdiction), setting aside proceedings may be initiated on the grounds of the let (a) and (b). The grounds referred to in let (c) to (e) may only be raised, if they are inseparably linked to the composition or jurisdiction of the tribunal
- an interim decision on jurisdiction must be appealed directly within 30 days upon notification, as the objections raised will otherwise forfeit and cannot be brought before the SFSC in an appeal against the final award. According to the principle of 'substance over form', this applies regardless of whether the decision is referred to as, eg, a 'procedural order', 'preliminary award' or 'decision on jurisdiction'

- the SFSC decides on the basis of the facts as stated in the award. It cannot correct or supplement the tribunal's findings, even if the facts have been established in a manifestly incorrect manner or in violation of the law

What was the background?

In 1997, Spain passed a law establishing a special regime to promote renewable energy sources. The details of this special regime were regulated in several successive decrees. The decree promulgated in 2007, established the feed-in-tariff (FIT) for photovoltaic electricity. It provided for an attractive FIT for the first 25 years of operation of the photovoltaic installations, and a lower FIT for the subsequent years.

Following the adoption of the aforementioned decree, 25 corporate entities and one natural person (Investors), all of whom have their headquarters or domicile in an EU Member State, made significant investments and took the necessary steps to be able to sell the electricity produced at the advantageous tariff set out in the aforementioned decree.

In 2010, Spain took various legislative measures affecting the remuneration of renewable energy producers. In 2013, it adopted a new regulation ending the previous incentives for photovoltaic installations.

On 16 November 2011, the Investors, relying on Article 26 para 4 let b) of the Energy Charter Treaty of 17 December 1994 (ECT), commenced arbitration proceedings against Spain for the purpose of, inter alia, obtaining payment of damages for violation of Article 10 para 1 of the ECT. Spain filed an answer requesting that the claim be dismissed in its entirety.

The dispute was decided by a Geneva seated three-member arbitral tribunal (Tribunal) constituted in accordance with the UNCITRAL Arbitration Rules under the aegis of the Permanent Court of Arbitration (PCA).

On 28 February 2013, the Tribunal issued Procedural Order (PO) No 4 bifurcating the proceedings to first consider the five preliminary objections to the jurisdiction of the Tribunal raised by Spain.

On 13 October 2014, the Tribunal issued an award on jurisdiction declaring itself competent to hear the dispute. In particular, the Tribunal rejected the third argument for incompetence invoked by Spain, according to which intra-community disputes between a company based in an EU Member State and an EU Member State concerning investments covered by the ECT made by the former in the territory of the latter cannot be decided by arbitration (the 'intra-community exception').

On 13 August 2018, Spain requested the Tribunal to consider a 'new jurisdictional objection' based on 'new facts' and to allow Spain to produce three documents in support of this objection, (i) the *Achmea v Slovakia* decision of 6 March 2018, (ii) the 'Intra-EU Investment Protection' from the EC of 19 July 2018, and (iii) a fact sheet dated July 19, 2018, in which the EC points out that investor-state arbitration under bilateral investment treaties between EU Member States is not compatible with EU law.

On 15 October 2018, the Tribunal issued PO No 19 in which it rejected Spain's request, pointing out that Spain had already raised several objections to jurisdiction, which were set aside in the award on jurisdiction of 13 October 2014. Under Swiss lex arbitri the award had the conclusive and preclusive effect comparable to res judicata and was binding on the Tribunal.

Spain appealed neither against the award on jurisdiction nor against the PO No 19.

On 12 February 2019, Spain sought leave to place on the record a Declaration of 15 January 2019, signed by twenty-two EU Member States, relating to 'the legal consequences of the *Achmea* judgment of the Court of Justice and the protection of investments in the European Union' ('Declaration of 22'). The Tribunal granted the request.

On 7 March 2019, Spain requested the Tribunal to review its jurisdiction ex officio in light of the 22 Declaration. The Tribunal retained this request for trial.

By award of 28 February 2020, the Tribunal found that Spain had violated Article 10(1) of the ECT and ordered it to pay various amounts to certain claimants totaling more than €91m. The Tribunal denied Spain's request to reconsider the issue of jurisdiction, stating, inter alia, that neither the preliminary award nor the PO No 19 had been challenged and that the situation was no different with respect to Spain's request of 7 March 2019. None of the presented documents, including the

Declaration of 22, changed the nature of the intra-EU objection already resolved by the Tribunal, but merely added possible legal arguments in support of it. The Tribunal could thus reach no different conclusion in its final award.

On 27 April 2020, Spain appealed to the SFSC seeking the annulment of the award of 28 February 2020.

What did the court decide?

The first part of Spain's appeal was directed against PO No 19. Spain argued that the Tribunal violated Spain's right to be heard (art 190 (2) let d PILA) by refusing to examine its 'new arbitration objection' and by rejecting its request for the production of the Achmea documents to support the said objection. The Tribunal also allegedly misapplied the principle of res judicata, by wrongly considering itself bound by the award on jurisdiction it had issued on October 13, 2014. Therefore, it violated the procedural public policy (art 190 (2) let e PILA).

The SFSC dismissed Spain's arguments holding that, as to its content, PO No 19 was not a simple procedural order that could be modified or revoked during the course of the proceedings. PO No 19 was in substance a decision on jurisdiction. The Tribunal's refusal to reconsider a plea of lack of jurisdiction that had already been rejected should therefore have been challenged within 30 days upon notification. The grounds of appeal raised by Spain concerned issues inseparably linked to the jurisdiction of the Tribunal and Spain could and should have raised them immediately by directly challenging PO No 19. Since it did not do so, it was precluded from invoking any of these complaints against the final award.

The second part of Spain's appeal was directed against the final award. Spain argued that the award infringed its right to be heard (article 190 (2) let d PILA) and was contrary to procedural public policy (article 190 (2) let e PILA).

The SFSC held that, in its final award, the Tribunal rejected Spain's request for an ex officio review of its jurisdiction with regard to the Declaration of 22. It did so for the same reasons as those that led it to reject the new objection to jurisdiction in PO No 19. With regard to the rejection of the said request, the final award could have been the subject of the complaint of lack of jurisdiction of the tribunal (art 190 (2) let b PILA). However, Spain did not raise this ground for appeal. To the extent that the appeal raised by Spain concerned issues inseparably related to jurisdiction, the appeal was thus inadmissible.

As to Spain's complaint that the final award violated its right to be heard, the SFSC held that Spain's objection was unfounded because, after ordering a further exchange of pleadings on this issue, the Tribunal rejected Spain's request and set out the reasons for this in the award under appeal.

Spain's complaint that the final award was contrary to procedural public policy was based on the allegation that the tribunal misapplied the principle of res judicata by wrongly characterising the Declaration of 22 as a legal argument, and not a factual one, which is why it considered itself unduly bound by the award on jurisdiction. The SFCS dismissed also this complaint by holding that, as for preliminary awards, which settle preliminary questions of substance or procedure, they do not enjoy the authority of res judicata. Nevertheless, such awards are binding on the arbitral tribunal from which they originate.

Case details

- Court: Swiss Federal Supreme Court
- Judges: Kiss, Niquille and Rüedi
- Date of judgment: 23 February 2021

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