4A_34/2015[1]

Judgment of October 6, 2015

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Mr. Carruzzo

Republic A._____,
Represented by Mr. Elliott Geisinger and Mrs. Nathalie Voser,
Appellant

*v.*

B._____ International,
Represented by Mrs. Dominique Bron-Berset and Mrs. Dominique Ritter,
Respondent

Facts:
A.
A.a. On December 14, 2000, B._____ International (hereafter: B._____), a holding company under the law of [name of country omitted], acquired 89% of the share capital of C._____, a company under the law of [name of country omitted], active in the field of production of heat and residual electricity. The holding increased throughout the years to ultimately reach more than 95% and constitutes an investment pursuant to the December 17, 1994, Energy Charter Treaty (ECT), which X._____ and A._____ ratified and to which Switzerland is also a party (*RS. 0.730.0).

At the time B._____ made its initial investment in this company, C._____ was entitled to some Power Purchasing Agreements (hereafter: PPA, as used in the award under appeal). These PPAs were

[1] Translator's Note: Quote as Republic A._____ *v.* B._____ International, 4A_34/2015.
The original text of the decision is in French. It is available on the website of the Federal Tribunal, www.bger.ch.

entered into with a state company named D._____, which had a monopoly for the purchase of the energy produced in A._____ and they were long term. In order to attract foreign investors, the acquisition by D._____ of the electricity produced by the suppliers such as C._____, pursuant to the PPAs, occurred at very favorable prices for them, which did not correspond to those of an open and competitive market.

A.b. In 2004, Republic A._____ (hereafter: A._____) became a member of the European Union (hereafter: the EU).

In a decision of June 4, 2008, the European Commission (hereafter: the EC) held that the PPAs were state aid incompatible with European competition law, so A._____ should terminate the PPAs within six months. Moreover, it had to obtain the reimbursement of the aid, which the electricity producers had unduly received in the meantime. However, the EC authorized compensatory allowance to the energy producers under certain conditions to compensate for the loss of investments due to the premature termination of the PPAs, a loss known as "stranded costs" according to official terminology.

A._____ took the necessary steps to terminate all PPAs as of December 31, 2008. On April 29, 2010, its government adopted decree n. 149/2010 on the stranded costs, pursuant to which no financial compensation was awarded to the electricity producers to the extent that their claim based on these costs went beyond that for reimbursement of the illegal state aid. Yet, the stranded costs of C._____ were slightly more than twice the reimbursable state aid. A dispute arose, which the parties could not settle amicably, as to the effects of this government decree concerning C._____ and the losses sustained as a consequence by B._____ on its investments in that company.

Pursuant to another decree n. 50/2011 of September 30, 2011, A._____ also capped the profits that operators such as C._____ could make.

B.
In the meantime, B._____ relied on Art. 26 ECT and initiated arbitral proceedings against A._____ on May 12, 2009, with a view to obtaining compensation for the loss it claimed to have sustained as a consequence of the early termination of the PPAs. A three-member arbitral tribunal was constituted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), under the aegis of the Permanent Court of Arbitration (PCA), with its seat set in Zürich. English was designated as the language of the arbitration.

The arbitration was stayed with the agreement of the parties between April 15, 2010, and September 30, 2011.

In a final award of December 3, 2014, the Arbitral Tribunal rejected A._____'s objections to its jurisdiction and to the admissibility of the claim, found that A._____ breached its obligation under Art. 10(1) ECT to grant fair and equitable treatment to B._____'s investments and not to impede them,

ordered the state to pay the [name of country omitted] company damages amounting to EUR 107 million with interest, adjudicated the costs of the arbitration and rejected all other claims.

The circumstances concerning the arbitral proceedings and the submissions made by the parties as well as the arguments in support of these submissions and the reasons on which the award rests, will be indicated hereafter only to the extent necessary to understand the Appellant's arguments.

C.
On January 19, 2015, A._____ (hereafter: the Appellant) filed a civil law appeal for breach of Art. 190(2)(b), (d) and (e) PILA,[2] submitting that the Federal Tribunal should annul the December 3, 2014, award and find that the Arbitral Tribunal had no jurisdiction. As a provisional measure, it sought the stay of the appeal proceedings until its request for interpretation and correction of the award of January 2, 2015, was decided.

In its decision of February 4, 2015, the Arbitral Tribunal corrected a *lapsus calami* concerning one of the reasons of the award, and moreover rejected the request.

In its answer of March 19, 2015, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected.

In its reply of April 7, 2015, the Appellant and the Respondent in its rejoinder of April 23, 2015, repeated their submissions.

The Arbitral Tribunal submitted an electronic copy of its file and did not file an answer to the appeal.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its judgment in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Before the arbitral tribunal, they used English. The brief sent to the Federal Tribunal was written in French. Consequently, the Federal Tribunal will issue its judgment in French.

2.
2.1.

[2] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.
[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.

A civil law appeal is admissible against awards concerning international arbitration pursuant to the requirements at Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions – including those seeking a finding by the Federal Tribunal itself of the absence of jurisdiction of the arbitral tribunal (ATF 136 III 605[5] at 3.3.4, p. 616) – or as to the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in the case at hand. There merits of the appeal may therefore be addressed.

Moreover, the decision taken by the Arbitral Tribunal on February 4, 2015, as to the request for interpretation and/or correction of the award under appeal rendered moot the request for a stay of the federal proceedings contained in the appeal brief.

2.2. For an admissible and duly invoked grievance to be capable of appeal, it must also be reasoned as prescribed by Art. 77(3) LTF. This provision corresponds to what Art. 106(2) LTF states as to the grievance based on the violation of fundamental rights or of provisions of cantonal and intercantonal law. Akin to this article, it institutes the principle of allegation (*Rügeprinzip*) and therefore excludes for this very reason the admissibility of criticism of an appellate nature. Moreover, the appellant may not use the reply to invoke legal or factual arguments that were not presented in a timely manner, namely before the non-extendible time limit to appeal expired (Art. 100(1) LTF, in connection with Art. 47(1) LTF), nor to supplement beyond the time limit some insufficient reasons (judgment 4A_709/2014 of May 21, 2015, at 2.1 and the precedent quoted). Similarly, the possibility to submit a rejoinder must be subject to the restrictive rules just explained as to the admissibility of a reply (Bernard Corboz, *Commentaire de la LTF*, 2nd ed. 2014, n. 46 ad Art. 102 LTF).

3.
In a first and main argument based on Art. 190(2)(b) PILA, the Appellant argues that the Arbitral Tribunal wrongly accepted jurisdiction to address the claim.

3.1. Seized of a jurisdictional objection, the Federal Tribunal freely reviews the legal issues, including preliminary questions, which determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal. Yet, this does not turn this Court into a court of appeal. Therefore, it does not behoove the Court to seek itself in the award under appeal which legal arguments could justify upholding the grievance based on Art. 190(2)(b) PILA. Instead, it behooves the Appellant to draw the Court's attention to them in order to comply with the requirements of Art. 77(3) LTF (ATF 134 III 565[6] at 3.1 and the cases quoted).

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[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

However, the Federal Tribunal reviews the factual findings only within the usual limits, even when it decides as to the argument of lack of jurisdiction of the arbitral tribunal (judgment 4A_676/2014 of June 3, 2015, at 3.1).

3.2. In order to fully understand the reasons for which the Arbitral Tribunal accepted jurisdiction and the arguments of the parties to challenge it or to uphold it, the boundaries of the legal framework in which the issue was raised by the Appellant must be eliminated as a preliminary issue.

3.2.1. Art. 10(1) ECT, inserted in the third section of the treaty, states the following under the heading, "*Promotion, protection and treatment of investments*":

> (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Insofar as it is relevant to the proceedings at hand, Art. 26 ECT, devoted to the "settlement of disputes between an investor and a contracting party" contains the following provisions in particular:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> > (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> >
> > (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> >
> > (c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) …

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) [*Enumeration of the various types of arbitration being considered*].

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

A._____ is one of the four Contracting Parties at Annex IA, within the meaning of Art. 26(3)(c) ECT.

3.2.2. Litigation as to international investments, a procedural phase of the protection of foreign investors against the axe of the host state harming their rights, calls for a fundamental distinction between contract claims and treaty claims: the former are the claims the investors raise on the basis of the contract they entered into with the host state or with another public body depending on that state; the latter are based on a treaty between the national state of the investors and the host state providing for reciprocal protection of their investors (see among others: Pierre Mayer, *Contract claim et clauses jurisdictionnelles des traits relatifs à la protection des investissements*, Journal du Droit International, 2009, p. 71 *ff*, 72).

Investment protection treaties, whether bilateral or multilateral, contain substantive commitments taken over from the previous practice of international jurisdictions in general international law, such as the requirement of fair and equitable treatment, the prohibition of discriminatory measures, or the prohibition of expropriations and nationalizations without compensation. Such treaties mainly contain a jurisdiction clause pursuant to which each state agrees in advance to the benefit of investors that are nationals of the other state or of the other states who invest on its territory, that the dispute concerning the investment shall be raised by the investor against the state before an independent arbitral tribunal (Mayer, *op. cit.*, p. 73 *f*., n. 3). Such is the claims of the ECT which, at its Art. 26(2)(c), in connection with §4, gives the investor the choice – the investor may also raise the case in the judicial or administrative jurisdictions of the host state, which is a party to the different or resort to the previously agreed-upon dispute resolution mechanism (Art. 26(2)(a) and (b) ECT) – between several types of arbitration to decide any dispute concerning treaty claims (International Center for Settlement of Investment Disputes (ICSID), *ad hoc* arbitration according to UNCITRAL rules or arbitration under the aegis of the Stockholm Chamber of Commerce).

To the contrary, the contract claims are outside the scope of the investment treaty protection and its jurisdiction clauses. They belong in the national courts of the host state or, if the investment contract contains an arbitration clause, in the arbitral tribunal designated by this clause. There is a great risk to the

investor claiming a breach of the contract with the host state to see his contract claims left without answer or to be turned away by the courts of this very state, too favorable to a public law corporation of which they are a body, or even to be compelled to act in an arbitral tribunal lacking independence. This is the reason for which some suggested inserting into the investment protection treaties a clause of respect of commitments, also called a 'cover clause', 'elevator clause', 'mirror clause', or the most widely used 'umbrella clause.' Whatever its name, the clause describes the provision of an investment treaty by which each party state commits on the basis of variable formulae to comply with any obligation concerning investments made by nationals of the other state (Gérard Cahin, *La clause de couverture* (*dite:* umbrella clause), Revue Générale de Droit International Public, 2015, p. 103 *ff*, 103). In other words, the umbrella clause puts the contract concluded by the investor with the host state directly under the protection of the bilateral or multilateral treaty protecting investments, with that treaty shielding the contract under its 'umbrella', so that any disregard of a contractual obligation will *ipso facto* also be a breach of an international commitment and the contract claims in connection with this may be invoked in the jurisdictional body foreseen by the treaty (Mayer, *op. cit*., p. 80; Cahin, *op. cit.*, p. 127 *ff*). The aforesaid body will most often be an arbitral tribunal deciding under the aegis of an international arbitration institution, such as ICSID. The clause in question is fraught with uncertainties, whether as to the scope of the obligations protected, its legal effects, or its jurisdictional function (Cahin, *op. cit.*, p. 105) and the arbitral tribunals that have had to examine it are divided as to its scope (Mayer, *op. cit.*, p. 80 and the arbitral awards quoted in footnotes 25 to 27). There is no need to enter into this controversy. One will simply review hereafter the legal issues indispensable to deciding the case at hand. The last sentence of Art. 10(1) ECT unquestionably constitutes an umbrella clause.

It is as undeniable that A._____ availed itself of the opportunity, reserved at Art. 26(3)(c) ECT, to not give its unconditional consent to the submission of any dispute to an international arbitration or conciliation procedure as to the disputes falling within the scope of this umbrella clause. The dispute between the parties requires a determination of the impact of the aforesaid clause and of the reservation as to the Respondent's claims and therefore as to the jurisdiction of the Arbitral Tribunal. This Court will carry out this research on the basis of the original text of the award under appeal in order to avoid any discussions arising from a possible disagreement between the parties as to the accuracy of the translation of the pertinent passages proposed in their respective briefs.

3.3.

3.3.1. In its award of December 3, 2014, the Arbitral Tribunal summarized the Appellant's arguments (n. 270 to 276) and the Respondent's (n. 277 to 279), as Respondent and Claimant in the arbitral proceedings, respectively, and reasoned as follows its decision to accept jurisdiction to address the Respondent's claim:

> *280.*
> *First, the Tribunal notes that the Claimant's primary request for relief, in its Claim (i), seeks a declaration "that Respondent has breached Article 10 (1) of the ECT". This paragraph of Article 10 indeed includes the last sentence which is considered as the umbrella clause.*

*281.*
*However, in reply to the Respondent, the Claimant expressly states that it does not raise an umbrella clause claim under the last sentence of that provision. The Claimant's request for relief, therefore, is to be interpreted with that qualification and limitation. Consequently, the Claimant's argumentation for a breach does not in any way focus on a breach of the last sentence, but only on the earlier sentences of Article 10(1).*

*282.*
*In this context, the Respondent argues that, even though the Claimant invokes the language of FET [acronym for Fair and Equitable Treatment] and unreasonable impairment, what it really asserts is an umbrella clause claim falling within the last sentence of Article 10(1) ECT. The Tribunal is not persuaded by that argument. When considering the Respondent's conduct under the criteria of FET and unreasonable impairment, all of that conduct can be relied on. This conduct includes the PPAs and other contractual arrangements between the parties which are obviously a very relevant framework regarding the expectations of the Parties. Further, their implementation by each of the Parties is indeed relevant for the examination of whether there may be a breach of the provisions on FET and unreasonable impairment. That does not make them a claim under the umbrella clause.*

*283.*
*Accordingly, the Tribunal will not examine whether the umbrella clause has been breached, but concludes that this will not prevent it from accepting jurisdiction over the claims raised regarding alleged breaches of the earlier sentences of Article 10(1) ECT.*[7]

3.3.2. To challenge the reasons thus held by the Arbitral Tribunal and the conclusion it drew as to its jurisdiction, the Appellant submits a lengthy and often redundant argument, which it nonetheless managed to summarize in a few lines. In its view, the Arbitrators did not analyze, in depth, the true nature of the Respondent's claims and stopped the argument advanced by the latter, according to which its claims were based on the duty to provide fair and equitable treatment to the investor. In so arguing, the Respondent was attempting to benefit from the consent to arbitration given by the Appellant, although the claims were really based on the umbrella clause, as to which that party had withheld its consent. The Arbitral Tribunal therefore decided in the absence of an arbitration clause (reply n. 5).

This Court will review the objection to the jurisdiction of the Arbitral Tribunal by focusing its attention on its very essence, as it appears from this summary. Therefore, it will not address all arguments developed in the Appellant's briefs, which it duly took into account, some of which – sometimes enhanced by explanatory sketches (see reply n. 44) – disregarded the aforesaid rules as to a reply (see above, 2.2), but will analyze those which appear objectively relevant to the argument under review.

3.4.

[7] Translator's Note: In English in the original text.

3.4.1. The arbitration clause must meet the requirements of Art. 178 PILA.

Pursuant to Art. 26(3)(a) ECT, each contracting party gave its unconditional consent to the submission of any dispute to an international arbitration or conciliation procedure defined by the provisions of the same article. As to Art. 26(4) ECT, it provides in substance that if an investor chooses to refer a dispute with a contracting party to arbitration, he gives his consent in writing that the dispute be brought to one of the arbitral institutions listed in the rest of the clause. Art. 26(5)(a)(ii) adds that the consent foreseen by para.(3) and the investor's written consent pursuant to para.(4) are deemed to satisfy the requirement of a written agreement for the purposes of Art. II of the June 10, 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (RS. 0.277.12). Yet, the formal requirements at Art. II(2) of this treaty are certainly not less strict than the features of the simplified written form as prescribed by Art. 178(1) PILA (ATF 121 III 38 at 2c, p. 44; Kaufmann-Kohler and Rigozzi, *Arbitrage international*, 2nd ed. 2010, n. 212 and 212a). Thus, it is indisputable – and nor is it disputed – that the clauses of the ECT quoted satisfy the formal requirement of the latter provision.

3.4.2. Pursuant to Art. 178(2) PILA, the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties, or the law governing the dispute and in particular the law applicable to the main contract, or indeed Swiss law. The provision quoted therefore institutes three alternate connections *in favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the object of the dispute (*lex causae*), and Swiss law as the law of the seat of arbitration (ATF 129 III 727 at 5.3.2, p. 736).

The Arbitral Tribunal seated in Zürich decided on its own jurisdiction and adjudicated the dispute in the light of the ECT, a treaty which is an integral part of Swiss law and does not refer to the law of another state as to the interpretation and the enforcement of its jurisdictional clause. In the absence of a choice of law as to the aforesaid clause, Swiss law is therefore both the *lex causae* and *lex fori* in the case at hand. The review of this Court will therefore be limited to the issue as to whether the Arbitral Tribunal disregarded Swiss law – concretely the ECT – by accepting jurisdiction. It must be pointed out in this respect that *in casu* the arbitration agreement is based on a peculiar mechanism because it is anchored directly in a multilateral treaty concluded by states for the protection of investments, one provision of which provides for arbitration to settle the disputes concerning the alleged violations of its material clauses (also called substantial). Arbitration practice likens such a provision to an offer of each of the contracting states to resolve disputes that may arise with investors (not parties to the treaty) of the other contracting states by arbitration. The arbitration agreement is concluded only when the investor accepts the state's offer, which he most often does by conclusive act when filing the request for arbitration (Kaufman-Kohler and Rigozzi, *op. cit.*, n. 230 and footnote 148). Art. 26(4) ECT does require that the investor give his consent in writing. However, the Appellant does not argue that the Respondent would not have done so, neither does it invoke a form error which could invalidate the acceptance of the offer. Therefore the existence of an arbitration agreement must be admitted under the non-standard arrangement, which case law has considered like a contract in favor of a third person within the meaning of Art. 112 CO (judgments 4P.114/2006 of September 7, 2006, at 4.1 and 1P.113/2000 of September 20, 2000, at 1c).

3.5. As authorized by Art. 26(3)(c) ECT, the Appellant, akin to the three other contracting parties, did not give its unconditional consent as to disputes arising with regard to the provision contained in the last sentence of Art. 10(1) of the treaty, namely the umbrella clause. The scope of this unilateral statement of will pursuant to the topical clause of the multilateral treaty at issue must be envisaged to determine whether or not the Respondent's clams fell within the aforesaid clause. If this was the case, the Arbitrators would have been wrong to accept jurisdiction to handle the dispute between the parties and the argument based on Art. 190(2)(b) PILA would have to be admitted.

3.5.1. Like any other treaty, the ECT must be interpreted in good faith according to the ordinary meaning of the words of the treaty, in their context, and in the light of the treaty's object and purpose (Art. 31(1) of the Vienna Convention of May 23, 1969 on the Law of Treaties [VC; RS 0.111]; ATF 131 III 227 at 3.1, p. 229). Moreover, the principle of good faith is intimately connected to the rule of interpretation of the effectiveness of the law, even if the latter does not expressly appear at Art. 31 VC. The interpreter must therefore choose between several possible meanings that allow for effective application of the clause, the meaning of which is being researched, whilst however avoiding reaching a meaning that contradicts the letter or the spirit of the treaty (judgment 4A_736/2011 of April 11, 2012, at 3.3.4).

It is not different as to the reservation formulated by a state, which must be considered as an integral part of the treaty (last case quoted, at 3.3.1). "Reservation" means a unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state (Art. 2(1)(d) VC). Pursuant to Art. 4.2.6 of the Guide to Practice on Reservations to Treaties adopted by the International Law Commission of the United Nations on August 11, 2011, (as to the origin and the nature of the document available on the internet site http://legal.un.org, see Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, European Journal of International Law, 24/2013, p. 1061 *ff*), a reservation must be interpreted in good faith, taking into account its author's intent as reflected by the text of the reservation first and by the object and the purpose of the treaty and the circumstances in which the reservation was formulated (p. 25). The official commentary of the Guide emphasizes, among other points, that with the possible exception of the treaties concerning human rights, there is no reason to take the view that, as a general rule, any reservation should be interpreted restrictively (p. 496 n. 13).

3.5.2. In the theoretical part of its main brief (appeal n. 77 to 103), the Appellant emphasizes at first that consent to arbitration cannot be admitted lightly (ATF 140 III 134 at 3.2, p. 139). Recalling then some of the rules mentioned above as to the interpretation of treaties, it adds the principle *in dubio mitius*, which it connects to this case law to deduce that, when in doubt, one must prefer the interpretation of the treaty which is the less burdensome for the party making the commitment; in other words, the interpretation which will reduce the scope of acceptance of the state to seeing its disputes with an investor submitted to arbitration as much as possible. The Appellant refers to case law and legal writing (in particular: Christoph H. Schreuer, *Fair and Equitable Treatment (FET): interactions with other standards* in *Investment*

*Protection and the Energy Charter Treaty*, Coop and Clarisse [editors], Huntingdon: JurisNet 2008, p. 63 *ff*, 90), also emphasizes the necessity to distinguish between claims based on the clause imposing fair and equitable treatment on the one hand and those which rely on an umbrella clause on the other hand, the latter clause being subsidiary in its views as compared to the former. It concludes by emphasizing that in international investment law, an arbitral tribunal may not simply rely on the qualification the claimant gives to its claims but it is obliged to determine the real legal nature of the claims submitted on the basis of the facts stated in support.

Applying these principles to the case at hand, the Appellant points out at the outset that the umbrella clause at Art. 10(1), last sentence, ECT, the application of which it rejected expressly as authorized by the reservation at Art. 26(3)(c) ECT, does not concern only contractual obligations but any commitment made by the host state towards investors of another contracting party of the ECT. Having made this point, it envisages first the question as to whether the Respondent's claims fall within the category covered by the umbrella clause. In this respect, it criticizes the Arbitral Tribunal for relying merely on the Respondent's statements to decide the matter. Indeed, in its view, an in-depth analysis demonstrates that that party sought to be placed into the same financial situation in which it would have been if the PPAs had not terminated; consequently, no matter the label the Respondent tried to present its claims under, they fell squarely within the scope of the umbrella clause. Second, the Appellant criticizes the Arbitrators for holding that, even if a statement of facts falls within both the category of treaty claims and that of contract claims, it is sufficient for jurisdiction to be given in one or the other respect. According to the Appellant, this approach is contrary to the principle *in dubio mitius* and deprives the reservation it made to Art. 26(3)(c) ECT of any meaning, thereby disregarding the principle of effectiveness of the law because an investor could simply argue that its claim relies on both grounds merely with a view to circumvent the reservation made as to the claims arising from the umbrella clause.

3.5.3. The Appellant's arguments thus developed must be examined in the light of the legal principle governing the interpretation of treaties and the reservations they contain, taking into account the objections raised in the Respondent's answer (n. 59 to 124). Before doing so (see 3.5.4, hereunder), some theoretical considerations must be made to provide a better understanding of the answers given to the issues raised in the case at hand.

3.5.3.1. It can be admitted with the Appellant that the umbrella clause at Art. 10(1), last sentence, ECT and the substantive commitments made by the contracting parties to the treaty in the previous sentences of the same provision, such as the commitment to fair and equitable treatment at any time granted to the investments of the investors of the other contracting parties, are not interchangeable. The Respondent concedes as much (answer n. 83). Moreover, this is a finding based on simple logic, except if one were to deny any meaning to the umbrella clause and, even more, to the exclusion by a contracting party of its unconditional consent to dispute in this respect being submitted to the arbitration procedure stated in the treaty. To substantiate the argument of a violation of the fair and equitable treatment contained in the treaty, the investor cannot therefore simply establish that the host state disregarded its obligations as contained in the umbrella clause. He must instead demonstrate, at the very least, that the manner in which

the state treated its investment was unfair and/or inequitable. This being so, it appears nonetheless very difficult, or even excluded, to completely leave aside the specific historical context in which the foreign investor made investments in the territory of the host state, as well as the legal framework germane to these investments. Therefore, the taking into account such elements, in particular the reference to the contract concluded by the investor with the host state, could not imply that a claim based on the breach of the requirement of fair and non-discriminatory treatment should necessarily fall within the scope of the umbrella clause due to this very fact.

Moreover, it is not clear that as to its scope *ratione personae*, an umbrella clause allows a foreign shareholder to avail himself of the contracts that a company under local law, which is the subject of its investment, entered into with the host state or with a public company dependent upon it, and arbitration case law is divided as to this issue (see among others: Sophie Lemaire, *La mystérieuse Umbrella Clause […]*, Revue de l'arbitrage, 2009, p. 479 *ff*, 498 to 501 and Cahin, *op. cit.*, p. 135 *f.*, each with references to case law). Asked differently, the question boils down to asking whether the investor may claim the benefit of a contract to which he is not a party on the basis of the umbrella clause. The first author quoted answers in the affirmative as to the ECT because Art. 10(1) *in fine* of the treaty refers to the obligations a state agreed to be bound by, not only toward an investor but also "as to the investments" of an investor of another contracting party, thus covering two different realities (Lemaire, *op. cit.*, p. 501, n. 51). This is also the interpretation favored by the official document established by the Secretariat of the Energy Charter, according to which, "*[t]his provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country or a contract between the host country and the parent of the subsidiary*"[8] (*The Energy Charter Treaty – A Reader's Guide*, June 2002, p. 26, cited by Lemaire, *ibid*.) As to the scope of application *rationae materiae* of the umbrella clause, the issue – just as disputed – is whether or not all formal sources of obligations may be covered by this clause, whether contractual, unilateral or conventional (see Lemaire, *op. cit.*, p. 484 *ff*; Cahin, *op. cit.*, p. 119 *ff*;). Lemaire suggests – not irrelevantly - that the violation of a generally applicable standard, abstract and hypothetical, enacted by the host state, does not affect the umbrella clause, whilst if the measure in dispute is specific and categorical, it constitutes a decision as to which the investor may seek the protection of the aforesaid clause (*op. cit.*, p. 490, n. 26).

The Appellant's unilateral statement pursuant to Art. 26(3)(c) ECT is a reservation in the legal meaning of the term. As such, it must be interpreted in good faith, according to the intent of its author, which primarily arises from its text and according to the object and the purpose of the treaty in which it is found and taking into account the circumstances in which it was formulated. No matter what the Respondent says (answer n. 102 to 106), the reservation does not necessarily have to be interpreted restrictively (see 3.5.1, §2, above). Conversely, the Appellant's attempt cannot be upheld to the extent that it would indirectly widen the scope of the reservation at issue by way of an extensive interpretation of the umbrella clause in addition to the principle *in dubio mitius*. This would be tantamount to depriving Art. 10(1) ECT (with the exception of its last sentence) and Art. 26(3)(a) ECT of any meaning, contrary to the rule of interpretation of effectiveness of the

[8] Translator's Note: In English in the original text.

law, insofar as the treaty claims would be assimilated into the contract claims and thereby outside the jurisdiction of the tribunal instituted by the treaty. Going back to the image of the umbrella, it would be as though the carrier of the protective umbrella sought to attract the largest possible number of people under it (expansive interpretation of the umbrella clause although its aim is to restrict the jurisdictional sovereignty of the host state), only to close the umbrella suddenly (invocation of the reservation) to leave the unfortunate people without a defense against bad weather. Moreover, the *in dubio mitius* presumption is no longer applied very often (Robert Kolb, *Interprétation et création du droit international*, 2006, p. 659, footnote 841), including as to the interpretation of investment protection treaties (Katrin Meschede, *Die Schutzwirkung von* umbrella clauses *für Investor-Staat-Verträge,* 2014, p. 53 *ff*).

3.5.3.2. In accordance with a general principle of procedure, one must rely first on the content and legal ground of the clam raised by the claimant in order to decide jurisdiction. The subject of the claim is defined by the party filing the claim, so that the defendant does not have the power to modify it or to compel the claimant to change its legal basis. The claimant determines the issue it submits to the court and the latter gives the answer to the question posed. However, as to the legal assessment of the facts submitted in support of the claim, the court is not bound by the claimant's arguments (ATF 137 III 32 at 2.2; judgment 4P.18/1999 of March 22, 1999, at 2c).

Moreover, when the decisive facts as to the jurisdiction of the tribunal are also decisive as to the merits of the claim – in such a case, one refers to doubly pertinent facts or to double relevance (*doppelrelevante Tatsachen*; judgment 4A_703/2014 of June 25, 2015, meant for publication, at 5.1) – the adducement of the evidence as to such facts is deferred to the stage in the proceedings during which the merits of the claim will be examined. This is the case in particular when jurisdiction depends on the nature of the claim (same judgment at 5.2). However, the theory of double relevance does not come into consideration when the jurisdiction of an arbitral tribunal is challenged because a party may not be compelled to accept that such a tribunal would decide as to its disputed rights and obligations if it has no jurisdiction to do so (same judgment, at 5.3 and the precedents quoted).

3.5.4.
3.5.4.1. *In casu*, the Arbitral Tribunal was right to rely first on the claim as submitted by the Respondent to decide the jurisdictional issue. In doing so, it merely complied with the general rule just recalled. Consequently, the Appellant seeks in vain to present the claim in another light, to give it a different color and in short to reshape it as it sees fit in order to fit it into the scope of the umbrella clause, the application of which would be prevented by the reservation it made.

Moreover, no matter what the Appellant says, the Arbitrators did not blindly rely on the legal qualification given to the claim by the Respondent with regard to the legal issue as to which they had full power of review. Except for its submissions for a finding of the existence of a right (i) and (ii) the Respondent's claim in its latest formulation contained four submissions on the merits against the Appellant and more precisely, one main submission and three alternate submissions (award n. 80). The main submission (iii) sought compensation for the damage caused by the termination of the PPAs and the adoption of decree n.

50/2011. It was rejected by the Arbitral Tribunal because the termination in dispute did not constitute *per se* a breach of Art. 10(1) ECT (award n. 535). The same fate was suffered by the first alternate submission (iv), which sought compensation for the very absence of adoption by the Appellant of a compensation mechanism for the stranded costs which could reestablish the profits generated by the PPAs in addition to the adoption of the aforesaid decree. The Arbitrators agreed with the Appellant's opinion in this respect and found that following the damage theory formulated in this submission would have been a way to admit the Respondent's attempt to reintroduce the PPAs (award n. 640). However, the Arbitral Tribunal found that the damages sought pursuant to the second alternate submission (v) based on both the adoption of the aforesaid decree on one hand and the failure to set up a mechanism to compensate for the stranded costs so that C._____ could have a reasonable return on its investment on the other hand, was not tantamount to creating a synthetic PPA, which is why that submission was capable of review (award n. 641). As to the third alternate submission (vi), exclusively based on the damage caused by the adoption of decree n. 50/2011, the Arbitrators did not address it because, in their view, it was duplicating part of the previous submission (award n. 570).

According to the Appellant, these explanations did not concern the jurisdiction of the Arbitral Tribunal but the computation of damages (reply n. 18). Nothing could be less certain. It appears to the contrary that they seek to distinguish the submissions of the claim on the basis of their respective legal nature and not to establish the quantum of damage yet it is not important in this respect that they would not appear in a specific chapter dealing with jurisdiction. In doing so, the Arbitrators therefore did not rely on the mere statements of the Respondent as though the theory of doubly pertinent facts were not applicable. Instead, they tried to discover what the facts advanced by that party to substantiate its claims corresponded to legally speaking, whilst the existence of such facts was not in dispute as such.

3.5.4.2. As the Respondent rightly points out, it never stated that D._____ breached its contractual obligations towards C._____ by terminating the PPA prematurely. It could hardly have argued this as the termination was imposed upon D._____ through the Appellant by way of a decision of the EC which it could not escape. Neither did the Respondent argue that some clauses of the PPAs were disregarded by D._____. It must be pointed out moreover that it would not necessarily be a critical objection to the application of the umbrella clause (see 3.5.3.1, §2, above), that neither the investor, *i.e.* the Respondent, nor the host state, *i.e.* the Appellant, were parties to the PPAs. Moreover, the latter were entered into before the investor arrived. Therefore, seeking at all costs to classify within the contract claims the Respondent's claim pursuant to its submission (v) – the only one upheld by the Arbitral Tribunal – is an approach which does not take into account the circumstances of the case at hand.

The Arbitral Tribunal rightly saw that, in connection with the aforesaid submission, it was argued that the Appellant failed to establish a reasonable system of compensation for the stranded costs whilst such compensation was not only allowed by EU law but even encouraged by the foreign advisors of the Appellant and in particular of the EC (award n. 467). One can only approve the Arbitral Tribunal's finding that such a grievance was within the framework of the general duties imposed upon the host state by the first sentences of Art. 10(1) ECT, to grant fair and equitable treatment to the investments of the investors

and other contracting parties and not to impair their enjoyment or maintenance by unreasonable or discriminatory measures. It was therefore not at all contrary to this treaty provision to qualify the submission made in this respect as a treaty claim and consequently to hold that it was outside the reservation.

3.5.4.3. If one understands the Appellant well, the mere fact that there may have been a connection between the Respondent's legitimate expectations as to the protection of its investments on the one hand and the existence or the maintenance of the PPAs on the other hand, would be sufficient to turn into contract claims the claims based on the alleged failure to respect the undertakings on which such expectations were based. Such an assertion is unconvincing. Pushed to the extreme, it would be tantamount to forbidding an investor to denounce a violation of the fair and equitable treatment standard contained in the treaty merely because he invested funds in the host state with a view to benefitting from the advantageous conditions under which a company controlled by this state would purchase the energy produced by the producer the subject of its investment. Interpreted in this manner, Art. 10(1) ECT, which imposes compliance with this standard, would be deprived of any effectiveness. Moreover, and more generally, one does not see that it would be possible to totally disregard the factual context and the legal framework in which the investments were made when it comes to verifying that the investor was then given just, fair, and nondiscriminatory treatment. This would overlook that the very fact of investing is *per se* a legally relevant act.

The aforesaid remarks may also be opposed *mutatis mutandis* to the Appellant's argument, according to which the umbrella clause would not be limited to the contractual commitments of the host state, but would also address other formal sources of obligations, such as unilateral government acts (see in this respect 3.5.3.1, §2, *in fine*, above).

3.5.4.4. Finally, for the reasons already stated above, (see 3.5.3.1, §3), the general principles of interpretation of treaties and of the reservations therein are of no assistance to the Appellant.

3.5.5. Therefore, the Arbitral Tribunal was right to accept jurisdiction as to the Respondent's submission (v). Therefore, the argument based on Art. 190(2)(b) PILA must be rejected.

4.
In a second group of arguments, the Appellant argues that the Arbitral Tribunal violated its right to be heard when it computed the Respondent's loss.

4.1.
4.1.1. As guaranteed by Art. 182(3) and 190(2)(d) PILA, the right to be heard in contradictory proceedings is not different in principle from that enshrined in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus, it was held that in the field of arbitration that each party has the right to state its views on the facts essential for judgment, to submit its legal arguments, to propose evidence on relevant facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c, p.

643). As to the principle of contradiction, it guarantees that each party shall be able to express its views as to its adversary's arguments, to examine and discuss the evidence adduced, and to refute it with its own evidence before a decision can be taken against it. Finally, the principle of equal treatment within the meaning of the aforesaid two provisions demands that the arbitral tribunal treat the parties in a similar manner at all stages of the proceedings (ATF 133 III 139 at 6.1, p. 144 and the references).

4.1.2. The right to be heard in contradictory proceedings sanctioned by Art. 190(2)(d) PILA certainly does not require an international arbitral award be reasoned (ATF 134 III 186[9] at 6.1 and the references). Yet, it imposes upon the arbitrators a minimum duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2, p. 248 and the cases quoted). This duty is violated when, due to oversight or a misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some items apparently important to resolve the dispute, it behooves the arbitrators or the respondent to justify this omission in their observations as to the appeal. It behooves them to demonstrate that, contrary to the appellant's allegations, the items omitted were not relevant to resolve the case at hand or, if they were, that they were refuted by the arbitral tribunal implicitly. However, the arbitrators are not obliged to discuss all of the arguments invoked by the parties. They cannot be held in violation of the right to be heard in contradictory proceedings for not refuting, albeit implicitly, an argument objectively devoid of any relevance (ATF 133 III 235 at 5.2 and the cases quoted).

4.1.3. In view of the formal nature of the right to be heard, the violation of this guarantee leads to the annulment of the award under appeal (ATF 133 III 235 at 5.3, p. 250, *in fine*).

4.2. In order to determine the loss addressed by submission (v) in the claim, the Arbitral Tribunal relied on the computation made by an expert that Respondent retained for this purpose (E._____ company) as to the difference between the hypothetical situation in which the investment would have been if the facts attributed to the Appellant had not taken place ('But-For Scenario' or 'Counterfactual Scenario'), on the one hand and the actual situation of the investment ('Actual Scenario'), on the other. This led to an amount of EUR 107 million, which was allocated to the Respondent as damages (award n. 643 to 681). In order to understand the Appellant's arguments as to this calculation, it is not necessary to set it forth in detail (on this issue, see appeal brief n. 139 to 154).

4.3.
4.3.1. In the first part of the argument, the Appellant submits that the Arbitral Tribunal disregarded its reply to access its opponent's means in order to criticize and refute them (appeal. N. 182 to 186). This would be a violation of the right to be heard, which could also constitute a violation of equal treatment of the parties. In this respect, the Appellant submits that the E._____ Report, relied upon by the Arbitrators as a basis for calculation, itself relied on a forecasting model developed by a third party – F._____ company

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

(hereafter: F._____) – at the Respondent's request and the Appellant did not obtain access to the model despite its repeated complaints and the steps undertaken with a view to obtaining the production of the pertinent documents.

4.3.2. Without really being contradicted by the Appellant in this respect, the Respondent explains that F._____, contrary to E._____, is not engaged as an expert entrusted with assessing damages in the framework of a dispute but merely provides its clients with forecasts as to the price of electricity in particular, which it created from information gathered throughout the years, without disclosing to them the underlying data which constitutes its know-how and its business. F._____ would therefore be an indicator of trends to which reference is frequently made to determine the projected evolution of the electricity market. The Respondent points out that in the arbitration, it disclosed all the exchanges it had with the latter company, so that both parties to the proceedings were given access to the same level of information in this respect (answer n. 132 to 135).

In the light of these explanations, which appear plausible to say the least and are not challenged formally, there is no violation of equal treatment of the parties in the case at hand, which the Appellant merely deduces from the different level of information between the parties as to the basic data elaborated by F._____ (appeal n. 187).

From the point of view of the right to be heard, one may wonder if the Appellant really did all it could to challenge the reliability of the data furnished by F._____. Indeed, as the Respondent points out, the Defendant in the arbitration could have injected into the E._____ model its own forecast of the price of electricity on the European market, carry out its own market simulations to compare them with those of F._____, or submit its own calculation of the damages to which the Respondent said it was entitled. Ultimately, the Appellant could have invoked Art. 184(2) PILA and request the intervention of the state court at the seat of arbitration to try to obtain, if necessary by a rogatory commission, F._____'s disclosure of the sources upon which its forecasts were based and how they were prepared (see judgment 4P.221/1996 of July 25, 1996, at 3d; Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 88; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 1368). In this context, the Appellant's metaphor (reply n. 55) is not appropriate. Instead of asking today how it would have been possible to provide evidence of the existence of the iceberg, despite seeing its tip only, it would have been advised to undertake everything at the time to ensure that the visible part of the iceberg did not conceal a much more important submerged part. Arguing *ex post* under such conditions that it was impossible to access evidence without having done everything necessary to implement it, appears hardly compatible with the rules of good faith.

Moreover, the Arbitral Tribunal took into account the Appellant's arguments as to the forecasts prepared by F._____. It devoted two paragraphs of the award to them and admitted that they justify giving only limited evidentiary value to this piece of evidence (n. 674 to 675). This is also the sanction afforded by

Swiss civil procedural law in cases of this kind for example. Art. 164 CPC[10] (RS 272) states indeed that if one of the parties refuses to collaborate without a valid reason, the tribunal takes this into consideration when assessing the evidence. The same applies to international arbitration. Thus, it has been held in a comparable framework for a long time that the factual consequences which an arbitrator must draw from the statements and the behavior of a party or a witness, or from their silence or absence, belong to the assessment of the evidence (last case quoted, at 3c). It must be pointed out in this respect that when seized of a civil law appeal against an international arbitral award, the Federal Tribunal does not review the assessment of the evidence, even if it is arbitrary. Similarly, the way the rules of the burden of proof were applied is outside the scope of its review (judgment 4A_606/2013 of September 2, 2014, at 5.3, §3 and the precedent quoted).

The argument concerning the violation of the right to be heard turns out to be unfounded therefore, insofar as the matter is capable of appeal in this respect.

4.4.

4.4.1. In the second part of the same argument, the Appellant claims a formal denial of justice and submits that the Arbitral Tribunal failed to address an important argument it submitted as to the Present Value (PV) of cash flow after valuation date. In summary of its argument as to this issue (see appeal brief 165 to 172 and 190 to 196), it argues that the Arbitrators plainly and simply applied the same figure as E._____ to determine the amount as to this item in the effective scenario, namely EUR 63 million when it had reduced the corresponding amount from EUR 176 to 146 million in the hypothetical scenario (see line [1] of the spreadsheet reproduced at n. 680 of the award). According to the Appellant, the same reason that led them to hold that the figure raised by E._____ in the latter scenario as to this item was overestimated – *i.e.* the uncertainties as to the reliability of the data of F._____ due to the lack of access to them – should also have led them to consider that the future cash flows of company C._____ in the effective scenario were largely underestimated.

4.4.2. In footnote 1203, to which n. 672 of the award refers, the Arbitral Tribunal indicated why it did not consider it necessary to review the amount of EUR 63 million raised by E._____ as to the effective scenario. This is sufficient reason to justify taking this amount into consideration and *a contrario*, the implicit rejection of the arguments by which the Appellant wanted it to be reassessed. It does not matter that the Appellant describes the footnote at issue as "cryptic", particularly because the right to be heard does not require an international arbitral award to be reasoned (judgment 4A_178/2014[11] of June 11, 2014, at 5.1 and the precedents quoted). Moreover, its arguments at n. 62 to 66 of the reply do not change the matter. In reality and although it disputes this, the Appellant attempts here to challenge the result of the assessment of the evidence by the Arbitral Tribunal under the cloak of an argument based on Art. 190(2)(d) PILA, which is not admissible.

[10] Translator's Note: CPC is the French abbreviation for the Swiss Federal Code of Civil Procedure.
[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-substantive-review-assessment-evidence

Consequently, the argument of a violation of the right to be heard appears unfounded in its second part too, insofar as the matter is capable of appeal in this respect.

5.
In a final argument, the Appellant submits that the award under appeal violates substantive public policy within the meaning of Art. 190(2)(e) PILA.

5.1. An award is incompatible with public policy when it disregards the essential and broadly recognized values which, according to prevailing concepts in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). One must distinguish between procedural and substantive public policy.

An award is contrary to substantive public policy when it violates some fundamental principles of substantive law to such an extent that it is no longer compatible with the determining legal order and system of values; among such principles are in particular the sanctity of contracts, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition of discrimination or confiscatory measures, and the protection of incapables (same judgment, at 2.2.1).

5.2. According to the Appellant, when the Arbitral Tribunal ordered it to pay EUR 107 million with interest from the date of the award without taking into consideration the qualitative criteria and the procedural constraints arising from European law in this respect, it would compel it to violate its international obligations, in particular the Treaty on the Functioning of the European Union (hereafter: TFEU) and consequently the principle *pacta sunt servanda* as understood in international public law. This would not be compatible with substantive public policy under Art. 190(2)(e) PILA.

5.3.
5.3.1. With plenty of quotes from legal writing and case law concerning public international law, the Appellant first attempts to demonstrate that the violation of the principle *pacta sunt servanda* within the meaning of that law, would render the award contrary to substantive public policy, which is sanctioned by the aforesaid provision.

It is far from certain that such a demonstration has been made. The primacy of international law on domestic law is doubtlessly a generally admitted principle, including in Switzerland (see Art. (4) CTS[12]; RS 101). This does not necessarily mean that an award ordering a party to compensate its opponent fairly would be incompatible with the restrictive definition of substantive public policy recalled above, even though it would contradict a standard of supranational law (see ATF 132 III 389 at 3). Be this as it may, the theoretical question raised by the Appellant needs not be examined any further for the following reasons.

5.3.2. After carefully analyzing the issue on the basis of the argument advanced by both sides, the Arbitral Tribunal held that it could uphold the Respondent's conclusion (v) without infringing on European law

[12] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

because, on the one hand, there was no contradiction in this respect between the ECT and the TFEU and on the other hand, because the compensation awarded to the Claimant was below the maximum amount of the stranded costs as determined by the EC. It explained this clearly in its award (n. 523, 538, 547 and 681).

5.3.2.1. According to the Appellant, the Arbitral Tribunal did not take into consideration the qualitative criteria to hold the compensation in dispute inadmissible in the light of European law. It refers in this respect to a document entitled, "*Commission Communicational Relating to the Methodology for Analyzing State Aid Linked to Stranded Costs,*" which it submitted as Exhibit R–331. In its view, this document would establish that compensation for such costs are likened to state aid and therefore subject to certain conditions in this respect.

Neither did the Arbitrators take into account the procedural constraints applicable to state aid in European law and particularly Art. 108(3) TFEU, pursuant to which, any payment seeking to compensate for stranded costs must be submitted to the EC for prior examination. Yet, their attention was drawn to this issue in the Appellant's first post-hearing memorandum (n. 199).

Moreover, according to the Appellant, the Arbitral Tribunal did not consider it necessary to be more precise as to the aforesaid requirements despite the request for interpretation submitted.

5.3.2.2. The issue may remain open as to whether or not the mere filing of one exhibit among some 500 it placed in the arbitration file and the few lines devoted to the alleged procedural constraints would be sufficient for the Appellant to draw the Arbitrator's attention to the problem it raises in the appeal.

In reality, what is argued is that the Arbitral Tribunal would not have taken into consideration the Appellant's arguments as to the qualitative criteria and the procedural constraints applicable to state aid in European law. Under the cloak of a violation of substantive public policy, the Appellant actually argues a violation of its right to be heard. Yet, it does not raise the grievance based on Art. 190(2)(d) PILA in this framework. Consequently, the matter is not capable of appeal by this Court in this respect due to Art. 77(3) LTF. Moreover, the Appellant does not demonstrate that, irrespective of the two arguments that the Arbitral Tribunal did take into consideration (in violation of its right to be heard or not), the reasons justifying compensating the Respondent that it upheld would in themselves render the award under appeal incompatible with substantive public policy.

Moreover and in any event, it does not appear from the arguments raised by the parties in the appeal brief and in the answer, taking into account the qualitative criteria and the procedural constraints advocated by the Appellant, that would certainly bring to light a violation of European law by the Arbitral Tribunal and, depending upon the answer given to the theoretical question mentioned above but left undecided, to a finding that the award is incompatible with substantive public policy. The Appellant's attempt to supplement its arguments in the reply is doomed from the outset and so is the filing of an exhibit dated after the award under appeal.

6.
The Appellant loses and it shall pay the judicial costs (Art. 66(1) LTF) and compensate the Respondent for the federal judicial proceedings (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 100'000 shall be borne by the Appellant.

3.
The Appellant shall pay CHF 200'000 to the Respondent for the federal proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the Permanent Court of Arbitration.

Lausanne, October 6, 2015

In the name of the First Civil Law Court of the Swiss Federal Tribunal

| Presiding Judge: | Clerk: |
| --- | --- |
| Kiss (Mrs.) | Carruzzo |