Federal Court
Federal Tribunal
Federal Tribunal
Federal Court

4A_66/2024

Judgment of 13 June 2024

I. Civil Law Division

occupation
Federal Judge Kiss, presiding member,
Federal Judge Rüedi,
Federal Judge May Canellas,
Court Clerk Leemann.

Parties to the proceedings
Czech Republic,
represented by attorney Dr. Xavier Favre-Bulle,
and lawyer Dr. Hanno Wehland, complainant,

against

1. A._____ NV,
2. B._____ Limited (formerly A1._____ Limited),
3. C._____ Limited,
4. D._____ S.à.rl,
all four represented by attorneys Frank Spoorenberg and Dr. Lukas Beeler as well as attorney Stephanie Huchler,
Respondents.

Object
International arbitration,

Appeal against the interim award of 20 December 2017 (No. 2013-35) and the final award of 15 December 2023 (No. 2013-35) of the arbitral tribunal sitting in Geneva.

Facts:

A.

Aa A._____ NV (Plaintiff 1, Respondent 1) is a company with registered office in U._____, the Netherlands. B._____ Limited (formerly A1._____ Limited; Plaintiff 2, Respondent 2) and C._____ Limited (Plaintiff 3, Respondent 3) are companies with registered office in V._____ and

W._____, Cyprus respectively. D._____ S.à.rl (Plaintiff 4, Respondent 4) is a company with registered office in Luxembourg.
The plaintiffs made investments, among other things, in the solar energy sector in the Czech Republic (defendant, complainant). Specifically, they invested in the Czech company E._____. This was founded in 2007 and is in turn a shareholder in eleven companies established under Czech law that own and operate photovoltaic plants in the Czech Republic.

Since the early 1990s, the Czech Republic has adapted its legislation to promote renewable energy sources. In 1992, tax incentives for the operation of photovoltaic systems were introduced.
The promotion of renewable energy sources has also been a goal of the European Union (EU) since the mid-1990s. After joining the EU in May 2004, the Czech Republic introduced legislation to meet the non-binding EU targets.
In 2005, a law was passed to promote electricity production from renewable energy sources. This required grid operators to buy electricity from renewable energy plants as a priority, at a price set by the government. This price per kilowatt hour (feed-in tariff or FiT) was calculated on the basis of the investment and operating costs of renewable energy plants in a certain category and was guaranteed for 15 years (or 20 years).

Ac From the end of 2008, a significant drop in the price of components needed for solar power plants led to a much higher than expected increase in investments in solar power plants in the Czech Republic, known as the "solar boom". This "solar boom" occurred during a turbulent political period that led to the establishment of a caretaker government. In addition, the Czech Republic was suffering from the effects of the global economic crisis of 2008.
As a result, the Czech government decided to reduce the existing investment incentives in response to the sharp increase in investments in the solar energy sector. On 16 November 2009, the Czech Minister of Industry and Trade announced at a press conference that he would authorise the regulator to adjust the FiT and the related price guarantees. The relevant provision of the Renewable Energy Promotion Act was abolished on 20 May 2010, affecting all plants connected to the grid after 1 January 2011.
The Czech Republic subsequently adopted a number of other measures amending the Income Tax Act and the Renewable Energy Promotion Act, including a solar levy on revenues from solar power systems built between 1 January 2009 and 31 December 2010. On 1 January 2011, the Czech Republic ended all support measures for photovoltaic systems commissioned after 1 March 2011 and with a maximum output exceeding a certain value, abolished the income tax exemption and changed the rules for tax depreciation. Finally, further measures were introduced and all contracts between renewable energy producers and grid operators subject to the FiT were terminated as of 31 December 2012.

Ad Various investors subsequently complained about the measures taken by the Czech Republic, including the plaintiffs.

b.

Ba On 8 May 2013, the plaintiffs initiated arbitration proceedings against the defendant based on Article 26 of the Energy Charter Treaty of 17 December 1994 (SR 0.730.0), various bilateral investment protection agreements and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) with the legal claim - which was amended in the course of the proceedings - that the defendant be ordered to pay damages totalling at least CZK 1,769.8 million for breach of the concluded international agreements.
The Permanent Court of Arbitration (PCA) designated Geneva as the seat of the arbitration tribunal consisting of three arbitrators.
The defendant raised, inter alia, various objections to the jurisdiction of the arbitral tribunal seated in Geneva.

Bb On 20 December 2017, the arbitral tribunal made an arbitral decision referred to as a "Partial Award".
It denied jurisdiction with regard to some of the claims asserted (operative part lit. ac) and rejected individual claims in the matter (operative part lit. gj). In all other respects, the arbitral tribunal affirmed its

jurisdiction and - in principle - the liability of the defendant (operative part lit. df), although the amount of damages would be decided later (operative part lit. k).
By appeal of 1 February 2018, the defendant challenged the "Partial Award" of 20 December 2017 before the Federal Supreme Court and requested its annulment under Article 190 paragraph 2 letter b PILA , with the exception of those parts of the operative part in which the lack of jurisdiction of the arbitral tribunal was established or certain parts of the claim were dismissed.
By judgment 4A_80/2018 of 7 February 2020, the Federal Supreme Court dismissed the appeal and upheld the positive jurisdiction decision of the arbitral tribunal of 20 December 2017.

Bc In a submission dated 4 March 2021, the defendant again contested the jurisdiction of the arbitral tribunal (hereinafter Achmea objection) based on the judgment of the Court of Justice of the European Union (ECJ) of 6 March 2018 C-284/216 *Slovak Republic v Achmea BV* (hereinafter Achmea judgment). The plaintiffs contested the admissibility of this objection.
By decision of 22 July 2021, the arbitral tribunal declared the Achmea objection raised by the defendant against the arbitral tribunal's jurisdiction to be inadmissible.
After a further exchange of correspondence, an oral hearing took place in Vienna between 23 and 25 May 2022.

By its final award ("Final Award") of 15 December 2023, the arbitral tribunal seated in Geneva ordered the defendant to pay a total of CZK 350.1512 million plus interest to the plaintiffs.

C
By appeal in civil matters, the defendant requests the Federal Supreme Court to set aside the Partial Award of 20 December 2017 and the Final Award of 15 December 2023 of the Arbitral Tribunal sitting in Geneva.
The respondents request that the appeal not be entertained, or alternatively that it be dismissed. The arbitral tribunal has waived the right to hold a hearing.
The parties have replicated and duplicated.

Considerations:

1.
According to Article 54, paragraph 1 of the Federal Court Act , the decision of the Federal Court is issued in an official language, usually the language of the contested decision. If the latter was written in another language, the Federal Court uses the official language used by the parties. The contested decision is written in English. Since this is not an official language, the Federal Court's decision is issued in the language of the appeal, as is practice (**BGE 142 III 521** E. 1).

2.
The respondents argue that, due to the previous work of attorney Wehland at the Permanent Court of Arbitration, there is a conflict of interest which results in the inability of the complainant's two legal representatives to stand for trial. The complainant denies the existence of a conflict of interest both in factual and legal terms and also disputes the effects on the appeal proceedings before the Federal Court as claimed in the response to the appeal.
In view of the outcome of the proceedings, we will refrain from going into the alleged conflict of interest and its possible effects in more detail.

3.
In the area of international arbitration, the appeal in civil cases is subject to the conditions ofArt. 190-192 PILA(SR 291) permissible (Art. 77 para. 1 lit. a BGG).

3.1. The seat of the arbitral tribunal is in Geneva. At the relevant time, the parties had their seat outside Switzerland (Art. 176 para. 1 PILA).

Insofar as the arbitral tribunal affirmed its jurisdiction and (in principle) the liability of the defendant in its partial award of 20 December 2017 (operative part lit. df), this is an interim decision (cf. **BGE 143 III 462** E. 3.1). This could be contested by means of an appeal in accordance with Art. 190 para. 3 PILA . The Final Award of December 15, 2023 is an appealable final decision against which an appeal is admissible under Article 190, paragraph 2 of the PILA .

3.2. Only the complaints listed exhaustively in Article 190 paragraph 2 PILA are admissible (**BGE 134 III 186** E. 5; **128 III 50** E. 1a; **127 III 279** E. 1a). According to Article 77 paragraph 3 BGG, the Federal Supreme Court only examines the complaints that have been raised and substantiated in the appeal. This provision provides for the complaint principle and thus a similar obligation as Article 106 paragraph 2 BGG for the complaint of violation of fundamental rights or of cantonal and intercantonal law (**BGE 134 III 186** E. 5; judgment 4A_244/2023 of April 3, 2024 E. 4.1, scheduled for publication). The requirements for the justification of the arbitration appeal are therefore increased. The complaining party must assert one of the exhaustively listed grounds for appeal and, based on the contested award, show precisely how the reason asserted justifies the acceptance of the appeal (judgments 4A_244/2023 of April 3, 2024, E. 4.1 with references, intended for publication). Appellate criticism is inadmissible (**BGE 134 III 565** E. 3.1; **119 II 380** E. 3b).
Since the grounds must be included in the appeal, the complaining party cannot refer to the allegations, evidence and offers of evidence contained in the legal documents of the arbitration proceedings. Nor may the complaining party use the reply to assert factual or legal reasons that it did not raise in a timely manner - i.e. before the expiry of the non-extendable appeal period (Art. 190 para. 4 PILA in conjunction with Art. 47 para. 1 BGG) - or to supplement insufficient grounds after the expiry of the deadline (judgments 4A_244/2023 of 3 April 2024 E. 4.1 with references, intended for publication; 4A_478/2017 of 2 May 2018 E. 2.2 with references).

4.

4.1. The complainant had lodged an appeal in civil matters against the interim decision of 20 December 2017 - insofar as the arbitral tribunal thereby confirmed its jurisdiction. This appeal was dismissed by the Federal Supreme Court in judgment 4A_80/2018 of 7 February 2020. The appeal against the aforementioned interim decision concerning jurisdiction under Art. 190 para. 3 PILA was only admissible on the grounds set out inArt. 190 para. 2 lit. a and b IPRGadmissible for the reasons stated. The complaint of violation of the right to be heard (Art. 190 para. 2 lit. d PILA), like the other complaints under Art. 190 para. 2 PILA , could only be raised insofar as they directly concerned the jurisdiction of the arbitral tribunal (**BGE 140 III 477** E. 3.1, 520 E. 2.2.3). With regard to the liability of the complainant, which the arbitral tribunal (in principle) affirmed in its interim decision of 20 December 2017, the complaint of violation of the right to be heard was, on the other hand, inadmissible under Art. 190 para. 3 PILA ; this can now be raised with the appeal against the final arbitral award of 15 December 2023 (see below E. 5).

4.2. The final award cannot be challenged on the grounds of the alleged lack of jurisdiction of the arbitral tribunal (Art. 190 para. 2 lit. b PILA). This complaint could and had to be raised against the interim decision of 20 December 2017; however, the corresponding appeal was unsuccessful (judgment 4A_80/2018 of 7 February 2020).
The complainant did not appeal the interim decision of July 22, 2021, in which the arbitral tribunal declared the Achmea objection raised by her to be inadmissible, before the Federal Supreme Court. Contrary to the arguments in the appeal, this interim decision was by no means merely a "procedural order of the arbitral tribunal to organize the further proceedings." Rather, the arbitral tribunal thereby assessed in detail and exclusively ("Decision on the Admissibility of the *Achmea* Objection") whether the subsequently raised objection that the ECJ's Achmea judgment of March 6, 2018 was contrary to the arbitral tribunal's jurisdiction should be considered inadmissible ("The Tribunal therefore declares the Respondent's objection to the Tribunal's jurisdiction based on the *Achmea* Judgment inadmissible"). Contrary to what the complainant seems to assume, there is also nothing to indicate that the interim decision of 22 July 2021 was merely provisional. By refusing to admit the new objection, the arbitral tribunal has unambiguously expressed, and in a way that is binding for the final decision, that it will adhere to its previous (positive) decision on jurisdiction, which is why it is to be seen as an interim

decision on jurisdiction within the meaning of Art. 186 para. 3 PILA (see already judgment 4A_187/2020 of 23 February 2021 E. 5.2.2 concerning a renewed objection). The complainant's objection that she was not able to challenge the arbitral tribunal's interim decision of 22 July 2021 is therefore not valid.
Contrary to the complainant's submission, it is also not true that the arbitral tribunal based in Geneva "again confirmed its jurisdiction" with the final award of December 15, 2023, which is why the complaint raised under Article 190, paragraph 2, letter b of the PILA that the arbitral tribunal made an incorrect decision on jurisdiction with the final award of December 15, 2023 is pointless from the outset. Apart from that, the circumstances now raised by the complainant before the Federal Supreme Court, which allegedly only occurred after the interim decision of July 22, 2021, should have been brought forward in good time in the arbitration proceedings. To complain about them for the first time in the context of the appeal proceedings is contrary to good faith, which is why the grounds for complaint would have been forfeited anyway (cf. **BGE 130 III 66** E. 4.3 with references).
The complaint that the arbitral tribunal made an incorrect decision regarding jurisdiction (Article 190 paragraph 2 letter b PILA) is entirely irrelevant. This cannot be accepted.

5.
The complainant alleges that the arbitral tribunal violated her right to be heard (Article 190 paragraph 2 letter d PILA).

5.1. Article 190, paragraph 2, letter d of the PILA permits the challenge solely because of the mandatory procedural rules pursuant to Article 182, paragraph 3 of the PILA . According to this, the arbitral tribunal must in particular protect the parties' right to be heard. With the exception of the right to reasons, this corresponds to the constitutional right guaranteed in Article 29, paragraph 2 of the Federal Constitution. Case law derives from this in particular the right of the parties to comment on all facts essential to the judgment, to defend their legal position, to prove their material factual arguments with suitable means offered in a timely and correct manner, to participate in the negotiations and to inspect the files (**BGE 147 III 379** E. 3.1, 586 E. 5.1; **142 III 360** E. 4.1.1; **130 III 35** E. 5; each with references).
The right to be heard in adversarial proceedings under Article 182 paragraph 3 andArt. 190 para. 2 lit. d IPRGAccording to established case law, this does not include the right to a statement of reasons for an international arbitral award (**BGE 134 III 186** E. 6.1 with references). Nevertheless, this does result in a minimal duty on the part of the arbitrator to examine and deal with the issues relevant to the decision. The arbitral tribunal violates this duty if, due to an oversight or misunderstanding, it fails to take into account legally relevant allegations, arguments, evidence or requests for evidence from a party. However, this does not mean that the arbitral tribunal must expressly deal with every single submission made by the parties (**BGE 142 III 360** E. 4.1.1; **133 III 235** E. 5.2 with references).

5.2. The complainant submits that in its interim award of 20 December 2017, the arbitral tribunal upheld the respondents' claims for violation of the protection standards contained in the relevant investment protection agreements and at the same time ordered that the assessment of the amount of the resulting claim for damages be carried out in a separate stage of the proceedings. In doing so, the arbitral tribunal simply failed to address the complainant's legal argument, which was relevant to the decision, regarding the mandatory priority of application of European law.
In the arbitration proceedings, the complainant presented in detail the importance of European law for decision-making and made strong reference to the priority of application of European law over the relevant investment protection agreements agreed by the EU member states. In doing so, she particularly emphasised the consequences resulting from the priority of application of European law: European law is part of the law applicable in the arbitration proceedings and the protection standards contained in the relevant investment protection agreements, including the principle of fair and equitable treatment, must be interpreted in the light of European law in order to avoid a conflict with the latter and thus ensure application in accordance with European law. In addition, the corresponding protection standards cannot be applied in view of the priority of European law if an interpretation in accordance with European law is not possible and there is therefore a conflict with European law.

5.3. Contrary to the view expressed by the complainant, the arbitral tribunal did not fail to notice its arguments on the primacy of European law and its alleged impact on the protection standards contained in the relevant investment protection agreements. As the complainant itself admits, it sets out the relevant

arguments on the primacy of European law in detail in the interim decision of 20 December 2017. In its assessment under the title "D. The Relevance of the EU State Aid Rules and Decisions", the arbitral tribunal then specifically points out that the parties' arguments on this topic concern both the question of liability and that of the amount of compensation, but that this stage of the proceedings only addresses the points relevant to the complainant's liability. It follows from the following considerations that it did not accept the complainant's argument that EU law precludes the complainant's fundamental liability. The fact that the arbitral tribunal did not expressly address the complainant's - relatively general - arguments in detail in this context does not constitute a violation of the right to be heard.
Furthermore, in the final award entitled "F. EU State Aid Rules", the arbitral tribunal considered that, while it should be assumed with the complainant that the EU rules on state aid should be taken into account when calculating the amount of damages, it rejected her objection that compensation should be refused on this basis. In doing so, it once again expressed that it did not accept the argument that the arguments put forward should lead to an exclusion of liability altogether.
It is therefore not true that the arbitral tribunal failed to take into account the complainant's arguments on the primacy of EU law due to an oversight or misunderstanding. The complaint of infringement of the right to be heard is unfounded.

6.
The appeal is to be dismissed insofar as it can be entertained. In accordance with the outcome of the proceedings, the complainant is liable to pay costs and compensation (Art. 66 para. 1 andArt. 68 para. 2 BGG).

Accordingly, the Federal Court recognizes:

1.
The complaint is dismissed to the extent that it is entertained.

2.
The court costs of CHF 42,000 are to be borne by the complainant.

3.
The complainant must compensate the respondents for the federal court proceedings with a total of CHF 52,000.

4.
This judgment shall be communicated in writing to the parties and to the arbitral tribunal sitting in Geneva.

Lausanne, 13 June 2024

On behalf of the I. Civil Law Division
of the Swiss Federal Supreme Court

The presiding member: Kiss

The court clerk: Leemann