October 28, 2024

NEXTERA: WILL INTRA-EU ARBITRAL AWARDS BE FINALLY ENFORCED IN THE UNITED STATES?

In the first half of 2024, the United States Court of Appeals for the District of Columbia ("**DC Circuit**") affirmed the district court's denial of Romania's motion to set aside the 2019 judgements that enforced the Micula's ICSID award.[1] In the second half of 2024, the DC Circuit has made further developments in the intra-EU arbitration saga. On August 16, 2024, the DC Circuit held that the district court had jurisdiction to enforce the awards resulting from the arbitrations between the Spain and three Dutch and Luxembourg energy companies. At the same time, however, the DC Circuit reversed the lower court's injunction preventing Spain from seeking anti-suit relief in the EU.[2]

BACKGROUND OF THE UNDERLYING DISPUTE

During the early 2000s, the Spanish government implemented new regulations and incentives to attract foreign investment to the renewable energy sector. Several energy companies, including NextEra Energy Global Holdings B.V. ("**NextEra**"), 9 REN Holding S.À.R.L. ("**9REN**") and AES Solar Energy Cooperatief U.A. and Ampere Equity Fund B.V. ("**AES**"), made significant investments in photovoltaic energy projects in Spain. However, due to the 2008 financial crisis, which was worsened in Spain due its own fiscal deficit problems, Spain reduced and eventually eliminated all such subsidies to control costs.

As a result, the investors decided to commence arbitration procedures against Spain, invoking violations of the Energy Charter Treaty ("**ECT**"). Pursuant to the ECT's Article 26, NextEra and 9REN chose to arbitrate before the International Centre for Settlement of Investments Disputes ("**ICSID**") in Washington, D.C., while AES instituted arbitral proceedings before an *ad hoc* UNCITRAL tribunal seated in Geneva, Switzerland.

While the arbitrations were ongoing, on March 6, 2018, the Court of Justice of the European Union ("**CJEU**") issued a preliminary ruling in connection with the Permanent Court of Arbitration award of *Slovak Republic v. Achmea*.[3] The CJEU held that by entering into a Bilateral Investment Treaty ("**BIT**") and establishing an alternative mechanism for the settling of disputes, EU member states were bypassing the mechanisms arranged to preserve the uniform application of EU laws. Consequently, the BIT's arbitration clause was declared invalid.

Following this decision, on January 15 and 16, 2019, EU member states issued declarations recognizing the legal consequences of the *Achmea* judgment and undertaking to terminate its intra-EU BITs to comply with the ruling. However, the EU member states disagreed on *Achmea's* applicability to the ECT.

In 2019 and 2020, the ICSID and UNCITRAL tribunals in the *NextEra*, *9REN* and *AES* arbitrations upheld their jurisdiction over their respective cases, finding that the ECT did not violate EU law and did not exclude intra-EU disputes. Finding Spain liable for breaching the ECT, the tribunals awarded damages in the amount of € 290 million to NextEra, € 41 million to 9REN, and € 26.5 million to AES.

---

[1] *Micula v. Government of Romania*, 101 F.4th 47 (C.A.D.C., 2024).

[2] *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024).

[3] *Slowakische Republik (Slovak Republic) v. Achmea BV*, Case C-284/16, Judgment of March 6, 2018.

Eventually, the extension of *Achmea* to the ECT was made clear (at least at an EU level) by the Judgment of the CJEU's Grand Chamber of September 2, 2021, in the case *Energoalians (now Komstroy) v. Moldova*. Applying the legal findings of *Achmea*, the CJEU concluded "that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[4]

Spain attempted to annul these awards unsuccessfully. In turn, the investors sought to enforce the awards in the District of Columbia. The DC District Court, however, rendered conflicting decisions:

- In February 2023, the DC District Court dismissed Spain's intra-EU objection in two judgments (*NextEra v. Spain* and *9REN v. Spain*) and granted the investors' anti-suit injunctions.[5]
- Meanwhile, in *Blasket*,[6] a different Judge of the DC District Court granted Spain's motion to dismiss, finding that no valid agreement to arbitrate existed and denying the companies anti-suit injunction.[7]

Spain appealed the decision in *NextEra* and *9REN*, while Blasket appealed the other decision. In light of the similarities of the three cases, the appeal was consolidated and the DC Circuit resolved them in a single opinion.

THE DC CIRCUIT DECISION

Two primary questions were presented to the DC Circuit on appeal:

- **Whether the FSIA grants the district courts jurisdiction to enforce (or decline to enforce) the arbitration awards against Spain.**

Pursuant to the Foreign Sovereign Immunities Act ("**FSIA**"), a foreign state is presumptively immune from the jurisdiction of US courts unless a specified exception applies. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal courts. While Spain insisted on its immunity and the district court's lack of jurisdiction, the investors submitted that two FSIA exceptions applied: the waiver and arbitration exceptions. Since the DC Circuit found that the arbitration exception applied, it decided not to analyze and rule on the waiver exception, as to which the law is unsettled in the DC Circuit.[8]

---

4 *Republic of Moldova v Komstroy LLC* (Case C-741/19) Judgment of the Grand Chamber of the September 2, 2021, ¶¶ 39-66.

5 *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023), aff'd in part, rev'd in part and remanded, 112 F.4th 1088 (D.C. Cir. 2024) and *9REN Holding S.À.R.L. v. Kingdom of Spain*, 19-CV-01871 (TSC), 2023 WL 2016933 (D.D.C. Feb. 15, 2023), rev'd and remanded sub nom. NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088 (D.C. Cir. 2024).

6 AES transferred its interest in the award to a Delaware firmed, Blasket Renewable Energy, LLP.

7 *Blasket Renewable Investments, LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023), rev'd and remanded sub nom. NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088 (D.C. Cir. 2024).

8 While the Second Circuit has held that by ratifying the ICSID or New York Convention a country implicitly waives its sovereign immunity from suits seeking to enforce awards under that convention, the DC Circuit has not formally adopted such reasoning. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria* (*P&ID*), 27 F.4th 771, 774 (D.C. Cir. 2022).

The arbitration exception is codified in Section 1605(a)(6) of the FSIA, which provides, in relevant part, that "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States" where the action is brought "either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences […] or to confirm an award made pursuant to such an agreement to arbitrate, if […] the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards [...]."[9]

The DC Circuit recalled that, for this exception to apply, the district court must find three jurisdictional facts: "(1) an arbitration agreement, (2) an arbitration award, and (3) a treaty potentially governing the award enforcement."[10] The investors, as plaintiffs, had the burden of proving jurisdiction.

Given that the only jurisdictional fact disputed by Spain was "the existence of the arbitration agreement," the DC Circuit noted that the sole jurisdictional question was the arbitration agreement's "existence," while the question of whether the arbitration agreement applied to EU investor was a question of scope of the arbitration agreement and "go[es] to the award's enforceability on the merits."[11]

The DC Circuit then analyzed the relevant arbitration agreement. Under the FSIA, the arbitral agreement is made by the foreign state either "with" or "for the benefit" of a private party.[12] The first type refers to direct agreements with investors, while an arbitration provision in an investment treaty constitutes a standing offer to arbitrate made "for the benefit" of investors, which might be accepted by filing a notice of arbitration.

The DC Circuit found that Article 26(3)(a) of the ECT[13] contained Spain's unconditional offer and consent to arbitrate with investors. Whether, as contended by Spain, the offer extended only to the national of the ECT signatories outside the European Union pursuant to the *Komstroy* opinion, "is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*" and therefore whether the ECT applies to a dispute is not "a jurisdictional question under the FSIA."[14]

Consequently, the DC Circuit held that the district court had jurisdiction to enforce these arbitration awards. However, it clarified it did not "address the merits questions whether that [ECT's] arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies."[15] While the ultimate enforceability of these awards is for the district courts to decide on, the DC Circuit has already anticipated that there are "powerful reasons to conclude that the standing offer to arbitrate contained in the ECT's arbitration provision extends to EU nationals."[16]

---

9 28 U.S.C. § 1605(a)(6).

10 *NextEra*, at 1100 (D.C. Cir. 2024) (citing *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015)).

11 *Id*. at 1101.

12 28 U.S.C. § 1605(a)(6).

13 Article 26(3)(a) of the ECT "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."

14 *Id*. at 1103.

15 *Id* at 1104.

16 *Id*. at 1102.

- **Whether the district court in *NextEra* and *9REN* abused its discretion by enjoining Spain from seeking anti-suit relief under foreign law in foreign courts.**

In the *NextEra* and *9REN* decisions, the district court preliminarily enjoined Spain from seeking relief in the Netherlands or Luxembourg in a manner that would obstruct the petition to confirm the award in the district court. Spain submitted that the injunctions were an abuse of discretion, and the DC Circuit agreed.[17]

First, the DC Circuit held that the district court erred in issuing the injunctions without considering Spain's sovereign status. The district court found that the anti-suit injunctions were warranted since they were defensive, reasoning that Spain's suits in the Netherlands and Luxembourg were aimed to thwart the enforcement process in the US district court. The DC Court found that this justification, which might have been appropriate against private parties, was insufficient when targeting a foreign sovereign and raised significant comity concerns.

Second, the DC Circuit found that the district court failed to identify domestic interests substantial enough to justify the anti-suit injunctions. With no US parties involved, no US law questions, and the US not being a party of the ECT, the only domestic interest was that of promoting arbitration. Although "[u]nder [the ICSID] Convention, the United States must open the doors of its courthouses to foreign investors seeking to enforce such awards [] neither the treaty nor the statute requires the United States to remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts."[18]

THE AFTERMATH OF THIS DECISION

The *NextEra* decision has removed an important jurisdictional hurdle to the enforcement of ECT awards. On September 26, 2024, applying the holding in *NextEra*, the DC District Court enforced an ECT award against Spain rendered under the ICSID Convention.[19] However, since this case involved a non-EU investor, it is yet to be seen how the district courts will deal with the "ultimate enforceability of the award" in ECT cases with EU investors. Finally, while the DC Circuit did not categorically foreclose anti-suit injunctions against foreign sovereigns, these will likely be limited going forward given the acute comity concerns underlined in *NextEra*.

---

[17] However, Hon. Judge Pan filed an opinion dissenting in part. The Judge considered that the district court did not abuse its discretion in granting the investors' requests for anti-suit injunctions against Spain since it "(1) properly applied our precedent in *Laker Airways*, a case in which we upheld an anti-suit injunction in a similar posture; (2) considered the United States' interests in protecting the jurisdiction of its courts and upholding the ICSID framework; (3) assessed Spain's actions and prerogatives in a detailed discussion of "comity" concerns; and (4) gave appropriate weight to the irreparable harm that would be done to the Investors if the requested injunctions were denied." *Id*. at 1115.

[18] *Id*. at 1109.

[19] *Blasket Renewable Investments, LLC v. Kingdom of Spain*, CV 23-2701 (RC), 2024 WL 4298808 (D.D.C. Sept. 26, 2024). Please note that this is case is different to the *Blasket* case addressed in the *NextEra* appeal. Here, the original petitioner and investor was JGC Holdigns Coporation (a Japanese engineering company) who, like AES, assigned the arbitration award to Blasket.

CONTACTS

Damián Vallejo

Partner

dvallejo@drmlaw.com

Tel.: +1 646 680 9236

Esther Romay

Associate

eromay@drmlaw.com

Tel.: +1 917 306 3057

The articles and client alerts published on Dunning Rievman & MacDonald LLP's website and LinkedIn site are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice should always be sought separately before taking any action.