Bundesgericht
Federal Court
Federal Court
Federal Court

4A 244/2023

Judgment of April 3, 2024

1st Civil Law Court

Composition
Federal Judges
Jametti, Presiding Judge, Hohl, Kiss, Rüedi and May Canellas.
Clerk: M. O. Carruzzo.

Participants in the proceedings
Kingdom of Spain,
represented by Mes. Jean-Marie Vulliemin, Jean Marguerat and Tomas Navarro Blakemore, attorneys,
Appellant,

versus

A. _____ ,
represented by Mes. Philippe Bartsch, Anya George and Anne-Carole Cremades, lawyers, Respondent.

Subject
international arbitration,

appeal in civil matter against the Award rendered on April 11, 2023 by an Ad Hoc Arbitral Tribunal with seat in Geneva.

Facts:

A.
In order to transpose into its domestic law several European directives aimed at encouraging the production of energy from renewable sources, the Kingdom of Spain adopted several Royal Decrees around the mid-2000s. Royal Decree 661/2007 (hereinafter: RD 661/2007), issued on May 25, 2007, set the purchase price per kilowatt hour (*Feed-in-Tariff* or FIT) for qualified photovoltaic systems. It provided for a determined and attractive FIT for the first 25 years of operation of the said systems and a lower FIT for subsequent years. To be able to sell the electricity produced at the FIT provided for by the said Decree, renewable energy producers had to register with the competent authority within a specified period. RD 661/2007 was a resounding success

and managed to attract a number of investors in just a few months. It also led to a growing gap, termed a “tariff deficit,” between the electricity access charges (i.e., the amount customers pay for their electricity consumption) and the regulated costs of the Spanish electricity market, including the costs related to the support mechanisms for renewable energy sources.
Royal Decree 1578/2008 (hereinafter: RD 1578/2008), issued on September 26, 2008, introduced new support parameters for photovoltaic systems that have not been registered with the competent authority within the deadline provided for this purpose by RD 661/2007. It provided for a reduced FIT over a 25 year period.
The French A. _____Company acquired and developed, through various Spanish entities controlled by it, twelve photovoltaic systems on Spanish territory. Three of them were initially subject to RD 661/2007, while the other nine were governed by RD 1578/2008.
Between 2010 and 2013, the Kingdom of Spain, which claimed to want to combat its energy tariff deficit, amended the financial support measures provided for by RD 661/2007 as well as RD 1578/2008. In 2013 and 2014, it repealed the said Decrees and adopted a new legislative arsenal aimed in particular at replacing the FITs set for photovoltaic systems with compensation intended to ensure a reasonable rate of return for investors.

B.

B.a. On February 24, 2016, A. _____, based on Art. 26 of the Energy Charter Treaty of December 17, 1994 (ECT; RS 0.730.0), initiated arbitration proceedings against the Kingdom of Spain. An Ad Hoc Arbitral Tribunal, composed of three members, was formed. Its seat was set in Geneva. During the proceedings, the Respondent raised the objection of the lack of jurisdiction of the Arbitral Tribunal. In particular, it argued that the Tribunal did not have jurisdiction to hear a dispute between an investor located in one of the Member States of the European Union (hereinafter: the EU) and one of these States concerning an investment made by the former in the territory of the latter.

B.b. On November 10, 2017, the European Commission (hereinafter: the EC) issued a decision at the end of which it concluded in particular that the financial support mechanism put in place by the Kingdom of Spain in its Regulations adopted in 2013 and 2014, was compatible with European law, for the purpose of promoting the production of electricity from renewable energy sources.
On November 15, 2018, the EC requested permission to be involved in these proceedings.
On December 10, 2018, the arbitrators invited the EC to file an *amicus curiae* brief relating to whether the Decision it issued on November 10, 2017, was binding on the Arbitral Tribunal.
On January 9, 2019, the EC transmitted its brief to the arbitrators.

B.c. After holding a Hearing in London from October 15 to 19, 2018, the Arbitral Tribunal rendered its Award on April 11, 2023. It dismissed the ground of lack of jurisdiction raised by the Respondent in relation to the intra-European nature of the dispute. Partially granting the request, the Arbitral Tribunal, ruling by a majority of its members, considered, on the merits, that the Respondent State had violated Art. 10 para. 1 ECT because, by adopting its new regulations in 2013, it failed in its duty to grant fair and equitable treatment to the Petitioner's investments, which is why it had to compensate the latter in the amount of 29,600,000 Euros, plus interest. The reasons supporting this Award will be examined later to the extent that is useful for understanding the criticism that has been directed against it.

C.
On May 16, 2023, the Kingdom of Spain (hereinafter: the Appellant) lodged an appeal in civil matters, accompanied by a request for suspensive effect, for the purposes of obtaining the annulment of the said Award.
The request for suspensive effect was admitted by Order of July 14, 2023, for lack of opposition.
In its response, A. _____ , whose new company name is now A. _____ (hereinafter the Respondent), primarily argued that the appeal was inadmissible and, subsidiarily, that it be rejected.
Asked to respond to the appeal, the Arbitral Tribunal did not make a determination in this regard.
The Appellant filed an unsolicited Reply, prompting the filing of a Rejoinder by the Respondent.

Whereas in law:

1.
Pursuant to Art. 54 para. 1 of the Law on the Federal Court of June 17, 2005 (LTF; RS 173.110), the Federal Court writes its judgment in an official language, as a general rule in the language of the contested decision. When such decision was rendered in another language (here English), it uses the official language chosen by the parties. In the briefs they sent to the Federal Court, the parties used French. In accordance with its practice (see **ATF 142 III 521** consid. 1), the Federal Court will therefore issue its judgment in the language of the appeal, which is to say in French.

2.
In the area of international arbitration, appeal in civil matters is admissible against the decisions of arbitral tribunals under the conditions provided for by Arts. 190 to 192 of the Federal Law on Private International Law of December 18, 1987 (LDIP; RS 291), in accordance with Art. 77 para. 1 Let. a LTF.
The seat of arbitration is in Geneva. Neither party was headquartered in Switzerland at the relevant time. The provisions of Chapter 12 of the LDIP are therefore applicable (Art. 176 para. 1 LDIP).

3.
Whether it concerns the subject of the appeal, the standing to appeal, the deadline for appeal or even the pleadings on the merits made by the interested party, none of these admissibility conditions pose a problem in this case. Nothing therefore stands in the way of examining the matter. The examination of the admissibility of the various grounds raised by the Appellant remains reserved.

4.

4.1. An appeal in matters of international arbitration can only be brought for one of the reasons exhaustively listed in Art. 190 para. 2 LDIP. The Federal Court only examines the list of grievances that have been raised and justified in accordance with Art. 77 para. 3 LTF. This provision establishes the principle of allegation (*Rügeprinzip*) and establishes an obligation similar to that provided for in Art. 106 para. 2 LTF for a grievance based on a violation of fundamental rights or provisions of cantonal and intercantonal law (**ATF 134 III 186** consid. 5). The requirements to state reasons for appeals in arbitration matters are increased. The Appellant must therefore invoke one of the exhaustively-stated grounds for appeal and show through precise argumentation, starting from the contested award, how the invoked ground justifies the admission of the appeal (Judgments 4A_7/2019 of March 21, 2019, consid. 2; 4A_378/2015 of September 22, 2015, consid. 3.1). The appellate criticisms are inadmissible (Judgment 4A_65/2018 of December 11, 2018, consid. 2.2). As the stated reasons must be contained in the notice of appeal, the Appellant cannot use the process of asking the Federal Court to kindly refer to the allegations, evidence and offers of proof contained in the filings placed in the arbitration file. Likewise, the Appellant cannot use the reply to invoke grounds, factual or legal, which it has not presented in due time, which is to say before the expiry of the non-extendable appeal deadline (Art. 100 para. 1 LTF in conjunction with Art. 47 para. 1 LTF) or to supplement, after the deadline, insufficient stated reasons (Judgment 4A_478/2017 of May 2, 2018, consid. 2.2 and the references cited).

4.2. The Federal Court rules on the basis of the facts noted in the contested award (see Art. 105 para. 1 LTF). It cannot rectify or supplement the arbitrators' findings ex officio, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77 para. 2 LTF which excludes the application of Art. 105 para. 2 LTF). Its mission, when it is seized of an appeal in civil matters against an international arbitral award, does not consist of ruling with full knowledge, like an appeal court, but only of examining whether the admissible grievances formulated against the said award are founded or not. Allowing the parties to allege facts other than those found by the arbitral tribunal, outside of the exceptional cases reserved by case law, would no longer be compatible with such a mission, even if these facts were established by the elements of evidence contained in the arbitration file. The Arbitral Tribunal's findings as to the conduct of the proceedings also bind the Federal Court, whether they relate to the parties' pleadings, the alleged facts or the legal explanations given by the latter, to the statements made during the trial, the requisitions of evidence, or even the content of testimony or an expert opinion or even the information gathered during a visual inspection (Judgment 4A_322/2015 of June 27, 2016, consid. 3 and the references cited). However, the Federal Court retains the power to review the facts underlying the contested award if one of the grievances mentioned in

Art. 190 para. 2 LDIP is raised against the said statement of facts or that new facts or evidence are exceptionally taken into consideration in the context of the proceedings in civil matters (Judgment 4A_478/2017, cited above, consid. 2.2).

5.
In an initial group of pleadings brought together under the heading “Error in Deliberation,” the Appellant, simultaneously opposing an improper constituting of the Arbitral Tribunal (Art. 190 para. 2 Let. a LDIP), an infringement of its right to be heard (Art. 190 para. 2 Let. d LDIP) as well as being contrary to procedural public order (Art. 190 para. 2 Let. e LDIP), criticizes the arbitrators for not having discussed, during their deliberations, the Award rendered on June 16, 2022, by another arbitral tribunal, located in Sweden and ruling under the auspices of the Arbitration Institute of the Chamber of Commerce of Stockholm (SCC), in the SCC V Case No. 2016/135 *Green Power Partners K/S and SCE Solar Don Benito APS versus the Kingdom of Spain* (hereinafter: the *Green Power case*).

5.1. To support its demonstration, the Appellant begins by retracing the conduct of certain stages of the arbitration proceedings. In this regard, it recalls that it requested, on June 28, 2022, authorization to produce the award rendered in the *Green Power* case and the possibility of being able to make comments relating to this Decision. It emphasizes that the said award was of crucial importance, since it was the first case in which an arbitral tribunal accepted the objection of lack of jurisdiction based on the intra-European nature of the dispute. The interested party specifies that, by Procedural Order No. 12 rendered on July 29, 2022, by a majority of its members, the Arbitral Tribunal agreed to place in the file the Award pronounced in the *Green Power* case, without however allowing the parties to consider the content of this decision.
The Appellant then indicates that the arbitrator designated by it issued a dissenting opinion, communicated with the contested award, in which it notably indicated the following:

“... the Majority, after acknowledging that ‘...[t]he Green Power tribunal's discussion of this question is relatively lengthy and addresses the same ECT provisions discussed above...’ concluded, without the Tribunal having deliberated and without the Majority stating its reasons therefore, that ‘... [it] understands those provisions differently from the Green Power tribunal and is not persuaded by the tribunal's reasoning’.”
The Appellant deduces from the aforementioned passage that the award rendered in the *Green Power* case was not the subject of any discussion during the Arbitral Tribunal's deliberations. To support such an assertion, it maintains that the absence of discussion on the point concerned - which in its opinion would be decisive for the outcome of the dispute - must either be considered established solely on the basis of the dissenting opinion expressed by the arbitrator that it chose, or be corroborated by the discussions that took place between the arbitrators during the deliberations, which it requests be produced.
The interested party also denounces an improper nature of the Arbitral Tribunal's composition (Art. 190 para. 2 Let. a LDIP), an infringement of its right to be heard (Art. 190 para. 2 Let. d LDIP), on the grounds that a decisive element for the outcome of the dispute was not discussed or taken into consideration. According to the Appellant, the President of the Arbitral Tribunal, who had accumulated a considerable delay and had been put under pressure by the Respondent so that the arbitrators would rule quickly, knowingly decided not to debate the award rendered in the *Green Power* case and contented himself with repeating word-for-word the considerations that he had already formulated in the context of a decision rendered a few months previously by another arbitral tribunal over which he presided. The Appellant deduces from the aforementioned passage that the award rendered in the *Green Power* case was not the subject of any discussion during the Arbitral Tribunal's deliberations. 190 para. 2 Let. a LDIP.

5.2. When the arbitral tribunal is composed of several members, deliberation is an essential operation that must take place even if it is not expressly provided for by law. This is both a right of the parties that arises, according to several authors, from the right to be heard, and a right and duty of each of the arbitrators (Judgment 4P.115/2003 of October 16, 2003, consid. 3.2 not published in **ATF 129 III 727** and the references cited). Art. 189 LDIP implicitly requires that all the arbitrators participate in each deliberation and decision of the Arbitral Tribunal, a similar requirement constituting in any event an unwritten rule of international public order applicable to all international arbitration (Judgment 4P.115/2003, cited above, consid. 3.2 not published in **ATF 129 III 727** and the references cited).
The Federal Court considered that the errors affecting the deliberations fall in principle within the provisions of

Art. 190 para. 2 Let. a LDIP, which sanctions the improper composition of the Arbitral Tribunal, whether it is a structural defect or a one-off problem (Judgment 4P.115/2003, cited above, consid. 3.2 not published in **ATF 129 III 727**). However, it also mentioned the possibility of examining such defects from the perspective of Art. 190 para. 2 Let. d LDIP (violation of the equality of the parties or their right to be heard) or as a contravention of procedural public order as referred to in Art. 190 para. 2 Let. e LDIP (Judgment 4P.115/2003, cited above, consid. 3.2 not published in **ATF 129 III 727**).
The LDIP does not say anything about the form that the deliberations should take. This question depends on the agreement of the parties or the settlement that they choose. It is not excluded that the deliberations take place by circulation of a written proposal, if the arbitrators agree - expressly or through conclusive acts - to proceed in this manner (Judgment 4P. 115/2003, cited above, consid. 3.2 not published in **ATF 129 III 727**). It is necessary and sufficient that each of the arbitrators has had the opportunity not only to express his opinion, but also to determine that of the other arbitrators (**ATF 128 III 234** consid. 3b/aa and the cited references; Judgment 4P.115/2003, cited above, consid. 3.2 not published in **ATF 129 III 727**).

5.3. In this case, there is no need to determine whether the criticisms simultaneously formulated by the Appellant from the perspective of Letters a, d and e of Art. 190 para. 2 LDIP must be attached to a specific letter of the aforementioned legal provision, as long as they prove to be unfounded in any event.
The Appellant claims, in essence, that the Arbitral Tribunal excluded a “relevant fact” from its discussions, namely the award rendered in the *Green Power* case. Moreover, a reading of the contested award shows that this point was indeed taken into consideration by the arbitrators. Under No. 269 and 270 of the contested decision, the Arbitral Tribunal in fact indicated the following:

“269. The Green Power Award is the first Investment Treaty award to accept the Intra-EU Objection. It did so in a dispute between investors in photovoltaic systems and the Kingdom of Spain under the ECT.
270. The central question addressed by the tribunal in *Green Power* was ‘whether a unilateral offer to arbitrate under Article 26 (3) (a) ECT can be validly given by an EU Member State to the investors from another EU Member State despite the existence of another agreement between these EU Member States which prevents them from making such offer.’ The Green Power tribunal's discussion of this question is relatively lengthy and addresses the same ECT provisions discussed above. The Arbitral Tribunal, however, understands those provisions differently from the Green Power tribunal and is not persuaded by the tribunal's reasoning. As a result, the Arbitral Tribunal does not share the Green Power tribunal's conclusion that the principles of autonomy and primacy of the EU legal order deprive it of jurisdiction under ECT Article 26.”
This passage attests to the fact that the arbitrators considered the content of the Award rendered in the *Green Power* case, it being specified here that they even referred to certain specific numbers of the said award in several footnotes. It further appears from the aforementioned passage that the question of the relevance of the said award for the solution to be rendered in this case was addressed and dealt with by the Arbitral Tribunal. In addition, the three arbitrators appended their signature to the disputed Award. Said signatures thus reveal that the arbitrators considered that they had completed the deliberations and decided on both the reasons and the operative part of their Award. The arbitrator appointed by the Respondent State was therefore able to take note of the reasons supporting the decision under appeal, and particularly of the considerations relating to the Award rendered in the *Green Power case*, express his opinion on this point and determine that of the other arbitrators. He was even able to express his disagreement with them on the point concerned in the dissenting opinion that he issued. He was then at full leisure to express his opinion and to determine that of the other arbitrators, which is the only thing that matters here. The arbitrator appointed by the Respondent State was therefore able to take note of the reasons supporting the decision under appeal, and particularly of the considerations relating to the Award rendered in the *Green Power* case, to express his opinion on this point and to determine that of the other arbitrators. Indeed, a dissenting opinion remains an independent opinion, foreign to the Award, which affects neither the considerations nor the operative part (Judgment 4A_319/2015 of January 5, 2016, consid. 4.2.2). Furthermore, reading the contested Award, and in particular Nos. 269 and 270, demonstrates that the question of whether the sentence rendered in the *Green Power* case was relevant to the outcome of this dispute and was necessarily mentioned, at one time or another, during the course of the deliberations. The arbitrator appointed by the Respondent State would undoubtedly have preferred that this question be debated at greater length and respectively examined in more depth, but the fact remains that he benefited from the possibility of arguing his own point view on the ins and outs of the Award rendered in the *Green Power* case. Under the cover of an alleged “Error in Deliberation,” the Appellant thus seeks, by a roundabout route, to attack the Arbitral Tribunal’s reasoning, which is inadmissible. In any case, it cannot

obtain explanations on every detail of the reasoning used by the Arbitral Tribunal, nor information relating to the comments made by the arbitrators during the deliberations phase.
In any event, it should be noted that the error denounced by the Appellant obviously had no impact on the result that the arbitrators reached. As the Respondent rightly emphasizes, without being contradicted by its opponent, the arbitrator appointed by the Appellant, if he certainly expressed his disagreement with the other arbitrators regarding certain considerations expressed in connection with the Award rendered in the *Green Power* case, nonetheless considered that the objection of lack of jurisdiction raised by the Appellant was unfounded, given that it was unanimously rejected. Moreover, he expressly stated the following in the dissenting opinion that he issued: “I do not share some of the Majority's statements relating to jurisdiction, without these differences in criterion affecting my consent to the Tribunal's decision on jurisdiction.” It thus appears that the arbitrator in question, even if he did not necessarily share the other arbitrators' opinion on certain aspects of the reasoning, agreed with the decision admitting the jurisdiction of the Arbitral Tribunal to hear this dispute.
The request presented by the Appellant with the purpose of obtaining the production of the discussions that took place between the arbitrators concerning the Award rendered in the *Green Power* case, if indeed it is admissible, therefore has no relevance in any event, with regard to the unanimous solution adopted by the arbitrators concerning the problem at issue, and must, therefore, be dismissed.
In view of the above, the criticisms formulated by the Appellant in support of an alleged defect affecting the deliberations must therefore be rejected.

6.
In a second plea, the Appellant, invoking Art. 190 para. 2 Let. a LDIP, calls into question the impartiality of the President of the Arbitral Tribunal. In this regard, it argues that this arbitrator had already definitively formed his opinion at the time of the deliberations. It cites as proof the fact that the decision under appeal repeats word-for-word the reasoning adopted by another Arbitral Tribunal, chaired by the same arbitrator, in the Award rendered on October 24, 2022, in the SCC Case No. 2017/194 *Triodos SICAV II against the Kingdom of Spain* (hereinafter: the *Triodos* case).

6.1. An arbitrator must, as does a State judge, present sufficient guarantees of independence and impartiality. In order to say whether an arbitrator presents such guarantees, one must refer to the constitutional principles developed regarding State courts, having regard, however, to the specificities of arbitration - especially in the area of international arbitration - when examining the circumstances of the actual case (**ATF 142 III 521** consid. 3.1.1; **136 III 605** consid. 3.2.1).
The guarantee of an independent and impartial tribunal makes it possible to demand the recusal of an arbitrator whose situation or behavior is likely to raise doubts as to his impartiality. It aims to prevent that circumstances external to the case can influence the decision in favor or to the detriment of a party. It does not impose recusal only when an actual prejudice of the arbitrator's part is established, because a provision relating to the internal forum can hardly be proven; it is enough that the circumstances give the appearance of prevention and raise fears of biased activity on the arbitrator's part. However, only objectively observed circumstances should be taken into consideration; as purely individual impressions of one of the parties to the lawsuit are not decisive (**ATF 142 III 521** consid. 3.1.1; **140 III 221** consid. 4.1).
The party that intends to seek an arbitrator's recusal must invoke the reason for recusal as soon as it becomes aware thereof. This jurisprudential rule covers both the grounds for recusal that the interested party actually knew of and those that it may have known about by paying due attention (**ATF 129 III 445** consid. 4.2.2.1 and the references cited). The rule in question constitutes applying the principle of good faith to the area of arbitral procedure. Pursuant to the said principle, the right to invoke the argument based on the improper composition of the arbitral tribunal expires if the party does not assert it immediately, because the latter cannot keep it in reserve to invoke it only in case of unfavorable outcome of the arbitral proceedings (Judgment 4A_318/2020 of December 22, 2020, consid. 6.1 not published in **ATF 147 III 65**).

6.2. In this case, the Appellant is excluded from denouncing an improper composition of the Arbitral Tribunal. As the Respondent rightly points out, the interested party knew full well that the arbitrator in question sat as President of the Arbitral Tribunal in the two arbitration proceedings concerned. It also knew that an identical legal problem arose in both of those cases, since it had raised the same objection of lack of jurisdiction in both cases. However, when it learned of the

Award handed down in the *Triodos case* in October 2022, the Appellant did not formulate the slightest objection concerning a possible appearance of prejudice by the arbitrator in question. Moreover, if the interested party feared that the latter could be warned in any way and that it risked having his opinion prevail over that of the two other arbitrators in the context of these proceedings, it could and should have argued such immediately in similar pleadings, instead of keeping it in reserve to only invoke it in the event of an unfavorable outcome for it. The Appellant is not moreover credible when it maintains that it could not anticipate the fact that the reasoning adopted in the Award rendered in the *Triodos case* would be repeated in the decision rendered in the context of this case, respectively when it claims that it only "discovered" the alleged lack of impartiality of the arbitrator in question at the moment when the disputed Award was notified to it. It must in fact be clearly understood that the two Arbitral Tribunals in question were chaired by the same individual and had to rule on an identical legal issue in connection with an objection of lack of jurisdiction raised by the very same party. It is hardly surprising therefore that the response to an identical problem is the same in two awards handed down six months apart by Arbitral Tribunals chaired by the same person.

7.
In a Third Pleading, the Appellant, invoking Art. 190 para. 2 Let. b LDIP, criticizes the Arbitral Tribunal for having wrongly admitted its jurisdiction to hear a dispute of an intra-European nature. In this regard, it maintains that the arbitration clause enshrined in Art. 26 ECT would be incompatible with EU law. However, in its opinion, in the presence of such a conflict of standards, EU law would take precedence over the ECT.
In order to facilitate understanding of the explanations that will follow and to better grasp the meaning of the criticisms expressed by the interested party, it is appropriate to refer (first of all) to Arts. 16 and 26 ECT as well as to Art. 267 and 344 of the Treaty on the Functioning of the EU (hereinafter: the TFEU), then to examine the reasons that support the Arbitral Tribunal's dismissal of the objection of lack of jurisdiction under consideration.

7.1. In the contested Award, the Arbitral Tribunal describes the arguments put forward by the parties, who in order to contest its jurisdiction (Nos. 179-194), who to justify it (Nos. 195-228). To resolve the disputed question, it considers it necessary to interpret Art. 26 ECT in accordance with the rule provided for by Art. 31 of the Vienna Convention of May 23, 1969 on the Law of Treaties (RS 0.111; hereinafter: VC). In this regard, the arbitrators consider that the terms of Art. 26 ECT, determined according to their ordinary meaning, confirm their jurisdiction in principle. The central point is to determine whether the said terms, interpreted in their context and in light of the purpose and objective of the ECT, exclude recourse to arbitration to settle an intra-European dispute, which is to say a dispute between an EU Member State and an investor located or domiciled in one of these States (Award, No. 229-248).
Analyzing this question, the Arbitral Tribunal notes that Art. 16 ECT governs the relationship between the said Treaty and an international agreement concluded before or after it by two or more parties to the ECT. According to the aforementioned norm, no rule of another treaty can be interpreted as derogating from the provisions of Parts III or V of the ECT - among which appears in particular Art. 26 ECT - nor the right to demand settlement of the dispute regarding this matter in accordance with the ECT. The arbitrators consider that Art. 16 ECT therefore excludes the assumption that an intra-European dispute cannot be validly submitted to an arbitral tribunal to arrive at such a solution, they examine three hypotheses in turn. The first relates to the possible existence of an initial incompatibility between the ECT and EU law. On this point, the Arbitral Tribunal considers that the terms used in the ECT do not reveal any incompatibility of this kind. The statements made by the contracting parties upon their accession to the ECT do not mention that Art. 26 ECT would not include intra-European disputes. The second scenario examined is that of an amendment to the ECT adopted by the EU Member States, which would have ruled out the application of Art. 26 ECT. The Arbitral Tribunal rejects this possibility, since the proceedings provided for this purpose by Art. 42 ECT was not respected, an amendment to the ECT tacitly occurring solely between the EU Member States was not taken into account in its opinion. Finally, it looks at the third and final scenario according to which EU law takes precedence over the ECT in the relationships between EU Member States, which is why the arbitration clause anchored in Art. 26 ECT would not apply to intra-European disputes. It considers that such a theory is incompatible with the terms of the ECT interpreted in their context and in light of the objective and purpose of the said Treaty (Award, No. 249-259).
Continuing its analysis, the Arbitral Tribunal specifies that the elements put forward by the Appellant concerning the solution provided for the problem at issue within the EU do not change the assessment of its own jurisdiction. In this regard, it highlights, first of all, that the Decision rendered on March 6, 2018, by the Court of Justice of the EU (hereinafter: the CJEU) in Case C-284/16 *Achmea versus Slovakia* (hereinafter:

the *Achmea* case) did not concern the application of the ECT. In the Judgment in question, the CJEU ruled only on the compatibility with the TFEU of an arbitration clause contained in a bilateral investment treaty concluded by two EU Member States. The Arbitral Tribunal then notes that the CJEU, in the Judgment it rendered on September 2, 2021 in Case C-741/19 *Komstroy LLC versus Moldavia* (hereinafter: the *Komstroy* case), certainly ruled that the arbitration clause enshrined in Art. 26 ECT would not apply to intra-European disputes. It considers, however, that the said decision is not binding on an arbitral tribunal constituted on the basis of the rules of a multilateral treaty such as the ECT, which is foreign to the EU treaties.
According to the Arbitral Tribunal, in order to assess whether the State concerned has given its unconditional consent to the submission of any dispute relating to the ECT to an arbitration proceeding, it is appropriate for it to base itself on the rules of the ECT and those of the VC, and not on the legal standards of EU law, which are not binding on the Arbitral Tribunal. Moreover, according to Art. 26 para. 3 point a) ECT, the Respondent State has given its “unconditional consent” to the submission of any dispute to arbitration, including disputes between an investor located in an EU Member State and one of those States. According to the arbitrators, the decisions rendered in the *Achmea* and *Komstroy* cases cannot otherwise be qualified as *instrument*, of *agreement*, of *practice* or of *relevant rule of international law* in the sense of Art. 31 para. 2 and 3 VC, given that the said decisions have not received the assent of all parties to the ECT and that they are not enforceable against States which are not members of the EU. As for the declaration made on January 15, 2019 by twenty-two EU Member States - including France and the Appellant State - regarding the “legal consequences of the *Achmea* Judgment rendered by the Court of Justice and the protection of investments in the European Union” (hereinafter: the Declaration of 22), the Arbitral Tribunal notes that the document in question was not signed by all the EU Member States nor *a fortiori* by all the parties to the ECT. It considers that this only involves a declaration of intention that has no binding character for it. It also rules that the “Decision” adopted on November 10, 2017 by the EC concerning the financial support mechanism put in place by the Appellant in 2013 for the purpose of promoting the production of electricity from renewable energy sources was not a determining factor for it to assess its own jurisdiction. After indicating that it does not share the opinion expressed by the arbitrators in the Award rendered in the *Green Power* case, the Arbitral Tribunal dismisses the objection of lack of jurisdiction raised by the Respondent State (Award, No. 260-271).
The reasons that support the solution adopted by the arbitrators on the problem at issue having been summarized, it is now appropriate to present the arguments put forward by the parties, who in order to deny the jurisdiction of the Arbitral Tribunal, who to admit it.

7.2.

7.2.1. In its Appeal Brief, the interested party notes, as a preliminary point, that Art. 26 para. 3 point a) ECT provides that each contracting party gives its unconditional consent to the submission of any dispute to arbitration proceedings. Referring to the Judgment rendered in the *Komstroy* case, it notes, however, that the CJEU has ruled that the aforementioned provision is not applicable to disputes of an intra-European nature. According to the Appellant, the principle of the primacy of EU law over that of its Member States should lead to the conclusion that the ECT only applies to relationships between EU Member States to the extent that the said Treaty is compatible with EU law. In other words, in the event of a conflict between the ECT and EU law, the latter should prevail.
The Appellant State recalls that the EU is, just like France and itself, a party to the ECT. Based on the decision in the *Komstroy* case, it maintains that the CJEU has exclusive jurisdiction to interpret the ECT, to the extent that the said Treaty is an integral part of the EU legal order. The fact that the ECT constitutes a mixed agreement, ratified not only by the EU but also by a large number of EU Member States, cannot lead to excluding the exclusive jurisdiction of the CJEU to hear intra-European disputes. Emphasizing that it is required to comply with European law and respect the decisions rendered by the CJEU, the Appellant claims that the judgment rendered in the *Komstroy* case is imposed on it and that it could not therefore agree to submit an intra-European dispute to arbitration. It also notes that the EC confirmed this point of view in the Decision it adopted on November 10, 2017.
The interested party then seeks to demonstrate that the interpretation of the ECT carried out by the Arbitral Tribunal on the problem considered is erroneous. In this regard, it maintains that the validity of the consent to arbitration, which constitutes a condition for the material validity of the arbitration agreement, must be assessed with regard to the ECT and the rules of public international law. Then proceeding, over more than

twenty pages, with its own interpretation of the ECT with regard to the criteria provided for in Art. 31 VC, it comes to the conclusion that an EU Member State cannot validly consent to submit an intra-European dispute to arbitration.

7.2.2. To achieve such a solution, the interested party claims, first of all, that the text of certain provisions of the ECT would lead to recognition of the primacy of EU law over the ECT. It is based, as such, on the terms defined in Art. 1 Ch. 3 and 10 ECT as well as on Art. 25 ECT. According to the Appellant, the aforementioned provisions demonstrate that the ECT reserves for the EU an area of jurisdiction that would escape the Treaty in question. The transferred areas, initially covered by the ECT, would thus fall within the jurisdictional sphere of the Regional Economic Integration Organization (hereinafter: REIO) referenced in Art. 1 Ch. 3 ECT, namely in this case the EU. In such areas, the EU would be solely empowered to lay down the applicable rules and to monitor their application, through the CJEU. The combination of Art. 1 Ch. 3 and 10 ECT as well as of Art. 25 ECT would thus establish a space within the ECT, subject exclusively to EU law.

7.2.3. The Appellant then launches into explanations aimed at demonstrating that the analysis of the context where the ECT corroborates the conclusion it draws from its literal interpretation of the said Treaty. In this regard, it recalls that, according to Art. 31 para. 2 VC, the context includes, in addition to the text, the preamble and the appendices of a treaty, any agreement relating to the treaty and which was entered into between all the parties on the occasion of the conclusion of the treaty (point a), as well as any instrument established by one or more parties at the time of the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty (point b). Referring to various documents, it argues, on the one hand, that the areas relating to the internal electricity market and direct investments (see Art. 207 para. 1 TFEU) were transferred to the REIO (i.e. the EU) upon the adoption of the Lisbon Treaty in 2007 and, on the other hand, that the EU and its Member States have not given their unconditional consent to arbitration for intra-European disputes, as shown from the Declaration of the European Communities of December 16, 1997, done pursuant to Art. 26 para. 3 point b) ii) ECT (hereafter: the Declaration of 1997). The interested party then criticizes the arbitrators for not having taken into account the Declaration of the 22, on the grounds that it was not accepted by all the parties to the ECT. According to it, nothing prevents State parties simultaneously with two multilateral treaties from agreeing to give priority, in their mutual relationships, to the commitments arising from one treaty rather than another. The Appellant considers that the Declaration of the 22 confirms that certain parties to the ECT decided, by a subsequent agreement, to exclude any consent to arbitration for intra-European disputes. In its opinion, this document binds the signatory States and excludes the possibility of submitting disputes to an arbitral tribunal that divide one of them and a citizen from another EU Member State.
The interested party also complains that the arbitrators have denied any relevance to the EU treaties, even though Art. 31 para. 3 point c) VC mandates taking into account any relevant rules of international law applicable to the relationships between the parties. It considers that the TFEU standards exclude the consent to arbitration, referred to in Art. 26 ECT, for intra-European disputes.

7.2.4. Finally examining the subject and the purpose of the ECT, the Appellant maintains that the analysis of the latter would be unsuitable to refute the conclusions that it has previously drawn on the basis of the text of the said Treaty and the context.

7.3. In its response, the Respondent disagrees with the theory supported by its opponent. It notes that the text of Art. 26 para. 3 point a) ECT is limpid, as it provides that each contracting party gives its unconditional consent to the submission of any dispute to arbitration proceedings, in accordance with the provisions of said Article. When the Appellant, France and the EU ratified the ECT in the late 1990s, they had jurisdiction to do so, since it was only the Treaty of Lisbon, concluded in 2007, amending the EU Treaty and the Treaty establishing the EC, which gave the EU exclusive jurisdiction in matters of foreign direct investment, without however calling into question the validity of the previous agreements. The Respondent insists on the fact that the ECT does not contain any “disconnection clause” authorizing the member parties of a regional organization, such as the EU, not to apply the rules of a multilateral treaty like the ECT in their mutual relationships. It emphasizes that the EU had nevertheless included disconnection clauses on various occasions before the ratification of the ECT. It also notes that the preparatory work for the ECT reveals that the EU tried in vain to introduce such a clause into the said Treaty. Referring to several decisions rendered by arbitral tribunals constituted on the basis of Art. 26 ECT, the interested party maintains that EU Member States are subject, in their mutual relations, to all the rules of the ECT, given the absence of a disconnection clause. After setting out the reasoning used by the CJEU in its judgment in the *Komstroy* case, the Respondent

emphasizes, with supporting references, that this decision has been strongly criticized in legal doctrine, on the grounds in particular that it does not take into account international law nor the rules of interpretation of treaties. It further argues that numerous arbitral tribunals, constituted on the basis of Art. 26 ECT, admitted their jurisdiction to hear disputes of an intra-European nature, notwithstanding the judgment pronounced by the CJEU in the *Komstroy* case, the only exception being the Award rendered in the *Green Power* case. The interested party also explains that various courts of non-EU member States have refused to apply the aforementioned case law of the CJEU.
The Respondent then seeks to demonstrate that the validity of the arbitration clause must in this case be examined in the light of Swiss law under Art. 178 para. 2 LDIP and be assessed at the time when this arbitration proceeding was initiated. As Switzerland is not a member of the EU, it considers that this state is not bound by EU law. The interpretation arrived at by the CJEU of certain standards of EU law therefore has no binding effect on Switzerland. The interested party then sets out to refute the theory according to which EU law takes precedence over other rules of international law.
The Respondent devotes the rest of its brief to the interpretation of Art. 26 ECT. To do this, it uses as its basis the criteria set out in Art. 31 VC, by examining the meaning of the terms used, the context, the subject and the purpose of the ECT and the practice followed by the Appellant following the signing of the said Treaty. It notes in particular that the ordinary meaning of the terms of Art. 26 ECT demonstrates that the Appellant gave its unconditional consent to the arbitration, without any restriction as to the origin of the investor. It also insists on the fact that the other provisions of the ECT invoked by the Appellant in support of its thesis do not make it possible to rule out such consent to arbitration on the part of the Member States of the EU for disputes of an intra-European nature. Referencing Art. 16 ECT, the interested party considers that a possible conflict between Art. 26 ECT and the EU treaties must be resolved in favor of the investor, which is why we cannot deny him the possibility of seizing an arbitration tribunal, including in the presence of an intra-European dispute. It also considers that neither the 1997 Declaration nor the Declaration of the 22 upon which the Appellant relies affects the validity of the arbitration clause in this case. Finally analyzing the subject and purpose of the ECT, the Respondent argues that this Treaty aims to promote cooperation and the flow of international investments in the area of energy between all the contracting parties for the purpose of creating and maintaining a stable and secure energy market. However, such an objective would be compromised if European investors were to be denied the right to initiate an arbitration proceeding on the basis of Art. 26 ECT, under the pretext that the Respondent State is a member of the EU.

7.4. In its reply, the Appellant maintains that EU law takes precedence over Art. 26 ECT in the relations between EU Member States. It emphasizes that the question to be resolved in this case is not whether EU law is applicable to Switzerland, although it is not a member of the EU. This involves determining whether the ECT must take precedence over EU law, in the event they are in conflict, in relations between EU Member States. According to the Appellant, the primacy of EU law results primarily from Art. 41 VC, under which two or more parties to a multilateral treaty may conclude an agreement for the purpose of amending the treaty in their mutual relations. Secondly, such a solution is corroborated by a “rigorous interpretation” of the ECT. Thirdly, finally Art. 30 VC, which governs the relationship between two international treaties relating to the same subject, would lead to the same result, to the extent that EU law occupies a legally superior rank to that of the ECT.

7.5. In its rejoinder, the Respondent maintains that its opponent is trying to justify the alleged primacy of EU law over the ECT by invoking new and, therefore, inadmissible grounds at the stage of the reply. It then sets out the reasons why these are in any case unfounded.

7.6. The arguments put forward by the parties having been summarized hereinabove, it is appropriate to examine their merits.

7.6.1. Seized of the complaint of lack of jurisdiction, the Federal Court freely examines the questions of law that determine the jurisdiction or lack of jurisdiction of the Arbitral Tribunal (**ATF 149 III 131** consid. 6.4.1; **146 III 142** consid. 3.4.1; **133 III 139** consid. 5). Where applicable, when ruling on the jurisdiction of an arbitral tribunal, it may be required to examine preliminary questions relating to foreign law; it does so with full knowledge, but agrees in principle with the majority opinion expressed on the point in consideration, or even, in the event of controversy between doctrine and jurisprudence, with the opinion issued by the supreme court of the country having decreed the applicable rule of law (**ATF 142 III 296** consid. 2.2). The Federal Court thus had to rule, for example, on the capacity of a bankrupt Polish company to participate in an

arbitration proceeding (Judgment 4A_428/2008 of March 31, 2009, consid. 3.1) or examine the validity of a power of attorney under Cypriot law (Order issued on July 23, 2014 in case 4A_118/2014, consid. 3.4.2). It may also be necessary to interpret the meaning of certain terms used in a bilateral or multilateral investment treaty (**ATF 149 III 131** consid. 6.4.1; **144 III 559** consid. 4.1; **141 III 495** consid. 3.2 and 3.5.1; Judgments 4A_172/2023 of January 11, 2024, consid. 4.2.1 intended for publication; 4A_65/2018, cited above, consid. 2.4.1 and the references cited).
Even if it is not unaware of the important place that arbitral awards rendered in the field of international investment protection occupy in specialized works, This Court itself will endeavor to determine the meaning to be given to certain terms of an international treaty, taking into account as applicable the doctrine, and drawing inspiration, possibly, from the solutions reached by the arbitral tribunals in such matters, it being specified that the solutions rendered in certain arbitral cases are not binding on other arbitral tribunals nor on the Federal Court, so that we cannot see in arbitration case law a source strictly speaking of arbitration law (**ATF 149 III 131** consid. 6.4.1; **144 III 559** consid. 4.4.2; Judgment 4A_172/2023, cited above, consid. 4.2.1 intended for the publication and the references cited). As this case involves a question of assessing the jurisdiction of an arbitral tribunal, constituted on the basis of Art. 26 ECT, to hear a dispute of an intra-European nature, the Federal Court will draw its inspiration, among other things, as applicable, from the awards rendered by various arbitration panels that have been called upon to rule on the same legal question.

7.6.2. The interpretation of the ECT must be carried out in accordance with Arts. 31 ss VC, which essentially codify customary international law (**ATF 149 III 131** consid. 6.4.2; **145 III 339** consid. 4.4.1; **122 III 234** consid. 4c; Judgment 4A_80/2018 of February 7, 2020, consid. 3.1.2).
Art. 31 para. 1 VC provides that a treaty shall be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in light of its subject and purpose. In addition to the context (see Art. 31 para. 2 VC), it will be taken into account, according to Art. 31 para. 3 VC, of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Let. a); any practice subsequently followed in the application of the treaty by which the agreement of the parties with regard to the interpretation of the treaty (Let. b) is established and any relevant rule of international law applicable in the relations between the parties (Let. c). The preparatory works and the circumstances under which the treaty was concluded constitute complementary means of interpretation when the interpretation given in accordance with Art. 31 VC leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable (See Art. 32 VC).
Art. 31 para. 1 VC sets an order for taking into account the elements of interpretation, without however establishing a mandatory legal hierarchy between them. The ordinary meaning of the treaty text constitutes the starting point for interpretation. This ordinary meaning of the terms must be arrived at in good faith, taking into account their context and in light of the subject and purpose of the treaty. The subject and purpose of the treaty is what the parties wanted to achieve by the treaty. The teleological interpretation guarantees, in connection with the interpretation according to good faith, the “useful effect” of the treaty. When several meanings are possible, it is necessary to choose the one that allows the actual application of the clause whose meaning we are seeking, by avoiding ending up with an interpretation that is in contradiction with the letter or the spirit of the commitments made. A Contracting State must therefore prohibit any behavior and any interpretation that would result in evading its international commitments or in diverting the treaty from its meaning and purpose (**ATF 149 III 131** consid. 6.4.2; **144 II 130** consid. 8.2.1 and the cited references; Judgment 4A_80/2018, cited above, consid. 3.1.2; 4A_65/2018, cited above, consid. 2.4).

7.6.3. The arbitration agreement results in this case from a particular mechanism since its anchor point is located directly in a multilateral treaty signed by States for the protection of investments, a treaty whose Art. 26 provides in particular for recourse to arbitration to settle disputes relating to alleged violations of its material clauses (also called substantial). Arbitral practice assimilates such a provision to an offer from each of the Contracting States to resolve disputes through arbitration that could bring it into opposition with investors (not parties to the treaty) from the other Contracting States. The arbitration agreement is only concluded when the investor accepts the State's offer, which it will most often do by the conclusive act of filing a request for arbitration. The Federal Court had the opportunity to clarify that the particular mechanism referenced by Art. 26 ECT constitutes a formally valid arbitration agreement (**ATF 149 III 131** consid. 6.4.3; **141 III 495** consid. 3.4.2; see also KAJ HÔBER, The Energy Charter Treaty, A commentary, 2020, Pg. 400).

7.6.4. In this case, the investor, a company that has its headquarters in a State that is party to the ECT (France), relying on Art. 26 para. 2 point c) and para. 4 point b) ECT, chose to submit the dispute between it and the Appellant State to an ad hoc tribunal whose headquarters were located in Switzerland. By introducing, on February 24, 2016, a request for arbitration against the Appellant, party to the ECT, it thus accepted the unconditional offer from this State, according to Art. 26 para. 3 point a) ECT, to submit their dispute to an arbitration proceeding. Therefore, on February 24, 2016, an Arbitration Agreement was formally concluded between the French investor and the Appellant State in whose territory the disputed investments were made. The Appellant objects, however, that the Arbitration Agreement resulting from this unique mechanism was not validly concluded. In this regard, it maintains that the arbitration clause enshrined in Art. 26 para. 3 point a) ECT, would not apply to intra-European disputes, respectively that EU law prohibited it from consenting to settlement by arbitration of such disputes when the Respondent initiated these arbitration proceedings. As the existence of a valid arbitration agreement is a condition *sine qua non* of the jurisdiction of the Arbitral Tribunal, it is appropriate to determine, first of all, whether the interpretation of the ECT leads to the conclusion that the offer of arbitration provided for by Art. 26 of said Treaty does not in reality target intra-European disputes. As the case may be, it will be necessary, secondly, to examine whether the validity of the consent to arbitration expressed in Art. 26 ECT would be likely to be challenged by EU law, assuming that it takes precedence over the rules of the ECT in relations between EU Member States.

7.6.5. Before examining these questions, the Federal Court considers it useful to recall that this dispute is part of the broader context of the very legality of recourse to investment arbitration, within the EU, to settle disputes of an intra-European nature. For several years, EU bodies have, in fact, been leading a crusade against such international arbitrations (see MALIK LAAZOUZI, The Twilight of Intra-European Investment Arbitration, Revue de l'Arbitrage 2022/4 Pg. 1609 ss; CLAIRE DEBOURG, The Scope of Achmea/PL Holdings Jurisprudence: Exclusion of Commercial Arbitration, Revue de l'Arbitrage 2023/3 Pg. 633 ss).
On a jurisdictional level, the CJEU, in its judgment rendered on March 6, 2018 in the *Achmea* case, thus ruled that an arbitration clause inserted into a bilateral investment treaty concluded by two EU Member States was contrary to EU law. It confirmed this point of view for multilateral investment treaties by considering, in the decision it pronounced on September 2, 2021 in the *Komstroy* case, that “Article 26(2)(c) of the ECT must be interpreted as meaning that it is not applicable to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State”. A similar conclusion was rendered in the form of an *obiter dictum*, the main question asked by the referring court being quite different (i.e. the existence of an investment). To achieve this solution, the CJEU emphasized the requirement to preserve the autonomy and specific character of EU law, without taking into account international law or the rules on interpretation of treaties.
For this reason in particular, the decision in question has been strongly criticized by a number of commentators (LAVRANOS/LATH/VARMA, The Meltdown of the Energy Charter Treaty [ECT]: How the ECT was ruined by the EU and its Member States, SchiedsVZ German Arbitration Journal 21/1 Pg. 42 s.; GIULIA WOLFF, The Impact of the CJEU's Komstroy Decision on Investor-State Arbitration, SchiedsVZ German Arbitration Journal 21/5 Pg. 283 ss; JÉRÉMY JOURDAN-MARQUES, Chronique d'arbitrage [Chronical of Arbitration]: après Komstroy, London rit et Paris pleure [After Komstroy, London is Laughing and Paris is Crying], Dalloz Actualité, September 17, 2021; ALAN DASHWOOD, Republic of Moldova v. Komstroy LCC: Arbitration under Article 26 ECT outlawed in Intra-EU Disputes by Obiter Dictum, in European Law Review 2022 Pg. 136 s.; PASCHALIS PASCHALIDIS, From Achmea to PL Holdings, Republic of Moldova, and Opinion 1/20: The End of Intra-EU Investment Treaty Arbitration, in Sarmiento et al. [Ed.], Yearbook on Procedural Law of the Court of Justice of the European Union, 4e éd. 2022, Pg. 60; LE MÊME [THE SAME], Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in Republic of Moldova, European Investment Law and Arbitration 2022/1 Pg. 14 ss; EBERT/WEYLAND, Weitere Rechtsschutzdefizite in der EU?, Recht der Internationalen Wirtschaft 2022 Pg. 23 s.; RAYYAN EL ISSA, La place contestée de l'arbitrage international en droit de l'investissement [The Disputed Place of International Arbitration in Investment Law], 2023, No. 225 ss. WILSKE/EBERT/RUSCH, The View From Europe: What's New in European Arbitration?, in Dispute Resolution Journal, AAA-ICDR, 2022 Pg. 83; CRISTIAN GALLORINI, The Termination of Intra-EU Investor- State Arbitration and the Enforceability of Intra-EU Awards in The United States District Courts, ELTE Law Journal 2022/1 Pg. 35).
The CJEU also emphasized that setting the seat of arbitration on the territory of an EU Member State entails the application of EU law, which national courts have an obligation to ensure compliance with. Such an

obligation does not apply to the courts of non-EU states, such as Switzerland, as EU law is a *res inter alios acta* for these States (VOSER/NESSI, The Consequences of Achmea on Arbitrations Seated in Switzerland, in Stanic/Baltag [éd.], The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court, 2020, Pg. 117 s.; WOLFF, op. cit., Pg. 287). Non-EU Member States cannot, moreover, submit to the CJEU a preliminary question concerning the interpretation of EU law, as the court of an EU Member State would be able to do that is seized of an appeal against an award rendered by an arbitral tribunal having its seat in that State. It follows that the decisions rendered by the CJEU, and particularly the Judgment rendered in the *Komstroy* case, do not bind the State judge called upon to rule on an appeal against an award rendered by an arbitral tribunal sitting in Switzerland (see to the same effect: VOSER/NESSI, op. cit. Pg. 123 s.; WOLFF, op. cit., Pg. 287; LAAZOUZI/LEMAIRE, Chronique de jurisprudence arbitrale en droit des investissements [Chronicle of Arbitral Case Law in Investment Law], Revue de l'Arbitrage 2019/2 Pg. 562; WILSKE/EBERT/RUSCH, op. cit., Pg. 83; JOURDAN-MARQUES, op. cit.).
It is true that, according to case law (See **ATF 142 III 296** consid. 2.2), the Federal Court, when it is called upon - in the context of its free power of examination in law of the jurisdiction of an arbitral tribunal - to examine questions relating to foreign law, rallies in principle, due to the lack of a majority opinion expressed on the disputed point and in the event of controversy between doctrine and jurisprudence, towards the opinion issued by the supreme court of the country that decreed said rule. This praetorian rule, which may however suffer from exceptions, is undoubtedly relevant when the Federal Court must resolve a specific preliminary question that falls under foreign law, because the supreme court of the State in question is undoubtedly better able to clarify the nature and scope thereof. This is less so when it comes to determining whether the rules adopted by a community of States, such as the EU, must prevail over those resulting from a multilateral international treaty, like the ECT, which binds the said community, its Member States and third party States. It is indeed necessary to see that, in such a case, the legal problem does not come down to assessing the scope of a norm of foreign law but to examining the legal relationship that exists between the rules enshrined in various instruments of an international nature. However, in the presence of a conflict between such rules, it is possible that the judicial authority established by the said community of States may be tempted, as in the *Komstroy* case, to assert the primacy of its law over that resulting from this other international agreement, thus giving its decision the nature of a *pro domo* plea. Consequently, the Court will not attach particular value to the judgment rendered by the CJEU in the *Komstroy* case but will, on the contrary, endeavor to itself seek the meaning and the scope of Art. 26 ECT and, to determine, as applicable, whether EU law can effectively call into question the validity of the consent that the Appellant State gives to the implementation of arbitration to settle the dispute between it and the Respondent.

7.7.

7.7.1. Like any treaty, the ECT shall be interpreted in good faith according to the ordinary meaning to be given to the terms of the Treaty in their context and in light of its subject and purpose (Art. 31 para. 1 VC). Moreover, the principle of good faith is closely related to the rule of useful effect, even if the latter does not explicitly appear in Art. 31 VC. The interpreter must therefore choose between several possible meanings for the one that allows the effective application of the clause whose meaning is sought, whilst however avoiding arriving at a meaning that contradicts the letter or spirit of the treaty (**ATF 141 III 495** consid. 3.5.1 and the reference cited).
Pursuant to Art. 26 para.: 3 point a) ECT, “each contracting party gives its unconditional consent to the submission of any dispute to arbitration proceedings”, subject to reservation of the cases covered by Art. 26 para. 3 point b) and c) ECT. When interpreted in good faith, the term “unconditional” means that the consent to arbitration is expressed without the slightest reservation and thus knows no limits. Such consent has a general scope, since it aims to submit “*any* dispute” to arbitration. The expression “subject to reservation”, appearing in Art. 26 para. 3 point a) *in initio* ECT, certainly indicates that there are exceptions to unconditional consent to arbitration, but these are exhaustively listed and only concern the cases covered by Art. 26 para. 3 points b) and c) ECT, as appears from the text of the topical provision. The clear letter of Art. 26 para. 3 point a) ECT thus shows that the Appellant State, bound by the said Treaty, has given its unconditional consent to the fact that an investor located in another State party to the ECT, such as the Respondent, can submit any dispute to arbitration concerning an investment made on its territory and relating to an alleged breach of an obligation covered by Part III of the ECT, subject to the exceptions mentioned in Art. 26 para. 3 point b) and c) ECT. No element of the text of Art. 26 ECT thus allows us to deduce that the scope of the “unconditional consent” to

arbitration would have other limits and would not in reality cover disputes of an intra-European nature (SULLIVAN/INGLE, Arbitration under the Energy Charter Treaty: the Relevance of EU Law, in Mata Dona/Lavranos [Ed.], International Arbitration and EU Law, 2021, Pg. 323; see in the same direction: *Vattenfall et al. versus Germany*, CIRDI No. ARB/12/12, Award of August 31, 2018, No. 182 s. and the references cited; *Ekosol S.p.A. versus Italy*, CIRDI No. ARB/15/50, Award of May 7, 2019, No. 85; *Mercuria Energy Group Limited versus Poland*, SCC No. V 2019/126, Award of December 29, 2022, No. 384). Such a solution could thus only be adopted on the basis of the other criteria for interpretation provided for in Art. 31 VC.
At this stage of the reasoning, it is appropriate to note that the Appellant State is a contracting party according to Art. 1 Ch. 2 ECT, that the Respondent has the status of investor with regard to Art. 1 Ch. 7 and that the dispute dividing the parties concerns an investment within the meaning of Art. 1 Ch. 6 ECT and relates to an alleged failure to fulfill an obligation contained in Title III of the said Treaty. The conditions provided for by Art. 26 para. 1 ECT are thus fulfilled. The parties do not further contest that the exceptions referred to in Art. 26 para. 3 points b) and c) ECT do not apply in this case.

7.7.2. To establish its position according to which unconditional consent to arbitration within the meaning of Art. 26 para. 3 point a) ECT would not apply to intra-European disputes, the Appellant refers to other provisions of the said Treaty. According to it, the combined reading of Art. 1 Ch. 3 and Ch 10 ECT as well as of Art. 25 ECT would establish the existence of an autonomous legal regime, within the ECT, specific to the EU Member States. The Appellant claims, in effect, that the very text of the ECT would reserve an entire area of powers transferred to the EU and would recognize the primacy of EU law over the ECT. In its opinion, the transferred powers would thus fall outside the scope of the ECT and the EU would be solely competent to set the applicable rules in the areas concerned and to monitor their application through the CJEU. This would particularly be the case in the sector of the internal electricity market and of foreign direct investments.
Such argumentation does not convince the Court in this case. Art. 1 Ch. 3 ECT defines what a REIO is, which covers any organization constituted by States to which they have transferred powers in specific areas, some of which are governed by this Treaty, including the power to make decisions that bind them in these areas. As for Art. 1 Ch. 10 ECT, it only specifies that the “zone” of a REIO covers the zone of the member states of such an organization. Contrary to what the Appellant claims, these two definitions do not allow us to conclude that the powers transferred by certain States to a REIO, in this case the EU, would fall outside the scope of application of the ECT and that the areas concerned would exclusively obey the rules of EU law (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 180). That States that are parties to the ECT decided to transfer certain areas of power to the EU does not mean that they would no longer be bound by the provisions of an international treaty that they have ratified, including the in relationships between EU Member States. As for the notion of the zone of a REIO defined in Art. 1 Ch. 10 ECT, it in no way allows it the conclusion that there is an autonomous legal space within the ECT itself that would be exclusively subject to EU law (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 180).
As regards Art. 25 ECT, it provides, in its first paragraph, that the provisions of the said Treaty shall not be interpreted as obligating a contracting party that is party to an economic integration agreement (EIA) to extend, under the guise of the treatment of the most favored nation, to another contracting party that is not a party to this EIA, the preferential treatment applicable between the parties to this EIA by reason of the fact that they are parties to this EIA. It thus appears that the EU Member States - which are bound by an EIA within the meaning of Art. 25 para. 2 ECT - are not required to grant to third party States the prerogatives resulting from such an agreement. Thus, as an example, EU Member States are not required to extend the free movement rights in force on EU territory to investors from third party States. Art. 25 ECT does not, however, allow one to conclude that the various material guarantees provided for by the ECT would not apply in intra-European disputes nor that the arbitration clause enshrined in Art. 26 ECT would be inoperative in resolving such disputes. Such a reading finds no basis in the text of Art. 25 ECT. In reality, this provision simply demonstrates that the EU and its Member States decided, during the negotiations surrounding the conclusion of the ECT, to insert into the said Treaty certain rules expressly aimed at delineating the contours and scope of specific provisions of the ECT, like the most favored nation treatment clause in connection with an EIA (see in the same sense: *Ekosol S.p.A. versus Italy*, op. cit., No. 95).
That being said, if the EU and its Member States really intended to restrict the application of other ECT rules

in their mutual relations, respectively limiting the scope of their unconditional consent only to arbitration proceedings initiated by investors from third party States, such an intention could and should have been clearly expressed in the text of the ultimately-adopted ECT, which was not the case (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 202). This is all the more true since the EU, before concluding the ECT, had already inserted disconnection clauses, on several occasions, into multilateral treaties, authorizing EU Member States not to apply the rules of such a treaty in their mutual relations (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 203; *Ekosol S.p.A. versus Italy*, op. cit., No. 92). However, in this case, it is clear that such a disconnection clause was not introduced into the ECT.

7.7.3. Art. 31 para. 1 VC also requires consideration of the subject and purpose of the Treaty. According to Art. 2 ECT, entitled "Purpose of the Treaty," it aims to establish a legal framework intended to promote long-term cooperation in the energy field, and based on complementary and mutual benefits, in accordance with the objectives and principles of the European Energy Charter, signed on December 17, 1991, which already insisted on the need for the signatory States to offer a legal framework that was both stable and transparent in order to encourage the international flow of investments. The ECT thus seeks to promote cooperation and international investment flows in energy - without making any distinction at the geographical level as to the investors' origin - in order to serve the ultimate cause of energy security. Granting to investors located in an EU Member State the right to initiate arbitration proceedings against another Member State undoubtedly contributes to the achievement of such an objective and is consistent with the spirit of the ECT. On the other hand, depriving the investors concerned of such an option would be counterproductive to the purpose of encouraging international investment flows (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 198; *Mercuria versus Poland*, op. cit., No. 393). This is all the more true since Art. 16 ECT, which governs the relationship between the said Treaty and other international agreements, seeks to guarantee investors the right to demand a settlement of the dispute that is most favorable to them.

7.7.4. In order to support its thesis according to which the unconditional consent to arbitration expressed in Art. 26 para. 3 point a) ECT would be inoperative in intra-European disputes, the Appellant makes much of the 1997 Declaration, whose content is as follows:

"The European Communities, as a Contracting Party to the Energy Charter Treaty, make the following declaration concerning its policies, practices and conditions relating to disputes between an investor and a Contracting Party and the submission of disputes to an international arbitration or conciliation proceeding:
'The European Communities are a regional economic integration organization within the meaning of the Energy Charter Treaty. They exercise the powers transferred to them by their Member States through autonomous institutions endowed with decision-making power and judicial power.
The European Communities, on the one hand, and their Member States, on the other hand, have signed the Energy Charter Treaty and must therefore be responsible at the international level for the execution of the obligations contained therein, in accordance with their respective powers.
If necessary, the Communities and the Member States concerned will determine which of them is the Respondent party in an arbitration proceeding initiated by an investor or by another contracting party. Where applicable, at the investor's request, the Communities and the Member States concerned will make this designation within thirty days.
The Court of Justice of the European Communities, as the judicial body of the Communities, has jurisdiction over any question relating to the application and interpretation of the founding treaties and the acts adopted pursuant thereto, including international agreements concluded by the Communities, which can be invoked before it under certain conditions.
Any case submitted to the Court of Justice of the European Communities by an investor or other contracting party in accordance with the possibilities of appeal provided for by the founding Treaties of the Communities falls under Article 26, paragraph 2, point a) of the Energy Charter Treaty. Given that the legal system of the Communities provides for the proceeding applicable to such action, the European Communities have not given their unconditional agreement to the submission of a dispute to an international arbitration or conciliation proceeding. [...]'" (passage put in bold by the Appellant). Contrary to what the Appellant asserts, this document is of no help to it. It appears, firstly, from the very title of the declaration in question that it was formulated on

the basis of Art. 26 para. 3 point b) ii) ECT, which is the reason why it has a scope that is limited to the particular case covered by this provision. In this regard, it is appropriate to recall that Art 26 para. 3 point b) i) ECT provides that the contracting parties listed in Appendix ID have not given their unconditional consent to arbitration in the event that the investor has previously submitted the dispute to another jurisdictional authority referred to in Art. 26 para. 2 points a) and b) ECT ("*Fork-in-the-Road*" clause). The European Communities, which later became the EU, are listed in Appendix ID. Art. 26 para. 3 point b) ii) ECT provides that, for reasons of transparency, each Contracting Party listed in Appendix ID shall communicate in writing its relevant policies, practices and conditions. It is therefore clear that the 1997 Declaration only has a scope that is limited to the "*Fork-in-the-Road*" clause.
Secondly, contrary to what the Appellant tries to make us believe, the 1997 Declaration only targets the European Communities, and not its Member States ("the European Communities have not given their unconditional agreement to the submission of a dispute to an arbitration proceeding"). It therefore does not concern EU Member States, such as the Appellant.
Finally, thirdly, it should be emphasized that the said document makes no distinction between disputes of an intra-European nature and those involving an investor from a non-EU Member State. At no time does it make any mention of an alleged exclusive jurisdiction of the Court of Justice of the European Communities (henceforth the CJEU) to hear possible disputes between an EU Member State and an investor from another Member State. The 1997 Declaration also expressly alludes to the possibility of resolving possible investment disputes through arbitration, without ever specifying that such a proceeding would be excluded when the dispute is of an intra-European nature (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 189 s.).

7.7.5. In invoking Art. 31 para. 3 points a) and b) VC, the Appellant considers that it is appropriate to take into account the Declaration of the 22, which states in particular the following:
"(...)
Union law takes precedence over bilateral investment treaties concluded between Member States. Consequently, all the arbitration clauses between investors and States contained in the bilateral investment treaties concluded between Member States are contrary to Union law and, therefore, inapplicable. These clauses (...) do not produce effects. An arbitral tribunal established on the basis of such clauses lacks jurisdiction because the member State party to the underlying bilateral investment treaty has not made a valid offer to arbitrate.
Furthermore, the international conventions concluded by the Union, notably the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the European treaties. Arbitral tribunals have ruled that the Energy Charter Treaty also contained an arbitration clause between investors and States applicable between member States. Thus interpreted, this clause would be incompatible with the Treaties, and its application should therefore be excluded.
(...)
Having regard to the foregoing considerations, the Member States declare that they will take the following measures as soon as possible:

1. By this declaration, Member States are informing the investment arbitration tribunals of the legal consequences of the *Achmea* Judgment, as set out in this declaration, for all pending arbitration proceedings relating to intra-EU investments that have been initiated under either bilateral investment treaties concluded between Member States or the Energy Charter Treaty.
2. In conjunction with the Respondent Member State, the Member State in which an investor that has initiated this type of action is established will take the necessary measures to inform the investment arbitration tribunal concerned of the consequences of this Judgment. Likewise, the Respondent Member States will request that the courts, including those of third countries, which must pronounce an arbitration award relating to intra-EU investments, annul or not enforce such awards due to the absence of a valid consent.
3. By this declaration, the Member States are informing the investment community that no new intra-EU investment arbitration proceedings should be initiated.
(…)
6. In accordance with Article 19, paragraph 1, second subparagraph of the TEU [Treaty on the EU], the Member States will guarantee, under the supervision of the Court of Justice, effective judicial protection against measures by State that are subject to still pending intra-EU investment

arbitration proceedings.
7. The judgments and arbitral awards rendered in arbitration cases relating to intra-EU investments that can no longer be either canceled or suspended and which have been voluntarily respected or definitively enforced prior to the *Achmea* Judgment should not be contested. The Member States shall examine, in the context of the plurilateral treaty or of bilateral terminations and in compliance with Union law, the practical arrangements to be adopted for these judgments and arbitral awards. This approach is without prejudice to the arbitral tribunals' lack of jurisdiction in pending intra-EU cases.
(...)
9. Beyond the measures concerning the Energy Charter Treaty based on this declaration, the Member States will examine as soon as possible with the Commission whether additional measures are necessary to draw the full consequences of the *Achmea* Judgment regarding the intra-EU application of the Energy Charter Treaty".
Referring to Art. 31 para. 3 points a) and b) VC, the Appellant maintains that the Declaration of the 22 would constitute a subsequent agreement between the parties regarding the interpretation of the ECT, and particularly of the scope of the arbitration clause enshrined in Art. 26 of said Treaty, respectively a practice subsequently followed pursuant to the ECT.

For the reasons set forth hereinafter, one cannot follow the interested party when it claims that the States concerned, by signing the said document, would have validly excluded any consent on their part to the arbitration referred to in Art. 26 ECT for disputes of an intra-European nature.
Art. 31 para. 3 points a) and b) VC requires agreement or a practice by the parties to the Treaty. It is doubtful whether the meaning of clear terms of a multilateral treaty can vary depending on the State involved in a dispute, by virtue of an agreement or a practice adopted only by certain States, and not by all the contracting parties (see in the same sense: *Mercuria versus Poland*, op. cit., No. 409). In this case, the Declaration of the 22 was not formulated by all the parties to the ECT, but only by certain States. The said document was not signed by all the EU Member States, since six of them refused, at the time of its drafting, to qualify the arbitration clause provided for by the ECT as incompatible with EU law. Under these conditions, one cannot *a priori* see in the Declaration of the 22 a subsequent agreement reached between the parties concerning the interpretation of the ECT or its application within the meaning of Art. 31 para. 3 point a) VC, nor a practice subsequently followed pursuant to said Treaty with regard to Art. 31 para. 3 point b) VC.
A more careful examination of the Declaration of the 22 further confirms that it does not, in fact, seek to interpret the provisions of the ECT, but only to specify the legal consequences resulting from the judgment rendered in the *Achmea* case, which in no way concerns the ECT. Thus, it is above all a declaration of intent, for political purposes, of the 22 States concerned that intended to give a new reading, in the future, to their unconditional consent to the arbitration provided for by the ECT, in order to rule out contrary solutions, which were potentially harmful to their interests, adopted by various arbitral tribunals (see in the same sense: *Ekosol S.p.A. versus Italy*, op. cit., No. 222 s.). It does not therefore appear from the Declaration of the 22 that the EU Member States concerned would never have previously validly consented to intra-European disputes being submitted to arbitration tribunals. In any case and even assuming that we must acknowledge any value whatsoever to the Declaration of the 22 pursuant to Art. 31 para. 3 VC, it cannot have retroactive effects (see in the same sense: *Ekosol S.p.A. versus Italy*, op. cit., No. 226). In other words, the Respondent that initiated arbitration proceedings on February 24, 2016 by relying in good faith on the offer of arbitration unconditionally formulated by the Appellant State under Art. 26 para. 3 point a) ECT, cannot be denied the right to have its case decided by an arbitral tribunal on the basis of a document established more than three years after the initiation of these proceedings. It is appropriate to recall here that the Federal Court has already had the opportunity to specify that, in order to assess the jurisdiction of an arbitral tribunal based on Art. 26 ECT, it was appropriate, in principle, to rely on the legal situation prevailing at the time when the arbitration proceedings concerned were initiated (Judgment 4A_492/2021 of August 24, 2022, consid. 6.4.9 not published in **ATF 149 III 131**).

7.7.6. Having regard to the foregoing considerations, the Federal Court considers that Art. 26 para. 3 point a) ECT, interpreted in good faith according to the ordinary meaning to be attributed to the terms of the Treaty in their context and in the light of its subject and its purpose, excludes the assumption that the unconditional consent given by the Appellant State to the submission of any dispute to an arbitration proceeding would not include disputes of an intra-European nature.
In light of the above, recourse to complementary means of interpretation pursuant to Art. 32 VC is not

necessary, as long as the sole application of the principles of interpretation laid down in Art. 31 VC leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. As a superfluous point, it should nevertheless be noted that, during the negotiations surrounding the signing of the ECT, the EU attempted to introduce a disconnection clause within the said treaty (ROBERT BASEDOW, Moldova v. Komstroy and the Future of Intra-EU Investment Arbitration under the Energy Charter Treaty: What Does the ECT's Negotiating History Tell Us?, Kluwer Arbitration Blog, April 24, 2021; WOLFF, op. cit., Pg. 284; SULLIVAN/INGLE, op. cit., Pg. 325; see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 205; *Ekosol S.p.A. versus Italy*, op. cit., No. 93; *Mercuria versus Poland*, op. cit., No. 389). Said clause having not ultimately come to fruition, this constitutes an additional element that pleads in favor of the possibility of submitting intra-European disputes to arbitration in accordance with Art. 26 para. 3 point a) ECT. It is therefore certainly not a coincidence that, during the adoption of the modernized Draft ECT in June 2022, the parties wished to introduce a new provision specifying that Art. 26 ECT would not apply between Member States of the same REIO.

7.8. In its appeal brief, the interested party, invoking Art. 31 para. 3 point c) VC, again complains that the arbitrators have denied any relevance to the EU treaties. In its opinion, the provisions of the said treaties, as interpreted by the CJEU, would be in conflict with Art. 26 ECT - these rules having the same purpose - and they would prevail in such a case, which is why they would rule out any consent to arbitration with regard to intra-European disputes.
In its reply, the Appellant maintains, for the first time, that the primacy of EU law over the ECT would also result from Arts. 30 and 41 VC.

7.8.1. It must be noted from the outset that the interested party, in its appeal brief, limited itself to maintaining that a “correct” interpretation of the ECT with regard to Art. 31 VC should lead to denying the validity of the consent to arbitration according to Art. 26 ECT for intra-European disputes, and to claim that the EU treaties, as “relevant rule[s] of international law applicable in the relationships between the parties” within the meaning of Art. 31 para. 3 point c) VC, should prevail in the event of conflict with Art. 26 ECT. At no time did the interested party make the slightest allusion to Art. 30 VC, or to Art. 41 VC, in an attempt to justify the alleged primacy of EU law over the ECT. For its part, the Respondent did not refer to these provisions in its response. Contrary to what the Appellant asserts, it was it, and not its opponent, who raised the question of the alleged primacy of EU law over the ECT. It thus appears that the Appellant, by devoting, for the first time at the stage of its reply, lengthy developments relating to Arts. 30 and 41 VC, formulated new legal considerations that could and should have appeared in its appeal brief (Judgment 4A_172/2023, cited above, consid. 3.1 intended for publication). These new elements that seek to fill the gaps in its initial argument thus appear to be inadmissible.

7.8.2. In any event, the arguments put forward by the Appellant with a view to demonstrating that EU law would, in this case, justify excluding its consent to arbitration in intra-European disputes do not appear to be convincing in any way.
The Appellant bases its reasoning on the premise that a conflict exists between Art. 26 ECT and certain norms of the TFEU. The Federal Court is aware that the CJEU arrived, in the *Komstroy* case, at the conclusion that Art. 26 ECT would be incompatible with EU law. It is, however, not convinced by the reasoning adopted by the CJEU in the *Komstroy* judgment since it is essentially, if not exclusively, based on the requirement of preserving the autonomy and specific nature of EU law, without taking international law or the rules on the interpretation of the treaties into account. In any event, the judgment rendered in the *Komstroy* case is not binding on This Court, given that the obligation for national courts of EU Member States to with the decisions reached by the CJEU when the seat of arbitration is located in one of these States is not binding on jurisdictional authorities located outside the EU, such as Switzerland.
Contrary to what the Appellant claims, the Federal Court considers that the existence of a conflict between Art. 26 ECT and the EU treaties is not established (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 212; *Mercuria versus Poland*, op. cit., No. 419). Since the entry into force of the Lisbon Treaty, Art. 207 para. 1 TFEU has certainly conferred exclusive jurisdiction on the EU in matters of foreign direct investment. This does not mean, however, that the standards contained in previously-concluded multilateral international treaties would have automatically become contrary to EU law. As for Art. 267 TFEU, it certainly provides that

the CJEU has jurisdiction to rule, by means of preliminary ruling, on the interpretation of the founding treaties of the EU (TEU and TFEU) as well as on the validity and interpretation of the acts undertaken by the EU institutions, including in particular the ECT, given that the said Treaty has also been ratified by the EU. It does not however emerge from the letter of Art. 267 TFEU that the CJEU's jurisdiction in the matter would be exclusive. In its judgment that it rendered in the *Komstroy* case, the CJEU itself emphasized that, according to its established case law, an international agreement providing for the creation of a court responsible for the interpretation of its provisions and the decisions of which bind the EU institutions, including the CJEU, is, in principle, not incompatible with EU law (see No. 61). It thus appears that various jurisdictional authorities can in principle coexist at the international level, including within the EU.
Art. 344 TFEU does not allow us to conclude that there is any incompatibility between Art. 26 ECT and EU law. According to this provision, the Member States undertake not to submit a dispute relating to the interpretation or application of the treaties to any settlement method other than those thereby provided. It follows from the letter of this standard that it is targeted to the Member States and not to the citizens thereof (WOLFF, op. cit., Pg. 284 and the cited references). In addition, Art. 344 TFEU only provides that EU Member States may not use a dispute resolution method that differs from those provided for in the Treaties; on the other hand, it does not in any way indicate that the said States could not be sued before other jurisdictional authorities. Last but not least, the provision exclusively targets disputes relating to “the interpretation or application of treaties”. Moreover, according to Art. 1 para. 2 TFEU, the term “the Treaties” refers to the TEU and the TFEU. It does not appear thus that Art. 344 TFEU would also cover investment disputes between an EU Member State and an investor located in another Member State. In light of the above, it is not possible to conclude that there is a possible conflict between the above-mentioned standards of the TFEU and Art. 26 ECT.

7.8.3. Whatever the case is, and even supposing that Art. 26 ECT is actually incompatible with EU law, which has not been demonstrated, there is nothing, as regards the principles of public international law, which supports that the rules of the TFEU should take precedence over those of the ECT.

7.8.3.1. Art. 31 para. 3 point c) VC certainly mandates, at the time when the rules of a treaty are interpreted, taking into account any relevant rules of international law that are applicable in the relationships between the parties. However, one may immediately wonder whether the aforementioned norm only refers to the rules of international law applicable between *all* the parties to the treaty in question, i.e. in this case the ECT, or whether it also encompasses the norms exclusively binding certain contracting States. Whatever the case is, it does not follow from Art. 31 para. 3 point c) VC that other international commitments made by certain States parties to the ECT should prevail in the event of conflict with the provisions of the said Treaty. Indeed, the norms of a multilateral treaty must, in principle, be interpreted in the same way for all of the contracting parties, and not given a different meaning depending on the other agreements concluded by some of them, under penalty of harming the security of the law (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 156; *Ekosol S.p.A. versus Italy*, op. cit., No. 125).

7.8.3.2. The rules of conflict between international treaties enshrined in Art. 30 VC does not lead to adopting the primacy of EU law over the ECT.
In this case, the TFEU cannot take precedence over the ECT pursuant to the principle *lex posterior derogat priori*, embodied in Art. 30 para. 3 VC. On the one hand, it must first be emphasized that the two international instruments in question do not relate to the “same subject matter” within the meaning of Art. 30 VC. The ECT seeks, in fact, to establish a legal framework intended to promote long-term cooperation in the field of energy. The TFEU seeks to organize the functioning of the EU and to determine the areas, delineation and methods for the exercise of its powers (see Art. 1 para. 1 TFEU). It is not therefore related to the promotion and protection of investments in the energy sector. It does not provide any further material guarantees to investors in the area concerned. On the other hand, the standards upon which the CJEU relied to assert the primacy of EU law over Art. 26 ECT, or Arts. 267 and 344 TFEU, already existed, in another form, at the time of the conclusion of the ECT. The topical provisions were in fact taken from previous EU treaties, under different numbering, when the Lisbon Treaty was adopted (WOLFF, op. cit., Pg. 285; see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 218; *Mercuria versus Poland*, op. cit., No. 432).
Nor is it possible to conclude that EU law would occupy a hierarchically higher rank than that of the ECT pursuant to Art. 30 para. 2 VC. The application of said standard first of all assumes that the two international treaties concerned, namely the ECT and the TFEU, relate to the same subject, which is not the case. In order

for Art. 30 para. 2 VC to be able to apply, one of the treaties would still have to specify that it is "subordinate" to the other or mention that it should not be considered incompatible with this other treaty. However, nowhere does the ECT suggest that it would be subordinated to other international commitments made by the Contracting States. The provisions of the TFEU also do not provide that it would take precedence over the ECT.
But there is more. The ECT indeed contains a specific rule that seeks to govern the relationship between the said Treaty and an international agreement concluded before or after it by two or more contracting parties. Art. 16 ECT thus provides that no norm of an international treaty concluded by two or more contracting parties before or after the conclusion of the ECT may be interpreted as derogating from the provisions of Parts III or V of the ECT nor from the right to require a settlement of the dispute regarding this point in accordance with the ECT, where such provisions are more favorable to the investor or the investment. This specific conflict rule, adopted by the parties upon signing the ECT, confirms that the right for an investor to submit a dispute to an arbitral tribunal in accordance with Art. 26 ECT should be guaranteed, notwithstanding any possible conditions less favorable to investors that might be provided for in other international treaties. If the parties to the ECT had really wished to establish a special regime for EU Member States, specifying that the dispute resolution mechanism provided for by EU law should take precedence over Art. 26 ECT, they could and should have explicitly mentioned it in the text of the ECT. The parties not having done so, Art. 16 ECT allows for reaching the conclusion that Art. 26 ECT takes precedence over the dispute resolution method provided for by the TFEU, the investor concerned thus benefiting from the possibility of submitting the dispute between it and an EU Member State to the jurisdictional authority of its choice (State courts or arbitral tribunals).

7.8.3.3. One cannot follow the Appellant either when, invoking Art. 41 VC, it claims that the EU Member States concluded an agreement solely for the purpose of amending the treaty in their mutual relations.
The first hypothesis referenced by Art. 41 point a) VC is the one where the possibility of an amendment would be provided for by the ECT. Moreover, contrary to what the Appellant claims, the said Treaty in no way reserves such an option. Art. 1 Ch. 3 ECT, which the interested party makes much of, only defined what a REIO is. Nothing therefore allows us to admit that the ECT would grant the member states of a REIO the option of adopting a special regime in their mutual relations, derogating from the provisions of the ECT.
The second hypothesis concerns the case where such an amendment is not prohibited by the multilateral treaty concerned. According to Art. 41 para. 1 point b) VC, an agreement concluded by two or more parties to a multilateral treaty may conclude an agreement solely for the purpose of amending the treaty in their mutual relations, is then only possible if the following cumulative conditions are fulfilled:

- the amendment in question does not affect the other parties' enjoyment of their rights under the treaty or the performance of their obligations (point i); and
- said amendment is not related to a provision from which derogation cannot be made without its being incompatible with the effective achievement of the subject and purpose of the treaty taken as a whole (point ii).

In this case, these conditions are not fulfilled, since the provisions of the TFEU upon which the Appellant relies to exclude the possibility of submitting a dispute to arbitration on the basis of Art. 26 ECT contravenes Art. 16 ECT. It is not therefore possible to admit that the fact of excluding the application of Art. 26 ECT in the presence of disputes of an intra-European nature would be compatible with the effective achievement of the subject and purpose of the said Treaty, given that Art. 16 ECT provides, in substance, that no provision of any other international treaty may be interpreted as derogating from the right to require settlement of the dispute in accordance with Art. 26 ECT (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 221; *Ekosol S.p.A. versus Italy*, op. cit., No. 151). As the respondent points out in its rejoinder, the General Secretariat of the Energy Charter clearly indicated, in a letter dated February 13, 2023 addressed to the EU Parliament, that an *inter se* agreement between the Member States of the EU, excluding the application of the ECT in their mutual relations, would be contrary to Art. 16 ECT.

7.8.4. In light of the above, the criticisms formulated by the Appellant in support of its complaint of the lack of jurisdiction of the Arbitral Tribunal can only be dismissed to the extent of their admissibility.

8.
In another Plea, entitled "The Arbitrability of the Dispute with Regard to International Jurisdictional Public Order (Art. 190 para. 2 Let. e LDIP)", appearing under a separate section of its Appeal Brief, the interested party

maintains that this dispute would be inarbitrable according to Art. 177 LDIP, to the extent that the CJEU would in this case have exclusive jurisdiction that would apply to all EU Member States. Referring to various judgments of the Federal Court in which it mentioned "the possibility of denying the arbitrability of claims whose treatment would have been reserved exclusively to a state jurisdiction by provisions of foreign law which it would be required to take into consideration from the public order perspective referred to in Art. 190 para. 2 Let. e LDIP" (**ATF 118 II 353** consid. 3c; Judgment 4A_200/2021 of July 21, 2021, consid. 4.2 and the references cited), the Appellant argues that the exclusive jurisdiction of the CJEU would, in this case, fall under "the jurisdictional public policy" within the meaning of Art. 190 al. 2 Let. a LDIP. According to it, if Switzerland refused to take into account the exclusive jurisdiction of the CJEU and assumed the power to approve the consent to arbitration of an EU Member State which this same legal order refuses to do for it, it would interfere with EU law and obstruct the execution of treaties to which it is not a party.
The person concerned seeks, ultimately, to demonstrate that Art. 177 para. 2 LDIP would not apply in this case. As the Respondent rightly points out, the complaint of inarbitrability of the dispute, as presented, appears inadmissible. Upon reading the appeal brief, it appears in fact that the interested party seems to want to exclusively connect its criticisms relating to the inarbitrability of the dispute to the plea referenced in Art. 190 para. 2 Let. a LDIP. The title of its grievance devoted to the examination of this question exclusively refers to the said provision. Furthermore, in the developments that it devotes to supporting the said plea, the Appellant does not cite, at any time, Art. 190 para. 2 Let. b LDIP. In its reply, it does not really contest this last point, but indicates that it expressly invoked Art. 190 para. 2 Let. b LDIP, at the beginning of its pleading. It asserts that the question of the arbitrability of the dispute was "first treated from the perspective of Art. 190 para. 2 Let. e LDIP, then and naturally, under the more specific perspective of Art. 177 para. 2 LDIP..." The interested party maintains, finally, that declaring the pleading in question inadmissible would amount to excessive formality. This argument does not appear at all convincing. According to the consistent case law of the Federal Court, arbitrability is a condition for the validity of the arbitration agreement and, therefore, for the jurisdiction of the arbitral tribunal (**ATF 118 II 353** consid. 3a; Judgment 4A_200/2021, cited above, consid. 4.2). Such a pleading therefore falls under Art. 190 para. 2 Let. b LDIP, and not under Art. 190 para. 2 Let. a LDIP. This Court has already had the opportunity to clarify that the Appellant is not admissible to invoke the lack of arbitrability from the perspective of Art. 190 para. 2 Let. e LDIP (Judgment 4A_370/2007 of February 21, 2008 consid. 5.2.1). In accordance with the allegation obligation and the increased demand for a statement of reasons of Art. 77 para. 3 LTF (see consid. 4.1 *supra*), it is in fact up to the Appellant to connect the grievance it invokes to the appropriate ground for appeal provided for by Art. 190 para. 2 LDIP. It is therefore in vain that the interested person invokes the ban on excessive formalism. In this case, it does not appear from the Chapter of the Appeal Brief devoted to the complaint concerning the arbitrability of the dispute that it would be connected to Art. 190 para. 2 Let. b LDIP. The Appellant has, on the contrary, clearly alluded to Art. 190 para. 2 Let. e LDIP and to the notion of public order in the title of the grievance concerned and in the developments it devoted to the examination of the arbitrability of the dispute. That the Appellant made reference to the case law of the Federal Court according to which it may eventually be possible to admit the inarbitrability of claims with regard to provisions of foreign law that public order would require be taken into account, does not in any way change the nature of the complaint of lack of arbitrability of the dispute and does not bring it within the scope of Art. 190 para. 2 Let. a LDIP. Finally, the simple fact that the interested party cited Art. 190 para. 2 Let. b LDIP in the heading of its appeal, without ever clearly specifying in its pleading that the complaint of inarbitrability had to be handled with regard to the said provision is insufficient to admit the admissibility of the said complaint, having regard to the strict requirements of Art. 77 para. 3 LTF. The formal criticisms that the Respondent addresses to the Appellant with regard to the statement of reasons for the grievance concerning arbitrability are thus well-founded.

9.
In light of the above, the appeal must be rejected to the extent of its admissibility. The Appellant, who is unsuccessful, shall bear the costs of these proceedings (Art. 66 para. 1 LTF) and shall pay costs to its opposing party (Art. 68 para. 1 and 2 LTF).

For these reasons, the Federal Court pronounces:

1.
The appeal is dismissed to the extent that it is admissible.

2.

The legal costs, set at FF 75,000, are the responsibility of the Appellant.

3.
The Appellant will pay to the Respondent compensation of FF 85,000, as costs.

4.
This Judgment is communicated to the representatives of the parties and to the Ad Hoc Arbitral Tribunal with seat in Geneva.

Lausanne, on April 3, 2024

On behalf of the First Court of Civil Law of the Swiss Federal Tribunal

The Presiding Judge: Jametti

The Clerk: Mr. O. Carruzzo.