School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: 1. Vattenfall Ab; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krümmel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG v. Federal Republic of Germany (ICSID Case No. ARB/12/12) – Decision on the *Achmea* Issue – 31 August 2018

Case Report by: Andreas D. Desyllas**, Editor Ignacio Torterola***

Summary: Claimants brought an action for relief against the Federal Republic of Germany pursuant to the Energy Charter Treaty ("ECT") alleging that Germany had breached a number of its international obligations by forbidding the use of nuclear energy plants in its territory and replacing them with renewable energy alternatives. Following preliminary objections, the Tribunal decided to have a phase of the proceedings dedicated to determining whether the decision in the *C-284/16 Slowakische Republik v. Achmea BV* case ("Achmea Judgment") rendered by the Court of Justice of European Union ("CJEU"), had any implications on these proceedings concerning the Tribunal's jurisdiction to hear the claims.

Main Issues: Intra – EU objection, application of the *Achmea* Judgment on ECT claims, interpretation of certain ECT Articles, conflict of rules.

Tribunal: Professor Albert Jan Van Den Berg (President), The Honourable Charles N. Brower (Arbitrator) and Professor Professor Vaughan Lowe (Arbitrator)

Claimant's Counsel: Mr. Kaj Hobér, Mr. Jakob Ragnwaldh, Mr. Fredrik Andersson, Mr. Alexander Foerster and Mr. Friederike Strack (Mannheimer Swartling Advokatbyrå AB, Stockholm), Mr. Richard Happ and Mr. Georg Scherpf (Luther Rechtsanwaltsgesellschaft mbH, Hamburg)

Respondent's Counsel: Ms. Sabine Konrad and Mr. Arne Fuchs (McDermott Will & Emery Rechtsanwälte Steuerberater LLP, Frankfurt), Mr. Hans-Joachim Henckel and Ms. Annette Tiemann (Ministerium für Wirtschaft und Energie, Berlin)

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Digest:

1. Relevant Facts

The underlying dispute arose out of the decision of the Federal Republic of Germany ("Respondent") to phase out the use of nuclear energy in its territory. In this context, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, and Kernkraftwerk Brunsbüttel GmbH & Co. oHG ("Claimants"), all of them Swedish investors operating in Respondent's nuclear energy sector, asserted that Respondent had breached a number of its obligations under the ECT (¶ 8). Claimants and Respondent (hereinafter referred to as the "Parties") are all based in the European Union ("EU") (¶ 6).

On 6 March 2018, the CJEU released the Achmea Judgment, which concerns the interaction between Article 8 of the 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ("Dutch-Slovak BIT") and Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU") (¶¶ 27, 28). Particularly, the CJEU, by applying EU law (¶ 36), went on to find the arbitration clause incorporated in Article 8 of the Dutch-Slovak BIT to be incompatible with Articles 267 and 344 of the TFEU, since the latter must be interpreted so as to preclude the application of an investor-State arbitration agreement in cases where the dispute concerns two or more parties based in the EU (¶ 33).

Pursuant to the Achmea Judgment, an arbitral tribunal constituted under Article 8 of the Dutch-Slovak BIT may perhaps be called on to interpret or apply EU law (¶ 38), but this arbitration agreement contravenes EU law, because it is for the courts of EU Member-States and the CJEU to determine questions involving EU law, in order to ensure its full effectiveness (¶ 42).

The controversial issue between the Parties, according to Respondent's jurisdictional objection, was whether the Achmea Judgment could also be applied to the ECT (¶ 18), taking into account that the EU itself is a contracting party to this agreement (¶ 43).

2. Procedural History

On 14 May 2012, Claimants submitted their Request for Arbitration to ICSID (¶ 5) registered on 31 May 2012 (¶ 7). On 7 August 2015, the tribunal ("Tribunal") issued Procedural Order No. 13, granting the application filed by the European Commission ("EC") on 24 July 2015, in order for the latter to intervene as a non-disputing party (¶¶ 11-12). On 30 September 2015, the EC filed its written submission (¶ 13). On April 2016, Claimants submitted their observations to EC's submission and Respondent followed suit by submitting a letter to the Tribunal, requesting from it to conduct an *ex officio* assessment of the EC's submission (¶ 14). A hearing on jurisdiction, merits and quantum took place from 10 to 21 October 2016 in Washington, D.C. (¶ 9).

Following the release of the Achmea Judgment, the Parties were invited to comment on its potential implications on their respected dispute, if any, by submitting their observations on

two rounds, on 4 April 2018 and 23 April 2018 respectively (¶ 15). On 25 April 2018, the Tribunal issued Procedural Order No. 35, granting the EC's request to update its past submission; the updated version was filed on 9 May 2018 (¶ 16). On 30 May 2018, the Parties submitted their own observations with respect to the final submission of the EC (¶ 17).

3. Positions of the Parties

3.1 Timeliness of Respondent's Jurisdictional Objection

3.1.1 Respondent's Position

Respondent submitted that its jurisdictional objection was timely. The *Achmea* Judgment reflects a "new procedural situation" and Respondent supported that it raised its jurisdictional objection as soon as this new situation occurred (¶ 46). Respondent further argued that it had already requested from the Tribunal to examine the first EC's submission on an *ex officio* basis, so it had always disputed the Tribunal's jurisdiction. Finally yet importantly, no award had been rendered yet, so its objection could not be considered belated (¶ 47).

3.1.2 Claimants' Position

Claimants argued that Respondent's jurisdictional objection was belated since it was raised for the first time 6 years after the initiation of the proceedings and 18 months after the hearing (¶ 60). According to Claimants, the *Achmea* Judgment could not be considered a new "fact", because the arguments raised by Respondent could have been raised long before the release of the *Achmea* Judgment. Finally, Claimants submitted that Respondent's objection went beyond the content of the *Achmea* Judgment, arguing for an extension of its relevance to ECT cases (¶ 61).

3.2 Applicability of EU Law to the Tribunal's Jurisdiction

3.2.1 Respondent's Position

In Respondent's view, for ECT investor-State disputes involving two EU Member States, EU law has to be regarded as part of the applicable international law. Pursuant to the *Achmea* Judgment, EU law forms part of domestic and international law. Therefore, Respondent disputed Claimants' understanding of EU law as forming part only of domestic law under Article 27 of the Vienna Convention on the Law of Treaties ("VCLT"), since EU law has a dual character (¶ 48).

3.2.2 Claimants' Position

Claimants contended that EU law does not form part of international law. Claimants relied on the EC's submissions and the *Achmea* Judgment to support that EU law is autonomous in relation to both international law and the domestic laws of the Member States (¶ 63). According to Claimants, Article 26(6) ECT is relevant solely to set out the law governing the merits of the dispute and not issues of jurisdiction. Those issues are exclusively governed by the ICSID Convention, interpreted in the light of international law, which does not include EU law (¶ 65). Hence, Claimants submitted that EU law does not form part of the law applicable to the Tribunal's assessment of its jurisdiction (¶ 66).

Claimants further argued that the *Achmea* Judgment is specifically based on Article 8 of the Dutch-Slovak BIT, which required the application of Slovak Republic's domestic laws and other relevant international agreements concluded between the contracting parties, thus, including the application of EU law. On the contrary, Article 26(6) ECT restricts the applicable law to the ECT and the "applicable rules and principles of international law", so this terminology does not include EU law (¶ 67).

3.2.3 EC's Position

In EC's view, EU law forms part of the "applicable rules and principles of international law" under Article 26(6) ECT and the "relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) VCLT. To support this argument, the EC relied primarily on Article 38 of the Statute of the International Court of Justice ("ICJ Statute") (¶ 81).

EC argued that the issue whether EU law forms or not part of international law remains undisputed since the award in *Electrabel v. Hungary*; in fact, the disputed issue between the tribunals in *Electrabel v. Hungary* and *RREEF v. Spain* concerned whether the ECT prevails over EU law or vice-versa (¶ 82). EC's position was that the process of systemic coherence requires the ECT to be interpreted so as to avoid any conflict with EU law (¶ 83); still, nothing in the ECT indicates, EC stated, that it operates as *lex specialis* vis-á-vis EU law (¶ 81).

3.3 Implications of the Achmea *Judgment*

3.3.1 Respondent's Position

Respondent contended that the *Achmea* Judgment applies to all international agreements concluded between EU Member-States including an investor-State dispute settlement procedure, such as the ECT (¶ 49). Particularly, Article 26 ECT must be interpreted in a restrictive manner and found inapplicable in intra-EU investor-State disputes. In this respect, Respondent argued that the applicable law provision in Article 26(6) ECT requires the Tribunal to interpret Article 26(6) ECT in accordance with EU law (¶ 50). Respondent highlighted the importance of respecting EU law, which could be infringed upon if Claimants continued to invoke Article 26 ECT as a basis for arbitration (¶ 55).

Moreover, Respondent submitted that, insofar as there is any inconsistency between the ECT and EU law, the latter will always prevail over the ECT when it comes to EU Member-States, in accordance with Article 30(4) VCLT and Article 351 TFEU, the latter being *lex specialis* and *lex posterior* to the former. Respondent further disputed Claimants' reliance on Article 16(2) ECT, stating that the conflict rule between two treaties provided in Article 351 TFEU takes precedence over Article 16 ECT, due to the primacy of EU law and also pursuant to Article 30 VCLT, since the TFEU is the later treaty (¶ 57).

3.3.2 Claimants' Position

Claimants submitted that the *Achmea* Judgment does not apply to the ECT, for its findings are limited to arbitral proceedings initiated under a BIT. Besides, the EU is a contracting party to the ECT. In this line, Claimants relied on the express finding of the *Achmea*

Judgment that the Dutch-Slovak BIT in question is "an agreement which was concluded not by the EU but by Member States" (¶ 68).

Claimants disputed the interpretation of the ECT put forward by the EC, stating first, that it ignored the plain wording of the ECT and second, that it incorrectly started its interpretation with Article 31(3)(c) VCLT. *Arguendo*, Claimants contended that EU law could not be taken into account under Article 31(3)(c) VCLT, since the relevant rules of international law must be applicable in relations between all the parties to the treaty being interpreted (¶ 71).

Claimants likewise challenged the EC's reliance upon Articles 1(2), 1(3) and 1(10) ECT by endorsing the tribunals' reasoning in *Charanne v. Spain*, *RREEF v. Spain*, *Eiser v. Spain*, *Blusun v. Italy*, *PV Investors v. Spain*, *Novenergia v. Spain* and *Masdar v. Spain*, where it was held that a claim brought against an EU Member State relates only to the territorial area of that Member State as defined in Article 1(10) ECT and is not absorbed into the area of the EU, which is only concerned when a claim is brought against the EU itself (¶ 72).

Moreover, Claimants submitted that, even if the *Achmea* Judgment were to apply to the ECT, the ECT takes precedence over Articles 267 and 344 TFEU in the absence of any "disconnection clause" in the ECT, which is included to ensure that the provisions of a mixed agreement only apply vis-à-vis third parties and not as between EU Member-States (¶ 73).

Claimants also disputed EC's arguments relating to a harmonious interpretation of the ECT and EU law, stating that this argument had nothing to do with the interpretation of the ECT; instead, it amounted to removing the investor's right to dispute resolution. In Claimants' view, no harmonious interpretation was required, nor were Articles 30 or 41(1)(b) VCLT applicable, given that Article 16 ECT specifically governs the question of which potentially applicable rules take precedence over the other in the case of two conflicting treaties (¶ 75). In any event, Claimants contended that Article 30 VCLT does not invalidate Article 26 ECT, *inter alia*, because there is no identity of subject matter between the treaties, no incompatibility between the provisions, and the ECT is the later treaty and, thus, *lex posterior* (¶ 76).

3.3.3 EC's Position

In the EC's view, the *Achmea* Judgment renders the offer to arbitrate in Article 26 ECT inapplicable. This is on the ground of the general principle of EU law of autonomy of the EU legal order, which is enshrined in Article 344 TFEU and on the preliminary ruling procedure provided in Article 267 TFEU (¶ 84).

Regarding the interaction between the ECT and the EU law, the EC offered two solutions: first, a harmonious interpretation of the ECT in conformity with EU law, or second, in the event of a conflict, the primacy of EU law as *lex posterior* (¶ 87). With respect to the first proposed solution, the EC submitted that EU law is a relevant rule of international law under Article 31(3)(c) VCLT; additionally, the EC put forth an interpretation on the basis of other means of interpretation under Articles 31 and 32 VCLT. In this regard, the EC relied on the definition of "Contracting Party" under Article 1(2) ECT, which includes a Regional Economic Integration Organization ("REIO") and the definition of an REIO in Article 1(3) ECT. On this basis, the EC stated that the ECT recognises the relationship between Member States to an REIO and the REIO itself to be governed by the provisions of the agreement establishing the REIO. Further, according to the EC, in light of these provisions of the ECT,

investments within the REIO are investments within the same contracting party, to which the offer to arbitrate under Article 26 ECT does not apply (¶ 88).

Moreover, the EC did not consider the absence of a "disconnection clause" in the ECT significant to affect its interpretation of Article 26 ECT, since a "disconnection clause" is "superfluous" in respect of intra-EU relations between Member-States (¶ 90).

The EC's alternative proposal was that the conflict rule in Article 351(1) TFEU does not apply to multilateral treaties where only the rights and obligations of EU Member States are at stake; instead, the general principle of primacy of EU law applies. The EC also contended that the same result is achieved pursuant to Articles 30 and 41 VCLT, since either Respondent and Sweden's reaffirmation of Articles 4(3) and 19 of the Treaty on the European Union ("TEU") and Articles 267 and 344 TFEU after their ratification of the ECT can be construed as an amendment for the purposes of Article 41 VCLT; or the TEU and TFEU constitute "later treaties" on the same subject matter as the ECT, and the ECT applies only to the extent it is compatible with these later treaties (¶ 91).

4. Tribunal's analysis

4.1 Timeliness of Respondent's Jurisdictional Objection relating to the Achmea *Judgment*

The Tribunal considered the *Achmea* Judgment to be a new situation, a "fact", under Article 41(1) ICSID, inasmuch it was unknown to the Parties prior to its issuance (¶¶ 98-99). Additionally, the Tribunal rejected Claimants' argument that Respondent's objection went beyond the contents of the *Achmea* Judgment by extending its scope to the ECT because the Tribunal itself invited both Parties to comment on the potential implications of the *Achmea* Judgment on these proceedings (¶ 102). As a result, the Tribunal concluded that Respondent's jurisdictional objection was a timely one and Respondent satisfied the required procedure under Article 41(1) ICSID (¶ 103). In any event, the Tribunal would have exercised its power to examine its jurisdiction *ex officio*, in the absence of a jurisdictional objection (¶ 106).

4.2 Applicable Law

In order to determine whether the *Achmea* Judgment had legal implications for its jurisdiction, the Tribunal considered it necessary to decide upon the applicable law (¶ 108). For this purpose, the Tribunal recalled the distinction between the law applicable to the merits of a dispute and the law applicable to the jurisdiction of a tribunal (¶ 109) and examined Article 26(6) ECT and Article 42(1) ICSID Convention, before turning to Article 26 ECT in general; additionally, the Tribunal examined whether EU law and the *Achmea* Judgment form part of the law applicable to the Tribunal's jurisdiction, specifically in the context of Article 31(3)(c) VCLT (¶ 112).

4.2.1 Article 26(6) ECT and Article 42(1) ICSID

Considering Respondent's assertion that EU law and the *Achmea* Judgment apply under Article 26(6) ECT and Article 42(1) ICSID Convention (¶ 113), the Tribunal examined the terms "dispute" or "issues in dispute", as described in Article 26(1) ECT. Article 26 ECT belongs to Part III of the ECT, where there are no provisions regarding dispute settlement. Accordingly, the provision concerning the applicable law set out in Article 26(6) is not

relevant to issues concerning the dispute settlement clause in Article 26 ECT (¶ 116). Likewise, Article 42(1) only concerns the law applicable to the merits of a dispute. The phrase "decide a dispute" points to the application of those rules of law in order to decide the dispute between the parties (¶ 118) and does not include a decision on any jurisdictional objection (¶ 119).

4.2.2 Article 26

The Tribunal largely agreed with Claimants that its jurisdiction was to be made "under the ICSID Convention, interpreted in the light of general principles of international law, and the instrument(s) containing the consent to arbitration" and the starting point was Article 26 ECT, setting out the terms of the agreement to arbitrate (¶ 128).

4.2.3 EU Law and the Achmea *Judgment*

In the Tribunal's view, EU law does not constitute principles of international law, which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty (¶ 133). One possibility through which EU law could be brought into the interpretive exercise is as "relevant rules of international law applicable in the relations between the parties" under Article 31(3)(c) VCLT. In order to test this argument, it was necessary to determine whether EU law is international law (¶ 134).

4.2.3.1 Subject Matter of the Achmea *Judgment*

The CJEU decided that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States". The basis for its decision was that the arbitral tribunal under the Dutch-Slovak BIT was not a "court or tribunal of a Member State" within the meaning of Article 267 TFEU and, thus, according to the rules established by the CJEU, an arbitral tribunal was not able to refer questions of EU law to the CJEU under the preliminary ruling procedure in that provision (¶ 136), although it "may be called on to interpret or indeed to apply EU law" (¶ 137).

This Tribunal considered the *Achmea* Judgment to be a new development, insofar as it arguably closed the door on the arbitral tribunal's jurisdiction under the Dutch-Slovak BIT by precluding the arbitration agreement, which could prevent a potential dispute from being resolved in a manner that ensures the full effectiveness of EU law (¶ 139).

4.2.3.2 Whether EU Is International Law

The Tribunal considered that international conventions or treaties concluded by and between States, such as EU law, constitute international law pursuant to Article 38(1) of the ICJ Statute (¶ 141).

The autonomous or constitutional nature of the EU Treaties does not exclude them from the purview of international law (¶ 145). The Tribunal agreed with the finding in *Electrabel v. Hungary* that "EU law is international law because it is rooted in international treaties". EU law derives from treaties that are themselves a part of international law, while also containing rules that operate only within the internal legal order of the EU and are not a part of international law (¶ 146). In light of the above, the Tribunal concluded that EU law, to the

extent of the TEU and the TFEU, including their interpretation by the CJEU, constitutes part of international law within the terms of Article 38(1) of the ICJ Statute (¶ 150).

4.2.3.3 Article 31(3)(c) of the VCLT

The Tribunal could not accept the EC's argument to apply Article 31(3)(c) VCLT for a number of reasons (¶ 152). Firstly, the correct starting point for the interpretation of Article 26 ECT is Article 31(1) VCLT (¶ 153). Secondly, to the extent that EU law may come into the interpretation analysis, it is to be "taken into account, together with the context" under Article 31(3)(c) (¶ 154). Thirdly, the Tribunal considered the EC's approach to be unacceptable, as it would potentially allow for different interpretations of the same ECT provision, and inconsistent with the object and purpose of the ECT and with the rules and principles of international law on treaty interpretation and application (¶ 155).

The Tribunal found that the effects of such an interpretation in the manner proposed in the EC submissions would not ensure "systemic coherence", but rather its exact opposite. It would create one set of obligations applicable in at least some intra-EU disputes and another set of different obligations applicable to other disputes (¶ 158**)**. Besides, the Tribunal had serious difficulty in deriving a "relevant rule of international law" from the EU Treaties for present purposes (¶ 159).

Moreover, the ECT is not an agreement concluded "between Member States", as referred to by the *Achmea* Judgment. The ECT is a multilateral treaty, to which the EU itself is a party. Unlike the Dutch-Slovak BIT, the ECT is a "mixed agreement" between both Member States and third States. The wording of Article 26 ECT is different to Article 8 of the Dutch-Slovak BIT (¶ 162).

4.3 Interpretation of the ECT

4.3.1 Ordinary Meaning of Contracting Party in Article 26 ECT

The Tribunal considered whether the references to "Contracting Party" in Article 26 ECT could be read as excluding EU Member States, insofar as intra-EU ECT arbitrations are concerned. Considering the ordinary meaning of the terms of Article 26, the Tribunal found no basis in the wording for such exclusion (¶ 172).

4.3.1.1 Articles 26, 1(2), 1(3) and 1(10)

Reading Article 26 together with Articles 1(2) and 1(3) ECT, the ordinary meaning of "Contracting Party" in Article 26 ECT includes both any State that signs and ratifies the ECT and the EU (¶ 177).

The EC argued that an investment made by an investor from one EU Member State in the area of another EU Member State is made within the area of the EU. According to the EC, the EU's offer to arbitrate is only made to investors from non-EU Member States, pursuant to Articles 1(3) and 1(10) ECT (¶ 179). The Tribunal could not accept that interpretation, considering that it was unsupported by the language of the ECT provisions. The mere mention in Article 1(3) that EU Member States have "transferred competence over certain matters" to the EU does not convey that there is no application of the provisions of the ECT between EU Member States (¶ 180).

Moreover, Article 1(10) contains two definitions of "Area", neither of which operates to exclude the other. The EU has an area and Member States have an area (¶ 181). If it was intended by Articles 1(2), 1(3) and 1(10) ECT that the offer to arbitrate in Article 26 ECT was only made to investors from non-EU Member States, it would have been necessary to include explicit language to that effect. Without such language, an EU Member State, which is a contracting party to the ECT, may be a respondent State under Article 26 with respect to an investment in its area and the same could be said about the EU (¶ 182). This interpretation is consistent with the conclusions reached by the tribunals in *Eiser v. Spain, Charanne v. Spain* and *Novenergia v. Spain* (¶ 183).

4.3.1.2 EU Statement

It would have been a simple matter to draft the ECT so that Article 26 does not apply to disputes between an investor of one EU Member-State and another EU Member-State as respondent and the Tribunal found no indication in the language of the ECT that any such exclusion was intended (¶ 187). Therefore, the Tribunal could not agree that intra-EU arbitrations have been carved out from the application of Article 26 ECT (¶ 188).

It is further clarified that a case brought by an investor before the CJEU "falls under Article 26(2)(a) ECT", i.e., the option for an investor to submit a dispute for resolution "to the courts or administrative tribunals of the Contracting Party to the dispute". This option is an alternative to the submission of a dispute to arbitration, provided under Article 26(2)(c). As such, it is clear that the competence of the CJEU does not exclude the independent dispute resolution procedure of arbitration, but is one instance of the application of that procedure (¶ 191).

4.3.1.3 Article 16 ECT

On Respondent's case, Articles 267 and 344 TFEU prohibited intra-EU ECT arbitrations. The Tribunal did not agree that those provisions "concern the same subject matter" as Part III or Part V ECT. The Tribunal also considered that Article 26 ECT, granting the possibility to pursue arbitration, would be understood as "more favourable to the investor", insofar as the EU Treaties are interpreted to prohibit that avenue of dispute resolution (¶ 194).

In this way, by the terms of Article 16 ECT itself, it would be prohibited for a contracting party to construe the EU Treaties so as to derogate from an investor's right to dispute resolution under Article 26 ECT, to the extent that they are understood to concern the same subject matter (¶ 195).

While the ordinary meaning of Article 26 was already clear, Article 16 confirms beyond doubt that Respondent's proposed reading of the provisions of the ECT is untenable. In light of this provision, it was not possible to "read into" Article 26 an interpretation whereby certain investors would be deprived of their right to dispute resolution, whether against an EU Member State or otherwise (¶ 196).

4.3.1.4 Object and Purpose

In sum, the ECT aimed to promote cooperation and the flow of international investment in the energy field to serve the ultimate goal of creating and maintaining a stable and efficient energy market. Granting the right to investors based in the EU to avail themselves of

investor-State dispute resolution is entirely consistent with that goal. On the other hand, depriving EU investors of the right to invoke the arbitration provision of the ECT, where the respondent State is an EU Member State, would be counterproductive to the flow of international investment in the energy field (¶ 198).

4.3.1.5 Disconnection Clause

Article 26 ECT grants investors a right to dispute settlement, and Article 16 prohibits the terms of another agreement from being construed to derogate from that right to dispute resolution. In these circumstances, if it was intended that intra-EU arbitration would not be available to investors, it would have been necessary to make such an intention explicit (¶ 202).

At the time of entering into the ECT, the EU was well aware of the possibility of including a disconnection clause, which would operate as a carve-out to ensure that the provisions of this mixed agreement would not apply between EU Member-States (¶ 203). Indeed, the *travaux préparatoires* of the ECT reveal that during negotiation of the ECT, the EU had proposed the insertion of a disconnection clause but that clause was ultimately dropped (¶ 205). In these circumstances, the Tribunal could only conclude that a disconnection clause was intentionally omitted from the ECT (¶ 206).

4.4 Whether EU law prevails under a conflict of laws analysis

The Tribunal did not consider it established that Articles 267 and 344 TFEU, as interpreted in the *Achmea* Judgment, are in conflict with Article 26 ECT. In principle, these provisions do not have the same subject matter or scope and they are capable of operating in their separate spheres without conflict (¶ 212). In any event, even if the Tribunal had been required to conduct a conflict of law analysis, the Tribunal had difficulty with Respondent's position that EU law would prevail (¶ 214).

4.4.1 Lex Posterior

There were several difficulties with applying the rule of *lex posterior* to the present case. One is that the general rule of *lex posterior* contained in Article 30 VCLT is a subsidiary one. Where a treaty includes specific provisions dealing with its relationship to other treaties, such as those appear in Article 16 ECT, the *lex specialis* will prevail (¶ 217). In addition, it was clear that the EU Treaties are the "later treaty" under Article 30 VCLT. The current Articles 267 and 344 TFEU have existed in substantively similar form since a time prior to the conclusion of the ECT and have only been renumbered in the successive versions of the EU Treaties (¶ 218).

4.4.2 Modification of the ECT

The Tribunal was not persuaded by the modification argument. It was unclear what precise modification of the ECT was alleged to have taken place. Moreover, the Tribunal considered that the modification proposed by the EC would be "prohibited by the treaty", contrary to Article 41(1)(b) VCLT. Specifically, Article 16 ECT prevents the EU Treaties from being construed so as to derogate from more favourable rights of the investor in Parts III and V ECT, including the right to dispute resolution (¶ 221).

4.4.3 Lex Specialis

The Tribunal considered that *lex specialis* should determine which rule of international law will prevail. However, the Parties had put forward two potential conflict clauses as *lex specialis* in the present case: Article 351 TFEU and Article 16 ECT (¶ 222). Article 351 TFEU relates to agreements between EU Member States and non-EU Member States. However, the EC and to a certain extent Respondent argued that the Tribunal must apply an *a contrario* reading of Article 351(1) TFEU, which leads to the conclusion that between EU Member States, the rights and obligations arising from agreements concluded with other EU Member States prior to accession are displaced by the EU Treaties (¶ 225).

In the Tribunal's view, the clearer conflict rule in Article 16 ECT must prevail over a rule derived from an *a contrario* interpretation of Article 351 TFEU which could not be found in the text of the TFEU itself. As a matter of public international law, the Tribunal could not be asked to leave aside a clear rule in favour of a countertextual one (¶ 227).

As for Article 351(2) TFEU, Respondent argued that this "confirms" that the ECT has been superseded by the more recent EU Treaties. However, this language merely contains an obligation upon Member States to "take all appropriate steps to eliminate" any incompatibilities between the EU Treaties and other agreements entered into with third States. It does not concern intra-EU treaties at all (¶ 228).

The Tribunal therefore found that Article 16 ECT was *lex specialis* as a conflict of laws rule in the present case. In the Tribunal's view, Article 16 posed an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT. The application of Article 16 confirmed the effectiveness of Article 26 and the investor's right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties (¶ 229).

5. Decision

For the foregoing reasons, the Tribunal decides as follows:

(i) Declares that Respondent's jurisdictional objection of 4 April 2018 contained in its First Submission re the ECJ Judgment in *Achmea* of 6 March 2018 has been raised in a timely manner;

(ii) Rejects Respondent's request for all claims pending before this Tribunal to be dismissed because the Tribunal has no jurisdiction in the light of the ECJ Judgment in *Achmea* of 6 March 2018;

(iii) Reserves all other issues relating to the jurisdiction, admissibility and merits of these arbitral proceedings for subsequent determination by the Tribunal; and

(iv) Reserves the decision on costs.