



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Landesbank Baden-Württemberg *et al.* v. The Kingdom of Spain - ICSID Case No. ARB/15/45 - Decision on the “Intra-EU” Jurisdictional Objection - 25 February 2019

Case Report by: Eleni Bakalarou**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against the Kingdom of Spain under the Energy Charter Treaty (hereinafter referred to as “ECT”), alleging that the Kingdom of Spain, through the implementation of a series of reforms, failed to honour its obligations for offering and guaranteeing certain conditions to investors. Following preliminary objections, the Tribunal decided to dedicate a phase of the proceedings in determining whether Respondent’s intra-EU jurisdictional objection shall be accepted.

Main Issues: Effect of the *Achmea* case, Relationship between ECT and EU Law, Validity of offer to arbitrate under Article 26 ECT, Determination of what is deemed “settled law”.

Tribunal: Sir Christopher Greenwood, GBE, CMG, QC (President), Dr. Charles Poncet (Arbitrator) and Mr. Rodrigo Oreámuno (Arbitrator)

Claimant's Counsel: Dr. Sabine Konrad, Mr. Arne Fuchs, Ms. Pauline Walde, Mr. Maximilian Pika (McDermott Will and Emery LLP);

Respondent's Counsel: Mr. José Manuel Gutiérrez, Ms. Mónica Moraleda, Ms. Patricia Froehlingsdorf, Ms. Elena Oñoro, Mr. Roberto Fernández, Ms. María Ruiz, Ms. Gloria de la Guardia, Mr. Javier Comerón, Ms. Estibaliz Hernández, Mr. Juan Quesada, Ms. Ana Rodríguez, Mr. Pablo Elena Abad (Abogacía General del Estado, Kingdom of Spain)

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Digest:

1. Introduction

1.1 Procedural History

Landesbank Baden-Württemberg (“**LBBW**”), HSH Nordbank AG (“**HSH Nordbank**”), Landesbank Hessen-Thüringen Girozentrale (“**Helaba**”) and Norddeutsche Landesbank-Girozentrale (“**NORD/LB**”) (collectively the “*Claimants*”) are public law institutions established under the laws of Germany, except for HSH Nordbank which is a joint stock company (“*Aktiengesellschaft*”), incorporated in Germany. Each Claimant maintains that it operates as a commercial bank but also as a *Landesbank* for one or more of Germany’s states (“*Länder*”) (¶ 1). Respondent is the Kingdom of Spain (the “*Respondent*” or “*Spain*” and hereinafter together with Claimant referred to as the “*Parties*”) (¶ 2).

On 22 October 2015, the International Centre for Settlement of Investment Disputes (“*ICSID*”) received a Request for Arbitration dated 20 October 2015 (¶ 3) and, on 7 June 2016, the Secretary-General notified the Parties that the Tribunal was deemed constituted on that date, following the acceptance of their nomination by the three arbitrators (¶ 5). On 1 September 2017, Respondent notified the Tribunal and the Claimants that it intended to raise objections to the jurisdiction of the Tribunal and that it would seek an order for bifurcation of the proceedings (¶ 8). One of Respondent’s jurisdictional objections was that the ECT and the ICSID Convention could not provide jurisdiction between nationals of one European Union (“*EU*”) Member State and another EU Member State (the “*Intra-EU Jurisdictional Objection*”). Although initially the Tribunal rejected the Request for Bifurcation (¶ 11), after the Court of Justice of the European Union (the “*CJEU*”) delivered its Judgment in Case No. C-284/16, *Republic of Slovakia v. Achmea BV* (the “*Achmea Judgment*”) (¶ 14), it approved the Parties’ joint request for bifurcation (¶ 17). On 31 October 2018, the European Commission (the “*EC*”) requested the Tribunal to intervene in the proceedings as a non-disputing Party under ICSID Arbitration Rule 37(2); the Tribunal, though, rejected this request, as it was not timely made (¶ 19). Eventually, a Hearing on the Intra-EU Jurisdictional Objection was held on 20 December 2018 (¶ 23).

1.2 Factual Background

In the late 1990’s Spain implemented extensive legislation to establish a special regime for renewable energy production and sought to encourage foreign investment in its renewable energy sector. The Claimants submitted that, given Spain’s commitments, between 2006 and 2011 they financed 78 renewable energy plants through loans with an overall value of approximately 1.76 billion euros (¶ 30). Spain subsequently enacted substantial changes to this favourable regime and, to this end, the Claimants claimed that Spain’s actions violated its obligations under Articles 10(1) and 13 ECT (¶¶ 31, 32).

2. The Arguments of the Parties and the European Commission

2.1 Respondent's position

Respondent maintained that EU law establishes its own system of investor protection, which is superior to the protection offered by the ECT or any bilateral investment treaty (“BIT”). When the ECT was signed, the Member States were unable to enter into obligations between themselves as regards the internal market because they had transferred their sovereignty in that area to the EU (¶ 43). The ECT, as a treaty governed by international law, has to be interpreted in accordance with the Vienna Convention on the Law of Treaties (the “VCLT”) and, thus, be interpreted in good faith and in accordance with its object and purpose. Spain noted the fact that the ECT was designed to ensure that investment could be made by the EU Member States and other developed countries in the emerging economies, and was never intended to provide for arbitration by an investor of one EU Member State against another EU Member State (¶ 44).

Besides, according to Article 25 ECT, the primacy of EU law in intra-EU relations is expressly recognized and Spain maintains that Article 26(6) ECT requires that the Tribunal “decide the issues in dispute” whether jurisdiction, merits or quantum in accordance with the ECT and other applicable rules and principles of international law and that, in intra-EU disputes, the relevant international law is EU law. In support of this, Spain referred to the Decision on Jurisdiction in the *Electrabel* case, as well as a number of other arbitral authorities in cases involving Spain (¶¶ 45, 46). For Spain, Article 344 of the Treaty on the Functioning of the European Union (the “TFEU”) is fundamental to this jurisdictional objection (¶ 47).

Moreover, Spain submitted that the application of Article 16 ECT shall be rejected, since it has to be read in light of the provisions of Article 26(6) ECT, arguing that it operates as a “disconnection clause” safeguarding the autonomy of EU law. In addition, Spain argued that the provisions of EU law which have to be applied are neither related to Part III nor Part V of the ECT and, thus, the system of investor protection in Part V of the ECT is not more favourable to the investor or the investment. Finally, Spain contends that, in accordance with the principle of *lex posterior* as set out in Article 30 VCLT, the provisions of the TFEU prevail over the ECT, as between the States which are parties to both treaties (¶ 49).

With regard to the *Achmea* Judgment, the CJEU, found that “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.” (¶ 52). The judgment was implemented by the German Federal Court of Justice (*Bundesgerichtshof*), which set aside the arbitration award (¶ 53). According to Spain, the Judgment of the CJEU and the subsequent Judgment of the *Bundesgerichtshof* confirmed that investor-State arbitration provisions in intra-EU cases are incompatible with EU law and therefore cannot afford a basis for jurisdiction where an EU Member State is taken to arbitration by an investor from another EU Member State. The fact that the *Achmea* case concerned a BIT, rather than the multilateral ECT, and that the EU itself is a party to the ECT does not, in Spain's view alter the effect of the *Achmea* ruling which has

to be applied to the ECT in the same manner as to a BIT (¶ 54). Spain also noted that this had been confirmed by the EC, especially considering its position in its Request to Intervene in the present proceedings (¶ 55).

Furthermore, Spain invokes the *Vattenfall case*, where the tribunal preliminarily decided upon the applicability of the *Achmea* Judgment to the ECT. In that case, Germany found that the ECT provisions on arbitration are inapplicable in intra-EU disputes. Spain submitted that Germany's position is especially important, given that this is the State of nationality of the Claimants in the present case, and also that the Claimants have to be equated with the Federal Republic of Germany. To this end, Spain contends that the *Vattenfall* tribunal erred in holding that Article 26(6) ECT is concerned only with the law applicable to the merits of a dispute, while criticising the tribunal's approach to Article 31(3)(c) VCLT, that, in interpreting a treaty, it is necessary to take into account "*any relevant rules of international law applicable in the relations between the parties*" noting that EU law should have been taken into account as well. Lastly, Spain submitted that the *Vattenfall* tribunal failed to consider the remedies offered by EU law to investors in an intra-EU context, failed to see that a "*disconnection clause*" was unnecessary, and misapplied Article 16 ECT (¶¶ 56, 57).

2.2 Claimant's position

The Claimants firstly presented the Tribunal with the fact that Spain, as well as other EU Member States, have raised such intra-EU Objections in numerous arbitrations with no success (¶ 58). The Claimants relied, in particular, upon the recent decisions in *Vattenfall* and *Greentech*, where the tribunals in analysing the intra-EU Objection took into account the *Achmea* Judgment, in relation not to a BIT, but to the ECT. Both tribunals concluded that Article 26 ECT constituted a valid offer of arbitration by all the States parties to the ECT to investors of any other Party, irrespective of whether the case was an "intra-EU" one (¶ 59).

Alternatively, the Claimants offered two arguments. Firstly, the Claimants maintained that the ECT has to be interpreted and applied as it is, on the basis of the normal interpretation of the text (¶ 61). To this end, Article 26 ECT is a valid offer of arbitration by Spain to investors from Germany, which the Claimants accepted when they submitted their Request for Arbitration; that offer is contained in a treaty which is valid and binding under international law. Besides, the Claimants underlined that there is no disconnection clause - express or implied - in the ECT, especially considering that the EU had proposed to include such a clause in the ECT, but that proposal had not been accepted (¶¶ 62, 63). Further, neither Article 42(1) of the ICSID Convention nor Article 26(6) ECT provides for any "*supremacy*" of EU law in relation to the arbitration agreement concluded between the Parties and Article 26(6) is rather an agreement as to the law to be applied to the merits of the dispute; hence, they submitted that neither that provision nor Article 42(1) of the ICSID Convention relates to the determination of the jurisdiction of the Tribunal (¶¶ 64, 65). The Claimants maintained that Article 16 ECT is applicable in the present case, because EU law does not offer the same degree of protection to the investor as that in Parts III and V of the ECT, while the *lex posterior* rule in Article 30 VCLT does not lead to a different conclusion, as the relevant provisions of the TFEU have their origin in earlier EU treaties (¶ 66).

Secondly, Claimants submitted that there is no conflict between the ECT and EU law and the latter does not preclude an EU Member State from making a valid offer of arbitration in Article 26 ECT to investors from other EU Member States. To this end, the *Achmea* Judgment applies only to intra-EU BITs and, as several arbitration tribunals have held, has no

application to the different, multilateral context of the ECT, and that it rather concerned a BIT not providing for ICSID arbitration (¶¶ 67, 68). Moreover, the Claimants argued that the EU itself has been a party to the ECT from the inception of the ECT, referring to the fact that the EC submitted a statement to the Energy Charter Secretariat in accordance with Article 26(3)(b)(ii) ECT. That statement declares that, “[t]he Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party”. Last but not least, the Claimants rejected the suggestion that they are to be equated with Germany, given that they are not all wholly owned by *Lander* and that, in any event, there is no basis for treating a bank owned by one of the *Lander* as though it were an organ of the German State (¶¶ 69, 70).

2.3 The European Commission’s position

In its Request to Intervene, the EC suggested that “while the starting point of [the Tribunal’s] analysis, in accordance with Article 26(6) ECT, is one of international law, it is also one of European Union law, which forms part of the public international law order for the purposes of this proceeding”, while relying on the *Achmea* Judgment, which endorses EC’s views, as well as the views of a number of arbitral tribunals, starting with the *Electrabel* tribunal, that “Union law takes precedence over the Energy Charter Treaty in case of conflict, at the very least in intra-EU situations [...]”, as well. An intra-EU arbitration tribunal, acting in accordance with Article 31(3)(c) VCLT, should take EU law into account in determining the scope of the offer to arbitrate and determine that Spain had made no offer to investors from other EU Member States (¶¶ 72, 73).

Moreover, in case that an intra-EU tribunal were to reject such an interpretation of Article 26 ECT, there would be a conflict between EU law and the ECT, which would have to be resolved in favour of EU law. In this context, the EC took issue with the decisions in *Vattenfall* and other arbitrations, which have reached different conclusions, and invited this Tribunal to depart from them. (¶¶ 74).

3. Developments Since the Hearing

On 15 January 2019 twenty-two EU Member States, including both Germany and Spain, signed a Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (the “*Declaration*”). Pursuant to this Declaration “Member States are bound to draw all necessary consequences from that judgment pursuant to Union law. Union law takes precedence over [BITs] concluded between Member States. As a consequence, all investor State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. [...] An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction [...] international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order”. In a footnote, it was added that “[t]he same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of Treaties and customary international law (*lex posterior*)” (¶ 76).

Considering the above mentioned the Member States undertook, *inter alia*, that they will inform “investment arbitration tribunals about the legal consequences of the *Achmea* Judgment [...] in all pending intra-EU investment arbitration proceedings brought either under [BITs] concluded between Member States or under the [ECT]”, “the investor

community that no new intra-EU investment arbitration proceeding should be initiated” (¶ 77).

On the day following the adoption of this declaration, five Member States which had not signed it adopted a declaration of their own (the “*Declaration of Five Member States*”). The Declaration of Five Member States drew the same inferences from the *Achmea* Judgment as regards BITs, as those set out in the Declaration of Twenty-Two Member States, but took a different course as regards the ECT, stating that “*the Achmea Judgment is silent on the investor-[S]tate arbitration clause in the [ECT]. A number of international arbitration tribunals post the Achmea Judgment have concluded that the [ECT] contains an investor-State arbitration clause applicable between EU Member States [...]. [T]he Member States [...] consider that it would be inappropriate, in the absence of a [judgment], to express views [...]*” (¶ 78).

The Representative of the Government of Hungary to the European Union issued a declaration, as well; this declaration drew from *Achmea* inferences similar to that in the Declaration of Twenty-Two Member States as regards BITs, but disagreed regarding the ECT, stating that “[*t]he Achmea Judgment is silent on the investor-State arbitration clause in the [ECT] and it does not concern any pending or prospective arbitration proceedings [...]*” (¶ 79).

Following these declarations, the Tribunal wrote to the Parties inviting them to comment on the three declarations and on whether Germany should be invited to convey its views to the Tribunal (¶ 80). Respondent noted that all three statements concurred in finding that arbitration provisions in intra-EU BITs are incompatible with EU law. However, the Claimants argued that the Declaration of Twenty-Two Member States “*is a political declaration without any legal effect*” and “*without relevance for the legal assessment*”. Finally, they contended that the ECT remains valid and effective between all its parties and that the Declaration of Twenty-Two Member States violates the principles of the rule of law and the separation of the powers, as Hungary pointed out in its Declaration, and is an attack on arbitral independence (¶ 83).

The Tribunal, then, invited Germany to address any comment to the Tribunal (¶ 85). The Director General of the Federal Ministry for Economic Affairs and Energy of the Federal Republic of Germany submitted a brief document, stating that “[*Germany*] *wishes to emphasise the statements made in the [Declaration], which was signed by Germany, the Kingdom of Spain and 20 other member States of the European Union [...], [and] is already in the possession of the Tribunal*” (¶ 86).

4. The Analysis of the Tribunal

4.1 The extent of the Tribunal’s compétence de la compétence

The Claimants argued that the Tribunal’s *compétence de la compétence* could not empower it to inquire into more fundamental issues of validity (¶ 90). However, the Tribunal found that its *compétence de la compétence* stems from the ICSID Convention; that Convention though gives it jurisdiction over the case only if the Parties have consented in writing. The basis on which the Claimants maintained that this requirement is satisfied is that Article 26 ECT constitutes an offer to arbitrate. In the absence of such offer, there could not have been a valid acceptance and, thus, the requirement of consent is not satisfied. The Tribunal has a duty to

satisfy itself that it has jurisdiction and therefore that there was a valid offer by Spain to investors from other EU Member States. To discharge that duty, it must consider not just the interpretation of the ECT but also whether EU law overrides the terms of the ECT so as to preclude an offer by Spain to investors from other EU Member States. The Tribunal, thus, considered that its *compétence de la compétence* extends to all aspects of the objection raised by Spain (¶¶ 91, 92).

4.2 *The relationship between the Claimants and Germany*

During the course of the proceedings, Spain raised arguments regarding the Claimants' relationship with Germany (¶ 93). Spain argued that the Claimants are not from another Contracting Party, given that the EU and its Member States have to be treated as a common entity for certain purposes under the ECT (¶ 94). However, the Tribunal rejected this argument. Since both Spain and Germany (as well as the EU) are Contracting Parties to the ECT, the natural reading of the treaty is that the Claimants, as juridical persons incorporated in Germany, are from a different Contracting Party from Spain (¶ 95), invoking as well *Greentech*, where the tribunal stated that “Article 26(1) ECT requires that a dispute between a Contracting Party and an Investor must relate to ‘an Investment of the latter in the Area of the former’. Article 1(10) ECT defines ‘Area’ as ‘the territory under [a Contracting Party's] sovereignty [...]’. Again, the Tribunal considers that this requirement is clearly met.” (¶ 96).

Secondly, Spain argued that the Claimants are, in effect, to be equated to Germany because they are owned by various Länder, and, thus, the case should be seen as an inter-State case, rather than one between a German investor and Spain (¶ 97). The Tribunal did not agree, as well. Apart from the fact that not all the Claimants are wholly owned by one or more of the Länder, they are all legal entities possessing juridical personality separate from that of the Federal Republic of Germany. They, therefore, qualify as investors of a Contracting Party, rather than being the Contracting Party itself. (¶ 98).

4.3 *Is the issue “settled law”?*

Both Parties suggested that the Tribunal should consider the issue before it as “*settled by prior decisions*” (¶ 100). The Kingdom of Spain claimed that the *Achmea* Judgment has settled the question at hand, and that this decision applies to arbitration under the ECT as much as it does to arbitration under a BIT, and that this decision is binding on all EU Member States, and, thus, upon this Tribunal (¶ 101). The Tribunal was not persuaded by this argument; a judgment of the CJEU in response to a reference from a national court for a preliminary ruling is binding only upon the court making the reference, as EU law has no concept of *stare decisis*. Hence, this Tribunal could not by any means be bound by a CJEU Judgment, although it will, of course, give great weight to it (¶ 102).

By contrast, the Claimants suggested that both before and after *Achmea*, there is consistent jurisprudence rejecting the Intra-EU Jurisdictional Objection (¶ 104). However, the Tribunal does not consider that it can rely upon those earlier precedents (¶ 105). First, there is no doctrine of binding precedent in international law and, although an arbitral tribunal should be aware of earlier rulings on the point it has to decide, it is not bound by them [*Wirtgen case*] (¶ 106). Secondly, most of the arbitral precedents cited by the Claimants pre-date *Achmea* and, as such, shed no light upon its effects (¶ 107). Lastly, while the awards and decisions referred to by the Claimants are consistent in that they reject the Intra-EU Jurisdictional Objection, they are not consistent in their reasoning (¶ 108).

4.4 Does the ECT confer jurisdiction in the present case?

Since Article 25 of the ICSID Convention and Article 26 ECT are the basis of any powers which the Tribunal may possess, it was necessary that the Tribunal approached the pertinent provisions step-by-step (¶¶ 110, 111).

4.4.1 Principles of interpretation

The ECT is a treaty governed by international law and must therefore be interpreted in accordance with the principles of international law regarding treaty interpretation. It is generally agreed – and not disputed in the present case – that these principles are today embodied in Articles 31 to 33 VCLT (¶ 112).

4.4.2 Provisional interpretation of Article 26 ECT

The Tribunal considers that Article 31 VCLT, as its title suggests, states a single, general rule of interpretation, which is the ordinary meaning of the terms in a treaty (¶ 116). With regard to Article 26, there is nothing in its wording to suggest that the offer by the EU and the EU Member States is limited to investors from non-EU States. Moreover, there is no “*disconnection clause*” in the ECT to the effect that some of its provisions do not apply in an intra-EU context, while the Tribunal agrees with the *Vattenfall* tribunal that the absence of such a clause is telling (¶ 117). Moreover, Spain claimed that the ECT treats the EU and its Member States as a single entity, and, thus, the German investor is not making an investment in the Area of another Contracting Party, falling outside the entire scope of the ECT (¶ 124). The Tribunal was not persuaded by this argument, as well. The ECT is a mixed agreement concluded by the EU and its Member States. The fact that the EU and its Member States acted as a bloc in the preceding negotiations does not alter the fact that both the EU and the Member States are Contracting Parties to the ECT (¶ 125).

4.4.3 Is it contrary to EU Law for an EU Member State to make an offer of arbitration under the ECT to an investor from another EU Member State?

The question that the present Tribunal had to deal with was whether the logic of the *Achmea* reasoning, although crafted in relation to a BIT, is also applicable to Article 26 ECT insofar as that provision is invoked in an intra-EU dispute (¶ 143). Nevertheless, the Tribunal considered that the differences between its situation, as a tribunal established under Article 25 of the ICSID Convention and Article 26 ECT, and that of the tribunal in *Achmea* are more significant than the similarities (¶ 146).

First, the ECT is a “*mixed agreement*” concluded both by the EU and by its Member States. There is, therefore, no question of the possibility of a tribunal established under Article 26 ECT (¶ 147). Secondly, the ECT, as a multilateral treaty, involves obligations by each Contracting Party towards all other Contracting Parties; it is more than just a network of bilateral relationships and is therefore quite different from a BIT (¶ 148). Thirdly, in the context of a BIT between two EU Member States, all proceedings will necessarily have an intra-EU character. However, that is not the case with the ECT, as the ECT can furnish a basis for jurisdiction in proceedings between an Investor from outside the EU and an EU Member State or the EU itself, or between an Investor from an EU Member State and a State outside the EU, and, in such a case, issues of EU law would be just as likely to arise and yet could not be referred to the CJEU for a preliminary ruling (¶ 149). Fourthly, the *Achmea*

tribunal had its seat in Germany. By contrast, the present Tribunal is an ICSID tribunal, deriving its authority from Article 25 of the ICSID Convention, having no national “*seat*” and subject to the jurisdiction of no national court (¶ 150). Fifthly, the Advocate-General in *Achmea* considered that the existence of jurisdiction under Article 26 ECT in an intra-EU dispute was compatible with EU law. While the CJEU did not follow the advice of the Advocate-General, it is noticeable that it “cherry-picked” passages from his Opinion (¶ 151). Lastly, the CJEU had not ruled out the possibility of a court established by an international agreement and, thus, rooted in public international law being able to rule in a dispute involving an EU Member State, notwithstanding that in doing so it had to take account of EU law (¶ 152).

In short, the Tribunal agrees with the analysis of the position before the *Achmea* Judgment in numerous other arbitration awards and decisions (¶ 154) and is therefore of the view that there is no conflict between EU law and a conclusion that Article 26 ECT constitutes an offer of arbitration by an EU Member State to an Investor from another EU Member State (¶ 155).

4.4.4 *The effect on the interpretation of Article 26 ECT of a prohibition under EU Law of arbitration in an intra-EU dispute*

The Tribunal especially considered Respondent’s argument that the *Vattenfall* analysis misreads Article 26(6), as it suggests that that provision applies to the “*dispute*” whereas the language actually used is “*the issues in dispute*” (¶ 159). However, when applicable, Article 26(6) directs a tribunal to “*decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*”. It, thus, requires a tribunal to begin with the provisions of the ECT (¶ 160). Nor is the Tribunal persuaded by Respondent’s reference to Article 42(1) of the ICSID Convention, as this provision refers to the law applicable to the merits and not to jurisdiction, while it is of limited relevance at present, since Article 26(6) ECT constitutes an agreement between the Parties regarding the applicable law (¶ 161).

Respondent also invokes Article 31(3)(b) VCLT, arguing that the practice of the EU constitutes subsequent practice pointing to an interpretation of Article 26 ECT which excludes intra-EU disputes (¶ 165). However, the problem with this argument is that Article 31(3)(b) requires practice that “*establishes the agreement of the parties*” to the relevant treaty and the body of practice relied upon by Spain comes nowhere near establishing such an agreement; as to the Declarations adopted by EU Member States, they cannot be said to establish an agreement between the parties to the ECT regarding its interpretation (¶ 166). Respondent also refers to Article 25(1) ECT, arguing that the reference to “*preferential treatment*” in this provision implies that the ECT is to be construed so as to accord preference to the rules of an EIA. However, all that Article 25(1) does is to ensure that the most favoured nation provisions of the ECT shall not be interpreted as requiring a Contracting Party which is a member of an EIA to extend to a Contracting Party which is not a member of that EIA the treatment which the EIA’s rules require it to extend to other States which are members of the EIA (¶ 167).

Finally, the Tribunal’s view that Article 16 ECT is applicable is confirmed by the disconnection provision proposed by the EU during the negotiation of the ECT. Although that provision was not adopted, the fact that it was put forward shows that the EU considered that “*Community rules*” concerned the subject matter of the ECT (¶ 172). Spain also contended that Article 16 ECT is inapplicable because the right to dispute resolution under the ECT is

not more favourable to the Investor or the Investment than the remedies available under EU law; however, the Tribunal did not agree, as EU law does not afford a right for an Investor to bring arbitration proceedings against a State under international law (¶ 174). The Tribunal, thus, held that Article 16 ECT is applicable; its effect is that the ECT cannot be interpreted in a way contradicting the ordinary meaning of the terms of Article 26, in order to give effect to any rule of EU law that might prohibit an EU Member State from making a valid offer of arbitration (¶ 175), thus rejecting Spain's argument that Article 26 ECT can and should be construed as inapplicable to an intra-EU dispute (¶ 176).

4.4.5 Does EU Law take priority over the ECT for the purposes of determining the jurisdiction of the Tribunal?

The argument that EU law must be given priority as between EU Member States over the provisions of an international agreement was not binding upon the present Tribunal, given that it does not operate under EU law, but under international law and, in particular, the terms of the ECT (¶ 178).

Respondent provided the Tribunal with three arguments in support of its view that international law requires to accord primacy to EU law. The first was based upon Article 30 VCLT (¶ 180); according to Spain, the *lex posterior* rule laid down in this provision should be applied here (¶ 181). However, firstly, it is by no means clear that the provisions of EU law on which Respondent relies are *lex posterior*. While the TFEU post-dates the ECT, the provisions on which Respondent relies – Articles 267 and 344 – are taken verbatim from earlier versions of the EU Treaties which pre-date the ECT (¶ 182). Secondly, the Tribunal agrees with the *Vattenfall* tribunal that “*the general rule of lex posterior in Article 30 VCLT is a subsidiary one*” and that “*where a treaty includes specific provisions dealing with its relationship to other treaties [...] the lex specialis will prevail*” - then Article 16 ECT is necessarily applicable (¶ 183).

For its second argument, Spain invoked Article 41 VCLT (¶ 185), maintaining that the relevant provisions of EU law must be deemed to be a modification *inter se* by the EU Member States of the provisions of the ECT. This argument, however, must fail for the same reason as that based on Article 30 VCLT; it is contrary to Article 16 ECT. Moreover, it is completely unclear what modification of the ECT is deemed to have taken place and there has been no notice to the other Contracting Parties to the ECT as required by Article 41(2) VCLT (¶ 186).

Finally, Respondent relied upon Article 351 TFEU (¶ 188); despite the fact that this article is not applicable to these proceedings, the issue before the Tribunal concerns the effects of the ECT between two EU Member States – Germany and Spain – both of which were EU Member States when they concluded the ECT (¶ 189). The Tribunal, however, was concerned with ECT's legal effect in international law. Within international law, a declaration by the EU Member States cannot alter or set aside obligations assumed by those States under a treaty. Similarly, the recent Declaration of Twenty-Two Member States regarding the effects of the *Achmea* Judgment cannot by itself alter the obligations of those States under the ECT. To hold otherwise would be to ignore the effects of Article 16 ECT and the clear intention of the Contracting Parties to the ECT that the same text should apply to all Contracting Parties – an intention manifested in their agreement not to permit reservations to the ECT (¶ 192). As for Respondent's *a contrario* argument, the Tribunal agrees with the *Vattenfall* tribunal that “*the clearer conflict rule in Article 16 ECT must prevail over a rule derived from an a contrario*

interpretation of Article 351 TFEU which cannot be found in the text of the TFEU itself'. It considers this analysis more persuasive than that adopted *obiter* by the *Electrabel* tribunal (¶ 193). For these reasons, the Tribunal concludes that, if EU law is incompatible with the Tribunal's interpretation of Article 26 ECT, then this Tribunal must accord priority to the ECT, the legal instrument which is the basis for the Tribunal's jurisdiction (¶ 194).

5. Future Disposition of the Case

The Tribunal rejected the Intra-EU Jurisdictional Objection advanced by Spain. The case will therefore proceed to the next phase, during which the Tribunal will consider Spain's other jurisdictional objections and, if those are dismissed, then the merits of the case (¶ 195).

6. Costs

With regard to the costs incurred by the Parties and the costs of the proceeding, the Tribunal has adopted a two-track approach, making separate provision for submissions regarding the costs of the present phase of the proceedings and the entire costs incurred hitherto (¶ 197).

Since the Tribunal has decided to reject the Intra-EU Jurisdictional Objection, it is unnecessary to consider the sealed submissions on costs (¶ 200). With regard to the costs of the present phase of the proceedings, the Tribunal concluded that it will address the issue of costs when issuing its final Award (¶ 201).