

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

In the arbitration proceeding between

CAVALUM SGPS, S.A.

Claimant

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/15/34

DECISION ON THE KINGDOM OF SPAIN'S REQUEST FOR RECONSIDERATION

Members of the Tribunal

Lord Collins of Mapesbury, LL.D., F.B.A., President of the Tribunal

Mr. David R. Haigh Q.C., Arbitrator

Sir Daniel Bethlehem Q.C., Arbitrator

Secretary of the Tribunal

Mr. Francisco Grob, ICSID

Date of dispatch to the Parties: 10 January 2022

REPRESENTATION OF THE PARTIES

Representing Cavalum SGPS, S.A.:

Mr. Kenneth R. Fleuriet
Ms. Amy Roebuck Frey
Ms. Héloïse Hervé
King & Spalding
12, cours Albert Ier
75008 Paris
France
and
c/o Mr. Reginald R. Smith
Mr. Kevin D. Mohr
King & Spalding
1100 Louisiana, Suite 4000
Houston, TX 77002
U.S.A.
and
c/o Mr. Christopher Smith
King & Spalding LLP
1180 Peachtree St. NE
Atlanta, GA 30309
U.S.A.

Representing the Kingdom of Spain:

Ms. Maria del Socorro Garrido Moreno
Mr. Rafael Gil Nievas
Ms. Lourdes Martínez de Victoria Gómez
Ms. Lorena Fatás Pérez
Ms. Elena Oñoro Sainz
Ms. Ana Fernández Daza Álvarez
Ms. Amparo Monterrey Sanchez,
Mr. Francisco Javier Peñálver Hernández
Ms. Gabriela Cerdeiras Megias
Ms. Ana María Rodríguez Esquivias
Mr. Juan Quesada Navarro
Mr. Javier Comeron Herrero
Ms. Maria Eugenia Cediél Bruno
Abogacía General del Estado
Dpto. Arbitrajes Internacionales
c/ Marqués de la Ensenada,
14-16, 2ª planta.
28004, Madrid
Spain

Contents

I.	PROCEDURAL HISTORY.....	1
II.	THE PARTIES' POSITIONS.....	2
	A. Spain's Position.....	2
	B. The Claimant's Position.....	6
III.	THE TRIBUNAL'S ANALYSIS	10
	A. The 2020 Decision.....	11
	B. <i>Achmea</i> and <i>Komstroy</i>	13
	1. <i>Achmea</i>	13
	2. <i>Komstroy</i>	14
	3. Republic of Poland v. PI Holdings Sàrl.....	18
	C. <i>Res judicata</i>	19
	D. Discussion and Conclusions.....	23
IV.	DECISION	38

I. PROCEDURAL HISTORY

1. On 4 October 2021, the Kingdom of Spain (“**Spain**”) submitted a Request for Reconsideration (the “**Request**”) of the Tribunal’s Decision on Jurisdiction, Liability and Directions on Quantum dated 31 August 2020 (the “**2020 Decision**”), in the light of the ruling issued on 2 September 2021 by the Court of Justice of the European Union (the “**CJEU**” or the “**Court**”) in Case C-741/19, *Republic of Moldova v. Komstroy LLC* (“**Komstroy**”). The Request was accompanied by legal authorities RL-0090, RL-0106, and RL-0107.
2. On 27 October 2021, further to the Tribunal’s invitation, Cavalum SGPS, S.A. (the “**Claimant**”) submitted its Response to the Request (the “**Response**”). The Response was accompanied by legal authorities CL-0231 to CL-0235.
3. On 9 December 2021 the Claimant wrote to the Tribunal to draw its attention to (a) a Decision on the Respondent’s Request for Reconsideration of the Tribunal’s Decision dated 19 April 2021 in *Mathias Kruck v. Kingdom of Spain* (ICSID Case No. ARB/15/23); and (b) an article by S Perry in *Global Arbitration Review* discussing *Landesbank Baden-Württemberg v. Kingdom of Spain*, ICSID Case No. ARB/15/45, an unpublished decision rejecting a request from Spain to reconsider a 2019 decision on jurisdiction.
4. On 11 December 2021 the Tribunal gave permission to Spain to respond to the Claimant’s letter, and on 17 December 2021 Spain submitted comments on the Claimant’s letter, to which it attached the decision of the CJEU in Case C-109/2020 *Republic of Poland v. PI Holdings Sàrl*¹ and an order of the Court of Appeal, Svea, Sweden, withdrawing its request for a preliminary ruling on the compatibility of the ECT with EU law.²

¹ Case C-109/2020, *Republic of Poland v. PI Holdings Sàrl*, Judgment, 26 October 2021, **RL-112**.

² Order of 12 November 2021 of the Court of Appeal of Svea, **RL-113**.

II. THE PARTIES' POSITIONS

A. Spain's Position

5. In its Request, Spain asks that the Tribunal reconsider its findings on the intra-European Union (“EU”) objection in the 2020 Decision and declare its lack of jurisdiction for the present intra-EU investment arbitration.
6. Spain first addresses the background of *Komstroy* and states that in the original arbitration against Moldova under Energy Charter Treaty (“ECT”) Article 26, Moldova objected to the tribunal’s jurisdiction, arguing that the contract was not an investment protected under the ECT, but rather a “*strictly commercial relationship not covered by the ECT.*”³
7. The tribunal in that case upheld its jurisdiction, and the award was challenged in the Paris Court of Appeal following a preliminary question referred to the CJEU on the interpretation of “*investment*” under the ECT.⁴
8. According to Spain, *Komstroy* is the CJEU’s first decision on the compatibility of intra-EU investment arbitration under the ECT with EU law.⁵ Spain adds that the reasoning followed by the CJEU is identical to that in Case C-284/16 *Slovak Republic v. Achmea BV* (“*Achmea*”), to the extent that many sections of *Achmea* are reproduced in *Komstroy*.
9. *Komstroy*, Spain explains, begins by recalling the limits of the international agreements of the EU and Member States by virtue of the legal and institutional framework established by the EU treaties and the essential principle of autonomy.⁶ Spain argues that this is reflected in the case of the EU’s jurisdictional system, which provides the CJEU with exclusive competence for the interpretation of EU law and is based on a dialogue mechanism between national courts and the CJEU, the latter of which has the last word in the interpretation of EU legal framework.⁷

³ *Ibid.*, ¶ 5.

⁴ *Ibid.*, ¶ 6.

⁵ *Ibid.*, ¶ 7.

⁶ *Ibid.*, ¶¶ 12-14.

⁷ *Id.*

10. In Spain’s submission, the CJEU considers that arbitral tribunals called to rule on intra-EU investment disputes “*would have to interpret and even apply EU law without being part of the EU jurisdictional system*” as “*intra-EU investment arbitration is not allowed and it is not compatible with the EU Treaties and with the autonomy principle.*”⁸
11. Spain further cites the CJEU’s statement that:
- [I]t must be concluded that Article 26, paragraph 2, letter c), of the ECT must be interpreted in the sense that it is not applicable to the disputes between a Member State and an investor from another Member State in relation to an investment made by the latter in the first Member State.*⁹
12. In its analysis of the judgment, Spain highlights the following *Komstroy* holdings in relation to the present arbitration: (i) that the application of the EU law is mandatory, (ii) that foreign direct investment (including the ECT) is part of the EU competences and EU law and, in cases where the seat of the arbitration is in an EU Member State, national courts have to ensure such application; (iv) that the autonomy of the EU legal framework must be respected; and (v) that intra-EU investment arbitration is not allowed and the ECT cannot be interpreted as allowing it.¹⁰
13. Regarding the first point on the mandatory application of EU law in intra-EU disputes, Spain reiterates that because the ECT was ratified by the EU, it constitutes an EU act and a part of the EU legal framework, and must be interpreted “*in conformity with the totality of the EU legal framework.*”¹¹ In that regard, Spain further argues that the ECT “*must be applied not only for jurisdictional purposes [...] but also regarding the EU state aid laws that must be applied to any controversy where the host country is an EU Member State.*”¹²

⁸ *Ibid.*, ¶¶ 15-16

⁹ *Ibid.*, ¶ 16, quoting *Komstroy*, ¶ 66.

¹⁰ *Ibid.*, ¶¶ 25-26.

¹¹ *Ibid.*, ¶ 27.

¹² *Ibid.*, ¶ 29.

14. Concerning the autonomy of the EU legal framework, the CJEU reiterates in *Komstroy* that international agreements cannot affect the autonomy of the EU legal system. Hence, as Spain argues, “*the autonomy of the EU and the preferential application of the EU legal framework for intra-EU affairs over international conventions*” is an essential rule that must be respected.¹³
15. Spain submits that the CJEU is clear on the fact that the ECT cannot be interpreted as allowing intra-EU investment arbitration.¹⁴ Because the ECT, foreign direct investment and state aid are EU law, EU law must be exclusively interpreted by national courts and the CJEU, and thus, intra-EU investment arbitrations under the ECT are not possible.¹⁵ As a result, the Tribunal lacks jurisdiction in this dispute.¹⁶
16. In terms of the admissibility of its Request in the ICSID system, Spain argues that, although the ICSID Convention and Arbitration Rules do not expressly contemplate the possibility of a decision on reconsideration, they do not expressly prohibit it either.¹⁷ Citing the award in *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd*, Spain argues that, in view of new evidence that could affect the outcome of a decision, the Tribunal has the power to reconsider previously-adopted decisions.¹⁸ *Komstroy*, according to Spain, calls into question the 2020 Decision regarding the intra-EU jurisdictional objection.¹⁹ Taking into account the importance of both *Achmea* and *Komstroy*, Spain requests that the Tribunal should reconsider the 2020 Decision and declare its lack of jurisdiction in the present case.²⁰
17. As to the reasons for reconsideration, Spain argues that in the 2020 Decision, the Tribunal considered that if the compatibility between EU law and the ECT were to be referred to the CJEU, the CJEU would apply the pronouncements of the *Achmea* judgment.²¹ However,

¹³ *Ibid.*, ¶ 30.

¹⁴ *Ibid.*, ¶ 35.

¹⁵ *Ibid.*, ¶ 37.

¹⁶ *Ibid.*, ¶ 37.

¹⁷ *Ibid.*, ¶ 38.

¹⁸ *Ibid.*, ¶¶ 38-41, 45.

¹⁹ *Ibid.*, ¶ 42.

²⁰ *Ibid.*, ¶¶ 42-44.

²¹ *Ibid.*, ¶ 47.

Spain submits: “*the Tribunal later found that there was no conflict between Articles 26.1-3 ECT and Articles 267 and 344 TFEU and that the Achmea judgment does not say that the arbitration agreement is void or incompatible with the TEC/TFEU.*”²² Thus, according to Spain, in light of *Komstroy*, where the Court “*clearly declared the incompatibility between Article 26 ECT and the EU Treaties,*” the 2020 Decision’s conclusions in that respect are clearly contradicted by the CJEU’s holding.²³

18. Spain further submits that *Komstroy* shows that no EU Member State gave its consent to submit an intra-EU dispute to arbitration, as this would be contrary to the principles of autonomy and the primacy of EU law.²⁴ According to Spain, this is regardless of the fact that the EU is a party to the international agreement,²⁵ since EU Member States “*did not have the power to bind themselves to submit disputes to arbitration.*”²⁶
19. Like the *Achmea* ruling, Spain submits that *Komstroy* confirms that the “*ECT cannot impose the same obligations on the Member States among themselves, since this would be contrary to the principle of the autonomy of Union law.*”²⁷ *Komstroy* further confirms that the autonomy of the EU legal framework must be respected, considering “*the disconnection from international treaties with no disconnection clause in order to apply the EU law for intra-EU affairs.*”²⁸
20. Spain concludes that *Komstroy* is binding for both Portugal and Spain and thus Portuguese investors cannot enjoy any rights and a legal framework that are different from those applicable to Portugal.²⁹
21. In its comments dated 17 December 2021 on the Claimant’s letter of 11 December 2021, Spain emphasized that (1) the decision in *Standard Chartered Bank v. Tanzania* that a tribunal was entitled to reconsider its prior decision was supported by the Claimant’s

²² *Ibid.*, ¶ 47.

²³ *Ibid.*, ¶ 48.

²⁴ *Ibid.*, ¶ 49.

²⁵ *Ibid.*, ¶ 49.

²⁶ *Ibid.*, ¶ 50.

²⁷ *Ibid.*, ¶¶ 51-53.

²⁸ *Id.*

²⁹ *Ibid.*, ¶ 55.

citation of *Mathias Kruck v. Kingdom of Spain*; and (2) a preliminary decision on jurisdiction is not an award, and is open to reconsideration. Spain drew to the attention of the Tribunal the decision of the CJEU in Case C-109/2020 *Republic of Poland v. PI Holdings Sàrl*,³⁰ which re-iterated the holdings in *Achmea* and *Komstroy*, and to the fact that the Court of Appeal of Svea, Stockholm, Sweden, had withdrawn a reference on the compatibility of the ECT with the EU Treaties. Spain also objected to the Claimant's reliance on the two new legal authorities to which it referred, on the ground that the Claimant had not complied with ¶ 16.3 of Procedural Order No. 1,³¹ in that no exceptional circumstances existed for adding them to the record.

B. The Claimant's Position

22. In its Response, the Claimant urges the Tribunal to reject the Request. In support of its position, the Claimant argues that Spain has not attempted to demonstrate, as required under Section 16.3 of Procedural Order No. 1, “*exceptional circumstances*” to justify the submission of new evidence at such a late stage of the proceeding, nor has Spain demonstrated any legal basis for the Tribunal to revisit a jurisdictional determination that it has made and that has *res judicata* effect.³² As such, in Claimant's view, no new “*fact of such a nature as decisively to affect*” the 2020 Decision exists under Article 51(1) of the ICSID Convention, and the Tribunal should therefore reject the Request.³³
23. The Claimant contends that there is not a sufficient basis for the Tribunal to reconsider the 2020 Decision because (i) *Komstroy* is not binding on this Tribunal and cannot serve to deprive the Tribunal of jurisdiction or invalidate Spain's “*unconditional consent*” to arbitration; (ii) the CJEU's purported interpretation of Article 26(2)(c) of the ECT in *Komstroy* was made purely according to EU law principles and without any international law analysis, which is the only relevant interpretative analysis that could be at all useful to the Tribunal; and (iii) the Tribunal already concluded that EU law-based considerations

³⁰ Case C-109/2020, *Republic of Poland v. PI Holdings Sàrl*, Judgment, 26 October 2021, **RL-112**.

³¹ “16.3. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party. 16.3.1. Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.”

³² Response, ¶ 2.

³³ *Id.*

cannot serve to deprive the Tribunal of jurisdiction or alter the plain meaning of the explicit text of the ECT, which requires the Tribunal to exercise jurisdiction of the dispute at hand.³⁴

24. In response to Spain's reliance on *Standard Chartered*, the Claimant argues that the case is "a clear outlier" and that the Tribunal should not follow the same approach, as the factors between the two cases are not the same and, in contrast to that decision, the Parties have already fully pleaded their cases in the present arbitration.³⁵
25. The Claimant further argues that *Komstroy* is irrelevant to the question of the Tribunal's jurisdiction for at least three reasons. *First*, the Tribunal is not constituted under EU law and is therefore not subject to the regional rules of the EU legal order.³⁶ Hence, as a decision from a court of a regional legal order, *Komstroy* has no bearing on the interpretation of the ECT or the Tribunal's jurisdiction as Article 26(1) gives the Tribunal jurisdiction without any caveat or exclusion relating to intra-EU disputes.³⁷
26. The fact that the CJEU interpreted Article 26(2)(c) of the ECT as not applying to intra-EU disputes does nothing in international law to (i) amend the terms of plain meaning of the ECT; (ii) invalidate the ECT; or (iii) alter the unconditional consent that Spain freely gave when concluding the ECT.³⁸ The Claimant argues that the ECT provides a very specific mechanism for its amendment, which has not been followed in this case.³⁹ *Komstroy* does not form part of the amendment mechanism nor does it affect the validity of the ECT.⁴⁰ It remains in force and is binding upon Spain unless and until Spain officially withdraws from it since it gave its "unconditional consent" to arbitrate disputes when it concluded the ECT "to the exclusion of any other remedy."⁴¹

³⁴ *Ibid.*, ¶ 3.

³⁵ *Ibid.*, ¶¶ 6-7.

³⁶ *Ibid.*, ¶ 9.

³⁷ *Ibid.*, ¶¶ 8-10.

³⁸ *Ibid.*, ¶ 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis omitted).

27. *Second*, the Claimant argues that the Tribunal is bound by the Vienna Convention and other well-settled rules of customary international law to apply the terms of Article 26 of the ECT.⁴² *Komstroy* is based exclusively on EU law principles that are irrelevant or not binding upon this Tribunal, but also, according to the Claimant, the judgment has no immediate or automatic consequence for the ECT even under EU law.⁴³
28. In response to Spain’s arguments on the similarities between *Achmea* and *Komstroy*, the Claimant contends that *Achmea* had no impact on the BIT at issue in that case, or on intra-EU BITs more generally, but rather, required agreements by the EU Member States to determine how to implement *Achmea*.⁴⁴ The Claimant, citing *Adamakopoulos et al. v. Cyprus*, argues that a conflict between the EU Treaties and the ECT arises with *Komstroy*, and that the ECT contains a *lex specialis* conflicts provision for precisely this situation.⁴⁵
29. *Third*, ECT Article 26(6) and its reference to “*rules and principles of international law*” may not be used as a “*back door*” for the application of EU law, particularly in a manner that would conflict with Articles 26(3)(a) and 26(1) of the ECT.⁴⁶ Numerous ECT tribunals, according to the Claimant, have ruled accordingly, including this Tribunal.⁴⁷
30. In sum, the Claimant argues that *Komstroy* could not be relevant to the Tribunal without the latter “*improperly subjecting itself to the regional rules of the EU legal order, misapplying the rules of the Vienna Convention, and/or misinterpreting the clear terms of ECT Article 26.*”⁴⁸
31. Even assuming that those reasons are not accepted, the Claimant further argues that “[a]t most, *Komstroy* merely means that there now exists a conflict between the ECT and the EU treaties (according to a court whose judgments do not bind ECT tribunals).”⁴⁹ In that case,

⁴² *Ibid.*, ¶ 11.

⁴³ *Id.*

⁴⁴ *Ibid.*, ¶ 12.

⁴⁵ *Ibid.*, ¶¶ 12-13.

⁴⁶ *Ibid.*, ¶ 14.

⁴⁷ *Id.*

⁴⁸ *Ibid.*, ¶ 15.

⁴⁹ *Ibid.*, ¶ 17.

ECT Article 16 applies to such a conflict, confirming that the more favorable provision to the investor provides the relevant legal rule.⁵⁰

32. The Claimant cites *SolEs Badajoz v. Spain*, *Masdar v. Spain*, and *Vattenfall v. Spain* to support its argument that “no ECT tribunal has ever concluded that a less favorable rule of EU law with respect to dispute resolution could or would survive an application of ECT Article 16.”⁵¹ According to the Claimant, the Tribunal has already considered a scenario in which there is a conflict between the ECT and EU law and the 2020 Decision upholding jurisdiction based on ECT Article 16 constitutes *res judicata*.⁵² ECT Article 16 is not a provision that is addressed in *Komstroy*.⁵³
33. The Claimant suggests that the Tribunal adopt the reasoning followed in *RREEF v. Spain* in which Spain relied on *Achmea* to request that tribunal to reconsider its decision on Spain’s intra-EU objection.⁵⁴
34. The Claimant submits that, even if *Komstroy* were relevant and the Tribunal were not to apply ECT Article 16 but rather EU law, *Komstroy* would still remain irrelevant as the Tribunal’s jurisdiction was established at the date the arbitration was commenced, *i.e.*, on 27 July 2015.⁵⁵ Citing Professor Schreuer, the Claimant maintains that “[i]t is a fundamental and well-settled principle of general international law that events taking place after the date on which judicial proceedings were instituted—including subsequent changes in the law—are irrelevant to a determination of jurisdiction.”⁵⁶ The Claimant argues that developments post-dating the commencement of this arbitration cannot serve to deprive the Tribunal of jurisdiction, nor does *Komstroy* address its temporal scope.

⁵⁰ *Id.*

⁵¹ *Ibid.*, ¶ 18.

⁵² *Ibid.*, ¶¶ 19-20.

⁵³ *Ibid.*, ¶ 20.

⁵⁴ *Ibid.*, ¶ 21.

⁵⁵ *Ibid.*, ¶ 23.

⁵⁶ *Ibid.*, ¶ 23, quoting CL-228, C. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), p. 92, ¶ 36.

Therefore, *Komstroy* cannot apply retroactively as the Tribunal's jurisdiction is not subject to *ex post facto* alteration.⁵⁷

35. In its letter of 9 December 2021 the Claimant relied on the rulings in *Mathias Kruck v. Kingdom of Spain* and *Landesbank Baden-Württemberg and others v. Kingdom of Spain* in support of its contention that the Tribunal should decline to re-open the 2020 Decision, and in particular that (a) the tribunal in *Landesbank Baden-Württemberg v. Kingdom of Spain* had declined to reconsider its decision on jurisdiction because it was *res judicata*; and (b) the tribunal in *Mathias Kruck v. Kingdom of Spain* had decided that it was permitted to reconsider its decision in exceptional circumstances, but declined to re-open its decision on the intra-EU issue because it was based on international law and was not affected by the re-iteration of EU law in *Komstroy*. The Claimant's position is that these decisions are directly responsive to issues raised in its Petition for reconsideration and that therefore exceptional circumstances exist for the purposes of Procedural Order No 1, ¶ 16.3.

III. THE TRIBUNAL'S ANALYSIS

36. The essence of Spain's argument on the Request is that (a) a decision in the course of ICSID proceedings which has not been incorporated in an award is not *res judicata* and can be reconsidered if it is affected by new evidence;⁵⁸ and (b) the *Komstroy* ruling contradicts the Tribunal's conclusions in the Decision that there was no conflict between ECT, Article 26(1)-(3) and TFEU, Articles 267 and 344, and that Member States had capacity to enter into agreements such as the ECT.⁵⁹
37. The essence of the Claimant's Response is that (a) pre-award decisions are *res judicata*, and cannot be re-opened;⁶⁰ (b) even if they could be re-opened, there would have to be

⁵⁷ *Ibid.*, ¶¶ 24-25, citing **CL-236**, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 178; **CL-137**, *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 255; **CL-237**, *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, ¶ 61.

⁵⁸ Request, ¶ 41.

⁵⁹ Request, ¶¶ 47-51.

⁶⁰ Response, ¶ 8.

circumstances which called out for a decision to be revisited;⁶¹ and (c) in any event, there is nothing in the *Komstroy* ruling which invalidates the reasoning of the Tribunal's Decision,⁶² but in any event there is no basis for reconsideration since the jurisdictional issues have been fully pleaded, and no conditions exist for the exercise of a power of reconsideration.

38. The questions for the Tribunal are, therefore, whether the 2020 Decision is *res judicata*, or unalterable for some other reason, and, if not, whether and under what conditions it may be the subject of reconsideration.
39. The Request will be dealt with below under the following headings: (A) the 2020 Decision; (B) the rulings in *Achmea* and *Komstroy*; (C) *Res Judicata*; and (D) Discussion and Conclusions.

A. The 2020 Decision

40. Spain's position before this Tribunal had been that the Tribunal had no jurisdiction because (1) the ECT did not apply to the relationship between EU Member States; (2) even if it did create *inter se* obligations between EU Member States, those obligations would not include the provisions on investment protection and dispute settlement; (3) EU law forbade the existence of any dispute mechanism other than that established by the EU Treaties; and (4) in the event of a conflict between EU law and the provisions of the ECT, EU law prevailed.⁶³
41. So far as material to the present ruling, the Tribunal decided in the 2020 Decision that (a) the combined effect of the ECT and the ICSID Convention was that the Tribunal had jurisdiction where the investor was a national of a Contracting Party and the respondent State was a Contracting Party; (b) those conditions were plainly fulfilled since Portugal and Spain were ECT Contracting Parties, the Claimant was a Portuguese company, and both Spain and Portugal were parties to the ICSID Convention; (c) so far as choice of law was concerned, the combined effect of Article 42(1) of the ICSID Convention and Article

⁶¹ Response, ¶¶ 6, 8.

⁶² Response, ¶¶ 15-20.

⁶³ Resp. C-M, ¶¶ 47 *et seq*; Resp. Rej., ¶¶ 72 *et seq*; Resp. PHB, ¶¶ 4 *et seq*.

26.6 ECT was that the Tribunal, which had jurisdiction under Article 26 ECT, applies, by virtue of Article 26.6 ECT, the ECT Treaty and “applicable rules and principles of international law;” and (d) those conclusions were not affected by the *Achmea* ruling.

42. The reasoning in the 2020 Decision was as follows:

- (1) The Tribunal was “the judge of its own competence.”⁶⁴
- (2) The question of jurisdiction had to be distinguished from the question of applicable law, or choice of law.
- (3) Article 26.6 ECT provided that the “tribunal established ... shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”
- (4) By virtue of Article 25(1) ICSID Convention jurisdiction existed where (1) there is a legal dispute which (2) arises directly out of an investment, (3) between a Contracting State and a national of another Contracting State, and (4) which the parties to the dispute consent in writing to submit to the Centre.
- (5) By virtue of Article 26.1-3 ECT: (1) where there arise disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former, (2) which cannot be settled amicably, (3) the investor party may submit it to ICSID arbitration, (4) if the Contracting Party of the investor and the Contracting Party to the dispute are both parties to the ICSID Convention.
- (6) There was plainly a dispute between the Claimant and Spain which arose out of an investment in Spain, and the Contracting Party of the investor, Portugal, is party to the ECT and to the ICSID Convention, as was Spain.
- (7) Accordingly, Spain had given “its unconditional consent to the submission of [the] dispute to international arbitration,”⁶⁵ and the Claimant had taken advantage of that consent.

⁶⁴ ICSID Convention, Article 41(1).

⁶⁵ ECT, Article 26.3.

- (8) If the principles in the *Achmea* ruling apply to the ECT as a matter of EU law, that could not affect the jurisdiction of the Tribunal under the applicable international law, namely the ECT and the ICSID Convention.
- (9) There was no conflict between Article 26.1-3 ECT and Articles 267 and 344 TFEU such as to bring Article 30 VCLT into play.
- (10) There was nothing in the *Achmea* ruling which could deprive a Tribunal so constituted of jurisdiction. Neither it, nor the decisions which it cited on multilateral agreements, suggested that Member States had no *capacity* to enter into agreements such as the ECT.
- (11) The fact that the Tribunal, as a mechanism of international law, and not national law, could not make a reference to the CJEU, did not deprive it of jurisdiction under international law.
- (12) The fact that EU law is international law for at least some purposes did not affect the conclusion that, on the plain meaning of the ECT and the ICSID Convention, the Tribunal had jurisdiction.

B. *Achmea* and *Komstroy*

1. Achmea

43. The operative part of the ruling in *Achmea* was:

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.*⁶⁶

44. The ruling was given in proceedings relating to a BIT, but the operative part was expressed to apply to “an international agreement..., such as” the relevant provision of the BIT.

2. *Komstroy*

45. This was a request by the Cour d’appel, Paris, in the course of proceedings by Moldova for the annulment of a French arbitral award rendered in favour of Komstroy, a Ukrainian company. The arbitral tribunal was constituted under ECT, Article 26, and had its seat in France. In the annulment proceedings the Cour d’appel referred a number of questions to the CJEU mainly relating to the interpretation of the expression “investment” in the ECT in connection with Moldova’s contention that Komstroy’s predecessor had simply been engaged in the supply of electricity, and had not made a relevant investment. The CJEU’s ruling was that a claim arising from a contract for the supply of electricity, which was not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, did not constitute an “investment” within the meaning of those provisions.
46. The only EU connection with the case was that the request for a preliminary ruling came from a court within the EU in annulment proceedings involving an award rendered in proceedings with a French seat. The parties were not within the EU and the law applicable to the substance was not the law of any EU Member State. The CJEU decided that it had jurisdiction to rule on the reference because (a) where a provision of an international agreement could apply both to situations falling within the scope of EU law and to situations not covered by that law, it was clearly in the interest of the EU that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly;⁶⁷ and (b) in any event, the arbitral tribunal had its seat in Paris, with the result that French law was the *lex fori*, the French courts had jurisdiction to hear actions to set

⁶⁶ *Achmea*, ¶ 62.

⁶⁷ *Komstroy*, ¶ 29.

aside an arbitral award made in France for lack of jurisdiction of the arbitral tribunal, and EU law formed part of the law in force in every Member State.⁶⁸

47. Having decided that the fact that the dispute in the main proceedings was between an operator from one third State (Ukraine) and another third State (Moldova) did not preclude the CJEU's jurisdiction to give a ruling, the CJEU went on to accept the contention of some EU Member States that it was necessary for the CJEU, in answering the question referred by the Paris Court of Appeal, to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former might be brought before an arbitral tribunal pursuant to Article 26 ECT.⁶⁹
48. The CJEU stated that "*it cannot be inferred that that [Article 26] of the ECT also applies to a dispute between an operator from one Member State and another Member State.*"⁷⁰
49. The reasoning was as follows⁷¹:
 - (1) an international agreement cannot affect the allocation of powers laid down by the EU Treaties and the autonomy of the EU legal system, a principle enshrined in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties;⁷²
 - (2) the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the nature of that law.⁷³
 - (3) consequently, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, with the CJEU having

⁶⁸ *Komstroy*, ¶¶ 32-34.

⁶⁹ *Komstroy*, ¶¶ 39-40.

⁷⁰ *Komstroy*, ¶ 41.

⁷¹ *Komstroy*, ¶¶ 42 *et seq.*

⁷² *Komstroy*, ¶ 42, citing *Achmea*, ¶ 42.

⁷³ *Komstroy*, ¶ 43, citing *Achmea*, ¶ 33 and Opinion 1/17 (*EU-Canada CET Agreement*), April 30, 2019, ¶ 109.

exclusive jurisdiction to give the definitive interpretation of that law, including giving rulings under the Article 267 TFEU;⁷⁴

- (4) the preliminary ruling procedure has the objective of securing the uniform interpretation of EU law, thereby ensuring its consistency, its full effect and its autonomy, the particular nature of the law established by the Treaties;⁷⁵
- (5) as in the case of the arbitral tribunal in *Achmea*, an ad hoc tribunal established under Article 26(6) ECT was not a component of the judicial system of a Member State such as France, and could not therefore make a reference under Article 267 TFEU;⁷⁶
- (6) under Article 26(4) ECT a dispute may be brought before an ad hoc arbitration tribunal on the basis of the UNCITRAL arbitration rules; and by Article 26(8) ECT, arbitral awards are final and binding on the parties to the dispute concerned;⁷⁷
- (7) the parties had chosen, in accordance with Article 26(4)(b) ECT, to submit that dispute to an *ad hoc* arbitration tribunal, established on the basis of the UNCITRAL arbitration rules, and accepted that the seat of the arbitration tribunal should be established in Paris, which made French law applicable to the proceedings before the Paris Court of Appeal, the purpose of which was the judicial review of the arbitration award;⁷⁸
- (8) but: “... such judicial review can be carried out by the referring court only in so far as the domestic law of its Member State so permits. Article 1520 of the Code of Civil Procedure provides only for limited review concerning, in particular, the jurisdiction of the arbitral tribunal”;⁷⁹
- (9) in relation to commercial arbitration, the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be

⁷⁴ *Komstroy*, ¶ 45, citing *Achmea*, ¶¶ 35-36 and Opinion 1/17 (*EU-Canada CET Agreement*), April 30, 2019, ¶ 111.

⁷⁵ *Komstroy*, ¶ 46, citing *Achmea*, ¶ 37.

⁷⁶ *Komstroy*, ¶ 56, citing *Achmea*, ¶¶ 46, 49.

⁷⁷ *Komstroy*, ¶ 55.

⁷⁸ *Komstroy*, ¶ 56.

⁷⁹ *Komstroy*, ¶ 57.

examined in the course of that review and they can, if necessary, be the subject of a reference to the Court for a preliminary ruling;⁸⁰

- (10) but arbitral proceedings such as those referred to in Article 26 ECT derive from a treaty whereby, in accordance with Article 26(3)(a) ECT, Member States agree to remove from the jurisdiction of their own courts and from the system of EU judicial remedies disputes which may concern the application or interpretation of EU law.⁸¹

50. The conclusions were

... if the provisions of Article 26 ECT allowing such a tribunal to be entrusted with the resolution of a dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law (see, by analogy, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158, para 56).

... the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.

Such a possibility would, as the Court held in ... Achmea ... call into question the preservation of the autonomy and of the particular

⁸⁰ Komstroy, ¶ 58, citing Achmea, ¶ 54.

⁸¹ Komstroy, ¶ 59, citing Achmea, ¶ 55.

nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.

It should be noted in that regard that, despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in the case giving rise to the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158, paragraph 58).

It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves.

In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.⁸²

3. Republic of Poland v. PI Holdings Sàrl

51. In Case C-109/2020 *Republic of Poland v. PI Holdings Sàrl* the CJEU re-affirmed its decision in *Achmea* (and referred also to *Komstroy*) in the context of an arbitration in

⁸² *Komstroy*, ¶¶ 60, 62-66.

Sweden under the Belgium-Luxembourg/Poland BIT. The essence of the question referred to the CJEU by the Swedish court was whether the ruling in *Achmea* applied where the Member State, after arbitration proceedings were commenced by the investor, deliberately refrained from raising objections before the arbitral tribunal as to jurisdiction.⁸³ The investor argued that the effect of Poland's conduct was that it had concluded an *ad hoc* arbitration agreement outside the BIT. The CJEU held that *Achmea* applied and ruled that:

Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles.

C. *Res judicata*

52. As the tribunal said in *Waste Management Inc. v. United Mexican States (Waste Management II)*:⁸⁴ “[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.”⁸⁵
53. The general principle of *res judicata* is concerned with the re-opening of claims and defences already decided in other proceedings. As the tribunal said in *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Co Ltd*:⁸⁶ “[a]n essential feature of *res*

⁸³ Poland did not accept that it had submitted to the jurisdiction of the arbitral tribunal.

⁸⁴ ICSID Case No. ARB(AF)/00/3, *Decision on Mexico's Preliminary Objection concerning the Previous Proceeding*, June 26, 2002, **CL-230**.

⁸⁵ ¶ 39, citing, inter alia, *Advisory opinion concerning the Polish Postal Service in Danzig*, PCIJ, Ser. B, No. 11 (1925).

⁸⁶ *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Co Ltd*, ICSID Case No. ARB/10/20, **RL-107**, ¶ 313. This passage was quoted with approval in *Mathias Kruck v. Kingdom of Spain*, ICSID Case No. ARB/15/23, ¶ 20.

judicata is that the judgment in question produces effects on the parties outside the proceedings in which it is granted.”⁸⁷

54. *Res judicata* effects in civil law countries are generally limited to the operative part (or *dispositif*) of the judicial decision, except to the extent that findings in the reasoning constitute a condition essential to the decision in the *dispositif*. In some countries (especially common law countries), *res judicata* extends not only to claims and defences in prior proceedings between the same parties, but also to *issues* decided in prior proceedings on different claims (called issue estoppel in England and other countries following the English model, and collateral estoppel in the United States).
55. This is not such a case of *res judicata* in the strict sense. It is not a case where it is said that a decision in another proceeding has preclusive effect. It is rather a case where a request is made in proceedings to re-open a decision made at an earlier stage of those same proceedings. The 2020 Decision was made in the same proceedings in which Spain seeks to have it reconsidered. What Spain says is that the Tribunal’s decision on jurisdiction should be re-opened and reversed because of new circumstances.
56. In proceedings before national courts,⁸⁸ whether a decision made in the course of proceedings may be re-opened in those same proceedings will depend on the applicable rules of civil procedure or judicial practice. Those rules or practice will determine, for example, whether a decision or ruling on provisional measures or security for costs can be re-opened because of changed circumstances; or whether a final preliminary ruling by a court on a factual issue can be re-opened in the same proceedings because of new evidence or because it has been obtained by the fraud of the successful party; or whether a decision on liability, with damages to be assessed subsequently, can be re-opened for similar reasons.
57. Mainly because of the application of the principle of party autonomy in arbitration, the rules of procedure in national arbitral systems or in institutional arbitral rules such as ICSID

⁸⁷ *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Co Ltd*, ICSID Case No. ARB/10/20, Award, 12 September 2016, ¶ 313, **RL-107**.

⁸⁸ The Tribunal has not been referred to the considerable body of international practice on the revision of awards: see, e.g. *Effect of Awards of Compensation*, 1954 ICJ Rep. 47, at 51-53.

are much less elaborate than the rules of procedure in national judicial systems, and in some respects the ICSID scheme is less elaborate than some national or institutional arbitral systems.

58. Thus in the ICSID Convention and the ICSID Arbitration Rules no provision is made for interim or partial awards. In the ICSID system the term “Award” means the final decision which terminates the proceedings.⁸⁹

59. There is little express provision for pre-award decisions. The ICSID Arbitration Rules provide for decisions, but do not regulate their content or their effects. By ICSID Arbitration Rule 16 (Decisions of the Tribunal):

(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

60. But an important exception relates to decisions by a tribunal that it does *not* have jurisdiction. By ICSID Convention, Article 41:

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

61. By ICSID Arbitration Rules, Rule 41 (Preliminary Objections):

(1) Any objection that the dispute ... is not within the jurisdiction of the Centre ... is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the

⁸⁹ See ICSID Convention, Arts. 48-49 (The Award), Arts. 50-52 (Interpretation, Revision and Annulment), Arts. 53-54 (Recognition and Enforcement); ICSID Arbitration Rules, e.g., Rule 25 (correction of errors prior to award); Rule 38(2) (re-opening of proceeding prior to award because of decisive new evidence); Rules 46-52 (time for preparation of award; formalities; rectification; interpretation, revision and annulment).

Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial ... unless the facts on which the objection is based are unknown to the party at that time.

... (4) The Tribunal ... may deal with the objection as a preliminary question or join it to the merits of the dispute.

... (6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, ...merit, it shall render an award to that effect.

62. The result of these provisions is that it is only a decision that the tribunal has no jurisdiction which becomes an award, which is consistent with the scheme of the ICSID Convention and the ICSID Arbitration Rules that only a decision terminating the proceedings is an award, and that there are no interim or partial awards in the system. A decision that the tribunal has jurisdiction only becomes part of the award when the award is made at the end of the proceedings.
63. Consequently the only express provision for modification of a tribunal *decision* is ICSID Rule 39 on provisional measures, which provides: “*Provisional Measures ... (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations ...*”⁹⁰
64. The other provision which has been treated as relevant by analogy on the tribunal’s powers in the event of new circumstances is ICSID Convention, Article 51, which provides:⁹¹

*(1) Either party may request revision of the **award** by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.*

⁹⁰ Cf. International Court of Justice, Rules of Court, Article 76. A similar provision for orders for security for costs is in the proposed new ICSID Rules. See ICSID Rules and Regulations Amendment - Working Papers, ICSID, November 2021.

⁹¹ This derives from the Statute of the International Court of Justice, Article 61.

*(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.*⁹²

This relates to revision of an award, and not a decision, but has been relied upon by tribunals which have been called upon to reconsider decisions as opposed to awards.

65. But although, apart from the case of provisional measures (and the proposed change for security for costs), there is no express power in the ICSID regime to revisit pre-award decisions, there is a power in ICSID Convention, Article 44, for a tribunal to decide any question of procedure which arises and which is not covered by the section of the ICSID Convention on powers and functions of the tribunal, or the Arbitration Rules or any rules agreed by the parties. This general power has been relied on as a source of a power to re-open pre-award decisions made in the course of an ICSID arbitration.

D. Discussion and Conclusions

66. The principal authorities relied on by the Parties are (by Spain) *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Co Ltd*⁹³ and (by the Claimant) *Perenco Ecuador Ltd v. Republic of Ecuador*.⁹⁴
67. In deciding that there was a power to reconsider decisions, the *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd* tribunal said:

313. Decisions of tribunals are of course binding within the scope of the proceedings, but this does not make them res judicata. That is so with procedural orders and provisional measures as pointed out earlier. An essential feature of res judicata is that the judgment in question produces effects on the parties outside the proceedings in which it is granted. But decisions of tribunals only have effect within

⁹² ICSID Convention, Art. 51 (emphasis added).

⁹³ *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award, 12 September 2016, **RL-107**.

⁹⁴ *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, 10 April 2015 ("*Perenco v. Ecuador*"), **CL-229**.

the proceedings until they have been incorporated into the final award.

314. This conclusion is supported by the structure and architecture of the ICSID Convention itself. Contracting States have an obligation to recognize only an award as binding (Art. 54(1)); recognition and enforcement is contemplated only in respect of an award (Art. 54(2)); only awards can be challenged through annulment proceedings (Art. 52). The proper inference to be drawn from these provisions is that only the Contracting State that is a party to the proceedings is under an obligation to recognize decisions of a tribunal as binding. Thus, decisions cannot have legal consequences outside the ICSID proceedings in which they are issued (i.e. they cannot be recognized and enforced and they cannot be challenged through annulment). Indeed, if decisions were res judicata before incorporation in the final award, then the requirement of incorporation into the final award under Article 48(3) would be redundant.⁹⁵

68. The tribunal in that case then went on to find that the combined effect of Articles 41(1) (tribunal judge of its own competence) and Article 44 (power of tribunal to decide any question of procedure not covered by the Rules) of the ICSID Convention gave the tribunal the power to reopen a decision in limited circumstances. That would avoid having to await until the decision was incorporated in an award and then having it re-opened or subject to annulment. The power would extend by analogy to the power in Article 51, but it was not unlimited, since “[a] decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will.”⁹⁶

⁹⁵ *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award, 12 September 2016, **RL-107**, ¶¶ 313, 314.

⁹⁶ *Ibid.*, ¶ 322.

69. On the other hand, in deciding that decisions in the course of an arbitration had preclusive effect, the *Perenco Ecuador Ltd v. Republic of Ecuador*⁹⁷ tribunal said

43. There is ample prior authority in support of the view once the tribunal decides with finality any of the factual or legal questions put to it by the parties, as was the case in the Decision on Remaining Issues of Jurisdiction and Liability, such a decision becomes res judicata.

44. In the CMS Gas Transmission v. Argentine Republic Award, the tribunal commented:

*“It must also be noted that in connection with the merits the Respondent has again raised certain jurisdictional issues that were addressed in the jurisdictional phase of the case such as the jus standi of the Claimant. These issues were decided upon at that stage and will not be reopened in this Award.”*⁹⁸

45. In the Waste Management Inc. v. United Mexican States (Waste Management II) Decision on Mexico's Preliminary Objection concerning the Previous Proceedings (a case conducted under the ICSID Additional Facility Rules rather than the Convention) the tribunal stated: “In cases where the same issue arises at the level of jurisdiction and of merits, it may be appropriate to join the jurisdictional issue to the merits. But at whatever stage of the case

⁹⁷ 2015Perenco v. Ecuador, ¶ 42.

⁹⁸ *Ibid*, ¶¶ 43, 44, quoting *CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 126, CL-66. This passage was also relied on in *RREEF v. Spain*, November 30, 2018, in deciding not to reopen, following *Achmea*, a decision on jurisdiction on the basis that its reasoning was *res judicata*, in which it was said: “Although these findings do not appear in the operative part of the Decision on Jurisdiction, they constitute the necessary support for it and are therefore *res judicata*. The Tribunal therefore considers that, as regards the relevance of EU law with regard to its jurisdiction, the discussion is closed and the relating issues will not be reopened at this stage.” *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S. à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 209.

*it is decided, a decision on a particular point constitutes a res judicata as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.*⁹⁹

46. *In the Electrabel S.A. v. Republic of Hungary Decision on Jurisdiction, Applicable Law and Liability, the tribunal noted: “This Decision is made in regard only to the first phase of these arbitration proceedings, relating to extant issues of jurisdiction and liability; and it is not made in regard to any issue of quantum (including interest). Although necessarily described as a ‘Decision’ and not an ‘Award’ under the ICSID Convention and ICSID Arbitration Rules, the several decisions and reasons contained in this Decision are intended by the Tribunal to be final and not to be revisited by the Parties or the Tribunal in any later phase of these arbitration proceedings.*¹⁰⁰

47. *Finally, in the ConocoPhillips v. Venezuela Decision on Respondent’s Request for Reconsideration, the tribunal stated: “As noted, the Respondent characterises the Decision as “interim” or “preliminary” and, accordingly, capable of being reconsidered, perhaps on an informal basis. The only reason suggested in its submissions is the temporal one: a further stage in the proceedings, relating to quantum, remains. The Decision does not however take an interim or preliminary form in respect of the matters on which it rules.” And: “Those decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute*

⁹⁹ *Perenco v. Ecuador*, ¶ 45, quoting *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceeding, 26 June 2002, ¶ 45, **CL-230**.

¹⁰⁰ Quoting *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 10.1.

*between the Parties have res judicata effect. 'They are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings.'*¹⁰¹

70. The Tribunal does not consider that the authorities cited justify the appellation of “ample authority” for the application of *res judicata*, and certainly not in the strict sense described above. First, *Republic Waste Management Inc. v. United Mexican States (Waste Management II)* was concerned with the traditional application of *res judicata*, namely the effect of a decision in one arbitration on a subsequent arbitration, and is irrelevant in the present context.¹⁰² Second, the statements in *CMS Gas Transmission v. Argentine Republic* and in *Electrabel S.A. v. Republic of Hungary* which are relied on in *Perenco v. Ecuador* are unsupported by any reasoning, as is the statement in *ConocoPhillips v. Bolivarian Republic of Venezuela*, which simply quotes *Electrabel S.A. v. Republic of Hungary*.
71. In the view of the Tribunal, the principle of *res judicata* is confined to the effect of a decision in one proceeding in another proceeding. Consequently, decisions made in the course of the arbitration do not have *res judicata* effect in that arbitration. Nevertheless there is a general principle that, for reasons of judicial and arbitral integrity, decisions made in the course of proceedings, and subject to their nature, may be the subject of revision. Important factors are the intention of the tribunal which rendered the decision, and the context in which it is made. Obvious examples, already mentioned, of orders which may be subject to revision in changed circumstances are orders for security for costs, and orders (called recommendations in the ICSID regime) for provisional measures. But it would be an exceptional case in which a decision on a preliminary issue of fact or law would be subject to revision.
72. Apart from the case of provisional measures (and the proposed change for security for costs), there is no express power in the ICSID regime to revisit pre-award decisions. As has been seen, there is a power in ICSID Convention, Article 44, for a tribunal to decide

¹⁰¹ Quoting *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent’s Request for Reconsideration, 10 March 2014, ¶¶ 20, 21, which quotes *Electrabel S.A. v. Republic of Hungary*, above.

¹⁰² The Tribunal does not express a view as to whether decisions made in the course of one proceeding, but not incorporated in an award may have preclusive effect in other arbitral or judicial proceedings

any question of procedure which arises and which is not covered by the section of the ICSID Convention on powers and functions of the tribunal, or the ICSID Arbitration Rules or any rules agreed by the parties.

73. But, whether or not Article 44 confers an express power, the Tribunal considers that an international arbitral tribunal has inherent powers, subject to any applicable rules, to regulate the conduct of the arbitration. The more difficult question, in the Tribunal's estimation, is in what circumstances that inherent power falls to be exercised?
74. Professor Abi-Saab in his dissenting opinion in *ConocoPhillips*¹⁰³ said that an ICSID tribunal, like many other international tribunals, has an inherent jurisdiction, in discharging its duty of safeguarding the credibility and integrity of the adjudicative function, to reconsider a prior decision if it becomes aware that it had committed an error of law or of fact which led it astray, or in the case of new evidence or changed circumstances having the same effect.¹⁰⁴
75. In the view of the Tribunal, that formulation goes too far. If a decision is made on a preliminary issue of law which is intended to be final, the mere fact that it may have been erroneous may not be a sufficient ground for re-opening the decision. Similarly, the emergence of new evidence or changed circumstances may not in themselves justify the re-opening of issues which have been the subject of argument and decision. The Tribunal agrees with the *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd* tribunal that “a decision of an ICSID tribunal cannot be considered to be merely a draft that can be reopened at will.”¹⁰⁵
76. The Tribunal also agrees with the *Standard Chartered Bank (Hong Kong) Ltd v. Tanzania Electric Supply Company Ltd* tribunal that inspiration may be derived from the ICSID Convention, Article 51, which, as stated above, derives from the Statute of the International Court of Justice, and which provides for revision of an award on the ground of discovery

¹⁰³ See also Professor Bucher (dissenting) in the second *ConocoPhillips* decision, ICSID Case No. ARB/07/30, 9 February 2016.

¹⁰⁴ *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, 10 March 2014, Dissenting opinion, ¶ 57, CL-231.

¹⁰⁵ ¶ 322.

of some fact of such a nature as decisively to affect the award, if the fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

77. In the present case, there is no question of the discovery of a new fact. The Request is based on the emergence of a new ruling of the CJEU, which is said wholly to undermine the Tribunal's conclusion of law in the 2020 Decision.
78. In the view of the Tribunal, the application of the principles relating to new facts (that is, facts which existed at the time of the decision, but were unknown to one or other of the parties and to the tribunal), in circumstances such as those in the present case, must be approached with great caution.
79. In a case such as the present, the closest analogy to the principles established by international tribunals in relation to newly discovered facts would be the discovery of *controlling* legal authorities, existing prior to the decision, which had been overlooked by the parties and the tribunal. Reconsideration would only be in exceptional circumstances. In such a case, the tribunal would have an inherent jurisdiction to revisit its decision to avoid an obvious injustice. But it would not be enough for a party to rely on a newly discovered legal authority which merely supported the case on which it had failed.
80. So also, it cannot be enough for an applicant to produce *subsequent* legal authorities which cast doubt on a tribunal's decision. The mere fact that a subsequent legal authority suggests that a tribunal's decision on the law may have been wrong is not sufficient to justify reconsideration, for otherwise there would be no finality. What must be shown is that the subsequent legal development not only undermines the Tribunal's legal conclusion, but shows that it was wholly wrong. It must be a decisive legal authority which, if it had existed at the time of the decision, would plainly have led to a different conclusion.
81. That, in the Tribunal's view, is the relevant and appropriate touchstone, namely, some development (such as a relevant and controlling judgment or award) of such a nature as would have decisively affected a pre-final-award decision (of whatever character), had it been known to the tribunal at the time of the decision.

82. The questions for the Tribunal are accordingly, first, whether *Komstroy* is a new factor; second, whether it undermines the 2020 Decision; and, third, whether the Tribunal would be justified in reconsidering the 2020 Decision.
83. The first question turns on whether the Tribunal properly took into account the point that the ruling in *Achmea* that a BIT was incompatible with EU law also applied to a multilateral treaty like the ECT.
84. In its 2020 Decision, the Tribunal was careful to consider, not only whether the reasoning relating to the BIT in *Achmea* applied to a multilateral treaty such as the ECT, but also whether the opinion of Wathelet A-G and the ruling of the CJEU had any direct bearing on that point.
85. Consequently the Tribunal referred to the following statement by Wathelet A-G:

Furthermore, all the Member States and the Union have ratified the Energy Charter Treaty, signed at Lisbon on 19 December 1994. That multilateral treaty on investment in the field of energy operates even between Member States, since it was concluded not as an agreement between the Union and its Member States, of the one part, and third countries, of the other part, but as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing. In that sense, the material provisions for the protection of investments provided for in that Treaty and the [investor-State dispute settlement] mechanism also operate between Member States. I note that if no EU institution and no Member State sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible.¹⁰⁶

¹⁰⁶ 2020 Decision, ¶ 341, quoting *Slowakische Republik v. Achmea BV*, Case C-284/16, Opinion of Advocate General Wathelet, 19 September 2017, CL-197, ¶ 43.

86. This Tribunal went on to point out that the ruling by the CJEU was that Articles 267 and 344 TFEU were to be interpreted as precluding a provision in *an international agreement* concluded between Member States, such as Article 8 of the BIT, under which an investor from one Member State might, 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.¹⁰⁷

87. The Tribunal quoted a passage on multilateral treaties in which the CJEU said:

It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement-I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183).

In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those

¹⁰⁷ 2020 Decision, ¶ 342.

*disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation ...*¹⁰⁸

88. The Tribunal quoted the *dispositif* in *Achmea*:

*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.*¹⁰⁹

and said¹¹⁰ that the first question was whether the *Achmea* ruling had any application to multilateral treaties such as the ECT. The majority of EU Member States (22 out of the then 28) had issued a Declaration to say that it did so apply. But the Tribunal expressed the view that it was a political act, without legal relevance or force, and did not affect the jurisdiction of the Tribunal; and, in particular, as a declaration by only some of the parties to the ECT, it could not, for the purposes of Article 31 VCLT, be regarded as a subsequent

¹⁰⁸ 2020 Decision, ¶ 344(8), quoting *Achmea*, ¶¶ 57-58.

¹⁰⁹ 2020 Decision, ¶ 344(8), quoting *Achmea*, ¶ 62 (emphasis added).

¹¹⁰ 2020 Decision, ¶ 344(8), ¶ 349.

agreement between the parties regarding its interpretation or application, or as practice establishing agreement.

89. The Tribunal considered¹¹¹ that there were two reasons for supposing that the CJEU did not express the view that investor-State dispute resolution procedures in a multilateral agreement such as the ECT were outside the scope of its intra-EU ruling. The first was that the following paragraph suggested, by its reference to the BIT being concluded “not by the EU but by member states,” that it was mainly directing itself to agreements with third States. The second reason was the citation of previous rulings, two of which concerned treaties concluded by the European Community or the European Union with third states.¹¹² The third ruling, Opinion 1/09, concerned the draft Agreement creating a unified patent litigation system, to which the Member States were parties, and concerned the draft agreement on the European and Community Patents Court.
90. The Tribunal therefore assumed,¹¹³ contrary to the contention of the Claimant, that there was at least the possibility, and perhaps the probability, particularly as a result of the citation of Ruling 1/09 on the European and Community Patents Court, and the use of the term “international agreement” in the *dispositif* (by contrast with the term “bilateral investment protection agreement” in the reference by the BGH) that if the compatibility of the ECT with the TFEU arose before the CJEU, it would apply the *Achmea* ruling to the dispute resolution mechanism under the ECT.
91. Consequently, the answer to the first question, namely whether *Komstroy* is a new factor, is that it is not a new factor, because the Tribunal, in its 2020 Decision, expressly contemplated that the reasoning in *Achmea* would be applied by the CJEU to a multilateral treaty such as the ECT.
92. The second question is whether *Komstroy* undermines the Tribunal’s decision that it has jurisdiction. Since the Tribunal took into account the possibility or probability that the CJEU would apply the reasoning in *Achmea* to the ECT, this question turns on whether the

¹¹¹ 2020 Decision, ¶ 353.

¹¹² 2020 Decision, ¶ 353, citing Opinion 1/91 (EEA Agreement), ¶¶ 40 and 70; and Opinion 2/13 (Accession of the EU to the ECHR), ¶¶ 182 and 183).

¹¹³ 2020 Decision, ¶ 356.

reasoning in *Komstroy* is so different from that in *Achmea* as to require the Tribunal to re-assess the 2020 Decision.

93. The reasoning in *Komstroy* has been set out in detail above, and in almost every respect it repeats the reasoning in *Achmea* (and applies it to the ECT) without adding any reasoning which this Tribunal did not take carefully into account when reaching its conclusions. In particular, the Tribunal had careful regard to the reasoning in *Achmea* which was applied in *Komstroy* as follows:

- (1) an international agreement cannot affect the allocation of powers laid down by the EU Treaties and the autonomy of the EU legal system, a principle enshrined in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties;¹¹⁴
- (2) the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the nature of that law;¹¹⁵
- (3) consequently, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, with the CJEU having exclusive jurisdiction to give the definitive interpretation of that law, including giving rulings under the Article 267 TFEU;¹¹⁶
- (4) the preliminary ruling procedure has the objective of securing the uniform interpretation of EU law, thereby ensuring its consistency, its full effect and its autonomy, the particular nature of the law established by the Treaties;¹¹⁷

¹¹⁴ *Komstroy*, ¶ 42, citing *Achmea*, ¶ 42.

¹¹⁵ *Komstroy*, ¶ 43, citing *Achmea*, ¶ 33 and Opinion 1/17 (*EU-Canada CET Agreement*), April 30, 2019, ¶ 109.

¹¹⁶ *Komstroy*, ¶ 45, citing *Achmea*, ¶¶ 35-36 and Opinion 1/17 (*EU-Canada CET Agreement*), April 30, 2019, ¶ 111.

¹¹⁷ *Komstroy*, ¶ 46, citing *Achmea*, ¶ 37.

- (5) an ad hoc tribunal established under Article 26(6) ECT was not a component of the judicial system of a Member State such as France, and could not therefore make a reference under Article 267 TFEU;¹¹⁸
- (6) arbitral proceedings such as those referred to in Article 26 ECT derive from a treaty whereby, in accordance with Article 26(3)(a) ECT, Member States agree to remove from the jurisdiction of their own courts and from the system of EU judicial remedies disputes which may concern the application or interpretation of EU law;¹¹⁹
- (7) if provisions of Article 26 ECT allowing a tribunal to be entrusted with the resolution of a dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Member States which were parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerned the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law;¹²⁰
- (8) the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed, and such a possibility would call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU;¹²¹
- (9) despite the multilateral nature of the international agreement of which it forms part, a provision such as Article 26 ECT is intended, in reality, to govern bilateral

¹¹⁸ *Komstroy*, ¶ 56, citing *Achmea*, ¶¶ 46, 49.

¹¹⁹ *Komstroy*, ¶ 59, citing *Achmea*, ¶ 55.

¹²⁰ *Komstroy*, ¶ 60, citing *Achmea*, ¶ 56.

¹²¹ *Komstroy*, ¶ 62, citing *Achmea*, ¶ 58.

relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in *Achmea*.¹²²

94. Consequently, the answer to the second question is that there is nothing in *Komstroy* which undermines the Tribunal's 2020 Decision that it has jurisdiction.
95. The third question is whether the Tribunal would be justified in reconsidering the 2020 Decision.
96. In the view of the Tribunal, there is no reasonable basis for re-considering its 2020 Decision. On the most generous application of the tribunal decisions allowing reconsideration by analogy with ICSID Convention, Article 51, there is no new CJEU ruling which would decisively affect the 2020 Decision and which was unknown to the Tribunal and the Parties. There is nothing in the reasoning in *Komstroy* which was not anticipated by the Tribunal or indeed by the Parties, in their submissions leading to the 2020 Decision. All that has happened is that the CJEU has, since the Tribunal's 2020 Decision, made a further ruling the likelihood and analysis of which had been taken into account by the Tribunal. *Komstroy* added nothing material to *Achmea* apart from its express application to the ECT, which had been taken fully into account by the Parties in their arguments and by the Tribunal in the 2020 Decision.
97. This said, for the avoidance of doubt, and so that there should be no misunderstanding, the Tribunal, notwithstanding the ruling in *Komstroy*, fully adheres to and affirms the reasoning in its 2020 Decision, and concludes:
 - (1) by virtue of Article 25(1) ICSID Convention jurisdiction exists where (a) there is a legal dispute which (b) arises directly out of an investment, (c) between a Contracting State and a national of another Contracting State, and (d) which the parties to the dispute consent in writing to submit to the Centre.
 - (2) By virtue of Article 26.1-3 ECT: (1) where there arise disputes between a Contracting Party and an investor of another Contracting Party relating to an

¹²² *Id.*

investment of the latter in the area of the former, (2) which cannot be settled amicably, (3) the investor party may submit it to ICSID arbitration, (4) if the Contracting Party of the investor and the Contracting Party to the dispute are both parties to the ICSID Convention.

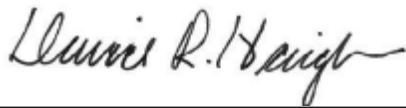
- (3) There is a dispute between the Claimant and Spain which arose out of an investment in Spain, and the Contracting Party of the investor, Portugal, is party to the ECT and to the ICSID Convention, as is Spain.
- (4) Accordingly, Spain has given “its unconditional consent to the submission of [the] dispute to international arbitration” (Article 26.3.a ECT), and the Claimant has taken advantage of that consent.
- (5) The ruling in *Komstroy* does not affect the jurisdiction of the Tribunal under the applicable international law, namely the ECT and the ICSID Convention.
- (6) There is nothing in the *Achmea* and *Komstroy* rulings which could deprive a Tribunal so constituted of jurisdiction, or suggest that Member States have no capacity to enter into agreements such as the ECT.
- (7) The fact that the Tribunal, as a mechanism of international law, and not national law, cannot make a reference to the CJEU, does not deprive it of jurisdiction under international law.
- (8) The fact that EU law is international law for at least some purposes does not affect the conclusion that, on the plain meaning of the ECT and the ICSID Convention, the Tribunal had jurisdiction.

98. The Tribunal has noted above that Spain objected to the Claimant’s reference to the two recent ICSID decisions refusing reconsideration of decisions on jurisdiction in the light of *Komstroy*. As will have appeared from the reasons above, the Tribunal, while referencing them, has not relied on them in reaching its conclusions, and it is therefore unnecessary for it to rule on whether the Claimant should be allowed to introduce them. For the sake of completeness, the Tribunal notes that no application was made by Spain to introduce *Republic of Poland v. PI Holdings Sarl*, but no objection was made by the Claimant to its introduction.

IV. DECISION

99. For the above reasons the Tribunal decides:


- (1) To reject Spain's Request for Reconsideration; and
- (2) To reserve the costs of the Request for Reconsideration until the Award in these proceedings.



Mr. David R. Haigh Q.C.
Arbitrator



Sir Daniel Bethlehem Q.C.
Arbitrator



Lord Collins of Mapesbury, LL.D., F.B.A.
President of the Tribunal