EUROPEAN COMMISSION

Brussels, 9 August 2019
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TO THE PRESIDENT AND MEMBERS OF THE ARBITRAL TRIBUNAL

Alejandro A. ESCOBAR, President of the Tribunal

Oscar M. GARIBALDI, Arbitrator

Christophe BONDY, Arbitrator

OBSERVATIONS AS A NON-DISPUTING PARTY

lodged by the **European Commission**, represented by Nicolaj KUPLEWATZKY, Petra NEMECKOVA, Luigi MALFERRARI, Tim MAXIAN RUSCHE, Members of its Legal Service, as Agents, with an address for service at the Legal Service of the European Commission, Greffe Contentieux, BERL 1/169, 1049 Brussels, who consent to service by e-mail via nicolaj.kuplewatzky@ec.europa.eu, petra.nemeckova@ec.europa.eu, luigi.malferrari@ec.europa.eu, tim.rusche@ec.europa.eu, and,

in

SCC Arbitration 2017/194

TRIODOS SICAV II

Claimant

v.

Kingdom of Spain

Respondent

1. INTRODUCTION

1. The European Commission ("Commission") expresses its gratitude to the Arbitral Tribunal for granting it leave to intervene in the current proceedings.

2. As set out in Section 3.8 of Procedural Order No. 2 of 25 January 2019[1], the Arbitral Tribunal has invited the Commission to make a submission as non-disputing party to indicate the Commission's position on two issues of treaty interpretation:

   a. Whether Article 26 of the ECT applies to a dispute between a Contracting Party and an Investor of a Contracting Party where both Contracting Parties are EU Member States;

   b. Whether and to what extent the rules of EU law on State aid are relevant to the interpretation of the substantive provisions of Part III of the ECT, including Article 16 of the ECT.

3. The Commission has the honour of providing the following observations as a non-disputing party on the above matters.

2. ON THE APPLICATION OF ARTICLE 26 ECT BETWEEN THE MEMBER STATES

2.1 The EU legal order

4. The Member States of the Union owe each other and the Union far-reaching duties of loyal cooperation and mutual trust within the framework of a structured network of principles, rules and mutually interdependent legal relations that bind the Union and its Member States reciprocally and its Member States to each other.[2]

5. Article 19(1) TEU obliges the Member States of the Union to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. Together with the remedies provided for directly in the Treaties, a complete system of judicial protection is thereby ensured. The integrity of the Union legal order is protected via this comprehensive judicial system.

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[1] The Commission observes that, pursuant to paragraph 3.8.3 of Procedural Order No. 2, the "*Section 11.4 and 11.5 of Procedural Order No. 1 shall apply to the Commission's exhibits, if any, and legal authorities, respectively*". The Commission observes that it was not communicated Procedural Order No. 1 and so is not aware of the directions in those sections. For the purposes of submission of legal authorities, it will herewith only submit electronic copies of materials that are not judgments or orders of the EU or national courts or of other arbitral tribunals, insofar as those judgments and orders are publicly available. Conversely, the Commission will attach all academic material and international legal instruments it seeks to rely on. Should the Arbitral Tribunal require also electronic copies of judgments or orders of the EU or national courts or of other arbitral tribunals, the Commission should be pleased to provide those at short notice.

[2] Judgment of the Court of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 33.

6. For present purposes, of particular importance are Articles 267 and 344 TFEU. The former describes the preliminary ruling procedure, which is the keystone of uniform interpretation and application of Union law. The latter reinforces that objective by prohibiting Member States from creating, in relation to any matter implicating Union law, dispute settlement mechanisms other than those set out in the Treaties. It is by virtue of this set-up that the specific characteristics and the autonomy of the Union legal order are preserved.[3]

7. Equally essential to the Union legal order is the principle of primacy, which is closely linked to the unity of the Union legal order and without which that legal order would not be able to function as such.[4] Union law is an integral part of, and takes precedence in, the legal order applicable in the territory of each of the Member States. The CJEU has found that the constitutional order of the Union consists of certain core principles, which may prevail over provisions of the Treaties – primacy would appear to be one of those essential ingredients.[5]

8. Union law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the Union that implements them will be respected.[6]

9. A system of dispute resolution introduced in a situation covered by Union law but set up outside the system of effective legal protection established by the Treaties, unjustifiably calls, or risks calling into question that principle of mutual trust. That is particularly so because Union law already protects all forms of cross-border intra-EU investment, throughout the entire life cycle of that investment.

10. Finally, it is important to emphasise that while the CJEU has always treated the Union legal order as "*special*", it has never called into question its international character: on the contrary, in *Achmea*, the CJEU concludes that Union law "*must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the*

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[3] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 35.
[4] Long-standing case law of the CJEU was codified in a Declaration on primacy annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon (**Annex EC-1**).
[5] Judgment of the CJEU of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285.
[6] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 34.

Member States".[7] International courts and tribunals have consistently accepted the nature of Union law as international law applicable between the Member States.[8]

2.2 Article 26 ECT and its application between the Member States

11. It is the understanding of the Union and of each of the Member States that the CJEU in *Achmea* confirmed that the TFEU prohibits, and always has done, the Member States from offering to resolve intra-EU investor-State disputes before international arbitral tribunals.

12. Indeed, the binding interpretation of Union law handed down by the Court is not, because it cannot be, limited to the particular facts of the case underlying the preliminary ruling. The role of the CJEU in the context of the Article 267 TFEU procedure is to give a binding interpretation of Union law, not to decide the case before it; the ruling that it hands down applies *ex tunc* and *erga omnes*.[9] The ruling in *Achmea* therefore states the law as it always has been and therefore as it must be applied including in pending cases.[10] The manner in which an interpretation of Union law contained in a judgment of the CJEU affects a particular set of circumstances is a matter for the court competent to hear that dispute. The question before the Arbitral Tribunal is how to apply the interpretation of Articles 267 and 344 TFEU handed down by the CJEU in *Achmea* to the arbitration clause in the Energy Charter Treaty.

13. The considerations set out by the CJEU apply equally to an intra-EU application of Article 26 ECT:

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[7] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 41. See also judgment of 5 February 1963 in *Van Gend en Loos*, 26/62, EU:C:1963:1 in which the CJEU refers to the then European Economic Community as "*a new legal order of international law*" (at p. 12).

[8] See, for example, Order No 3 of 23 June 2003 in *Ireland v United Kingdom (Mox Plant)*, UNCLOS Arbitral Tribunal.

[9] See, for example, judgment of the Court of 19 December 2013, *Vent de colère*, C-262/12, EU:C:2013:851, paragraph 39: "*It should be recalled in this connection that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied*". It is possible for the CJEU to limit the application of its judgment in time: despite a request to that effect during the proceedings, the Court declined to do so in *Achmea*.

[10] German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15, ECLI:DE:BGH:2018:311018BIZ2.15.0, paragraph 32: "*Contrary to the defendant's view, it does not matter in the case in dispute whether the arbitral tribunal did in fact apply EU law or whether it was required to do so. To determine whether there was an arbitration agreement between the parties, the only decisive consideration is whether the applicant could make a valid offer to conclude an arbitration agreement with the defendant in Article 8(2) of the BIT. The Court of Justice of the EU held that it could not, irrespective of whether in the case at issue the arbitral tribunal was or was not required to apply EU law*". **Annex EC-2** (English translation of German original).

- Union law is international law applicable between all Member States of the Union,
- Union law is covered by the term "*applicable rules and principle of international law*" as it is used in Article 26 ECT and is explicitly recognises as binding under the Energy Charter Treaty in an intra-EU context in Article 1(3) ECT;[11]
- Arbitral tribunals are not "*national courts or tribunals*" within the meaning of Article 267 TFEU; and
- There is no full review of the award by a court in a Member State.

14. The first point appears now to be generally accepted as an accurate description of how the Union legal order fits into the international legal, whereas the second point follows logically from the first point and should, accordingly, not be controversial.

15. The third point is a matter of settled case-law from the CJEU. There is no difference, as regards the conditions for being considered to fall within the scope of bodies able to have recourse to the preliminary reference procedure, between a tribunal set up under an intra-EU BIT or one established under the Energy Charter Treaty, just as there is no difference between an UNCITRAL, SCC, or ICSID tribunal. Should there be any doubt in that regard, the matter is best resolved by referring a question to the CJEU pursuant to Article 267 TFEU: the Court will either confirm the point in an order of inadmissibility or answer the question and thereby resolve the fourth point and the underlying question of whether Articles 267 and 344 TFEU preclude the validity of an offer for arbitration made on the basis of Article 26 ECT to an investor from one Member State by another Member State.[12]

16. Just as in investment disputes arising out of intra-EU investments under a bilateral investment treaty, disputes arising out of intra-EU investments under the Energy Charter Treaty "*are liable to relate to the interpretation or application of EU law*".[13] But, arbitral tribunals convened under the ECT are no more a part of the Union judicial system than are arbitral tribunals convened under a bilateral investment treaty. Like the arbitral tribunal in *Achmea*, an investor-State arbitral tribunal constituted pursuant to Article 26 ECT lies beyond the supervision and control of the Union courts and any pronouncements that such an arbitral tribunal could make pose a threat to

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[11] "'*Regional Economic Integration Organization*' *means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*" (emphasis added).

[12] To obtain such a reference, the Arbitral Tribunal could either directly refer this particular point to the CJEU, or it could put that question – possibly also alongside other questions, see the end of the *amicus curiae* brief – to the competent *juge d'appui*, with the request to refer those questions on its behalf to the CJEU. In case this Arbitral Tribunal has its seat in Stockholm, as is usual for SCC tribunals, the competent *juge d'appui* would hence seem to be the Svea Court of Appeal.

[13] Judgment of the Court of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 39.

the integrity of the Union legal order and the principles of sincere cooperation and mutual trust that apply between the Union and the Member States and between the Member States among themselves.

2.3 The principle of primacy prevails over Article 26 ECT in an intra-EU scenario

17. Treaty interpretation is a single combined operation without any hierarchy between the interpretative elements.[14]

18. It is generally recognised that the conflict rules contained in Article 30 VCLT operate as residual rules and would thus bow to the principle of primacy that underpins the Union legal order and constitutes what, in international law terms, is called a "*special*" conflict rule (i.e. a specific regulation by the Member States of the relationship between present and future treaties entered into by those parties to the effect that Union law will take precedence over other international law obligations).[15]

19. The CJEU has specifically recognised that primacy applies to international treaties that were concluded between a Member State and a third country as of the day of accession of the latter to the Union.[16] As to the position of international tribunals, Order No 3 of 23 June 2003 in *Ireland v United Kingdom (Mox Plant)* of the UNCLOS Arbitral Tribunal also confirms the primacy of EU law and exclusive competence of the CJEU in the public international law relations between Member States in cases of mixed agreements, such as UNCLOS and the Energy Charter Treaty.[17]

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[14] Waldock (Special Rapporteur on the Law of Treaties), Sixth Report on the Law of Treaties, UN Doc. A/CN.4/186 and Add. 1-7, available at [1966] 2 Y.B. Int'l L. Comm'n, 95 & 219. **Annex EC-3**.

[15] The focus by the Tribunal in the *Vattenfall* case on Article 351 TFEU and the "*significant amount of interpretation*" allegedly required to derive the outcome argued for by the Commission in that case is incomprehensible: ICSID Case No. ARB/12/12, *Vattenfall v Germany*, Decision on the Achmea issue, paragraphs 224 to 226. There is broad academic support for the view put forward by the Commission: Thomas Eilmansberger writes that "the intentions of the parties are expressed in the most authoritative way by conflict rules included in the later treaty, [footnote omitted] and the EC Treaty (being the later Treaty in this case) does indeed contain such a conflict rule, namely the already mentioned Article 307 EC" ("Bilateral Investment Treaties and EU Law" (2009) 46 Common Market Law Review, pp. 383-429, at page 421 and 425); and Martti Koskenniemi writes in his report for the International Law Commission on fragmentation that "[t]he EC Treaty takes absolute precedence over agreements that Member States have concluded" (Fragmentation of international law, Report of the Study Group of the International Law Commission, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682, paragraph 283). **Annex EC-4**.

[16] Judgment of the Court of 8 September 2009 in *Budějovický Budvar*, C-478/07, EU:C:2009:521, paragraphs 97 to 99; see also the earlier judgments in *Conegate*, 121/85, EU:C:1986:114, para. 25; *Matteucci v Communauté française de Belgique*, C-235/87, EU:C:1988:460, para. 22; and *Exportur*, C-3/91, EU:C:1992:420, para. 8.

[17] Paragraphs 20 to 28, available at https://pcacases.com/web/sendAttach/867 .

20. Thus, in any situation concerning both the Energy Charter Treaty and Union law, the former would, pursuant to Article 30(4)(a) VCLT, only apply to the extent that it is compatible with the latter, and in particular the Act of Accession of Poland to the EU and the Treaty of Lisbon that first affirmed and then reaffirmed the will of the Contracting Parties that are also Member States of the Union to be bound by Articles 267 and 344 TFEU. As set out above, Article 26 ECT on dispute settlement is not, when applied between one Member State and an investor of another Member State, compatible with Union law.

21. Hence, Article 26 ECT could not be applied in any proceedings concerning an intra-EU dispute.

3. ON EU STATE AID LAW AND ITS RELATIONSHIP WITH PART III OF THE ECT

22. The second point on which the Arbitral Tribunal has invited the Commission to present its opinion of the state of the law is the extent to which the rules of EU law on State aid are relevant to the interpretation of the substantive provisions of Part III of the ECT, including Article 16 thereof.

23. The Commission observes that its position on this point of intervention requires an explanation of factual and legal background to the dispute before you. As it is not in possession of the facts before the Arbitral Tribunal, it will take this opportunity to explain, first, the role and functioning of State aid control in the EU legal order (**3.1**), before, second, briefly recalling the status of a State aid decision under EU law (**3.2**). Subsequently, and third, it will explain more closely the effect of EU State aid law on Article 10 ECT (**3.3**) and, fourth, the effect of the same on Article 16 ECT (**3.4**).

3.1 The role and functioning of State aid control in the EU legal order

24. Under the EU Treaties (the Treaty on European Union "TEU" and the Treaty on the functioning of the European Union "TFEU), the EU Member States have, in stages, transferred legislative, regulatory, and enforcement competences in a large number of fields to the Union and its institutions.

25. Pursuant to Article 3(1) TFEU, the Union has the exclusive competence to establish "*the competition rules necessary for the functioning of the internal market*".

26. The rules on State aid are based on Articles 107 to 109 of the Treaty on the Functioning of the European Union ("TFEU") and are part of Chapter I of Title VII of the TFEU, which is entitled "Rules on Competition". Those provisions have remained largely unaltered since the Treaty of Rome, which established the European Economic Community in 1957.

27. One of the original and central purposes of the EU Treaties is the establishment and proper functioning of the "internal market," defined in Article 26(2) of the TFEU as "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.*"

28. The EU's internal market rules are contained in the Treaties, EU legislation and the case law of the Court of Justice. These rules cover all cross-border economic activities in the EU, including investment activities. Internal market rules secure to EU investors fundamental and directly enforceable rights throughout the investment cycle, but also impose obligations, including the obligation to comply with EU competition law and various regulatory standards that are designed to ensure that the internal market functions as a level, integrated playing field.

29. Importantly for present purposes, the EU Treaties charge the Commission with the enforcement of EU competition law, including the investigation and control of any publicly funded support and/or subsidy schemes introduced by Member States (known as "State aid") that distort or threaten to distort competition in the internal market. The Commission has exclusive competence to apply those exceptions and to declare aid compatible with the EU Treaties[18], subject to review by the ECJ of the EU.[19] EU Member States have completely devolved their competence in this field.

30. Article 107(1) TFEU provides that "*[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between EU Member States, be incompatible with the internal market*". State aid is therefore, as a matter of principle, forbidden under EU law.[20]

31. That prohibition is, however, neither unconditional nor absolute, since the Commission enjoys wide discretion under Article 107(2) and (3) TFEU to declare various categories of aid compatible with the internal market. In particular, under Article 107(3)(c) TFEU, "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*" may be considered compatible with the internal market.

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[18] *See*, for example, the judgment in Case C-590/14 P, *DEI and Commission v Alouminion tis Ellados*, EU:C:2016:797, para. 96 and the case-law cited therein.

[19] In certain, very limited, circumstances, which do not arise in the present case, the Council of the European Union is also competent to find that State aid is compatible with EU law.

[20] See, for instance, ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 55-56.

32. The Commission can limit its discretion under Article 107(3) TFEU by adopting guidelines for the assessment of aid measures. It is bound by such guidelines, provided that they do not depart from the rules in the Treaty.[21]

33. In the relevant time-period, State aid for the production of electricity from renewable sources fell within the scope of the Community Guidelines on State aid for environmental protection of 3 February 2001[22] and the Guidelines on State aid for environmental protection of 1 April 2008.[23]

34. Pursuant to Article 108(3) TFEU, Member States must inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant new aid or alter existing aid. Member States may not implement new State aid measures, before they have been approved by the Commission (the so called "stand-still obligation").

35. The Commission and any national court is competent to find that a measure constitutes a State aid, that it has been implemented in disregard of the stand-still obligation, and that, therefore, the measure constitutes an illegal or unlawful aid.

36. New aid, which has been put into effect in contravention of Article 108(3) TFEU, is called unlawful aid. Where unlawful aid is granted, national courts must ensure that all appropriate conclusions will be drawn from the infringement of Article 108(3) EC, in accordance with their national law, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision. Unlawful aid is, however, not necessarily incompatible with the internal market; the Commission may still declare such aid compatible under Article 107(2) or (3) TFEU.[24]

37. The consequence of that stand-still obligation is that an undertaking to which an aid has been granted may not, in principle, entertain legal certainty and legitimate expectations that the aid is lawful unless it has been granted in compliance with the procedure laid down in the Treaties.[25] That applies also if the authorities of the Member State have actively encouraged undertakings to accept the aid in question.[26]

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[21] See ECJ, Judgment in *Holland Malt* v *Commission*, C-464/09, EU:C:2010:733, paragraphs 46-47.
[22] Published in the Official Journal of the European Union (OJ), volume C 37, 3.2.2001, p. 3. The 2001 Community Guidelines on State aid for environmental protection applied until 1.4.2008.
[23] OJ C 82, 1.4.2008, p. 1.
[24] See, for instance, C-199/06 *CELF II*, EU:C:2008:79, paragraphs 33-41.
[25] Case C-5/89 *Commission* v *Germany* ECLI:EU:C:1990:320, paragraph 14.
[26] ECJ, Judgment in *Land Rheinland-Pfalz* v *Alcan Deutschland,* C-24/95, EU:C:1997:163, paragraphs 39-43. The European Court of Justice concluded that Union law: "*requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible*

38. Furthermore, it is standing case-law of the Court of Justice that the Commission may not authorize a State aid scheme that contains a violation of another rule of Union law.[27] Therefore, it is obliged, when adopting a decision under Article 108(3) TFEU on the compatibility of State aid, to assess as well whether the proposed State aid measure complies with other provisions of Union law.

39. In line with Article 2(1) of the TFEU the attribution of an exclusive competence to control the grant of State aid to the European Union has the effect that EU Member States cannot exercise anymore their sovereign competence to assess the compatibility of State aid with EU law.

40. It is for the same reasons that the effective implementation of EU competition rules, which includes EU State aid rules, have been considered a matter of EU public policy[28] able to give precedence even over the principle of *res judicata* of judgments rendered by national courts of the Member States[29].

41. Indeed, respect of State aid rules by Member States and the control of Member States' plans to grant aid by the Commission ensure that competition is not distorted by Member States' interventions to an extent contrary to the common interest and thereby preserves the integrity and functioning of the EU internal market.

3.2 Status of a State aid decision under EU law

42. In its landmark judgment in *Grad*, the Court of Justice observed that a decision by the EU institutions, including the Commission, has direct effect in the EU legal system, in the same manner as the provisions of the EU Treaties and Regulations.[30]

43. Furthermore, Article 4(3) TEU provides that:

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with the [internal] market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article [108 TFEU] had not been followed."

[27] Case C-156/98 *Germany v Commission* EU:C:2000:467, paras 78 and 79; C-204/97 *Portugal v Commission* EU:C:2001:233, paras 41 and 42; Case C-225/91 *Matra v Commission* ECLI:EU:C:1993:239, para 41; Case 73/79 *Commission v Italy* ('the sugar levy case') ECLI:EU:C:1980:129, para 11; Case 74/76 *Iannelli* ECLI:EU:C:1977:51, paras 14 and 15; joined Cases T-197/97 and T-198/97 *Weyl Beef Products a.o. v Commission* EU:T:2001:28, para 75.

[28] Case C-126/97, *Eco Swiss,* ECLI:EU:C: 1999:269, para. 39.

[29] Case C-505/14, *Klausner Holz Niedersachsen,* ECLI:EU:C:2015:742, operative part; judgment in C-19/05, *Lucchini,* ECLI:EU:C:2007:434, operative part; judgment in Case T-185/15, *Buonotourist* v *Commission,* ECLI:EU:T:2018:430, paras 187-193; judgment in Case T-186/15, *CSTP Azienda della Mobilita v Commission,* ECLI:EU:T:2018:430, paras 187-193.

[30] Case 9/70 *Grad*, EU:C:1970:78, paragraphs 5 to 10.

"[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."

44. The direct effect of decisions, coupled with the obligation contained in Article 4(3) TEU, preclude national courts from taking decisions which conflict with a decision of the Commission.[31]

45. It should also be observed that, according to the Court of Justice in *Deutsche Lufthansa*, national courts of EU Member States have to take "*all the necessary measures*" to ensure fulfilment of EU law obligations and refrain from those which may jeopardise the attainment of the objectives of the Treaty, and in particular, refrain from taking decisions which conflict with a Commission State aid decision.[32]

46. As the Court of Appeal of England & Wales in Micula v Romania found, "*the application of EU rules on State aid engage the duty of sincere cooperation under Article 4(3) TEU*"[33], by which a national court of another Member State "*must yield to the need for the effective application of EU State aid law*"[34], so that another Member State may not frustrate, obstruct and circumvent the Commission's State aid decision and undermine its effectiveness. The Luxembourg Court of Appeal has reasoned the effect of the duty of loyal cooperation arising from the Commission's decision in *Micula v Romania* in a similar way.[35]

47. In this respect, the Commission observes that the Arbitral Tribunals in *Electrabel* v *Hungary*[36] and *JSW* v *Czech Republic*[37] have recognized the importance of Commission decisions on State aid. Those tribunals, in fact, integrated the binding findings of the Commission into their analysis of the fair and equitable treatment standard contained in Article 10 ECT arising from the peculiar nature of EU law and its relevance to the dispute before them.

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[31] Case C-432/05 *Unibet (London) v Justitiekanslern*, ECLI:EU:C:2007:163, paragraph 38.
[32] Case C-284/12 *Deutsche Lufthansa*, ECLI:EU:C;2013:755, paragraph 17.
[33] Judgment of the Court of Appeal of England & Wales (Civil Division), *Micula and Ors. v Romania and Ors.*, [2017] EWHC 1430 (Comm), paragraph 91. **Annex EC-5**.
[34] Judgment of the Court of Appeal of England & Wales (Civil Division), *Micula and Ors. v Romania and Ors.*, [2017] EWHC 1430 (Comm), paragraph 100. **Annex EC-5**.
[35] **Annex EC-6**.
[36] ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Decision on Jurisdiction of 30 November 2012, paragraphs 6.70 to 6.93, which contain a detailed analysis of the effect of the Commission's State aid decision.
[37] PCA Case No. 2014-03, *JSW Solar and Wirtgen* v *Czech Republic*, Final Award of 11 October 2017, paragraphs 371, 373, 406 (including footnote 250).

3.3 The effect of EU State aid law on Article 10 ECT

3.3.1 The original support scheme and the measures amending and replacing that original support scheme

48. The Commission notes, by way of primer, that it is not in possession of the facts of the dispute before the Arbitral Tribunal.

49. That being said, the Commission has assumed, for the purposes of its intervention, that the underlying claim of the present dispute arises out of a series of energy reforms undertaken by Spain, which constitute the transposition of an obligation flowing from Directive 2009/28/EC.[38] The factual matrix underlying those reforms need not require elaboration on the side of the Commission and is best left to the parties concerned.

50. For the purposes of the Commission's intervention, what matters is that the underlying claim is closely linked to proceedings in relation to State aid granted by Spain to investors in the renewable energy sector. Those proceedings culminated in Commission Decision SA.40348 "*Spain – Support for electricity generation from renewable energy sources, cogeneration and waste*" (hereafter "Decision SA.40348")[39], which assesses the support scheme as it stood after the reforms carried out by Spain.

51. That decision finds that

    (i) any aid granted from 11 June 2014 to the adoption of Decision SA.40348 on 10 November 2017 had breached the stand-still obligation provided for in Article 108(3) TFEU and hence constititued unlawful State aud[40]; and

    (ii) that the amended support scheme constituted unauthorized State aid within the meaning of Article 107(1) TFEU that is nonetheless compatible with the internal market.

52. Indeed, the Court of Justice, in *Elcogás* had already decided that the mechanism that financed the support scheme at stake constituted State resources within the meaning of Article 107(1) TFEU, so that the Commission was bound to follow that assessment and find State aid.[41]

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[38] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16.

[39] Commission Decision SA.40348 of 10 November 2017, summary published in the Official Journal of the European Union, OJ C 442, 22.12.2017, p. 1 (accessible on-line via the EUR-Lex website; see http://eur-lex.europa.eu/homepage.html?locale=en), whereas the full text was published at http://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf, recitals 159 to 164.

[40] That finding is contained in recital 89 of Commission Decision SA.40348.

3.3.2 The Commission's finding on the existence of legitimate expectations under EU law

53. The Commission recalls that, under EU law, investors enjoy complete, strong and effective protection of their investment, including in particular the protection of legitimate expectations.[42]

54. With regard to legitimate expectations under EU law, it is long-standing case-law of the Court of Justice that, save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the Treaties.[43]

55. EU case-law has, moreover, clarified that "*three conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded.*

– First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities.

– Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed.

– Third, the assurances given must comply with the applicable rules."[44]

56. Hence, assurances given by national authorities about State aid matters are, by definition, incapable of creating any legitimate expectations.[45]

57. Precisely because the original Spanish support scheme at stake had not been authorised by the Commission pursuant to Article 108(3) TFEU (see previous sub-section), under EU law, it found that any legitimate expectations were precluded.

58. For those reasons, for its assessment of EU law, Decision SA.40348 notes as follows:

> (158) *In the very specific situation of the present case, where a Member State grants State aid to investors, without respecting the notification and stand-still obligation of Article 108(3) TFEU, legitimate expectations with regard to those State aid payments are excluded. That is because according to the case-law of the Court of Justice, a recipient of State aid cannot, in principle, have legitimate expectations in the lawfulness of aid that has not been notified to the Commission.* [64]
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> [64] Case C-24/95 Land Rheinland-Pfalz v Alcan Deutschland, EU:C:1997:163, paragraph 25, in which the Court of Justice has concluded that "In view of the mandatory nature of the

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[41] Case C-275/13, *Elcogás*, ECLI:EU:C:2014:2314; see also Case C-262/12, *Association Vent De Colère and Others*, EU:C:2013:851.
[42] Case C-201/08, *Plantanol*, EU:C:2009:539.
[43] Case C-5/89, *Commission* v *Germany* ECLI:EU:C:1990:320, paragraph 14.
[44] Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, *Regione Autonoma della Sardegna v Commission*, ECLI:EU:T:2011:493, paragraph 273 and the case-law cited therein.
[45] *Ibid*, paragraph 281.

supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principles, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed." (paragraphs 13 and 14); see also the judgment in case C-169/95 Spain v Commission EU:C:1997:10." [Emphasis added.]

3.3.3 General observations on legitimate expectations and the FET standard

59. The Commission observes that the principle of legitimate expectations is not a self-standing element of the ECT. Instead, it operates as an interpretative tool of the FET standard and is directly connected to the phenomenon of "change".[46]

60. In the first place, it should be clear that an investor can never have a legitimate expectation that general regulatory measures will not be changed. This is an inherent risk of doing business and investment treaties are not intended to protect against such business risks.[47] The principle of legitimate expectations cannot be understood as protecting the investor's subjective aspirations, hopes, or unjustified optimism.[48]

61. Rather, that principle requires specific formal assurances and representations made to the investor, on which the latter relied in making or maintaining an investment. Such formal assurances cannot be *contra legem*.[49]

62. Consequently, for expectations to be considered reasonable and legitimate and thus be worthy of protection under international law, it is necessary to take into account the responsibility of foreign investors in terms of due diligence carried out prior to the investment.[50] Diligent

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[46] UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, (U.N. Publications, 2012), page 63, **Annex EC-7**.

[47] CETA, Article 8.9(2). OJ, L 11, 14.1.2017, p. 1. "*2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.*", **Annex EC-8**.

[48] Mr. *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 532: *"Where these expectations have an objective basis, and are not fanciful or the result of misplaced optimism, then they are described as 'legitimate expectations'."* See also *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, paragraph 509.

[49] See e.g. *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award, 19 January 2007, paragraphs 241-243; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, paragraphs 260-261; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, paragraph 256; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraphs 546-547; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America,* UNCITRAL, Award, 12 January 2011, paragraph 141.

[50] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, paragraph 601. See also *Joseph C. Lemire v. Ukraine [II]*, ICSID Case No. ARB/06/18, Decision on

investors must be held to be acquainted with the regulatory framework under which the investment will operate, including substantive and procedural law and important decisions of the highest judicial authority on such framework.[51] They cannot be ignorant of the law.

3.3.4 No legitimate expectations and a violation of the FET standard in the ECT arise from an investment made contrary to EU State aid law

63. The Commission recalls, as a preliminary point, that while the ECT does not contain a specific "conformity-of-investment-with-governing-law" provision, the *Plama* Tribunal nonetheless famously observed that the ECT should "*be interpreted in a manner consistent with the aim of encouraging respect for the rule of law*"[52] and that "*the substantive protections of the ECT cannot apply to investments that are made contrary to law.*"[53]

64. The Commission also recalls that EU law is both national law as well as international law and that, by reason of its peculiar nature, "*it is clear that mandatory rules of EU law have primacy over even mandatory rules of domestic law*"[54].

65. The standard of review that, in the Commission's opinion should, accordingly, colour any intra-EU analysis of Article 10 ECT is whether the investments concerned were made in accordance with the law at the time. In the case at hand, that applicable legal framework includes EU law, and notably the system of State aid control, which is directly applicable in all Member States. Under EU law, protection of the legitimate expectations of the aid beneficiary is available in certain very limited circumstances.[55] Assurances given by national authorities about State aid

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Jurisdiction and Liability, 21 January 2010, paragraph 285; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 164.

[51] See *Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, paragraph 258; and, *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award, 12 July 2016, paragraph. 794. See also, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paragraph 58, where the tribunal stated that *"prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable."*

[52] ICSID Case No. ARB/03/24, *Plama Consortium Limited v. Republic of Bulgaria*, Award, at paras. 139,.

[53] *Ibid.*

[54] PCA Case No. 2014-22 I.C.W. *Europe investments Ltd. v. The Czech Republic*, Award, at paragraph 560. PCA Case No. 2014-19 *WA Investments Europa Nova Ltd. v. Czech Republic*, Award, at paragraph 607. PCA Case No. 2014-20 *Voltaic Network GMBH (Voltaic) v. The Czech Republic*, Award, at paragraph 520. PCA Case No. 2014-21 *Photovoltaic Knopf Betriebs GMBH v. The Czech Republic*, Award, paragraph 516.

[55] According to settled case-law, "*in view of the mandatory nature of the supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed*", Judgment in Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland*, ECLI:EU:C:1997:163, para. 25. This settled case-law originates from the judgment in Case C-5/89, *Commission v Germany*, ECLI:EU:C:1990:320, paras 13-15.

matters are, by definition, incapable of creating any legitimate expectation – they are *contra legem* the system of EU State aid control.[56]

66. Accordingly, in order for there to be a legitimate expectation, any investor must have a reasonable basis to maintain such an expectation. Given that Member States (or national judges[57], and hence, by analogy, arbitral tribunals[58]) have no say in deciding whether a State aid is compatible or not with the internal market, and consequently (if already paid out) on whether it must be recovered or not, the question of the existence of a promise or assurance by a competent organ or representative must necessarily be referred to the Commission and its representatives.

67. That is why multiple tribunals recently observed that:

> "*[t]he basic rule with regard to State aid under EU law is that State aid is only permitted when it has been approved by the EC. . . . Consequently, the relevant question is whether, at the time the investment was made, the EC had, upon due notification, positively decided that the solar support regime was compatible with EU law. In the absence of due notification and any such decision, the investor – as in the present case – was not entitled to hold any legitimate expectations that the un-notified support system would not be changed.*"[59]

68. The Commission observes that, in relation to disputes falling within the purview of Decision Decision SA.40348, it granted no assurances to any investor that could have given rise to legitimate expectations. A reasonably-diligent investor having undertaken the necessary and independent due diligence assessment prior to making its investment would have been aware of that factual element.[60] In fact, any independent due diligence assessment of applicable investment requirements would have revealed that Article 108(3) TFEU constitutes a mandatory

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[56] Judgment in Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, *Regione Autonoma della Sardegna v Commission*, ECLI:EU:T:2011:493, para. 281.

[57] Judgment in *Deutsche Lufthansa*, EU:C:2013:755, C-284/12, paragraph 28; ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 42.

[58] Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 36. *See also Bernard Hanotiau*, "L'arbitrage et le droit européen de la concurrence", in: Robert Briner (ed.), *L'arbitrage et le droit européen*, Reports of the International Colloquium of CEPANI April 25, 1997, Bruylant, 1997, pp. 31 to 64, in particular p. 47; **Annex EC-9**; similarly, in English, *Bernard Hanotiau*, "Competition Law issues in international commercial arbitration: An arbitrator's viewpoint, in: 6 The American Review of International Arbitration [1995], pp. 287 to 299, in particular p. 294, **Annex EC-10**.

[59] PCA Case No. 2014-22 I.C.W. *Europe investments Ltd. v. The Czech Republic*, Award, at paragraph 566,. PCA Case No. 2014-19 *WA Investments Europa Nova Ltd. v. Czech Republic*, Award, at paragraph 613. PCA Case No. 2014-20 *Voltaic Network GMBH (Voltaic) v. The Czech Republic*, Award, at paragraph 526. PCA Case No. 2014-21 *Photovoltaic Knopf Betriebs GMBH v. The Czech Republic*, Award, paragraph 522.

[60] Case C-5/89 *Commission* v *Germany* ECLI:EU:C:1990:320, paragraph 14: "*However, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.*"

provision of EU law[61], and that the prohibition laid down therein (of not putting into effect State aid without prior notification) is not "just" a formality. That is because, as the case-law of the Court of Justice shows, said notification constitutes a fundamental principle of the Union legal order that has to be enforced by all national courts and tribunals.[62]. In fact, the effective implementation of EU State aid rules is of such paramount importance in the EU legal order that the ECJ has given precedence even over the principle of *res judicata* of judgments rendered by national courts of the Member States.[63]

69. The Commission is not in possession of any information as to the extent to which the Claimant carried out an independent assessment on whether the State aid they were expecting had been notified in accordance with the procedures required by Spanish and EU law. It invites the Arbitral Tribunal to make that assessment on the basis of the available facts in light of the fact that, in a State aid scenario, expectations about outcome, behaviour, or decision which would be *contra legem* the applicable domestic law, *i.e.* contrary to the framework in which the investment is carried out, cannot be considered reasonable within the framework of the *Plama* jurisprudence.

70. For its part, the Commission came to the conclusion that any investments made prior to the authorisation by Decision SA.40348 were made contrary to applicable Spanish and EU law, and so contrary to the applicable domestic law provisions applicable to such investment:

> "*(164) In any event, there is also on substance no violation of the fair and equitable treatment provisions. As explained above at section 3.5.2, in the specific situation of the present case Spain has not violated the principles of legal certainty and legitimate expectations under Union law. In an intra-EU situation, Union law is part of the applicable law, as it constitutes international law applicable between the parties to the dispute. As a result, based on the principle of interpretation in conformity, the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme. In an extra-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid. This has been expressly recognised by Arbitration Tribunals. [70] It is in any event settled case-law [71]*

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[61] Particularly in light of the Court of Justice finding that measure to constitute State aid pursuant to Article 107(1) TFEU. Order in Elcogás, Case C-275/13, EU:C:2014:2314.

[62] Judgment in Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 39. The effective implementation of State aid rules is of such paramount importance in the EU legal order that the Court of Justice has given it precedence even over the principle of *res judicata* of judgments rendered by national courts of the Member States, Judgment in Case C-505/14, *Klausner Holz Niedersachsen*, ECLI:EU:C:2015:742, operative part; judgment in C-119/05, *Lucchini*, ECLI:EU:C:2007:434, operative part; judgment in Case T-185/15, *Buonotourist v Commission*, ECLI:EU:T:2018:430, paras 187-193; judgment in Case T-186/15, *CSTP Azienda della Mobilita v Commission*, ECLI:EU:T:2018:430, paras 187-193.

[63] Judgment in Case C-505/14, *Klausner Holz Niedersachsen,* ECLI:EU:C:2015:742, operative part; judgment in C-l 19/05, *Lucchini,* ECLI:EU:C:2007:434, operative part; judgment in Case T-185/15, *Buonotourist* v *Commission,* ECLI:EU:T:2018:430, paras 187-193; judgment in Case T-186/15, *CSTP Azienda della Mobilita v Commission,* ECLI:EU:T:2018:430, paras 187-193.

that a measure that does not violate domestic provisions on legitimate expectation generally does not violate the fair and equitable treatment provision.

[70] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.
[71] *EDF v Romania*, ARB/05/13, paragraphs 279 to 283; *Al Bahloul v Tajikistan*, SCC/64/2008, paragraphs 221 to 225; see also in that sense *ADF Group v United States of America*, ARB(AF)/00/1, para 189." [Emphasis added.]

3.4 The effect of EU State aid law on Article 16 ECT

71. The second aspect under the purview of EU State aid law and Section III of the ECT that the Commission wishes to address in these observations concerns Article 16 ECT.

72. The Commission observes that Article 16 ECT deals with the ECT's relation to other agreements that form part of the international law corpus.

73. Since the provisions on EU State aid law are contained in Articles 107-109 TFEU, it is not so much EU State aid law that would be relevant to an interpretation of Article 16 ECT in an intra-EU situation. Rather, TFEU, and in particular Articles 267 and 344 TFEU thereof, and the TEU, and in particular Articles 2, 4, and 19 thereof, collectively are relevant for such an interpretation. In fact, it is those Treaties that form the foundation of EU law underlying the dispute before your Tribunal.

74. Now, the Commission is aware that the *Vattenfall* tribunal has previously suggested that the conflict with EU law arising from the binding nature on EU Member States of Articles 267 and 344 TFEU, as highlighted in the judgment in *Achmea*, can be dealt with simple reference to Article 16 ECT.[64]

75. Two reasons militate against that approach. First, Article 16 ECT cannot be deemed a rule of conflict for the purposes of the ECT, but, instead, a rule of interpretation. This arises from both its place in the order of arrangement in the ECT (Section III as opposed to Section IV, which contains the rules on jurisdiction) as well as the use of the word "construe" in the first subparagraph of Article 16 ECT. Second, nothing in the text of Article 16 ECT appears to override later and special rules of conflict put in place by self-contained systems of international law (such as the rule of primacy of EU law, which, most recently is contained in Declaration 17 attached to the Treaty of Lisbon[65]). This has been recognized by the arbitral tribunal in

[64] ICSID Case No. ARB/12/12, *Vattenfall* v *Germany*, Decision on the Achmea issue of 31 August 2018, paragraphs 208 and 231.
[65] Declaration on primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon **Annex EC-11**.

Electrabel v *Hungary*: "*[T]he Tribunal decides that Article 16 ECT would [...] be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 ECT.*"[66]

76. The Commission recalls, in this regard, that primacy of Union law is a matter of long-settled case law, which, in an intra-EU scenario, extends to national law, however framed, and international law.

77. It is inherent to the Union legal order and the Member States would not be competent to decide to place an international agreement on a higher footing than a rule of Union law, especially one such as the autonomy of the Union legal order upon which the ruling in *Achmea* is based.[67]

78. In other words, two options arise for the understanding of Article 16 ECT as interpreted against the background of the applicability of the TFEU and the TEU: either Article 16 ECT is a rule of interpretation or it must be set aside, in intra-EU cases, for the avoidance of conflict with the principle of primacy of Union law.

79. On that basis, Article 16 ECT cannot be usefully invoked to reach a different outcome to that which flows logically from the ruling of the CJEU in *Achmea*.

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[66] ICSID Case No. ARB/07/19, *Electrabel v Hungary*, Award of 30 November 2012, paragraph 4.178. As becomes clear in the reasoning, in paragraphs 4.179 to 4.191, and in particular the reference to the judgments of the CJEU in *Commission* v *Italy* and *Commission* v *Austria*, quoted and explained by the arbitral tribunal in paragraphs 4.184 and 4.185, Article 307 EC is seen as expression of the principle of primacy. It is regretful that later arbitral tribunals have completely ignored the work of the *Electrabel* tribunal, which on this point is a correct application of EU law as public international law.

[67] Judgment of the Court of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461.

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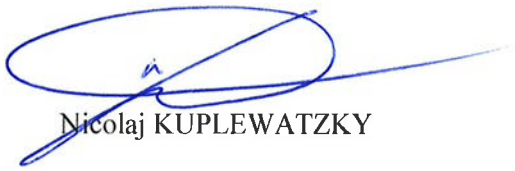
80. The Commission reiterates its gratitude to the Arbitral Tribunal for accepting its *amicus curiae* brief.

81. The Commission remains at the disposal of the Arbitral Tribunal for any questions it may have, and is prepared to provide further written or oral input and evidence, if needed.



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