IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2026] SGHC(I) 1

Originating Application No 2 of 2025

Between

DNZ

… *Claimant*

And

(1) DOA
(2) DOB

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

THE PARTIES 2

BACKGROUND 3

THE PARTIES' CASES **4**

JURISDICTIONAL OBJECTION 1: THE INTRA-EU OBJECTION **4**

THE STATE'S CASE ON THE INTRA-EU OBJECTION 4

WHETHER THE ECT DISPUTE IS AN INTRA-EU DISPUTE 8

WHAT LAW APPLIES TO DETERMINE WHETHER THE ARBITRATION AGREEMENT APPLIES TO THE DISPUTE IN QUESTION? 14

Is there an express choice of law that makes EU law applicable? *15*

Is there an implied choice of law that makes EU law applicable? *15*

DOES ART 26 OF THE ECT APPLY TO AN INTRA-EU DISPUTE? 30

Article 16 of the ECT *30*

Article 31 of the VCLT *33*

Article 30 of the VCLT *37*

WHETHER THE JURISDICTIONAL DEFECT (IF ANY) WAS CURED BY THE TIME OF THE ECT AWARD 41

JURISDICTIONAL OBJECTION 2: THE SUBJECT-MATTER OBJECTION **43**

THE DEFINITION OF AN "INVESTMENT" UNDER THE ECT 44

WHETHER THE SALINI CRITERIA NEED TO BE SATISFIED 46

JURISDICTIONAL OBJECTION 3: THE FORK-IN-THE-ROAD OBJECTION 53

THE STATE'S CASE ON THE FORK-IN-THE-ROAD OBJECTION 53

WHETHER "THE INVESTOR" HAS PREVIOUSLY SUBMITTED "THE DISPUTE" IN ACCORDANCE WITH ANY "APPLICABLE, PREVIOUSLY AGREED DISPUTE SETTLEMENT PROCEDURE" 58

PUBLIC POLICY 59

BREACH OF NATURAL JUSTICE 65

CONCLUSION.....83

DNZ
v
DOA and another

[2025] SGHC(I) 1

Singapore International Commercial Court — Originating Application No 2 of 2025
Andre Maniam J, Dominique Hascher IJ, Vivian Ramsey IJ
22–24 July, 26 September 2025

9 January 2026 Judgment reserved.

Joint judgment of Andre Maniam J, Dominique Hascher IJ, Vivian Ramsey IJ:

Introduction

1 The claimant ("State") applied to set aside the Final Award dated 7 October 2024[1] ("ECT Award") issued by the arbitral tribunal ("Tribunal") constituted under the Energy Charter Treaty (17 December 1994), 2080 UNTS 95 (entered into force 16 April 1998)[2] ("ECT") in PCA Case No 2021-06 ("ECT Arbitration"). This is our judgment on that application.

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1 Joint Core Bundle of Documents ("JCBD") Volume I ("JCBD (1)") at TAB 1.

2 Joint Core Bundle of Authorities ("JCBA") Volume II at TAB 11: Energy Charter Treaty (17 December 1994), 2080 UNTS 95 (entered into force 16 April 1998) ("ECT").

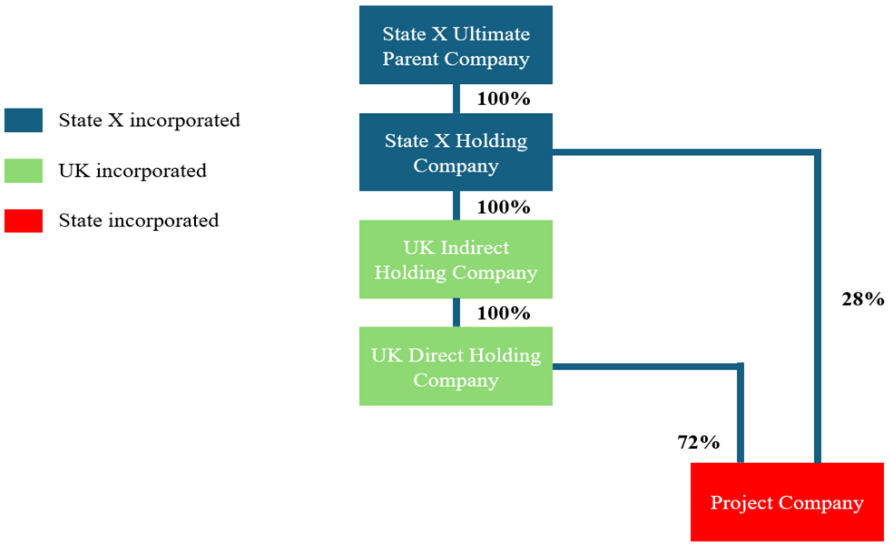
Facts

The parties

2 The defendants ("UK Investors") are two companies incorporated in the United Kingdom ("UK"). The second defendant ("UK Direct Holding Company") is a wholly owned subsidiary of the first defendant ("UK Indirect Holding Company"). The UK Direct Holding Company owned 72% of the shares in a company incorporated in the State ("Project Company") which undertook the Project in question. The State is a Member State of the European Union ("EU").

3 The other 28% of the shares in the Project Company was owned by a company from "State X" ("State X Holding Company"). State X is not an EU Member State. The State X Holding Company also wholly owned the UK Indirect Holding Company. The State X Holding Company thus had a 100% shareholding in the Project Company (a 28% direct shareholding, and a 72% indirect shareholding).

4 The State X Holding Company was wholly owned by another State X company ("State X Ultimate Parent Company"). The State X Ultimate Parent Company thus had a 100% shareholding, whether direct or indirect, in: the State X Holding Company, the UK Indirect Holding Company, the UK Direct Holding Company, and the Project Company. The group corporate structure is depicted below:



Background

5 Pursuant to a bilateral investment treaty ("BIT") between the State and State X, the State X Holding Company commenced arbitration against the State ("BIT Arbitration"). The next day, the UK Investors commenced the ECT Arbitration against the State pursuant to the ECT.

6 The arbitrations were heard before the same three-member Tribunal.

7 In the ECT Arbitration, the Tribunal found the State liable for breaching investor protection obligations under Arts 10 and 13 of the ECT. In the BIT Arbitration, the Tribunal found the State liable for breaching the BIT.

8 The Tribunal awarded damages against the State in both arbitrations. The damages awarded were based on the Tribunal's assessment of the value of the Project. The amount awarded to the UK Investors in the ECT Award was 72% of the amount awarded to the State X Holding Company in the award

issued in the BIT Arbitration[3] ("BIT Award"): this was proportionate to their respective shareholdings in the Project Company: the UK Investors had a 72% shareholding, whereas the State X Holding Company had a 100% shareholding. Provision was made to avoid double recovery: the ECT Award stipulates that if the State pays the damages awarded under the BIT Award, its liability for damages under the ECT Award would be extinguished.

The parties' cases

9 The State raises five objections to the ECT Award:

(a) Jurisdictional Objection 1: the Intra-EU Objection;

(b) Jurisdictional Objection 2: the Subject-Matter Objection;

(c) Jurisdictional Objection 3: the Fork-in-the-Road Objection;

(d) breach of public policy; and

(e) breach of natural justice.

10 The UK Investors maintain that none of those objections should succeed.

Jurisdictional Objection 1: the Intra-EU Objection

The State's case on the Intra-EU Objection

11 The State contends that in so far as Art 26 of the ECT provides for investor-state arbitration, it is invalid and/or inapplicable in the present case, because the dispute submitted to arbitration is an "Intra-EU Dispute", *ie*, one in which the relationship between the two states (the respondent State, and the UK

[3] JCBD (1) at TAB 2.

– the UK Investors' home state) is governed by EU law. The State says this is because Art 26 of the ECT is incompatible with EU law – specifically, Art 26 is incompatible with the principle of autonomy reflected in Art 19 of the Treaty on European Union (7 February 1992), 1757 UNTS 3 (entered into force 1 November 1993)[4] ("TEU") and Arts 267 and 344 of the Treaty establishing the European Community (25 March 1957), 294 UNTS 3 (entered into force 1 January 1958), as amended and now known as the Treaty on the Functioning of the European Union[5] ("TFEU") (collectively, "EU Treaties"):

(a) Article 19(3) of the TEU provides that:

> The Court of Justice of the European Union shall …
>
> (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of [EU] law or the validity of acts adopted by the institutions; …

(b) Articles 267 and 344 of the TFEU provide that:

> *Article 267*
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the [EU Treaties];
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union …
>
> …
>
> *Article 344*
>
> Member States undertake not to submit a dispute concerning the interpretation or application of the [EU Treaties] to any method of settlement other than those provided for therein.

12 Article 26(1) to (3) of the ECT read as follows:

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4 JCBA Volume IV ("JCBA (4)") at TAB 14 .

5 JCBA (4) at TAB 15.

> (1) 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, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
>
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
>
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

13 The State's contention is that an EU Member State cannot validly offer to arbitrate a dispute with a national of another EU Member State, for that may result in disputes which may concern the application or interpretation of EU law being removed from the EU court system (and consequently prevent the Court of Justice of the European Union ("CJEU") from playing its role as the final arbiter in the interpretation and application of EU law).

14 The State explains that the Tribunal's jurisdiction is determined at the time the ECT Arbitration commenced, on 9 September 2020, when it received the UK Investor's Notice of Arbitration. Any subsequent events after 9 September 2020 would not affect the determination of the Tribunal's jurisdiction. Whether the dispute is an Intra-EU Dispute should therefore be determined at that date.

15 The State recalls that EU law applied in the State since its accession to the EU on 1 May 2004. EU law applied in the UK from its accession to the EU in 1973 until 31 December 2020. The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019) OJ C 384I/1[6] ("Withdrawal Agreement"), which regulates the UK's withdrawal from the EU on 31 January 2020, establishes a Transition Period until 31 December 2020 during which "[u]nless otherwise provided in this Agreement, [EU] law shall be applicable to and in the United Kingdom" (Art 127(1)). The Withdrawal Agreement specifies that the applicable EU law shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the EU (Art 127(3)). It further sets out that the CJEU shall have jurisdiction as provided for in the EU Treaties in relation to the UK and to natural and legal persons residing or established in the UK (Art 131), and that judgments and orders of the CJEU handed down before the end of the Transition Period shall have binding force in their entirety on and in the UK (Art 89(1)).

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[6] JCBA Volume I ("JCBA (1)") at TAB 6: Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019) OJ C 384I/1 ("Withdrawal Agreement").

The key issue, says the State, is not so much whether the UK could properly be described as an EU Member State after 31 January 2020 but whether EU law, including international agreements concluded by the EU, governed the relationship between the State and the UK when the ECT Arbitration commenced on 9 September 2020.

Whether the ECT Dispute is an Intra-EU Dispute

16 There is no serious dispute that the UK Investors were no more investors from an EU Member State on 9 September 2020.[7] The discussion between the parties focuses on the reasoning of the Tribunal concerning the extent to which the UK remains subject to aspects of EU law after its withdrawal from the EU on 31 January 2020 (at paras 366–367 of the ECT Award).

17 The Tribunal decided (at paras 369–373) that:

(a) *Slovak Republic v Achmea BV*, CJEU Case C-284/16, ECLI:EU:C:2018:158, Judgment (6 March 2018) ("*Achmea*"),[8] a judgement by the CJEU on the incompatibility of arbitration clauses in intra-EU BITs with EU law, does not extend to a multilateral treaty such as the ECT; and

(b) *Republic of Moldova v Komstroy*, CJEU Case C-741/19 ECLI:EU:C:2021:655, Judgment (2 September 2021) ("*Komstroy*"),[9] a subsequent judgment by the CJEU on the inapplicability of Art 26 of the

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7 Defendants' Written Submissions dated 7 July 2025 ("DWS") at para 90.

8 JCBA Volume XXXII ("JCBA (32)") at TAB 190.

9 JCBA (32) at TAB 209: *Republic of Moldova v Komstroy*, CJEU Case C-741/19 ECLI:EU:C:2021:655, Judgment (2 September 2021) ("*Komstroy*").

ECT to an Intra-EU Dispute, does not apply in the circumstances as it was issued after the expiry of the Transition Period.

18 The Tribunal then drew the following conclusion (at para 375):

> 375. In light of the above findings, the Tribunal does not consider it necessary to determine issue (iii), i.e., whether Article 26 of the ECT is contrary to EU law under the conflict laws of the VCLT, the ECT, or the TFEU, as argued by the Parties.
>
> 376. … Since the Tribunal has found to its satisfaction that the intra-EU objection is inapplicable to the present dispute, it does not consider that there is reason to decline the exercise of its jurisdiction under the principle of comity.
>
> 378. Therefore, the Tribunal dismisses the Respondent's objection to its jurisdiction on the basis that Article 26 of the ECT cannot be used in intra-EU disputes, in the specific circumstances of this case.

19 The CJEU in *Achmea* interpreted, upon a request for preliminary ruling, Arts 267 and 344 of the TFEU as precluding the arbitration provision in a bilateral investment treaty concluded by two Member States for the settlement of disputes between an investor from one of those Member State and the other Member State which hosts the investment (at para 62). The CJEU will not answer a further referral for an interpretative ruling relating to a similar case which discloses no issues of fact or of law of a nature such as to lead to a different interpretation. It is rather telling that the CJEU seized the occasion of the *Komstroy* case involving an investor from a non-EU Member State and another non-EU Member State to rule "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" (at para 66). The *Komstroy* ruling could not, as a matter of CJEU practice, decide that the *Achmea* judgment had already ruled on the inapplicability of Art 26 of the ECT, to which the EU is a party. We note

that the Opinion of the Advocate General in *Komstroy* precisely acknowledges that the solution reached in *Achmea* concerning BITs could not automatically apply to a multilateral treaty notwithstanding the similarity of the dispute settlement mechanism (at paras 70–71):[10]

> 70. Nevertheless, the judgment in *Achmea* does not resolve all matters relating to the relationship between investment arbitration and EU law. In particular, that case involved a bilateral treaty to which two Member States were parties. The ECT, although providing for a dispute settlement mechanism similar to the one at issue in the judgment in *Achmea*, in that it allows recourse to an arbitral tribunal, is for its part a multilateral treaty to which the European Union and the Member States are parties.
>
> 71. Those differences have limited the automatic application of the solution reached concerning BITs to the dispute settlement mechanism provided for in Article 26 of the ECT. The successive declarations of the Member States in that regard rightly illustrate existing divergences as regards the possibility of extending the scope of the judgment in *Achmea* to the dispute settlement mechanism provided for by the ECT … and, more fundamentally, as regards the compatibility of Article 26 of the ECT with EU law.

20 It may be however that the answer to the inapplicability of Art 26 of the ECT in an Intra-EU Dispute could have been already foretold from the reasoning of the CJEU in *Achmea* and other decisions of the CJEU[11] and that *Komstroy*, as the State puts it, only confirms what was made clear in *Achmea*.[12] These legal constructions do not have the binding force of a ruling of the CJEU, less an *ex tunc* effect of an interpretative judgment. Similarly, the Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on

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10 JCBA (32) at TAB 208.

11 JCBA (32) at TAB 206: *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* CJEU Case C-64/16, ECLI:EU:C:2018:117, Judgment (27 February 2018) ("*Associação Sindical dos Juízes Portugueses*").

12 CWS at para 102.

Investment Protection in the European Union[13] ("2019 Declaration") signed on 15 January 2019 by 22 Member States invoked by the State in support of its interpretation of *Achmea* that Art 26 must be disapplied in Intra-EU Disputes[14] does not have the force and effect of an interpretative ruling as to the status of EU law on 9 September 2020. As the UK Investors point out,[15] the 2019 Declaration informing "the investor community that no new intra-EU investment arbitration proceeding should be initiated" either under BITs or the ECT carefully reserves the possibility of a future holding of the CJEU as "it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with [EU] law of the intra EU application of the [ECT]." Even the State acknowledges that the 2019 Declaration should only be taken into account as a means of interpretation of the ECT under Art 31(3) of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) ("VCLT"),[16] which will be discussed below.

21 We conclude by referring to the Tribunal's holding (at paras 371–372 of the ECT Award) about the limited scope of the *Achmea* judgment as applying only to BITs so that it cannot be read as applying equally to multilateral international agreements as the State suggests:[17]

> 371. The Respondent also contends that the *Komstroy* judgment "only confirms what was already made clear"" in the *Achmea* judgment issued on 6 March 2018. The Tribunal disagrees with this argument since the reasoning in the *Achmea*

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13 JCBA Volume V ("JCBA (5)") at TAB 29.

14 CWS at paras 96–100.

15 Certified transcript of hearing on 23 July 2025 ("Transcript 23 July 2025") at p 12.

16 CWS at para 96; Certified transcript of hearing on 22 July 2025 ("Transcript 22 July 2025") at p 107.

17 CWS at paras 93–95.

> judgment was limited to dispute resolution provisions contained in BITs between EU Member states. The Achmea judgment concerned the interpretation of Articles 267 and 344 of the TFEU in the context of the bilateral investment agreement between the Netherlands and the Czech and Slovak Federative Republic. In its *dispositif*, the CJEU ruled
>
> > 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. (emphasis added)
>
> 372. The Tribunal concludes from the *dispositif* that the judgment limited itself to international agreements in the nature of bilateral investment agreements. The limited scope of the *Achmea* judgment is further evidenced by the plurilateral Joint Declaration entered into by certain Member States on the judgment's legal consequences on investment protection in the EU, which committed to terminate only intra-EU BITs, not membership of other multilateral agreements such as the ECT. …
>
> [emphasis in the ECT Award]

22 The specific EU law rule which precludes intra-EU ECT arbitration was only laid down as a matter of EU law when *Komstroy* was decided by the CJEU on 2 September 2021. *Komstroy* (and *Achmea*) are interpretative judgments made in preliminary references of Member States courts pursuant to Art 267 of the TFEU which have an *ex tunc* effect under EU law. It is long established law that preliminary rulings are of a declaratory nature and take effect from the date on which the rule interpreted entered into force: *European Commission v Ireland*, C-455/08, CJEU Case C-455/08, Judgment (23 December 2009)[18] at para 39. The State precisely invokes the *ex tunc* effect to say that although the

[18] JCBA Volume 33 at TAB 227.

Komstroy ruling was issued after the expiry of the transition period, it applied to the UK on 9 September 2020.[19]

23 Interpreting, as the UK Investors propose,[20] Arts 89(1) and 127(3) of the Withdrawal Agreement (see [15] above) as setting EU law in aspic in the UK during the Transition Period which includes the date of the Notice of Arbitration would create an awkward situation where EU law would apply in the UK without its fundamental tenets for interpretation and application. It would go beyond the reasoned exceptions provided for in Art 89(1) regarding enforcement of judgments of the CJEU in pending cases brought by or against the UK[21] or cases brought by the EU Commission against the UK for breach of its obligations.[22] The UK Investors contend in support of the Tribunal's finding (at para 370 of the ECT Award) that the application of *Komstroy* would indefinitely submit the UK to the jurisdiction of the CJEU after 31 January 2020. However this fails to take account of the fact that the interpretation of Art 26 in *Komstroy* would already be part of EU law during the Transition Period on account of the *ex tunc* effect of that judgment which is not a retroactive application of new EU law.[23] Second, after the Transition Period, UK courts,

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19 CWS at paras 101–107.

20 DWS at paras 98–101.

21 JCBA (1) at TAB 6: Withdrawal Agreement at Art 86 ("Pending cases before the Court of Justice of the European Union").

22 JCBA (1) at TAB 6: Withdrawal Agreement at Art 87 ("New cases before the Court of Justice"). It would further achieve an impermissible derogation from Art 4(5) of the Withdrawal Agreement ("Methods and principles relating to the effect, the implementation and the application of this Agreement") which obliges the UK's judicial and administrative authorities to have due regard to the relevant case law of the CJEU handed down after the end of the transition period.

23 Transcript 23 July 2025 at pp 13–14; Certified transcript of hearing on 24 July 2025 ("Transcript 24 July 2025") at pp 103–104; DWS at para 100; see also JCBA (33) at TAB 227: *European Commission v. Ireland*, CJEU Case C-455/08, Judgment (23 December 2009) at para 39: "… it is appropriate to point out that according to settled

like all courts of third States such as the Singapore International Commercial Court ("SICC"), would apply EU law where appropriate, as any other foreign law by determining its contents by reference to the positive law in force, which includes the *ex tunc* effect of CJEU interpretative rulings, irrespective of their date of issuance.

24 Whether EU law would apply to the Tribunal is a matter which pertains to the law applicable to the arbitration agreement. Whatever the interpretation of Art 89(1) of the Withdrawal Agreement might be after the Transition Period, the issue, as the UK Investors correctly remark, is academic because the *Komstroy* judgment would not apply in this case should Art 26 of the ECT not be interpreted in accordance with EU law.[24] We therefore examine the law applicable to the arbitration agreement in Art 26(3) concluded between the State and the UK Investors to determine whether the Intra-EU objection is grounded.

What law applies to determine whether the arbitration agreement applies to the dispute in question?

25 The State argues that under Art 26(6) of the ECT, EU law applies under the three-stage test in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 ("*Anupam Mittal*") either as an express choice of law to the arbitration agreement or as an implied one, the law of the document creating the substantive rights and obligations serving as the starting point for

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caselaw, the interpretation which the Court gives to a rule of Community law clarifies and defines, where necessary, 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 (see particularly Case C-453/00 *Kühne v Heitz* [2004] ECR I-837, paragraph 21)."

[24] Transcript 24 July 2025 at p 105.

determining such implied choice, or as the law with the most real and substantial connection if no choice can be discerned.[25]

Is there an express choice of law that makes EU law applicable?

26 Article 26(6) of the ECT provides that a United Nations Commission on International Trade Law ("UNCITRAL") arbitral tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law". This addresses the way in which the "issues in dispute" are decided and does not determine the law applicable to issues of jurisdiction, as the UK Investors rightfully observe with the support of investment jurisprudence.[26] The ECT has no express choice of law for the arbitration agreement.

Is there an implied choice of law that makes EU law applicable?

27 The State suggests that even if Art 26(6) cannot be regarded as an express choice of law of the arbitration agreement, it would at a minimum constitute a choice of the substantive law governing the merits of the dispute which should be considered according to *Anupam Mittal* as an implied choice of the law to govern the arbitration agreement.[27] The State clarified at the hearing that took place from 22 to 24 July 2025 ("Hearing") that it does not

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25 CWS at paras 38–39; Transcript 22 July 2025 at pp 19–20.

26 DWS at paras 138–142; Transcript 22 July 2025 at pp 21–22; JCBA Volume XXIX ("JCBA (29)") at TAB 139: *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwek Krümmel GmbH & Co. oHG and Kernkraftwerk Brunsbüttel GmbH & Co. oHG v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (31 August 2018) ("*Vattenfall*") at para 121; JCBA Volume 16 ("JCBA (16)") at TAB 95: *Green Power Partners K/S, SCE Solar Don Benito APS v. Spain*, SCC Case No. V. 2016/135, Award (16 June 2022) at para 157.

27 Transcript 22 July 2025 at pp 24–25; Transcript 24 July 2025 at pp 31–32; CWS at para 40.

conceptually make a difference to the applicability of the *Anupam Mittal* three-stage test that a treaty is involved. In the event that a national law had been designated in the treaty to govern the merits, that would only be a *prima facie* indication of an implied choice of the law for the arbitration agreement. However, the State submitted that any such indication would be contradicted by the application of international law as the closest and most real connection because the ECT is a treaty.[28] For the State, even if an implied choice could not be discerned, it contends that EU law (which forms part of international law) would have, pursuant to the third stage of *Anupam Mittal*, the closest connection and most real connection with any purported arbitration agreement based on the ECT arbitration provision in an Intra-EU Dispute since relationship between EU Member States are governed by EU law.[29]

28 The State thus admits that conflict of law rules should be applied with the necessary flexibility to allow for the designation of international rules and principles. A conflict of laws approach such as recommended by *Anupam Mittal* is no obstacle to the application of international law for finding whether a valid offer to arbitration could be made by the State and accepted by the UK investor pursuant to Arts 26(3) and (4) of the ECT. Notwithstanding Singapore not being a party to the ECT, the ECT cannot be given a meaning which would be contrary to international law. Treaties are a source of international law which applies before Singaporean courts. The SICC has therefore an obligation to respect international law and to observe the provisions of the treaty accordingly.

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[28] Transcript 24 July 2025 at pp 31–33.

[29] CWS at para 40.

29 In the premises, both parties do not dispute that the law governing their arbitration agreement is international law.[30] They disagree on the application of EU law as part of international law.

In any event, is EU law applicable?

30 The State says that EU law is international law when it is applied to relations between EU Member States and should as such be applicable in full to an Intra-EU Dispute. *Komstroy* (and *Achmea*) have established that the Art 26 of the ECT is inapplicable to Intra-EU Disputes because it conflicts with the EU Treaties to which the State and the UK have made the sovereign choice of subordinating their relations in public international law. The State highlights that the principle of primacy governs the relationship of EU law and international treaties between the Member States and operates to that extent as a conflict rule in relations between EU Member States as a matter of public international law.[31]

31 Although the State recognises that Singapore was deliberately chosen as the seat of the arbitration by the Tribunal as a third State, it says, relying on, albeit rare, occasions where investment tribunals have upheld the Intra-EU Objection such as *Green Power Partners K/S, SCE Solar Don Benito APS v. Spain*, SCC Case No V. 2016/135, Award (16 June 2022)[32] ("*Green Power*"), that the question of the seat is irrelevant for considering the law of the arbitration

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30 DWS at para 138.

31 Transcript 22 July 2025 at pp 61–62, 67; CWS at paras 110–114; JCBD Volume 2 ("JCBD (2)") at TAB 17: 1st Witness Statement of Steffen Hindelang (with Expert Report only) ("Hindelang Report") at paras 14, 94.

32 JCBA (16) at TAB 95.

agreement.[33] As pertinently observed by the UK Investors, the *Green Power* arbitral tribunal was sitting in Sweden within the EU legal system[34] and the same can be said of the national courts of the Member States whose decisions are invoked in support of the CJEU rulings on the inapplicability of Art 26 of the ECT to Intra-EU Disputes.[35] As compared with these cases, courts of third States, such as the Swiss Federal Tribunal[36] or the English High Court[37] may

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33 CWS at paras 82–83; Transcript 22 July 2025 at pp 113–118; Transcript 24 July 2025 at pp 60–62.

34 Transcript 23 July 2025, pp 36–37; JCBD (2) at TAB 18: 1st Witness Statement of Professor Dan Sarooshi KC (with Expert Report only) ("Sarooshi Report") at paras 97–103.

35 For Dutch decisions, see JCBA Volume 30 ("JCBA (30)") at TAB 152: *Republiek Polen v. LC Corp B.V.*, Gerechtshof Amsterdam Case No. 200.328.367/01, Judgment (22 April 2025), TAB 154: *Koninkrijk Spanje v. AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Rechtbank Amsterdam C/13/728512 / HA ZA 23-64, ECLI:NL:RBAMS:2025:732, Judgment (05 February 2025); for French, JCBA (30) at TAB 149: *Republique de Pologne v. Société CEC Praha, Société Slot Group AS c/o M. David Janosik*, Cour d'Appel de Paris N° RG 20/14581, Arrêt (19 April 2022); for German, JCBA (30) at TAB 144: *Croatia v. Raiffeisen International et al.*, Bundesgerichtshof Case No. I ZB 16/21, Decision (17 November 2021), TAB 145: *Germany v. Mainstream Renewable Power et al.*, Bundesgerichtshof Case No. I ZB 43/22, Decision (27 July 2023), TAB 147: *The Netherlands v. RWE*, Bundesgerichtshof Case No. I ZB 75/22, Decision (27 July 2023); for Luxembourg, JCBA (30) at TAB 150: Cour de cassation du Grand-Duché de Luxembourg Case No. CAS-2021-00061, Decision (14 July 2022); for Swedish, see JCBA Volume 31 ("JCBA (31)") at TAB 155: *Poland v. Mercuria Energy Group Ltd*, Svea Hovrätt Case No. T 2613-23, Judgment (23 December 2024), TAB 156: *Festorino Investment Limited et al. v. Poland*, Svea Hovrätt Case No. T 12646-21, Judgment (20 December 2023), TAB 157: *Spain v. Triodos SICAV II*, Svea Hovrätt Case No. T 15200-22, Judgment (27 March 2024), TAB 158: *Spain v. Foresight Luxembourg Solar 1 S.à.r.l. and others*, Svea Hovrätt Case No. T 1626-19, Judgment (28 June 2024), TAB 159: *Italy v. CEF Energia B.V.*, Svea Hovrätt Case No. T 4236-19, Judgment (27 May 2024), TAB 160: *Spain v. Novenergia II - Energy & Environment (SCA), SICAR*, Svea Hovrätt Case No. T 4658-18, Judgment (13 December 2022), TAB 161: *Republic of Italy v. Athena Investments A/S and others*, Svea Hovrätt Case No. T 3229-19, Judgment (17 June 2024). See also JCBD (2) at TAB 17: Hindelang Report at paras 190–194.

36 JCBA (30) at TAB 143: *Kingdom of Spain v. EDF Energies Nouvelles (France)*, Bundesgericht Case No. 4A 244/2023, Judgment (3 April 2024) ("*EDF*"); JCBD (2) at TAB 18: Sarooshi Report at para 121; DWS at paras 249–251.

37 JCBD (2) at TAB 18: Sarooshi Report at para 104; DWS at paras 249–251.

rule differently because the infringement procedure for failure to comply with EU law is a tool limited to driving the development of EU law within the European legal space. The State for its part considers that these decisions are flawed.[38] A foreign judgment is however taken to be conclusive on the merits regardless of the correctness of its conclusion. We agree with the State[39] though that, wherever the seat of the arbitration including Singapore, the Tribunal is not the ultimate decision-maker of its own jurisdiction as Art 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), read with the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"), allows the court to review the relevance of EU law to finding whether an arbitration agreement exists.

32 In support of the view that no valid arbitration agreement exists here, the State's expert ("Professor Hindelang") has given evidence that the constitutional framework creating an EU legal order is embedded in the legal systems of the Member States.[40] Interpretation of the EU Treaties must consequently consider the spirit, the general scheme and the wording of the Treaty provisions as the CJEU decided in *V Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, CJEU Case C-26/62, ECLI:EU:C:1963:1, Judgment (5 February 1963).[41] These special rules of interpretation complement or relate to the principle of primacy of EU law which overrides the conflict rules contained in the VCLT.[42]

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38 JCBD (2) at TAB 17: Hindelang Report at paras 189 (footnote 375), 195–197; see also Claimant's Further Submissions dated 26 September 2025 ("CFS").

39 CWS at para 84.

40 Transcript 22 July 2025 at p 64.

41 JCBA (31) at TAB 173.

42 CWS at paras 115, 126–131; JCBD (2) at TAB 17: Hindelang Report at paras 108–112; Transcript 22 July 2025 at pp 67, 86, 88–90.

33 The preliminary ruling procedure (Art 267 of the TFEU) is the keystone of the EU judicial system formed by the CJEU and the national courts of the Member States for ensuring consistency and uniformity of interpretation of EU law. Arbitral tribunals, which are not part of the judicial system established by the EU Treaties, are under no obligation to respect the primacy of EU law which governs the relationship of EU law with Member States law together with autonomy to defend the EU legal order against the challenges of the Member States. Autonomy of the EU legal order is further used by the CJEU to protect the integrity of the legal system established by the EU Treaties against the intrusion from international courts established under international agreements which affect the CJEU's role of preserving the unity and equality before the law.[43] In the present circumstances, Art 26(4) of the ECT would affect the responsibilities allocated in the EU Treaties to the EU judicial system which is intended to ensure the consistency and uniformity of EU law.[44] The principle of equality before EU law which is guaranteed by the uniformity of its interpretation by the CJEU would moreover be departed from if Art 26 of the ECT applied in an Intra-EU context.[45]

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43 JCBA Volume 33 ("JCBA (33)") at TAB 223: *EEA*, CJEU Opinion 1/91, ECLI:EU:C:1991:490, Opinion (14 December 1991); see also JCBA (31) at TAB 167: *Amministrazione Delle Finanze Dello Stato v Simmenthal*, CJEU Case 106/77, ECLI:EU:C:1978:49, Judgment (9 March 1978) at paras 21–22; JCBA (32) at TAB 192: *Exportur v LOR SA and Confiserie du Tech*, CJEU Case C-3/91, ECLI:EU:C:1992:420, Judgment (10 November 1992) at para 8; see also CWS at para 117; Transcript 22 July 2025 at pp 61–63, 69–73, JCBD (2) at TAB 17: Hindelang Report at paras 76–97.

44 JCBA (32) at TAB 209: *Komstroy* at para 45; JCBA (33) at TAB 224: *ECHR*, CJEU, Opinion 2/13, ECLI:EU:C:2014:2454, Opinion (18 December 2014) at para 174; JCBA (32) at TAB 198: *Commission v. Ireland*, CJEU Case C-459/03, ECLI:EU:C:2006:345 at para 123; Transcript 22 July 2025 at p 83.

45 Transcript 22 July 2025 at p 72; JCBD (2) at TAB 17: Hindelang Report at para 97.

34 We cannot however accept the State and Professor Hindelang in their conclusion that primacy of EU law applies to defend the autonomy of the EU legal order with respect to general international law including international agreements applicable between EU Member States.[46] It is settled case law of the CJEU that on the one hand, obligations under international law are binding on the EU and may even take precedence over secondary law; on the other hand however, autonomy of the EU legal order does not allow the exclusion of judicial review of the EU acts giving effect to an act of international law.[47] Primacy at the level of international law should be distinguished from primacy under EU law.

35 Although the CJEU may, for the furtherance of its goals regarding the preservation of the autonomy of the EU legal order,[48] need to treat the ECT (to which the EU is itself a Contracting Party) as an EU act for purposes of the coherence of the EU legal order,[49] the ECT remains an international treaty. As

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46 Transcript 22 July 2025 at p 84; see also JCBD (2) at TAB 17: Hindelang Report at paras 46–57.

47 JCBA (33) at TAB 217: *Yassin Abdullah Kadi, Al Barakaat International Foundation*, CJEU Joined Cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, Judgment (3 September 2008) at paras 290– 292 (291: "In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers"), 316 ("the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement"), 317 ("The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights").

48 See JCBA (1) at TAB 15: Art 19(1) of the TFEU ("The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed"); JCBD (2) at TAB 18: Sarooshi Report at paras 22(3)(vi), 81–82.

49 JCBA (32) at TAB 209: *Komstroy* at para 49; CWS at paras 67, 120.

such, it is governed by international law in the courts of third States, like the SICC, who are not charged with any mission regarding the functioning of the EU legal order under the EU Treaties.

36 We are comforted in our conclusion by *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028[50] ("*Blasket*"), a judgment of the Federal Court of Australia of 29 August 2025 which the UK Investors introduced in the proceedings on 4 September 2025. The State has sought to distinguish *Blasket*, which concerned an award by the International Centre for Settlement of Investment Disputes ("ICSID") made under the international and self-contained system of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), from our case which involves an *ad hoc* UNCITRAL award.[51] We cannot follow the State in its contention that *Blasket* would be irrelevant. The arguments about the conflict between EU law and the international arbitral obligations under the ECT raised in the *Blasket* case have been made with the same peremptory force regardless of the arbitration system or the nature of the review proceedings, whether enforcement as in *Blasket* or setting aside as here. *Blasket* unambiguously stated that EU law does not trump international law on the interplay between treaties (here, the EU treaties and the ECT) because the principle of primacy applies "only within the EU system and not on the broader international plane (ie outside the EU system)" (at [205]), that the CJEU did not have jurisdiction to rule on the validity of Art 26 of the ECT as an arbitration agreement as it could not have the final word on a conflict between the EU Treaties and Art 26 outside the EU system (at [206]), and that legal certainty

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50 Enclosed in the letter from Providence Law Asia LLC to the court dated 4 September 2025.

51 See CFS generally.

requires the same interpretation of Art 26 between the various contracting parties to the ECT ("Contracting Parties") (at [209]).

37 In light of that, we also cannot accept the State's suggestion and consider that, as an alternative route to the principle of primacy leading to the application of EU law, the relevant rules of international law are EU rules. In particular, we do not accept that the applicable law in the relations between the parties mentioned at Art 31(1)(c) of the VCLT for assisting with the interpretation of Art 26 of the ECT refer to the EU rules.[52] The rules of international law as a means of interpretation under Art 31(3)(c) are enumerated in Art 38 of the Statute of the International Court of Justice, annexed to the Charter of the United Nations (26 June 1945), 1 UNTS XVI (entered into force 24 October 1945),which includes international conventions such as the EU Treaties. The UK Investors rightly observe that EU Treaties are part of international law in the sense that all treaties derive from international law.[53] The State's argument however is not about the formal nature of the EU Treaties but about the rules of the EU legal order which have a public international law nature applicable in the relations between the EU Member States. Such rules are distinct from the rules of international law as explained by the CJEU.[54] The rules protecting the

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52 CWS at paras 52–56, 142.

53 Transcript 23 July 2025 at pp 71–77.

54 JCBA (31) at TAB 175: *Costa v. ENEL* CJEU, Case 6/64, ECLI:EU:C:1964:66, Judgment (15 July 1964): "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. … By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

integrity of the EU legal system are not relevant rules of international law within the meaning of the rule of interpretation of Art 31(3(c) of the VCLT.[55]

38 The State nonetheless further argues that, notwithstanding the multilateral nature of the ECT, which binds both EU and non-EU Member States, the dispute between itself and the UK Investors is bilateral, as the recourse to the dispute settlement mechanism is of a bilateral implementation structure. The rights and obligations of other Contracting Parties would not consequently be affected by how Art 26 is interpreted and applied between two Contracting Parties who are therefore at liberty to disapply Art 26 in case of conflict with the EU Treaties.[56]

39 The State traces back to the bilateralism of international law the distinction between *erga omnes partes* obligations essential to a treaty's object and purpose which are owed by each contracting party to all contracting parties and obligations owed bilaterally between two contracting parties as a matter only relevant to them such as Art 26 of the ECT. [57] The Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006), UN Doc. A/CN.4/L.682 ("Report on Fragmentation") notes that the bilateralist mode of operation is particularly

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55 JCBD (2) at TAB 18: Sarooshi Report at para 22(3)(vii).

56 Transcript 22 July 2025 at p 29; CWS at paras 68–74.

57 Transcript 24 July 2025 at p 70 (see also pp 54–55); JCBD (2) at TAB 17: Hindelang Report, paras 206–216; JCBA Volume XL at TAB 285: C. McLachlan, The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention (2005) 52(2) ICLQ 279 at 312: "if on its proper construction, a particular obligation in the treaty is owed in a synallagmatic way between pairs of parties, rather than erga omnes partes (even if contained within a multilateral treaty), then the application of that obligation as between the relevant pair of parties (as opposed to its interpretation generally) may properly be considered in the light of other obligations applying bilaterally between those parties"; see also CWS at para 72.

important in the law of State responsibility and observes that contemporary international law has however moved well beyond bilateralism with the distinction between treaties creating reciprocal obligations and those creating more absolute type of obligations ("*erga omnes*") such as humanitarian law conventions.[58] The Third Report on State Responsibility (10 March 2000) UN Doc. A/CN.4/507[59] ("Report on State Responsibility") acknowledges three types of multilateral obligations: obligations to the international community as a whole (*erga omnes*) to which all States in the world have a legal interest, obligations owed to all the parties to a particular regime (*erga omnes partes*) where all the States parties have a common interest, and obligations to which some States are parties, but in respect of which particular States or group of States are recognised as legally interested. The Report on State Responsibility considers that it is, however, not necessary to say which particular obligations are multilateral in this sense, but it is sufficient to affirm that the category exists. There is also no reason to require that regimes created by a multilateral treaty should recognise the collective interest in express terms.[60] According to what precedes, there is no assumption, as the State puts it,[61] that obligations in multilateral treaties are usually bilateral.

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58 JCBA Volume XXXVIII ("JCBA (38)") at TAB 276: Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006), UN Doc. A/CN.4/L.682 ("Report on Fragmentation") at paras 383, 385.

59 JCBA Volume XXXVI ("JCBA (36)") at TAB 253: Third Report on State Responsibility (10 March 2000) UN Doc. A/CN.4/507 ("Report on State Responsibility").

60 JCBA (36) at TAB 253: Report on State Responsibility at pp 110–112, para 106; see also JCBA (38) at TAB 276: Report on Fragmentation at paras 380–409; Transcript 24 July 2025 at pp 71–77.

61 CWS at paras 71(a); *cf* Transcript 23 July 2025 at pp 22–27, 98, DWS at paras 227–237: The UK Investors draw attention to the amendment process to the ECT at Arts 36(1)(a) and 42 of the ECT requiring unanimity and the prohibition of reservations at

40 For the State, the obligations under Art 26 of the ECT are owed only between the Contracting Parties concerned with the dispute.[62] This argument relates to the right to invoke a breach and the legal interest in the fulfilment of the obligation. As the State admits, this is a question of standing.[63] That is standing according to whether the obligations are *erga omnes partes* or bilateral which should be distinguished from forum obligations under Art 26. In the context of a dispute settlement clause, the issue would be one of whether, beyond the existing bilateral jurisdictional link between the parties at hand, the arbitral mechanism would provide the intervention of a State or individual to whom an *erga omnes partes* obligation is owed. The analogy with contractual relations between individual States giving rise to obligations owed by States to each other which reflect the bilateralism of international law[64] is besides inapposite regarding an arbitration agreement. No reciprocal debtor creditor relationship arises out of an arbitration agreement in comparison to a substantive protection clause which gives rise to rights of the investor and obligations of the host State. As the English High Court concluded in *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v Kingdom of Spain* [2023] EWHC 1226 (Comm) at [84], it cannot be considered "that the fact that only two parties would be in dispute means that the treaties should be construed as though they were bilateral, as they plainly are multilateral. The mechanism

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Art 46 as confirming the multilateral character of the ECT obligations, including Art 26.

62 CWS at para 71(c); Transcript 22 July 2025 at p 20; see also Transcript 24 July 2025 at pp 70–77.

63 Transcript 22 July 2025 at pp 50–51.

64 JCBA (38) at TAB 276: Report on Fragmentation at para 382.

within the ECT for resolving disputes does not make it a bilateral treaty, nor does it mean that any part of it should be considered as though it were."[65]

41 Article 26 of the ECT is properly regarded as a multilateral obligation which each Contracting Party owes to *all* other Contracting Parties, with each Contracting Party agreeing to arbitrate investment disputes involving nationals of the other Contracting Parties. As held by the arbitral tribunal in *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the Intra-EU Jurisdictional Objection (25 February 2019):

> … the ECT, as a multilateral treaty, involves obligations by each Contracting Party towards all other Contracting Parties; it is more than just a network of bilateral relationships and is therefore quite different from a BIT. The nature of the ECT as a single legal instrument in force in the same terms and to the same effect between all its Contracting Parties is reinforced by the fact that reservations to the ECT are expressly prohibited by Article 46 of the ECT.

42 The State finally relies on Arts 1(3) and 25 of the ECT to require the application of EU law in an Intra-EU context. These recognise the EU as a Regional Economic Integration Organization ("REIO") to which its Member States have transferred competence over certain matters in pursuance of political and economic integration. The 1998 Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art 26(3)(b)(ii) of the ECT ("1998 Statement") identifies the CJEU as the judicial body to which the Member States have transferred competence to examine any question relating to the interpretation and application of international

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[65] JCBA (30) at TAB 151: *Infrastructure Services Luxembourg S.à.r.l. (formerly Antin Infrastructure Services Luxembourg S.à.r.l.) and Energia Termosolar B.V. (formerly Antin Energia Termosolar B.V.) v. Kingdom of Spain* [2023] EWHC 1226 (Comm) 523 at [84]; Transcript 23 July 2025 at pp 23–24.

agreements concluded by the EU.[66] In the instance of an Intra-EU Dispute, the investor of an EU Member State should have brought an action before an EU Member State court which would have referred the matter by way of preliminary ruling to the CJEU.[67]

43 The identification of the EU as an REIO within the definition given at Art 1(3) of the ECT could not have the consequence that the relationships between the Member States are governed by EU law under the ECT as if the Member States had not independently ratified the ECT. The 1998 Statement makes clear that the Member States have concluded the ECT independently and are responsible for the obligations incurred in accordance with their respective competences.[68] It follows that it is not possible to infer from the EU's declaration in the 1998 Statement following which, given the EU legal system, the EU cannot give unilateral consent to arbitration under Art 26(3) of the ECT,[69] that the 1998 Statement would exclude intra-EU investments from the

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66 JCBA Volume XI ("JCBA (6)") at TAB 57: "The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice."

67 Transcript 22 July 2025 at pp 36, 39. CWS at paras 57–64.

68 JCBA (6) at TAB 57: "The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party."

69 JCBA (6) at TAB 57: "The Court of Justice of the European Communities, as the judicial institution of the Communities, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the Communities, which under certain conditions may be invoked before the Court of Justice. Any case brought before the Court of Justice of the European Communities by an investor of another

jurisdiction of arbitral tribunals according to the ordinary meaning of Art 26 of the ECT. Competence in respect of the dispute settlement mechanism of Art 26 has not been transferred to the EU as a REIO.

44 The UK Investors consider the absence of an express disconnection clause to ensure the continuing application of EU rules between Member States[70] such as included by Contracting Parties in the case of the Treaty concerning the Archipelago of Spitsbergen (9 February 1920), 2 LNTS 7 (entered into force 14 August 1925) or in other instances by the EU, as a further rebuttal of the State's argument concerning the carve-out for Intra-EU Disputes.[71] The State's reply that the absence of an express disconnection clause is not necessary to disapply Art 26 of the ECT in Intra-EU Disputes because

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Contracting Party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) of the Energy Charter Treaty. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation".

70 JCBA Volume XXIV at TAB 123: *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (6 June 2016) at para 82: "The purpose of a disconnection clause is to make clear that EU Member States will apply EU law in their relations inter se rather than the convention in which it is inserted. Absent such a clause in a multilateral treaty, it is intended to be integrally applied by the EU and its Member States. It has not been challenged that no such clause has been included in the ECT. According to the Respondent, the inclusion of such a clause would be meaningless when "the envisaged agreement covers areas in which there has been total harmonisation". In the Tribunal's view, given that there is no disharmony or conflict between the ECT and EU, as noted above, there was simply no need for a disconnection clause, implicit or explicit."

71 Transcript 23 July 2025 at pp 47–57; JCBD (2) at TAB 18: Sarooshi Report at paras 22(3)(vii)(c), 178–183 (citing *Vattenfall, AES Solar and others (PV Investors) v. The Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction (13 October 2014), *Sevilla Beheer B.V. et al. v. The Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum (11 February 2022) ("*Sevilla*"), *NextEra Energy Global Holdings BV and others v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (12 March 2019) ("*NextEra*"), *Blusun SA and others v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016).

such disconnection clauses are irrelevant where bilateral obligations are concerned,[72] does not hold in light of what is said above on the bilateral nature of Art 26. At any rate, it suffices to note[73] that the EU failed in the negotiations to include a disconnection clause to regulate conflicts between EU rules and the ECT specifically for Intra-EU Disputes, notwithstanding the essential character for the preservation of the EU legal order of the application of EU rules in the mutual relations of Member States. For the State, the absence of a disconnection clause moreover underlines the incompatibility of Art 26 with the EU Treaties with the consequence of Art 26's non-application in an Intra-EU context.[74] This raises more generally the application of Art 26 to an Intra-EU Dispute which we examine now.

Does Art 26 of the ECT apply to an Intra-EU Dispute?

Article 16 of the ECT

45 Article 16 of the ECT reads:

> ARTICLE 16
> RELATION TO OTHER AGREEMENTS
>
> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
>
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect

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72 CWS at para 75; JCBD (2) at TAB 17: Hindelang Report at para 187; Transcript 24 July 2025 at pp 84–87.

73 Transcript 23 July 2025 at p 55.

74 JCBD (2) at TAB 17: Hindelang Report at para 186.

> thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

The State considers that Art 16 of the ECT cannot deviate from the principle of primacy which is the special conflict rule between EU Member States. Article 16 which speaks of "construing" would thus be a rule of interpretation rather than a rule of conflict.[75]

46 Article 16 lays down an interpretative rule guided by the more favourable provision to the investor and aims to resolve conflicts of the ECT with prior and subsequent agreements. The interpretation of the parties' intent and object and purpose is inextricably linked to conflict resolution. Even if read as a conflict rule for solving conflicting treaty provisions which primacy cannot replace as proposed by the UK Investors,[76] the State asserts that Art 16 would not give priority to the ECT which is not the more favourable regime compared to the EU Treaties allowing for annulment of an act violating an investor's right. Arbitration moreover could not be considered as more advantageous in so far as Art 26(2) of the ECT envisages jurisdiction of the Member States courts. While the UK Investors regard the key question to be whether Art 26 is more favourable to the investor,[77] what needs to be considered from the State's point of view is the legal remedy available before the courts and before an arbitral tribunal.[78]

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75 Transcript 22 July 2025 at p 87; see also JCBD (2) at TAB 17: Hindelang Report at paras 73–75.

76 DWS at p 100; Transcript 23 July 2025 at pp 90, 95.

77 Transcript 23 July 2025 at p 92.

78 Transcript 22 July 2025, pp. 87, 88; JCBD (2) at TAB 17: Hindelang Report, paras 101-104.

47 The more favourable regime argument made by the State must be examined against the backdrop of the CJEU rulings on the principle of effective judicial protection of individual's rights under EU law referred to in Art 19 of the TEU.[79] Such effective judicial review which is designed to ensure compliance with EU law is open before Member States courts having in this regard a shared responsibility with the CJEU.[80] It is not available before arbitral tribunals because they lack the required characteristics laid down by the CJEU for cooperating with it[81] in reviewing acts of EU law, such as the ECT.[82] Hence, it is inescapable that by choosing arbitration as allowed by Art 26(4) of the ECT, an investor would renounce the advantage of the right to challenge before the courts the legality of any decision relating to an EU act and an effective legal review regarded by the CJEU as the essence of the rule of law.[83] Whatever an investor's true interest as seen through the lenses of the CJEU, the possibility of pursuing arbitration, as contrasted with the prohibition against arbitration within the EU legal system, may indeed be regarded following investment jurisprudence,[84] as an additional and therefore more favourable protection under

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79 JCBA (4) at TAB 14: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by [EU] law."

80 JCBA (32) at TAB 206: *Associação Sindical dos Juízes Portugueses* at paras 35–37.

81 JCBA (31) at TAB 177: *Eco Swiss v Benetton International*, CJEU, Case C-126/97, ECLI:EU:C:1999:269, Judgment (1 June 1999) at para 34.

82 JCBA (32) at TAB 209: *Komstroy* at paras 23, 49.

83 JCBA (32) at TAB 206: *Associação Sindical dos Juízes Portugueses* at paras 30–32, 36.

84 DWS at paras 296–297; JCBD (2) at TAB 17: Sarooshi Report at paras 164–166 (citing *Vattenfall*, *Sevilla*, *BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019), *RENERGY Sarl v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award (6 May 2022), *9REN Holding Sarl v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, (17 November 2022).

international law regardless of the State's remark[85] that arbitration and litigation are put at par in Art 26(2) of the ECT, as alternatives in their own right.

Article 31 of the VCLT

48 The State says that, notwithstanding the irrelevance of the VCLT in an Intra-EU Dispute, its rules of interpretation would nonetheless support the view that Art 26 of the ECT is invalid or inapplicable in an Intra-EU Dispute.[86] The State asserts that the ECT's object and purpose mentioned at Art 31(1) of the VCLT for determining the ordinary meaning of the treaty terms supports its position that the Art 26 of the ECT was not intended to apply in Intra-EU Disputes. The State notably infers from the European Energy Charter (17 December 1991), [1991] OJ C 65/1 ("Charter") that the ECT was an EU-driven initiative, not having investment protection as its only objective and primarily designed to promote East-West energy cooperation and not to regulate the EU's internal market for energy.[87] So, the EU Member States did not intend their ECT obligations to supersede their EU Treaties obligations.[88]

49 The purpose of the ECT as defined by Art 2 is the establishment of a "legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." It bears noting that this objective is made without any distinction between the investor's geographical origin which would limit the ordinary meaning of the terms of Art 26(3) of the ECT according to which "each Contracting Party hereby gives its unconditional consent to the

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85 JCBD (2) at TAB 17: Hindelang Report at para 104.

86 CWS at paras 133–134.

87 CWS at paras 143–148.

88 JCBD (2) at TAB 17: Hindelang Report at para 152.

submission of a dispute to international arbitration" save for exceptions regarding the fork-in-the-road clause (Art 26(3)(b)) or the umbrella clause (Art 26(3)(c)).[89] The ordinary meaning of Art 26 does not allow, as a starting point, one to conclude that its arbitration provisions would not apply to all investors-State disputes. We examine the additional means of interpretation listed at Art 31 of the VCLT.

50 In further support of its contention that Art 26 of the ECT was not intended to apply, the State argues that Art 26 could be modified *inter se* between EU Member States. It invokes Art 31(3)(a) and (b) of the VCLT, which require the interpreter to have regard to any subsequent agreement between the parties regarding the interpretation of the treaty and to any subsequent practice in the application which establishes the agreement of the parties regarding its interpretation.[90]

51 The State relies on the 2019 Declaration signed by representatives of various EU Member States, including the State and the UK, and as such binding on them both, and the Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and on the Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings[91] ("2024 Declaration") signed on 26 June

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89 DWS paras 164–168; JCBD (2) at TAB 17: Sarooshi Report at paras 22(3)(vii)(a)(b)(d), 127–147 (citing investment jurisprudence (*ESPF Beteiligungs GmbH and others v. Italian Republic*, ICSID Case No. ARB/16/5, Award (14 September 2020), *Encavis and others v. Italian Republic*, ICSID Case No. ARB/20/39, Award (11 March 2024)) at paras 143–145); see JCBA (30) TAB 143: *EDF*.

90 Transcript 22 July 2025 at p 99.

91 JCBA (5) TAB 31: "The signatories hereby reaffirm, for greater certainty, that they share a common understanding on the interpretation and application of the Energy Charter Treaty, according to which Article 26 of that Treaty cannot and never could serve as a legal basis for intra-EU arbitration proceedings."

2024 by 26 Member States. The State says that these are subsequent agreements and practice between it and the UK regarding the interpretation of the ECT and the non-application of the arbitration provisions of Art 26.[92]

52 Subsequent agreement or practice must establish the agreement of the parties regarding the interpretation of the treaty, which must have been acquiesced by the others or otherwise they must have raised no objection. Even if, as the State contends,[93] the reference to "parties" in Art 31(3) of the VCLT would mean some parties in the context of a multilateral treaty such as the ECT, it remains undisputable that within the EU Member States, the 2019 and 2024 Declarations have not been agreed and have even met opposition. Not only has the 2019 Declaration not been accepted by all the ECT States, it has not even been accepted by all EU Member States, being signed by only 22 of them.[94] Among the non-signatories, Hungary made a separate declaration on 16 January 2019[95] and it also issued a separate declaration on 26 June 2024 regarding the

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92 Transcript 22 July 2025 at pp 56–59, 97–100, 103 (referring to Claimant's Supplemental Bundle of Authorities Volume 10 at TAB 88: Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty COM (2022) 523 final, 5 October 2022, which was released after the *Komstroy* judgment and which mentions the risk of legal conflict if arbitration awards violating EU law would circulate in the legal order of third countries is dealt with the public policy argument), 110–113, 115–117; see also CWS at paras 138–141.

93 CWS at para 138.

94 Transcript 23 July 2025 at pp 61–70; JCBD (2) at TAB 17: Sarooshi Report at paras 200–212, 219–222.

95 JCBA (5) at TAB 28 at para 8 ("Hungary further declares that in its view, the *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty (hereinafter: "ECT") and it does not concern any pending or prospective arbitration proceedings initiated under the ECT", 9 ("Against this background, Hungary underlines the importance of allowing for due process and considers that it is inappropriate for a Member State to express its view as regards the compatibility with

2024 Declaration.[96] The decision of the European Commission ("EC") to refer Hungary to the CJEU for not joining the 2024 Declaration (which was reported by the State at the Hearing)[97] does not change the fact that the conditions of a subsequent agreement or practice required by Art 31(3)(a) and (b) are not met.

53 The State additionally draws attention to Art 41 of the VCLT which permits modification of a multilateral treaty between certain parties only under strict conditions enacted for the protection of the general regime of the treaty.[98] The UK Investors observe that the ECT does not provide for the *inter se* modification mentioned at Art 41(1)(a) of the VCLT or, to the extent the ECT is silent, that such modification is permissible because it does not affect the interests or rights of the other Contracting Parties or the execution of the object and purpose of the ECT (as required by Art 41(1)(b) of the VCLT). The UK Investors also note that the EU Member States have not, as invited by Art 41(2) of the VCLT, notified the other Contracting Parties of their intention to modify

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[EU] law of the intra-EU application of the ECT. The ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States."

96 JCBA (5) at TAB 27: "The withdrawal of the applicability of Article 26(2)(c) of the Energy Charter Treaty in intra-EU arbitration proceedings may be ensured in accordance with international law by a future amendment of the Energy Charter Treaty through bilateral or multilateral treaty between all or certain parties to the treaty, in accordance with Article 40 or 41 of the Vienna Convention on the Law of Treaties."

97 Transcript 22 July 2025 at p 119.

98 CWS at paras 72(d), 137(c); JCBA (5) at TAB 18; see JCBA (38) at TAB 276: Report on Fragmentation at para 295.

Art 26 of the ECT.[99] Professor Hindelang's report[100] acknowledges that Art 41 of the VCLT prohibits but does not invalidate *inter se* modification agreements which do not satisfy the above conditions. Illegitimate modifications still enjoy priority over the original agreement as follows from the relationship with Art 30(4) of the VCLT which is without prejudice to Art 41 according to Art 30(5).[101] We examine now Art 30.

Article 30 of the VCLT

54 The State argues that EU law takes precedence as a result of Art 30 of the VCLT which reads in pertinent part:

Article 30
Application of successive treaties relating to the same subject matter

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99 Transcript 23 July 2025 at pp 22–27 and 96–100, with reference to *Vattenfall* (JCBA (29) at TAB 139) at para 221 ("… Moreover, the Tribunal considers that the modification proposed by the EC would be "prohibited by the treaty", contrary to Article 41(1)(b) VCLT. Specifically, Article 16 ECT prevents the EU Treaties from being construed so as to derogate from more favourable rights of the Investor in Parts III and V ECT, including the right to dispute resolution.") and *EDF* (JCBA (30) at TAB 143) at para 7.8.3.3 ("It is not therefore possible to admit that the fact of excluding the application of Art. 26 ECT in the presence of disputes of an intra-European nature would be compatible with the effective achievement of the subject and purpose of the said Treaty, given that Art. 16 ECT provides, in substance, that no provision of any other international treaty may be interpreted as derogating from the right to require settlement of the dispute in accordance with Art. 26 ECT (see in the same sense: *Vattenfall et al. versus Germany*, op. cit., No. 221; *Ekosol S.p.A. versus Italy*, op. cit., No. 151). As the respondent points out in its rejoinder, the General Secretariat of the Energy Charter clearly indicated, in a letter dated February 13, 2023, addressed to the EU Parliament, that an inter se agreement between the Member States of the EU, excluding the application of the ECT in their mutual relations, would be contrary to Art. 16 ECT.").

100 JCBD (2) at TAB 17: Hindelang Report at para 239.

101 See JCBA (1) at TAB 11: ECT at Art 30(5) ("Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.").

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the **same subject matter** shall be determined in accordance with the following paragraphs.
>
> …
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> [emphasis added]

55 The State alleges that the ECT which entered into force between the UK and the State applied earlier than the EU Treaties did between them; and in any case that the Treaty on European Union and the Treaty establishing the European Community (13 December 2007), [2007] OJ C 306/1 (entered into force 1 December 2009) ("Treaty of Lisbon"), which birthed the TFEU, constitutes a later treaty as compared to the ECT (as between the UK and the State). In so far as Art 26 of the ECT could not be interpreted to be consistent with EU law, the State alleges that Art 30 of the VCLT would render the same inapplicable because the dispute resolution provisions designating the CJEU in Arts 267 and 344 of the TFEU relate to the same subject matter as Art 26 of the ECT.[102]

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102 CWS at paras 134(b), 151–158; JCBD (2) at TAB 17: Hindelang Report at paras 228–234; Transcript 24 July 2025 at p 92.

56 The State refers to the Report on Fragmentation which, it says, proposes another approach to sameness not limited to dealing with the same subject but an approach which would permit reference to the similarity of context of the dispute settlement, provisions of Arts 267 and 344 of the TFEU and of Art 26 of the ECT.[103]

57 It should be noted here that the preliminary ruling mechanism of Art 267 of the TFEU and the prohibition set out at Art 344 of the same for EU Member States to submit disputes concerning the interpretation or application of the EU Treaties to any method of dispute settlement other than those provided in the EU Treaties, preserve the autonomy of the EU legal order from modifications of the allocation of powers fixed by the EU Treaties in international agreements entered into by the EU.

58 The Report on Fragmentation notes the difficulty with determining in the abstract when two instruments deal with the same subject matter. There is concern over a too strict interpretation of "same subject matter" arising out of arbitrary labels being applied to the subject matter such as human rights, trade or environmental law. Human right treaties are often used to further environmental objectives and trade regimes presuppose the protection of human rights. The criterion of subject matter therefore cannot be decisive in the determination of whether there is a conflict between instruments. This does not mean that it would be impossible to establish an institutional connection between treaties. The distinction between treaties dealing with the same subject matter and treaties within the same regime[104] constitutes a shift in focus from

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103 CWS at para 156.

104 See JCBA (38) at TAB 276: Report on Fragmentation at para 256. A notion which points to the institutional arrangements that may have been established to link sets of treaties to each other.

the object that is regulated to the intent of the State parties and the institutions they have established. It is difficult to find that the ECT and the EU Treaties are part of the "same project" or "part of the same concerted effort" as these labels are used by the Report on Fragmentation to establish an institutional relationship for the application of the *lex posterior* conflict rule codified at Art 30(3) of the VCLT.[105]

59 *Eskosol SpA in liquidazione v. Italian Republic*, ICSID Case No ARB/15/50, Decision on Immediate Termination and Intra-EU Jurisdictional Objection (7 May 2019) ("*Eskosol*"), relied on by the UK Investors in support of their argument that the ECT deals with the long-term promotion of cooperation in the field of energy and protection of investments in the energy sector while the TFEU concerns the organisation of the functioning of the EU,[106] held the Treaty of Lisbon to be a successive treaty relating to the same subject matter within the regime of the prior EU Treaties as distinct from the ECT which could not be considered part of the same regime as the EU Treaties.[107] For the *Eskosol* tribunal:

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105 See JCBA (38) at TAB 276: Report on Fragmentation at paras 21–23, 252, 254–255, which considers the *lex posterior* argument more powerful between treaties within a same regime than between treaties in different regimes.

106 DWS at paras 277–285; see JCBD (2) at TAB 17: Sarooshi Report at paras 238–245, citing further investment jurisprudence (*NextEra*, *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation (11 July 2022), *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award (26 February 2021); see also JCBA (30) at TAB 143: *EDF* at para 7.8.3.2 (JCBA (30) 181) paras 238-245; Transcript 23 July 2025 at pp 100–104.

107 See JCBA Volume XIV ("JCBA (14)") at TAB 88: *Eskosol SpA in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Immediate Termination and Intra-EU Jurisdictional Objection (7 May 2019) ("*Eskosol*") at para 146. The *Eskosol* Tribunal (at para 141) "[a]cknowledges that VCLT Article 30(1) does not define what it means for two treaties to be "successive treaties relating to the same subject matter." Nonetheless, content must be given to these terms. The first

> The mere fact that protections under both regimes could be afforded in certain circumstances to the same investors – at least in the context of direct rather than indirect investment – does not conclusively demonstrate that the ECT and the EU Treaties themselves have the same subject matter for purposes of international law.

60 As the ECT and EU Treaties do not relate to the same subject matter, the issue of incompatibility between treaties and the application of the *lex posterior* in Art 30(3) of the VCLT do not arise.[108] We conclude that Art 26 of the ECT has not been superseded as between EU Member States by Art 30 of the VCLT.

Whether the jurisdictional defect (if any) was cured by the time of the ECT Award

61 The UK Investors add that any jurisdictional defect concerning the State's invalid consent to arbitrate under Art 26(2) of the ECT at the time of the commencement of the arbitration proceedings on 9 September 2020 would have been cured by the time the Tribunal rendered the ECT Award. The UK Investors

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observation is that a treaty is not "successive" to all treaties that came before it, simply because it is later in time; to "succeed" a prior treaty implies some intended relationship between the two, such that an inference may be drawn from the sequence regarding the Contracting Parties' intent for provisions of the latter to supplant those of the former. Otherwise, the lex posterior notion would be fatally broad, inconsistent with the right of States to enter into various different treaties for different purposes, without the earlier ones being negated each time a later one entered into force. The "same subject matter" test provides the description of the type of relationship that must be established between distinct treaties, before any inferences regarding intent may be drawn based on temporal considerations. This test accordingly must be given some positive meaning." See also paras 144, 145.

108 JCBA (14) at TAB 88: *Eskosol* at para 137: "It is notable, moreover, that the comparators in Articles 30(1) and 30(3) are different: Article 30(1) examines the relationship between treaties as a whole (whether they "relat[e] to the same subject matter"), while Article 30(3) examines the relationship between particular provisions within such related treaties (whether they are "compatible"). While in principle it could be possible to reason from the whole to a part (i.e., that if two treaties at their macro-level do relate to the same subject matter, their particular provisions may well contain overlaps which require scrutiny for compatibility), it is not equally possible to reason in reverse, from a part to a whole (i.e., that treaties necessarily relate to the same subject matter because specific provisions in different treaties might have different effects)".

rely on *Mavrommatis Palestine Concessions (Greece v. Great Britain) (Jurisdiction)* PCIJ Rep Series A. No 2[109] ("*Mavrommatis*"), a judgment of the Permanent Court of International Justice ("PCIJ"), which clarified that if consent to jurisdiction is not perfected at the time of filing of the proceedings, such defect may still be cured if, by the time the court renders its decision on jurisdiction, the defect no longer exists. The UK Investors allege that, according to the *Mavrommatis* doctrine (which has been adopted in investment arbitration),[110] the Intra-EU Objection fell away regarding UK Investors after 1 January 2021 when EU law ceased to be applicable in the UK after the Transition Period. The UK Investors say that holding otherwise would simply lead them to resubmit their claims, which would be contrary to the sound administration of justice which the PCIJ wished to avoid in allowing the defect to be cured instead.[111]

62 The State replies that the *Mavrommatis* doctrine is limited to defective procedural conditions at the commencement of the proceedings, while the impossibility to give consent under EU law is not a procedural technicality. As a result, the Tribunal had no jurisdiction and was not fully constituted from the outset. Being non-existent, the Tribunal had no power to cure its own lack of jurisdiction subsequently.[112]

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109 JCBA Volume XXXIV at TAB 242.

110 See JCBA Volume XXIII at TAB 117: *Philip Morris Brand SARL v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013).

111 DWS paras at 301–313 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, ICJ Reports 2008, 18 November 2008), 307–308 and 310 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia), Preliminary Objections*, Judgment, ICJ Reports 1996, 11 July 1996).

112 CWS at paras 167–171.

63 It bears noting that any jurisdictional objection relating to an Intra-EU Dispute would have been removed for any arbitration proceedings commenced by the UK Investors after 1 January 2021. A setting aside of the ECT Award in satisfaction of the State's Application would not be an obstacle for the UK Investors to resubmit their claims. Indeed, there would be no need for the UK Investors to conclude another arbitration agreement with the State after that date[113] when according to the terms of Art 26(3) of the ECT, an unconditional consent to arbitrate was already offered. The *Mavrommatis* doctrine is wholly appropriate in these circumstances. Commencing proceedings anew on a basis which already existed on 1 January 2021 would be the kind of inefficient approach to international jurisdiction which the PCIJ wished to avoid already a century ago.

Jurisdictional Objection 2: the Subject-Matter Objection

64 The State contends that the Tribunal did not have jurisdiction because the UK Investors did not have a protected "Investment" under Art 1(6) of the ECT; they were therefore not "Investors" under the ECT.

65 The following issues arise:[114]

(a) What criteria are applicable in determining whether an asset qualifies as a protected "Investment"?

(b) Do the UK Investors' alleged investments relating to the Project qualify as protected "Investments" under the applicable criteria?

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113 CWS at para 170(b).

114 DWS at para 40.

The definition of an "Investment" under the ECT

66 The ECT defines "Investment" as follows in Art 1(6):

> (6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor
>
> and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
>
> "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

67 Articles 1(7) and (8) of the ECT contains definitions of "Investor", and "Make Investments" or "Making of Investments":

> (7) "Investor" means:

> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
>
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
>
> (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.
>
> (8) "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.

68 The interpretation of Art 1(6) of the ECT is also informed by the following Understanding with respect to Art 1(6) of the ECT (which was agreed to in the Final Act of the European Energy Charter Conference), which the Tribunal cited at para 475 of the ECT Award:

> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
>
> (a) financial interest, including equity interest, in the Investment;
>
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
>
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
>
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

69 The Tribunal found that the UK Investors' direct and indirect shareholdings in the Project Company were Investments under the ECT. In

particular, Art 1(6) of the ECT defines "Investment" to mean "every kind of asset, owned or controlled directly or indirectly by an Investor" and expressly includes shares in a company.

70 The State's case, however, is that not only must an "Investment" satisfy the definition of "Investment" on the face of the ECT provisions, but it must also satisfy the "*Salini* criteria" (from *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001),[115] interpreting the term "investment" in Art 25 of the ICSID Convention).[116] The UK Investors disagree with that.

Whether the Salini criteria need to be satisfied

71 The *Salini* criteria as advanced by the State are: (a) a contribution of money or assets, (b) the assumption of risk, (c) a certain duration, and (d) a contribution to the host State's economic development or, at least, an economic venture in the host state.[117]

72 We agree with the Tribunal's decision that the UK Investors' direct and indirect shareholdings in the Project Company are Investments under the ECT, and that the UK Investors are thus Investors under the ECT. An investment that satisfies the ECT definition of "Investment" does not need also to satisfy the *Salini* criteria, which originated from an interpretation of the term "investment" in the ICSID Convention (a treaty which has no definition of "investment", unlike the ECT).

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115 Claimant's Supplementary Bundle of Authorities Volume 6 at TAB 32.

116 CWS at para 173.

117 CWS at para 173.

73 The ECT defines “Investment" as “every kind of asset” and adds a non-exhaustive list of examples. Article 1(6) of the ECT sets out no particular criteria for an objective definition of an “investment” such as the one proposed by the *Salini* tribunal within the context of Art 25(1) of the ICSID Convention. The issue of the ICSID’s jurisdiction under the ECT could not be made dependent on the conditions laid out in investment treaties. The ordinary meaning of the terms of Art 1(6) of the ECT in their context and in light of their object and purpose carry their own definition of “investment” which requires no other criteria for their interpretation. There is no obligation for the UK Investors’ investments to qualify as investments beyond the requirements of the ECT or,in particular, under conditions applicable to investment treaties under the ICSID Convention. There was thus no necessity for the Tribunal to establish other characteristics of an investment applicable to the ECT. The lack, otherwise, of a unanimous definition of an investment is amply demonstrated by the cases referred to by the parties in support of their respective positions.

74 In *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263, where the investment satisfied the definition of an “investment “ in the relevant treaty, the Court of Appeal did not require the *Salini* criteria also to be satisfied, for the investment to be a protected investment. It was sufficient that the investment satisfied the treaty definition of “investment” and had a territorial nexus with the host state (such a territorial nexus not being in issue in the present case): at [93], [98]–[103], [109].

75 This was also the approach taken in the English case of *The Republic of Korea v Mohammad Reza Dayyani* [2019] EWHC 3580 (Comm), where the BIT had a definition of “investment” similar to that in the ECT. At [58] of the judgment, Butcher J rejected the argument that in addition to satisfying the

treaty definition of "investment", the purported investment also had to have certain objective characteristics (such as those in the *Salini* criteria).

76 The UK Direct Holding Company directly owned 72% of the shares in the Project Company. The Project Company was thus directly majority-owned by the UK Direct Holding company, and the Project Company was directly controlled by the UK Direct Holding company. The UK Direct Holding Company's direct ownership of shares in respect of the Project Company falls squarely within the ECT's definition of "Investment". The definition of "Investment" in Art 1 of the ECT expressly includes: "a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise" (Art 1(6)(b)), "owned or controlled directly or indirectly by an Investor" (Art 1(6)).

77 The State contended that notwithstanding the UK Direct Holding Company's direct majority shareholding in the Project Company, it did not control the Project Company; the only company in the group that controlled the Project Company was the State X Ultimate Parent Company (which had not brought an investor-state claim).[118] This is unsound: through its majority shareholding, the UK Direct Holding Company directly controlled the Project Company. This in turn gave the UK Indirect Holding Company, the State X Holding Company, and the State X Ultimate Parent Company, indirect control over the Project Company. In any event, the UK Direct Holding Company's direct majority ownership of the Project Company satisfies the ECT definition of "Investment", irrespective of the issue of control.

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118 CWS at para 241.

78 As for the UK Indirect Holding Company, it wholly owned the UK Direct Holding Company and thus had indirect ownership and/or control over the Project Company (through the UK Direct Holding Company's majority shareholding in the Project Company). The UK Indirect Holding Company's indirect ownership and/or control of the Project Company satisfied the ECT definition of "Investment" (see [75] above).

79 On the terms of the ECT, the UK Investors were "Investors" with a protected "Investment". That is sufficient to decide this issue, without the *Salini* criteria also having to be satisfied.

80 *Ex abundante cautela*, the Tribunal also considered if the *Salini* criteria were satisfied, and concluded that they were. We respectfully agree.

81 Before us, the State pressed the contention that the UK Investors had not proved that they had paid for the UK Direct Holding Company's 72% shareholding in the Project Company. Specifically, although it appeared that payment had been made, the documents indicated that this was ultimately funded by the State X Holding Company.[119]

82 The State contended that (a) the evidence in the arbitration did not prove that the UK Investors had paid for their shareholding; (b) what the UK Investors sought to put forward as further evidence in these proceedings should not be admitted; and (c) even if further evidence were admitted, it does not prove such payment.

83 We first make a preliminary observation that the ECT definition of "Investment" does not, on its terms, require that the party that owns or controls

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[119] CWS at para 228.

an investment must *itself* have paid for the investment, for that party to be an Investor with an Investment protected by the ECT. If that were required, then in the scenario where one company paid for an investment, but the investment were held in the name of a related company, the relevant State could seek to deny both companies investor protection under the ECT on the basis that the first company did not own the investment, whereas the second company had not paid for it. This would run counter to the investment protection scheme of the ECT. Moreover, the Art 1(8) definition of "Make Investments" or "Making of Investments" expressly includes not only “establishing new Investments”, but also “acquiring all or part of existing Investments”: an “Investor” within the ECT can thus make a protected “Investment’ by acquiring an existing Investment from another party.

84 In any event, the Tribunal found (at para 484 of the ECT Award) that there was sufficient evidence that the UK Direct Holding Company had paid for its direct shareholding in the Project Company. The Tribunal accepted the UK Investors’ witness’ evidence that all the relevant payments for that shareholding in the Project Company would have been made, otherwise concerns would have been raised at the audit phase.

85 After the hearing, the UK Investors stated in their Post-Hearing Brief that they were prepared to adduce further evidence of payment if the Tribunal considered it necessary; in the event, the Tribunal accepted that the payment had been made, without the further evidence that had been offered. This is not a case where the further evidence was only being offered to the court at the setting-aside stage.

86 Having regard to the broad principles of relevance, reason for prior non-admission, and credibility (*Sanum Investments Ltd v Government of the Lao*

People's Democratic Republic [2016] 5 SLR 536 at [102]–[103]), we admit as further evidence what the UK Investors put forward in these proceedings to prove payment. The State had the opportunity to, but did not, apply to cross-examine the maker of the witness statement introducing the further evidence (who was the witness whose evidence of payment the Tribunal had accepted).

87 We are satisfied that the new evidence reinforces the evidence given in the ECT Arbitration that the UK Direct Holding Company had paid for its shares in the Project Company.

88 The State contended that the documents show that on the same day that the UK Investors paid for the shares, there was an intercompany payment of the same sum from the State X Holding Company. The State conceded that if the documents were accepted as authentic (which we accept them to be), they show that monies had been paid, but the State contended that even if monies had to be paid, *who* paid was a relevant consideration: the contention was that as the payment was ultimately funded by the State X Holding Company, the UK Investors had not paid for the shares.

89 The State conceded that if money were borrowed by an investor from a bank to pay for an investment, that did not mean that *the investor* had not paid for the investment; but funding by a related company (particularly one higher in the corporate structure) should be viewed differently. We reject that contention. Whether money is borrowed from a bank, or from a related company, in the hands of the investor who uses that money to pay for an investment, the money is that of the investor.

90 As for the State's contention that the amount paid was not sufficient for an "Investment" under the ECT, we reject this, as the Tribunal did (at para 485

of the ECT Award). As the Tribunal noted, the ECT does not impose any particular monetary threshold for the value of shares for inclusion within the definition of "investment".

91 We thus uphold the Tribunal's finding that the UK Investors' direct and indirect shareholdings in the Project Company were Investments under the ECT, and that they were thus Investors under the ECT.

92 That finding is sufficient to ground the Tribunal's subject matter jurisdiction and the award of damages in the ECT Arbitration.

93 A majority of the Tribunal ("Majority Arbitrators") also found that various Project assets within the State could be regarded as Investments of the UK Investors. We respectfully agree. The ECT definition of "Investment" covers not only ownership but also control: "Investment" is defined to mean "every kind of asset, owned or controlled directly or indirectly by an Investor". We agree with the Majority Arbitrators that the concept of control is not limited to companies, but also applies to other assets. Of course, if an Investor is regarded as having an Investment in a company, as well as assets of that company, it must not thereby receive double recovery – but that did not happen in the present case. The UK Investors received one award of damages in the ECT Arbitration based on the Tribunal's assessment of the value of the Project: they did not receive two awards – one in respect of their shareholdings in the Project Company, and another in respect of the Project assets.

94 We thus dismiss the Subject-Matter Objection.

Jurisdictional Objection 3: the Fork-in-the-Road Objection

The State's case on the Fork-in-the-Road Objection

95 The State contended that pursuant to the "fork-in-the-road" provision in Art 26(2) and (3) of the ECT read with Annex ID of the ECT, the State had expressly withheld its consent to arbitrate disputes which had already been submitted for resolution "in accordance with any applicable, previously agreed dispute settlement procedure".[120]

96 For the text of Art 26 of the ECT, see [12] above.

97 The State's fork-in-the-road objection was as follows:[121]

(a) the UK Investors commenced the ECT Arbitration on 8 November 2020;

(b) a day earlier, the State X Holding Company had commenced the BIT Arbitration;

(c) the State thus contended that for the purposes of Art 26(3)(b)(i), "the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)", specifically "in accordance with any applicable, previously agreed dispute settlement procedure" within Art 26(2)(b); and so the State had not consented to the ECT Arbitration.

98 The Tribunal rejected the State's "fork-in-the-road" objection; however, the reasoning of the Majority Arbitrators and the minority of the Tribunal ("Minority Arbitrator") differed, as elaborated upon below.

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120 CWS at para 251.

121 CWS at para 259.

99 We start with the wording of Art 26(2) and (3). Pursuant to Art 26(3)(b)(i) read with 26(2)(b), the State did not consent to arbitration "where the Investor has previously submitted the dispute" "in accordance with any applicable, previously agreed dispute settlement procedure".

100 That may be analysed as follows:

(a) had "the Investor"

(b) previously submitted "the dispute"

(c) in accordance with an "applicable, previously agreed dispute settlement procedure"?

101 Article 26(1) provides that disputes between a Contracting Party (here, the State) and an Investor of another Contracting Party (here, the UK Investors) relating to an Investment of the latter in the Area of the former (defined in Art 1(1) as the territory under its sovereignty) which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

102 Article 26(2) goes on to say that if such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution, *inter alia*, to investor-state arbitration pursuant to Art 26(2)(c) read with Art 26(3).

103 The "Investor" mentioned in Art 26(2) is the same "Investor" mentioned in Art 26(2), *ie*, the one which had a dispute with the respondent state under Art 26(2) which could not be settled amicably within three months.

104 Article 26(3)(b) then provides that the states listed in Annex ID do not consent to investor-state arbitration "where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)", *ie*, to the courts or administrative tribunals of the respondent state (under subparagraph (2)(a), or in accordance with any applicable, previously agreed dispute settlement procedure (under subparagraph (2)(b)).

105 On the terms of Art 26(1), (2), and (3), "the Investor" mentioned in Art 26(3)(b) would be the same Investor mentioned in Art 26(1) and (2). That is what the UK Investors contended for, and the Tribunal accepted.

106 The State, however, contended that "the Investor" in Art 26(3)(b) referred to *any* Investor which had the same dispute with the respondent state.[122] This would mean, *eg*, that if there were 100 investors affected by a particular state measure that they were dissatisfied with, and one such investor submitted its dispute with the respondent state to resolution under Art 26(2)(a) or (b), then none of the 99 other investors could thereafter pursue investor-state arbitration under Art 26(2)(c) read with Art 26(3). We do not accept this.

107 Article 26(2) and Art (3)(b) use the phrase "*the* Investor", not "*an* Investor" (which would encompass "*another* Investor"). The language of Art 26(2)and (3)(b) cannot support the State's contention that "the Investor" in Art 26(3)(b) includes "another Investor". Indeed, interpreting "the Investor" in Art 26(3)(b) as "another Investor" would contradict the meaning of Art 26(3)(b).

108 The fork-in-the-road objection applies where "the Investor" in question has earlier submitted the dispute to the courts or administrative tribunals of the

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122 CWS at para 287.

respondent state (under Art 26(2)(a), or in accordance with any applicable, previously agreed dispute settlement procedure (under subparagraph Art 26(2)(b)); it does not apply where "another Investor" has done so.

109 The State cited the definition of "Investor" in Art 1 of the ECT (see [67] above) to contend that "Investor" could mean "a company incorporated in a third state"[123] (here, the State X Holding Company, which was incorporated in a third state, *ie*, a state which was not a Contracting Party to the ECT).

110 Article 1 of the ECT does indeed define what "Investor" means "with respect to a Contracting Party" and "with respect to a "third state"". That does not, however, mean that wherever the term "Investor" appears, it means "Investor, whether of a Contracting Party or a third state". Nor does it mean that the term "*the* Investor" means "*an* Investor", "*any* Investor" or "*another* Investor".

111 The ECT does have references to "Investor" "with respect to a "third state"", *eg*, in Art 10.

112 Article 26, however, does not relate to third state Investors. Article 26(1) only refers to disputes between an Investor of a Contracting Party, and another Contracting Party, *ie*, the respondent state.

113 As explained above, it is that Investor, not any other Investor, who is entitled to submit the dispute for resolution in one of the ways set out in Art 26(2), and, for the purposes of the fork-in-the-road objection, it is only if "the Investor" (not another Investor, and certainly not a third state Investor) has

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123 CWS at para 267.

earlier submitted the dispute to resolution under Art 26(2)(a) or (b), that "the Investor" loses the right to submit the dispute to investor-state arbitration.

114 Indeed, a third state Investor cannot submit a dispute for resolution under the ECT, for the third state is not a party to the ECT.

115 The Tribunal was unanimous in holding that the UK Investors (as Investors of a Contracting Party – the UK), and not the State X Holding Company (an Investor of a third state) were "the Investor(s)" under Art 26(3) for the purposes of the fork-in-the-road objection.

116 The Majority Arbitrators applied the Triple Identity Test (elaborated upon below), the Minority Arbitrator applied the Fundamental Basis Test, but they were agreed that, for the fork-in-the-road objection, there had to be an identity of parties between "the Investor" who commenced investor-state arbitration (under Art 26(2)(c) read with Art 26(3)), and "the Investor" who had earlier submitted the dispute to resolution "in accordance with any applicable, previously agreed dispute settlement procedure" (under Art 26(2)(c)).

117 This is sufficient to dispose of the fork-in-the-road objection: the investor which had commenced the BIT Arbitration was not the same investor(s) that had commenced the ECT Arbitration.

118 The Tribunal nevertheless proceeded to also consider whether the same dispute had been submitted both to the BIT Arbitration and the ECT Arbitration.

Whether "the Investor" has previously submitted "the dispute" in accordance with any "applicable, previously agreed dispute settlement procedure"

119 The Majority Arbitrators held that the Triple Identity Test needs to be met, *ie*, the two proceedings must have (a) the same parties, (b) the same cause of action, and (c) the same object. The UK Investors cited several decisions of ECT arbitral tribunals, all of which applied the Triple Identity Test to Art 26 of the ECT.[124]

120 The State contends that the Fundamental Basis Test is to be applied, and that applying that test to the fork-in-the-road objection is a good one.[125] The State contends that it is sufficient that the two disputes have the same fundamental basis, *ie*, the same subject matter: see paras 383 and 407 of the ECT Award.

121 We agree with the Tribunal's decision that the fork-in-the-road objection fails. We prefer the Triple Identity Test as applied by the Majority Arbitrators: the dispute in the ECT Arbitration is not the same dispute as that in the BIT Arbitration, for the ECT Arbitration concerns allegations of breach of Arts 10 and 13 of the ECT (which the Tribunal found were made out), whereas the BIT Arbitration concerns allegations of breach of the BIT between State X and the State (and moreover State X was not a party to the ECT).

122 If, however, the Fundamental Basis Test were the applicable one, we agree with the Minority Arbitrator's conclusion that the fork-in-the-road objection fails nevertheless, as there was no identity of parties. The Minority Arbitrator considered that the fork-in-the road objection would apply to an

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124 DWS at para 403 and footnotes 363 and 364.

125 CWS at para 262.

investor bringing two different cases before two different fora, but it would have to be the *same* investor, which was not the case here: para 407 of the ECT Award.

123 We note that the State appears to take contradictory positions, in that here the State says that the BIT Arbitration had been submitted "in accordance with any applicable, previously agreed dispute settlement procedure", whereas the State disputed the jurisdiction of the BIT Tribunal on the basis that the arbitration agreement in the BIT was inapplicable (BIT Award at paras 447–451),[126] and the State is in English proceedings presently seeking to set aside the BIT Award for such lack of jurisdiction. This is, however, simply an observation; we do not rest our decision on it.

Public Policy

124 The State contends that the ECT Award should be set aside as it is contrary to the public policy of Singapore, pursuant to Art 34(2)(b)(ii) of the Model Law:[127]

(a) Singapore should not uphold the ECT Award, which governs the subjects of a foreign legal community but violates the fundamental norms of that legal community – the ECT Award violates the autonomy of EU law, which is part of the fundamental constitutional norms of the EU applicable to the parties at the material time.

(b) If the ECT Award were upheld, it would place the State in the extremely unfair and prejudicial position of having to breach EU law

126 JCBD (1) at TAB 2.

127 CWS at para 296.

and expose it to infringement proceedings and significant sanctions by the EC.

(c) It would be a breach of international comity to uphold the ECT Award, given that the CJEU, the "final arbiter" of the application and interpretation of EU law, has unequivocally found that intra-EU arbitration agreements such as that underlying the ECT Award are invalid.

125 The "public policy" objection under Art 32(2)(ii) of the Model Law is a narrow one, applying where upholding an award would "shock the conscience", "violate the forum's most basic notions of morality and justice", be "clearly injurious to the public good", or be "wholly offensive to the ordinary reasonable and fully informed member of the public": *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]; *CHY v CIA* [2022] 4 SLR 218 ("*CHY*") at [69]–[72].

126 On the first of the State's contentions, the mere fact that the ECT Award (or, more broadly, intra-EU arbitrations under the ECT) might be contrary to EU law or EU public policy does not mean that upholding the ECT Award would be contrary to *Singapore's* public policy. The court in *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2025] 3 SLR 209 ("*Sacofa*") noted at [55] that in *CBX v CBZ* [2020] 5 SLR 184 ("*CBX*"), although the order of compound interest in the award contravened Thai mandatory law and was thus "against public order and good morals" as a matter of Thai law, the SICC held that the award was not contrary to Singapore public policy as it did not involve "palpable and indisputable illegality" – it did not involve conduct of an obviously criminal nature or an "illicit enterprise": see also *CHY* at [74].

127 On the third of the State's contentions, its invocation of "international comity" does not advance its case. Citing *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22, the SICC in *CHY* stated at [75]: "Nor does maintaining international comity mean that, absent the type of criminal activity such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice or would 'shock the conscience', public policy should be engaged".

128 Likewise, it does not advance the State's case to characterise the autonomy of EU law as being part of the "fundamental constitutional norms" of the EU, with the CJEU being the "final arbiter" of the application and interpretation of EU law. It is not contrary to Singapore's public policy to uphold an award that is contrary to EU law (including contrary to decisions of the CJEU) or EU public policy (however important that might be to the EU), unless there is a contravention of Singapore's public policy in the manner consistently recognised in the authorities, *ie*, upholding the ECT Award would shock the conscience, be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed members of the public, and/or violate the most basic notions of morality and justice. We do not find that to be the case.

129 As noted above at [126], the fact that an award may be contrary to a foreign law does not in itself make upholding the award contrary to Singapore's public policy. Indeed, the fact that an award may contain errors of *Singapore* law is not in itself a ground for setting aside the award: *Swire Shipping Pte Ltd v Ace Exim* [2024] 5 SLR 706 ("*Swire Shipping*") at [73]; *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [21].

130 It is evident that the CJEU has a different perspective on arbitrations that involve EU law – to the extent that those are intra-EU arbitrations, the CJEU considers those to be invalid, in that arbitral tribunals outside the EU court system are determining EU law issues, without the avenue of referring such issues to the CJEU. Singapore, on the other hand, accepts the validity of arbitral tribunals outside the Singapore court system determining Singapore law issues, without the avenue of such issues being referred to the Singapore courts, without an appeal process for the correction of errors of law by those tribunals, and with such errors of law not being a sufficient basis to set aside arbitral awards.

131 From the Singapore perspective, for an arbitral tribunal to be determining issues of law without recourse to judicial determination does not shock the conscience, it is not clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed members of the public, and it does not violate the most basic notions of morality and justice.

132 The parties made further submissions on the recent case of *Mercuria Energy Group Limited v Republic of Poland* Case No.1:23-cv-03572 (TNM)[128] ("*Mercuria*"),[129] where the United States District Court for the District of Columbia ("USDC") declined to enforce an award that had been annulled by the Svea Court of Appeal ("SCA") based on the Intra-EU Objection. The USDC itself did not, however, decide on whether the Intra-EU Objection deprived the tribunal of jurisdiction.

133 The USDC noted that, pursuant to Art V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330

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128 Enclosed in the letter from WongPartnership LLP to the court dated 10 September 2025.

129 See CFS and Defendants' Further Submissions dated 26 September 2025.

UNTS 38 (entered into force 7 June 1959) ("New York Convention"), the enforcing court may refuse enforcement of an award which "has been set aside by a competent authority of the country in which, or under the law of which, that award was made" (at p 8). The issue was thus not whether the USDC agreed with the Intra-EU Objection, but whether the foreign judgment annulling the award was "repugnant to fundamental notions of what is decent and just", a standard which is "high, and infrequently met" (at p 9).

134 The USDC did not consider whether the SCA's application of *Komstroy* to annul the award was *correct* or not, for "[e]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention" (at p 10, citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004)). In the event, the USDC found that the SCA's decision to invalidate the award was not contrary to American public policy, and so it denied enforcement of the award.

135 *Mercuria* does not assist the State. The SICC is not considering the enforcement of an award that has been set aside by the seat court. Rather, the SICC as the seat court has considered whether to set aside the award based on the Intra-EU Objection, and decided not to do so.

136 Returning to the issue of public policy, for the reasons stated above (at [124]–[131]) it is not contrary to *Singapore's* public policy to enforce an award that might be regarded by the CJEU, or by a EU court or tribunal applying EU law, to be contrary to EU law.

137 On the State's second objection, the State contends that upholding the ECT Award would generate contradictory obligations on its part: on the one

hand, it would have to pay the UK Investors the sums under the ECT Award; on the other hand, complying with the ECT Award would place it in breach of EU law.[130]

138 The UK Investors point out that the State could avoid such a situation by satisfying the BIT Award – on the terms of the ECT Award, that would extinguish the State's liability under the ECT Award.[131] However, the State is presently challenging the BIT Award. As things stand, we do not rely on the possibility of the State satisfying the BIT Award, as an answer to the State's second objection.

139 We nevertheless do not accept this objection. Any contradictory obligations the State now faces, are a function of the State entering into the relevant treaties: the ECT and the EU Treaties. It is not contrary to Singapore's public policy to uphold an award merely because the award debtor would then face contradictory obligations arising from commitments the debtor had entered into. It is not for the Singapore court to relieve the State of the consequences that may flow from the treaty obligations the State has entered into.

140 Moreover, we are not satisfied that the State does face the risk of infringement proceedings by the EU if it satisfies the ECT Award. *European Food SA v European Commission*, CJEU Cases C-T-624/15 RENV, C-T-695/15 RENV and C-T-704/15 RENV, ECLI:EU:T:2024:659,[132] concerned the issue of whether compensation for the withdrawal of subsidies would amount to state aid contrary to EU law – the ECT Award in the present case does not

130 CWS at para 306.

131 DWS at para 479.

132 JCBA (33) at TAB 213.

concern the withdrawal of subsidies. Further, the State has not pointed to any infringement proceedings brought by the EC against a state for merely complying with an intra-EU Investor-State award, whereas the UK Investors had in the ECT Arbitration identified cases in which states had complied with such awards, or voluntarily settled Intra-EU Disputes, without any such infringement proceedings.[133]

Breach of Natural Justice

141 Under this head of claim, the State contends that the ECT Award should be set aside because the Tribunal made certain errors when calculating the damages due to the UK Investors and did so without seeking the parties' input on the appropriate calculation methodology or inviting the parties to submit updated valuation models and sensitivity analyses. On that basis the State contends that it was unable to present its case within the meaning of Art 34(2)(a)(ii) of the Model Law, read with s 3(1) of the IAA and/or that there was a breach of the rules of natural justice in rendering the ECT Award, specifically the right for the State to be heard or to present its case and therefore the State's rights had been prejudiced within the meaning of s 24(*b*) of the IAA.[134]

142 The State says that the Tribunal determined the quantum of damages in the ECT Award by making its own adjustments to an outdated and therefore inaccurate Excel spreadsheet containing a sensitivity analysis referred to as "BR-218". That spreadsheet had been prepared by the State's quantum expert in the ECT Arbitration, The Brattle Group ("Brattle"), as part of its first expert

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133 JCBD Volume V at TAB 27: Statement of Reply (Text Only) at para 1021 and footnote 1866.

134 CWS at para 324.

report. Brattle's first report was submitted in response to the first report by the UK Investors' quantum expert ("Secretariat"). Secretariat's first report included a discounted cash-flow ("DCF") valuation model of the Project, which valued 100% of the Project at US$845 million as of 31 December 2019. Brattle's first report raised criticisms of the pricing assumptions in Secretariat's First Report and it was in that context that Brattle produced its own version of Secretariat's DCF valuation model, BR-218, which allowed changes to be made to various pricing assumptions and inputs, so as to show the consequent impact of such changes on Secretariat's DCF valuation. BR-218 was therefore intended to provide the Tribunal with a model which showed the impact of each potential change to Secretariat's pricing assumptions individually, as well as their cumulative impact on Secretariat's DCF valuation.

143 The screenshot of the "Control Panel" of BR-218, set out below, allowed the user to adjust the different pricing assumptions numbered [1] to [10].

Table B1: Control Panel to Modify Versant's [redacted] DCF Model

		Brattle	Versant
[1]	Exchange Rate	Forwards	Forwards
[2]	Adjust [redacted] for inclusion of VAT?	No	No
[3]	Adjust [redacted] prices to BEIS and WEO sustainable scenario?	No	No
[4]	Adjust for forecasted [redacted] exports?	No	No
[5]	Adjust for [redacted] demand reduction?	No	No
[6]	[redacted] Discount	80%	80%
[7]	Proportion of [redacted] exports sold into [redacted]	0%	0%
[8]	Proportion of [redacted] sold into [redacted] (versus domestic markets)	57%	57%
[9]	Initial CapEx Discount Rate	Project Discount Rate	Project Discount Rate
[10]	Discount Rate	10.5%	10.5%
	Value of [redacted] (USD)	845,427,215	845,427,215
	Difference (USD)	-	
	Difference (%)	0%	

Notes:
Tabs modified by Brattle are colored in blue. Directly-modified cells indicated by blue shading.
Switch [7] models different scenarios associated with switch [4] and therefore has no independent effect when switch [4] is not applied.

144 The "Versant" column had the pricing assumptions made by Secretariat. In the "Brattle" column it was possible to alter the pricing assumptions by, for instance, inserting "Yes" instead of "No" in item [2] which would change the

pricing assumption as to whether there was an adjustment for inclusion of VAT. By way of illustration, the screenshot of the Control Panel of BR-218 with "Yes" instead of "No" for that assumption led to a 4% reduction in the value of Secretariat's original DCF valuation model from US$845 million to US$811 million, as set out below:

Table B1: Control Panel to Modify Versant's [redacted] DCF Model

		Brattle	Versant
[1]	Exchange Rate	Forwards	Forwards
[2]	Adjust [redacted] for inclusion of VAT?	Yes	No
[3]	Adjust [redacted] prices to BEIS and WEO sustainable scenario?	No	No
[4]	Adjust for forecasted [redacted] exports?	No	No
[5]	Adjust for [redacted] demand reduction?	No	No
[6]	[redacted] Discount	80%	80%
[7]	Proportion of [redacted] exports sold into [redacted]	0%	0%
[8]	Proportion of [redacted] sold into [redacted] (versus domestic markets)	57%	57%
[9]	Initial CapEx Discount Rate	Project Discount Rate	Project Discount Rate
[10]	Discount Rate	10.5%	10.5%
	Value of [redacted] (USD)	811,065,759	845,427,215
	Difference (USD)	**(34,361,456)**	
	Difference (%)	**-4%**	

Notes:
Tabs modified by Brattle are colored in blue. Directly-modified cells indicated by blue shading.
Switch [7] models different scenarios associated with switch [4] and therefore has no independent effect when switch [4] is not applied.

145 In response to Brattle's first report and BR-218, Secretariat accepted some criticisms raised by Brattle and updated its DCF valuation, resulting in a reduced DCF valuation of US$727 million for 100% of the Project as of 31 December 2019. Brattle then submitted a second expert report which raised criticisms of Secretariat's updated DCF valuation but did not include a further sensitivity analysis, like BR-218, based on that updated DCF valuation. No further reports or Excel spreadsheets were submitted by the parties after that although, at the hearing of the ECT Arbitration, Secretariat accepted a correction to the capital costs and updated its DCF valuation reducing it from US$727 million to US$719 million.

146 In the ECT Award at section VII the Tribunal dealt with quantum. After dealing with some preliminary matters, at para 1210 the Tribunal turned to the application of the DCF method to the Project. At para 1211 the Tribunal noted that, whilst Secretariat submitted a DCF calculation which it updated, Brattle did not produce an alternative DCF calculation but criticised assumptions in Secretariat's DCF valuation model. The Tribunal then concluded in para 1212 that Secretariat's DCF model was a "reliable and robust calculation" on which the Tribunal could quantify the UK Investors' losses with reasonable confidence. However the Tribunal also found that some of the points of criticism raised by Brattle were justified so as to warrant modifications to Secretariat's DCF calculation.

147 The Tribunal then considered the assumptions made by Secretariat which had been criticised by Brattle. At paras 1213–1216 of the ECT Award the Tribunal considered Brattle's alleged sources of overstatement and found that Secretariat's assumptions were realistic. Similarly at paras 1217–1220, the Tribunal considered Brattle's criticism of the mix of products assumed by Secretariat and found Secretariat's assumptions to be reliable. In relation to capital costs, Brattle proposed adjustments which the Tribunal considered at paras 1221–1223 and, apart from the reduction in the DCF valuation to US$719 million accepted by Secretariat at the hearing, found that no further adjustment was necessary. Similarly at paras 1224–1227 the Tribunal considered operating costs at paras 1228–1230 and decided that no adjustment was necessary.

148 The Tribunal then considered pricing at paras 1231–1247:

(a) At para 1231, the Tribunal considered the impact of lower export prices for one market and another market. The Tribunal said at para 1234 that Brattle's price sensitivity analysis on this aspect showed that

"exports to the [first] market reduce the value of the [Project] by approximately 3.09% whereas exports to the [other] market decrease the project value by approximately 1.02%." It then concluded at para 1235 that:

> Assuming that the [Project output] to be exported would have been split evenly across [the two] markets, the Tribunal considers it appropriate to apply a discount of 2.06% (which is the median of the two values) to the DCF value of the [Project].

(b) At paras 1236–1238, the Tribunal considered the impact of new climate change policies on prices and agreed with Brattle that this represented a considerable uncertainty and said at para 1238:

> Building on Brattle's sensitivity analysis, the Tribunal considers it reasonable to apply a discount of 5.47% (which represents approximately 75% of the price impact calculated by Brattle when applying the "Sustainable Development" scenario) to the DCF value of the [Project] to reflect that risk.

(c) At paras 1239–1245, the Tribunal dealt with a particular product and noted that Brattle's sensitivity analysis showed that "selling 100% of [the product] to [one] market would reduce the DCF value by approximately 14.68% (applying the adjusted discount rate discussed below)." At para 1245 it concluded:

> While at least some of the [Project output] might have been sold on the [State] domestic market and the netback prices for regional markets would have likely been higher than for [one] market, the Tribunal considers that a discount of 7.34% on the DCF value of the [Project] is warranted to account for the risk that the [product] produced at [the Project] would have had to be exported, resulting in lower netback prices.

(d) In terms of product prices, the Tribunal dealt with this at paras 1246–1247 and concluded at para 1247 that:

> Brattle's price sensitivity analysis showed an impact on [the Project's] DCF value of approximately 1.46% (when using the adjusted discount rate discussed below). To account for the risk of declining [product] demand, the Tribunal considers it appropriate to apply an additional discount of 0.73% to the DCF value of the [Project].

149 At paras 1248–1252, the Tribunal dealt with the particular tariff discounts and concluded that:

> 1251. … In the Tribunal's view, the assumption of a 72% discount made by Brattle in its sensitivity analysis is more realistic and reduces the DCF value of the [Project] by 3.87% (based on the adjusted discount rate discussed below).
>
> 1252. The Tribunal therefore considers that a discount of 3.87% to the DCF value of the [Project] is justified to account for the uncertainty regarding [the particular] tariff discounts.

150 No adjustment was made by the Tribunal at paras 1253–1255 for systematic risk but at paras 1256–1261 for project-specific risk the Tribunal concluded that:

> In light of this, the Tribunal considers that the residual, unquantified uncertainties in the present case justify a project-specific premium at the upper end of the range suggested by Brattle. In its quantification of the [UK Investors'] losses, the Tribunal has therefore applied a project-specific risk premium of 5.7% and thus a discount rate of **13.2%**.
>
> [emphasis in original]

151 The Tribunal's overall conclusion at para 1262 was then expressed as follows:

> Applying the above-mentioned adjustments to Secretariat's DCF model,[135] the Tribunal arrives at the following valuation of the [Project]:

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[135] The Tribunal referred to the relevant DCF model as being "Appendix 6.1 to Second Secretariat Report, 15 July 2022. For the avoidance of doubt, the Tribunal has incorporated the modifications suggested in the Second Brattle Expert Report, 26 October 2022, footnote 251 and accepted by Secretariat at the Hearing."

	Amount
2016 [Project] PFS, as adjusted by AMC and applying the modified discount rate (USD)	330,209,891
Additional [Project] life, as adjusted by AMC and applying the modified discount rate (minus 50% discount) (USD)	23,683,975
Minus discount (19.47%) based on Brattle's sensitivity analysis	- 68,903,136
Value of [Project] (USD)	284,990,730
USD:GBP FX Rate (December 2019)	0.763496
31 December 2019 Value of [Project] (GBP)	217,589,282
[UK Investors'] share	72.44%
[UK Investors'] share of [Project] Value (31 December 2019) (GBP)	157,621,676
Sale of [Project] and receivables (May 2021) (PLN)	50,000
PLN:GBP FX Rate (May 2021)	0.190350
Sale of [Project] and receivables (May 2021) (GBP)	- 9,518
Damages in relation to [Project] (GBP)	**157,612,158**

152 The area which is challenged in these proceedings is the third line of that table: "Minus discount (19.47%) based on Brattle's sensitivity analysis". That figure of 19.47% is made up as follows, as described above:

Award paragraph	**Adjustment**	**Tribunal's percentage**
1235	[Particular] sales into [one market] (50%) and [another market] (50%)	2.06
1238	75% of Sustainable Development Scenario	5.47
1247	{Particular] Demand Reduction of 30% by 2040	0.73

1252	[Particular] Tariff Discount 72%	3.87
1245	Risk of 50% of [product]being exported	7.34
	Total	19.47

153 The State submits that the Tribunal made these percentage adjustments and the overall percentage adjustment without seeking the parties' input on the appropriate calculation methodology or inviting the parties to submit updated valuation models and sensitivity analyses. As a result, the State contends that because of the Tribunal's failure to consult the parties when making adjustments to BR-218, the Tribunal made certain errors when calculating the damages due to the UK Investors which were inconsistent with the Tribunal's own reasoning and findings. These errors, the State submits, led the Tribunal to overstate the amount of damages awarded to the UK Investors by US$102,119,266, thereby causing it serious prejudice.

154 This overstatement of the damages arose, the State submits, from two computational errors in the Tribunal's calculation of the 19.47% discount rate. First, the individual adjustments are derived from Secretariat's original DCF valuation on which BR-218 was based but are then applied to the lower updated DCF valuation based on the higher discount rate of 13.2% and the further 50% discount rate to the Inferred Resources. The State submits that the resulting value did not accurately reflect the impact that the Tribunal was attempting or intended to quantify. Secondly, by simply adding up the individual adjustments rather than implementing them in the DCF model simultaneously, the State submits that the Tribunal had failed to derive the true cumulative impact of all the adjustments, which is greater than the sum of its parts, because of the interactions among the various adjustments.

155 In relation to the first alleged error, the State says that if the discount rate of 13.2% is input into the model in BR-218,[136] this results in a 42% reduction in the original valuation from US$845 million to US$490 million. The particular tariff discount can then be reduced from 80% to 72% which reduces the DCF valuation to US$457,659,547, an additional reduction of US$32,650,777, which in percentage terms is 3.86% of the original DCF valuation of US$845 million (from 42.00% to 45.87%). The Tribunal took this 3.86% reduction and applied it to the DCF valuation of US$490 million which would give a reduction in value of US$18.9 million (US$490.3 million x 3.86%). However, the State submits that because the percentage reduction was applied to the US$490 million rather than the original DCF valuation of US$845 million against which the 3.86% figure was calculated, the Tribunal understated the actual value impact of changing the particular tariff discount rate which is US$32.7 million or 6.67% (US$32.7 million / US$490 million). When the other adjustments are made to the DCF valuation, the State submits that the percentage rises to 8.18%.

156 Doing the same calculation in respect of each of the four other adjustments,[137] the State submits that had the Tribunal correctly calculated the individual impact of each adjustment, it would have arrived at a combined discount rate of 40.21%, rather than 19.47% as follows:

Award paragraph	**Adjustment**	**Tribunal's percentage**	**"Corrected" percentage**
1235	[Product] sales into [one market] (50%) and	2.06	4.43

136 By entering "13.2%" in cell F17 of the 'Control Panel' tab of BR-218.

137 As set out in Exhibit BR-260 to Brattle's memorandum dated 3 November 2024 accompanying the State's Request for Correction.

	[another market] (50%)		
1238	75% of Sustainable Development Scenario	5.47	11.55
1247	Household Demand Reduction of 30% by 2040	0.73	0.49
1252	[Particular] Tariff Discount 72%	3.87	8.18
1245	Risk of 50% of [product] being exported	7.34	15.55
	Total	19.47	40.21

157 In relation to the second alleged error, the State says that simply adding together the five adjustments is incorrect and the Tribunal should have implemented the individual adjustments in the DCF model simultaneously. The State refers to the first Brattle report at [194] where Brattle set out the individual adjustments derived from BR-218 in a table, Table 3 and said that: "Each line [of Table 3] shows the individual impact of each sensitivity, with the final line showing the cumulative impact (which is not the sum of the individual impacts because some changes interact with others)." The sum of the individual adjustments was 60% or a reduction of US$505 million but the combined reduction of those individual adjustments was 84% or US$708 million based on Brattle's assumptions.

158 In the new sensitivity analysis, BR-262,[138] produced by Brattle on 3 November 2024 after the ECT Award, for the purpose of the State's request for the Tribunal to correct the ECT Award, Brattle calculated that the 40.21% reduction obtained by adding together the five adjustments became 48.33% when those adjustments were combined simultaneously in the DCF model, as Brattle had done in BR-261.[139] This compares to the Tribunal's 19.47% adjustment.

159 The UK Investors do not seek to challenge these two alleged errors nor have they submitted any further evidence from Secretariat or otherwise to challenge the correctness of the calculations in BR-261 or BR-262.

160 The central complaint made by the State is that the Tribunal used BR-218 to carry out its calculations of its finding on the assumptions in the DCF valuation but, instead, should have sought the parties' input on the appropriate calculation methodology or invited the parties to submit updated DCF valuation models and sensitivity analyses.

161 The State contends that the failure to go back to the parties on that basis meant that it was unable to present its case within the meaning of Art 34(2)(a)(ii) of the Model Law and/or that there was a breach of the rules of natural justice in rendering the ECT Award in terms of the right for the State to be heard or to present its case and therefore the State's rights had been prejudiced within the meaning of s 24(*b*) of the IAA.

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138 Described as an "Adapted version of Exhibit BR-218 to generate inputs into the corrected calculation of cumulative impact of the Tribunal's five adjustments to coal demand and pricing".

139 Described as a "Corrected calculation of Award amount, in accordance with the Tribunal's reasoning and findings in the Award."

162 The State properly accepts that it cannot seek to set aside the ECT Award merely because the Tribunal had made certain errors in calculating the quantum of damages but its complaint is that those errors arose because of the Tribunal did not accord the State its proper right to be heard and present its case in relation to the quantum of damages. It refers to the decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29] where, on a natural justice challenge, the party mounting the challenge must identify (a) the specific rule of natural justice that was breached; (b) how it was breached; (c) how the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

163 The State submits that the Tribunal breached its right to be heard and, in particular, referring to the decision in *Soh Beng Tee* at [65(a)], "[p]arties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute" and that arbitrators have to "treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond".[140]

164 The State also refers to the High Court decision in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") at [146], where it was stated that there are "two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect". The positive aspect "encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be". The responsive aspect "encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it". The State submits that in the

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[140] CWS at para 328.

present case, it is the responsive aspect of the opportunity to present its case which the Tribunal had denied it.[141]

165 As was further stated in *JVL Agro* at [147]:

> The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case if it either: (a) requires the party to respond to an element to the opposing party's case which has been advanced without reasonable prior notice; or (b) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case. But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address."

166 The State submits that the final point in the quoted passage above is consistent with the Court of Appeal's statement in *Soh Beng Tee* at [65(a)] that an "arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges".[142]

167 The State contends that the Tribunal breached its right to be heard and/or deprived it of a fair opportunity to present its case by making its own adjustments to Brattle's sensitivity analysis in BR-218, without seeking the parties' input on these adjustments. In doing so, it states that the Tribunal had effectively adopted a "chain of reasoning in its award which it has not given the

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141 CWS at para 329.

142 CWS at para 331.

complaining party [or any party] a reasonable opportunity to address" as described in *JVL Agro* at [147].[143]

168 The UK Investors also refer to *Soh Beng Tee* at [65(e)] where the Court of Appeal said:[144]

> "It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him."

169 The UK Investors also refer to *Swire Shipping* at [91] where it was stated:[145]

> Thus, there is no breach of natural justice if a party fails to present evidence or submissions to the tribunal on an issue which is a link in the tribunal's chain of reasoning, either because the party fails to appreciate that the issue is before the tribunal through mistake or misunderstanding, or because the party makes a conscious tactical choice not to engage the opposing party on that issue (see the High Court decision of *CDX and another v CDZ and another* [2021] 5 SLR 405 at [34(h)(iv)], citing *Triulzi* at [137]). The courts would not allow setting aside applications to be abused by a party who, with the benefit of hindsight, wishes that it had presented its case in a different way or had taken certain strategic decisions differently (see *BLC v BLB* at [53]).

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143 CWS at para 347.

144 DWS at para 484.

145 DWS at para 508.

170 In the present case it is evident that the State had a full opportunity to be heard and to present its case on the quantum of damages, on the basis that the Tribunal found that the State was liable to the UK Investors. The UK Investors relied on the DCF valuation model put forward by Secretariat. The State contended that the DCF method was inappropriate and that the Tribunal should award compensation on the basis of the UK Investors' sunk or historical costs instead. In its Post-Hearing Brief at para 332 the State submitted that the UK Investors' "DCF valuation must be dismissed as legally flawed and riddled with errors, so that any compensation could be at most equal to [the UK Investors'] sunk costs in the Projects" [emphasis in original].

171 The State, at para 334 of its Post-Hearing Brief, referred to the evidence given in cross-examination by Mr Sequeira of Secretariat,[146] as follows:

> Q. If this Tribunal for some reason does not agree with your DCF, there is no other value for the Tribunal, is there? […] In your reports, will we find any other value different from the one in your DCFs?
>
> MR SEQUEIRA: No, but there is a model tied to the DCF with inputs and assumptions that can be assessed and varied to get to a range of conclusions.
>
> Q. So they can do another DCF; is that what you are suggesting?
>
> MR SEQUEIRA: No, no, I'm not saying that at all, I'm saying there are many inputs and assumptions which we had a professional debate with Brattle about and the Tribunal, if it comes to a different view on some of them it can adjust them on the DCF.
>
> Q. In the DCF, correct?
>
> MR SEQUEIRA: Correct.
>
> [Emphasis in Post-Hearing Brief]

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146 JCBD Volume XVI at TAB 91; JCBD Volume XIII at TAB 79: Transcript of Day 9 of Hearing at pp 221 :20–222 :22.

172 Whilst the State was evidently seeking to undermine the DCF and establish that if the DCF were rejected there was no other calculation, it chose to emphasise in that passage the very evidence that, if the Tribunal came to a different view on some of the inputs and assumptions, it could "adjust them on the DCF". Therefore the State was on notice that if the Tribunal adopted the DCF valuation method and took a different view on some of the inputs and assumptions, the Tribunal would be able to adjust the inputs and assumptions in the DCF model.

173 The State had decided to respond to the DCF valuation in the first Secretariat report by submitting BR-218 from Brattle. That provided an active spreadsheet by which different values of inputs and assumptions could be used to alter Secretariat's DCF valuation. Table B1, referred to above, was expressly stated to be a "Control Panel to Modify Versant's [Project] DCF Model" and that is what Brattle did in Table 3 of its first report to reduce the DCF valuation of US$845.4 Million by US$708 million, as follows:

Table 3: Effects of Price Sensitivities on Versant's Valuation of [redacted]

[1]	**Versant's Valuation ($ mm)**		**845.4**
		Reduction in Value	
	Sensitivity	$ mm	%
[2]	Excluding VAT from [redacted]	(34)	-4%
[3]	[redacted] demand reduction	(17)	-2%
[4]	Sustainable development [redacted] price scenario	(84)	-10%
[5]	[redacted] sold 100% to [redacted]	(168)	-20%
[6]	Account for [redacted] transition to [redacted] exports to [redacted]	(36)	-4%
[7]	Adjust [redacted] tariff discounts	(166)	-20%
[8]	Combined	**(708)**	**-84%**

174 Therefore, the State provided in Brattle's BR-218 the means to allow the Tribunal to adjust the DCF valuation produced by Secretariat. When Secretariat updated the DCF valuation in its second report, the State did not respond by

providing another sensitivity analysis or suggest that the sensitivity analysis in BR-218 could not be used on the updated DCF valuation or the further updated DCF valuation accepted by Secretariat in the evidence. Whilst the State now submits that "[c]rucially, Secretariat did not submit an updated Excel spreadsheet in respect of Secretariat's Final DCF Valuation",[147] it did not raise any concerns at the time and it is clear that, if Brattle had been asked to they could have produced BR-258 (Secretariat's DCF model as corrected at the Hearing) at the time without having Secretariat's spreadsheet, as they have now done on 3 November 2024 in relation to the application to correct the ECT Award.

175 In relation to Mr Sequeira's evidence on adjusting the DCF valuation, the State submits that "Given that the exchange quoted above had taken place after Secretariat's presentation, it would have been apparent to the Tribunal that the "model tied to the DCF" which Secretariat was referring to was in respect of Secretariat's final DCF valuation. However, despite the fact that Secretariat had not submitted any such model in respect of Secretariat's final DCF valuation, the Tribunal did not raise any concerns or query the Parties on the matter."[148]

176 It is not clear why the Tribunal should raise any concerns or query the parties on the matter. The unchallenged quantum evidence was that the Tribunal could adjust the DCF valuation and the State had provided the means by which they could do so by providing BR-218. If BR-218 was no longer applicable to the updated or further updated DCF valuations then it was for the State to point that out. Having not submitted a revised version of BR-218 after the updated

147 CWS at para 341.

148 CWS at para 343.

DCF valuation in Secretariat's second report, it was for the State to make the appropriate submissions and not for the Tribunal to raise any concerns or query the parties. However, BR-218 remained on the record without any submissions to the effect that it could no longer be used. Indeed, as the State accepts, BR-218 was not mentioned during the Hearing and neither BR-218 nor any similar type of sensitivity analysis was mentioned in the Post-Hearing Briefs.

177 Therefore, this is not a case where, based on the existing quantum evidence, there was any reason for the Tribunal to go back to or seek the assistance of the parties to make the adjustments proposed by Mr Sequeira given the existence of Brattle's BR-218. Whilst the State says that it was taken by surprise when the Tribunal relied on BR-218 as part of its methodology to determine the quantum of damages to be awarded to the UK Investors,[149] it should not have been surprised because, in the absence of any submissions or other evidence, BR-218 was the relevant document to be used.

178 Whilst the State submits that, if the Tribunal had informed the parties that it intended to use BR-218 to calculate the applicable discount rate and invited the parties to make further submissions on this, it would then have had the opportunity to submit an updated version of BR-218 or at least point out to the Tribunal the issues with applying BR-218 to Secretariat's final DCF valuation, that exposes the flaw in the State's case.[150] It was not for the Tribunal to inform the parties but for the State to have submitted an updated version of BR-218 and to have made the relevant submissions as part of its case in the ECT Arbitration.

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149 CWS at para 345.

150 CWS at para 347.

179 The State had every opportunity to be heard and to present its case on quantum based on Secretariat's DCF valuation but failed to do so. In those circumstances, there can be no criticism of the Tribunal for taking the final updated DCF valuation, accepting where appropriate Brattle's criticism of the assumptions in the DCF model and making the adjustments as proposed by Mr Sequeira in his evidence, using BR-218 to do so.

180 It follows that the State has not established that it was unable to present its case within the meaning of Art 34(2)(a)(ii) of the Model Law, read with s 3(1) of the IAA or that there was a breach of the rules of natural justice in rendering the ECT Award in terms of its right to be heard or to present its case within the meaning of s 24(*b*) of the IAA.

181 This ground therefore fails. The State was not unable to present its case nor did a breach of natural justice occur in connection with the making of the ECT Award. It follows that further issues in relation to this ground do not arise.

Conclusion

182 For the above reasons, we dismissed the State's application to set aside the ECT Award. Unless the parties can agree on costs, they are to file and exchange costs submissions by 30 January 2026, the text of such submissions being limited to 12 pages (excluding any schedule of disbursements).

Andre Maniam
Judge of the High Court

Dominique Hascher
International Judge

Vivian Ramsey
International Judge

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