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INTERNATIONAL CENTRE FOR SETTLEMENT OF

INVESTMENT DISPUTES

ICSID Case No ARB/15/42

between

HYDRO ENERGY 1 Sàrl and HYDROXANA SWEDEN AB

Respondents on Annulment/Claimants

- v -

KINGDOM OF SPAIN

Applicant on Annulment/Respondent

The ad hoc Committee

Ms Wendy J Miles QC - President

Dr José Antonio Moreno Rodriguez - Member

Prof Dr Jacomijn J van Haersolte-van Hof - Member

ANNULMENT PROCEEDING

Friday, 11 February 2022

A P P E A R A N C E S

The Tribunal:

The President:

MS WENDY MILES QC

Co-Members:

DR JOSÉ ANTONIO MORENO RODRIGUEZ

PROF DR JACOMIJN J VAN HAERSOLTE-VAN HOF

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DIANA BURDEN, Diana Burden Ltd
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Spanish transcript:
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MS AMPARO MONTERREY SANCHEZ
MR JAVIER COMERÓN HERRERO

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I N D E X

(11.12 am GMT, Friday, 11 February 2022)

Introduction and Housekeeping

by the Committee

PRESIDENT: Hello and welcome to all of the parties. I can see on the screen Claimants -- [Technical issue]

PRESIDENT: Excellent. Thank you, Paul Jean, and the team for getting this all set up.

We have the updated list of participants. We don't need to go through the list of participants to save time, save to confirm for the Applicant, Ms del Socorro Garrido Moreno, are you lead counsel with Ms Cerdeiras Megias or just you?

MS CERDEIRAS: Madam President, I will be with Ms Martínez de Victoria.

PRESIDENT: Thank you very much. And if you could both keep your screens on throughout as now, that would be perfect, and for the Claimants I see Mr Sullivan. Is anybody joining you for submissions today?

MR SULLIVAN: No, just myself.

PRESIDENT: Excellent. Welcome to the rest of the teams. You are equally important even though you are not visually with us right now; probably more important, some would say.

So we have a few administrative matters to deal with and we will try and get through them quickly. We have a further application for reconsideration of the stay on enforcement, and I just want to say per correspondence from the secretariat we will consider that matter after this hearing, and so we don't want to hear from you any more on that today.

In relation to the new documents, per our email to you earlier this week, what we would like to hear from you both, and starting with the Applicant, although the Applicant wasn't the first in time to put in a post-Award authority, but because it is your application more broadly for annulment, we will hear from the Applicant first, just briefly summarising your position as to the scope of this Committee's authority to take into account any new authorities that postdate the Award that were not before the Tribunal when it prepared the Award, and that includes the Komstroy judgment submitted by the Claimants. And so our authority to take those into account for the purpose of ascertaining whether or not the Tribunal exceeded its powers in that Award, so I would like to hear very briefly, as a housekeeping matter, from the

Applicant first on that. We now have those six authorities which have helpfully been given exhibit numbers, so in the context of those, as well as the Komstroy judgment, could we please hear you on that?

MS CERDEIRAS: Thank you, Madam President. I will speak in Spanish, if I may. Thank you.

Thank you very much indeed, Madam President, and members of the Committee, for your question. In the opinion the of Kingdom of Spain, these documents, even though they are post-award, particularly the legal authorities submitted by the Kingdom of Spain, added to the record, are indeed later documents post-Award, but they are in reference to documents that had already been submitted to the Arbitral Tribunal stemming from the Achmea judgment, and therefore the Kingdom of Spain believes these are documents that this Committee is certainly entitled to take into account.

PRESIDENT: Thank you very much. Mr Sullivan?

MR SULLIVAN: Thank you, Madam President. The Claimants' position --

Well, first a clarification. I think there are two separate issues. I think the question, Madam President, that you put to us is

second, just an administrative issue? Apologies that I can't listen to the Spanish. The English translation is very, very fast. The transcriber I assume is keeping up because he or she has a written version of what you are saying, but my brain can't keep up, so I don't know if it is the same in Spanish or if Spanish brains are faster than mine but can we slow down a little, please? It might just be the translation. Thanks.

MS CERDEIRAS: As I was saying, all those documents that were at the disposal of the Tribunal concerning Hydro Energy, led to a lack of competence, lack of jurisdiction to hear the dispute, and the legal authorities that have been cited in the annulment Memorials, although some are not from the underlying arbitration, but they do not mean new arguments: they are additional new pronouncements. Those were additional decisions that were in the public domain and that reaffirm what the Kingdom of Spain insistently explained to the Arbitral Tribunal.

Anyway, in any event the Kingdom of Spain must insist that the Tribunal in the underlying arbitration had the necessary elements to assess its lack of jurisdiction over an intra-EU dispute.

Unfortunately the Tribunal gave preference to its will to declare jurisdiction over that dispute instead of understanding correctly what was the applicable law concerning its jurisdiction or its lack of it, and also to the merits of the case in a strictly European dispute, and we emphasise that this is an investment made by European investors on European territory and under European regulations.

The Kingdom of Spain repeatedly explained to the HydroEnergy Tribunal that neither the EU nor the Member States gave their consent to submit intra-EU disputes to arbitration, and that for the purposes of article 26(1) we are not in a dispute between a contracting party and an investor from another contracting party, and the same explanation has been made in the Memorials. Despite the Claimants' insistence, this does not imply that we are trying to re-arbitrate the case, but rather that you understand that the only intention of this party is for the Committee to see that this excess of powers took place.

The HydroEnergy Tribunal notes the parties' background as EU Member States, and acknowledges that the essential provisions of the Treaty on the Function of the European Union which

are the basis of a jurisdictional objection were already found in the Treaties establishing the European Communities.

And the Tribunal acknowledges in paragraph 494 and subsequent that the EU Treaties and the case law of the European Court of Justice are relevant. However, with manifest excess of power, the Tribunal improperly declares jurisdiction over a dispute to which there was no consent. Neither Spain nor Luxembourg nor Sweden consented to submit an intra-EU dispute to the dispute resolution mechanism of article 26(3) ECT, because this was contrary to articles 344 and 267 TFEU, and also to article 19 of the Treaty of the European Union.

In paragraph 502 the Tribunal considers the rules applicable between the parties under article 42(1) of the ICSID Convention and article 26(6) of the ECT should be taken into account, however, finally, the Tribunal misreads both the Convention and article 26 of the ECT, ignoring that the parties to the dispute are EU Members, and concludes that there is an unconditional consent to submit the dispute to arbitration.

The States concerned in the dispute that ratified the ECT were party to the EU Treaties.

These EU Member States have chosen to exercise their sovereign rights in such a way as to give precedence to the EU Treaties in their mutual relations. This is acknowledged by the Tribunal itself, citing the constant case law of the CJEU in paragraph 494 of the Decision.

In particular, this means that the States: ie Spain, Luxembourg and Sweden, have agreed in public international law that any other international agreements applicable between them are to be interpreted in the light of and in conformity with European Treaties. The States, as parties to the ECT and the EU Treaties, in their relations with each other, expected the Arbitral Tribunal to give full effect to their sovereign choice, and this same choice does not affect in any way the rights and obligations of States that are not party to the EU Treaties and are contracting parties to the ECT, but disregarding the sovereign choice of Spain, Luxembourg and Sweden, disregarding that would amount to a denial of the erga omnes obligations deriving from the EU Treaties. Obligations which, as emphasised by the European Court of Justice in the Achmea judgment, "are based on the fundamental premise that each Member State shares with all the

other Member States, and recognises that they share with it a set of common values on which the European Union is founded, as enshrined in article 2 of the TEU". That is Achmea, paragraph 34.

The Vienna Convention (cited by the Tribunal in 474 and 475, and we assume that the Tribunal applied), states that a treaty must be interpreted in good faith in accordance to the ordinary meaning of its terms, in accordance with the context, and having regard to the object and purpose of the treaty. This interpretation rule is to be found in paragraphs 2 and 3 of the article, and those are not subsidiary in nature and there is no sort of hierarchy between them. They are part of the rule of interpretation provided for in the article.

Article 31(2), as you know, includes, in addition to the text, preamble and annexes: "(a) any agreement relating to the Treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

And paragraph 3 adds that "together with the context, regard shall be had to: (a) any

subsequent agreement between the parties (...) (b) any subsequent practice (...) and (c) any relevant form of international law applicable in the relations between the parties".

And despite referring to such a rule of interpretation, the HydroEnergy Award Tribunal did no more than a literal interpretation of articles 1, 10, 25, 26 of the ECT without analysing the context in its entirety as required by the Vienna Convention. And not only by virtue of the iura novit curia principle, but also because the Respondent made constant references to the fact that given the intra-EU nature of the dispute the context was of utmost relevance in assessing whether the intervening parties had consented or not to the arbitration procedure of article 26.

And this is precisely the mistake made by the tribunals that have ruled on the intra-EU objections. They have all confined themselves to literal interpretations and several of those tribunals have persisted in their error when ruling on the petitions for review.

If the Tribunal had analysed the context of the ECT, it would have realised that it lacked jurisdiction because neither Spain nor Luxembourg

nor Sweden agreed to submit an intra-EU dispute to arbitration, because it is contrary to article 219 TCEE, and that is a constituting treaty of the European Communities, and now it is article 344 of the TFEU.

The ECT is a multilateral investment treaty. It was promoted and adopted at the initiative of the European Union. It is signed by 50 contracting parties including the European Union, and its Member States acting as a single bloc. The negotiation and promotion of the Treaty was based on the European Energy Charter signed in 1991 which was also promoted at the initiative of the European Union at a conference promoted and financed by the European Union itself.

Although the ECT is a multilateral treaty in the sense that it has been negotiated and signed by a number of parties, but it is a treaty that when it is applied, and especially in what concerns us here, ie Part III and Part V of the Treaty, it has a bilateral application. It governs the relations between an investor from the territory of one contracting party who invests in the territory of another contracting party.

And the main consequence to be drawn from

this is, as we said, that when the application of the ECT is sought between two EU Member States, the fundamental principles and rules that govern the relationships between those Member States must necessarily be taken into account, and those are none other than the principles of EU law, principle of primacy, the principle of mutual trust, the principle of autonomy, among many others.

The purposes of the ECT was to create an environment of co-operation in the energy sector between the European Union and the states of the Soviet bloc. Therefore, at no time was the ECT conceived as an instrument that could lead to a change in the rules and principles governing EU law; rather, it preserves the principle of the autonomy of the Union and the primacy of European law.

This respect for the principles of EU law by the Member States that concurred in the signature of the ECT follows from the simple fact that both the EU and the Member States signed the ECT after the creation of the European Communities. So it would make no sense for states that had established a community that is the subject of international law, through which they had endowed themselves with rules to govern their mutual relations, and to which

they had bestowed competence, it would make no sense to proceed years later to adopt a treaty that would be contrary to those essential principles and rules and that would jeopardise the objectives envisaged in the Treaty of Rome and successive treaties establishing the EU.

But not only does this conclusion follow from the very context of the promotion, negotiation and signature of the ECT, but also it is because the European Communities sent a communication to the Secretariat of the Treaty saying that:

First of all, the EU is an REIO for the purposes of the Treaty and it exercises the powers conferred by Member States through autonomous decisions and its own judicial institutions.

Secondly, the EU and its Member States have concluded the ECT and they are internationally bound by it according to their respective competences.

The Court of Justice of the European Union has exclusive jurisdiction to examine any question relating to the application and interpretation of the founding treaties and acts adopted thereunder, including of course the ECT within the EU.

So this declaration is an instrument that

serves as a standard of interpretation of the ECT in accordance with Article 31(2)(b) of the Vienna Convention. A regime that removes from the jurisdiction of Member States' tribunals and the CJEU disputes that are purely intra-EU would not be compatible with EU law, and it is clear because these disputes have only an internal dimension that is governed by European law contained in the Treaties in preference to any other treaty or international agreement.

And this incompatibility between the system of arbitration provided for in the ECT and the jurisdictional system recognised and accepted by the Member States of the European Communities, which is now the European Union, was evident at the time of the conclusion of the ECT, and this means that the ECT was by no means designed to facilitate the initiation of arbitration proceedings between different Member States of the European Union.

The Member States undertook from the Treaty establishing the European Economic Community, they committed themselves not to take any action which might jeopardise the objectives laid down in the Treaty. They also committed themselves not to submit questions which might involve interpretation

of the Treaties to a settlement procedure other than those provided for in the Treaties.

Not only is the conclusion of the lack of jurisdiction reached on the basis of the above, but the same conclusion is reached if the ECT is analysed in the light of any relevant form of international law applicable in the relations between the parties; ie the principle of primacy that governs relations between the EU Member States and more specifically between the parties in this arbitration.

The principle of the primacy of EU law constitutes international law in relations between Member States. This principle is considered as a source of international law in accordance with article 38 of the Statute of International Court of Justice. The primacy of EU law in relations between EU Member States is international custom respected by the international community. As explained in our Memorials, the primacy of EU law and relations between the Member States meets all the requirements to be considered a source of international law.

The principle of primacy is recognised, accepted and respected by all Member States of the European Communities since their integration into

the European Union, and it could not be otherwise because that was the basic premises for accession to the Union. This has been stated very strongly by the European Court of Justice on many occasions.

The HydroEnergy Tribunal, in its eagerness to assume jurisdiction over this dispute, excludes the argument of the primacy of EU law and relations between Member States arguing in a very simple way that it is a principle that only applies in respect of domestic law as that was the case in the Costa v Enel judgment, and this is the argument that the Claimants rely on. It is obvious that we do not agree with that conclusion.

The principle of primacy was initially developed in the context of a relationship between Union law and domestic law and then it was extended to relations between Member States in the field of public international law. The principle of primacy of EU law is not limited to a Member State's domestic law. It extends beyond it. The principle of the primacy of EU law applies in respect of international agreements or treaties applicable between Member States. EU law takes precedence over any rules created by the EU and Member States in international agreements concluded and to be applied

between them.

The international treaties to which the European Union and its Member States accede, as is the case of the ECT, are concluded by means of an act of the Union. This international treaty is therefore subordinated to the constitutional system of the Union's treaties as long as the application of the international agreement is strictly intra-European.

What does it mean? It means that the international treaties such as the ECT to which the EU and Member States are parties, are subject to the system of sources of European law, and there the EU treaties take precedence.

In a strictly European dispute such as the present one, there is no international law comprising the ECT on the one hand and EU law on the other. There is only one international law applicable in the relations between Spain, Luxembourg and Sweden and it comprises both the ECT as an EU Act and the EU Treaties. By a sovereign choice the conflicting countries in this case established -- here Spain, Luxembourg and Sweden -- establish that this set of rules of international law governs their mutual relations with hierarchy of

the rules contained in the EU Treaties over the rest.

And the prevalence of EU Treaty law over any international agreements between Member States has been clearly stated by the EU institutions as well as by the United Nations, as you can see on the slide.

EU law is part of international law binding on all Member States and the inapplicability of article 26 of the ECT as a matter of EU law means that neither the Kingdom of Spain nor any other Member State made a valid offer for arbitration to investors from other EU Member States and there is no valid arbitration agreement between the Hydro Energy and Hydroxana parties and the Kingdom of Spain.

This lack of agreement to submit a strictly European dispute to arbitration was obvious and manifest to the Member States when they concluded the ECT.

The Member States knew that they could not submit a dispute involving the interpretation of EU law to a dispute resolution mechanism located outside of the EU jurisdictional system.

An explicit disconnection clause was not

necessary between the contracting Member States in the ECT because at the genesis of their integration into the EU was the acceptance of the principle of the primacy of EU law, the system of sources of EU law and respect for the provisions of article 219 of the TEC, article 19 of the European Union Treaty, and the current articles 267 and 344 of the Treaty on the Functioning of the European Union.

And this is demonstrated not only by an interpretation of ECT in accordance with Article 31 of the Vienna Convention, but if any doubt could remain, the same conclusion is reached if we use the complementary mechanism of interpretation contained in article 32 VCLT to which the Claimants seem to refer in their Rejoinder. The truth is that the European Union and its Member States did not need an explicit disconnection clause since all the States that negotiated and signed the Treaty recognised the division of competences, the attribution of competences, between the Union and its Member States and this is clear from the travaux préparatoires on the Treaty between 1991 and its signature.

And they all reflect the same idea: the negotiations leading to the conclusion of the ECT were conducted by the individual States in full

compliance with the rules of competence applicable to the EU Member States under the Treaties establishing the European Communities. This delimitation of competences by virtue of which the EU and the Member States assumed their respective obligations by signing the ECT was communicated as well to the other contracting parties in the declaration sent to the Secretariat of the Treaty in 1998, to which we have already referred.

The European Union did indeed promote the inclusion of an explicit disconnection clause in the Treaty. This is clear from the document CL-298 provided by the Claimants.

As the Committee can see, the reason why it was not included was because the ECT negotiating parties did not consider it necessary and the Secretary General made it explicitly and clearly stated. The Secretary-General literally stated that an explicit disconnection clause in relation to the EU and its Member States was not necessary "given the existence of 27".

It is striking how the Claimants in the present case omit the first sentence of this communication from the Secretary General, and they want to imply that the clause was simply denied, but

in reality it was not considered necessary given the existence of another article in the Treaty whose effect would have been the same.

There is no evidence to support the Claimants' contention that the EU Member States would have wanted to consent to intra-EU arbitration, as they simply could not do that because it would have been contrary to the EU legal order and the fundamental principles of the Union. In other words, because it was radically contrary to the sovereign choice they had made before the conclusion of the ECT, and that choice was none other than that EU law would prevail in their mutual relations.

If the Tribunal had analysed the ECT as a whole, it would have noted how there is an unequivocal recognition of the delimitation of competences between the EU and the Member States, there is full compliance with the EU's founding Treaties, and no Member State raised any objection to the explicit disconnection clause proposed by the European Communities or to the implicit disconnection confirmed by the Secretary General of the Conference.

The Court of Justice of the European Union

in its Achmea judgment confirmed that in view of articles 267 and 344 TFEU, the EU treaties have always prohibited EU Member States from offering to settle investor-state disputes within the EU before international arbitral tribunals, and this is true not only with regard to bilateral investment treaties but also with regard to multilateral treaties such as the ECT.

This was made absolutely clear by the European Commission in the 2017 State Aid Decision and the Commission's Communication to Parliament in 2018. It goes without saying that the Arbitral Tribunal had at its disposal all these legal authorities.

The Kingdom of Spain insistently argued in the underlying arbitration that the pronouncements of the Achmea judgment were applicable to the present case, in other words the Tribunal had numerous elements that demonstrated its lack of jurisdiction. Its lack of jurisdiction derives from the lack of consent of Member States to submit an intra-EU dispute to arbitration. The commitment to submit a dispute to arbitration under article 26(3) ECT does not cover disputes that may arise between an investor from one Member State and another

Member State as between them there is no diversity of contracting party.

The Tribunal, despite acknowledging that the rulings of the European Court of Justice are relevant, excludes Achmea's conclusion on the basis that the Court of Justice's rulings are not binding on the Arbitral Tribunal. However, the fact remains that the Arbitral Tribunal, as it owes its existence to an agreement between Member States, should have observed the rulings of the Court of Justice as they are binding on Member States and their citizens. The manifest nature of this excess of power is also demonstrated and confirmed by recent rulings of the Court of Justice. The Court of Justice of the European Union has once again recalled that it is not compatible and has never been possible for Member States to have given their consent to international arbitration in order to resolve an intra-EU dispute as this is contrary to EU law, to article 344, TFEU.

The Court of Justice has expressly ruled on the ECT and on the possibility that article 26 ECT can be understood to cover intra-European arbitration. The Court of Justice has stated categorically that such a possibility does not

exist, and that it cannot be understood that article 26(3) of the ECT was conceived by the drafters of the ECT, which included the EU and the Member States, could not have been conceived to cover intra-European operation.

The Court of Justice of the EU in the Komstroy judgment has followed the same reasoning as in Achmea, which is not surprising as the Tribunal itself acknowledges the Achmea rulings were not limited to bilateral agreements. They referred, and it was very clear in the Achmea judgment, also to arbitration clauses contained in international agreements. The CJEU recalls in the Komstroy judgment that the ECT as an EU Act is part of the EU law.

Secondly, that the limits of the international agreements of the EU and the Member States derive from the legal and institutional system shaped by the founding Treaties. Third, that an Arbitral Tribunal constituted under article 26 ECT and called upon to resolve disputes between an EU Member State and an investor from another Member State will necessarily involve the interpretation and application of EU law.

And, lastly, that an Arbitral Tribunal

constituted under the ECT is not part of the jurisdictional system of the EU, and therefore cannot ensure a uniform application of EU law.

The Komstroy judgment recalls that the fact that the EU has competence in international matters and that it has ratified the ECT does not imply that a provision such as article 26 ECT can mean that an intra-EU dispute can be excluded from the Union's jurisdictional system, preventing any effectiveness ofEU law.

Finally the Court of Justice confirms that the mechanism of dispute settlement through arbitration provided for in article 26 binds Member States in relation to investors from third states that are parties to the ECT in respect of investments made in the territory of those Member States, but the ECT does not impose the same obligation on Member States between themselves as this would be contrary to the principle of autonomy and primacy of Union law.

The Court of Justice in the PL Holdings ruling once again goes back to the same reasoning expressed in Achmea in clearly stating once again that there shouldn't be any investment arbitration intra-EU. The Court of Justice is referring to Achmea and

again is indicating that the arbitral clause in the reference treaty could endanger the mutual trust principle as well as the cooperation principle. It is also indicating that the Member States would have accepted that a dispute that resorts to an Arbitral Tribunal would be an evasion of the obligations of that State from the articles of the treaties at article 4 TEU, articles 267 and 344 of the TFEU as interpreted in the judgment of March 6, 2018, the Achmea judgment.

The Court of Justice based on the reasoning contained in Achmea and the principles of primacy and sincere cooperation warns that a Member State cannot remove a dispute involving the interpretation and application of European Union law from the EU judicial system but also has a duty to combat such a situation by invoking the lack of jurisdiction of the Arbitral Tribunal.

The Court of Justice rejects the applicant's request for the effects of the judgment to be limited in time in line with its previous rulings. Finally, as regards the protection of investors' rights the Court of Justice recalls that such protection is found in EU law and that in no case can the invocation of a lack of protection

imply a breach of the fundamental rules and principles of EU law.

In short, the Court of Justice has once again confirmed that the Member States have not been able to undertake to remove disputes concerning the application and interpretation of EU law from the EU judicial system such as this case.

As Professor Kohen recalls, in line with what was stated by the European Commission in 2017 and 2018, legal authorities made available to the Tribunal, EU law provides European investors investing in another Member State with the appropriate protection mechanisms to which they are subject.

The issue of the lack of jurisdiction of an Arbitral Tribunal constituted under the ECT to hear an intra-EU dispute is so clear that the Swedish Court of Appeal, home country of one of the Claimants, has itself withdrawn the question referred to the CJEU for a preliminary ruling in view of the pronouncements in Achmea, Komstroy and PL Holdings.

It is noteworthy that the Court of Appeal's order was issued at the request of the Court of Justice, and the initiative to resort to

asking the Court of Appeal in light of this judgment the Swedish Court's request for a preliminary ruling was still valid.

The parties here argue that -- the Hydro Energy parties argue that this Committee should ignore any post-award developments and ask the Committee to ignore in particular these Court of Justice rulings. However, this position overlooks that the Court of Justice rulings are not new developments. Therefore the Committee has the obligation to consider and pay due respect to any binding interpretation issued by the Court of Justice even after the Tribunal has issued its award.

Even if Komstroy were to be considered a "new" development, this would not alter the outcome. As the Court of Justice stated in Komstroy, all of its conclusions resulted from its reasoning in Achmea as the ECT operates "in a manner analogous to the BIT provision at issue in the case giving rise to the judgment of Achmea". The Court of Justice cites Achmea up to 14 times in the Komstroy judgment, so it is clear that the reasoning is not new.

Hence, since the Court of Justice's

judgment in Achmea made it abundantly clear that intra-EU investment arbitration has been incompatible with the EU Treaties from the moment that they, or their respective predecessor treaties, entered into force, the Tribunal whose Award is the subject of the present annulment should have been fully aware of its lack of jurisdiction.

Under the EU treaties, in particular article 19 of the TEU, and articles 267 and 344 of the TFEU, the EU Member States conferred on the Court of Justice the power to give judgments on the interpretation of EU law which have general and binding effect on the EU Member States.

If this Committee derives its competences from an international agreement between two EU Member States, it must respect the interpretation of the EU Treaties and the public international legal order they establish in the opinion of the Kingdom of Spain.

As established by the Court of Justice, where the case law of the Court of Justice of the European Union already provides a clear answer to a question referred to it for a preliminary ruling, a tribunal of last instance is obliged to do whatever is necessary to ensure the application of that

interpretation of EU law.

In conclusion, the Tribunal should have declared its lack of jurisdiction as the dispute giving rise to this underlying arbitration was not covered by the dispute settlement mechanism provided for in article 26(3) of the ECT.

Since this is strictly a European matter in the present case, this means that the Committee must annul the Award.

I conclude my presentation and now I give the floor to Ms Martínez de Victoria and I thank you for your attention.

by Ms Martínez de Victoria

MS MARTÍNEZ: Thank you very much, Ms Cerdeiras. I will now continue with the opening statements of the Kingdom of Spain in English.

Good morning, members of the Committee and the rest of participants in this virtual hearing. It is an honour for me to represent the Kingdom of Spain in this annulment proceeding.

I will share my screen.

We shall now turn to analyse the reasons why the non-application of EU law to the merits must entail the annulment of the Decision. For the sake of efficiency, we will be focusing on the points

PRESIDENT: Thank you.

MR SULLIVAN: So that is the summary of the Award. As I said, I haven't taken you through all of the parties' arguments set out by the Tribunal and analysed over the many pages of the Award. We have gone through the key conclusions. It is clear they have dealt with Spain's arguments. The argument Spain now makes on annulment are effectively twofold. First, they say there should have been a literal reading of article 26(6). We call it the Literal Approach. Then they say the second argument is there was no consent, so we call that the Consent Argument.

So starting with each of those two, the Literal Approach, Spain says there can be no intra-EU arbitration under the ECT because one cannot differentiate between the contracting parties, and then Spain argues in its Reply, for example at paragraph 44, that there are various other provisions of the Treaty that, if you read them, you will see there is no consent that was given.

None of the provisions cited by Spain say anything about prohibiting intra-EU arbitration, and there are references to these various provisions this morning but they didn't take you to any of

them. These are the same arguments they made before the Tribunal. They were rejected in the Award, paragraphs 465-471, so they were rejected by the Tribunal over those several paragraphs. They have been uniformly rejected again by every single tribunal that has considered them.

The next three slides (41-43) have quotes from various other tribunals that are consistent with the Hydro Tribunal, again showing that that analysis and conclusion is reasonable and tenable. In the interests of time I won't take you through those. What they say is that Spain's arguments around the REIO provision, articles 1(3), 1(10), 16, 25 and 36 of the ECT do not deprive the tribunal of jurisdiction, the same thing the Hydro Tribunal found.

One final point on the Literal Approach, and I am very happy to go through these in detail, Madam President, if you would like me to. I do fear I am slightly running over. (Slide 44)

One final point that we heard about this morning was the so-called disconnection clause, and what we see in Spain's case is it varies across cases depending upon the issue. In Spain's Reply on annulment in this case it says the existence of an

implicit disconnection clause can be inferred from the main role of the principle of autonomy in EU law, and we heard a lot this morning about how you can read into the Treaty non-consent. No explicit disconnection clause is required because everybody understood that there was effectively an implicit disconnection clause in the Treaty. That was in Spain's argument in its Reply and this morning.

In the Antin case of course they say the opposite. Spain made it very clear and we see this in CL-192, that it is does not claim that an explicit or implicit disconnection clause exists.

We make this point because we say again you see inconsistency between the arguments that Spain puts depending on the Tribunal it is before, and the Tribunal we think should draw the appropriate inferences from that.

The Consent Argument is the next point. Spain's argument here is that it never consented to intra-EU arbitration in the first place. Let me just take you through those briefly. First, Spain claims there can be no consent under EU law because there is this contradiction between articles 267 and 344, the same argument it made before the underlying Tribunal which we have just discussed. We looked at

the Tribunal's findings on that. Spain effectively says there is this conflict between the ECT and EU law. That must be resolved in favour of EU law because of the principle of primacy, and we heard a lot about the principle of primacy this morning. That argument was also put before the Tribunal.

Our position on this is the same as it was before the Tribunal. There is no conflict between the ECT and EU law. No arbitral tribunal has ever found one in any of those 46 ECT cases I mentioned. The principle of primacy that Spain referred to is a principle of EU law and that is not in dispute. As this Tribunal found and as every ECT Tribunal has ever found, EU law is not relevant to the question of jurisdiction, and the principle of primacy states that EU law takes precedence over national law, not international law.

We heard new submissions this morning suggesting it does take precedence over international law. That is not correct. We have various citations on the next few slides where tribunals, again consistent with this Tribunal, rejected the principle of primacy. The first is Foresight v Spain. "The Tribunal is not persuaded by the Respondent's submissions on the primacy of EU

law. Contrary to the Respondent's contention, article 26(6) ECT applies to the merits of the case and not to jurisdiction. The Tribunal must determine its jurisdiction exclusively in accordance with the jurisdictional requirements of the ECT". Again, entirely on all fours with the Hydro Tribunal's finding.

Mathias Kruck v Spain, again rejecting the principle of primacy in paragraph 290. (Slide 47) It has a "fundamental importance within the EU, but it is far from being 'manifest' that a treaty concluded by the EU itself, alongside its Member States, without any reservation or any declaration of how the express provisions of that treaty were to be interpreted and applied, should be regarded as incompatible with EU law", so again we see consistency in the case law with the Hydro Tribunal's findings.

The next slide I think shows you, takes you back to some of the Tribunal's analysis and conclusions. 499, Madam President, here you see I am answering my own questions or answering the questions you put to me. "It is impossible to see how, on the face of articles 267 and 344, and in accordance with normal rules of treaty

interpretation, the effect of article 26(3) is to prevent national courts from making references to the CJEU or to allow Member States to submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the EU Treaties". So again, they are addressing Spain's arguments under 344 and 267 and we saw the conclusion in paragraph 500 earlier.

I have already mentioned the consistency on the REIO points. The same here. Vattenfall AB v Federal Republic of Germany also rejected the 267 and 344 arguments. You see that on the slide 49. The Antin tribunal -- again this is the underlying decision not the annulment decision -- again rejecting Spain's arguments under 344 in that case.

The second argument Spain makes on consent is that it didn't intend to consent because the purpose of the ECT was to encourage investment in the former Soviet republics. In other words it wasn't meant to apply within the EU because that is not what people were intending at the time. There is no support, no evidence for this. That may have been Spain's subjective intent at the time but it is not recorded in the Treaty and the Treaty of course

is what matters. The argument has been rejected, time and again, by many, many tribunals in cases against Spain and we have those. I won't take you through those now.

The final argument that Spain makes is on the various Court of Justice decisions, and in addition various statements have been made publicly by the European Commission or by the various EU Member States. The first it refers to is the European Commission statement in 2018. That argument has no merit in the Claimants' submission. It is the non-binding view of a single party to the ECT that has no force as a matter of public international law. Spain has never offered an explanation as to how it would under the Vienna Convention and again this argument has been rejected time and again.

In fact, the quote before you (slide 51) is from Greentech Energy et al v Italian Republic case, where you have Italy acknowledging that the EC communication has no binding force. You see that from both sides. EC communication is not a binding legal instrument. So it doesn't provide any interpretation that is binding on the Tribunal or this Committee, for that matter.

Spain also referred to the declarations of the various EU Member States on the effect of Achmea. It was said this morning I believe that this was a binding interpretative statement under the Vienna Convention. That is not correct. Article 31(3)(a) refers to subsequent agreements between the parties regarding the interpretation of the Treaty, and you can see in the quote at the bottom the International Law Commission's conclusions on subsequent agreements make it clear that the term "parties" in Article 31(3)(a) requires agreement between all parties to the Treaty, so that January 2019 declaration was signed by 22 EU Member States. So not even all EU Member States, and it certainly wasn't signed by all parties to the ECT and therefore has no force and effect as a matter of interpretation under the Vienna Convention.

Let me just briefly address Komstroy. This was submitted by the Claimants, as you pointed out, Madam President, with our Rejoinder. We don't think you should consider this. The reason it was submitted, and the reason the Claimants have submitted quite a few authorities under EU law, is in response to the arguments that have been raised

by Spain, and it was done in an abundance of caution on the assumption that Spain would raise Komstroy given its conclusions, so it was submitted with the Rejoinder, but it is our position it has no relevance to the Committee's analysis because it wasn't before the Tribunal. And, in any event, even if it were, if it had been, it would make no difference and the reason for that is the Tribunal determined EU law was not relevant to the question of jurisdiction.

And we see in the reconsideration decisions that we have put on the record, the three new authorities we have put in response this past week, you see that very conclusion being drawn by each of the tribunals. So post Komstroy, tribunals have been asked to reconsider their findings on jurisdiction and they have all said we reject that because EU law is not relevant. It doesn't matter what the Court of Justice says. They don't have authority to interpret the ECT under public international law. So we have set out our position in the Rejoinder. I won't repeat that here. It is at paragraphs 129 to 131 of the Rejoinder.

Manifest excess of powers and applicable law is the next ground for annulment. Spain in this

case you may recall originally argued that the Tribunal exceeded its powers by both failing to apply EU State Aid law or by misapplying it.

In the Reply, Spain clarified that and made clear that they are limiting [this] argument to the failure to apply EU State Aid law, rather than the misapplication of that law, and that is why, Madam President, I mentioned earlier our understanding was that Spain was no longer arguing a misapplication of the law. That was Spain's reply at paragraph 182 where it clarified its position.

So the question is did the Tribunal manifestly exceed its power by incorrectly deciding the law applicable to the case? That is Spain's argument. In particular, as I said, they argue that Claimants could not have any legitimate expectation in light of EU State Aid law.

And you see the quotes from Spain's Reply where it sets out its argument on the slide (slide 54). It says, "EU law should have been applied to analyse the true legitimate expectation of the Hydro Energy Parties when they claimed the amount of State Aid should remain unchanged throughout the useful life of their projects, bearing in mind that the regime was never notified and as such this contravened the

requirements of legislation on State Aid".

And then in 267, in its conclusion on this, "the Hydro Energy Parties could not have had legitimate expectations".

Our position is Spain's arguments fail for several reasons. The first, EU law is not the applicable law under the ECT, including EU State Aid law.

And then the second point is the arguments before the Tribunal went to questions of fact, and legitimate expectations is a question of fact. This is not even a question of applicable law, and Spain's arguments on the failure to apply EU law are limited to arguments on state aid and its relevance to the Claimants' legitimate expectations.

So again going through the Award and its analysis, most of this, as the Committee will appreciate, is in the context of jurisdiction. That is where Spain argued the relevance of EU law as opposed to its relevance as a background fact. You have first the starting point for the Tribunal is article 26 of the ECT and article 42 of the ICSID Convention. Those are the provisions on applicable law and you see references to article 26(6) there, paragraph 456.

Then we have already gone through this, the Tribunal in paragraph 502(2) and 502(3), which you see on the slide (slide 56), notes that 26(6) provides that the Tribunal shall decide the issues in dispute in accordance with the Treaty and applicable rules and principles of international law, and then in 502(4), the issues in dispute on the merits are those concerning alleged breaches of the obligations under the ECT relating to investments, referring you back to article 26(1). And then it adds --

Well, sorry, before I come on to the next one, you see article 26(1) at the bottom which refers to the issues in dispute between the parties and so what the Tribunal has found here is that article 26(6) is limited to questions of the merits and that is why it is not applicable to jurisdiction.

It also then finds that the 26(6) is the primary law that is applicable. 26(1) - What are the issues in dispute? They are the alleged breaches of the ECT under article 10(1) of the Treaty. So that is the primary source of law, the ECT itself.

And then the Tribunal considers the question of whether EU law would fall within the

scope of applicable international law, and that is in paragraph 495 where it says "the point that EU law (or most of it) is international law, or that the rulings of the CJEU are part of international law is not in any sense conclusive. The question still remains as to whether EU law and the rulings of the CJEU are part of the applicable international law". That is paragraph 495.

And then at paragraph 500, which we have already looked at, it then determines that the EU law, including decisions of the Court of Justice, do not bind the Tribunal. That is on the same slide --

PRESIDENT: Mr Sullivan, what do you make of this whole discussion coming under the jurisdiction analysis?

MR SULLIVAN: That is the key point. The arguments that were put by Spain, as I said, the Award has to be looked at in the context of the arguments that were made by the parties, so this discussion is in respect of the Tribunal -- well, not entirely in respect of the Tribunal's jurisdiction, but primarily in respect of the Tribunal's jurisdiction, because that is the context in which Spain argued EU law was relevant.

As counsel for Spain pointed out this