

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**MAINSTREAM RENEWABLE POWER LTD, INTERNATIONAL MAINSTREAM
RENEWABLE POWER LIMITED, MAINSTREAM RENEWABLE POWER GROUP
FINANCE LTD, HORIZONT I DEVELOPMENT GMBH, HORIZONT II
RENEWABLE GMBH, AND HORIZONT III POWER GMBH**

Claimants

and

FEDERAL REPUBLIC OF GERMANY

Respondent

ICSID Case No. ARB/21/26

**DECISION ON RESPONDENT'S APPLICATION UNDER ICSID
ARBITRATION RULE 41(5)**

Members of the Tribunal

Ms. Wendy Miles QC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek


Date of dispatch to the Parties: 18 January 2022

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I. INTRODUCTION AND THE PARTIES

1. This case concerns claims brought by (i) Mainstream Renewable Power Ltd, (ii) International Mainstream Renewable Power Limited, and (iii) Mainstream Renewable Power Group Finance Ltd, three private companies limited by shares incorporated in Ireland, and (iv) Horizont I Development GmbH, (v) Horizont II Renewable GmbH, and (vi) Horizont III Power GmbH, three limited liability companies incorporated in Germany (together, the “**Claimants**”), against the Federal Republic of Germany (“**Germany**” or the “**Respondent**”). The dispute was submitted by the Claimants to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Energy Charter Treaty (“**ECT**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
2. The dispute arises out of regulatory measures taken by the Respondent regarding its wind energy regime, which allegedly affected the Claimants’ wind energy projects, resulting in a loss to their investments.
3. This ruling concerns the Respondent’s preliminary objection pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).

II. PROCEDURAL HISTORY

4. On 30 April 2021, the Centre received the Claimants’ Request for Arbitration of that same date.
5. On 13 May 2021, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention and ICSID Institution Rule 6.
6. On 14 September 2021, the Tribunal was constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules.
7. The Tribunal is composed of Ms. Wendy Miles QC, a national of New Zealand, President, appointed by agreement of the Parties; Dr. Charles Poncet, M.C.L., a national

of Switzerland, appointed by the Claimants; and Mr. Antolín Fernández Antuña, a national of Spain, appointed by the Respondent. Ms. Martina Polasek, ICSID Deputy Secretary-General, was designated to serve as Secretary of the Tribunal.

8. Following correspondence between the Parties and the Tribunal, by email of 22 September 2021 transmitted by the Secretary of the Tribunal, the Tribunal confirmed that the first session would be held on 26 October 2021.
9. On 12 October 2021, the Respondent filed its Application under Rule 41(5) of the ICSID Arbitration Rules, together with Legal Authorities RL-0001 through RL-0010 (the “**Rule 41(5) Application**” or the “**Application**”).
10. By email of 15 October 2021 transmitted by the Secretary of the Tribunal, the Tribunal invited the Parties to consult and revert by 19 October 2021 with joint or separate proposals concerning the briefing schedule for the Application. The Tribunal also reminded the Parties that, as provided by ICSID Arbitration Rule 41(5), the Tribunal must notify its decision on the Application at the first session or promptly thereafter; therefore, given the imminent timing of the first session, the Tribunal invited the Parties to consider either a postponement of the first session or an extension of the time limit for the Tribunal’s decision on the Application.
11. By emails of 19 October 2021, the Parties informed the Tribunal that they had agreed to the following: (i) the Claimants would file their observations on the Application on 22 October 2021; (ii) during the first session, the Parties would discuss with the Tribunal whether it requires further written or oral submissions on the Application; and (iii) the Tribunal would notify the Parties of its decision on the Application as soon as reasonably practicable following the first session, with a reasoned decision to follow at a later date. The Parties’ agreement was subsequently approved by the Tribunal on 20 October 2021.
12. Pursuant to the Parties’ agreement, on 22 October 2021, the Claimants filed their Observations on the Application (the “**Observations**”), together with Exhibits C-0034 through C-0039 and Legal Authorities CL-0003 through CL-0023.
13. On 26 October 2021, the Tribunal held a first session with the Parties by videoconference. During the first session, the Tribunal determined that each Party

would file a second round of submissions on the Application, with the Respondent's submission due on 5 November 2021 and the Claimants' submission due on 15 November 2021.

14. In accordance with the Tribunal's instructions, on 5 November 2021, the Respondent submitted its response on the Application (the "**Reply Observations**"), together with Legal Authorities RL-0011 through RL-0013; the Claimants submitted their observations thereto (the "**Rejoinder Observations**") on 15 November 2021, together with Factual Exhibits C-0040 through C-0042 and Legal Authorities CL-0024 and CL-0025.

III. THE PARTIES' POSITIONS

15. This section provides a summary of the Parties' positions as set out in their written submissions. The Tribunal's summary is necessarily not an exhaustive account of the written pleadings. The Tribunal has reviewed the Parties' respective submissions carefully and in their entirety.

A. THE RESPONDENT'S POSITION

16. It is the Respondent's position that its case on jurisdiction is a "*clear and obvious case*" that only allows for one conclusion and therefore is manifestly without legal merit within the meaning of ICSID Arbitration Rule 41(5).
17. The Respondent argues that the Tribunal manifestly lacks jurisdiction to adjudicate the present dispute due to the incompatibility of the relevant parts of Article 26 of the ECT with the EU Treaties.¹
18. In the alternative, the Respondent argues that the Fourth, Fifth and Sixth Claimants – *i.e.*, Horizont I Development GmbH, Horizont II Renewable GmbH and Horizont III Power GmbH, respectively – are incorporated in Germany and therefore do not qualify as protected investors.²

¹ Application, Secs. B-C; Reply Observations, Secs. A.I-A.V.

² Application, paras. 2, 191; Reply Observations, Sec. A.VI.

(1) The Legal Standard under ICSID Arbitration Rule 41(5)

19. As to the applicable legal standard pursuant to Rule 41(5), the Respondent submits that “[i]n order to be ‘manifestly’ without legal merit, the alleged claim must be plainly without merit as a matter of law”.³ It further “recognizes that this standard requires a high degree of clarity that the claims as presented cannot succeed as a matter of law”.⁴
20. The Respondent submits that “it is not necessary to conduct an in-depth inquiry into the facts of the case in order for the Tribunal to appreciate the legal defect of the claim”,⁵ that “[a]ll impediments raised by Respondent are legal in nature”,⁶ and “[t]he factual predicate for Respondent’s objections are assumed to be undisputed”.⁷
21. The Respondent relies upon the standard accepted in *Trans-Global v. Jordan*, requiring a “clear and obvious case”.⁸ It further relies on *Trans-Global v. Jordan* in support of its submission that the “exercise to decide upon the matter might require some level of sophistication”, citing to *Trans-Global* award in support as follows:

*The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high. Given the nature of investment disputes generally, **the Tribunal nonetheless recognizes that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult.***⁹

22. The proof for Respondent’s arguments, it argues, is readily available and does not need extensive taking of evidence.¹⁰ The Respondent submits that while its arguments require a comprehensive analysis of international law, including EU law, they are not

³ Application, para. 17.

⁴ Application, para. 17.

⁵ Application, para. 19.

⁶ Application, para. 19.

⁷ Application, para. 19.

⁸ Application, para. 189; *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (“*Trans-Global v. Jordan*”) (CL-0004), paras. 86 (*see fn. 5*), 92.

⁹ Application, para. 20, fn. 5; *Trans-Global v. Jordan* (CL-0004).

¹⁰ Application, para. 189.

difficult to comprehend and allow only one conclusion for this Tribunal: to reject the Claimants' claims for lack of jurisdiction.¹¹

23. In this regard, the Respondent further relies on *Global Trading v. Ukraine*, which it notes “discussed both factual evidence and complex legal issues to reach a conclusion on the legal merits of the claim”.¹²

(2) Article 26 of the ECT and the EU Treaties

24. As to the substance of its Application, the Respondent argues that a clause consenting to investor-State arbitration in a treaty between European Union (“EU”) Member States is incompatible with the Treaty on European Union and the Treaty on the Functioning of the European Union (the “EU Treaties”). This includes the ECT insofar as relationships among EU Member States are concerned. It further argues that because of this incompatibility, the relevant consent clause in the ECT, Article 26, cannot be a valid basis of consent to arbitration in investor-State disputes between Irish investors and Germany, both EU Member States, including in the present dispute.

a. Factual Basis of the Objection

25. The Respondent submits that the basis of its jurisdictional objection is very clear and has been “widely discussed in arbitration circles”.¹³ It submits that the EU Commission and the CJEU have stated their position on EU law leading to the inapplicability of arbitration clauses to intra-EU relations in an unambiguous manner.¹⁴ The EU Member States, including Respondent, have taken the necessary political and legal steps to comply with the CJEU’s findings.¹⁵
26. In that regard, the Respondent sets out what it describes as the factual basis of its objection, which comprises a summary of events and instruments from 2009. The Respondent submits that these make manifestly clear that an investor-State arbitration

¹¹ Application, paras. 20, 190.

¹² Application, para. 21, fn. 6; *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (“*Global Trading v. Ukraine*”) (CL-0005).

¹³ Application, para. 188.

¹⁴ Application, para. 188.

¹⁵ Application, para. 188.

clause in a treaty between two or more EU Member States is incompatible with these States' obligations under the EU Treaties and include the following:¹⁶

- (i) 2009 Lisbon Treaty;
- (ii) 2015 EU Commission's infringement proceedings against EU Member States;
- (iii) 2016 Non-paper by Germany and a number of other EU Member States concerning intra-EU investment;
- (iv) 6 March 2018 judgment of the Court of Justice of the European Union (the "CJEU") in Case C-284/16, *Slovak Republic v. Achmea BV* (the "**Achmea Judgment**");¹⁷
- (v) intra-EU arbitration after the *Achmea* Judgment;
- (vi) 2018 EU Commission's communication "Protection of intra-EU investment";¹⁸
- (vii) January 2019 Declaration by EU Member States on the Legal Consequences of the *Achmea* Judgment and on Investment Protection in the EU;¹⁹
- (viii) Council of European Union's Decision regarding Negotiations on the Modernization of the ECT;
- (ix) May 2020 EU Proposal regarding the ECT Modernization;
- (x) May 2020 Termination Agreement regarding Intra-EU BITs; and
- (xi) 2 September 2021 judgment of the CJEU in Case C-741/19, *Republic of Moldova v. Komstroy LLC* (the "**Komstroy Judgment**").²⁰

¹⁶ Application, Sec. B.

¹⁷ *Slovak Republic v. Achmea BV*, CJEU Case C-284/16, Judgment, 6 March 2018 (**RL-0004**).

¹⁸ EC, Communication from the Commission to the European Parliament and the Council, "Protection of intra-EU investment", 19 July 2018 (**RL-0005**).

¹⁹ 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 investment protection in the European Union", 15 January 2019 (**RL-0006**).

²⁰ *Republic of Moldova v. Komstroy LLC*, CJEU Case C-741/19, Judgment, 2 September 2021 (**RL-0007**).

27. In the Respondent’s submission, these events and instruments establish beyond any doubt that Article 26 of the ECT is “*not applicable to intra-EU arbitration*”.²¹

b. Legal Basis of the Objection

28. The Respondent submits that because of the alleged incompatibility of the investor-State arbitration clause in the ECT with the EU Treaties, Article 26 of the ECT is “*not applicable*”.²² Consequently, there would not have been a valid offer to arbitrate at any relevant time in these proceedings and this Tribunal does not have jurisdiction.²³ The Tribunal must take account of this incompatibility and its consequences *ex officio*.²⁴

29. In support of this conclusion, the Respondent advances three arguments: (i) the interpretation of the ECT; (ii) recent legal developments in the EU; and (iii) the lack of an arbitration agreement pursuant to private law based on the common will of the Parties. These are detailed in turn below.

(i) No jurisdiction based on the interpretation of the ECT

30. The Respondent’s first argument is that the interpretation of the ECT in accordance with the Vienna Convention on the Law of Treaties (the “**VCLT**”) leads to the conclusion that there is no valid offer to arbitrate by the Respondent. Under Article 10 of the ECT, each Contracting Party to the ECT guarantees favourable treatment to investors of other Contracting Parties to the ECT. The Respondent argues that since the ECT treats the EU and its Member States as a single entity, the reference to “*other contracting parties*” in the ECT can only refer to third (non-EU) States.²⁵

31. Both the investors’ home State and the host State of the investment were EU Member States at the time they ratified the ECT. The Respondent argues that the extent of these States’ commitments to arbitration under Article 26 of the ECT must therefore be determined by an interpretation of the ECT in accordance with Articles 31 and 32 of

²¹ Application, para. 92.

²² Application, paras. 92-95.

²³ Application, para. 94.

²⁴ Application, para. 93.

²⁵ Application, para. 97; Energy Charter Treaty (“**ECT**”) (**CL-0001**), Arts. 1(10)(b) (“[...] *With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation*”) and 10.

the VCLT, specifically Article 31(1) of the VCLT.²⁶ Neither the ordinary meaning of the ECT's terms nor the context, object and purpose of the ECT, even when taking into account the preparatory works, can be a basis for this Tribunal's jurisdiction.²⁷

32. Article 1(2) of the ECT defines a “*Contracting Party*” as a “[S]tate or Regional Economic Integration Organization which has consented to be bound by the ECT and for which that treaty is in force”. Article 1(3) of the ECT defines a Regional Economic Integration Organization (“**REIO**”).²⁸ Article 1(10) of the ECT defines “*Area*” of a REIO as the Areas of its Member States.²⁹ Article 36(7) of the ECT reflects the division of competences between the EU and the EU Member States.³⁰ Article 25 of the ECT further recognizes that Contracting Parties who extend certain trade and investment liberalization to one another by virtue of an Economic Integration Agreement like the EU Treaties, are not required by the ECT to extend the same benefits to non-EIA States.³¹

33. The Respondent submits that the ECT foresees the possibility that a Contracting Party is bound only for parts of the ECT, namely for the parts for which it enjoys international competence.³² In that regard, the Respondent contends that:

The ECT thus recognizes that the EU Member States have transferred competence over matters governed by the ECT to the EU, including the authority to take binding decisions for the EU Member States in respect of those matters. Thereby, the signatories to the ECT acknowledge that the competence for concluding the ECT is shared between the EU and the EU Member States. Furthermore, the ECT recognizes that the EU corresponds to its parts (because it has a number of votes equal to its parts), and that each acts only in the matters falling under its competence. For the

²⁶ Application, para. 98.

²⁷ Application, para. 100.

²⁸ Application, para. 104; ECT (CL-0019), Art. 1(3) (“[...] organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by [the ECT], including the authority to take decisions binding on them in respect of those matters”).

²⁹ Application, para. 107; ECT (CL-0019), Art. 1(10) (“[...] With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation”).

³⁰ Application, para. 105; ECT (CL-0019), Art. 36(7) (“A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to [the ECT]; provided that such an Organisation shall not exercise its right to vote if its member states exercise theirs, and vice versa”).

³¹ Application, para. 112.

³² Application, para. 103.

*EU, EU Member States and the EU are therefore not bound for the entirety ECT, but each for its respective competences.*³³

The Respondent concludes that the Contracting Parties to the ECT signed the ECT on the mutual understanding that it would not apply to an intra-EU situation.³⁴

34. According to the Respondent, the ECT's context and object and purpose lead to the same conclusion. Even though, in theory, EU Member States have the international capacity to enter into *inter se* obligations when negotiating a multilateral agreement for those areas of the agreement for which they retain competence, they, in practice, never do.³⁵ The preparatory work to the ECT and the circumstances of its conclusion confirm the goal of integrating the energy sectors of the former Soviet Union and Eastern Europe with those of the "*Western world*", including the EU, USA, Canada and Norway.³⁶ It was understood by all Contracting Parties that the EU Member States did not intend to create *inter se* obligations between them.³⁷
35. In addition, even if supplementary means of interpretation are resorted to, the conclusion remains the same.³⁸

(ii) *No jurisdiction based on the recent legal developments in EU law*

36. The Respondent's second argument is that, even if the Tribunal does not follow its interpretation of the intent of the Contracting Parties to the ECT *ab initio*, in light of the progressive developments of EU Treaties and EU law (*see above, Section (2)a*), especially the *Komstroy* Judgment,³⁹ the Tribunal lacks jurisdiction.⁴⁰ These progressive developments include: (i) changes to EU law following the Lisbon Treaty leading to the inapplicability of Article 26 of the ECT; (ii) the *Komstroy* Judgment

³³ Application, para. 106.

³⁴ Application, para. 114.

³⁵ Application, para. 119.

³⁶ Application, para. 116.

³⁷ Application, para. 126.

³⁸ Application, paras. 127-139.

³⁹ Application, paras. 172-177.

⁴⁰ Application, Sec. II.

having sealed the debate that ECT arbitration is not available for intra-EU ECT-based investor-State arbitration; and (iii) political developments since 2018.

37. *First*, the Respondent sets out the process by which it submits that changes to EU law following the Lisbon Treaty led to the inapplicability of Article 26 as follows:
- a. the Respondent and investors' home State are both parties to the ECT and the Treaty on the Functioning of the European Union ("TFEU") and their relationship is governed by the more recent treaty (Article 30(4)(a) of the VCLT);⁴¹
 - b. EU Treaties have a dual nature under international law, including as the basis for EU law under international law and, as between EU Member States, to underpin the establishment under international law of the supranational union;⁴²
 - c. the general requirement for EU Member States to make use of all means available to ensure that treaties concluded with third countries under international law do not violate EU law (Article 351(2) of the TFEU),⁴³ applies *a fortiori* in cases where agreements concluded between EU Member States are incompatible with EU law;⁴⁴ and
 - d. in 2009, the Respondent and investors' home State both adopted changes to EU law following the Lisbon Treaty,⁴⁵ which effectively modified the ECT as between EU Member States (Article 41(1)(b) of the VCLT).⁴⁶
38. Therefore, the Respondent submits, as the ECT is the elder of the treaties concluded under international law, with regard to EU Member States it has been superseded by the more recent Treaty on European Union ("TEU") and TFEU and the provisions

⁴¹ Application, para. 148.

⁴² Application, para. 149.

⁴³ Application, para. 151.

⁴⁴ Application, para. 152. This special conflict rule that EU Treaties take absolute precedence over agreements that Member States has concluded been recognized for instance in 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*: Application, para. 153; M. Koskenniemi, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (International Law Commission, 2006) (C-0039), para. 283.

⁴⁵ Application, para. 147.

⁴⁶ Application, para. 158.

therein.⁴⁷ According to Article 351(1) of the TFEU, only such agreements shall not be affected by EU law which an EU Member State has entered into with one or more non-members of the EU, before its accession to the EU.⁴⁸ This means that, if two States are both parties to a pre-accession treaty and to the EU Treaties, in case of incompatibility between the two, it is the later EU Treaties that apply, in conformity with Article 30(3) VCLT.⁴⁹

39. The Respondent further submits that the conflict rule in Article 16 of the ECT is “*not applicable since intra-EU disputes are not within its scope of application*”.⁵⁰ Even if it were applicable, it submits that it would not lead to a precedence of the ECT over EU law since the EU Treaties represent “*a more favorable developed legal system which offers more forms of protection than the ECT does*”.⁵¹
40. *Second*, the Respondent sets out the basis upon which it submits that the *Komstroy* Judgment deals the debate. It refers to the *Komstroy* Judgment where the CJEU concluded as follows:

*In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.*⁵²

⁴⁷ Application, para. 166.

⁴⁸ Application, para. 167.

⁴⁹ Application, para. 167; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.189 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>) (“*Subject to the several assumptions above [...] the Tribunal concludes that Article 307 EC [now Article 351 of the TFEU] precludes inconsistent pre-existing treaty rights of EU Member States and their own nationals against other EU Member States; and it follows [...] that EU law would prevail over the ECT’s substantive protections and that the ECT could not apply inconsistently with EU law to such a national’s claim against an EU Member State*”).

⁵⁰ Application, para. 170.

⁵¹ Application, para. 170.

⁵² Application, para. 176; *Komstroy* Judgment, para. 66.

41. The Respondent submits that the CJEU judgment is a binding interpretation of EU law, which applies to all EU Member States.⁵³ Therefore, the position that only intra-EU investor-State arbitration based on BITs violates EU law cannot be upheld.⁵⁴
42. The CJEU further confirmed its analysis in its 26 September 2021 judgment in the *Poland v. PL Holdings* case (the “**PL Holdings Judgment**”).⁵⁵ The Respondent submits that “*the CJEU even took it one step further, declaring all ad hoc intra-EU arbitration inadmissible as well*”.⁵⁶ It submits that, based on that judgment:
- [...] *that ad hoc arbitration clearly was no different than arbitration under a BIT. Hence, the possibility for a Member State to bring an action before an arbitral body through an ad hoc arbitration agreement, showing the same characteristics as an arbitration clause in a BIT, violates Art. 4 (3) TEU and Art. 267, 344 TFEU in the same way as an arbitration clause contained in a BIT, or the ECT, for that matter.*⁵⁷
43. *Third*, as to political developments since the 2018 *Achmea* Judgment, the Respondent refers to two recent instruments as follows:
- a. January 2019 Declaration, signed by the investors’ home State, the Respondent and 20 other EU Member States, which contained statements as to the nature of the ECT and its systemic interpretation precluding intra-EU investor-State arbitration,⁵⁸ demonstrating the shared understanding of the signatories regarding the interpretation of the ECT,⁵⁹ and, which confirms that the ECT should have always been interpreted according to this understanding;⁶⁰ and

⁵³ Application, para. 175.

⁵⁴ Application, para. 177.

⁵⁵ Application, para. 184; Reply Observations, paras. 25-34; *Republic of Poland v. PL Holdings Sàrl*, CJEU Case C-109/20, Judgment, 26 October 2021 (“**PL Holdings Judgment**”) (available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=248141&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26155384>).

⁵⁶ Reply Observations, para. 30.

⁵⁷ Reply Observations, para. 32.

⁵⁸ Application, para. 179.

⁵⁹ Application, para. 179.

⁶⁰ Application, para. 179.

- b. May 2020 Termination Agreement, which provides that new arbitration proceedings are those initiated after 6 March 2018, the day of the *Achmea* Judgment.
44. The Respondent submits that the present arbitration, registered with ICSID on 13 May 2021, qualifies as a new arbitration within the meaning of the May 2020 Termination Agreement.⁶¹ It contends that the Tribunal is bound by the will of the Contracting Parties and therefore should take into account the Declarations and Agreements in accordance with Articles 31(2)(b) and 31(3)(a) of the VCLT and terminate these proceedings accordingly.⁶²
- (iii) *No jurisdiction based on the common will of the Parties*
45. The Respondent submits that there are no grounds to argue that the Respondent accepted the Tribunal’s jurisdiction by not objecting to it in a timely manner, unlike the findings of other tribunals, such as the tribunal in *PL Holdings*.⁶³ The Respondent raised concerns as to jurisdiction in its very first submission dated 7 June 2021.⁶⁴
46. Therefore, the Respondent asserts that the Tribunal cannot base its jurisdiction on the common will of the Parties to the dispute expressed in an arbitration agreement concluded *inter se*,⁶⁵ because “[t]here is no agreement to arbitrate based on private law”,⁶⁶ and “no valid arbitration agreement between the Parties in accordance with Article 25(2) ICSID Convention”.⁶⁷
- (iv) *No jurisdiction based on private law*
47. In its Reply Observations, the Respondent further submits that pursuant to Article 5 of the VCLT any relevant rules of an international organization take precedence over any general rule of public international law.⁶⁸

⁶¹ Application, para. 181.

⁶² Application, para. 180.

⁶³ Reply Observations, paras. 25-34; *PL Holdings* Judgment, paras. 44-45.

⁶⁴ Application, para. 186.

⁶⁵ Application, para. 186.

⁶⁶ Application, para. 186.

⁶⁷ Application, para. 4.

⁶⁸ Reply Observations, paras. 40-44.

48. Article 5 of the VCLT provides:

*The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.*⁶⁹

49. The Respondent submits that the term “*rules of the organization*” comprises both written rules and rules emanating from established organizational practice,⁷⁰ and any conflict rules contained in the constituent instrument of an international organization.⁷¹ Therefore, the primacy rule applies to the EU Treaties at international level and endows them with *lex specialis* status vis-à-vis other rules of conflict. It is irrelevant whether the conflicting treaty was concluded before or after the EU Treaties, and whether or not it contains its own conflict rules.⁷² It would therefore be erroneous to assume applicability of Article 26(4) of the ECT by relying on an alleged structural dichotomy between EU primary law and international law.⁷³

50. In sum, the Respondent argues that the general international law of treaties, in particular the application of its conflict of law rule in Article 5 of the VCLT, leads to the inapplicability of Article 26 of the ECT in an intra-EU context, including in the present case.

(3) Nationality of the Fourth, Fifth and Sixth Claimants

51. In the alternative, the Respondent argues that Claimants Four, Five and Six – *i.e.*, Horizont I Development GmbH, Horizon II Renewable GmbH and Horizont III Power GmbH, respectively – are incorporated in Germany and are not protected investors.⁷⁴

⁶⁹ Vienna Convention on the Law of Treaties (“VCLT”) (CL-0017), Art. 5 (emphasis added by the Respondent).

⁷⁰ Reply Observations, para. 43; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018) (“VCLT Commentary”) (RL-0012), para. 15; United Nations, *Conference on the Law of Treaties* (Vienna, 26 March to 24 May 1968), Official Records (1969) UN Doc A/CONF.39/11 (RL-0013), paras. 31, 40.

⁷¹ Reply Observations, para. 43; VCLT Commentary (RL-0012), para. 16.

⁷² Reply Observations, para. 46.

⁷³ Reply Observations, para. 47.

⁷⁴ Application, para. 2.

52. According to the Respondent, the Claimants do not provide evidence that would establish Claimants Four, Five and Six being “*Irish companies via control*” and are thus “*not protected investors*”.⁷⁵

(4) Request for Relief

53. The Respondent requests that the Tribunal: (i) dismiss the Claimants’ claims for manifest lack of jurisdiction under Article 26 of the ECT and in accordance with Rule 41(5) of the ICSID Arbitration Rules; and (ii) examine *ex officio* its scope of jurisdiction, in particular taking into account the CJEU’s *Komstroy* Judgment; or, in the alternative (iii) dismiss the claims of Claimants Four, Five and Six, for manifest lack of jurisdiction as being incorporated in the host State and in accordance with Rule 41(5) of the ICSID Arbitration Rules.⁷⁶

B. THE CLAIMANTS’ POSITION

54. The Claimants agree with the Respondent that the Rule 41(5) standard “*requires a high degree in clarity that the claims as presented cannot succeed as a matter of law*” as set out in *Trans-Global v. Jordan*.⁷⁷

55. As to the Respondent’s first objection regarding incompatibility between Article 26 of the ECT and the EU Treaties, the Claimants argue that the Respondent misrepresents some of the instruments it relies on inaccurately and that these instruments have “*no bearing*” on the Tribunal’s jurisdiction.⁷⁸ They submit that the Tribunal has jurisdiction on the basis of Article 26 of the ECT in conjunction with Article 25 of the ICSID Convention.⁷⁹

56. As to the Respondent’s second objection concerning the nationality of the Fourth, Fifth and Sixth Claimants, the Claimants argue that, by virtue of Article 26(7) of the ECT, these Claimants were at all relevant times owned and controlled by the First, Second and Third Claimants respectively, the latter three being investors with Irish

⁷⁵ Reply Observations, paras. 55-56.

⁷⁶ Reply Observations, para. 57.

⁷⁷ Observations, para. 8.

⁷⁸ Observations, Sec. III.

⁷⁹ Observations, Sec. IV.

nationality.⁸⁰ Consequently, all Claimants were “*nationals of another Contracting State*” for the purposes of the ICSID Convention.

(1) Legal Standard under ICSID Arbitration Rule 41(5)

57. The Claimants submit that the Respondent has to overcome a “*very high threshold*”.⁸¹ On the basis of earlier ICSID decisions, the Claimants argue that “*manifest*” in Rule 41(5) is equivalent to “*obvious*” or “*clearly revealed to the eye, mind or judgment*”.⁸² Under Rule 41(5), the Respondent must establish its objection “*clearly and obviously, with relative ease and despatch*”.⁸³
58. The Claimants submit that this standard applies no less to jurisdictional than other matters.⁸⁴

(2) Article 26 of the ECT and the EU Treaties

a. Factual Basis of the Objection

59. The Claimants submit that what the Respondent “*described as the ‘factual basis’*” contains “*certain inaccuracies*” and significant parts of it are “*irrelevant*” for the purpose of the Application.⁸⁵ They firmly assert that Article 26 of the ECT contains a valid offer to arbitrate on the part of the Respondent.⁸⁶
60. The Claimants contend that significant parts of the “*factual basis*” invoked by the Respondent are inaccurate or irrelevant as follows:
- (i) *2009 Lisbon Treaty*: has no bearing on the Tribunal’s jurisdiction because Article 207 of the TFEU, which stipulates that foreign direct investment is an

⁸⁰ Observations, para. 6.

⁸¹ Observations, Sec. II.

⁸² Observations, paras. 8-9; *Trans-Global v. Jordan (CL-0004)*, para. 92; *Global Trading v. Ukraine (CL-0005)*, para. 35; *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009 (“*Brandes v. Venezuela*”) (CL-0006), paras. 62-63; *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (“*Lotus v. Turkmenistan*”) (CL-0007), para. 158.

⁸³ Observations, paras. 8-9.

⁸⁴ Observations, para. 10; *PNG Sustainable Development Program Ltd. v. The Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014 (“*PNG v. Papua New Guinea*”) (CL-0008), para. 91.

⁸⁵ Observations, para. 7.

⁸⁶ Observations, para. 7.

exclusive EU competence, relates to the EU's external competence rather than intra-EU relations;⁸⁷

- (ii) *2015 EU Commission's infringement proceedings against EU Member States*: have no bearing on the Tribunal's jurisdiction because the EU Commission did not follow through with these proceedings and the CJEU did not rule;⁸⁸
- (iii) *2016 Non-paper by Germany and a number of other EU Member States concerning intra-EU investment*: at most a policy paper that has no bearing on the Tribunal's jurisdiction;⁸⁹
- (iv) *Achmea Judgment*: not one tribunal, including ICSID tribunals, has denied jurisdiction on the basis of the *Achmea Judgment* both with regard to intra-EU claims under bilateral investment treaties and with regard to intra-EU claims under the ECT;⁹⁰
- (v) *July 2018 EU Commission's Communication "Protection of intra-EU investment"*: is unaccompanied by any explanation as to how this policy paper would deprive the Tribunal of jurisdiction;⁹¹
- (vi) *January 2019 Declaration by EU Member States on the Legal Consequences of the Achmea Judgment and on Investment Protection in the EU*: is "not a legally binding document",⁹² and "[t]he use of the future tense suggests that the signatories [to the Declaration] do not consider that their intra-EU BITs have already been terminated for invalidity of the underlying consent",⁹³ and the VCLT "provides specific procedures in this regard, yet there is no assertion in the January 2019 Declaration that these procedures have been commenced, much less completed";⁹⁴

⁸⁷ Observations, para. 13.

⁸⁸ Observations, para. 14.

⁸⁹ Observations, para. 15.

⁹⁰ Observations, paras. 16-19.

⁹¹ Observations, para. 20.

⁹² Observations, para. 21.

⁹³ Observations, para. 22.

⁹⁴ Observations, para. 22.

- (vii) *Council of European Union’s Decision regarding Negotiations on the Modernization of the ECT*: negotiation directives that are “*aspirational*”⁹⁵ and contradict the Respondent’s measures taken in relation to the Claimants that are the subject of the present dispute;⁹⁶
- (viii) *May 2020 Termination Agreement regarding Intra-EU BITs*: does not cover intra-EU proceedings on the basis of Article 26 of the ECT, as admitted by the Respondent and therefore has no bearing on jurisdiction and cannot support the Application;⁹⁷ and
- (ix) *Komstroy Judgment*: following the *Achmea* Judgment, “*it was to be expected that the CJEU may make the finding that it did in the Komstroy Judgment*”,⁹⁸ but “*neither the courts of EU Member States, nor the CJEU itself, appear to follow the Komstroy Judgment*”,⁹⁹ because two months after the *Komstroy* Judgment, the Svea Court of Appeal in Stockholm has not withdrawn its request for a preliminary ruling to the CJEU regarding a question on the compatibility of Article 26 of the ECT with the EU Treaties, and the CJEU has not removed the case from its docket.¹⁰⁰

61. The Claimants therefore question why an ICSID tribunal should decline jurisdiction in the context of the Application.¹⁰¹

⁹⁵ Observations, paras. 26.

⁹⁶ Observations, paras. 24-26.

⁹⁷ Observations, para. 27.

⁹⁸ Observations, para. 28.

⁹⁹ Observations, para. 30.

¹⁰⁰ Observations, para. 30. The Tribunal notes that it appears subsequently to have so withdrawn. *Italian Republic v. Athena Investments A/S (earlier Greentech Energy Systems A/S), NovEnergia II Energy & Environment (SCA) SICAR, NovEnergia II Italian Portfolio SA*, Svea Court of Appeal, Case No. T 3229-19, Order, 24 November 2021 (available at: <https://jusmundi.com/en/document/pdf/decision/sv-greentech-energy-systems-a-s-novenergia-ii-energy-environment-sca-sicar-and-novenergia-ii-italian-portfolio-sa-v-the-italian-republic-svea-hovratt-protokoll-wednesday-24th-november-2021>).

¹⁰¹ Observations, para. 31.

b. Legal Basis of the Objection

(i) Interpretation of the ECT

62. The Claimants submit that an interpretation of Article 26 of the ECT in accordance with the VCLT confirms that the Tribunal has jurisdiction.¹⁰² As the legal basis for the Tribunal's jurisdiction in the present dispute, the Claimants rely on Articles 26(1) and 26(3)(a) of the ECT, which read as follows:

(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.

[...]

(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.¹⁰³

63. As to the continued application of Article 26 of the ECT, the Claimants:

- a. reiterate that both Germany and Ireland at all relevant times were and still are Contracting Parties;¹⁰⁴
- b. submit that nothing in the language of Article 26 of the ECT suggests that its scope was intended to be restricted to disputes involving either an investor or a Contracting Party outside of the EU;¹⁰⁵
- c. as to other provisions of the ECT, invoke the Decision on the *Achmea* Issue in *Vattenfall v. Germany*, which held that explicit language was necessary to support the interpretation that the offer to arbitrate in Article 26 was only to Investors from non-EU Member States;¹⁰⁶ and

¹⁰² Observations, Sec. IV.A.

¹⁰³ Observations, para. 32; ECT (CL-0019), Arts. 26(1), 26(3)(a).

¹⁰⁴ Observations, para. 34.

¹⁰⁵ Observations, para. 35.

¹⁰⁶ Observations, para. 37; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 ("*Vattenfall v. Germany*") (CL-0018),

- d. reject that the context or object and purpose of Article 26 of the ECT can change this conclusion.¹⁰⁷

(ii) *Recent EU developments and the ICSID Convention*

64. The Claimants submit that it is Article 26 of the ECT and Article 25 of the ICSID Convention and not “*EU law*” that are determinative of the Tribunal’s jurisdiction.¹⁰⁸ They make five arguments in that regard:
- a. “*EU law*” is not applicable law pursuant to Article 26(6) of the ECT to determine the Tribunal’s jurisdiction;
 - b. there are no rules between the parties of the ECT within the meaning of Article 31(3)(c) VCLT to deprive the Tribunal of its jurisdiction;
 - c. the ECT, including its Article 26, has not been superseded by the EU Treaties pursuant to Article 30(4)(a) of the VCLT;
 - d. there has been no modification of the ECT within the meaning of Article 41(1) of the VCLT that could deprive the Tribunal of its jurisdiction; and
 - e. Article 351 of the TFEU does not even apply and in any event, cannot deprive the Tribunal of its jurisdiction.
65. Regarding the first argument, the Claimants submit that the ECT provision concerning applicable law (Article 26(6)) does not apply to the dispute settlement clause in Article 26. It applies only to the merits of a dispute between the Parties and not to issues relating to the Tribunal’s jurisdiction.¹⁰⁹
66. Moreover, even if Article 26(6) of the ECT did apply, its effect would not be to incorporate EU law as part of the applicable law, based on the “*natural and ordinary*

para. 182. The Claimants also allege that the Respondent’s Application is “disingenuous” in light of its recent settlement agreement in the mentioned *Vattenfall* arbitration: Observations, para. 5(ii).

¹⁰⁷ Observations, paras. 38-45.

¹⁰⁸ Observations, Sec. IV.B.

¹⁰⁹ Observations, paras. 50-51.

meaning” of the provision and the “*context*” in relation to other provisions of the ECT.¹¹⁰

67. Regarding the second argument, the Claimants assert that “*Article 31(3)(c) VCLT requires practice that establishes rules ‘between the parties’ to the relevant treaty*”,¹¹¹ and none of the instruments the Respondent invokes can be said to establish rules between the parties to the ECT regarding its interpretation.¹¹²
68. Regarding the third argument, the Claimants submit that the EU Treaties do not post-date the ECT as the relevant provisions of the EU Treaties were already part of their predecessor treaty, the Treaty of Rome and the European Communities Treaty.¹¹³
69. Moreover, even if the EU Treaties were considered to be the later instrument, the EU Treaties and the ECT cannot be considered part of the same “*treaty regime*” and do not relate “*to the same subject matter*” within the meaning of Article 30(1) of the VCLT.¹¹⁴ In any event, the *lex specialis* conflict rules in Article 16 of the ECT prevails over the subsidiary rules in Article 30 of the VCLT.¹¹⁵
70. Regarding the fourth argument, the Claimants submit that Article 16 of the ECT means that there can be no modification of the ECT pursuant to Article 41(1) of the VCLT.¹¹⁶ The Claimants also rely on the lack of any reference in the Lisbon Treaty to the ECT or any modifications to it. In particular, there is no suggestion that the EU followed the procedures set out in Article 41(2) of the VCLT for advance notification of other ECT Contracting Parties of their intention to modify ECT obligations among EU Member States.¹¹⁷
71. Regarding the fifth and final argument on this issue, the Claimants contend that Article 351 of the TFEU only concerns non-EU member States and provides no basis for the EU Treaties’ precedence over other agreements concluded between EU Member

¹¹⁰ Observations, para. 82.

¹¹¹ Observations, para. 56.

¹¹² Observations, para. 56.

¹¹³ Observations, para. 58.

¹¹⁴ Observations, paras. 60-61.

¹¹⁵ Observations, para. 62.

¹¹⁶ Observations, para. 63.

¹¹⁷ Observations, para. 64.

States, in particular the ECT given that treaty's Article 16 *lex specialis* conflict rule.¹¹⁸ Consequently, the EU Treaties do not prevail over the ECT.¹¹⁹

(iii) *Private law and Article 5 of the VCLT*

72. As to the Respondent's argument that the Tribunal lacks jurisdiction based on private law, the Claimants deal with this in their Rejoinder Observations.¹²⁰ The Claimants submit that the Respondent's "*position cannot be grounded in Article 5 VCLT and none of the Respondent's authorities has made this point*".¹²¹ They submit that:

*To the Claimant's best knowledge, no EU Member State in dozens of intra-EU investment arbitrations has ever sought to argue that an international arbitral tribunal in an intra-EU investment arbitration would not have jurisdiction by virtue of Article 5 VCLT. For good reason, because such an argument cannot reasonably be made.*¹²²

73. They further submit that, although Article 5 of the VCLT establishes "*that international organisations, such as the EU, may have their own rules when it comes to determining issues such as amendment, modification and interpretation of the constituent instrument, such as the EU Treaties*", it "*does not have anything to say about the relationship between EU Treaties and other treaties, such as the ECT*".¹²³

(3) Nationality of the Fourth, Fifth and Sixth Claimants

74. The Claimants contend that the Fourth, Fifth and Sixth Claimants are "*nationals of another Contracting State*" for the purposes of the ICSID Convention by virtue of Article 26(7) of the ECT since they were owned and controlled by the First, Second and Third Claimants, respectively.¹²⁴
75. In addition, the Claimants allege that the Respondent was in fact already aware of the First, Second and Third Claimants' respective control of the Fourth, Fifth and Sixth

¹¹⁸ Observations, paras. 65-66.

¹¹⁹ Observations, para. 66; *Vattenfall v. Germany (CL-0018)*, para. 229.

¹²⁰ Rejoinder Observations, paras. 15-20.

¹²¹ Rejoinder Observations, para. 18.

¹²² Rejoinder Observations, para. 18.

¹²³ Rejoinder Observations, paras. 19-20.

¹²⁴ Request for Arbitration, para. 66, fn. 32: Extract from Share Register of the Fourth Claimant, 15 April 2021 (C-0008); Extract From Share register of the Fifth Claimant, 15 April 2021 (C-0011); Extract from Share Register of the Sixth Claimant, 15 April 2021 (C-0013).

Claimants because of its involvement in German domestic court proceedings against the same companies who are the Claimants in this arbitration.¹²⁵

(4) Request for Relief

76. The Claimants request that the Tribunal: (i) reject the Respondent's Application; (ii) consider its jurisdiction on the basis of the Parties' submissions; and (iii) order the Respondent to pay all costs and fees incurred in connection with its Application.¹²⁶

IV. THE TRIBUNAL'S ANALYSIS

77. The Tribunal has carefully reviewed and considered the Parties' written submissions arising out of the Respondent's Application pursuant to Rule 41(5) for dismissal of the claim on the ground that it is manifestly without legal merit because the Tribunal lacks jurisdiction.
78. For the purpose of determining the Rule 41(5) Application, the relevant provision of the ICSID Arbitration Rules states as follows:

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

79. It is against this Rule that the Tribunal sets out its reasoning below.

A. LEGAL STANDARD UNDER ICSID ARBITRATION RULE 41(5)

80. First, the legal standard established by Rule 41(5) expressly requires that the Tribunal determine the claim to be "*manifestly without legal merit*".

¹²⁵ Rejoinder Observations, para. 32.

¹²⁶ Rejoinder Observations, para. 34.

81. As to the meaning of that phrase, the Parties accept that the claim must be clearly and obviously without merit as a matter of law and that the application of the standard requires a high degree of clarity.
82. Previous decisions applied that standard in a relatively consistent manner. In *Trans-Global v. Jordan*, the tribunal said the “*standard is thus set high*” and “*required the respondent to establish its objection clearly and obviously, with relative ease and despatch*”.¹²⁷ It noted that “*Rule 41(5) can only apply to a clear and obvious case*”, or to “*patently unmeritorious claims*”.¹²⁸ As to what it required by way of “*relative ease and despatch*”, the tribunal noted that “*this exercise may not always be simple*”.¹²⁹ That tribunal further noted that this “*may thus be complicated; but it should never be difficult*”.¹³⁰
83. In *Eskosol S.p.A. in liquidazione v Italian Republic*, the Tribunal said that “*the Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law.*”¹³¹
84. In *Lotus v. Turkmenistan*, the tribunal required that it be “*obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified*”. Therefore, “[i]f the claimant [...] can point to an arguable case, the claim should proceed”.¹³²
85. The tribunal in *PNG v. Papua New Guinea* noted that Rule 41(5) “*is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts*”.¹³³ It said this was because the Rule 41(5) procedure would “*inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect*”.¹³⁴

¹²⁷ *Trans-Global v. Jordan* (CL-0004), para. 88.

¹²⁸ *Trans-Global v. Jordan* (CL-0004), para. 92.

¹²⁹ *Trans-Global v. Jordan* (CL-0004), para. 90.

¹³⁰ *Trans-Global v. Jordan* (CL-0004), para. 90.

¹³¹ *Eskosol S.p.A. in liquidazione v Italian Republic*, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 20 March 2017, para. 41.

¹³² *Lotus v. Turkmenistan* (CL-0007), para. 158.

¹³³ *PNG v. Papua New Guinea* (CL-0008), para 89.

¹³⁴ *PNG v. Papua New Guinea* (CL-0008), para 94.

86. This Tribunal does not understand there to be any real issue between the Parties as to the high standard legal standard imposed by ICSID Arbitration Rule 41(5). The language in previous decisions simply reiterates that clear language in the Rule; there must be a clear and obvious basis to reject the claim on the basis of lack of legal merit.

(1) Application of the Legal Standard

87. The Respondent's Application arises out of a claim by investors from EU Member States against an EU host State, *i.e.*, an intra-EU investment claim. The Tribunal is required to determine whether or not the jurisdictional basis for the claim pursuant to Article 26 of the ECT is "*manifestly without legal merit*" on grounds of incompatibility with the EU Treaties.

a. Timeliness of the Respondent's Application

88. ICSID Arbitration Rule 41(5) requires that an objection that a claim is manifestly without legal merit is filed "*no later than 30 days after the constitution of the Tribunal*".

89. This Tribunal was constituted on 14 September 2021. The Application was filed on 14 October 2021. Accordingly, the Application is within time in accordance with Rule 41(5).

b. Application of ICSID Arbitration Rule 41(5) to Jurisdiction

90. In a 2010 article, "*Objection Under Rule 41(5) of the ICSID Arbitration Rules*", the author observes that the text of Rule 41(5):

does not contain the term "jurisdiction"; it only mentions "preliminary objections" and specifies that such objections should be in relation to claims that are "manifestly without legal merit". This silence is open to interpretation. For instance, an interpretation that Rule 41(5) permits preliminary objections to jurisdiction would be reasonable because there is no de jure basis to exclude such objections. The relevant provision of the ICSID Institution Rules, Rule 7(e), does not preclude consideration of jurisdictional issues from any stage of a proceeding. Rule 7(e) provides that "the registration of the request is without prejudice to

the powers and functions of the ... Arbitral Tribunal in regard to jurisdiction, competence and the merits".¹³⁵

91. Although the Claimants do not dispute the application of Rule 41(5) to an objection based on jurisdictional grounds, they note that “[t]he very demanding standard of proof [...] applies no less to jurisdictional than other matters”.¹³⁶ In order to analyse how to apply that standard specifically in the context of jurisdiction, the Tribunal is assisted by the decision in *Brandes v. Venezuela*.
92. In *Brandes*, the tribunal noted that, whilst Rule 41(5) does not mention “*jurisdiction*”, and instead employs the term “*legal merit*”, this wording “*by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is ‘without legal merit’*”.¹³⁷ The tribunal then considered two other provisions in the ICSID Rules and Convention that also address threshold jurisdictional issues as follows:
- a. Article 36 of the ICSID Convention, which limits the Secretary-General’s decision whether or not to permit the case to be registered and the procedure put in motion on the basis that “*the dispute is manifestly outside the jurisdiction of the Centre*” to “*the information contained in the request*”;¹³⁸ and
 - b. Rule 41(1) of the ICSID Arbitration Rules, which “*expressly addresses the issue of objections regarding the jurisdiction of the Centre or the competence of the Arbitral Tribunal which have to be raised ‘not later than the expiration of the time-limit for the filing of the counter-memorial’*”.¹³⁹
93. The *Brandes* tribunal contrasted Rule 41(5), which was introduced in 2006 “*to prevent ‘patently unmeritorious claims’*” that “*clear [the Article 36] jurisdictional threshold,*

¹³⁵ Application, para. 15, citing A. Diop, “Objections under Rule 41(5) of the ICSID Rules”, ICSID Review, 25 Foreign Investment Law Journal 2 (2021), pp. 321 *et seq.* (available at: <https://academic.oup.com/icsidreview/article/25/2/312/632163>).

¹³⁶ Observations, para. 10.

¹³⁷ *Brandes v. Venezuela (CL-0006)*, para. 50.

¹³⁸ *Brandes v. Venezuela (CL-0006)*, para. 51.

¹³⁹ *Brandes v. Venezuela (CL-0006)*, para. 46.

but are frivolous as to the merits".¹⁴⁰ Having noted that "[t]here exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal's powers to decide the case rest",¹⁴¹ the tribunal accepted that this would mean that "*there are actually three levels at which jurisdictional objections could be examined*".¹⁴²

94. These three levels of potential jurisdictional challenge therefore are: (i) the threshold level by the Secretariat under Article 36 of the ICSID Convention; (ii) the summary dismissal level by the tribunal under Rule 41(5) of the ICSID Arbitration Rules, and if it passes that level, (iii) as a preliminary jurisdictional objection (which could be heard separately or together with the merits) by the tribunal under Rule 41(1) of the ICSID Arbitration Rules.
95. The purpose of Rule 41(5) must be to enhance, rather than impede, efficient disposal of the proceedings. It could not have been intended to create two identical jurisdiction proceedings, once pursuant to Rule 41(5) and then again pursuant to Rule 41(1). What plainly differentiates Rule 41(5) is its very high standard, requiring it to be clear, obvious or patent that there is no legal dispute between the parties. Such summary dismissal requires the Tribunal largely to assume that the facts as pleaded by the Claimants are correct and find that, on the basis of those facts, there is simply and transparently no legal basis for the claim.
96. The Respondent must be able to show the Tribunal that the claim was lost before it left the start line. As the *Brandes* tribunal pointed out, there are "*very short time-limits*" under Rule 41(5), which require the objection to be raised "*in any event before the first session of the Tribunal*", and the decision to be notified at the "*first session or promptly thereafter*", having given the parties "*the opportunity to present their observations*".¹⁴³ This further reinforces that the decision is one of summary dismissal. If the underlying

¹⁴⁰ *Brandes v. Venezuela (CL-0006)*, para. 47, citing A. Parra, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes", 41 *International Lawyer* 1 (Spring 2007), p. 56.

¹⁴¹ *Brandes v. Venezuela (CL-0006)*, para. 52.

¹⁴² *Brandes v. Venezuela (CL-0006)*, para. 53.

¹⁴³ *Brandes v. Venezuela (CL-0006)*, para. 54.

factual basis is disputed and/or lack of legal merit is not clear and obvious, then a Rule 41(5) decision upholding the objection is not appropriate.

97. Although the Claimants invoked this “*very demanding standard of proof*”,¹⁴⁴ they also included in their prayer for relief a request that the Tribunal “[c]onsiders its jurisdiction on the basis of the parties’ submissions”.¹⁴⁵ However, though it is conceivable that in the context of a Rule 41(5) Application a tribunal could decide not only that the applicant failed to meet the “*manifestly without legal merit*” standard but that the objection it has raised has no legal merit at all, that is not the case here.
98. The Tribunal accepts that there is a dispute between the Parties as to the compatibility of Article 26 of the ECT and the EU Treaties in relation to the Parties in the current claim. But the purpose of this decision is only to determine whether or not the Claimants’ legal position is “*manifestly without legal merit*”, as opposed to which of the Parties’ legal position should ultimately prevail.

c. Respondent’s So-called Factual Basis

99. The Respondent’s burden of proof requires it first to establish that manifest lack of legal merit is clear and obvious on the basis of largely undisputed facts. In this regard, the *Brandes* tribunal adopted the position of the claimant, that the respondent “*must show that on the circumstances as they plausibly arise out of the Request for Arbitration, the claimant cannot be granted legal relief*”.¹⁴⁶ It said:

*A preliminary objection under Rule 41(5) is an objection based on the manifest absence of legal merit of a claim, not on the absence of a factual basis. It is therefore not necessary to prove facts, if these facts, even if proven, are not capable of supporting a claim that has no legal merit.*¹⁴⁷

100. In its Application, the Respondent sets out at length (20 pages of a 47-page submission) a section entitled “*Factual Basis of this Objection: Investment Arbitration in the EU*”.¹⁴⁸ In their Observations, the Claimants purported to “*address certain*

¹⁴⁴ Observations, para. 10.

¹⁴⁵ Observations, para. 71.

¹⁴⁶ *Brandes v. Venezuela (CL-0006)*, para. 69.

¹⁴⁷ *Brandes v. Venezuela (CL-0006)*, para. 70.

¹⁴⁸ Application, Sec. B.

inaccuracies in what is described as the ‘factual basis’ in the Application, as well as show that significant parts of that ‘factual basis’ are irrelevant for the purpose of the Tribunal deciding the Application (and cannot even support Germany’s case)”.¹⁴⁹ In further comments and reply, the Parties proceeded to debate the details and effect of events and instruments discussed in the Respondent’s “*factual basis*”, including but not limited to the effect, if any, of the recent *Komstroy* and *PL Holdings* Judgment.

101. Although the occurrence or existence of the 11 events or instruments set out at paragraph 26 above is not in issue, the accuracy of the Respondent’s description of those events or instruments and their effect in the context of the Application remains firmly in issue between these Parties.¹⁵⁰
102. Accordingly, the Tribunal is not satisfied that the Respondent has established a foundation of “*unavoidable and indisputable fact*” from which to proceed to determination pursuant to Rule 41(5), on the basis of the ‘factual basis’ as asserted in the context of the Application.¹⁵¹ Based on the Parties’ submissions, as the description and effect of some or all of the events and instruments appears to form part of the factual basis’ as asserted by the Respondent, this cannot – in light of the Claimant’s objections – be considered to be a matrix of “*uncontested facts*”, to which this Tribunal is able to apply “*undisputed or genuinely indisputable rules of law*”.¹⁵²
103. It certainly is not able to do so “*with relative ease and despatch*”.¹⁵³ The relatively detailed written submissions, accompanied by a reasonable volume of exhibits cited in support of the Respondent’s “*factual basis*”, which includes extensive legal authorities, containing a large number of contentious issues, present the Tribunal with an exercise that is neither simple nor uncomplicated. The Tribunal accepts that this in itself does not preclude it from accepting a Rule 41(5) objection. The problem is that, at the heart

¹⁴⁹ Observations, para. 12.

¹⁵⁰ Claimants’ Observations on Respondent’s Application Pursuant to Rule 41(5), dated 22 October 2021, Section III.

¹⁵¹ *Lotus v. Turkmenistan* (CL-0007), para. 158.

¹⁵² *PNG v. Papua New Guinea* (CL-0008), para. 89.

¹⁵³ *Trans-Global v. Jordan* (CL-0004), para. 88.

of jurisdiction in this case, is a difficult point of contention that involves, as the Respondent acknowledges, an issue that is “*widely discussed in arbitration circles*”.¹⁵⁴

104. The Tribunal recognises that the difficult point of contention is actually the *legal effect* of the 11 events asserted by the Respondent as its “*factual basis*”. That is a matter that is not only “*widely discussed*”, but also widely debated, in public international law circles, including beyond the EU in the context of the broader application of international investment protection.
105. The Respondent’s “*factual basis*”, as pleaded, focuses exclusively on EU instruments and decisions, including several judicial decisions of the CJEU. It excludes any decisions or doctrine arising out of the broader international investment law context. In its response to the Claimant’s Observations to its “*factual basis*”, the Respondent argues that, “[w]hether or not other tribunals have decided to have jurisdiction [...] is irrelevant” and “[t]his Tribunal should not be impressed by other tribunals’ legal analysis, especially if such legal analysis is erroneous”.¹⁵⁵
106. The Respondent’s position in that regard is not entirely consistent. In its Application, it cites to and relies upon several previous ICSID decisions regarding to the applicable standard under Rule 41(5), including *Trans-Global v. Jordan* and *Global Trading v. Ukraine*.
107. Accordingly, insofar as the Respondent seeks to assert the effect of the 11 events listed at paragraph 26 above as forming its uncontested “*factual basis*” for the purpose of this Application, such matrix is neither complete nor broadly undisputed as between the Parties.

d. Manifestly Without Legal Merit

108. Even assuming the “*factual basis*” were sufficiently undisputed (including as to its effect), as pleaded, the Tribunal would also need to be persuaded that the legal arguments put forward by the Respondent establish that the claim is clearly and obviously or “*manifestly without legal merit*” as against those facts.

¹⁵⁴ Application, para. 188.

¹⁵⁵ Reply Observations, para. 17.

109. The Respondent puts forward three separate legal grounds for its objection that the claim is “*manifestly without legal merit*” because the Tribunal lacks jurisdiction: (i) based on the interpretation of the ECT; (ii) due to EU developments; and (iii) based on an arbitration agreement pursuant to private law. The Tribunal considers these grounds below.

(i) *ECT interpretation*

110. The Respondent submits that the interpretation of the ECT in accordance with the VCLT means there is no valid offer to arbitrate by the Respondent, because the ECT treats the EU and its Member States as a single entity and, therefore, the reference in Article 10 of the ECT to “*other contracting parties*” can only mean non-EU Member States.¹⁵⁶ It further submits that, as the ECT must be interpreted in accordance with Articles 31 and 32 of the VCLT (specifically Article 31(1) of the VCLT),¹⁵⁷ neither the ordinary meaning of the ECT’s terms, nor its context, object and purpose, even when taking into account the preparatory works, can be a basis for this Tribunal’s jurisdiction.¹⁵⁸

111. The Claimants raise two legal arguments in response: (i) “*EU law*” is not applicable law pursuant to Article 26(6) of the ECT to determine the Tribunal’s jurisdiction because it applies only to the merits of a dispute between the Parties and not to issues relating to the Tribunal’s jurisdiction;¹⁵⁹ and (ii) there are no rules between the parties of the ECT within the meaning of Article 31(3)(c) of the VCLT to deprive the Tribunal of its jurisdiction, as “*Article 31(3)(c) VCLT requires practice that establishes rules ‘between the parties’ to the relevant treaty*”, and none of the instruments the Respondent invokes meets that requirement.¹⁶⁰

112. On the basis of the legal arguments raised by the Parties, and their submissions concerning those arguments, the Tribunal is not persuaded that the Respondent’s interpretation of the ECT in accordance with the VCLT is a sufficiently “*undisputed or*

¹⁵⁶ Application, para. 97; ECT (CL-0019), Arts. 1(10), 10.

¹⁵⁷ Application, para. 98.

¹⁵⁸ Application, para. 100.

¹⁵⁹ Observations, paras. 50-51.

¹⁶⁰ Observations, para. 56.

genuinely indisputable rule[] of law”,¹⁶¹ as required to decide that the claim in the current arbitration is “*manifestly without legal merit*”.

(ii) *EU law*

113. The Respondent also submits that based on the progressive developments of the EU Treaties and EU law, including (i) changes to EU law following the Lisbon Treaty leading to the inapplicability of Article 26 of the ECT; (ii) the *Komstroy* Judgment; and (iii) political developments since 2018, the Tribunal lacks jurisdiction.¹⁶²
114. In response, the Claimants argue that the ECT, including Article 26, has not been superseded by the EU Treaties pursuant to Article 30(4)(a) of the VCLT because the EU Treaties do not post-date the ECT on the basis that the relevant provisions of the EU Treaties were already part of their predecessor treaty, the Treaty of Rome and the European Communities Treaty.¹⁶³ The Claimants further argue that, even if the EU Treaties were considered to be later, the EU Treaties and the ECT cannot be considered part of the same “*treaty regime*” and do not relate “*to the same subject matter*” within the meaning of Article 30(1) of the VCLT,¹⁶⁴ and, in any event, the *lex specialis* conflict rules in Article 16 of the ECT prevail.¹⁶⁵
115. On the basis of the legal arguments raised by the Parties, and their submissions concerning those arguments, the Tribunal is not persuaded that the Respondent’s interpretation of the effect of developments, including recent developments, under EU law is a sufficiently “*undisputed or genuinely indisputable rule[] of law*”,¹⁶⁶ as required to decide that the claim in the current arbitration is “*manifestly without legal merit*”. This is particularly so given the recency of the *Komstroy* Judgment and *PL Holdings* Judgment.

¹⁶¹ *PNG v. Papua New Guinea (CL-0008)*, para. 89.

¹⁶² Application, Sec. II.

¹⁶³ Observations, para. 58.

¹⁶⁴ Observations, paras. 60-61.

¹⁶⁵ Observations, para. 62.

¹⁶⁶ *PNG v. Papua New Guinea (CL-0008)*, para. 89.

(iii) *Private law*

116. The Respondent further submits that pursuant to Article 5 of the VCLT any relevant rules of an international organisation take precedence over any general rule of public international law.¹⁶⁷ Therefore, the primacy rule applies to the EU Treaties at the international level and endows them with *lex specialis* status vis-à-vis other rules of conflict. It is irrelevant whether the conflicting treaty was concluded before or after the EU Treaties, and whether or not it contains its own conflict rules.¹⁶⁸
117. The Claimants submit that the Respondent’s “*position cannot be grounded in Article 5 VCLT and none of the Respondent’s authorities has made this point*”.¹⁶⁹ They argue that Article 5 of the VCLT does establish “*that international organisations, such as the EU, may have their own rules when it comes to determining issues such as amendment, modification and interpretation of the constituent instrument, such as the EU Treaties*”, but “*does not have anything to say about the relationship between EU Treaties and other treaties, such as the ECT*”.¹⁷⁰
118. On the basis of the legal arguments raised by the Parties, and their submissions concerning those arguments, the Tribunal is not persuaded that the Respondent’s interpretation of Article 5 of the VCLT is a sufficiently “*undisputed or genuinely indisputable rule[] of law*”,¹⁷¹ as required to decide that the claim in the current arbitration is “*manifestly without legal merit*”.
119. In sum, the Tribunal recognises that from the Respondent’s perspective, the legal basis is clear and obvious pursuant to EU law, based on a series of CJEU decisions and instruments. However, to date none of those decisions or instruments has been adopted and applied outside the EU courts or government. The two most recent CJEU decisions in the *Komstroy* Judgment and the *PL Holdings* Judgment in particular have not been subject to consideration, interpretation or application by a judicial or quasi-judicial body applying public international law outside the CJEU or EU Member State courts.

¹⁶⁷ Reply Observations, paras. 40-44.

¹⁶⁸ Reply Observations, para. 46.

¹⁶⁹ Rejoinder Observations, para. 18.

¹⁷⁰ Rejoinder Observations, paras. 19-20.

¹⁷¹ *PNG v. Papua New Guinea (CL-0008)*, para. 89.

120. Accordingly, that consideration, interpretation or application remains novel and, it would appear, potentially disputed. In that context, the Tribunal refers to the tribunal's finding in *PNG v. Papua New Guinea*, that Rule 41(5) “*is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts*”.¹⁷²
121. The Tribunal nevertheless emphasises that, as accepted by the Parties, the legal standard for Rule 41(5) is a high one. The Respondent's failure to meet that standard on these jurisdictional grounds says nothing about the relative strength of any substantive arguments on jurisdiction, which would be ventilated in full at an appropriate stage of the proceedings.

e. Nationality Objection

122. Finally, the Respondent's alternative legal ground for lack of jurisdiction is based on Claimants Four, Five and Six – *i.e.*, Horizont I Development GmbH, Horizon II Renewable GmbH and Horizont III Power GmbH, respectively – being incorporated in Germany and not, therefore, protected investors.¹⁷³ According to the Respondent, the Claimants do not provide evidence that would establish Claimants Four, Five and Six being “*Irish companies via control*” and are thus “*not protected investors*”.¹⁷⁴
123. The Claimants contend in response that the Fourth, Fifth and Sixth Claimants are “*nationals of another Contracting State*” for the purposes of the ICSID Convention by virtue of Article 26(7) of the ECT since they were owned and controlled by the First, Second and Third Claimants respectively.¹⁷⁵
124. Article 25(2)(b) of the ICSID Convention provides that a juridical person that has the nationality of the host State on the date of consent to arbitration can be a claimant if the parties have agreed to treat such juridical person as a national of another Contracting

¹⁷² *Ibid.*

¹⁷³ Application, para. 2.

¹⁷⁴ Reply Observations, paras. 55-56.

¹⁷⁵ Request for Arbitration, para. 66, fn. 32; Rejoinder Observations, paras. 28-29; Extract from Share Register of the Fourth Claimant, 15 April 2021 (C-0008); Extract from Share Register of the Fifth Claimant, 15 April 2021 (C-0011); Extract from Share Register of the Sixth Claimant, 15 April 2021 (C-0013).

State because of foreign control. The Claimants indicate that such agreement can be found in Article 26(7) of the ECT, which provides:

*An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” [...].*¹⁷⁶

125. On the basis of the Claimants’ response, which submits that the Fourth, Fifth and Sixth Claimants were owned and controlled by the (Irish) First, Second and Third Respondents at the date of consent and before the dispute between the Parties arose, as pleaded in the Request for Arbitration, the Tribunal is not persuaded that the Respondent’s objection to nationality is sufficient grounds to decide that their claim is “manifestly without legal merit”.

V. DECISION

126. In view of the above, the Tribunal determines as follows:

- a. the Respondent’s Application under ICSID Arbitration Rule 41(5) is denied;
- b. both Parties’ requests that the Tribunal rule on jurisdiction are denied in the context of this Application; and
- c. any decision as to costs is reserved.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles QC
President of the Tribunal
Date: 18 January 2022

¹⁷⁶ ECT (CL-0019), Art. 26(7).