PCA Case No. 2016-12:

In the matter of an arbitration under the UNCITRAL Arbitration Rules 1976

- between -

1. WCV WORLD CAPITAL VENTURES CYPRUS LTD
2. CHANNEL CROSSINGS LTD

Claimants

v.

THE CZECH REPUBLIC

Respondent

SECOND INTERIM AWARD ON INTRA-EU OBJECTION

ARBITRAL TRIBUNAL

Juan Fernández-Armesto (Chairman)
Stanimir Alexandrov
Marcelo Kohen

ASSISTANT TO THE TRIBUNAL

[redacted]

SECRETARY TO THE TRIBUNAL

[redacted]

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ABBREVIATIONS AND ACRONYMS

***Achmea* Arbitration**	*Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13
***Achmea* Award on Jurisdiction**	*Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010
***Achmea* Final Award**	*Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012
***Achmea* Judgment**	Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV*, CJEU, Judgment, 6 March 2018 (RL-153)
BGH	German *Bundesgerichtshof* (Supreme Court)
BGH Judgment	31 October 2018, the BGH set aside the *Achmea* Final Award based on the CJEU's *Achmea* Judgment (CL-221)
BIT	Bilateral investment treaty, specifically the Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, 15 June 2001
CJEU	Court of Justice of the European Union
Claimants	WCV World Capital Ventures Cyprus Ltd and Channel Crossings Ltd, both companies have their registered seats in Arch. Makariou III, 2, Atlantis Building, 3rd floor, Flat/Office 301 Mesa Geitonia 4000, Limassol, Republic of Cyprus
Counter-Memorial	Claimants' Counter-Memorial on the Intra-EU BIT Objection, 6 May 2019
Cyprus	Republic of Cyprus
DAA	Dutch Arbitration Act incorporated in the Dutch Code of Civil Procedure
DCC	Dutch Civil Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

EEC	European Economic Community
EU	European Union
EU Treaties	The TEU and TFEU, jointly
FET	Fair and Equitable Treatment standard as under the text of most BITs, including the Cyprus-Czech BIT under Article 2
ILC	International Law Commission
Interim Award	Interim Award on Jurisdiction, issued on 25 April 2018
Intra-EU Objection	Respondent's objection regarding the incompatibility of Article 8 of the BIT with EU law
Member States' Declaration	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, also "Declaration"
PCA	Permanent Court of Arbitration
Rejoinder	Claimants' Rejoinder on the Intra-EU BIT Objection, 17 September 2019
Reply	Respondent's Reply on the Intra-EU BIT Objection, 8 July 2019
Respondent	The Czech Republic, a sovereign State
[redacted] Report	[redacted] Second Expert Report
[redacted] Report	Second Expert Report of [redacted]
Statement of Defence	Respondent's Statement of Defence and Memorial on Non-Bifurcated Objections to Jurisdiction, 16 October 2018
Termination Treaty	Agreement for the termination of bilateral investment treaties between the Member States of the European Union, 5 May 2020
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union (then EC Treaty)

TofA	Terms of Appointment of the Arbitral Tribunal of 16 June 2016
UNCITRAL Rules	Arbitration Rules of the United National Commission on International Trade Law, 15 December 1976
VCLT	Vienna Convention on the Law of Treaties

TABLE OF CASES AND OTHER LEGAL MATERIALS

AAPL	*Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990
Achmea AG Opinion	Opinion of Advocate General Wathelet of 19 September 2017, Slovak Republic v. Achmea B.V., Case C-284/16, ECLI:EU:C:2017:699
***Achmea* Judgment**	Case C-284/16 *Slowakische Republik (Slovak Rebublic) v Achmea BV*, CJEU, Judgment, 6 March 2018 (RL-153)
***Achmea* Award on Jurisdiction**	*Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (RL-3)
***Achmea* Final Award**	*Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012
***Achmea* Request for a Preliminary Ruling**	Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016 – Slovak Republic v Achmea BV (Case C-284/16)
Adamakopoulos	*Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction dated 7 February 2020
ADC v. Hungary	*ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Hungary*, Final Award on Jurisdiction, Merits and Damages of October 2, 2006
AES	*AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. APJJ/07/22, Award, 23 September 2010
Alessi	D. Alessi, *Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability*, Journal of International Law, 2014 (RL-274).
Amco Asia	*Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983
Anglia Auto	*Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case No. V 2014/181, Award of 10 March 2017

Association Agreement with the Czech Republic	Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and the Czech Republic, of the other part, Official Journal of the European Communities, No. L 360/2, December 31, 1993 (C-333)
Azinian	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 November 1999, (RL-19)
Azurix	*Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006
BGH Judgment	Slovak Republic v Achmea BV, Federal Court of Justice, Ruling I ZB 2/15, 31 October 2018 (CL-221)
Budějovický Budvar	C-478/07 *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH,* CJEU, Judgment dated 8 September 2009 (RL-231)
Burgoa	C-812/79 *Attorney General v. Juan C. Burgoa*, CJEU, Judgment dated 14 October 1980 (RL-229)
Busta v. Czech Republic	*Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V 2015/014, Award of 10 March 2017
Charanne	*Charanne and Construction Investments v Spain,* SCC Case No. V 062/2012, 21 January 2016 (CL-12)
Chevron	Republiek Ecuador/(1) Chevron Corporation (USA), (2) Texa*co Petroleum Company* [2014] NJ 2015/318 (Supreme Court of the Netherlands (Hoge Raad)) (CL-211)
Commission v. Austria	C-147/03, *Commission v. Austria*, CJEU, Judgment dated 7 July 2005 (RL-228)
Commission v. Ireland	C-455/08, *European Commission v Ireland*, CJEU, Judgment dated 23 December 2009 (RL-162)
Commission v Italy	Case No. 10/61 *Commission of the European Economic Community v. Government of the Italian Republic*, CJEU, Judgment dated 27 February 1962 (RL-221)
Czech Constitutional Court Award 1	, Constitutional Court Award, Ref No Pl ÚS 29/10 [Chrastava] dated 14 June 2011 (C-26)
Czech Constitutional Court Award 2	Czech Republic, Constitutional Court Award, Ref No Pl ÚS 56/10 [Františkovy Lázně] dated 7 September 2011 (C-27)

Czech Constitutional Court Award 3	Czech Republic, Constitutional Court Award, Ref No Pl ÚS 22/11 [Kladno] dated 27 September 2011 (C-147)
Czech Constitutional Court Award 4	Czech Republic, Constitutional Court Award, Ref No Pl ÚS 6/13 [Klatovy] dated 2 April 2013 (C-30)
Decken	K. von der Decken, *Article 30, Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2nd edition, 2018 (RL-226)
Diageo	C-681/13, *Diageo Brands v Simiramida-04 EOOD*, Judgment dated 16 July 2015 (CL-188)
Dutch Supreme Court	Dutch Supreme Court, NJ 1999/737 dated 24 September 1999 (RL-250)
Eastern Sugar	*Eastern Sugar BV (Netherlands) v The Czech Republic,* SCC Case No 088/2004, Partial Award dated 27 March 2007 (CL-21)
Eco Swiss	C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV*, CJEU, Judgment dated 1 June 1999 (RL-44)
Electrabel	*Electrabel S.A. v Republic of Hungary,* ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012 (CL-230)
El Paso	*El Paso Energy lnternational Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011
Eskosol	*Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50,* Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of The Energy Charter Treaty to Intra-EU Disputes dated 7 May 2019 (RL-215)
EURAM	*European American Investment Bank AG (Austria) v The Slovak Republic* (PCA Case No 2010-17) Award on Jurisdiction, 22 October 2012 (RL-155)
Fontanelli	F. Fontanelli, *Comity, Overview of Topic*, Westlaw UK, dated 17 October 2016 (RL-166)
GPF Gp S.á.r.l	*GFP Gp S.á.r.l v Republic of Poland*, SCC Case No. V 2014/168, Judgment of the UK High Court on the Set Aside Application of 2 March 2018

Hartkamp	A. S. Hartkamp, *Consequences of the Achmea judgment for the practice of investment arbitration within the EU,* 2018, Ars Aequi, Vol. 9 (CL-199)
Henckels	C. Henckels, *Overcoming Jurisdictional Isolationism at the WTO - FTA Nexus: A Potential Approach for the WTO*, The European Journal of International Law, Vol. 19, No. 3, 2008 (RL-167)
Hess	B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Series, No. 3. 2018 (RL-222)
Horvath	G. J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, Journal of International Law, 2001 (RL-273)
ICS	*ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction dated 10 February 2012 (RL-54)
ILC Draft Conclusion on Subsequent Agreements	International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, Yearbook of the International Law Commission, Vol. II, Part Two, 2018 (RL-239)
ILC Fragmentation Report	International Law Commission, *Report on the Fragmentation of International Law, United Nations General Assembly*, 2006 (RL-236)
Japan – Taxes on Alcoholic Beverages	WTO, Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS/11/ABR, adopted 4 October 1996 (CL-232)
JSW Solar	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03, Award dated 11 October 2017 (RL-154)
Jurisdictional Immunities	*Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, 3 February 2012 (RL-253)
Kadi	Joint Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European*

	Communities, CJEU, Judgment dated 3 September 2008 (CL-78)
Lazic et al	*Netherlands*, in F B Weigand (ed.), *Practitioner's Handbook on International Arbitration* (3rd edn, 2019) (CL-202)
Lozada	F. P. Lozada, *Duty to Render Enforceable Awards: The Specific Case of Impartiality*, Spanish Arbitration Review, 2018 (RL-272)
LBBW	*Landesbank Baden-Württemberg et al v Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection dated 25 February 2019 (CL-247)
Magyar Farming	*Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary,* ICSID Case No. ARB/17/27 (CL-268)
Marfin	*Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award dated 16 July 2018 (CL-203)
Matteucci	Case 235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, CJEU, Judgment dated 27 September 1988 (RL-230)
Meijer 1	G. J. Meijer, *Agreement to arbitrate considered in light of the requirement of proof of article 1021*, 2011 (CL-250)
Meijer 2	G. J. Meijer, *Dutch Code of Civil Procedure, Commentary Article 1020*, Kluwer (partial English translation and Dutch original) (RL-43, resubmitted)
Meijer 3	G. J. Meijer, *Overeenkomst tot arbitrage Bezien in het licht van het bewijsvoorschrift van artikel 1021*, Kluwer, 2011 (excerpts) (RL-241)
Meijer 4	G. J. Meijer, *Tekst & Commentaar Burgerlijke Rechtsvordering*, Kluwer, 2018 (RL-246)
Methanex	*Methanex Corporation v. USA*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits dated 3 August 2005 (RL-170)
Member States' Declaration	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 (C-318).

Micula	*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Final Award dated 11 December 2013 (CL-44)
Micula (CJEU)	Cases T-624/15, T-694/15 and T-704/15, *Micula and Others v Commission*, CJEU, Judgment dated 18 June 2019 (CL-264)
MOX Plant	*MOX Plant Case* (Ireland v United Kingdom), PCA Case No. 2002-01, Procedural Order No. 3 dated 24 June 2003 (CL-206)
MTD v. Chile	MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award of May 25, 2004
Northern Cameroons	*Case concerning the Northern Cameroons* (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 15 (RL-168)
Occidental	*Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN3467, Non-justiciability of Challenge to Arbitral Award (Appeal Court) dated 9 September 2005 (CL-253)
Oostergetel	*Jan Oostergetel and Theodora Laurentius v The Slovak Republic* (UNCITRAL) Decision on Jurisdiction dated 30 April 2010 (CL-53)
Paulsson	J. Paulsson, *Denial of Justice in International Law*, Cambridge University Press (excerpts) (RL-21, resubmitted)
Pauwelyn	J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003 (extract) (RL-234)
Pál Aranyosi	C-404/15*, Pál Aranyosi and* C-659/15, *Robert Căldăraru*, Judgment dated 5 April 2016 (CL-193)
Peters	N. Peters, *IPR, Procesrecht & Arbitrage: Over Grondslagen en Rechtspraktijk*, Antwerpen Maklu, 2015 (RL-242)
PL Holdings	*PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award dated 28 August 2017 (RL-217)

PL Holdings (Svea Court of Appeal)	*Republic of Poland v PL Holdings* S.à.r.l., Case No. T 8538-17 and T 125033-17, Judgment of the Svea Court of Appeal dated 22 February 2019 (CL-190)
RREEF	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction dated 6 June 2016 (CL-8)
SGS	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction dated 29 January 2004 (RL-122)
Slaughter	A. M. Slaughter*, Court to Court*, The American Journal of International Law, Vol. 92, No. 4, 1998 (RL-165)
Snijders	H. J. Snijders, *Dutch Arbitration Law, General considerations and article-specific comments on art 1020-1076 Rv in national and international perspective*, 2018, (CL-222)
SPP	*Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction dated 27 November 1985, (CL-223)
Tenaris	*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No, ARB/11/26, Award, 29 January 2016
Temple of Preah Vihear	*Temple of Preah Vihear* (*Cambodia v. Thailand*), ICJ Judgment of 15 June 1962, Separate Opinion of Vice-President Alfaro
United Utilities	*United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award dated 21 June 2019 (CL-260)
UP & CD	*UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, dated 9 October 2018 (RL-216)
Van den Berg et al	A.J. van den Berg, R. van Delden, and H. J. Snijders, *Netherlands Arbitration Law*, 2009 (extract) (RL-292)
Vattenfall	*1. Vattenfall AB; 2. Vattenfall GMBH; 3. Vattenfall Europe Nuclear Energy GMBH; 4. Kernkraftwerk Krümmel GMBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GMBH & Co.*

	OHGf U.A. v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue dated 31 August 2018 (RL-157)
Villiger	M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2008 (RL-227)
WNC Factoring	*WNC Factoring Limited v. The Czech Republic, PCA Case No. 2014-34*

I. INTRODUCTION

1. In this **Second Interim Award** the Tribunal decides exclusively on Respondent's objection regarding the incompatibility of the jurisdictional clause of the BIT with the European Union ("**EU**") legal regime (the "**Intra-EU Objection**").

2. The Award is structured in five parts:

   - Part I presents the background of this arbitration, including the Parties, their representatives, the members of the Tribunal, the subject matter of the dispute and its procedural history;

   - Part II reproduces the requests for relief by each Party;

   - Part III elaborates on the issue of applicable law;

   - Part IV summarizes the Parties' arguments on the Intra-EU Objection, presents a chronology of relevant facts and sets forth the Tribunal's reasoning on the Intra-EU Objection;

   - Finally, Part V contains the Tribunal's decision.

3. Unless otherwise provided, this Award uses the same defined terms as in the "**Interim Award"**.

1. CLAIMANTS

4. The Claimants in this arbitration are WCV World Capital Ventures Cyprus Ltd and Channel Crossings Ltd (the "**Claimants**"). Both companies have their registered seats in Arch. Makariou III, 2, Atlantis Building, 3rd floor, Flat/Office 301 Mesa Geitonia 4000, Limassol, Republic of Cyprus.

5. Claimants are represented in this arbitration by the following counsel:

[redacted]
104 Avenue des Champs-Elysées
75008 Paris
France

[redacted]
Sítkova 1
110 00 Prague 1
Czech Republic

[redacted]
One Essex Court
London EC4Y 9AR
United Kingdom

[redacted]
Linklaters LLP
World Trade Centre
Zuidplein 180
Amsterdam 1077 XV
The Netherlands

2. RESPONDENT

6. The Respondent in this arbitration is the Czech Republic, a sovereign State (the "**Respondent**").

7. Respondent is represented in this arbitration by the following counsel:

Ms. Martina Matejová
Ms. Anna Bilanová
Mr. Jaroslav Kudrna
Ministry of Finance
Letenská 15
118 10 Prague 1
Czech Republic

Mr. Eduardo Silva Romero
Dechert (Paris) LLP
32 rue de Monceau
75008 Paris
France

Ms. Erica Stein
Dechert LLP
480 Avenue Louise
1050 Brussels
Belgium

3. ARBITRAL TRIBUNAL

8. The Arbitral Tribunal was constituted as follows.

9. On 24 September 2015, Claimants appointed as arbitrator Mr. Stanimir A. Alexandrov, Stanimir A. Alexandrov PLLC, 1501 K Street NW, Suite C-072, Washington D.C. 20005, USA.

10. On 26 October 2015, Respondent appointed as arbitrator Mr. Mark Clodfelter, Foley Hoag LLP, 1717 K Street, NW, Washington, D.C. 20006-5350, USA.

11. On 9 February 2016, Messrs. Clodfelter and Alexandrov appointed as presiding arbitrator Prof. Juan Fernández-Armesto, Armesto & Asociados, General Pardiñas 102, 8º izda., 28006 Madrid, Spain.

12. Following Mr. Clodfelter's resignation from the Tribunal, on 29 October 2018 Respondent appointed as arbitrator Prof. Marcelo Kohen, Graduate Institute of International and Development Studies, Chemin Eugene-Rigot 2, Case Postale 1672, 1211 Geneva 21, Switzerland.

4. ASSISTANT TO THE TRIBUNAL

13. With the consent of the Parties, the Arbitral Tribunal designated [redacted] as Assistant to the Tribunal (in replacement of [redacted], who served in this capacity until shortly following the issuance of the Interim Award).

5. PERMANENT COURT OF ARBITRATION

14. As set out in the Terms of Appointment ("**TofA**"), the Permanent Court of Arbitration (the "**PCA**") was designated to administer the arbitration and serve as registry and appointing authority for this arbitration. [redacted], Senior Legal Counsel of the PCA was designated as Secretary to the Tribunal for this purpose.

6. ARBITRATION AGREEMENT

15. Claimants initiated these arbitral proceedings pursuant to Article 8(2) of the Agreement between the Czech Republic and the Republic of Cyprus ("**Cyprus**") for the Promotion and Reciprocal Protection of Investments, 15 June 2001 (the "**BIT**") and Article 3 of the Arbitration Rules of the United National Commission on International Trade Law, 15 December 1976 (the "**UNCITRAL Rules**"). Article 8(2) of the BIT provides as follows:

> "Article 8
>
> Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
>
> 1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute.
>
> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from

> the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to:
>
> (a) a court of competent jurisdiction or an administrative tribunal of the Contracting Party which is the party to the dispute,
>
> or
>
> (b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention of the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965,
>
> or
>
> (c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United National Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules,
>
> or
>
> (d) The Arbitration Institute of the Chamber of Commerce in Stockholm.
>
> 3. The arbitral awards shall be final and binding on both parties to the dispute and shall be enforceable in accordance with the domestic legislation."

7. PROCEDURAL RULES

16. The Parties have agreed for the 1976 UNCITRAL Arbitration Rules[1] to govern these proceedings.

17. The Parties also agreed that the Arbitral Tribunal would take into consideration, as general guidelines, the International Bar Association ("**IBA**") Rules on the Taking of Evidence in International Arbitration adopted by the IBA Council on 29 May 2010, and the IBA Rules on Party Representation in International Arbitration adopted by the IBA Council on 25 May 2013.[2]

8. PLACE OF ARBITRATION AND LANGUAGE OF THE PROCEDURE

18. The Parties further agreed that the legal place of this arbitration is The Hague, Netherlands;[3] and that the language to be used in the proceedings is English.[4]

[1] Respondent's communication R-1; Claimants' communication C-1.
[2] Terms of Appointment ("**TofA**") signed 16 June 2016, para. 30.
[3] Respondent's communication R-1; Claimants' email of 26 February 2016.
[4] Respondent's communication R-1; Claimants' communication C-1.

9. PROCEDURAL HISTORY

19. The Tribunal set out a detailed procedural history of the case in its Interim Award. This section is therefore limited to the description of events that are essential to the understanding of the current Award and events subsequent to the Interim Award.

20. On 24 September 2015, Claimants served on Respondent a Notice of Arbitration pursuant to Article 8(2) of the BIT.

21. On 5 August 2016, Respondent filed its Memorial on Jurisdiction and Request for Bifurcation, setting out six legal grounds for challenging the jurisdiction of this Tribunal and the admissibility of Claimants' claims:

- Objection 1: judicial decisions on domestic constitutional law cannot *prima facie* breach the BIT or International Law;
- Objection 2: the Intra-EU Objection;
- Objection 3: the claims have already been litigated before the Czech Courts;
- Objection 4: the Czech Republic did not consent to a multi-party arbitration;
- Objection 5: Claimants do not have their permanent seat in Cyprus; and
- Objection 6: the claims are brought in bad faith.

22. On 26 August 2016, Claimants submitted their Response to the Request for Bifurcation, requesting that the Tribunal dismiss Respondent's application to bifurcate the proceedings.

23. On 6 September 2016, the Tribunal issued a Decision on the Request for Bifurcation, whereby the proceedings to address Objections 3 to 6 were to be held separately from Objections 1 and 2, which were joined to the merits phase.

24. On 25 April 2018, the Tribunal delivered its Interim Award rejecting Objections 3 to 6.

25. On 4 June 2018, Respondent submitted its request that – in light of the ruling of the Court of Justice of the European Union (the "**CJEU**") of 6 March 2018 in Case C-284/16: *Slovak Republic v. Achmea B.V.* (the "***Achmea* Judgment**") – the Arbitral Tribunal further bifurcate the proceedings in order to decide on the Intra-EU Objection in a preliminary manner.

26. On 14 August 2018, after considering the Parties' comments, the Tribunal dismissed Respondent's request for further bifurcation of the proceedings. The Tribunal instead decided to bifurcate Objections 1 and 2 together with liability from the quantum phase and established a new procedural calendar.

27. On 26 September 2018, Mr. Clodfelter notified the Parties of his resignation from the Tribunal due to a potential conflict of interest in connection with the *Achmea* Judgment. On 29 October 2018, Respondent appointed Prof. Marcelo Kohen as a replacement for Mr. Clodfelter.

28. On 16 October 2018, Respondent filed its Statement of Defence and Memorial on Non-Bifurcated Objections to Jurisdiction (the "**Statement of Defence**"). The Statement of Defence was accompanied by the First Expert Report of [redacted] and the Expert Report of [redacted]

29. On 20 January 2019, Respondent requested and Claimants accepted that the Tribunal stay the main calendar and first hear the Intra-EU BIT Objection separately. This request was prompted by recent developments regarding this issue, namely, the decision of the German Supreme Court dated 31 October 2018 and the Declaration of the EU Member States on the consequences of the *Achmea* Judgment ("**Member States' Declaration**").

30. On 21 February 2019, having requested and received the Parties' joint proposal on a modified procedural calendar, the Tribunal issued **Procedural Order No. 7**. The Tribunal agreed to bifurcate the Intra-EU Objection and suspended the main calendar. The Tribunal further updated the procedural calendar for the Intra-EU Objection phase on 12 March 2019, 2 April 2019, and 9 July 2019.

31. In accordance with the procedural calendar, Claimants submitted their Counter-Memorial on the Intra-EU BIT Objection on 6 May 2019 (the "**Counter-Memorial**"). The Counter-Memorial was accompanied by [redacted] Second Expert Report (the "[redacted]").

32. On 8 July 2019, Respondent submitted its Reply on the Intra-EU BIT Objection (the "**Reply**"), together with the Second Expert Report of [redacted] (the "[redacted]").

33. Having requested and received Respondent's consent for a deadline extension, Claimants submitted their Rejoinder on the Intra-EU BIT Objection (the "**Rejoinder**") on 17 September 2019. The Rejoinder was accompanied by [redacted] Third Expert Report.

34. On 2 December 2019, the Tribunal issued **Procedural Order No. 8** on the organization of the hearing on the Intra-EU BIT Objection.

35. On 18 and 19 December 2019, the Parties and the Tribunal held a hearing on the Intra-EU BIT Objection at the ICC Hearing Centre in Paris. At the end of the hearing the Tribunal requested the Parties to submit additional documents that they had referenced in their pleadings but were not yet in the record, and any additional relevant documents that might be in their possession.

36. On 10 March 2020, Respondent submitted a *Note Verbale* that it had received from the Ministry of Foreign Affairs of Cyprus on 20 December 2019.

37. Claimants consented to the *Note Verbale*'s admission on the record, but requested that the correspondence leading up to its issuance also be put on the record, which Respondent did.

38. On 11 March 2020, in compliance with the Tribunal's request at the end of the hearing, Claimants submitted a number of additional documents to be placed on the record on behalf of both Parties:

- The European Agreement of 1993;[5]
- Documents from the *travaux préparatoires* of the Cyprus–Czech Republic BIT;
- The agreement on the termination of the Czech Republic–Italy BIT; and
- An additional document of the Economic and Financial Committee to the Commission and Council that Respondent wished to include. On the same day, Respondent confirmed its agreement with the foregoing submission.

39. On 16 March 2020, Claimants commented on Respondent's letter of 10 March 2020 and the attached *Note Verbale*, to which Respondent replied on 25 March 2020.

40. On 29 May 2020, both Parties submitted their statement of costs as per paras. 86 and 95 of Procedural Order No. 1.

[5] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part (**C-333**).

II. REQUESTS FOR RELIEF

1. RELIEF SOUGHT BY RESPONDENT

41. In its Reply, Respondent made the following request for relief:[6]

> "FOR THE FOREGOING REASONS, and reserving the right to further develop and expand its submissions and request for relief, the Czech Republic respectfully requests the Tribunal to:
>
> a. DECLARE that it has no jurisdiction over Claimants' claims; or
>
> b. Alternatively, DECLARE that Claimants' claims are inadmissible; and
>
> c. ORDER Claimants to fully reimburse the Czech Republic for the costs it has incurred in defending its interests in this arbitration, plus interest on any costs at a rate to be determined by the Tribunal."

2. RELIEF SOUGHT BY CLAIMANTS

42. In their Rejoinder, Claimants made the following request for relief:[7]

> "On the basis of the foregoing, the Claimants respectfully request that the Tribunal:
>
> (a) DISMISS Respondent's Intra-EU BIT Objection;
>
> (b) ORDER Respondent to pay all of the costs and expenses associated with this jurisdictional objection, including the fees and expenses of the Claimants' counsel, the fees and expenses of the Tribunal, PCA costs and any other costs incurred by the Claimants, on a full indemnity basis, together with interest on such costs, in an amount to be determined by the Tribunal; and
>
> (c) AWARD such alternative or additional relief as the Tribunal considers appropriate."

[6] Reply on the Intra-EU Bit Objection ("**Reply**"), para. 167.
[7] Claimants' Rejoinder on the Intra-EU BIT Objection, 17 September 2019 ("**Rejoinder**"), para. 174.

III. APPLICABLE LAW

43. Before embarking on the analysis of the Intra-EU Objection, the Tribunal must identify the law applicable to the determination of its jurisdiction. The question has been pleaded at length by both Parties, specifically with regard to the role of EU law, and is a pivotal one for the outcome of the Intra-EU Objection.

44. The Tribunal will start by summarizing Respondent's position (**1.**), followed by Claimants' position (**2.**), and will finally take its decision (**3.**).

1. RESPONDENT'S POSITION

45. Respondent's argumentation is based first and foremost on Dutch law as the *lex loci ar bitri*, which it submits is decisive for the Tribunal's decision on jurisdiction.[8] This is so because the Parties implicitly chose Dutch law to govern the arbitration agreement when they chose The Hague as the seat of the arbitration.[9] According to Respondent, Dutch law defines the arbitrability of the dispute as well as the validity of the Parties' consent and the law applicable to the dispute.

46. The applicable law thus includes, according to the Respondent, the Dutch Arbitration Act ("**DAA**") and the Dutch Civil Code ("**DCC**").

EU law is applicable by way of Dutch law

47. Respondent also claims that, since Dutch law incorporates EU law, EU law is equally applicable to the determination of jurisdiction.

48. Additionally, for purposes of subjective arbitrability, Dutch conflict rules refer back to the internal law of the party in question, *i.e.* the law of the Czech Republic, which in turn incorporates EU law.[10]

49. Respondent contends that EU law constitutes a part of international law under Dutch law[11] and therefore even if the Tribunal applies international law rather than Dutch law, the results of the analysis would be the same. Additionally, Respondent avers that the Tribunal should follow the principle of primacy of EU law in determining its jurisdiction.[12]

[8] Transcript of Hearing on Intra-EU Objection, 18 December 2019, Day 1 ["**Hearing Day 1**"], 10:06; 10-16.
[9] Hearing Day 1, 10:09; 10-13.
[10] Hearing Day 1, 10:10; 21-25, 10:12; 1.
[11] Hearing Day 1, 10:20; 18-23.
[12] Reply, paras. 52-53, Hearing Day 1, 11:34; 18-25.

Applicability of international law

50. Regarding the applicability of international law, Respondent avers that principles of international law as reflected under the Vienna Convention on the Law of Treaties ("**VCLT**") must be used to decide on the conflict of international obligations which occurs in this case.[13]

51. Respondent also invites the Tribunal to use the VCLT to interpret the Joint Declaration and *Notes Verbales* as subsequent agreements or proof of subsequent practice invalidating consent.

52. Additionally, Respondent submits that the international principle of comity must be applied by the Tribunal.[14]

2. CLAIMANTS' POSITION

53. Claimants argue that "the validity of the arbitration clause in the Treaty (Article 8) is to be assessed in accordance with international law".[15]

54. Claimants assert that this position is reflected under Dutch law. According to Claimants, the arbitration agreement is governed by the "law applicable to the legal relationship between the parties" under Article 166 of Book 10 of the DCC, which enshrines the *favor validitatis* principle. Such law, according to Claimants, is public international law.

55. Claimants also contend that the Dutch Supreme Court[16] has confirmed that in investment arbitration, one may solely look at public international law – specifically the rules laid down in Articles 31 and 32 of the VCLT.[17]

56. Pursuant to Claimants' arguments, the "validity of the arbitration agreement" is not "governed by Dutch law as the *lex loci arbitri*", save only as to the choice-of-law rule applicable.[18]

57. Claimants also reject the suggestion of an implied choice of Dutch law by virtue of the selection of The Hague as the seat of arbitration, pointing out that the new Arbitration Law of 2015 no longer entertains the notion of implied choice of law and instead uses the *in favorem validitatis* principle.[19] They further contend that

[13] Reply, paras. 20-21.
[14] Hearing Day 1, 11:07; 1-5.
[15] Counter-Memorial, para. 17.
[16] *Republiek E cuador/(1) C hevron C orporation (USA), (2) T exaco P etroleum C ompany* [2014] NJ 2015/318 (Supreme Court of the Netherlands (Hoge Raad)), ("***Chevron***") (**CL-211**), para. 4.4.4.
[17] Hearing Day 1, 16:20; 13-20.
[18] Rejoinder, para. 76.
[19] Hearing Day 1, 16:06; 12-24.

the burden of establishing an implied choice of law rests with Respondent, who has not demonstrated that the implied choice was indeed intended.[20]

58. Finally, Claimants submit that Respondent's capacity to arbitrate is equally governed by international law by virtue of Dutch law.[21]

EU law is not applicable to the adjudication of the dispute

59. According to Claimants, EU law is irrelevant to determining the outcome of this jurisdictional objection.[22]

60. First, Claimants submit that the Czech-Cyprus BIT contains no applicable law provisions that would instruct the Tribunal to apply EU law (either directly or through domestic law)[23] and that the present case does not concern the interpretation or application of EU law.[24]

61. Secondly, while Claimants agree that EU law is part of international law, they reject Respondent's attempt to qualify EU law as being synonymous with international law. Claimants argue that EU law is an autonomous legal order,[25] emphasizing that the *Vattenfall* tribunal concluded that there was "serious difficulty" in deriving a "relevant rule of international law" from the CJEU's interpretation of Treaty on the Functioning of the European Union (then EC Treaty) (the "**TFEU**").[26] Claimants also rely on the decisions of the CJEU in the *Kadi* and *Al Barakaat International Foundation* cases to support their position.[27]

3. DECISION OF THE TRIBUNAL

62. The Parties have made extensive submissions on the question of applicable law, and specifically, the role of EU law – an issue of special relevance in view of Respondent's Intra-EU Objection.

[20] Hearing Day 1, 16:15; 1-5.
[21] Hearing Day 1, 14:46; 13-14.
[22] Rejoinder, para. 6.
[23] Counter-Memorial, para. 46; Rejoinder, paras. 44-50.
[24] Counter-Memorial, para. 5, Transcript of Hearing on Intra-EU Objection, Day 2, 19 December 2019 ["**Hearing Day 2**"], 14:29; 19-22.
[25] Hearing Day 1, 14:36; 5-9.
[26] Rejoinder, para. 42, *citing 1. Vattenfall AB; 2. Vattenfall GMBH; 3. Vattenfall Europe Nuclear Energy GMBH; 4. Kernkraftwerk Krümmel GMBH & Co. OHG; 5. Kernkraftwerk Brunsbüttel GMBH & Co. OHGf U.A. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue dated 31 August 2018 (**RL-157**), para. 150 ["***Vattenfall***"].
[27] Counter-Memorial, paras. 23-24, *citing* Joint Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, CJEU, Judgment dated 3 September 2008 (**CL-78**), para. 290 ["***Kadi***"]; Hearing Day 1, 14:34; 22-14:36; 9.

63. To properly decide the issue, it is necessary to differentiate between the law applicable to the Tribunal's determination of its own jurisdiction, and to the law applicable to the merits of the dispute.

3.1 LAW APPLICABLE TO JURISDICTION

64. The Tribunal's jurisdiction derives from the Parties' consent to arbitration expressed in the Czech Republic's standing offer to arbitrate contained in Article 8 of the BIT, and Claimants' acceptance of the Republic's offer through the filing of the Notice of Arbitration.[28]

65. The Cyprus-Czech Republic BIT does not contain any rules as to the law to be applied by the Tribunal in relation to jurisdiction. However, since the BIT is an international treaty, its interpretation and the rules governing its application, invalidity, termination and suspension, are derived from general principles of international law, as codified in the VCLT.

66. Both the Czech Republic and the Republic of Cyprus are parties to the VCLT, and were already bound by it at the time of the entry into force of the BIT and the filing of the Notice of Arbitration.[29] The applicability of international law, and specifically the rules contained in the VCLT to a Tribunal's decision on jurisdiction, has also been upheld by numerous decisions,[30] including by the Supreme Court of the Netherlands in other investment treaty cases having their seat in The Hague.[31]

67. Furthermore, the TofA also provide for the application of international law. The TofA were signed by and are binding upon both Parties. They enshrine the Parties' choice of law:

- Title IV regulates the "Applicable Substantive Rules", while
- Title V regulates "Procedural Rules".

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[28] Article 3 of the 1976 UNCITRAL Arbitration Rules.

[29] Cyprus and the Czech Republic (Czechoslovakia) acceded to the VCLT on 28 December 1976 and 22 February 1993.

[30] *See*, e.g., *GFP Gp S.á.r.l v Republic of Poland,* SCC Case No. V 2014/168, Judgment of the UK High Court on the Set Aside Application of 2 March 2018 ["***GPF Gp S.á.r.l***"], para. 46 ("It is not in dispute between the parties that an arbitration agreement in a bilateral, or multilateral, investment treaty, although a separate agreement, is governed by international law."); *Occidental E xploration a nd P roduction Company v. The Republic of Ecuador,* LCIA Case No. UN3467, Non-justiciability of Challenge to Arbitral Award (Appeal Court), ["***Occidental***"] para. 33 ("Although it is a consensual agreement, it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the State against which an investor is arbitrating.").

[31] *Chevron* (**CL-211**), para. 4.3 ("The court of appeal therefore rightly, and uncontested in cassation, answered the question of whether the arbitration tribunal is competent in this case based on the interpretation of Article VI BIT. Additionally the court of appeal rightfully found that this interpretation must be done in accordance with the rules laid down in Article 31 and 32 [VCLT] […]").

68. The relevant provisions read as follows:

> "**IV. Applicable substantive rules**
>
> 28. The Tribunal shall decide the dispute in accordance with the BIT.
>
> **V. Applicable procedural rules, place of arbitration and language**
>
> **1. Procedural rules and place of arbitration**
>
> 29. The Parties have agreed to apply the 1976 UNCITRAL Arbitration Rules [UNCITRAL RULES]. The place of Arbitration is The Hague, Netherlands." [Emphasis in the original]

69. Title IV, which regulates "Applicable Substantive Rules", in para. 28 mandates the Tribunal to "decide the dispute in accordance with the BIT". Title V, on the other hand, only refers to "procedural rules", and provides that procedure will be governed by the 1976 UNCITRAL Rules.

70. Questions concerning jurisdiction have a substantive rather than procedural character. The applicable rule is thus para. 28, which provides that disputes must be adjudicated "in accordance with the BIT". The Parties have thus agreed that the preliminary dispute whether the Tribunal has or not jurisdiction, is to be decided by applying the BIT – an instrument of international law.

EU Treaties

71. The Treaty on the European Union ["**TEU**"] and the TFEU [jointly, the "**EU Treaties**"] also form part of international law applicable between EU Member States. This conclusion is reflected in the well-known finding of the tribunal in *Electrabel*[32]:

> "EU law is international law because it is rooted in international treaties".

72. As articulated in Article 38(1)(a) of the Statute of the International Court of Justice, international law is comprised of international conventions "whether general or particular". EU Treaties do not form part of general international law applicable to all States. The EU Treaties apply only to the signatories – the EU Member States – who have agreed to form part of the EU legal order; they establish an internal market, define the relationships between EU Member States and EU treaty bodies, and organize the functioning of the Union and its areas of competence. [33]

73. The *Eskosol* decision accurately delineated the relationship between what it calls the overarching "international legal system" and various subordinated sub-

[32] *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012 (**CL-230**), para. 4.120 ["***Electrabel***"].
[33] TFEU, Article 1.

systems of international law, governed by their own norms and subject to their own dispute resolution authorities:[34]

> "As a whole, the international legal system is bound by general principles of international law, i.e., by customary international law, including norms such as *jus cogens* and *pacta sunt servanda* as discussed above. But below this level of general principles there exist various sub-systems of international law, with no precise hierarchy between the different norms established in each sub-system. Rather, each of these sub-systems is governed by its own applicable norms, and vests dispute resolution authority in particular bodies obligated to proceed under those norms. The EU Treaties are one such sub-system, vesting authority in various organs including the Commission, the CJEU, etc. But the EU Treaties are not general international law displacing all other sub-systems of international law; rather, they exist side-by-side with other sub-systems, including those created by various multilateral treaties." [Emphasis added]

74. EU law and international investment protection law are sub-systems of international law, existing side-by-side, without a precise hierarchy between both, governed by their own treaties and subject to their distinct dispute resolution authorities.

75. Since both the BIT and the EU Treaties are international conventions, the international law rules on the termination of treaties and application of successive treaties regulate their reciprocal application; these rules can have an impact on the validity or enforceability of the BIT, on the Czech Republic's consent to arbitration and ultimately on the jurisdiction of this Tribunal – as will be further discussed when the Tribunal analyses the Intra-EU Objection.

Dutch law

76. Dutch law is the law of the place of arbitration, a place which was selected by agreement among the Parties in Title V of the TofA.

77. The Tribunal disagrees with Respondent's contention that the Parties tacitly chose Dutch law to govern issues of jurisdiction through their choice of The Hague as the *lex loci arbitri*.[35]

78. First, for an implicit choice to be considered, there must be no explicit choice made by the Parties. In the current case, the Parties explicitly agreed in the TofA for the BIT to govern the substantive aspects of the dispute, including the Tribunal's jurisdiction.

79. Second, if it is accepted *arguendo* that the Parties have failed to designate the applicable law (*quod non*), then the power to do so is vested with the arbitral

[34] *Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of The Energy Charter Treaty to Intra-EU Disputes dated 7 May 2019 (**RL-215**), para. 181 ["***Eskosol***"].
[35] Hearing Day 1, 10:09; 4-6, 10-13.

tribunal, as provided for in Article 1054 of the Dutch Arbitration Act (previously defined as the "**DAA**"):[36]

> "Article 1054
>
> (1) […]
>
> (2) If a choice of law has been made by the parties, the arbitral tribunal shall decide in accordance with the rules of law designated by the parties. Failing such designation of law, the arbitral tribunal shall decide in accordance with the rules of law which it considers appropriate." [Emphasis added]

80. This is consonant with Article 33 of the 1976 UNCITRAL Rules:

> "1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

81. Pursuant to the text of the DAA and the UNCITRAL Rules, absent a choice of law agreed upon by the Parties, the arbitral tribunal is to decide in accordance with the law which it considers "appropriate" or "determined by the conflict of laws rules which it considers applicable". In this case, the Arbitral Tribunal would unhesitatingly select the BIT and international law as the most appropriate rules of law to govern the substance: the Parties' consent to arbitration is formalized in the BIT, the standards of protection offered to Claimants' investment in the Czech Republic are defined in the BIT, and the legal nature of the BIT is that of an international treaty ruled by international law. Likewise, international law, including the BIT as interpreted and applied in accordance with the VCLT, constitutes the law which is applicable to an investment treaty arbitration such as this one, as has been confirmed by the Supreme Court of the Netherlands among many others (see para. 66 *supra*).

3.2 LAW APPLICABLE TO THE MERITS

82. Article 8(1) of the BIT defines the scope of disputes which a protected investor may submit to arbitration:

> "Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connections with an investment in the territory of the other Contracting Party […]"

83. In the present case, Claimants have alleged that measures adopted by the Czech Republic have resulted in a breach of the rights granted and the guarantees provided under the BIT, and not any other body of law. Therefore, to decide Claimants' claims, the Tribunal must interpret and apply the BIT.

[36] Dutch Arbitration Act (**RL-8)**.

84. The question of the law applicable to the adjudication of these disputes has been agreed upon by the Parties: para. 28 of the TofA explicitly states that the

> "Tribunal shall decide the dispute in accordance with the BIT".

85. The Parties' choice is binding upon the Tribunal, as provided for in Article 33 of the 1976 UNCITRAL Rules:

> "1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. […]"

86. The Tribunal has thus been entrusted with the task of resolving the dispute before it by deciding whether the Czech Republic has breached any of the rights granted and guarantees made to Claimants under the BIT.

The VCLT and customary international law

87. The Parties' consent refers explicitly to the BIT, an instrument of international law, but it implicitly extends to general international law, including the VCLT and customary international law.

88. This was the conclusion reached in *ADC v. Hungary*:[37]

> "In the Tribunal's view, by consenting to arbitration under Article 7 of the BIT with respect to 'Any dispute between a Contracting Party and the investor of another Contracting Party concerning expropriation of an investment… ' the Parties also consented to the applicability of the provisions of the Treaty […]. Those provisions are Treaty provisions pertaining to international law […]. The consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty […]." [Emphasis added]

89. A similar analysis may be found in *MTD v. Chile*, where the tribunal held the following: [38]

> "This being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law."

90. And that:

> "[…] the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law."

[37] *ADC v. Hungary*, para. 290.
[38] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award, 25 May, 2004, , paras. 86–87. ["***MTD v. Chile***"].

Municipal law

91. Municipal law in this case includes Czech law and certain rules of EU law, which have been incorporated into and form part of Czech law, or which have a direct effect within the Czech Republic, without need for formal incorporation. [39]

92. The Tribunal's task is limited to establishing whether any measure adopted by the Czech Republic and affecting a Cypriot investor amounts to a breach of the rights granted and guarantees promised in the BIT.

93. The Tribunal is not empowered to interpret or apply Czech or EU law, nor to establish the legality of measures adopted by the Czech Republic under its domestic legal order. The Tribunal is additionally not entitled to judge the Republic's compliance with its obligations under the TEU or the TFEU, nor is it being requested to do so by Claimants. In its assessment of whether a breach of the Treaty has occurred, the Tribunal will treat municipal law as a fact,[40] and will follow the prevailing interpretation given to the municipal law by the courts and authorities of the Czech Republic and the EU.

94. The Tribunal cannot, and will not, *sua sponte* interpret or develop Czech law or EU law; any attempt to do so would exceed the Tribunal's jurisdiction.

[39] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. APJJ/07/22, Award, 23 September 2010 (**CL-16**), para. 7.6.6 ["***AES***"].
[40] *El Paso Energy lnternational Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (**RL-34**), paras. 135 and 141 ["***El Paso***"]; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (**RL-86**), para. 67 ["***Azurix***"].

IV. THE INTRA-EU OBJECTION

95. Having established that the BIT and international law (as reflected by the VCLT and customary international law) are the rules which must be applied to establishing jurisdiction, the Tribunal will now move to the analysis of the Intra-EU Objection.

96. In the following sections, the Tribunal will start by summarizing Respondent's position (**1.**), followed by Claimants' position (**2.**). The Tribunal will then turn to the facts that underlie Respondent's jurisdictional objection and establish a chronology of events (**3.**).

97. Finally, the Tribunal will make its own analysis of Respondent's Intra-EU Objection (**4.**) and conclude that it must be dismissed (**5.**).

1. RESPONDENT'S POSITION

98. Respondent primarily argues that its consent to arbitration was not validly given (1.), and supports its arguments by referring to: the effects of the *Achmea* Judgment (1.A.), the invalidation of consent through the principle of *lex posterior* (1.B.), the Contracting States' subsequent agreement and practice reflected in the Member States' Declaration and the *Notes Verbales* (1.C.) and the operation of the *lex arbitri* (1.D.).

99. Respondent further argues that the dispute is not subjectively or objectively arbitrable under Dutch law (2.) and that it is irrelevant whether "effective legal protection" is otherwise available to Claimants (3.). Finally, Respondent asserts that the Tribunal must decline jurisdiction in order to exercise comity towards the CJEU (4.) and that it should also find to the same effect because of its duty to deliver enforceable awards (5.).

1.1 CONSENT WAS NOT VALIDLY GIVEN

A. The *Achmea* Judgment

100. Respondent's main argument is that EU law, as expressed in the *Achmea* Judgment, has invalidated the Czech Republic's offer to arbitrate.[41] In this regard, Respondent notes that the *Achmea* Judgment is "not the centre of [Respondent's] case", it is only a clarification of the state of the law as has existed since 2004.[42] Accordingly, it was not the *Achmea* Judgment, but the accession of Cyprus and

[41] Respondent's Statement of Defence and Memorial on Non-Bifurcated Objections to Jurisdiction, 16 October 2018, para. 322 ["**Statement of Defence**"].
[42] Hearing Day 2, 10:41; 6-14; 10:55; 1-10:57; 9, *citing* C-455/08, *European Commission v Ireland*, CJEU, Judgment dated 23 December 2009 (**RL-162**), para. 39.

the Czech Republic to the EU in 2004 that rendered ineffective Article 8 of the BIT.[43]

101. This does not mean, however, that the *Achmea* Judgment applies retroactively. Respondent submits that the CJEU's judgment effect is declaratory and not constitutive, making it "legally incorrect" to talk of retroactivity in connection with *Achmea*.[44]

102. Respondent emphasizes that Claimants are wrong to suggest that the scope of the *Achmea* Judgment is limited to the Netherlands-Slovakia BIT. The CJEU specifically referred to the numerous BITs still in force between EU Member States, and intentionally widened the scope of the referring court's original question.[45] Respondent also rejects the argument that the present case can be distinguished on the basis that the BIT lacks a provision on applicable law.[46]

103. Respondent argues that there are two cumulative reasons for the invalidity of the arbitration agreement:

- First, there is no valid offer to arbitrate under international law, and
- Second, Claimants could not validly accept the offer of an arbitration agreement under Dutch law as the *lex arbitri*.[47]

B. *Lex posterior*

EU law is binding on the Tribunal

104. Respondent asserts that it is widely accepted that international law governs the jurisdiction of an investment treaty tribunal.[48] As investment arbitration tribunals have "repeatedly confirmed" that EU law forms part of international law,[49] once international law applies, EU law applies as well.[50] Respondent acknowledges that

[43] Statement of Defence, para. 328.
[44] Hearing Day 2, 10:41; 2-12.
[45] Reply, paras. 30-32.
[46] Hearing Day 1, 11:16; 7-1, *citing* B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Series, No. 3. 2018 (**RL-222**), p. 10.
[47] Reply, para. 19.
[48] Statement of Defence, para. 324, *citing Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03, Award dated 11 October 2017 (**RL-154**), para. 156 ["***JSW Solar***"]; Reply, para. 22.
[49] Statement of Defence, para. 324, *citing e.g. Electrabel* (**CL-230**), paras. 4.117-4.126; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 paras. 156, 180 and 187 (**RL-3**), para. 283 ["***Achmea Award on Jurisdiction***"]; Reply, para. 23, *citing 1. Vattenfall* (**RL-157**), paras. 148, 150.
[50] Statement of Defence, para. 324; Reply, para. 25.

the CJEU was not tasked with deciding on the conflict from the viewpoint of international law. According to Respondent, that is the task of this Tribunal.[51]

Article 351 TFEU is to be applied as the governing conflict rule

105. While Respondent notes the relevance of the VCLT for the applicable rules on treaty conflict,[52] it argues that the Tribunal should primarily look at Article 351 TFEU, which regulates the relationship of EU Treaties with other agreements.[53]

106. Respondent argues that under this provision – and following the principle of the primacy of EU law – Article 8 of the BIT ceased to produce any effects and the Tribunal therefore has no jurisdiction.[54]

107. Respondent rejects Claimants' argument that Article 351 only applies to agreements between Member States on the one hand, and third countries on the other. According to Respondent, the jurisprudence of the CJEU[55] and investment arbitration tribunals[56] contradicts Claimants' assertions, and any different reading of Article 351 would be "absurd".[57]

Application of successive treaties under Article 30(3) has occurred

108. Alternatively, Respondent directs the Tribunal to Article 30 VCLT. Respondent avers that Article 30(3) is applicable in the present case as:[58]

- The BIT is an earlier treaty as compared with the TFEU;
- There is an incompatibility between the two treaties;
- The treaties are between the same parties; and
- They relate to the same subject matter.

[51] Hearing Day 1, 11:27; 1-9.
[52] Reply, para. 42.
[53] Reply, para. 43; Hearing Day 1, 11:28; 17-21.
[54] Reply, paras. 52-53, *citing* Case 235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, CJEU, Judgment dated 27 September 1988 (**RL-230**), para. 22 ["***Matteucci***"]; C-478/07 *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH,* CJEU, Judgment dated 8 September 2009 (**RL-231**), para. 98. ["***Budějovický Budvar***"].
[55] Reply, paras. 48-51*, citing* Case No. 10/61 *Commission of the European Economic Community v. Government of the Italian Republic*, CJEU, Judgment dated 27 February 1962 (**RL-221**), p. 10; C-147/03, *Commission v. Austria*, CJEU, Judgment dated 7 July 2005 (**RL-228**), para. 58; C-812/79 *Attorney General v. Juan C. Burgoa*, CJEU, Judgment dated 14 October 1980 (**RL-229**), para. 6; Hearing Day 2, 11:37; 4-12.
[56] Reply, paras. 48-51*, citing Electrabel* (**CL-230**), paras. 4.178, 1.183.
[57] Reply, para. 50.
[58] Reply, paras. 56-60.

109. Respondent argues that the successive treaties do not have to cover the same subject matter in all respects in order for Article 30(3) VCLT to apply.[59] Rather, Respondent cites scholarly opinion for the proposition that "incompatibility presupposes 'same[ness of the] subject matter'".[60] Thus, once the existence of a conflict is ascertained, Respondent argues that it can only be resolved one way: by concluding that Article 8 of the BIT is no longer valid.[61]

110. For Respondent, the *Achmea* Judgment makes it clear that there is an incompatibility between the two conflicting provisions, as arbitration clauses in intra-EU BITs are "precluded" by Articles 267 and 344 TFEU.[62] Respondent suggests that the Tribunal should apply the standard as it was formulated in the International Law Commission's ("**ILC**") Fragmentation Report.[63]

Article 8 of the BIT is inapplicable as Article 30 VCLT has no temporal aspect

111. Respondent adds that[64]

> "there is no temporal aspect to Article 30. Rather, the adjudicator has recourse to Article 30 at the moment he or she is faced with applying colliding norms".

112. Respondent rejects Claimants' suggestion that a two-step analysis should be undertaken as part of the application of Article 30(3). Respondent points out that Claimants' reference to the *EURAM* decision in this regard is misleading, as the decision actually concerned the application of Article 59 VCLT.[65]

113. Respondent further rejects Claimants' arguments to the effect that there is no conflict because the present case does not raise any issue of EU law. Respondent asserts that, first, it cannot be excluded that the Tribunal might be called upon to interpret EU law in a later phase of the proceedings,[66] and second, that the mere risk or possibility of the application of EU law is sufficient for the conflict to exist.[67]

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[59] Reply, para. 62; Hearing Day 1, 11:40; 7-21, *citing Achmea* Award on Jurisdiction (**RL-3**), paras. 240-241.
[60] Reply, para. 60, *citing* e.g. K. von der Decken, *Article 30, Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2nd edition, 2018 (**RL-226**), para. 13; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003 (extract) (**RL-234**), pp. 364-365; Hearing Day 2, 11:41; 20-25.
[61] Reply, para. 63.
[62] Reply, para. 25.
[63] Reply, para. 60; Hearing Day 1, 11:39;12-19, *citing* International Law Commission, *Report on the Fragmentation of International Law, United Nations General Assembly*, 2006 (**RL-236**), para. 254.
[64] Hearing Day 1, 11:57; 9-12.
[65] Hearing Day 1, 11:44; 15-11:46; 16.
[66] Reply, para. 36.
[67] Reply, para. 37-40.

C. Member States' Declaration and *Notes Verbales*

114. Respondent adds that the Declaration of the EU Member States of 15 January 2019 (previously defined as "**Member States' Declaration**") qualifies as a "subsequent agreement between the parties" under Article 31(3)(a) VCLT, relying on the decision of the Tribunal in the *Methanex* case as support.[68] Respondent also submits that the Declaration constitutes conclusive evidence of "subsequent practice" under Article 31(3)(b) VCLT, citing, *inter alia*, the draft conclusions of the ILC on subsequent agreements and subsequent practice.[69]

115. Respondent rejects Claimants' assertion that the Member States' Declaration is a mere political declaration with no legal effect.[70] Further, Respondent contends that Claimants' reference to Article 6(1) of the European Convention on Human Rights ("**ECHR**") is misplaced and the case law they cite to support their position is irrelevant.[71]

116. Respondent further asserts that the exchange of the *Notes Verbales* between Cyprus and the Czech Republic serves as proof that both Contracting States adhere to the commitments undertaken in the Member States' Declaration and that they both perceive it as a subsequent agreement under Article 31(3)(a) of the VCLT, which rendered Article 8 of the BIT inapplicable upon the Contracting States' accession to the EU in 2004.[72]

D. *Lex arbitri*

117. In addition to the invalidity of the offer to arbitrate under international law, Respondent also relies on the invalidity of the acceptance of such an offer under Dutch law, the *lex loci arbitri*.[73]

BGH Judgment offers a roadmap for the Tribunal's jurisdiction

118. According to Respondent, Articles 1020 and 1021 of the DAA require a valid agreement to arbitrate, a requirement that is not fulfilled in the present case.[74] Respondent adds that the German Supreme Court (*Bundesgerichtshof*, the "**BGH**") also carried out its analysis of EU law as part of the *lex loci arbitri* when it set aside the *Achmea* Final Award,[75] and that Dutch courts would look at this

[68] Reply, para. 67, *citing Methanex Corporation v. USA*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits dated 3 August 2005 (**RL-170**), Part II, Chapter B, para. 19 ["***Methanex***"]; Hearing Day 1, 12:04; 9-12.
[69] Reply, paras. 69-70, 74, *citing* International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, Yearbook of the International Law Commission, Vol. II, Part Two, 2018 (**RL-239**), Conclusion 4(2).
[70] Reply, paras. 71-73.
[71] Reply, para. 72.
[72] Communication R-63, p. 2-3.
[73] Reply, paras. 77-78, *citing Achmea* Award on Jurisdiction (**RL-3**), paras. 224-226.
[74] Reply, para. 79.
[75] Reply, para. 82.

issue similarly.[76] Furthermore, Respondent contends that an *a contrario* reading of the Svea Court of Appeal's judgment in the *PL Holdings* case also supports its position.[77]

Article 10:166 DCC does not find application

119. Respondent rejects Claimants' invocation of the *favor validitatis* principle in Article 10:166 of the DCC. According to Respondent, the principle only applies if there is no choice of law by the parties. However, under Dutch law, the choice of law applicable to the arbitration agreement can be tacit, and "such tacit choice can be, for example, constituted by the parties' agreement on the seat of the arbitration".[78] Therefore, as the Parties tacitly chose Dutch law as the law applicable to the arbitration agreement by designating The Hague as the seat of the arbitration, Claimants cannot rely on the *favor validitatis* principle to apply international law to the arbitration agreement.[79]

120. Respondent finally argues that, while tribunals in previous cases have managed to find "excuses" to disregard the *Achmea* Judgment, this Tribunal has "no way out".[80] Previous tribunals have rejected similar objections in:

- Cases under the ECT;[81]
- Disputes where the facts arose prior to the Member States' accession;[82]
- ICSID cases;[83] and
- Cases where the objection was raised belatedly.[84]

[76] Reply, para. 85.
[77] Reply, para. 84, *citing Republic of Poland v PL Holdings* S.à.r.l., Case No. T 8538-17 and T 125033-17, Judgment of the (Svea Court of Appeal) dated 22 February 2019 (English translation and Swedish original) (**CL-190**), p. 43 ["***PL Holdings (Svea Court of Appeal)***"].
[78] Hearing Day 1, 10:08; 9-10:09; 9, *citing* G. I. Meijer, *Dutch Code of Civil Procedure, Commentary Article 1020*, Kluwer (partial English translation and Dutch original) (**RL-43**, resubmitted) ["***Meijer 2***"]; A.J. van den Berg, R. van Delden, and H. J. Snijders, *Netherlands Arbitration Law*, 2009 (extract) (**RL-292**); Hearing Day 2, 11:04; 7-23.
[79] Hearing Day 1, 10:09; 13-16; Hearing Day 2, 11:01; 10-16.
[80] Reply, para. 12; Hearing Day 1, 09:46; 23-09:48; 11.
[81] Reply, para. 12, *citing e.g. Charanne and Construction Investments v Spain*, SCC Case No. V 062/2012, 21 January 2016 (**CL-12**) ["***Charanne***"].
[82] Reply, para. 12, *citing e.g. Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 ("*Eastern Sugar*") (**CL-21**), paras. 163-164 ["***Eastern Sugar***"]; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No ARB/05/20, Final Award dated 11 December 2013 (**CL-44**), para. 319 ["***Micula***"].
[83] Reply, para. 12, *citing e.g. UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, dated 9 October 2018, (**RL-216**), paras. 253-258 ["***UP & CD***"]; *Eskosol* (**RL-215**), para. 233.
[84] Reply, para. 12, *citing e.g. PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award dated 28 August 2017 (**RL-217**), para. 306 ["***PL Holdings***"].

121. In this dispute, however, none of the above circumstances are present.

1.2 THE DISPUTE IS NOT ARBITRABLE UNDER DUTCH LAW

122. Respondent asserts that the present dispute is neither *objectively* nor *subjectively* arbitrable under Dutch law, the *lex loci arbitri*.[85]

A. Objective non-arbitrability

123. Respondent submits that the present dispute is objectively non-arbitrable under Dutch law. Respondent relies on Article 1020(3) of the DAA, which according to Respondent serves to designate a category of disputes that are objectively not capable of settlement by arbitration, as they constitute matters of public policy.[86] This position is in line with the case law of the Dutch Supreme Court and scholarly opinion – including that of Claimants' co-counsel.[87]

124. Respondent also relies on Article 3:40 of the DCC to argue that an agreement to arbitrate matters that are objectively non-arbitrable is also null and void.[88]

125. Respondent further relies on the landmark *Eco Swiss* judgment, where the CJEU held – in a case concerning an award rendered in a Dutch-seated arbitration – that if a Member State considers non-compliance with public policy as a ground for annulment, this equally applies to non-compliance with EU public policy.[89]

126. Respondent submits that Claimants are wrong to suggest that the domestic courts can still safeguard the proper application of public policy by the review of arbitral awards, in line with the *Eco Swiss* judgment. In Respondent's view, the CJEU went further in the *Achmea* Judgment than in the *Eco Swiss* case and found that the level of review exercised by domestic courts is insufficient in the context of an investment case to guarantee the preservation of the EU legal order.[90] Respondent argues that the *Achmea* Judgment manifestly reflects EU public policy, and Claimants' arguments to the contrary should be dismissed.[91]

127. Respondent also argues that Claimants' reference to the recent decision of the CJEU in the *Micula* case bears no relevance to the public policy discussion. This is because the CJEU in that case has only allowed enforcement of an arbitral award

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[85] Reply, para. 88.
[86] Statement of Defence, paras. 331-332, *citing* Meijer 2, (**RL-43**, resubmitted); Reply, paras. 96-97.
[87] Reply, para. 99, *citing* Dutch Supreme Court, NJ 1999/737 dated 24 September 1999 (**RL-250**); G. J. Meijer, *Overeenkomst tot arbitrage Bezien in het licht van het bewijsvoorschrift van artikel 1021*, Kluwer, 2011 (excerpts) (**RL-241**), p. 840 ["***Meijer 3***"].
[88] Reply, para. 97; Hearing Day 1, 10:14; 9-17.
[89] Reply, para. 101, *citing* C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV*, CJEU, Judgment dated 1 June 1999 (**RL-44**) para. 37 ["***Eco Swiss***"].
[90] Reply, paras. 102-103.
[91] Hearing Day 1, 10:29; 6-10:31; 1.

to the extent that it related to pre-accession facts. Therefore, no relevant conflict with the EU legal order is at issue there.[92]

128. Respondent further rejects Claimants' reliance on the *PL Holdings* case, stating the Svea Court of Appeal's decision was not centred on the same attributes of EU public policy as this case, and the final resolution of the case is still pending before the Swedish Supreme Court in any event.[93]

B. Subjective non-arbitrability

129. Respondent also suggests that, on the question of subjective arbitrability (i.e. legal capacity), Dutch law refers back to the internal law of the party in question.[94] Respondent further cites [redacted] Expert Report in which he explains that under EU law, as part of Czech law, the Czech Republic, as from accession, no longer had the legal capacity to enter into an arbitration agreement with Cypriot investors on the basis of the standing offer contained in Article 8 of the Treaty.[95]

130. Respondent anticipates Claimants' reliance on the *Lizardi* rule under Dutch law, borrowed from the *Arrêt Lizardi* decision of the French *Cour de Cassation*. The rule is embodied in Article 10:167 of the DCC, which provides that a State may not invoke its laws or regulations to dispute its capacity or powers to enter into agreement to arbitrate if the other party did not know such law or regulation and should not be considered to have been required to know such law or regulation.[96]

131. Respondent emphasizes the *caveat* provided by the second proviso of the Article which renders the rule applicable only

> "if the other party did not know such law or regulations and should not be considered to have been required to know such law or regulation".[97]

132. Respondent argues that this *caveat* should apply here, since there has been a debate regarding Intra-EU BITs since the year 2005, and Claimants at the very least had to consider the issue when they were debating the seat of arbitration. Therefore, the Tribunal should decline jurisdiction as the dispute is subjectively non-arbitrable.[98] Furthermore, the *Lizardi* rule only prevents a State from relying on its own internal law to dispute its capacity to enter into an arbitration agreement. Therefore, Respondent claims that it is not applicable in the present

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[92] Hearing Day 2, 11:58; 16-12:00; 8.
[93] Reply, para. 104, *citing PL Holdings* (Svea Court of Appeal) (**CL-190**), pp. 22-23, 46-52.
[94] Reply, paras. 90-91, *citing* V. Lazic and A. Schluep, *Netherlands*, in F B Weigand (ed.), *Practitioner's Handbook on I nternational Arbitration* (3rd edn, 2019) (**CL-202**), paras.11.55-11.57; N. Peters, *IPR, Procesrecht & Arbitrage: Over Grondslagen en Rechtspraktijk*, Antwerpen Maklu, 2015, (**RL-242**), p. 268; Meijer 3 (excerpts) (**RL-241**), pp. 393-394.
[95] Reply, para. 92, *citing* [redacted] paras.68-70, 72.
[96] Reply, para. 93, *citing* Article 10:167 DCC (**C-321**).
[97] Reply, para. 93.
[98] Reply, paras. 94-95; Hearing Day 1, 09:49; 15-20, 09:55; 3-17.

proceedings, where it is the EU legal order – and not the Czech Republic's internal law – that limits Respondent's capacity to enter into an arbitration agreement.[99]

1.3 WHETHER "EFFECTIVE LEGAL PROTECTION" IS OTHERWISE AVAILABLE FOR CLAIMANTS IS IRRELEVANT

133. Respondent rejects Claimants' position that the purported lack of an effective legal remedy supersedes arbitrability. In any event, Respondent contends that Claimants are able to obtain effective legal remedy before the Czech courts and the European Court of Human Rights ("**ECtHR**").[100]

134. Respondent submits that under international law, the fact that there may be no alternative forum for Claimants has no impact on the Tribunal's jurisdiction: holding rights under international law and having jurisdiction to bring claims before international fora are two different things. Respondent relies on the jurisprudence of the International Court of Justice ("**ICJ**") and investment arbitration tribunals to support this position.[101]

135. According to Respondent, Claimants are incorrect to assume that the ECHR would somehow trump international law in this respect:

- First, this Tribunal is neither a party to the ECHR, nor a state organ of any of the parties, therefore it is not bound by Article 6 ECHR;[102]
- Second, Article 6 ECHR concerns the right to a fair trial and not denial of justice;[103]
- Third, Article 6 is not a dispute resolution clause, and it does not provide open-ended consent to international adjudication under arbitration agreements in treaties extraneous to the ECHR.[104]

136. Respondent submits that the situation is the same under Dutch law: Article 94 of the Dutch Constitution would only preclude the application of other Dutch statutes in cases of the inconsistency of those statutes with international treaties binding on all persons. However, in Respondent's view, the ECHR is not such a treaty, and it is not binding on this Tribunal. Therefore, Respondent contends that the Dutch Constitution cannot have the effect of precluding the application of

[99] Hearing Day 1, 10:13; 4-21.
[100] Reply, paras. 107-108; Hearing Day 1, 10:31; 21-23.
[101] Reply, paras. 110-113, *citing e.g. Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, 3 February 2012 (**RL-253**), paras. 101-104; *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction dated 10 February 2012 (**RL-54**), para. 281; Hearing Day 1, 10:45; 13-20.
[102] Reply, para. 115.
[103] Reply, para. 115.
[104] Reply, para. 116.

statutory provisions of Dutch law, such as Article 1020(3) DAA.[105] Yet, even if the ECHR were binding on the Tribunal, Respondent asserts that this would still not preclude the application of Article 1020(3) DAA.[106]

137. Respondent argues that, in any event, Claimants are able to obtain effective legal protection from the Czech courts and the ECtHR.[107]

138. Regarding access to the Czech Courts, Respondent submits that [redacted] errs when he suggests in his expert report that Claimants do not have access to courts because Article 2(2) of the BIT is not self-executing. According to Respondent, Claimants have previously admitted that the Czech courts can hear claims under the BIT,[108] which conclusion was relied upon by the Tribunal in its Interim Award in which it held that "Claimants, if they had so chosen, could have filed their present dispute before a competent Czech court".[109] Respondent further relies on [redacted] Expert Report on the point that Article 2(2) of the BIT is self-executing.[110]

139. Respondent further argues that the mere rejection of Claimants' claims by Czech courts would not mean a denial of access to fair trial: Claimants have "no 'right to win'" their case before domestic courts.[111] This is the case, Respondent says, regardless of whether a potential rejection happens for substantive or procedural reasons.[112] According to Respondent, a denial of justice under international law requires a "manifest disrespect of due process". This is a high standard, one that is not met in this case.[113]

140. Respondent further argues that Claimants are wrong to suggest that the principle of mutual trust underpinning the *Achmea* Judgment should not apply in the present case. Respondent adds that the cases cited by Claimants are only "two limited exceptions to the principle established by the EU", that have no bearing on this dispute.[114]

141. Finally, Respondent submits if Claimants consider that the Czech courts denied them a fair trial, they can file an application before the ECtHR based on Article

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[105] Reply, para. 120, *citing* G. J. Meijer, *Overeenkomst t ot a rbitrage B ezien i n h et l icht v an het bewijsvoorschrift van artikel 1021*, Kluwer, 2011 3 (excerpts) (**RL-241**), p. 74.
[106] Reply, para. 121.
[107] Reply, para. 124.
[108] Reply, para. 126, *citing* Transcript of Closing Hearing on Jurisdiction, Day 3, 16 June 2017, 18:03;5-8; Hearing Day 2, 12:03; 9-13.
[109] Reply, para. 127, *citing* Interim Award, para. 615.
[110] Reply, paras. 128-133, *citing* [redacted] ([redacted]) paras. 86, 89, 99, 100, 103, 105, 134, 142-44.
[111] Reply, paras. 134, 137-139, *citing* J. Paulsson, *Denial of Justice i n International L aw*, Cambridge University Press (excerpts) (**RL-21**, resubmitted), p. 117; Hearing Day 2, 11:35; 2-16.
[112] Reply, para. 135.
[113] Reply, para. 136, *citing Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 November 1999 (**RL-19**) para. 97 ["***Azinian***"].
[114] Reply, paras. 142-143.

6(1) ECHR. The fact that Claimants may not be able to exhaust their local remedies is the "Claimants' own problem" and "not a concern for this Tribunal".[115]

1.4 THE TRIBUNAL SHOULD DECLINE JURISDICTION IN ORDER TO EXERCISE COMITY TOWARDS THE CJEU

142. As an alternative argument, Respondent submits that even if the Tribunal were to find that it has jurisdiction, it should decline to hear this case out of comity.[116] Comity, as suggested by Respondent, is a principle of judicial restraint, founded on mutual respect for the integrity and competence of tribunals.[117]

143. Respondent suggests that one way in which comity is exercised is by declining jurisdiction,[118] and that the Tribunal should exercise comity towards the Grand Chamber's *Achmea* Judgment.[119]

144. Respondent rejects Claimants' restrictive understanding of admissibility, and argues that admissibility is in fact a far broader concept.[120] Respondent adds that Claimants are also wrong to suggest that comity only applies where parallel proceedings exist. In support, Respondent refers to the *MOX Plant* case, where the arbitral tribunal exercised comity in favour of the CJEU, despite the latter not being at that time seized of any dispute.[121]

1.5 THE TRIBUNAL SHOULD DECLINE JURISDICTION BECAUSE IT HAS A DUTY TO DELIVER ENFORCEABLE AWARDS

145. In the further alternative, Respondent argues that any award rendered in the arbitration would be invalid and unenforceable, such that the Tribunal should decline its jurisdiction.[122] Respondent argues that it is a generally accepted principle of law that arbitrators must make every effort to ensure that their awards are enforceable.[123]

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[115] Reply, para. 140.
[116] Statement of Defence, para. 336; Reply, para. 157.
[117] Statement of Defence, para. 337, *citing* A. M. Slaughter, *Court to Court*, The American Journal of International Law, Vol. 92, No. 4, 1998 (**RL-165**), pp. 708-709.
[118] Statement of Defence, paras. 339-340, *citing* C. Henckels, *Overcoming Jurisdictional Isolationism at the WTO - FTA Nexus: A Potential Approach for the WTO*, The European Journal of International Law, Vol. 19, No. 3, 2008 (**RL-167**), p. 584; *Case concerning the Northern Cameroons* (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 15. (**RL-168**), p. 29 ["***Northern Cameroons***"].
[119] Statement of Defence, para. 340.
[120] Reply, para. 159, *citing Achmea* Award on Jurisdiction (**RL-3**), para. 115.
[121] Reply, paras. 161-162, *citing MOX Plant Case* (Ireland v United Kingdom), PCA Case No. 2002-01, Procedural Order No. 3 dated 24 June 2003 (**CL-206**), paras. 23-24, 28.
[122] Reply, para. 146.
[123] Reply, para. 147, *citing* F. P. Lozada, *Duty to Render Enforceable Awards: The Specific Case of Impartiality*, Spanish Arbitration Review, 2018 (**RL-272**); G. J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, Journal of International Law, 2001 (**RL-273**); D. Alessi, *Enforcing*

146. Respondent relies on an *a contrario* reading of the decision in the *Eskosol* case, according to which a non-ICSID award might be deemed categorically unenforceable if it was issued in violation of the mandatory rules of the seat of arbitration.[124]

147. Respondent suggests that such would be the case for any award upholding jurisdiction in this case as the Dutch courts would undertake an unrestricted *de novo* review of the Tribunal's decision on jurisdiction[125] and set it aside based on either Article 1065(1)(a) (non-existence of a valid arbitration agreement) or 1065(1)(e) of the DAA (violation of public policy).[126] Enforcement outside of the Netherlands would then also be denied under the New York Convention following the setting aside of the award by Dutch courts.[127]

2. CLAIMANTS' POSITION

148. Claimants assert that consent was validly given by the Parties to this arbitration (1.) and that the dispute is arbitrable under Dutch law (2.). They maintain that the Tribunal must assert jurisdiction over the dispute because no "effective legal protection" would be available to them otherwise (3.). According to Claimants, comity is irrelevant to the Tribunal's determination of jurisdiction (4.) and the potential enforceability of an award to be rendered by the Tribunal also bears no impact on its jurisdiction (5.).

2.1 CONSENT WAS GIVEN VALIDLY BY BOTH PARTIES

A. The *Achmea* Judgment

149. Claimants note first that investment arbitration tribunals have unanimously upheld their jurisdiction over intra-EU BITs such as the BIT in the present dispute – both in pre- and post-*Achmea* cases.[128]

150. Claimants state that both Parties agree that international law applies to the validity of the arbitration agreement.[129] Claimants maintain, however, that the *Achmea* Judgment does not offer conclusions regarding international law – and is therefore of no assistance to the Tribunal.[130] This is, they contend, because the CJEU is

Arbitrator's Obligations: Rethinking International Commercial A rbitrators' Liability, Journal of International Law, 2014 (**RL-274**).
[124] Reply, para. 149, *citing Eskosol* (**RL-215**), para. 233; Hearing Day 1; 12:19; 8-13.
[125] Reply, paras. 151-154, *citing* G. J. Meijer, *Tekst & Commentaar Burgerlijke Rechtsvordering*, Kluwer, 2018, (**RL-246**), Article 1065 note 2(a), p. 3 ["***Meijer 4***"]; Hearing Day 1, 12:21; 18-23.
[126] Hearing Day 1, 12:23; 14-12:24; 3; Hearing Day 2, 11:24; 25-11:25; 8.
[127] Reply, para. 155; Hearing Day 1, 12:26; 15-22.
[128] Rejoinder, para. 2; Hearing Day 1, 16:29; 9-21.
[129] Counter-Memorial, para. 17; Rejoinder, para. 18; Hearing Day 1, 15:44; 16-19.
[130] Counter-Memorial, para. 17; Hearing Day 1, 14:34; 15-21, 15:23; 22-15:25; 12, *citing Vattenfall* (**RL-157**), para. 159.

different from "any other judicial formation applying international law", as it "analyses international law exclusively through the lens of [the EU] treaties".[131]

151. The implication of the foregoing, according to Claimants, is that the CJEU (i) did not consider whether there is a subject matter identity under international law between the TFEU and the intra-EU BITS; and (ii) did not address the practical consequences of the conflict it perceived between the two legal regimes.[132]

B. ***Lex Posterior***

EU law is not binding on the Tribunal

152. Claimants agree that EU law is part of the corpus of international law, but argue that this only leads to the conclusion that EU Treaties are also subject to the international law of treaties and the rules of the VCLT.[133]

153. Claimants further submit that the CJEU did not identify any issue of incompatibility as a matter of international law.[134] Claimants reject the Respondent's attempt to qualify EU law as international law based on the finding of the *Vattenfall* tribunal, emphasizing that the same tribunal concluded that there was "serious difficulty" in deriving a "relevant rule of international law" from the CJEU's interpretation of the TFEU.

154. Claimants further submit that the present case does not concern the application of EU law, and, in any event, the BIT has no applicable law provisions that would instruct the Tribunal to apply EU law. Claimants refer to the reasoning of the CJEU in the *Achmea* Judgment to point out that the CJEU based its decision on the specific characteristics of that case. Claimants also rely on the *United Utilies v. Estonia* case, where the tribunal rejected the intra-EU objection due to the fact that the applicable BIT – similarly to this case – did not have a reference to the domestic law of the parties.[135]

155. According to Claimants, the crucial question is whether the relevant intra-EU BIT requires the Tribunal to apply EU law, and not whether a dispute before it raises an issue of EU law.[136]

Article 351 TFEU is not applicable

156. Regarding Respondent's arguments on Article 351 of the TFEU, Claimants submit that this provision is only applicable in relation between Member States

[131] Counter-Memorial, para.18.
[132] Counter-Memorial, para. 25.
[133] Hearing Day 1, 15:22; 15-15:23; 9.
[134] Counter-Memorial, para. 46; Rejoinder, paras. 41-43.
[135] Rejoinder, para. 49, *citing United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award dated 21 June 2019 (**CL-260**), para. 540 ["***United Utilities***"].
[136] Rejoinder, para. 51.

and third countries.[137] Thus, Respondent's arguments can be disregarded.[138] Claimants submit that Respondent's reference to the decisions of the CJEU in the *Matteucci* and *Budějovický Budva*r cases on this point is misleading, and that those decisions in fact support Claimants' case.[139]

157. But even if Article 351 were to apply, it would not deprive the Tribunal of jurisdiction, Claimants assert. Quite the contrary: it would oblige Member States to ensure that the acquired rights of investors remain unaffected.[140]

No application of successive treaties arises under Article 30(3) VCLT

158. Turning to Article 30(3) of the VCLT, Claimants contend that:

- As the BIT and the TFEU do not cover the same subject matter, the threshold condition for the application of Article 30 has not been met;[141] and

- Even if the condition of subject matter identity was fulfilled, there is no incompatibility.[142]

159. On the question of subject matter identity, Claimants criticize the ILC's approach, and point to the decision in *EURAM v. Slovakia*, which rejected this approach.[143] Claimants submit that the application of Article 30(3) entails a two-step inquiry involving, first, an examination of subject matter identity between the two treaties as a whole and, second, an analysis of the incompatibility of the specific provisions.[144] Claimants cite further case law to support their argument that the subject matter of the TFEU is not identical with that of intra-EU BITs.[145]

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[137] Counter-Memorial, para. 49; Rejoinder para. 31, citing *JSW Solar (***RL-154**), para. 256; *Vattenfall* (**RL-157**), paras. 225-226 and 228.
[138] Rejoinder, para. 22; Hearing Day 1, 16:49; 20-24, 16:51; 3-25, *citing Vattenfall* (**RL-157**), paras. 225-227.
[139] Rejoinder, para. 30, *citing Matteucci* (**RL-230**), para. 21; C-478/07 *Budějovický Budvar* (**RL-231**), para. 98.
[140] Hearing Day 1, 16:52; 1-16:54; 14.
[141] Counter-Memorial, para. 43, *referring to* what Claimants present as unanimous case law of investment tribunals to the effect that the TFEU and intra-EU BITs do not cover the same subject matter: *Eastern Sugar* (**CL-21**), paras. 159-160; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction dated 6 June 2016 (**CL-8**), para. 79 ["***RREEF***"]; *Vattenfall* (**RL-157**), para. 212.
[142] Counter-Memorial, para. 45.
[143] Rejoinder, para. 25, *citing EURAM* (**RL-155**), paras. 173–175. The Claimants note in footnote 25 of their Rejoinder that "[t]he EURAM tribunal's analysis related to Article 59 of the VCLT, but the tests are identical under Articles 30 and 59 of the VCLT".
[144] Rejoinder, para. 26.
[145] Rejoinder, para. 35, *citing Jan O ostergetel a nd T heodora L aurentius v The Slovak R epublic* (UNCITRAL) Decision on Jurisdiction dated 30 April 2010 (**CL-53**), para. 75 ["***Oostergetel***"]; Hearing Day 1, 16:33; 13-16:36; 12, *citing Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award dated 16 July 2018 (**CL-203**), para. 585 ["**Marfin**"]; *Eskosol* (**RL-215**), para. 136.

160. Turning to the question of incompatibility, according to Claimants, the Tribunal should approach this question based on a presumption of non-conflict. This derives from the principle of harmonious interpretation of international law.[146] Claimants posit that there is an incompatibility of treaty obligations only when a party cannot comply with one treaty without breaching the other.[147]

161. Claimants argue that Article 30(3) of the VCLT does not result in automatic invalidation without following the termination procedure set out in Article 65 VCLT.[148] The same argument was set out by the European Commission in its 2007 letter to the Czech Republic.[149] In any event, Claimants contend that the VCLT cannot invalidate the agreement to arbitrate formed in September 2015, as they had no reason to suspect then that the Czech Republic had considered its intra-EU BITs to have been terminated.[150]

Article 8 of the BIT cannot be rendered inapplicable retroactively

162. Claimants suggest that for Respondent to succeed it must also show that Article 8 is retroactively invalidated, and thereby "deemed to have ceased to exist in 2004" – which they say Respondent has failed to do.[151] According to Claimants, Respondent makes no attempt to explain how the retroactive nature of the CJEU's judgments as a matter of EU law could lead to the retroactive invalidation of a treaty provision that is concluded under and governed by international law.[152]

163. Claimants point out that there was a detailed correspondence between the Czech and the Cypriot Government in 2009 with the intention of terminating the BIT, but the termination never happened. Moreover, Claimants argue that even that voluntary termination would not have had a retroactive effect and would not have affected investors' acquired rights.[153]

C. Member States' Declaration and *Notes Verbales*

164. Regarding Respondent's reliance on the Member States' Declaration, Claimants note that the Declaration is political in nature, and that reliance on it has been

[146] Hearing Day 1, 16:38; 20-16:39; 5, *citing* M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2008 (**RL-227**), p. 402.
[147] Hearing Day 1, 16:38; 14-19, *citing Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary,* ICSID Case No. ARB/17/27 (**CL-268**), para. 241 ["**Magyar Farming**"].
[148] Rejoinder, para. 68, *citing Eskosol* (**RL-215**), paras. 190, 193, and 199.
[149] Rejoinder, para. 69, *citing* Letter from [redacted] of EC Internal Market and Services to [redacted] the Czech Deputy Minister of Finance, 13 January 2006, *quoted in Eastern Sugar* (**CL-21**), para 119.
[150] Rejoinder, para. 71.
[151] Rejoinder, para. 65.
[152] Rejoinder, para. 67.
[153] Hearing Day 2, 16:08; 11-16:11; 11, *citing* Letter sent by the Embassy of the Czech Republic in Nicosia to the Ministry of Foreign Affairs of the Republic of Cyprus of 5 January 2009 (**R-5**); *Note Verbale* sent by the Ministry of Foreign Affairs of the Republic of Cyprus to the Embassy of the Czech Republic dated 17 November 2009 (**R-6**).

rejected by every tribunal that considered the issue.[154] Moreover, according to Claimants, the Declaration's stated intention of actively interfering with pending arbitral proceedings is prohibited under Article 6(1) ECHR.[155]

165. Claimants further reject Respondent's suggestion that Articles 31(3)(a) or 31(3)(b) VCLT should apply in this case. With respect to Article 31(3)(a) Claimants note that the *Eskosol* tribunal has plainly rejected qualification of the Declaration under this guise.[156] In any event, in Claimants' view, such an agreement among Member States regarding the application of the BIT would be limited to its effects within the EU legal order.[157]

166. Turning to the argument that the Declaration qualifies as "subsequent practice" under Article 31(3)(b), Claimants aver that an isolated act is generally not sufficient to establish subsequent practice.[158] Claimants submit that the Member States' Declaration is an isolated act and, what is more, it is inconsistent with the prior practice of the Czech Republic and Cyprus.[159]

167. Furthermore, if the *Achmea* Judgment stood for the conclusion claimed by Respondent, then Claimants posit that there would be no need then for the Member States' Declaration to re-state these conclusions and embark on a campaign to retroactively invalidate offers in intra-EU BITs.[160]

168. With regard to the *Notes Verbales* issued by Cyprus and the Czech Republic, Claimants note that the exchange of these diplomatic instruments is of no impact on the current proceedings. According to Claimants, the *Notes Verbales* serve as a confirmation of the Member States' Declaration, which only amounted to a political statement. Claimants also quote pending cases brought by Cypriot and Czech State-controlled entities against other Member States, which have not been discontinued pursuant to the Member States' Declaration.[161]

D. ***Lex Arbitri***

169. In reply to Respondent's arguments concerning the invalidity of the acceptance of the offer to arbitrate under Dutch law as the *lex loci arbitri*, Claimants submit,

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[154] Counter-Memorial, para. 33; Rejoinder, para. 53, *citing e.g. Eskosol* (**RL-215**), para. 217; *Landesbank Baden-Württemberg et al v Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection dated 25 February 2019 (**CL-247**), para. 192 ["***LBBW***"]; Hearing Day 2, 15:45; 5-8.
[155] Counter-Memorial, para. 33; Rejoinder, para. 55.
[156] Rejoinder, para. 50, citing *Eskosol* (**RL-215**), para. 222.
[157] Counter-Memorial, para. 34; Rejoinder, para. 63.
[158] Counter-Memorial, para. 34, *citing* WTO, Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS/11/ABR, adopted 4 October 1996 (**CL-232**), p. 13; Rejoinder, para. 62.
[159] Counter-Memorial, para. 34; Rejoinder, para. 61.
[160] Counter-Memorial, para. 35.
[161] Communication C-75.

first of all, that the validity of the arbitration agreement is not – save for a choice of law provision – governed by Dutch law.[162]

BGH Judgment has no impact on the Tribunal's jurisdiction

170. Regarding the German Supreme Court Judgment, Claimants emphasize that the decision links the application of EU law – and hence the validity of the arbitration agreement – to the applicable law provision of the Netherlands-Slovak BIT.[163] Claimants further cite parts of the *Achmea* Judgment to argue that the CJEU also attributed great weight to the applicable law provision of the Netherlands-Slovak BIT.[164] The present case, however, should be distinguished, as Article 8 of the BIT contains no comparable provision on applicable law.[165]

171. Claimants also reject Respondent's assertion that the German Supreme Court decision would be a "roadmap" to how Dutch Courts would look at the issue. Claimants assert that Respondent does not provide any proper comparisons between the Dutch and the German legal systems when arriving to this point. There is such a difference, Claimants contend, as Article 1059(2)1 of the German Civil Procedure Code (ZPO) does not enshrine the *favor validitatis* principle, and holds that, in the absence of agreement on a choice of law between the parties, German law should apply. Thus, there is a crucial difference between the two legal systems on the critical question of applicable law.[166]

Article 10:166 DCC confirms the validity of the arbitration agreement

172. Claimantsrefer to Article 10:166 of the DCC, which regulates the validity of the arbitration agreement.[167] According to Claimants, this provision reflects the *favor validitatis* principle, which means that an arbitration agreement should be deemed valid if it is valid according to any one of the laws listed under Article 10:166 of the DCC. Accordingly, it is irrelevant whether the arbitration agreement might be considered invalid according to another potentially applicable law.[168]

173. Claimants reject Respondent's argument concerning an alleged "implied choice of law" under Article 10:166 DCC. Claimants argue that by enacting Article 10:166 the legislator's intention was exactly the opposite: to prevent a reference to an implied or tacit choice of law, as Article 10:166 makes such references unnecessary.[169] Claimants clarify that they do not claim "as such" that an implied

[162] Rejoinder, para. 76.
[163] Counter-Memorial, para. 29, *citing* BGH Judgment (**CL-221**), para. 18; Rejoinder, para. 86; Hearing Day 1, 15:01; 6-8.
[164] Hearing Day 1, 15:08; 12-15:11; 19, *citing* Case C-284/16 Slowakische Republik (Slovak Rebublic) v *Achmea* BV, CJEU, Judgment, 6 March 2018 (**RL-153**) paras. 33, 39-42, 56 ["***Achmea Judgment***"].
[165] Counter-Memorial, para. 30; Hearing Day 1, 14:44; 3-22.
[166] Rejoinder, paras. 88-90; Hearing Day 1, 14:41; 18-14:42; 20.
[167] Rejoinder, para. 77, *citing* Article 10:166 DCC (**C-294**).
[168] Rejoinder, paras. 78-79; Hearing Day 1, 16:05; 12-15.
[169] Hearing Day 1, 16:11; 1-21.

choice of law under Article 10:166 is not possible. They rather claim that the threshold for establishing an implicit choice of law should be higher. Furthermore, if the agreement on the place of arbitration could be construed as an implicit choice of the law applicable to the arbitration agreement, that would render moot the *favor validitatis* principle enshrined in Article 10:166.[170]

174. Thus, it is Claimants' position that if the Tribunal concludes that under public international law the parties' arbitration agreement is substantively valid, Dutch law does not alter that conclusion.[171]

2.2 THE DISPUTE IS ARBITRABLE UNDER DUTCH LAW

175. Claimants' argue that the current dispute is arbitrable under Dutch law, both *objectively* and *subjectively*, because:[172]

- The Parties are entitled to settle the dispute between them, and
- The dispute does not call for a holding that would affect the rights of third parties.

A. Objective arbitrability

176. Claimants reject the position advanced by Respondent to the effect that the dispute is objectively non-arbitrable. Claimants suggest that under 1020(3) of the DAA, a dispute is non-arbitrable if the parties may not validly reach a settlement between them in relation to the dispute.[173] This dispute is capable of settlement by the Parties themselves as is evident from the wording of Article 8(1) of the BIT.

177. Furthermore, Claimants submit that the issue of non-arbitrability could only arise if the dispute had an *erga omnes* effect – a legal effect in relation to third parties. Claimants aver that such types of dispute are typically disputes relating to family law, bankruptcy, validity of patents, etc. However, a distinction should be made between disputes relating to public policy, and disputes relating to public international law, the latter category being freely arbitrable under Dutch law.[174]

178. Claimants distinguish the *Eco Swiss* case from this case, as the CJEU in the *Eco Swiss* case "specifically mentioned public policy" and referred to specific

[170] Hearing Day 2, 14:35; 18-14:37; 24.
[171] Rejoinder, para. 83.
[172] Counter-Memorial, para. 54.
[173] Counter-Memorial, paras. 58-60.
[174] Counter-Memorial, paras. 62-64, *citing* H. J. Snijders, *Dutch Arbitration Law, General considerations and article-specific comments on art 1020-1076 Rv in national and international perspective*, 2018, (**CL-222**), Article 1020, note 4.2; *see also* V. Lazic and A. Schluep, *"Netherlands"*, in F. B. Weigand (ed.), *Practitioner's Handbook on International Arbitration*, 2019 (**CL-202**), p. 643.

provisions of the TFEU that it found to qualify as public policy, which is not the case with the *Achmea* Judgment.[175]

179. The *Achmea* Judgment, according to Claimants, has no effect on public policy: the settlement of a dispute under an intra-EU BIT is neither of a public policy nature nor has an *erga omnes* effect. In this respect, Claimants cite Professor Arthur Hartkamp, a former Attorney General of the Netherlands, who also confirmed that the jurisdiction of arbitral tribunals in pending and post-*Achmea* cases is not affected by the *Achmea* Judgment.[176] Claimants further draw the Tribunal's attention to the fact that the *Micula* case concerned a related issue of EU public policy, and the CJEU itself "has seen no public policy reason to block the enforcement of the *Micula* award".[177]

180. Claimants note that Respondent has also abandoned its original argument under Article 1020(3) DAA and has "pivoted" to a new argument under Article 3:40 DCC. This is, however, a provision of Dutch substantive law, and therefore not applicable to the present dispute, according to Claimants.[178]

181. Furthermore, even if Respondent's public policy argument could be relevant for the purposes of Article 1020(3) of the DAA, the *Achmea* Judgment still did not create a rule of public policy which would render the dispute non-arbitrable.[179]

182. Finally, Claimants rely on the judgment of the in the *PL Holding*s case, where, in spite of an objection similar to the one in the present case, the Svea Court of Appeal found the dispute to be arbitrable.[180]

B. Subjective Arbitrability

183. In response to Respondent's arguments on subjective arbitrability, Claimants bring forward three counter-arguments:

- First, they submit that the issue is governed by public international law, which Respondent fails to address;[181]

[175] Hearing Day 2, 14:59; 2-10.
[176] Counter-Memorial, 65-66, *citing* A. S. Hartkamp, *Consequences of the Achmea judgment for the practice of investment arbitration within the EU,* 2018, Ars Aequi, Vol. 9 (**CL-199**), pp. 732-738, in particular 733.
[177] Hearing Day 1, 14:48; 22-14:49; 1; Rejoinder, para. 115, *citing* Cases T-624/15, T-694/15 and T-704/15, *Micula and Others v Commission*, CJEU, Judgment dated 18 June 2019 (**CL-264**) ["***Micula (CJEU)***"].
[178] Rejoinder, paras. 111-112; Hearing Day 1, 16:23; 6-14.
[179] Rejoinder, paras. 115-116; Hearing Day 1, 15:28; 15-15:30; 11.
[180] Counter-Memorial, 67-69, *citing PL Holdings* (Svea Court of Appeal) (**CL-190**), para 5.2.3; Hearing Day 1, 17:08; 2-21.
[181] Rejoinder, paras. 95-96.

- Second, as evidenced by [redacted] Third Expert Report, they argue that the Czech Republic had capacity under Czech law to enter into the arbitration agreement with Claimants;[182] and

- Third, under the *Lizardi* rule codified in Article 10:167 of the DCC, they assert that Respondent cannot rely on its own law to deny its capacity to enter into the arbitration agreement with Claimants.[183]

184. Claimants suggest that Respondent is wrong to invoke the exception to the *Lizardi* rule, as Claimants did not know and could not have known that Respondent lacked capacity to enter into an arbitration agreement. This is so, say Claimants, because for many years the Czech Republic's consistent position was that the Treaty was valid,[184] and the *Achmea* Judgment itself was as unexpected as "a thunder in a clear blue sky".[185]

2.3 NO "EFFECTIVE LEGAL PROTECTION" IS OTHERWISE AVAILABLE FOR CLAIMANTS AND THUS THE TRIBUNAL MUST ASSERT JURISDICTION OVER THE DISPUTE

185. Claimants argue that any conflict under EU law presupposes an alternative forum available to Claimants, and that only this Tribunal can provide effective legal protection Claimants. This is for three reasons:[186]

- The Czech courts cannot entertain Claimants' claims;

- The *Achmea* Judgment does not apply unless the host state can provide effective legal protection; and

- Declining jurisdiction would amount to a denial of justice.

186. Claimants argue that if their claim – based on Article 2(2) of the BIT – were to be submitted before Czech courts, it would undoubtedly be rejected by them:

- First, Article 2(2) of the BIT is not self-executing under Czech law, which, according to [redacted] is a pre-requisite for domestic courts to apply international law;[187]

[182] Rejoinder, paras. 97-100, *citing* [redacted], para. 54.
[183] Rejoinder, paras. 101-104.
[184] Rejoinder, para. 104.
[185] Hearing Day 1, 14:39; 12-13.
[186] Counter-Memorial, 70-73; Rejoinder, para. 118.
[187] Counter-Memorial, paras. 75-81, *citing* [redacted], paras. 35, 36, 40, 42-43, 48; Rejoinder, paras. 129-136, *citing* [redacted], paras. 32-37; Hearing Day 1, 17:19; 20-23.

- Second, even if Czech courts decided to hear the claim, they would be bound by the prior decisions of the Czech Constitutional Court in 2011 and 2013, which preclude Claimants' claims.[188]

187. Claimants reject Respondent's argument to the effect that Claimants have "openly accepted" that Czech courts are available to hear claims under Article 2(2), and they should be "estopped" from now pleading otherwise.[189] Claimants submit that they only stated that Article 5 of the BIT was self-executing, and said nothing about Article 2(2). Similarly erroneous, they contend, is Respondent's allegation that this issue was decided in the Interim Award.[190]

188. Second, Claimants argue that the current proceedings present an exceptional situation and the *Achmea* Judgment should not be applicable since the host state courts cannot provide effective legal protection. According to Claimants, the principle of mutual trust in EU law is not absolute, and specific circumstances can warrant exceptions.[191]

189. Finally, Claimants submit that, if the Tribunal declined jurisdiction, that would amount to a denial of justice under Dutch law.[192] According to Claimants, the requirement of an effective legal remedy would supersede any arbitrability issues under the DAA, because arbitrability presupposes the availability of an alternative effective remedy.[193] Consequently, it would violate Article 6:2 DCC and Article 6(1) of the ECHR for the Tribunal to decline jurisdiction.[194]

190. In reply to Respondent's arguments under Article 6(1) ECHR, Claimants submit that the ECHR is in fact "binding on all persons" within the meaning of Article 94

[188] Counter-Memorial, paras. 83-88, *citing* [redacted]), paras. 54, 56; Czech Republic, Constitutional Court Award, Ref No Pl ÚS 29/10 [Chrastava] dated 14 June 2011, (**C-26**) ["***Czech Constitutional Court Award 1***"]; Czech Republic, Constitutional Court Award, Ref No Pl ÚS 56/10 [Františkovy Lázně] dated 7 September 2011, (**C-27**) ["***Czech Constitutional Court Award 2***"]; Czech Republic, Constitutional Court Award, Ref No Pl ÚS 22/11 [Kladno] dated 27 September 2011 (**C-147**) ["***Czech Constitutional Court Award 3***"]; Czech Republic, Constitutional Court Award, Ref No Pl ÚS 6/13 [Klatovy] dated 2 April 2013 (**C-30**) ["***Czech Constitutional Court Award 4***"]; Rejoinder, 137-141, *citing* [redacted], para. 51.

[189] Rejoinder, para. 121, *referring to* Reply, para. 126.

[190] Rejoinder, paras. 121-124; Hearing Day 2, 16:05; 5-17.

[191] Counter-Memorial, paras. 91-93, *citing* C-681/13, *Diageo Brands v Simiramida-04 EOOD*, Judgment dated 16 July 2015 (**CL-188**) ["***Diageo***"]; C-404/15*, P ál A ranyosi and* C-659/15, *Robert Căldăraru*, Judgment dated 5 April 2016 (**CL-193**) ["***Pál Aranyosi***"]; Rejoinder, para. 146.

[192] Counter-Memorial, para. 104; Hearing Day 1, 17:14; 3-6.

[193] Counter-Memorial, paras. 100-104; Hearing Day 1, 17:15; 9-17.

[194] Counter-Memorial, paras. 100-104.

Article 6:2 of the Netherlands Civil Code reads:

"A rule in force between a creditor and his debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness."

of the Dutch Constitution, and – through its horizontal effect – also indirectly binds arbitral tribunals.[195]

2.4 COMITY IS IRRELEVANT TO THE TRIBUNAL'S JURISDICTION

191. Claimants submit that Respondent's comity argument is essentially an inadmissibility argument.[196] According to Claimants, however, inadmissibility only arises in limited circumstances, and Respondent has failed to invoke any of the established categories of inadmissibility.[197]

192. Furthermore, the Tribunal cannot find that it lacks jurisdiction because there are no parallel proceedings which would require or legitimize its exercise of comity.[198] Claimants further note that the principle of comity would not justify the extraordinary step of declining jurisdiction – this is why in the few instances when comity has in fact been applied, tribunals have instead opted for temporarily staying the proceedings.[199]

193. Claimants submit that Respondent misinterprets the *MOX Plant* case, and that the case actually strengthens Claimants' argument. This is because in the *MOX Plant* case there was a real possibility that a parallel forum – the CJEU – might be seized of the dispute.[200] And, what is more, a similar reference to the *MOX Plant* case has recently been rejected by the *UP & CD* Tribunal as well.[201]

2.5 THE ENFORCEABILITY OF THE AWARD IS IRRELEVANT FOR THE TRIBUNAL'S JURISDICTION

194. Claimants start by setting out that Respondent's argument on potential unenforceability has already been considered and rejected by a number of investment arbitration tribunals.[202]

195. Claimants emphasize that, contrary to what Respondent suggests, the enforceability of an award is a separate matter which does not impinge upon the Tribunal's jurisdiction,[203] and the Tribunal's jurisdiction is not determined by the

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[195] Rejoinder, paras. 149-151, *citing* G. J. Meijer, *Agreement t o arbitrate c onsidered i n l ight o f t he requirement of proof of article 1021*, 2011 (**CL-250**), p. 74 ["***Meijer 1***"].
[196] Rejoinder, para. 165.
[197] Counter-Memorial, para. 107; Rejoinder, para. 166.
[198] Counter-Memorial, para. 108, *citing Southern Pacific Properties (Middle East) Limited v Arab Republic of E gypt*, ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction dated 27 November 1985 (**CL-223**), para 84 ["***SPP***"].
[199] Counter-Memorial, *citing e.g. SPP* (**CL-223**), para 84; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction dated 29 January 2004 (**RL-122**), paras. 173 and 175; Rejoinder, para. 172 ["***SGS***"].
[200] Rejoinder, para. 168.
[201] Rejoinder, para. 170, citing *UP & CD* (**CL-261**), para 278.
[202] Rejoinder, para. 162, *citing Marfin* (**CL-203**), para. 596; *Vattenfall* (**RL-157**), para. 230; *Eskosol* (**RL-215**), para. 233; *United Utilities* (**CL-260**), para. 541.
[203] Rejoinder, para. 163, *citing Vattenfall* (**RL-157**), para. 230.

various national rules governing the enforceability of arbitral awards, but by the Treaty and international law.[204] Claimants add that if the Tribunal held that it had jurisdiction, then a reviewing Dutch court would follow the Tribunal's reasoning, apply the same test, and come to the same conclusion.[205] Therefore, Respondent's arguments on potential unenforceability add nothing to its jurisdictional arguments, and both should be rejected.[206]

[204] Rejoinder, para. 163, *citing Marfin* (**CL-203**), para. 596.
[205] Hearing Day 2, 14:51; 14-14:53; 4.
[206] Rejoinder, para. 164, Hearing Day 1, 17:37; 18-24.

3. CHRONOLOGY OF EVENTS

196. A detailed factual background to this arbitration was included in the Interim Award. The chronology of events provided here is limited to the facts that are essential to understanding the Tribunal's decision on the Intra-EU BIT Objection.

3.1 1969-1993: THE VCLT

197. The VCLT was adopted on 22 May 1969 and entered into force on 27 January 1980. Cyprus and the Czech Republic acceded to the VCLT on 28 December 1976 and 22 February 1993,[207] respectively, prior to either State's accession to the EU.

3.2 1992: THE EUROPEAN UNION

198. In 1992 the members of the European Communities (the European Economic Community [the "**EEC**"], the European Coal and Steel Community and the European Atomic Energy Community) concluded the Treaty of Maastricht or the TEU, thereby merging the three communities into one.

3.3 1994: THE ASSOCIATION AGREEMENTS

199. To pave the way for accession, the European Union began negotiating Association Agreements with each of the so-called "A10 countries", which included Cyprus and Czechoslovakia. Many of the Association Agreements included a provision inviting the candidate States to enter into BITs with the Member States.[208] BITs were encouraged by the European Union as instruments necessary to prepare for accession to the Union.[209]

200. Complying with the obligations assumed in their Accession Agreements, both Cyprus and the Czech Republic entered into a number of BITs with EU Member States prior to their accession to the EU, including the BIT in the case at hand.

3.4 2001-2002: THE BIT AND CLAIMANTS' INVESTMENT IN THE CZECH REPUBLIC

201. On 15 June 2001 the Czech Republic and Cyprus signed the BIT, which entered into force on 25 September 2002. Article 8(2) provides for the settlement of disputes under the BIT by either litigation before the domestic courts of the host State or arbitration before a tribunal established under the ICSID Convention, the UNCITRAL Rules, or the Stockholm Chamber of Commerce.

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[207] Czechoslovakia acceded to the Convention on 29 July 1987.
[208] *See e.g.* Association Agreement of the Czech Republic or Romania, Article 74.
[209] *Opinion* of Advocate General Wathelet of 19 September 2017, *Slovak Republic v. Achmea B.V.*, Case C-284/16, ECLI:EU:C:2017:699, paras. 40-41 ["***Achmea AG Opinion***"].

202. Since at least 2002, Claimants' group of companies have held an investment in the Czech Republic.[210] WCV was incorporated in 2006, and acquired the investment as part of a restructuring within the company group.

3.5 2004: CYPRUS AND THE CZECH REPUBLIC JOIN THE EU

203. On 23 September 2003, the so-called A10 countries, including Cyprus, the Czech Republic, signed the Treaties of Accession to the European Union, which entered into force on 1 May 2004, marking the largest single enlargement of the EU.

204. There is evidence that during the accession negotiations with the A10 States, the question of the existing BITs was discussed. The European Commission has confirmed that during such negotiation the "concerns of the Commission services on BITs in general was raised"; this happened "at a specific TAIEX seminar on the subject with all candidate countries" on 17 January 2000, and the question was again raised "subsequently in the external relations chapter of the negotiation process".[211]

205. Although the European Commission raised "concerns", and although all candidate countries had entered into BITs with existing or prospective EU countries, all Accession Treaties are silent about the fate of the intra-EU BITs.[212]

3.6 2006-2007: THE COMMISSION'S POSITION IN *EASTERN SUGAR*

206. The issue of the compatibility between intra-EU BITs and EU law was raised for the first time in the case of *Eastern Sugar v. Czech Republic*: the partial award rendered in 2007 appears to be the first published investment arbitration award addressing this issue.

207. *Eastern Sugar* was an UNCITRAL arbitration seated in Paris, under the Czech-Netherlands BIT of 1991. The Dutch investor, Eastern Sugar B.V, contested certain regulatory measures adopted by the Czech Republic between 2000 and 2003 that had negatively affected its investment in the sugar beet industry.

208. The Czech Republic raised the objection that upon the Republic's accession to the EU in May 2004, the EU Treaties had superseded the intra-EU BIT, since both agreements regulated the same subject-matter.[213]

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[210] Interim Award, para. 458.
[211] Letter dated 13 January 2006 from the EC Internal Market and Services to the Czech Deputy Minister of Finance; *quoted in Eastern Sugar* (**CL-21**), para. 119.
[212] *Achmea AG Opinion* para. 41.
[213] *Eastern Sugar* (**CL-21**), paras. 94 and 117. The Czech Republic's argument was that the BIT was implicitly terminated (pursuant to Article 59 VCLT) when the Czech Republic acceded to the EU Treaties, since it related to the same subject matter as the BIT.

A. The Commission's Position

209. During the *Eastern Sugar* arbitration, the Czech Republic consulted the European Commission and obtained the European Commission's opinion (in the form of a letter dated 13 January 2006), which is reproduced in the *Eastern Sugar* Partial Award.[214] In this letter the European Commission states:

> "a) EC law prevails in a Community context as of accession
>
> Given that the rights and obligations of membership come into force on accession rather than on signature or ratification, the applicable date can be considered as 1 May 2004.
>
> Based on ECJ jurisprudence Article 307 EC is not applicable once all parties of an agreement have become Member States. Consequently, such agreements cannot prevail over Community law.
>
> For facts occurring after accession, the BIT is not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic representation, expropriation and eventually investment promotion, would appear to remain in question.
>
> Therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the nonconforming BIT provisions.
>
> As you mention correctly, the application of intra-EU BITs could lead to a more favourable treatment of investors and investments between the parties covered by the BITs and consequently discriminate against other Member States, a situation which would not be in accordance with the relevant Treaty provisions. **The Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence**.
>
> b) Effect on existing BITs
>
> However, the effective prevalence of the EU acquis **does not entail, at the same time, the automatic termination of the concerned BITs** or, **necessarily, the non-application of all their provisions.** Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. **Such termination cannot have a retroactive effect**.
>
> c) Dispute settlement procedures
>
> As mentioned above, Community law, **including the jurisdiction of the Court of Justice, in principle prevails from the date of accession**. However,

[214] *Eastern Sugar* (**CL-21**), pp. 24-26.

> the transitional situation until the BITs are formally terminated may result in complex questions of interpretation with regard to jurisdiction in particularly with regard to pending arbitration procedures but also in relation to rules such as Article 13 in the BIT between the Czech Republic and the Netherlands, which provides for an extended application of the agreement in a certain period after termination.
>
> In so far as conflicts between Member States are concerned, it follows from Article 292 EC that the Member States cannot apply the settlement procedures provided for in the BITs in so far as the dispute concerns a matter falling under Community competence.
>
> On the other hand, if the dispute concerns an investor-to-state claim under a BIT, the legal situation is more complex. **Since Community law prevails from the time of accession, the dispute should be decided on basis of Community law** (which indirectly also follows from Article 8(6) first bullet point in the agreement between the Czech Republic and the Netherlands). **However, it may be argued that the private investor could continue to rely on the settlement procedures provided for in the agreement until formal termination of the BIT if the dispute concerns facts which occurred before accession. The primacy of Community law should in such instance be considered by the arbitration instance.**
>
> The primacy of EU law and its definite interpretation by the European Court of Justice would not necessarily preclude a legal instance (arbitration) in another jurisdiction arriving at a different conclusion, even in an international agreement between two Member States.
>
> In particular, in order to avoid any legal problem with regard to an arbitration procedure, **existing BITs between Member States should, as mentioned above, therefore be terminated. The formal termination can only be done according to the provisions of the agreement in question**. I would note that this principle would not only apply to the Czech BIT with the Netherlands, which would seem to have given rise to a significant amount of litigation, but also those of the Czech Republic with 21 other Member States. **Without prejudice to the primacy of Community law, termination of the BIT would take effect according to the respective provisions of each such BIT**." [Emphasis added]

210. The view held by the Commission in 2006 is noteworthy, because it flatly contradicts the position which it has now adopted. In 2006, the Commission was of the opinion:

- That accession to the EU did not entail the automatic termination of BITs, and

- That Member States should terminate these agreements, as far as those BITs interfere with EU competences, by "strictly" following the relevant procedure.

211. The Commission also recognized that "such termination cannot have retroactive effect."[215]

212. In a Note dated November 2006 (from the Internal Market Services DG to the Economic and Financial Committee), the Commission reiterated its recommendation that Member States should "exchange notes to the effect that such [intra-EU] BITs are no longer applicable, and also formally rescind such agreements".[216]

B. Decision in *Eastern Sugar*

213. The *Eastern Sugar* tribunal dismissed the Czech Republic's jurisdictional objection. It found that the BIT had not been expressly terminated by the Accession Treaty of the Czech Republic, nor by the Contracting States pursuant to the termination procedure of the BIT. The tribunal dismissed the Czech Republic's argument that the BIT had been implicitly terminated pursuant to Article 59 of the VCLT.

214. At that time, the Czech Republic did not raise an argument against the tribunal's jurisdiction under Article 30 of the VCLT. The Czech Republic would raise this line of argumentation in a series of cases, whose awards were rendered a decade later.[217]

215. In subsequent cases, arbitral tribunals have unanimously reached the same conclusion as in *Eastern Sugar*.[218]

3.7 2009: TERMINATION OF ITALY-CZECH BIT

216. In 2009 Italy and the Czech Republic entered into an agreement to terminate the Italy-Czech BIT, which came into force on 30 May 2009.[219]

[215] This position was reiterated by the European Commission and The Netherlands in the *Achmea* Award on Jurisdiction (**RL-3**), paras. 156, 180 and 187.
[216] *Eastern Sugar* (**CL-21**), para. 126.
[217] *See: Anglia Auto*, para. 119: "The Respondent argues that, even if the BIT was not terminated by its accession to the EU, Article 8(1) is incompatible with the TFEU and is therefore no longer valid pursuant to Article 30(3) of the VCLT. "; *Busta v. Czech Republic*, para. 99: "In the alternative, the Respondent argues that, even if the BIT was not terminated, Article 8(1) is no longer valid by virtue of Article 30(3) of the VCLT."; *WNC Factoring*, para. 294: "[Respondent] contends that the BIT has been terminated pursuant to Article 59(1) of the VCLT. Alternatively, it is not applicable to the present case under Article 30(3) of the VCLT."
[218] *See*, *inter alia*, *EURAM* (**RL-155**); *Electrabel* (**CL-230**).
[219] Hearing Day 1, 09:51; 25-09:53; 1-4.

3.8 2009: INEFFECTIVE EXCHANGE OF *NOTES VERBALES*

217. In 2009, Cyprus and the Czech Republic discussed a possible termination of the BIT and exchanged *Notes Verbales* to this effect, but eventually no agreement was reached on the derogation of the sunset clause.[220]

3.9 2009: THE TREATY OF LISBON

218. The last substantial reform to the EU was implemented through the Treaty of Lisbon, which entered into force on 1 December 2009. The Treaty of Lisbon amended the TEU and replaced the EEC Treaty with the TFEU.

3.10 2009: THE EXCHANGE OF *NOTES VERBALES* ON THE TERMINATION OF THE BIT

219. In 2009, the Czech Republic and Cyprus engaged in discussions regarding the prospective termination of the BIT. They did not, however, terminate the BIT, as Cyprus did not agree to the abrogation of the sunset clause.[221]

3.11 2011: TACIT PROROGATION OF THE BIT

220. The BIT had initially been agreed for a period of 10 years, with a tacit prorogation thereafter:

> "Article 13 – Entry into Force, Duration and Termination
>
> […]
>
> 2. This Agreement shall remain in force for a period of ten years. Thereafter, it shall remain in force until the expiration of a twelve month period from the date either Contracting Party notifies the other in writing of its intention to terminate the Agreement."

221. In 2011, the 10-year initial period of validity lapsed. It is noteworthy that in this case, and contrary to what happened in the Czech-Italy BIT two years before, Cyprus and the Czech Republic did not take the decision, as they were entitled to, to terminate the Treaty with immediate effect. Instead both Parties permitted the tacit prorogation of the BIT.

222. Since 2011, neither of the State parties has notified the other in writing of its intention to terminate the Agreement.[222]

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[220] *Note Verbale* from the Embassy of the Czech Republic to the Ministry of Foreign Affairs of the Republic of Cyprus, 5 January 2009, **(R-5)**; *Note Verbale* from the Ministry of Foreign Affairs of the Republic of Cyprus to the Embassy of the Czech Republic, 17 November 2009, **(R-6)**.

[221] *Note Verbale* from the Embassy of the Czech Republic to the Ministry of Foreign Affairs of the Republic of Cyprus, 5 January 2009 (**R-5**); *Note Verbale* from the Ministry of Foreign Affairs of the Republic of Cyprus to the Embassy of the Czech Republic, 17 November 2009 (**R-6**); *Note Verbale* from the Embassy of the Czech Republic to the Ministry of Foreign Affairs of the Republic of Cyprus, 26 August 2015 (**R-7**).

[222] Apart from the Termination Agreement, which has not been ratified by either of the Contracting States.

3.12 2015: FILING OF THE NOTICE OF ARBITRATION

223. On 24 September 2015, Claimants served on Respondent the Notice of Arbitration pursuant to Article 8(2) of the BIT.

3.13 2017: ISSUANCE OF THREE AWARDS IN WHICH THE CZECH REPUBLIC RAISES THE INAPPLICABILITY OF ARBITRAL CLAUSES IN INTRA-EU BITS PURSUANT TO ARTICLE 30 (3) VCLT

224. On 22 February 2017 and 10 March 2017, the awards in *WNC Factoring* (on the former date) and *Busta v. Czech Republic* and *Anglia Auto* (both on the latter date) were issued. In these cases, the Czech Republic invoked for the first time (and the tribunals rejected) application of Article 30(3) VCLT as a reason for the alleged invalidity of an intra-EU BIT arbitration clause. This was a year and a half after the Notice of Arbitration had been filed.

3.14 2018: THE *ACHMEA* CASE

A. Background

225. The *Achmea* Judgment concerns a preliminary ruling submitted to the CJEU on 23 May 2016 by the German *Bundesgerichtshof* (Supreme Court) (previously defined as the "**BGH**"),[223] after the BGH was asked to decide an appeal from the Slovak Republic regarding an application to set aside the award rendered in an UNCITRAL arbitration between Achmea B.V., a Dutch insurance company, and Slovakia, under the Czechoslovakia-Netherlands BIT (in force as of March 1992).[224]

B. Arbitration

226. Achmea B.V., a Dutch insurance company, established a subsidiary in Slovakia to market private health insurance products following the liberalization of the insurance market in Slovakia in 2004 (around the time Slovakia became a Member State of the EU, on 1 May 2004).[225] In 2006, Slovakia reversed the liberalization process of the insurance sector, adversely affecting Achmea's investment.[226]

227. Achmea initiated an arbitration against the Slovak Republic pursuant to the Czechoslovakia–Netherlands BIT (in force as of March 1992) and the UNCITRAL Rules (the "***Achmea* Arbitration**").[227] The parties agreed on Frankfurt as the seat of the arbitration. On 26 October 2010, the tribunal issued a

[223] *Achmea* Judgment (**RL-153**), para. 13.
[224] *Achmea* Award on Jurisdiction (**RL-3**), para. 46.
[225] *Achmea* Award on Jurisdiction (**RL-3**), paras. 7 and 51-53.
[226] *Achmea* Award on Jurisdiction (**RL-3**), para. 54.
[227] *Achmea* Award on Jurisdiction (**RL-3**), para. 46.

partial award on jurisdiction (the "***Achmea* Award on Jurisdiction**") dismissing Slovakia's objections that:

- The Czechoslovakia-Netherlands BIT had been terminated or was inapplicable pursuant to Arts. 59 or 30 of the VCLT, because of Slovakia's accession to the EU in 2004;[228] and

- The Czechoslovakia-Netherlands BIT was incompatible with the EU Treaties, the autonomy of the EU legal order and the supremacy of EU law.[229]

228. On 7 December 2012 the tribunal issued its final award, finding Slovakia liable for breaching the fair and equitable treatment standard and the free transfer of payments provision of the Czechoslovakia-Netherlands BIT, and awarded EUR 22.1 million in damages (the "***Achmea* Final Award**").[230]

C. Set aside proceeding

229. During an action to set aside the award in the German courts, the Slovak Republic raised doubts as to the compatibility of the arbitral clause in Article 8 of the Czechoslovak-Netherlands BIT with Articles 18, 267, and 344 of the TFEU.[231] Although the BGH did not consider such an incompatibility to exist,[232] in light of the fact that the CJEU had not yet had the chance to rule on the important questions raised by Slovakia, it decided to stay the set aside proceeding and refer the following questions to the CJEU for a preliminary ruling:[233]

> "1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?
>
> If Question 1 is to be answered in the negative:
>
> 2. Does Article 267 TFEU preclude the application of such a provision?
>
> If Questions 1 and 2 are answered in the negative:

[228] *Achmea* Award on Jurisdiction (**RL-3**), paras. 265 and 277.
[229] *Achmea* Award on Jurisdiction (**RL-3**), paras. 278-283.
[230] *Achmea B.V. (formerly Eureko B.V) v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012 para. 352 ["***Achmea Final Award***"]
[231] *Achmea* Judgment (**RL-153**), para. 14.
[232] *Achmea* Judgment (**RL-153**), paras. 15-23.
[233] Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016 – Slovak Republic v Achmea BV (Case C-284/16), paras. 1-3.

> 3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?"

D. The CJEU's Judgment

230. On 6 March 2018, the CJEU (Grand Chamber) issued its ruling on the *Achmea* case, after hearing submissions from Achmea BV, the Slovak Republic, the Advocate General, the European Commission, and 15 EU Member States:[234]

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."

231. The CJEU thus found that arbitral clauses in intra-EU BITs that provide jurisdiction to investment arbitration tribunals such as the Czechoslovakia-Netherlands BIT are precluded by Articles 267 and 344 of the TFEU.

232. According to the CJEU, an international agreement could not affect the allocation of powers fixed by the EU Treaties or the autonomy of the EU legal system, observance of which is ensured by the CJEU.[235] The CJEU additionally recalled that EU law is characterized by the fact that it stems from an independent source of law, has primacy over the domestic laws of Member States, and its provisions have a direct effect on nationals and Member States.[236] National courts and tribunals and the CJEU have an obligation to ensure the full application and respect of EU law in all Member States.[237] To ensure the uniform interpretation of EU law, courts and tribunals of Member States can request a preliminary ruling from the CJEU, pursuant to Article 267 of the TFEU.[238]

233. In light of these principles, the CJEU examined whether arbitral tribunals in arbitrations based on intra-EU BITs apply or interpret EU law. The CJEU found that, although investment arbitration tribunals are called upon to rule on alleged breaches of the Czechoslovakia–Netherlands BIT provisions, to do so the tribunal must, in accordance with Article 8(6) of the Czechoslovakia–Netherlands BIT, take into account the law in force in the contracting State concerned and other relevant agreements between the contracting parties. As EU law forms a part of the law in force in every Member State and derives from an international

[234] *Achmea* Judgment (**RL-153**), para. 62.
[235] *Achmea* Judgment (**RL-153**), para. 32.
[236] *Achmea* Judgment (**RL-153**), para. 33.
[237] *Achmea* Judgment (**RL-153**), para. 36.
[238] *Achmea* Judgment (**RL-153**), para. 37.

agreement between Member States,[239] it follows that investment arbitration tribunals may be called upon to interpret or apply EU law.[240]

234. In answering the second question – whether an investment arbitration tribunal is a court or tribunal of a Member State within the meaning of Article 267 of the TFEU and, as such, is authorized to submit requests for preliminary rulings to the CJEU – the CJEU concluded that an investment arbitration tribunal does not form part of the judicial system of the respective Member States and therefore does not qualify as a court or tribunal of a Member State for the purposes of Article 267 of the TFEU.[241]

235. The CJEU then turned to the subsidiary question: whether an award made by an investment arbitration tribunal is subject to review by a court of a Member State, which would ensure that the questions of EU law addressed by the tribunal can be submitted to the CJEU through a reference for a preliminary ruling.[242]

236. The CJEU acknowledged that, whilst in the case under review German law permitted the German court to request a preliminary ruling from the CJEU, such judicial review could only be exercised if and to the extent that the national law in question so permits.[243]

237. Therefore, in light of the foregoing characteristics of an investment arbitration tribunal, the CJEU concluded that:[244]

> "[B]y concluding the BIT the Member States parties to it established a mechanism for settling disputes between an investor and a Member State **which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law**." [Emphasis added]

238. In addition, the CJEU added that BITs concluded between two Member States without participation of the EU that provide the possibility to submit investment disputes to a body which does not form part of the EU judicial system:[245]

> "[C]all into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above [which references Article 4(3) TEU].

[239] *Achmea* Judgment (**RL-153**), paras. 40 and 41.
[240] *Achmea* Judgment (**RL-153**), para. 42.
[241] *Achmea* Judgment (**RL-153**), paras. 45-46 and 48-49.
[242] *Achmea* Judgment (**RL-153**), para. 50.
[243] *Achmea* Judgment (**RL-153**), para. 53.
[244] *Achmea* Judgment (**RL-153**), para. 56.
[245] *Achmea* Judgment (**RL-153**), paras. 58 and 59.

> In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law."

239. Based on this reasoning, the CJEU concluded: [246]

> "Consequently, the answer to Questions 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."

240. In view of the answer to Questions 1 and 2, the CJEU found that there was no need to answer Question 3.[247]

E. The BGH Judgment

241. On 31 October 2018, the BGH set aside the *Achmea* Final Award based on the CJEU's *Achmea* Judgment (the "**BGH Judgment**").

3.15 2018: THE EUROPEAN COMMISSION'S COMMUNICATION

242. In July 2018, following the *Achmea* Judgment, the European Commission issued a communication to the European Parliament and the Council:[248]

> "Following the Achmea judgment, the Commission has intensified its dialogue with all Member States, **calling on them to take action to terminate the intra-EU BITs, given their incontestable incompatibility with EU law**. The Commission will monitor the progress in this respect and, if necessary, may decide to further pursue the infringement procedures.
>
> […]
>
> **This implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement**. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the *Achmea* judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs." [Emphasis added]

[246] *Achmea* Judgment (**RL-153**), para. 60.
[247] *Achmea* Judgment (**RL-153**), para. 61.
[248] http://ec.europa.eu/finance/docs/policy/180719-communication-protection-of-investments_en.pdf.

3.16 2019: THE EU MEMBER STATES' DECLARATION

243. On 15 January 2019, 22 EU Member States issued a joint "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" (the "**Member States' Declaration**" or "**Declaration**").[249]

244. The Declaration expressed the position that EU law takes precedence over intra-EU BITs, and as a consequence, all arbitral clauses providing for investor-State arbitration in such BITs are contrary to EU law and are thus inapplicable and do not produce effects, with the result that arbitral tribunals established on the basis of such clauses lack jurisdiction on account of an invalid offer of consent in the treaty.[250]

245. The Declaration was not signed by all EU Member States due to divergences in respect of whether the *Achmea* Judgment applies to the ECT; consequently, two additional declarations were issued on 16 January 2019: one signed jointly by Finland, Luxembourg, Malta, Slovenia, and Sweden, and another by Hungary.

3.17 2019: EXCHANGE OF *NOTES VERBALES*

246. On 9 July 2019 and 20 December 2019, respectively, the Czech Republic[251] and Cyprus[252] each issued a *Note Verbale* purporting to notify tribunals in any ongoing intra-EU investment arbitration cases of the effects of the *Achmea* Judgment.

247. Pursuant to the *Notes Verbales*, the arbitration clause in the BIT is contrary to the EU Treaties and thus inapplicable. As a consequence, it cannot serve as legal basis for ongoing arbitration proceedings, which should be terminated.[253]

3.18 2020: TERMINATION TREATY

248. On 5 May 2020, 23 EU Member States signed an "Agreement for the termination of bilateral investment treaties between the Member States of the European Union"[254] (the "**Termination Treaty**").

249. The Termination Treaty is an international agreement that purports to terminate all intra-EU BITs, together with their sunset clauses, "as soon as this Agreement

[249] "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 ("Member States' Declaration) (**C-318**).
[250] Member States' Declaration (**C-318**), p. 1.
[251] Czech Republic's *Note Verbale* of 9 July 2019, (**R-143**).
[252] Cyprus's *Note Verbale* of 20 December 2019, (**R-142**).
[253] Cyprus's *Note Verbale* of 20 December 2019, (**R-142**), p. 1.
[254] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union signed on 5 May 2020.

enters into force for the relevant Contracting Parties",[255] i.e. 30 days after their ratification by particular EU Member States.[256]

250. Additionally, the Termination Treaty defines three categories of arbitral proceedings ("Concluded Arbitration Proceedings", "Pending Arbitration Proceedings" and "New Arbitration Proceedings"), with respect to the *Achmea* Decision of 6 March 2018.

251. This dispute falls into the category of "Pending Arbitration Proceedings" defined as: [257]

> "[…] any Arbitration Proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement".

252. Article 7 of the Termination Treaty provides for the "Duties of the Contracting Parties concerning Pending Arbitration Proceedings and New Arbitration Proceedings". These duties require the State parties to:

- Inform, in cooperation with each other and on the basis of the statement in Annex C, arbitral tribunals about the legal consequences of the *Achmea* judgment as described in Article 4; and

- ask any competent national court, including in any third country, to set the arbitral award aside, annul it or to refrain from recognizing and enforcing it.

[255] Articles 2-4 of the Termination Treaty.
[256] Article 16(2) of the Termination Treaty.
[257] Article 1(5) of the Termination Treaty.

4. DISCUSSION

253. The Parties discuss whether the Tribunal has jurisdiction in light of the CJEU's preliminary ruling in the *Achmea* judgment, the setting aside of the *Achmea* award by the BGH, the Member States' Declaration and the subsequent exchange of *Notes Verbales* between the Czech Republic and Cyprus.

254. Before beginning its analysis, the Tribunal recalls that pursuant to Article 21 of the UNCITRAL Rules, which enshrines the *Kompetenz-Kompetenz* principle, the Tribunal has power to rule on its own jurisdiction, including any objections thereto.

255. This principle is also reflected under Dutch law, which states under Article 1052 of the DAA:

> "(1) The arbitral tribunal shall have the power to rule on its own jurisdiction."

256. Upon careful examination of the Parties' submissions, the Tribunal finds that Claimants and the Czech Republic validly consented to this investment dispute being adjudicated through arbitration, that this consent remains in force, that the Tribunal's jurisdiction derives from such consent, and that consequently the Intra-EU Objection must be dismissed.

257. The Tribunal's conclusion is supported by the following findings:

- Consent for arbitration was given validly and remains in force (**4.1.**);
- No application of successive treaties arises pursuant to Article 30(3) of the VCLT (**4.2.**);
- The Member States' Declaration and the *Notes V erbales* are political instruments that do not impact this Tribunal's jurisdiction (**4.3.**);
- The dispute is arbitrable (**4.4.**);
- The Tribunal should not decline jurisdiction based on the principle of comity (**4.5.**); and
- The potential setting aside and unenforceability of the award is immaterial (**4.6.**).

258. Since the Tribunal will reject the Intra-EU Objection, there is no need for it to analyse Claimants' counter-arguments pertaining to the availability of "effective legal protection".

4.1 CONSENT WAS VALIDLY RENDERED BY BOTH PARTIES

259. Arbitration is founded on consent: the jurisdiction of the arbitrators derives from the agreement of both parties to have the dispute adjudicated through arbitration.

In investment arbitrations, the State takes the initiative and issues in the relevant BIT a standing offer to arbitrate; once a dispute has arisen, the investor has the choice between accepting the host State's offer of arbitration or submitting the question to the courts of justice of such State.[258] Once the investor makes its election (e.g., by serving the notice of arbitration), an arbitration agreement is formed, and consent becomes irrevocable, both for the State and for the investor.

Consent by Respondent

260. The Czech Republic gave its consent to arbitration upon the entry into force of the Cyprus-Czech BIT on 25 September 2002. Pursuant to Article 8(2) of the BIT, the Czech Republic made a valid and binding offer for protected Cypriot investors to bring investment-related disputes to arbitration:

> "Article 8 - Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
>
> […] 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus [through negotiations] settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case at his choice, to settlement to: […]
>
> (c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNC1TRAL). The parties to the dispute may agree in writing to modify these Rules." [Emphasis added]

Consent by Claimants

261. Claimants expressed their consent to arbitration in their Notice of Arbitration of 24 September 2015. On that date, Claimants accepted Respondent's standing offer to arbitrate, the meeting of the minds occurred, consent became locked and irrevocable, and the investors obtained the subjective right to have their investment dispute adjudicated through binding international arbitration.

262. As of 24 September 2015, Respondent's offer of consent, originally formalized in Article 8(2) of the BIT, remained valid and in force. As will be discussed in the following sections, Respondent has not provided any evidence that its consent to be bound by Article 8(2) had been invalidated (in accordance with the criteria articulated in Articles 46 – 53 of the VCLT) or that the BIT had been terminated or suspended or that the Czech Republic had withdrawn from it (under Articles 54 – 68 of the VCLT).

[258] *See e.g.*, Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements,* in: Revue de l'arbitrage No. 3 853, 859 (2003), para. 9; Christoph Schreuer, *Failure to Apply the Governing Law in International Investment Arbitration*, p. 151.

263. As an international treaty, the validity, termination and suspension of the BIT must be assessed under general principles of international law, as codified in the VCLT. This rule is articulated in Article 42 of the VCLT which provides:

> "Article 42.- Validity and continuance in force of treaties.
>
> 1. The validity of a treaty or of the consent of a State to be bound by a treaty **may be impeached only through the application of the present Convention**.
>
> 2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place **only as a result of the application of the provisions of the treaty or of the present Convention**. The same rule applies to suspension of the operation of a treaty". [Emphasis added]

264. It is undisputed that Cyprus and the Czech Republic validly concluded the BIT in 2001, and that the BIT has not been affected by any of the causes for partial or total invalidity established in the VCLT, including error, fraud, corruption, coercion or conflict with a *jus cogens* norm.[259] It is also a fact that the BIT will be terminated by common agreement of both Contracting States, once the Termination Treaty, which has already been signed and is still pending ratification, enters into force.

265. The discussion between Claimants and Respondent centres on a different issue: whether (as alleged by Respondent and denied by Claimants) Article 8(2) of the BIT became inapplicable due to the application of a later treaty under Article 30(3) of the VCLT, and whether such inapplicability became effective in 2004, when the Czech Republic and Cyprus acceded to the EU and long before Claimants filed this arbitration – with the result that the Tribunal is deprived of jurisdiction.

4.2 NO APPLICATION OF SUCCESSIVE TREATIES UNDER ARTICLE 30(3) OF THE VCLT

266. The first issue to be analysed by the Tribunal is whether Article 8(2) of the BIT became inapplicable as of 2004, due to the coming into force on that date of a later treaty relating to the same subject matter – the TFEU (which allegedly includes two incompatible provisions – Articles 267 and 344).

267. It is important to note that the discussion relates only to Article 8(2), which authorizes protected investors to access international arbitration. Respondent does not argue that the rest of the Treaty has become inapplicable. It is undisputed that Cypriot investors can still invoke the substantive rules of the BIT and request compensation for improper direct or indirect expropriation or for breach of the FET or FPS standards. But Respondent argues that since 2004 investors are barred from accessing investment arbitration – with the result that investors have no other alternative but to enforce their Treaty rights through the Czech courts.

[259] Arts. 46-53 VCLT.

Article 30 of the VCLT

268. Application of successive treaties relating to the same subject matter is provided for in Article 30 of the VCLT:

> "Article 30 - **Application of successive treaties relating to the same subject-matter**
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to **successive treaties relating to the same subject** matter shall be determined in accordance with the following paragraphs.
>
> […]
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, **the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty**.
>
> […]" [Emphasis added]

269. The factual situation which underlies Article 30 of the VCLT is the following: two Contracting States execute successive treaties relating to the same subject matter and both treaties continue to be simultaneously in force, because the earlier treaty is not terminated or suspended. In such a case, Article 30(3) mandates that individual provisions of the earlier treaty apply only to the extent that such provisions are compatible with those of the later treaty.

270. Article 30(3) does not provide how the inapplicability is to be declared, nor whether such declaration will have *ex nunc* or *ex tunc* effects.

Respondent's position

271. Respondent argues that pursuant to the principle of *lex p osterior* reflected in Article 30 VCLT, Article 8 of the BIT (i) ceased to produce any effects due to application of Articles 267 and 344 TFEU, and (ii) it did so on the day of the simultaneous accession to the EU of the Czech Republic and of Cyprus.[260]

272. Respondent avers that Article 30(3) of the VCLT is applicable in the present case as:[261]

- The BIT is an earlier treaty as compared with the TFEU;
- There is an incompatibility between the two treaties;

[260] Reply, paras. 54, 63.
[261] Reply, paras. 56-60.

- The treaties are between the same parties; and

- They relate to the same subject matter.

273. For Respondent, the *Achmea* Judgment has made it clear that there is an incompatibility between the two conflicting provisions, as arbitration clauses in intra-EU BITs are "precluded" by Articles 267 and 344 TFEU.[262] The Tribunal would therefore lack jurisdiction.

Claimants' position

274. Claimants disagree with Respondent and contend that:

- As the BIT and the TFEU do not cover the same subject matter, the threshold condition for the application of Article 30 has not been met;[263] and

- Even if the condition of subject matter identity was fulfilled, there is no incompatibility.[264]

275. Claimants add that the Tribunal should approach the question of incompatibility with a presumption of non-conflict. This derives from the principle of harmonious interpretation of international law.[265] Claimants posit that there is an incompatibility of treaty obligations only when a party cannot comply with one treaty without breaching the other.[266] Claimants further submit that the CJEU did not identify any issue of incompatibility as a matter of international law.[267]

Discussion

276. The Czech Republic is pleading that, pursuant to Article 30(3) of the VCLT, the entry into force of the TFEU (a later treaty) triggered a partial implicit derogation of the BIT (an earlier treaty): Articles 267 and 344 TFEU are incompatible with Article 8(2) of the BIT, and the derogation became effective as of the day of the simultaneous accession to the EU of the Czech Republic and of Cyprus – i.e. in 2004, years before Claimants submitted their Notice of Arbitration in 2015.

277. In this case, the Czech Republic uses Article 30(3) as the basis of its argument, and has abandoned its previous strategy of invoking Article 59 of the VCLT.

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[262] Reply, para. 25.
[263] Counter-Memorial, para. 43, *referring to* what Claimants present as unanimous case law of investment tribunals to the effect that the TFEU and intra-EU BITs do not cover the same subject matter: *Eastern Sugar* (**CL-21**), paras. 159-160; *RREEF* (**CL-8**), para. 79; *Vattenfall* (**RL-157**), para. 212.
[264] Counter-Memorial, para. 45.
[265] Hearing Day 1, 16:38; 20-16:39; 5, *citing* M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2008 (**RL-227**), p. 402.
[266] Hearing Day 1, 16:38; 14-19, *citing Magyar Farming* (**CL-268**), para. 241.
[267] Counter-Memorial, para. 46; Rejoinder, paras. 41-43.

278. This is a new argument:

- The 2007 *Eastern Sugar* decision contained no reference to Article 30(3) among the arguments put forward by the Republic;

- The *Notes Verbales* exchanged in 2009[268] between Cyprus and Respondent only spoke of prospective termination of the BIT, but lacked any reference to the argument that Article 8 of the BIT had become inapplicable in 2004, when both Parties acceded; both Contracting States shared the view that prospective termination was the only viable means of freeing themselves from their obligations under the BIT;

- It was only in 2017 when Respondent's present position, that by operation of Article 30(3) VCLT intra-EU BIT arbitration clauses had become inapplicable upon accession to the EU in 2004, was publicly stated and could be ascertained by Cypriot investors[269] — a year and a half after Claimants had filed the present arbitration.

279. If Respondent's argument is accepted, the necessary consequence is that the Tribunal lacks jurisdiction: when in 2015 Claimants purported to accept the Czech Republic's standing offer to submit to arbitration, Article 8(2) of the BIT was already inapplicable, having been tacitly derogated 11 years before, when in 2004 the Czech Republic and Cyprus acceded to the TFEU. Claimants accepted an inexistent standing offer, consent was not locked, and the Tribunal is deprived of the cornerstone on which its jurisdiction is based.

280. Claimants plead the contrary: that no application of successive of treaties arises under Article 30(3) of the VCLT, and that, even if such rules on the application of successive treaties were to apply (*quod non*) their effects would not be retroactive.

281. For Article 30(3) to apply, the following cumulative elements must be met:

- There are two successive treaties;

- All the parties to the earlier treaty are also parties to the later treaty;

- The earlier treaty has not been terminated (or suspended);

[268] *Note Verbale* from the Embassy of the Czech Republic to the Ministry of Foreign Affairs of the Republic of Cyprus, 5 January 2009, **(R-5)**; *Note Verbale* from the Ministry of Foreign Affairs of the Republic of Cyprus to the Embassy of the Czech Republic, 17 November 2009, **(R-6)**.

[269] *See Anglia Auto*, para. 119: "The Respondent argues that, even if the BIT was not terminated by its accession to the EU, Article 8(1) is incompatible with the TFEU and is therefore no longer valid pursuant to Article 30(3) of the VCLT." ; *Busta v. Czech Republic*, para. 99: "In the alternative, the Respondent argues that, even if the BIT was not terminated, Article 8(1) is no longer valid by virtue of Article 30(3) of the VCLT."; *WNC Factoring*, para. 294: "[Respondent] contends that the BIT has been terminated pursuant to Article 59(1) of the VCLT. Alternatively, it is not applicable to the present case under Article 30(3) of the VCL T."

- The earlier and later treaties relate to the same subject matter;

- Provisions of the later treaty are incompatible with those of the earlier treaty.

282. It is undisputed that both Cyprus and the Czech Republic are parties to the BIT and the TFEU, and that the first is the earlier and the second – the later treaty.

283. The discussion hinges on the two final elements for the application of Article 30(3): the existence of successive treaties relating to the same subject matter (**A.**), which contain incompatible treaty provisions (**B.**)

Cautious approach

284. Before embarking on a detailed analysis of the two-step enquiry, the Tribunal must voice a note of caution: partial implicit derogations should be viewed with caution, especially when the later treaty is of a general nature, whilst the earlier treaty, which is to be implicitly disapplied, is of a more specific scope.

285. The principle that Article 30(3) of the VCLT should be strictly construed in these situations was already voiced by the representative of the United Kingdom during the discussions of the VCLT: [270]

> "[The representative] suggested that the formulation should only cover cases in which treaties refer to the same specific subject matter. If a general treaty, however 'impinged indirectly on the content of a particular provision of an earlier treaty', Art. 30 should not be applicable".

286. Most legal scholars have followed this point of view.[271]

A. The BIT and the TFEU do not relate to the same subject matter

287. Respondent claims that the BIT and the TFEU relate to the same subject matter. The Republic explains that Article 30(3) VCLT does not require a complete one-to-one sameness.[272] Instead, Respondent proposes that "incompatibility presupposes 'same[ness of the] subject matter'".[273] Thus, once two treaties are not capable of being applied simultaneously, Respondent argues that the conflict can only be resolved one way – by concluding that the provisions of the earlier treaty, *i.e.*, Article 8 of the BIT, can no longer be valid.[274] Additionally, Respondent

[270] Odendahl, in Dörr/Schmalenbach (eds.): "Vienna Convention on the Law of Treaties", (2012), p. 510.
[271] Odendahl, in Dörr/Schmalenbach (eds.): "Vienna Convention on the Law of Treaties", (2012), p. 510 and references contained therein.
[272] Reply, para. 62; Hearing Day 1, 11:40; 7-21, citing *Achmea* Award on Jurisdiction (**RL-3**), paras. 240-241.
[273] Reply, para. 60*, citing* e.g. K. von der Decken, *Article 30, Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2nd edition, 2018 (**RL-226**), para. 13; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003 (extract) (**RL-234**), pp. 364-365; Hearing Day 2, 41; 20-25.
[274] Reply, para. 63.

suggests that the Tribunal should apply the standard as it was formulated in the ILC's Fragmentation Report.[275]

288. Claimants, on the other hand, criticize the ILC's standard, and point to the decision in *EURAM*, which rejected this approach.[276] Claimants additionally invoke the decisions of "no less than 15" arbitral tribunals that have unanimously decided that there is no sameness of subject-matter covered by intra-EU BITs and the TFEU, and argue that the scope of protection for investors is different under the two treaty regimes.[277]

Discussion

289. The starting point of any discussion is the determination of what should be understood by the "subject matter" of a treaty. Different tribunals and scholars have approached this issue, coming up with various tests for sameness of subject matter.

290. Respondent submits that the Tribunal should resort to the set of criteria proposed by the ILC Report on Fragmentation of International Law: [278]

> "[T]he test of whether two treaties deal with the 'same subject matter' is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another."

291. While the ILC is a veritable authority in the international arena, this Tribunal respectfully disagrees with the standard for sameness of subject matter proposed in the Report on the Fragmentation of International Law. Instead, the Tribunal is convinced by the argumentation presented in the *EURAM* Award on Jurisdiction. The *EURAM* tribunal adopted a critical approach towards the test used by the ILC. It stated that the ILC was confounding the issue of the sameness of subject matter with that of incompatibility, and stressed the need to undertake a two-step inquiry to avoid conflating the two concepts: [279]

> "An important remark has to be made here by the Tribunal. In its view, the question at issue has invariably been obscured by frequent confusion or conflation between sameness and incompatibility. Even the ILC is not free from such error as can be seen when reading the definition of the criterion of 'sameness'".

[275] Reply, para. 60; Hearing Day 1, 11:39; 12-19, *citing* International Law Commission, *Report on the Fragmentation of International Law, United Nations General Assembly*, 2006 (**RL-236**), para. 254.
[276] Rejoinder, para. 25, *citing EURAM* (**RL-155**), paras. 173–175. The Claimants note in footnote 25 of their Rejoinder that "[t]he EURAM tribunal's analysis related to Article 59 of the VCLT, but the tests are identical under Articles 30 and 59 of the VCLT".
[277] Counter-Memorial, para. 43.
[278] International Law Commission, *Report on the Fragmentation of International Law, United Nations General Assembly*, 2006 (**RL-236**), para. 254.
[279] *EURAM* (**RL-155**), para. 173.

292. This Tribunal agrees with the need to undertake a two-step inquiry – with regard to both Article 30(3) and 59 of the VCLT, which use the same wording of "same subject matter". The test looks as follows:

- First, do the two treaties "relate to the same subject matter"?

- Second, do the rules in those treaties point in the same direction or in different directions, to use the terminology of the ILC?

If the answer to the second question is that the two sets of rules point in the same direction, the two treaties can easily coexist and be interpreted in harmony; if the answer is that they point in different directions and the different directions imply a true incompatibility, the latter treaty prevails. However, that second question arises only if the first question has been answered in the affirmative.

Criteria for sameness of subject matter

293. Previous tribunals have rightfully identified no sameness of subject matter between intra-EU BITs and the TFEU. [280] Their arguments may be categorized as follows:

- There is a difference in the substance between intra-EU BITs and the TFEU (**a.**);

- The remedies provided under the two regimes are different, since the TFEU does not provide for investor-State dispute resolution (**b.**); and

- The EU legal system lacks the standards of protection provided for in the BIT (**c.**).

294. The same reasons also find application in respect of the Cyprus-Czech BIT.

a. Different topic

295. The first category pertains to the topic of intra-EU BITs in relation to those of the TFEU. The *EURAM* tribunal stated that:[281]

> "the subject matter of a treaty is inherent in the treaty itself and refers to issues with which its provisions deal, *i.e.* its topic or its substance". [Emphasis added]

296. The BIT was concluded by Cyprus and the Czech Republic to

[280] While most of the quoted awards speak of EU Treaties, Respondent in the current case only submits that there is incompatibility between intra-EU BITs and the TFEU and so the analysis will only focus on this European Treaty, although the reasoning of the previous tribunals is applicable whenever invoked.
[281] *EURAM* (**RL-155**), para. 172.

> "create and maintain favourable conditions for the investments of investors of one Contracting Party in the territory of the other Contracting Party"

and to provide certain protections to investments made by investors of one State in the other's territory.[282] The TFEU, on the other hand, was concluded seeking a much broader purpose: to create an internal market, to define the relationships between EU Member States and EU treaty bodies, to organize the functioning of the Union and its areas of competence.[283]

297. The result is that BIT and the TFEU do not share the same topic:

- The BIT creates a separate legal sub-system, which seeks to foster investments by granting certain unique rights and protections to defined investors: the right to receive compensation if the State (i) directly or indirectly expropriates the investment, without meeting certain requirements and paying the appropriate price, or (ii) fails to provide certain international law minimum standards (including FET and FPS) to the investment;

- The TFEU, on the other hand, grants general rights and freedoms to all European citizens, like the fundamental freedoms or the relevant provisions falling under the principle of non-discrimination.

298. The BIT only protects investments made by Cypriot investors in the territory of the Czech Republic (and vice versa). Under the TFEU any European citizen is granted legal protection (of a different scope), without taking into consideration whether the assets constitute or not an investment, or whether such citizen had made the investment in his or her own country or in another EU country.

299. This is also the conclusion reached by the *Oostergetel* tribunal, which stated:[284]

> "[T]he Tribunal agrees with the argument advanced by the Claimants that the EC Treaty's objective to create a common market between all EU Member States is different from the objectives of a BIT, which provides for specific guarantees for the investor's investment in the host country pursuant to a bilateral agreement made between two countries. The EC Treaty provisions on the fundamental freedoms are aimed at all types of cross-border economic activity. The BIT, on the other hand, is mostly concerned with providing a set of guarantees for protection of a long-term investment in the host state."

300. Thus, the vastly different topics of the BIT and the TFEU point to the lack of sameness of subject-matter.

b. Different mechanisms of protection

301. The mechanisms for the protection of rights, provided to investors under a BIT and to citizens under the TFEU, are significantly different:

- Intra-EU BITs provide for investment arbitration;

- While the EU legal system encourages submitting disputes to judicial adjudication in the host state.[285]

302. The *Oostergetel* tribunal said the following: [286]

> "[…] it is at least questionable whether the substantive protection afforded to the foreign investor under the BIT is indeed comparable to the safeguards found under the EC Treaty. In other words, irrespective of a certain degree of overlap between the two regimes in terms of substantive provisions applicable to any potential investment disputes, this Tribunal is not convinced that the safeguards offered by the two are identical."

303. The possibility granted to a foreign investor to bring an action against the host state directly before an independent panel constitutes an advantage which fosters transborder investments. Advocate General Wathelet in his Opinion on the Achmea Judgment (previously defined as "***Achmea AG Opinion***") concurred:[287]

> "Furthermore, the arbitral tribunals are the most appropriate fora for the settlement of disputes between investors and States on the basis of the BIT, since the national courts often impose conditions on investors that subject reliance on international law to conditions which in reality are impossible to meet, and time limits which are difficult to reconcile with the timely treatment of cases and the amounts at stake.
>
> […] It is therefore hardly surprising that the right of investors to have recourse to international arbitration has been recognised in international law on investments as the most essential provision of the BITs, since, beyond its procedural content, it is also in itself a guarantee that encourages and protects investments."

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[285] This is the general available remedy under EU law. The default character of this option is made visible in the Termination Treaty, which provides for structured dialogue and bringing investment disputes to the host state courts as the two available remedies for intra-EU investment disputes in the future.
Aside from recourse to national courts, EU law offers special remedies, including the so-called *Francovich* action based on the case C-6/90 and CJEU infringement proceedings, which require the proving of the infringement of EU law. However, the special measures do not always provide for the protection of an investor's financial rights and do not necessarily involve compensatory measures.
See e.g. the European Commission's guidance on protection of cross-border EU investments – Questions and Answers, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4529.
[286] *Oostergetel* (**CL-53**), para. 76.
[287] *Achmea* AG Opinion, paras. 206, 208.

304. In a similar vein, the tribunal in *United Utilities* concluded that the lack of investment arbitration under the TFEU amounts to a prominent difference in the covered subject matter:[288]

> "[T]he Tribunal finds that the two [the relevant BIT and the TFEU] do not concern the same subject-matter or address the same rights and obligations, primarily because the TFEU does not provide any mechanism for adjudicating disputes between EU Member States and private investors."

305. This is further reinforced by the recent decision in *Adamakopoulos*:[289]

> "[…] at a more specific level they [the EU Treaties and intra-EU BITs] deal with different subject matters. BITs deal with general obligations on states relating to foreign investment within the countries of the contracting parties but they also provide a mechanism for nationals of one party to bring a claim against another party, something that is not provided for in the EU Treaties. Under the EU regime claimants are left in the hands of domestic courts only, something that BITs do not provide for. In fact, BITs provide specifically for an alternative to determination by national courts. In that respect, the EU Treaties and the BITs do not deal with the same subject matter." [Emphasis added]

306. The *JSW Solar* tribunal also observed that it was "obviously not the case" that the TFEU and a BIT share the same subject matter and buttressed the statement with an argument on the availability of ISDS:[290]

> "To take but one example, Article 10 of the Treaty allows an investor to sue a host state. No parallel provision exists in the TFEU […]".

307. Summing up, since the TFEU does not provide for the option for investors to initiate investment arbitration,[291] there is no sameness between the TFEU and the Cyprus-Czech BIT.

c. Different standards of protection

308. The substantive standards of protection afforded by BITs do not exist as such within the EU legal system. These standards, which include Fair and Equitable Treatment ("**FET**"), Full Protection and Security and the threshold for illegal expropriation, are defined in the BITs. They have been developed over the years by investment arbitration case law and find no counterpart under European law.

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[288] *United Utilities* (**CL-260**), para. 543.
[289] *Adamakopoulos*, para. 168.
[290] *JSW Solar* (**RL-154**), para. 253 (footnote omitted).
[291] *Achmea* AG *Opinion*, para. 208: "It is therefore hardly surprising that the right of investors to have recourse to international arbitration has been recognised in international law on investments as the most essential provision of the BITs, since, beyond its procedural content, it is also in itself a guarantee that encourages and protects investments."

309. For example, the FET standard under the BIT does not exist as a right or freedom under the TFEU. The *JSW Solar* tribunal observed that "EU law does not provide a protection similar to the FET found in the BIT […]".[292]

310. Regarding the other standards of protection, Advocate General Wathelet in the Achmea AG Opinion, pointed out that: [293]

> "As regards the other rules providing material protection of investments, namely full protection and security, fair and equitable treatment of investments and the prohibition of illegal expropriations, it should be emphasised that any overlap with EU law is only partial and does not render them incompatible with EU law." [Emphasis added]

311. The standards of protection in BITs find no equivalent within the EU legal order, once more reinforcing the Tribunal's conclusion that the subject matter of the BIT does not coincide with that of the TFEU, and that the first prong in Article 30(3), the existence of two treaties with the same subject matter, is not met.

B. No incompatibility between Article 8(2) of the BIT and Articles 267 and 344 TFEU

312. Since the first prong of the Article 30(3) test has not been complied with, and the two prongs are cumulative, the Tribunal need not delve into the question whether there is incompatibility between Articles 8(2) of the BIT and Articles 267 and 344 TFEU. *Ex abundante cautela* the Tribunal will nevertheless briefly discuss this second requirement and conclude that it has not been met either.

313. When States subscribe to successive treaties on the same subject matter, and the later treaty does not explicitly terminate or amend the earlier treaty, it should be presumed that the parties' intention was that both treaties should coexist and be applied simultaneously – not to create a normative contradiction. The necessary consequence is that both States are advocating a harmonious interpretation of the two legal texts, which makes apparently conflicting provisions in the later treaty compatible with those in the earlier one.[294] Conflicts leading to the application of Article 30(3) of the VCLT should be restricted to situations where a State, party to both treaties, cannot comply with the provisions of one of the treaties without breaching those of the other.[295]

314. Bearing these principles in mind, the Tribunal fails to see a conflict between Article 8(2) of the BIT and Articles 267 and 344 of the TFEU.

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[292] *JSW Solar*, para. 253 (footnote omitted).
[293] *Achmea* AG *Opinion*, para. 210.
[294] *Magyar Farming* (**CL-268**), para. 240.
[295] Dörr and Schmalenbach: "Vienna Convention on the Law of Treaties: A Commentary", (2012, Springer), Art. 30 VCLT, p. 511, para 13.

Article 344 TFEU

315. Article 344 TFEU reads as follows:

> "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for [in the Treaties]."

316. This provision limits the power of EU Member States to litigate (or arbitrate) disputes "concerning the interpretation or application of the Treaties" by means other than those provided in the EU Treaties.

317. Does this provision conflict with the Article 8 of the BIT?

318. Under Article 8(1) an investor can only submit to investment arbitration and adjudication under international law disputes

- in connection with an investment in the territory of the host State;
- regarding breaches by such State of the undertakings assumed and guarantees granted to the protected investor in the BIT.

These investment disputes do not constitute disputes "concerning the interpretation or application of the Treaties", as required by Article 344 TFEU; an EU Member State does not breach Article 344 TFEU by permitting foreign investors to submit investment disputes with such State to investment arbitration.

319. It is true that adjudication of investment disputes may involve questions regarding the application of municipal law, and that the municipal law of each EU Member State incorporates EU law (by direct application or through incorporation into domestic law). But investment tribunals are limited to the application of the BIT and of international law when adjudicating investment disputes, treating municipal law as a fact, and following the prevailing interpretation given to the municipal law by the courts and authorities of the EU Member State and the EU (as the Tribunal has already established – see section III on Applicable Law, *supra*).

320. No dispute concerning the interpretation or application of the EU Treaties can be submitted to an arbitration tribunal under an Intra-EU BIT (and none has been submitted to or is to be adjudicated by this Tribunal). There is consequently no incompatibility between Article 8(2) of the BIT, and Article 344 of the TFEU.

Article 267 TFEU

321. Article 267 TFEU reads as follows:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretations of acts of the institutions, bodies, offices or agencies of the Union"

322. This provision confers power to the CJEU to give preliminary rulings. Here the potential for a normative conflict is even more remote.

323. In accordance with the *Achmea* Judgement,[296] investment treaty tribunals are not empowered to resort to the CJEU and request preliminary rulings. This decision of the CJEU does not give rise to a normative conflict between Article 267 TFEU and Article 8 of the BIT. Article 267 TFEU does not create an obligation for Member States to ensure that each adjudicatory body potentially applying EU law may seek a preliminary ruling from the CJEU. If that were the meaning of Article 267, Member States would violate Article 267 by allowing commercial arbitration, which may be called upon to apply EU law, and whose tribunals have no standing to request preliminary rulings.[297]

324. Resorting to the principle of harmonious interpretation, Article 267 TFEU might at most be understood as a carve out: disputes that relate to the interpretation of the Treaty should be excluded from the scope of investment arbitration under Article 8(2) of the BIT. [298] But this has already been achieved: the Tribunal has already decided that no dispute concerning the interpretation or application of the EU Treaties can or has been submitted to or is to be adjudicated by this Tribunal.

* * *

325. In sum, this Tribunal observes that the BIT and the TFEU do not cover the same subject-matter, are not incompatible under international law, and may be applied simultaneously. No application of successive treaties arises, the requirements of Article 30(3) of the VCLT are not met, Article 8 of the BIT remains applicable and the Parties' consent continues to be valid.

C. No invalidation of consent under Article 351 of the TFEU

326. Respondent also pleads that the Tribunal should look to Article 351 TFEU when determining the validity or applicability of Article 8 of the BIT. [299]

327. Article 351 TFEU regulates the relationship between EU Treaties and other agreements and provides that:

> "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession,

[296] *Achmea* Judgment (**RL-153**), para. 19.
[297] *Magyar Farming* (**CL-268**), para 246.
[298] *Magyar Farming* (**CL-268**), para. 247.
[299] Reply, para. 43; Hearing Day 1, 11:28; 17-21.

> between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. […]"

The Parties' positions

328. Respondent argues that under Article 351 of the TFEU and by application of the principle of the primacy of EU law, Article 8 of the BIT ceased to produce any effects and the Tribunal therefore has no jurisdiction.[300]

329. Claimants, on the other hand, submit that Article 351 TFEU is only applicable in relations between Member States and third countries[301] and that Respondent's arguments should be disregarded.[302]

Discussion

330. The Tribunal has already stated that it is not bound by – or even called upon to apply – EU law as such (see section III on Applicable Law, *supra*). Likewise, it is not bound by previous decisions of EU organs such as the ECJ. If the "lodestar" of Article 351 TFEU does not find application to this Tribunal, then the analysis could end here.

331. The Tribunal has also established that the law applicable to the determination of its jurisdiction is the BIT, and subsidiarily international law as embodied in the VCLT and in customary international law. However, even if Article 351 of the TFEU were to apply, it would not deprive the Tribunal of jurisdiction.

332. First, the text of Article 351 of the TFEU expressly refers to extra-EU international agreements. Using the ordinary meaning of words, as required by Article 31(1) of the VCLT, the phrase

> "agreements […] between one or more Member States on the one hand, and one or more third countries on the other",

cannot be construed so as to apply to the relations between EU Member States as it would contradict the meaning of "third countries". Therefore, Article 351 does not regulate the relations between Cyprus and the Czech Republic, both of which acceded to the EU on the same date and neither of which could ever be treated as a third country by the other.

[300] Reply, paras. 52-53, *citing Matteucci* (**RL-230**), para. 22; *Budějovický Budvar* (**RL-231**), para. 98.
[301] Counter-Memorial, para.49; Rejoinder para. 31, citing *JSW Solar* (**RL-154**), para. 256, *Vattenfall*, paras. 225-226 and 228.
[302] Rejoinder, para. 22; Hearing Day 1, 16:49; 20-24, 16:51; 3-25, *citing Vattenfall*, paras. 225-227.

333. Secondly, pursuant to the text of Article 351 TFEU, Member States

> "shall take all appropriate steps to eliminate the incompatibilities established"

between EU Treaties and the prior agreements with third countries. This creates an obligation for the Member States to take action – but not an inference that any incompatibilities are eliminated *ipso jure*, as argued by Respondent. Whether the action chosen by the Member State amounts to a suspension, modification or termination of the prior agreements, an international act in this respect is required of the Member State both under Article 351 TFEU and under the general principles of international law. Thus, Article 351 could not have automatically rendered the arbitration clause in the BIT inapplicable.

D. The impact of the *Achmea* Judgement

334. In the *Achmea* Judgment the CJEU addressed as a preliminary question whether investment disputes, submitted to an investment arbitral tribunal under Article 8 of the Czechoslovakia-Netherlands BIT, can relate to the interpretation or application of EU law. Crucial to the CJEU's analysis was the choice of law provision contained in Article 8(6) of the Czechoslovakia-Netherlands BIT:

> "The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> - **the law in force of the Contracting Party concerned**;
>
> - the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
>
> - the provisions of special agreements relating to the investment;
>
> - the general principles of international law".
>
> [Emphasis added]

335. The CJEU concluded that the *Achmea* arbitral tribunal was required to take into account the law in force in "the contracting party concerned", i.e. Slovakia, which includes EU law.[303] This gave rise to the CJEU's concern that an investment arbitral tribunal established under the Czechoslovakia-Netherlands BIT could be called upon to interpret and apply EU law.

336. Since investment tribunals are not authorized to submit requests for preliminary rulings to the CJEU and judicial review of awards may be limited by national law, the CJEU found that:[304]

> "[B]y concluding the BIT the Member States parties to it established a mechanism for settling disputes between an investor and a Member State

[303] *Achmea* Judgment (**RL-153**), paras. 40 and 41.
[304] *Achmea* Judgment (**RL-153**), para. 56.

> **which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law**". [Emphasis added]

337. The judgment adds the following argument:[305]

> "Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, **ensured by the preliminary ruling procedure provided for in Article 267 TFEU**, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above [which includes a reference to Article 4(3) TEU].
>
> In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law". [Emphasis added]

338. Based on this reasoning, the CJEU concluded:[306]

> "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT […]".

The Parties' positions

339. Respondent's main argument is that EU law, as expressed in the *Achmea* Judgment, has invalidated the Czech Republic's offer to arbitrate.[307] The scope of the *Achmea* Judgment is not limited to the Czechoslovakia-Netherlands BIT. The CJEU specifically referred to the numerous BITs still in force between EU Member States, and intentionally widened the scope of the referring court's original question.[308] Respondent also rejects the argument that the present case be distinguished on the basis that the BIT lacks a provision on applicable law.[309]

340. Claimants note that investment arbitration tribunals have unanimously upheld their jurisdiction over intra-EU BITs such as the BIT in the present dispute – both in pre- and post-*Achmea* cases.[310] Claimants further aver that the *Achmea* Judgment "says nothing in respect of international law" – and is therefore of no assistance to the Tribunal.[311]

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[305] *Achmea* Judgment (**RL-153**), paras. 58 and 59.
[306] *Achmea* Judgment (**RL-153**), para. 60.
[307] Statement of Defence, para. 322.
[308] Reply, paras. 30-32.
[309] Hearing Day 1, 11:16; 7-1, *citing* B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Series, No. 3. 2018 (**RL-222**), p. 10.
[310] Rejoinder, para. 2; Hearing Day 1, 16:29; 9-21.
[311] Counter-Memorial, para. 17; Hearing Day 1, 14:34; 15-21, 15:23; 22-15:25; 12, *citing Vattenfall* (**RL-157**), para. 159.

The *Achmea* Judgment is not binding upon the Tribunal

341. The UNCITRAL Rules and Dutch law empower tribunals to decide over their own jurisdiction. In the exercise of such *Kompetenz-Kompetenz* powers, the Tribunal must analyse whether there is valid consent to arbitrate. A tribunal cannot abandon this mandate and blindly follow the determination of another adjudicatory body – even if it is the CJEU.[312]

342. The CJEU's authority is limited to the interpretation and application of the EU Treaties. As the tribunal in *Magyar Farming* said, the CJEU has no ultimate mandate in respect of the interpretation of the BIT or the VCLT. And to establish whether Article 8 of the BIT became inapplicable due to the accession to the EU, it does not suffice to interpret the TFEU. The determination requires the interpretation of both the TFEU and the BIT, to answer the crucial question whether the requirements for the application of Article 30(3) of the VCLT have been met.[313]

343. Not only does the CJEU have no exclusive authority to answer this question, it did not even purport to address them in the *Achmea* Judgement; in the words of the *Magyar Farming* tribunal:[314]

> "Even a cursory review of that decision reveals that the CJEU did not undertake a conflicts analysis under the VCLT. Thus, even if the Tribunal were willing to pay deference to the CJEU's reasoning, the Achmea Decision would give no guidance on the issues which must be resolved to determine whether the EU Treaties preclude the application of Article 8 of the BIT as a matter of international law."

The *Achmea* Judgement is inapposite

344. There is a second argument: the *Achmea* Judgement applies an investment treaty which is crucially different from the BIT between Cyprus and the Czech Republic.

345. The *Achmea* Judgement found that an incompatibility exists between Article 8 of the Czechoslovakia-Netherlands BIT and Articles 267 and 344 TFEU, because Article 8(6) of that treaty mandates tribunals to take into account Slovak law, which incorporates EU law. In the opinion of the CJEU this creates a risk that tribunals will interpret and apply EU law, without being entitled to submit requests for preliminary ruling to the CJEU.

346. This argument cannot be extended to the present case: the BIT between Cyprus and the Czech Republic does not foresee the possibility that the Tribunal could apply Czech/EU law.

[312] *Magyar Farming* (**CL-268**), para. 208.
[313] *Magyar Farming* (**CL-268**), para 209.
[314] *Magyar Farming* (**CL-268**), para 210.

347. The Tribunal has already found that, consistent with the TofA, it must adjudicate this investment dispute applying the BIT, and subsidiarily, general rules of international law. There is no reference to Czech or EU law in either the TofA or the BIT itself.

348. The Tribunal has also established that it will not interpret or apply Czech or EU law. If necessary, the Tribunal will simply consider and establish municipal law as a fact, following the prevailing interpretation given to municipal law by the courts or authorities of Respondent and the EU, including the decisions of the CJEU.

E. Successive treaties and termination of treaties do not trigger retroactive effects

349. In the previous sections the Tribunal has concluded that the BIT is valid and fully applicable. But even if it is assumed *ad arguendum* that this conclusion is wrong, and that the *Achmea* Judgment did indeed reveal – as Respondent argues – the inapplicability of Article 8 of the BIT, such conclusion would still not result in the Tribunal being deprived of jurisdiction.

350. If two States, that are bound by a treaty, conclude a later treaty that covers the same subject matter, this may result in either:

- The termination of the earlier treaty under Article 59 of the VCLT due to an incompatibility – a possibility which is not being pleaded in this case; or

- A finding that certain incompatible rules of the earlier treaty have become inapplicable under Article 30(3) of the VCLT.

351. In both cases, the effects will operate *ex nunc, i.e.* on the date when the declaration of termination or inapplicability is made, with the consequence that rights or legal positions crystalized before that date remain unaffected – as a review of the legal regime established in the VCLT shows.

Articles 69 and 70 of the VCLT

352. The VCLT devotes its Section 5 to the "consequences of the invalidity, termination or suspension of the operation of a treaty", with Article 69 establishing the consequences of the invalidity and Article 70 the consequences of the termination of a treaty. A comparative analysis of both provisions shows

- That a declaration of invalidity does indeed produce retroactive (*ex tunc*) effects; while

- The effects of termination (and by extension inapplicability) operate *ex nunc*.

353. Article 69 of the VCLT provides that the consequences for the finding of an invalid treaty due to the existence of one of the grounds for invalidity under the VCLT, such as error, corruption or fraud,[315] produces effects *ex tunc*:

> "**Consequences of the invalidity of a treaty.**
>
> 1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.
>
> 2. If acts have nevertheless been performed in reliance on such a treaty:
>
> *(a)* Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
>
> *(b)* Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty"

354. In contrast, Article 70 of the VCLT provides that the termination of a treaty produces effects *ex nunc*:

> "**Consequences of the termination of a treaty.**
>
> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) Releases the parties from any **obligation further to perform the treaty;**
>
> **(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination**". [Emphasis added]

355. The VCLT is clear: the termination of a treaty operates *ex nunc*, meaning that its effects apply from the moment the treaty is terminated – not before.

356. The Tribunal has already established that, as of 24 September 2015, Claimants accepted Respondent's standing offer to arbitrate, consent became locked and irrevocable, and the Claimants obtained the subjective right to have their investment dispute against the Czech Republic adjudicated through binding international arbitration. This right cannot be retroactively annulled through the termination of the BIT. The same conclusion has been reached by the tribunal in *Magyar Farming*:[316]

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[315] Art. 42 VCLT. The VCLT allows for the invalidity of a treaty in the following circumstances: error (Art. 48), fraud (Art. 49), corruption of State representative or another negotiating State (Art. 50), coercion of a representative of a State (Art. 51), coercion of a State by threat of force (Art. 52); and a treaty which at the time of its conclusion conflicted with a *jus cogens* norm of international law (Art. 53); and H. Ascensio: "The Vienna Convention on the Law of Treaties, A Commentary", Art. 70, p. 1589.
[316] *Magyar Farming* (**CL-268**), para. 214.

> "Thus the consent to arbitrate, in the sense of a meeting of minds, which is perfected by the investor's acceptance of the State's offer to arbitrate expressed in the BIT would not be retroactively invalidated by a subsequent termination of the BIT".

357. As Schreuer poignantly states, perfected consent creates an agreement between the host State and the investor to arbitrate, which cannot be subverted by amendment or termination of the treaty:[317]

> "Once the arbitration agreement is perfected through the acceptance of the offer contained in the treaty it remains in existence even if the States parties to the BIT agree to amend or terminate the treaty".

Inapplicability of a treaty

358. Respondent initially claimed that the CJEU's interpretation of EU law has retroactive effect:[318]

> "in the sense that, once the CJEU has ruled on a given issue, the interpretation of EU law given by the CJEU has effect from the time when the provisions of EU law at issue entered into force (*ex tunc*)".

359. Respondent later clarified that the CJEU's judgment effect is declaratory and not constitutive, making it "legally incorrect" to speak of retroactivity in connection with *Achmea*.[319] Respondent argues that, as a consequence of the *Achmea* Judgement, the arbitration clause in the BIT became inapplicable in a distant past: in 2004 when Cyprus and the Czech Republic acceded to the TFEU.

360. The Tribunal is not convinced by Respondent's present position that the declaratory nature of the *Achmea* Judgment does not amount to retroactivity:[320] regardless of the technical terms used, applying the *Achmea* Judgment, rendered in 2018, starting from 2004, undeniably amounts to retroactivity.

361. What Respondent in fact argues is that under international law, the declaration of inapplicability of the provision of a treaty under Article 30(3) of the VCLT operates *ex tunc*.

362. The Tribunal has already established that in accordance with the VCLT termination of a treaty does not produce retroactive effects, and does not affect an arbitration agreement validly entered into prior to termination. The same rule must be extended to the inapplicability of certain provisions of an earlier treaty under

[317] C. Schreuer, *Consent to Arbitration*, in: *The Oxford Handbook of International Investment Law* (Ed.: P. Muchlinski, F. Ortino, C> Schreuer), Oxford Handbooks in Law, 2008, pp. 8 and 39.
[318] Statement of Defence, para. 327.
[319] Hearing Day 2, 10:43; 2-12.
[320] Hearing Day 2, 10:43; 2-12.

Article 30(3) of the VCLT – if termination of the totality of the treaty operates *ex nunc*, the consequences of partial inapplicability cannot be more severe.[321]

363. A declaration pursuant to Article 30(3) of the VCLT cannot and does not produce retroactive effects. Claimants accepted Respondent's standing offer to adjudicate investment disputes through arbitration in 2015 – years before the *Achmea* Judgement. At that time, the meeting of the minds took place, and the arbitration agreement became perfected. The *Achmea* Judgement and the Czech Republic's declaration that Article 8 of the BIT is inapplicable, cannot thwart Claimants' pre-existing rights. If the Tribunal was vested with jurisdiction before the first declaration of inapplicability, its jurisdiction remains unaffected.

364. In sum: even if it is accepted *arguendo* that, as a consequence of the 2018 *Achmea* Judgment, Article 8 of the BIT became inapplicable under Article 30(3) of the VCLT, such inapplicability would, as a matter of customary international law, operate *ex nunc*. It could not deprive the Tribunal of its jurisdiction, which was established in 2015, when the consent of the Parties was irrevocably locked. The findings of the CJEU in the *Achmea* Judgment cannot operate to retroactively remove the irrevocable consent to arbitrate given by the Czech Republic and by the protected investor.

F. Validity of a good faith arbitration agreement

365. There is a final argument.

366. As the *Eskosol*[322] tribunal has said, even if, *arguendo*, it were assumed that the *Achmea* Judgment or declaration of inapplicability by the Czech Republic could operate retrospectively and invalidate Article 8 of the BIT as of 2004, even then the rules of international law governing the consequences of the invalidity of a treaty, and reflected in Article 69 of the VCLT, would still uphold the validity of the arbitration agreement.

367. Article 69(2)(b) of the VCLT provides:

> "Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty".

368. The rule refers to invalidity, but the principle can be extended by analogy to partial derogation under Art. 30 (3).[323]

369. The arbitration agreement, perfected before the *Achmea* Judgment, was indeed entered into in good faith by Claimants, who legitimately relied on the Czech Republic's apparent offer to arbitrate under Article 8 of the BIT. This valid

[321] Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2012, , Art. 30 VCLT, p. 518.
[322] *Eskosol* (**RL-215**), para. 206.
[323] *Eskosol* (**RL-215**), para. 206.

arbitration agreement cannot and has not been rendered unlawful by reason of the later declaration of inapplicability.

4.3 THE IRRELEVANCE OF THE MEMBER STATES' DECLARATION, THE *NOTES VERBALES* AND THE TERMINATION TREATY

370. Cyprus and the Czech Republic have signed three public documents regarding the validity of the BIT:

- the 15 January 2019 "Declaration of the representatives of the Governments of the Member States" (defined as the "Member States' Declaration");
- the *Notes Verbales* of the Czech Republic and of Cyprus of 2019, addressed to this Tribunal; and
- the Termination Treaty.

A. Facts

371. On 15 January 2019, 22 EU Member States, including the Czech Republic and the Republic of Cyprus, signed the Member States' Declaration, "on the legal consequences of the Judgement of the Court of Justice in *Achmea* and on investment protection in Europe".

372. The Declaration expressed the Member States' position that EU law takes precedence over intra-EU BITs, and therefore, all arbitral clauses providing for investor-State arbitration in such BITs are contrary to EU law. Said arbitral clauses are thus inapplicable and do not produce effects; arbitral tribunals established based on such clauses lack jurisdiction on account of an invalid offer of consent in the treaty.[324]

373. The 22 signatory Member States pledged to take the following actions:

- To inform tribunals in pending intra-EU BIT and ECT arbitrations about the legal consequences of the *Achmea* Judgment as set out in the Declaration;
- To put the "investor community" on notice that no new intra-EU investment arbitration proceedings may be initiated;
- To request national courts to set aside or not enforce intra-EU BIT awards; and
- To terminate intra-EU BITs with other EU Member States by way of a plurilateral or bilateral treaty, ideally by 6 December 2019.

[324] Member States' Declaration (**C-318**), p. 1.

The 2019 *Notes Verbales*

374. Cyprus and the Czech Republic have exchanged numerous *Notes Verbales* with regard to the BIT, including in 2009 when the Czech Republic was attempting to terminate the treaty. However, for the purposes of this section, the relevant *Notes Verbales* were exchanged between the Czech Republic[325] and the Republic of Cyprus[326] on 9 July 2019 and 20 December 2019 respectively.

375. The purpose of these *Notes Verbales* was to comply with the undertaking assumed in the Member States' Declaration: to inform this Tribunal about the legal consequences of the *Achmea* judgement.

376. The Czech Republic's *Note Verbale* purports to inform this Tribunal that:[327]

> "The arbitration provision contained in the Czech Republic-Cyprus Treaty is incompatible with EU law. Specifically, the arbitration provision is incompatible with Article 267 TFEU, which provides that the CJEU has jurisdiction over matters involving the interpretation of the founding Treaties of the EU […] and the EU secondary law […], and Article 344 of the TFEU, which provides that Member States may not submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided in the TFEU."

377. The *Note Verbale* adds:

> "In light of this, the position of the Czech Republic is that WCV and CCL should withdraw this arbitration"

378. The Tribunal notes that Claimants have not done so.

379. The Czech *Note Verbale* further adds:

> "Further, as the arbitration provision is incompatible with EU law, it is inapplicable, and has been since the Republic of Cyprus and the Czech Republic acceded to the EU in 2004. Consequently, there was no valid offer to arbitrate on the part of the Czech Republic when WCV and CCL started this Arbitration and, therefore, WCV and CLL could not have perfected an agreement to arbitrate by accepting any such offer. In the absence of a valid offer to arbitrate on the part of the Czech Republic, the arbitral tribunal constituted in this Arbitration lacks jurisdiction to hear the claims of WCV and CCL. It must, therefore, render an award declining jurisdiction on the basis that there is no consent to arbitrate".

380. Cyprus reacted five months later by issuing a *Note Verbale* in response, which provides the following:[328]

[325] Czech Republic's *Note Verbale* of 9 July 2019 (**R-143**).
[326] Cyprus's *Note Verbale* of 20 December 2019 (**R-142**).
[327] Czech Republic's *Note Verbale* of 9 July 2019 (**R-143**).
[328] Cyprus's *Note Verbale* of 20 December 2019 (**R-142**), p. 1.

> "[…] the arbitration clause in Article 8 of [the] Agreement between the Government of the Republic of Cyprus and the Government of the Czech Republic on the Promotion and Reciprocal Protection of Investments is contrary to the EU Treaties and thus inapplicable. As a consequence, it cannot serve as legal basis for the ongoing arbitration proceedings and thus these proceedings should be terminated."

Termination Treaty

381. On 5 May 2020, 23 EU Member States, including Cyprus and the Czech Republic, signed the Termination Treaty,[329] an international treaty which will come into force 30 calendar days after the second instrument of ratification, approval or acceptance by any of the Contracting States.[330]

382. Pursuant to Articles 2 and 3 of the Termination Treaty, all intra-EU BITs are to be terminated, together with their sunset clauses, 30 calendar days after ratification, approval or acceptance by the relevant EU Member States party to the particular BITs.[331] Consequently, the Cyprus-Czech BIT will be terminated 30 calendar days after the date on which the second of the Contracting Parties to the BIT ratifies, approves or accepts the Termination Treaty.

383. The Termination Treaty also includes the following provision under Article 4(1), purporting to give retroactive effect to the termination of the BIT: [332]

> "The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings."

B. The Parties' positions

384. Respondent says that the Member States' Declaration qualifies as a "subsequent agreement between the parties" under Article 31(3)(a) VCLT, relying on the decision of the Tribunal in the *Methanex* case as support.[333] Respondent also submits that the Declaration constitutes conclusive evidence of "subsequent practice" under Article 31(3)(b) VCLT.

385. Respondent further asserts that the exchange of *Notes Verbales* between Cyprus and the Czech Republic serves as proof that both Contracting States adhere to the

[329] The Termination Treaty was signed after the filing of the Parties' final submissions.
[330] Termination Treaty, Article 16 (1).
[331] Termination Treaty, Articles 4(2) and 16 (2).
[332] Termination Treaty, Article 4(1).
[333] Reply, para. 67, *citing Methanex* (**RL-170**), Part II, Chapter B, para. 19; Hearing Day 1, 12:04; 18-20.

commitments undertaken in the Member States' Declaration and that they both perceive it as a subsequent agreement under Article 31(3)(a) of the VCLT.[334]

386. Claimants note that the Declaration is "manifestly political", and that reliance on it has been rejected by every tribunal that considered the issue.[335] Claimants further reject Respondent's suggestion that Articles 31(3)(a) or 31(3)(b) VCLT should apply in this case.[336]

387. Claimants finally assert that the *Note Verbale* has no legal effect on the arbitral proceeding, as it is merely a declaratory statement whose goal is to confirm or further the undertakings of the Member States' Declaration.

C. Discussion

388. The Contracting States are indeed the masters of the treaty. At any time they are entitled to freely terminate the agreement or to amend any of its provisions.

Termination of the BIT will only happen in the future

389. The Czech Republic and Cyprus could have terminated the BIT in 2004, when both acceded to the EU.

390. They chose not to do so.

391. The Contracting Parties could have terminated the BIT in 2006, when the European Commission stated to the *Eastern Sugar* tribunal (a case involving the Czech Republic as defendant)[337]

> "that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence",

adding that

> "Member States would have to strictly follow the relevant procedure provided for this in regard to the agreements themselves. Such termination cannot have a retroactive effect"

392. They chose not to do so.

393. In 2009, Cyprus and the Czech Republic discussed a possible termination of the BIT and even exchanged *Notes V erbales*, but eventually no agreement was reached regarding the derogation of the sunset clause. In view of the disagreement,

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[334] Czech Republic's *Note Verbale* of 9 July 2019 (R-**143**), p. 2-3.
[335] Counter-Memorial, para. 33; Rejoinder, para. 53, *citing e.g. Eskosol* (**RL-215**), para. 217; *LBBW* (**CL-247**), para. 192; Hearing Day 2, 15:45; 5-8.
[336] Counter-Memorial, para. 34.
[337] *Eastern Sugar* (**CL-21**), pp. 24-26.

the Czech Republic and Cyprus decided not to terminate the BIT.[338] These *Notes Verbales* did not contain any mention that either of the Contracting States considered Article 8 of the BIT to be inapplicable pursuant to Article 30 (3) of the VCLT.

394. In 2011, the 10-year initially agreed period of validity of the BIT lapsed, and the Czech Republic and Cyprus were entitled to terminate the agreement with immediate effect.

395. Instead both Parties permitted its tacit prorogation.

396. It was only in 2020 when the Contracting Parties finally agreed to terminate the BIT (a decision which is still pending ratification) – 16 years after accession to the EU.

397. Once the BIT is terminated, both parties "will be released from any obligation further to perform the treaty" (Article 70 (1) (a) of the VCLT), the standing offer of the Czech Republic to submit to investment arbitration under Article 8 of the BIT will be invalidated, and no Cypriot investor will be able to resort to investment arbitration for the settlement of investment disputes against the Czech Republic.

398. The Tribunal has already explained that termination does not produce retroactive effects (see section 4.2.(E) *supra*): the jurisdiction of this Tribunal will not be affected by the termination of the BIT, there being an undisputed principle of international law, codified in Article 70 of the VCLT, that the consequences of the termination of a treaty operate *ex nunc*.

399. And the Tribunal has also found that the principle of non-retroactivity of termination should also be extended to the incompatibility (under Article 30(3) of the VCLT) of certain provisions of an earlier treaty, due to the promulgation of a later treaty dealing with the same subject matter.

400. The same principle also applies to the Termination Agreement – its entry into force will not affect the current proceedings, based on a validly locked consent, which cannot be subsequently withdrawn by Respondent. The purported termination of the BIT will only have prospective effect.

Interpretative agreements between the Czech Republic and Cyprus

401. The Member States' Declaration (which gave rise to the two *Notes Verbales*) and Article 4 (1) of the Termination Treaty purport to be interpretative agreements, signed by the Czech Republic and Cyprus with a common purpose: to support Respondent's interpretation that Article 8 of the BIT will not be invalidated in the

[338] *Note Verbale* from the Embassy of the Czech Republic to the Ministry of Foreign Affairs of the Republic of Cyprus, 5 January 2009, **(R-5)**; *Note Verbale* from the Ministry of Foreign Affairs of the Republic of Cyprus to the Embassy of the Czech Republic, 17 November 2009, **(R-6)**.

future, when the BIT is actually terminated, but rather that this provision had already become inapplicable in 2004, when the Czech Republic and Cyprus acceded to the EU (with the consequence that this arbitral procedures, and all other pending procedures against the Czech Republic under the BIT, should forthwith be terminated for lack of jurisdiction).

402. The *Notes Verbales* are specific means of information, addressed to this Tribunal by the Czech Republic and by Cyprus. In its *Note* the Czech Republic states:

- That the arbitration provision in Article 8 of the Treaty is incompatible with Articles 267 and 344 of the TFEU;

- That Article 8 is incompatible since both Contracting Parties acceded to the EU in 2004;

- That there was no valid offer to arbitrate when Claimants started this arbitration, and that no agreement to arbitrate has been perfected, and

- That this Tribunal lacks jurisdiction.

403. The Cypriot *Note Verbale* is more succinct, and simply states that Article 8 "cannot serve as a legal basis for the ongoing arbitration proceedings and these should be terminated".

404. Finally, in Article 4(1) of the Termination Treaty, the Contracting Parties "confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable", adding that an arbitration clause "cannot serve as legal basis for Arbitration Proceedings", "as of the date" of accession of the last Contracting Party to the EU.

a. The Tribunal's inherent power

405. Respondent says that these agreements[339] reached between the Czech Republic and Cyprus qualify as a "subsequent agreement between the parties" under Article 31(3)(a) VCLT.[340] Respondent also submits that these agreements constitute conclusive evidence of "subsequent practice" under Article 31(3)(b) VCLT.[341] The Czech Republic submits that the Tribunal is bound to assume the interpretation advocated in these agreements.

406. The Tribunal disagrees.

[339] Excluding the Termination Treaty, which had not been signed at the time when the Parties were making their final submissions.
[340] Reply, para. 67, *citing Methanex* (**RL-170**), Part II, Chapter B, para. 19; Hearing Day 1, 12:04; 9-12.
[341] Reply, paras. 69-70, 74, *citing* International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, Yearbook of the International Law Commission, Vol. II, Part Two, 2018 (**RL-239**), Conclusion 4(2).

407. The Tribunal (not the Czech Republic and Cyprus) is entitled, under the *Kompetenz-Kompetenz* principle enshrined in the UNCITRAL Rules and Dutch law,[342] to establish whether it has jurisdiction to adjudicate the dispute. In its task, the Tribunal must apply general international law, notably the provisions of the VCLT. Not even the Contracting Parties acting jointly can alter general international law in order to deny the BIT's effects under the law of treaties. Nor can they bereave the Tribunal of its inherent prerogative to decide on its jurisdiction in accordance with international law.

408. Moreover, any attempt to impose instructions upon the Tribunal, or to interfere in its decision would constitute an impermissible violation of the rule of law. It is improper for anyone, including the Contracting Parties acting jointly, to interfere with a procedure which is *sub iudice.*

409. States negotiate agreements with other States, record them in international treaties, and consent to be bound by such commitments under the time-honoured principle of *pacta sunt servanda* reflected in Article 26 of the VCLT:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

410. States are also free to amend treaties, to enter into subsequent agreements affecting the interpretation of the treaty, or to suspend or terminate the treaty.

411. However, there are limits to State power and autonomy, especially when a treaty creates rights for third parties. States are not free to *ex post facto* reverse the legal effect of clear treaty terms, simply by advocating a new interpretation. If the intention of two States, which have entered into a treaty, is to amend the treaty language, or to terminate its application, proper procedure (under customary international law codified in the VCLT or agreed upon in the text of the treaty itself) must be followed, including seeking insofar as necessary the consent of relevant third parties as to the revocation or modification of their vested rights.

412. The Tribunal has concluded that the BIT has not been invalidated, terminated, or suspended under Part V of the VCLT. The Tribunal has also concluded that neither the BIT nor its Article 8 have been succeeded or rendered inapplicable by the EU Treaties under Article 30(3) of the VCLT or any special conflict rule. The Tribunal has further concluded that any such invalidation, termination, suspension, or succession could not in any event produce retroactive effects in this case. The BIT remains valid and in full force. So does the arbitration agreement formed by the Parties' mutual and irrevocable consent.

413. As a result, the Tribunal is bound to interpret and apply the BIT and the arbitration agreement derived from its provisions "in good faith" and "in accordance with the ordinary meaning given to [their] terms in their context and in the light of its object and purpose" – as Article 31(1) of the VCLT mandates. These two criteria (good

[342] Article 21 of the UNCITRAL Rules and Article 1052 of the DAA.

faith and ordinary meaning) are the cornerstones of proper treaty interpretation. Article 31(3) then adds that the interpreter "shall [take] into account, together with the context" any subsequent agreement or practice between the parties regarding the interpretation or the application of the treaty.

414. There is a further, generally accepted rule of treaty interpretation: words must be interpreted in a way that ascribes meaning and produces effects. This principle of effectiveness or doctrine of *effet utile* requires treaty terms to be interpreted in a way that does not leave them devoid of meaning.[343]

415. In *AAPL* the Tribunal found that:[344]

> "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning […]. This is simply an application of the wider legal principle of "effectiveness" which requires favouring the interpretation that gives to each treaty provision '*effet utile*'".

416. The principle of *effet utile* is a logical consequence of the fundamental rule that a treaty must be interpreted in good faith and in accordance with the ordinary meaning of its terms. An interpretation of treaty language which renders words null and devoid of effect, is incompatible with these principles.

b. The proper interpretation of Article 8 of the BIT

417. The aim of interpretation is to clarify unclear meaning – not to invalidate clearly drafted treaty provisions which are in full force and effect.

418. However, the Czech Republic's proposed interpretation is contrary to the principles of interpretation which the Tribunal is mandated to apply under Article 31(1) of the VCLT: Respondent is asking the Tribunal to disregard the ordinary meaning of the words used in the Treaty and to render Article 8 of the BIT without any *effet utile*.

419. Under Article 31(3)(a) and (b) of the VCLT the Tribunal "shall take into account together with the context"

- "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"; and

- "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding interpretation".

420. These are ancillary means of interpretation, which the Tribunal must take into account "together with the context". And under Article 31(2) the "context for the purpose of the interpretation of a treaty" comprises "the text, including its

[343] *Tenaris*, para. 151.
[344] *AAPL*, para. 40.

preamble and annexes" and agreements or instruments made by the parties "in connection with the conclusion of the treaty".

421. The context for the interpretation of the BIT is consequently the treaty text itself, plus its preamble and annexes – none of which point to a possibility of inapplicability of Article 8 of the BIT upon the Contracting States' accession to the EU.

422. Under Article 31(3) of the VCLT, the Tribunal is thus mandated to take into account two elements:

- The context of the BIT, including its text, preamble and annexes, and
- The subsequent agreements or practices of the Czech Republic and Cyprus.

But these elements must be used to modulate the ordinary meaning of the terms of the treaty, not to supplant or suppress that meaning.

423. Article 31(4) of the VCLT provides that the parties to a treaty may give "special meanings" to certain treaty terms. However, that is not what the Czech Republic's proposed interpretation does; what it seeks is leave the terms bereft of any, as if subsequent agreements or practices (under Article 31(3) of the VCLT) could derogate the ordinary meaning of the treaty under Article 31(1). They cannot.

424. Moreover, subsequent agreements or practices under Article 31(3) do not supersede the context which the Tribunal is also directed to consider. It is thus for the Tribunal to consider both the context and the subsequent agreements or practices and to decide which of them to give greater weight to.

(i) Ordinary meaning

425. In this case, the ordinary meaning of Article 8 could not be clearer: a protected Cypriot investor who has a dispute relating to a protected investment, is entitled to submit such dispute to adjudication by an international *ad hoc* tribunal in conformity with the UNCITRAL Arbitration Rules. When the ordinary meaning is so clear, it trumps any subsequent agreements or practices of the Contracting Parties, purporting to subvert it.

426. The same opinion was voiced by the Tribunal in *Magyar Farming*:[345]

> "[…] joint interpretative declarations or agreements are not an exclusive and dispositive method of treaty interpretation. Pursuant to Article 31(3) of the VCLT they are but one circumstance that "shall be taken into account, together with the context" of the relevant treaty terms. What is more, context is itself one of the means of interpretation under Article 31(1) of the VCLT, together with the ordinary meaning and object and purpose of the treaty. Thus,

[345] *Magyar Farming* (**CL-268**), para. 218.

> an interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning"

(ii) Good faith

427. There is a second argument.

428. Article 31(1) of the VCLT also requires that treaties be interpreted in good faith. One of the fundamental principles of good faith is the prohibition of inconsistent behaviour (*venire contra factum propium, allegans contraria non audiendus est*), to which Vice-President Alfaro referred in his separate opinion in the *Temple of Preah Vihear*:[346]

> "Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible […] Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*)."

429. Good faith also requires that treaties be construed taking into consideration the expectations reasonably and legitimately held by the parties:[347]

> "As a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."

430. The interpretation which is now advocated by the Czech Republic is incompatible with these principles.

431. Claimants' group of companies have held an investment in the Czech Republic Since at least 2002, and the shareholding structure was reorganized in 2006.[348] At that time, the Czech Republic and Cyprus had not made any public announcement, indicating that, properly construed, Article 8 of the BIT was incompatible with EU law and thus had become inapplicable under Article 30(3) of the VCLT.

432. A prospective Cypriot investor, investing in the Czech Republic at the time when Claimants did, could consequently rely that Article 8 of the BIT continued to be in full force and effect, and would be construed in good faith and in accordance with its ordinary meaning, giving *effet utile* to its terms and that if termination of the treaty were to happen in the future, it would not have retroactive effects.

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[346] *Temple of Preah Vihear* (*Cambodia v. Thailand*), ICJ Judgment of 15 June 1962, Separate Opinion of Vice-President Alfaro, p. 40.
[347] *Amco Asia Corporation et al v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, para. 14.
[348] Interim Award, para. 458.

433. The Czech Republic is now proposing a volte-face: Respondent says that, upon its accession to the EU in 2004, Article 8 of the BIT became incompatible with EU law and Cypriot investors were deprived of the right to have investment disputes adjudicated by international arbitration. If that was indeed the Czech Republic's sincerely held belief as of 2004, the Czech Republic should have inserted the appropriate language in the Accession Agreement. Having failed to do so, the Republic is now precluded from advocating an interpretation which retroactively deprives investors from a right which they legitimately believed was available to them.

434. The Tribunal thus coincides with the findings in *Eskosol*:[349]

> "Finally, even if the January 2019 Declaration were to be treated as a binding joint interpretation of ECT Article 26(6) on a prospective basis, the Tribunal is unable to accept that it should be given retroactive effect to require the termination of a pending arbitration, initiated in good faith by an investor years before the Declaration was issued, and indeed already sub judice as of its issuance."

* * *

435. The Tribunal has established that the Czech Republic and Cyprus have not entered into any agreement that could impact its interpretation of Article 8 of the BIT, as neither the Member States' Declaration, nor the *Notes V erbales*, nor the Termination Treaty can:

- give binding instructions to the Tribunal regarding its jurisdiction in violation of the *Kompetenz-Kompetenz* principle;
- modify irrevocably locked consent;
- trump a good faith interpretation using the ordinary meaning of words with relation to Article 8 of the BIT; or
- impact in a self-serving manner a decision on an issue that is currently *sub iudice*.

4.4 THE DISPUTE IS ARBITRABLE

436. Respondent argues that the current dispute is objectively and subjectively non-arbitrable under Dutch law as the *lex loci arbitri*, which incorporates EU law and its notions of public order and public policy.

437. Claimants disagree by stating that the Parties are entitled to settle the dispute between them, and the dispute does not call for a decision that would affect the

[349] *Eskosol* (**RL-215**), para 226.

rights of third parties.[350] The Parties also argue as to the applicability of the *Lizardi* rule regarding Respondent's capacity to give consent to arbitration.

438. The Tribunal shall first address the arbitrability of the dispute under international law, as the law applicable to the dispute (**A.**). It shall then reach the conclusion that even if, *arguendo*, Dutch law were applicable the dispute would still be arbitrable (**B.**).

A. <u>The dispute is arbitrable under international law</u>

439. The Tribunal finds that the dispute is arbitrable under international law, both objectively (**a.**) and subjectively (**b.**).

a. The dispute is objectively arbitrable under international law

440. The BIT states that investors of one Contracting State may submit to arbitration any dispute in connection with an investment in the territory of the other State:

> "Article 8
>
> Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party
>
> 1. **Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment** in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute.
>
> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to: […]" [emphasis added]

441. Article 8 of the BIT delineates what issues may be subject to arbitration and who the parties to such proceedings are: a dispute is

- objectively arbitrable if it arises in connection with an investment, and
- subjectively arbitrable if the case is filed by an investor of one Contracting State against the other State, in whose territory the investment was made.

442. Without delving into the merits, a *prima facie* scrutiny leads to the conclusion that the current dispute was indeed filed "in connection with an investment" made by Claimants – investors of Cypriot nationality – in the territory of the Czech Republic.[351]

[350] Counter-Memorial, para. 54.
[351] Interim Award, para. 198.

443. Respondent invokes EU public order and public policy as factors that would render this dispute objectively non-arbitrable. However, as stated in the section on applicable law, EU law constitutes one of the subsystems of international law. Thus, it is not binding on this Tribunal and neither is EU public policy or public order. Additionally, there appears to be no "international public policy" that should be taken into account here and none has been brought up by Respondent.

444. Public international order would indeed be under threat if promises and obligations that States willingly undertook could be cancelled with impunity, under the excuse of exercising sovereignty or defending self-defined public order or public policy. The rule of *pacta sunt servanda* forms one of the pillars of the functioning of the international community and it cannot be undermined by States trying to avoid that disputes are adjudicated in accordance with the procedures established in a valid and binding international treaty.

445. Additionally, a recognition of the fact that investment disputes may indeed be settled and are thus objectively arbitrable may be seen in the text of the Termination Treaty signed by both Contracting Parties. Under Article 9,[352] the Termination Treaty offers evidence that both Cyprus and the Czech Republic recognize under international law that settlement procedures may be applied to solve investment dispute.

b. The dispute is subjectively arbitrable under international law

446. The Tribunal finds no issues of international customary law as enshrined under the VCLT that could put into doubt the subjective arbitrability of the current dispute.

447. Both Parties have the capacity to consent and therefore the dispute is subjectively arbitrable under the BIT: the Czech Republic is the host State, which validly expressed its consent under Article 8 of the BIT and the Claimants are investors of the other Contracting Party, who are entitled to pursue arbitration under the same provision of the BIT.

[352] Article 9 (1) of the Termination Treaty states: "Structured dialogue for Pending Arbitration Proceedings 1. An investor party to Pending Arbitration Proceedings may ask the Contracting Party involved in those proceedings to enter into a settlement procedure pursuant to this Article, on condition that: (a) the Pending Arbitration Proceedings have been suspended pursuant to a request to that effect by the investor, and (b) if an award has already been issued in the Pending Arbitration Proceedings, but not yet definitively enforced or executed, the investor undertakes not to start proceedings for its recognition, execution, enforcement or payment in a Member State or in a third country or, if such proceedings have already started, to request that they are suspended. The Contracting Party concerned shall reply in writing within two months in accordance with paragraphs 2 to 4. A Contracting Party may also ask an investor involved in Pending Arbitration Proceedings to enter into a settlement procedure pursuant to this Article. The investor may accept in writing within two months provided that the conditions set out in points (a) and (b) of the first subparagraph are fulfilled. The reply by the Contracting Party concerned or the acceptance by the investor must state, where relevant, that the settlement procedure is thereby initiated." (Emphasis added)

448. The Republic's argues that under EU law, which is encompassed by its own law, it lacks capacity to consent to arbitration. The Tribunal finds that Article 27 of the VCLT bars Respondent from making this argument:

> "Article 27 - Internal law and observance of treaties
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

* * *

449. Summing up, the dispute is arbitrable under the applicable law and the Tribunal's analysis could end here.

B. The dispute is arbitrable under Dutch law

450. The Parties have extensively discussed the arbitrability of the dispute under Dutch law. Tribunal will now confirm that even if, *arguendo*, one were to apply Dutch law, the dispute would still be arbitrable.

451. The relevant provisions regarding the arbitrability of disputes under Dutch law may be found under Articles 1020(3) and 1052(2) of the DAA.

452. Pursuant to Article 1020(3) of the DAA:

> "The arbitration agreement shall not serve to determine legal consequences that may not be freely determined by the parties."

453. Article 1052(2) of the DAA in turn refers to Article 1020(3):

> "A party that has appeared in the arbitral proceedings must raise a plea that the arbitral tribunal does not have jurisdiction on the ground of non-existence of a valid arbitration agreement before submitting a defence, on pain of forfeiting its right to rely on this later, in the arbitral proceedings or before the court, unless this plea is made on the ground that the dispute is not capable of settlement by arbitration according to Article 1020(3)."

a. The dispute is objectively arbitrable under Dutch law

454. The first line of reasoning by Respondent is that the dispute is objectively non-arbitrable under Dutch law, as it stands in violation of public policy and public order under the EU legal order, which is incorporated into Dutch law.

The Parties' positions

455. Respondent submits that the present dispute is objectively non-arbitrable under Article 1020(3) of the DAA. Respondent also relies on Article 3:40 of the DCC. In light of this provision, an agreement to arbitrate matters that are objectively

non-arbitrable is also null and void.[353] Respondent argues that the *Achmea* Judgment manifestly reflects EU public policy and makes investment disputes non-arbitrable.[354]

456. Claimants reject the position advanced by Respondent. Claimants note that Respondent has "pivoted" to a new argument under Article 3:40 DCC, which is a provision of Dutch substantive law, and therefore not applicable to the present dispute.[355]

Discussion

457. Under Article 1020(3) DAA, the only disputes that are not arbitrable are those where the legal consequences cannot be freely determined by the parties.

458. The Tribunal has no doubt that investment disputes can be freely determined by the investor and the host State: both parties can at any time agree on a settlement, which establishes the reparation or compensation to be paid by the State (or the absence thereof) and which terminates the dispute. The possibility of settlement is so undisputed, that Article 9 of the Termination Treaty offers a settlement procedure ("Structured dialogue") to investors party to pending investment arbitrations.

459. The Tribunal disagrees with Respondent's analysis of the *Achmea* Judgment as setting a new EU public policy, binding upon the Netherlands, that renders all intra-EU investment disputes non-arbitrable. Instead, the *Achmea* decision is focused on the prohibition of resolving disputes in a manner that does not ensure the full effectiveness of EU law – and the Tribunal has already stated that no issues of EU law can even potentially be decided upon in the current proceedings.

460. In its analysis of the impact of the *Achmea* Judgment on the arbitrability of intra-EU investment disputes, the Svea Court of Appeal has applied the same reasoning:[356]

> "[…], according to the *Achmea* ruling, the Member States must not create a system which results in disputes being resolved in a manner which does not ensure the full effectiveness of EU law."

461. Finally, in the Tribunal's view, Article 3:40 of the DCC, which provides that

> "[a] juridical act that, by its content or necessary implications, violates public morality or public order, is null and void",

[353] Reply, para. 97; Hearing Day 1, 10:14; 9-17.
[354] Hearing Day 1, 10:29; 6-10:31; 1.
[355] Rejoinder, paras. 111-112; Hearing Day 1, 16:23; 6-14.
[356] *PL Holdings* (Svea Court of Appeal) (**CL-190**), para. 5.2.6.

whether found to be applicable or not, does not change the outcome of the Tribunal's analysis, as neither public morality nor public order will be violated by its finding of jurisdiction.

b. The dispute is subjectively arbitrable under Dutch law

462. Respondent suggests that, on the question of subjective arbitrability (*i.e.* legal capacity), Dutch law refers back to the internal law of the party in question.[357]

463. Respondent anticipates Claimants' reliance on the *Lizardi* rule under Article 10:167 of the DCC and emphasizes the caveat provided by the second proviso of the Article. Furthermore, the *Lizardi* rule only prevents a State from relying on its own internal law to dispute its capacity to enter into an arbitration agreement – and in the current case it is EU law that is invoked by Respondent.[358]

464. Claimants bring forward three counter-arguments:

- First, they submit that the issue is governed by public international law, which Respondent fails to address;[359]
- Second, as evidenced by [redacted], they argue that the Czech Republic had capacity under Czech law to enter into the arbitration agreement with Claimants;[360] and
- Third, under the *Lizardi* rule codified in Article 10:667 of the DCC, they assert that Respondent cannot rely on its own law to deny its capacity to enter into the arbitration agreement with Claimants.[361]

Discussion

465. The *Lizardi* rule, which reflects a principle of international law under Article 27 of the VCLT, is codified in Dutch law under Article 10:167 DCC:

> "If a State, another legal person governed by public law or a state-owned company is a party to an agreement to arbitrate, it may not invoke its laws or regulations to dispute its capacity or powers to enter into the agreement to arbitrate or to argue that the dispute may be decided by arbitration, if the other party did not know such law or regulation and should not be considered to have been required to know such law or regulation." [Emphasis added]

[357] Reply, paras. 90-91, *citing* V. Lazic and A. Schluep, *Netherlands*, in F B Weigand (ed.), *Practitioner's Handbook on International Arbitration* (3rd edn, 2019) (**CL-202**), paras. 11.55-11.57; N. Peters, *IPR, Procesrecht & Arbitrage: Over Grondslagen en Rechtspraktijk*, Antwerpen Maklu, 2015, (**RL-242**), p. 268; Meijer 3 (excerpts) (**RL-241**), pp. 393-394.
[358] Hearing Day 1, 10:13; 4-21.
[359] Rejoinder, paras. 95-96.
[360] Rejoinder, paras. 97-100, *citing* [redacted], para. 54.
[361] Rejoinder, paras. 101-104.

466. The rule prevents States from relying on their own laws or regulations to claim a lack of capacity to give consent to arbitration based on two cumulative factors:

- The other party did not know such law or regulation, and
- Should not be considered to have been required to know such law or regulation.

467. The Czech Republic asserts that it did not have the capacity to consent under European law due to the *Achmea* Judgment[362] and that Claimants should be considered to have been required to know of this.[363]

468. The Tribunal finds that Claimants, when in 2015 they accepted the Respondent's standing offer and the arbitration agreement was perfected, were not required to know the effects of the *Achmea* Judgment and the subsequent declaration by the Czech Republic that Article 8 of the BIT had become inapplicable in 2004. There are two reasons:

- First, the Notice of Arbitration was filed in 2015, three years before the decision in *Achmea* (and four years before the Republic's Member States' Declaration);
- Second, because of the inconsistent position of the European Commission regarding intra-EU BITs: in 2002-2006, when Claimants made their investment, the Commission's position in *Eastern Su gar* created the expectation that if intra-EU BITs were to be terminated, that would happen by strictly applying their provisions, and without retroactive effects – not that the Czech Republic would defend in 2020 that Article 8 of the BIT had become inapplicable in 2004, due to its incompatibility with Articles 267 and 344 of the TFEU or due to the operation of Article 351 TFEU.

* * *

469. In sum, the Tribunal reaffirms that the dispute is arbitrable under international law as the law applicable to the dispute, and that, *arguendo*, it would still be arbitrable under Dutch law if this issue were to be decided on the basis of the *lex loci arbitri*.

4.5 THE TRIBUNAL IS NOT REQUIRED TO DECLINE JURISDICTION DUE TO REASONS OF COMITY

470. Respondent argues that, should the Tribunal decide that it has jurisdiction, it should still decline to hear the case out of comity.[364] According to Respondent,

[362] Reply, para. 92.
[363] Reply, para. 94.
[364] Statement of Defence, para. 336; Reply, para. 157.

comity may be exercised through declining jurisdiction[365] and the Tribunal ought to "exercise comity towards the Grand Chamber's *Achmea* Judgment".[366] Respondent refers to the *MOX Plant* case to support its position.[367]

471. According to Claimants, the existence of parallel proceedings is essential for comity to be considered by a tribunal.[368] Additionally, Claimants argue that the principle of comity customarily leads to the suspension of proceedings rather than the extreme result of declining jurisdiction.[369] Claimants submit that the *MOX Plant* case actually buttresses their argumentation,[370] and that the *UP & CD* tribunal has recently rejected a similar reference to the *MOX Plant* case.[371]

Discussion

472. Respondent argues that the Tribunal should "exercise comity towards the Grand Chamber's *Achmea* Judgment"[372] through declining its jurisdiction. The Tribunal disagrees and finds that reasons of comity are irrelevant to the determination of its jurisdiction.

473. First, the Tribunal notes that comity is habitually exercised through the suspension of proceedings rather than the declining of jurisdiction. The *MOX Plant* case, which appears to be the cornerstone of Respondent's argumentation, did not end in a finding of the tribunal's lack of jurisdiction due to reasons of comity. Instead, the proceedings in that case were suspended due to a "real possibility" of the CJEU seizing the dispute.[373]

474. Secondly, comity is exercised by tribunals whenever there is another pending judicial proceeding whose determination is expected to have direct impact on the analysed issues. Again, the *MOX Plant* tribunal suspended the case because

> "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties."[374]

475. Additionally, the *UP & CD* tribunal has recently stated that the *MOX Plant* case may not be invoked in investment disputes as an example of when to exercise

[365] Statement of Defence, paras. 339-340, *citing* C. Henckels, *Overcoming Jurisdictional Isolationism at the WTO - FTA Nexus: A Potential Approach for the WTO*, The European Journal of International Law, Vol. 19, No. 3, 2008 (**RL-167**), p. 584; *Northern Cameroons* (**RL-168**), p. 29.
[366] Statement of Defence, para. 340.
[367] Reply, paras. 161-162, *citing MOX Plant* (**CL-206**), paras. 23-24, 28.
[368] Counter-Memorial, para. 108, *citing SPP* (**CL-223**), para 84.
[369] Counter-Memorial, *citing e.g. SPP* (**RL-122**), paras. 173 and 175; Rejoinder, para. 172.
[370] Rejoinder, para. 168.
[371] Rejoinder, para. 170, citing *UP & CD*, (**CL-261**), para 278.
[372] Statement of Defence, para. 340.
[373] *MOX Plant* (**CL-206**), paras. 28-29.
[374] *MOX Plant* (**CL-206**), para. 28.

comity, given that there is no risk of parallel proceedings as "clearly, the CJEU has no jurisdiction to hear a case under the BIT".[375]

476. The Tribunal agrees with this finding. Although Respondent asserts that comity should be exercised towards the CJEU, the Tribunal observes that there are no pending proceedings seized by the CJEU that would have a direct bearing on the current case, and which could justify the suspension of these proceedings in order to avoid delivering two conflicting judgments on the same issue.

477. Third, Respondent submits that comity requires that:[376]

> "[…] bodies administering the monitoring, adjudication and enforcement of international norms should avoid generating, to the extent possible, situations where a State is bound by contradictory obligations or decisions, or subject to repeated proceedings."

478. In the Tribunal's view, this argument cannot be reconciled with the facts of the present case. If the Contracting States have found themselves in a situation where they are bound by contrary obligations, this is solely due to their own actions under international law. If Respondent acknowledges that there is a dissociation between the requirements of the BIT and the EU Treaties, then it should have eliminated this situation of conflict by terminating the BIT using the process delineated in the VCLT.

479. Lastly, the Tribunal notes that Respondent invokes the *Northern Cameroons* case, in which the ICJ declined to hear the case. However, this was done due the inadmissibility of the claim rather than due to comity. The Court stated:[377]

> "If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application."

480. Therefore, the Tribunal finds that the *Northern Cameroons* case is not relevant in the Tribunal's analysis of the impact of the concept of comity on its jurisdiction.

* * *

481. For the above reasons, the Tribunal rules that comity is irrelevant for the determination of its jurisdiction and thus it retains its jurisdiction as previously established.

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[375] Rejoinder, para. 170, citing *UP & CD* (**CL-261**), para. 278.
[376] Statement of Defence, para. 337, *citing* F. Fontanelli, *Comity, Overview of Topic*, Westlaw UK, dated 17 October 2016, (**RL-166**), para. 4.
[377] *Northern Cameroons* (**RL-168**), p. 33.

4.6 THE POTENTIAL UNENFORCEABILITY OF AN AWARD DOES NOT BEAR EFFECT ON THE TRIBUNAL'S JURISDICTION

482. Respondent posits, as an alternative argument, that the Tribunal should decline its jurisdiction as any award rendered in the arbitration would be invalid and unenforceable.[378]

483. Respondent places reliance on an *a contrario* reading of the decision in the *Eskosol* case[379] and suggests that the Dutch courts would set aside the award based on either Article 1065(1)(a) (non-existence of a valid arbitration agreement) or 1065(1)(e) (violation of public policy) of the DAA.[380] Pursuant to Respondent's arguments, enforcement outside of the Netherlands would then also be denied under the New York Convention following the setting aside of the award by Dutch courts.[381]

484. Claimants in turn say that Respondent's argument on potential unenforceability has already been considered and rejected by a number of investment arbitration tribunals.[382] Claimants also emphasize that the enforceability of an award has no effect on the Tribunal's jurisdiction[383] and that its jurisdiction is determined by the BIT and international law rather than various national rules on the enforceability of arbitral awards.[384]

Discussion

485. The Tribunal finds that the potential unenforceability of a future award has no bearing on its jurisdiction in the present proceedings.

486. First, while the Tribunal agrees that arbitrators must make every effort to ensure that their awards are enforceable, this acknowledgment does not amount to a prohibition for arbitral tribunals to issue decisions which may face difficulties at the enforcement stage. Simply because there is a risk connected to the enforcement of a subsequent award does not mean that the Tribunal should abandon its mission as given to it by the Parties.

487. Second, Respondent invokes the *Eskosol* case, in which the tribunal stated that:[385]

> "The issue of a categorically '*un*enforceable award' would seem to arise only if an award is issued in violation of the mandatory rules of the arbitral seat."

[378] Reply, para. 146.
[379] Reply, para. 149, *citing Eskosol* (**RL-215**), para. 233; Hearing Day 1; 12:19; 8-13.
[380] Hearing Day 1, 12:23; 14-12:24; 3; Hearing Day 2, 11:24; 25-11:25; 8.
[381] Reply, para. 155; Hearing Day 1, 12:26; 15-22.
[382] Rejoinder, para. 162, *citing Marfin* (**CL-203**), para. 596; *Vattenfall* (**RL-157**), para. 230; *Eskosol* (**RL-215**), para. 233; *United Utilities* (**CL-260**), para. 541.
[383] Rejoinder, para. 163, *citing Vattenfall* (**RL-157**), para. 230.
[384] Rejoinder, para. 163, *citing Marfin* (**CL-203**), para. 596.
[385] *Eskosol* (**RL-215**), para. 233.

488. Respondent states that in this case, the award would be categorically unenforceable as it is contrary to Dutch law (as the rules of the arbitral seat) due to the non-existence of a valid arbitration agreement and a violation of public policy.

489. The Tribunal has addressed these issues extensively and found that there is a valid arbitration agreement. Additionally, with regard to EU public policy, the Tribunal observes that the CJEU held that judicial review under EU public policy was "limited" and could be exercised by national courts "only to the extent that national law permits".[386] Therefore, EU public policy does not form part of Dutch public policy for the purpose of evaluating the enforceability of the award – otherwise, EU Member States' courts could scrutinize questions of EU law considered by arbitral tribunals, thus ensuring the consistency of EU law and in turn rendering null the basis for the *Achmea* Judgment.[387]

490. For the reasons above, a future award on the merits would not be issued in violation of the mandatory rules of the seat and no issue of categorical unenforceability arises, even if Respondent's *a contrario* interpretation of *Eskosol* were to be adopted.

491. Third, and in contradiction to the above, Respondent itself admits that even if the award were set aside by Dutch courts, its enforcement would still be possible "in jurisdictions with a more favorable regime towards such awards":[388]

> "After being set aside by the Dutch courts, the award would be denied enforcement under Article V(1)(e) of the New York Convention, except – by virtue of Article VII(1) – in jurisdictions which have a more favorable regime towards such awards."

492. Lastly, and most importantly, the duty of a tribunal to determine its jurisdiction is given to it by the parties to a dispute. As opined by the *Vattenfall* tribunal, the enforceability of a putative award is a separate matter, which does not impinge upon a tribunal's jurisdiction.[389]

* * *

493. Thus, this Tribunal has a duty to exercise the jurisdiction it has found to exist, and will proceed to fulfil the mission given to it by the Parties.

5. CONCLUSION

494. In view of the above, the Tribunal finds that consent, which is the basis of its jurisdiction, has been validly given by both Parties. This consent has not been withdrawn at any stage by either of the Parties and remains valid, despite the

[386] *Achmea* Judgment (**RL-153**), para. 53.
[387] *Achmea* Judgment (**RL-153**), para. 50.
[388] Reply, para. 155.
[389] *Vattenfall* (**RL-157**), para. 230.

recent developments in the EU arena. The current dispute is arbitrable and the Tribunal is not compelled to decline jurisdiction either due to reasons of comity or the potential issues with the enforceability of the award. The Tribunal must thus exercise its mission to adjudicate on the dispute.

495. The Intra-EU Objection must therefore be dismissed.

V. DECISION

496. For the foregoing reasons, the Tribunal:

1. Dismisses the Intra-EU Objection raised by the Czech Republic;

2. Postpones the decision on costs to the final award;

3. Dismisses any other claims, objections and defences pertaining to the Intra-EU Objection.

THE ARBITRAL TRIBUNAL

Seat of Arbitration: The Hague
Date: 29 September 2020

Stanimir Alexandrov

Marcelo Kohen
Subject to his dissenting opinion

Juan Fernández-Armesto
(Chairman)