INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ACF RENEWABLE ENERGY LIMITED

Claimant

and

REPUBLIC OF BULGARIA

Respondent

ICSID Case No. ARB/18/1

DECISION ON THE *ACHMEA* PRELIMINARY OBJECTION

Members of the Tribunal
Judge Bruno Simma, President
Mr. Oscar Garibaldi, Arbitrator
Professor Pierre Mayer, Arbitrator

Assistant to the Tribunal
Mr. Jan Ortgies

Secretary of the Tribunal
Ms. Celeste E. Salinas Quero

Date of dispatch to the Parties: 20 December 2019

REPRESENTATION OF THE PARTIES

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SELECT TABLE OF ABBREVIATIONS/DEFINED TERMS

22 Member State Declaration	RL-149, 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 dated 15 January 2019
ACF or Claimant	ACF Renewable Energy Limited, a company incorporated under the laws of the Republic of Malta
Achmea Judgment	The judgment of 6 March 2018 of the CJEU in *Slovak Republic v. Achmea B.V.* Case C-284/16
Achmea Objection	The Respondent's objection to jurisdiction based on the *Achmea* Judgment.
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006
Bulgaria or Respondent	Republic of Bulgaria
C-[#]	Claimant's Exhibit
CJEU	Court of Justice of the European Union
CL-[#]	Claimant's Legal Authority
Claimant's Counter-Memorial	Claimant's Counter-Memorial on the *Achmea* Preliminary Objection dated 22 March 2019
Claimant's Letter	Letter from Claimant to the Tribunal dated 15 August 2018
Claimant's Rejoinder	Claimant's Rejoinder on the *Achmea* Preliminary Objection dated 5 July 2019
Claimant's Response	Claimant's Response to Bulgaria's Request for Bifurcation dated 31 August 2018
Contracting Party	A contracting party to the ECT as defined therein. Also referred to as Contracting Party to the ECT.

Denial-of-Benefits Objection	The Respondent's objection that the advantages of Part III of the ECT are denied to Claimant pursuant to ECT Article 17(1)
EC's Application	EC's Application for Leave to intervene as a Non-Disputing Party pursuant to Rule 37(2) dated 22 November 2018
EC's Submission	EC's written submission pursuant to ICSID Arbitration Rule 37(2) dated 22 March 2019
ECT	Energy Charter Treaty
EU	European Union
EU Treaties	The TEU and the TFEU
Five Member State Declaration	RL-152, Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union dated 16 January 2019
Hearing	Hearing on the *Achmea* issue held on 23 and 24 July 2019 in Washington, D.C.
Hearing Transcript, Day [#], [date], p. [#]	Transcript of the Hearing on the *Achmea* issue
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Member State	A State that is a member of the EU. Also referred to as Member State of the EU or EU Member State.
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Request for Arbitration	Request for Arbitration submitted by the Claimant on 7 February 2018

Respondent's Brief	Respondent's Submission in Support of a Separate Preliminary Objections Phase dated 24 August 2018
Respondent's Letter	Letter from the Respondent to the Tribunal dated 6 August 2018
Respondent's Comments	Respondent's comments dated 17 September 2018
Respondent's Memorial	Respondent's Memorial on the *Achmea* Preliminary Objection dated 14 December 2018
Respondent's Reply	Respondent's Reply on the *Achmea* Preliminary Objection dated 14 May 2019
Svalbard Treaty	The Treaty recognising the sovereignty of Norway over the Archipelago of Spitsbergen signed at Paris on 9 February 1920
TEU	The Treaty on European Union, originally signed at Maastricht on 7 February 1992
TFEU	The Treaty on the Functioning of the European Union, originally signed at Rome on 23 March 1957
Tribunal	The Arbitral Tribunal in this case as constituted on 1 June 2018
UNCLOS	The United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982
VCLT	Vienna Convention on the Law of Treaties signed at Vienna on 23 May 1969

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty of 17 December 1994, which entered into force for the Republic of Bulgaria on 16 April 1998 and for the Republic of Malta on 28 August 2001 (the "**ECT**"),[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). The ICSID Convention Arbitration Rules of 10 April 2006 (the "**Arbitration Rules**") apply to these proceedings.

2. The Claimant is ACF Renewable Energy Limited ("**ACF**" or the "**Claimant**"), a company incorporated under the laws of the Republic of Malta.

3. The Respondent is the Republic of Bulgaria ("**Bulgaria**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to in this Decision as the "**Parties**", and the term "**Party**" is used to refer to either the Claimant or the Respondent. The Parties' representatives and their addresses are listed above on page (i).

5. The dispute relates to the Respondent's alleged failure to fulfil legislative and regulatory commitments it made relative to a photovoltaic facility of the Claimant, which in the view of the Claimant constitutes breaches of Articles 10 and 13 ECT.

6. This Decision deals with the Respondent's submission that the Tribunal lacks jurisdiction as a consequence of the application to this case of the judgment of 6 March 2018 of the Court of Justice of the European Union (the "**CJEU**") in *Slovak Republic v. Achmea B.V.* Case C-284/16 (hereinafter the "***Achmea* Judgment**", and the objection to jurisdiction based thereon the "***Achmea* Objection**").[2]

7. This Decision will first set forth the procedural history of the case thus far, followed by a presentation of the legal texts which are relevant in the view of the Tribunal and a summary of the submissions of the Parties and the European Commission's non-disputing party submission of 22 March 2019 (the "**EC's Submission**"). Thereafter, the Tribunal will analyse the issues and arguments concerning its jurisdiction and the *Achmea* Objection, after which the Tribunal will deal with the issue of costs, and will conclude with the Tribunal's Decision.

[1] Request for Arbitration, paras. 51 and 55.

[2] Respondent's Brief, para. 23; Respondent's Letter of 6 August 2018 (hereinafter the "**Respondent's Letter**"), p. 3.

8. Given that the *Achmea* Objection is a purely legal objection and given that the factual background of the case has not been pleaded yet, no factual background can be presented, and none will be.

9. Terms defined in earlier Orders and Decisions in this case have the same meaning unless otherwise defined herein. The submissions of the Parties are summarised to the extent pertinent. The Tribunal will engage with the EC's Submission only to the extent that it relates or is relevant to arguments also made by one of the Parties.

10. The Parties are reminded that the Tribunal will take a straightforward approach to the resolution of this case. Where, for example, an argument has convinced the Tribunal, the Tribunal will not normally engage with other arguments that have been brought forward in favour of the same or a similar solution. In principle, the Tribunal will not discuss arguments of the Parties, or case law, which it did not find applicable or relevant. It may be assumed that the Tribunal has considered all arguments submitted to it, but that those arguments with which it has not engaged have been rejected or deemed irrelevant.

II. THE PROCEDURAL HISTORY

A. REGISTRATION AND CONSTITUTION OF THE TRIBUNAL

11. On 7 February 2018, ICSID received a request for arbitration submitted by the Claimant against Bulgaria, together with Exhibits C-001 to C-008, and supplemented by letter of 13 February 2018 (the "**Request for Arbitration**").

12. On 14 February 2018, the Secretary-General of ICSID registered the Request for Arbitration and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**ICSID Institution Rules**").

13. By letter of 13 March 2018, the Claimant reiterated its proposal on the method for constituting the arbitral tribunal, as it initially laid out in its Request for Arbitration. The Claimant invited the Respondent to respond and accept its renewed proposal by 23 March 2018.

14. On 17 April 2018, pursuant to Rule 2(3) of the ICSID Arbitration Rules, the Claimant informed the Secretary-General that it selected the formula provided in Article 37(2)(b) ICSID Convention to constitute the Tribunal. In accordance with Article 37(2)(b) ICSID Convention, the Tribunal would consist of three arbitrators, one appointed by each Party

(the "**co-arbitrators**"), and the third arbitrator, the President of the Tribunal, to be appointed by agreement of the Parties.

15. On 1 June 2018, in accordance with Rule 6(1) of the ICSID Arbitration Rules, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Tribunal is composed of Judge Bruno Simma, an Austrian and German national, President, appointed by agreement of the Parties; Mr. Oscar M. Garibaldi, an Argentine and United States national, appointed by the Claimant; and Professor Pierre Mayer, a French national, appointed by the Respondent. Ms. Celeste E. Salinas Quero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. First Session and Request for Bifurcation

16. On 6 August 2018, the Respondent notified the Tribunal of its objection to the Tribunal's jurisdiction/admissibility of the Claimant's claims based on the *Achmea* Objection and on the ground that the advantages of Part III of the ECT are denied to the Claimant pursuant to ECT Article 17(1) (the "**Denial-of-Benefits Objection**"). The Respondent noted that the Claimant did not agree with this position. In light of the Parties' disagreement, the Respondent filed a request to address the objections to jurisdiction as a preliminary question (the "**Request for Bifurcation**" or the "**Respondent's Letter**").

17. By letter of 15 August 2018, the Claimant denied that the Preliminary Objections were founded, and objected to the Request for Bifurcation (the "**Claimant's Letter**").

18. In accordance with ICSID Arbitration Rule 13(1), the Arbitral Tribunal held a first session with the Parties on 16 August 2018 via teleconference (the "**First Session**").

19. On 16 August 2018, at its First Session, the Tribunal determined, in consultation with the Parties, that the Parties would be allowed to submit additional briefs on the Request for Bifurcation. The additional briefs would be presented sequentially; the Respondent would submit its brief by 24 August 2018 and the Claimant would submit its brief by 31 August 2018.

20. On 24 August 2018, the Respondent filed a Submission in Support of a Separate Preliminary Objections Phase (the "**Respondent's Brief**"), together with Legal Authorities RL-001 to RL-040.

21. Following the First Session, on 29 August 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and confirming the appointment of Mr. Jan Ortgies as Assistant to the Tribunal. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules are those in effect from

10 April 2006, that the procedural language is English, and that the place of the proceedings is Washington, D.C.

22. On 31 August 2018, the Claimant submitted its response to the Respondent's Request for Bifurcation, together with Legal Authorities CL-001 to CL-030.

23. On 4 September 2018, the Claimant requested leave to submit into the case record, as an additional Legal Authority, a decision in *Vattenfall AB v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), dated 31 August 2018, on issues raised by the *Achmea* Judgment (the "***Vattenfall* Decision**").

24. On 6 September 2018, the Tribunal invited the Respondent to comment on the Claimant's request for leave to submit the *Vattenfall* Decision.

25. On 17 September 2018, the Respondent submitted comments on the *Vattenfall* Decision and informed the Tribunal that it does not oppose the admission of the *Vattenfall* decision into the record (the "**Respondent's Comments**").

26. On 2 October 2018, the Tribunal granted leave to submit the *Vattenfall* Decision into the case record.

27. On 11 October 2018, the Tribunal issued Procedural Order No. 2 and granted the Respondent's Request for Bifurcation in part. The Tribunal decided to address the *Achmea* Objection in a preliminary phase, finding that the objection is not intertwined with the merits of the case and, if granted, would dispose of the entirety of the case. Also, the Tribunal considered that, *prima facie*, the objection presents a substantial question of law that requires a thorough analysis. The Tribunal recognized that multiple tribunals have rejected objections to jurisdiction based on intra-EU considerations, but most of those decisions were rendered before the *Achmea* Judgment.

28. The Respondent's Denial-of-Benefits Objection was joined to the merits phase, if any. The Tribunal considered, *inter alia*, that the evidence required for determining the nationality and the business activities of the Claimant in Malta would likely overlap. considerably with the evidence likely to be presented for the merits.

29. By communications of 31 October 2018, the Parties submitted to the Tribunal a joint proposal to hold a two-day hearing on the preliminary objection.

30. By letter of 8 November 2018, the Tribunal informed the Parties that the hearing on the preliminary objection would take place on 23 and 24 July 2019 at the World Bank facilities in Washington, D.C.

C. NON-DISPUTING PARTY APPLICATION

31. On 22 November 2018, the European Commission (the "**EC**" or "**Commission**") filed an Application for Leave to intervene as a Non-Disputing Party pursuant to Rule 37(2) (the "**EC's Application**").

32. On 27 November 2018, the Tribunal invited the Parties to submit comments on the European Commission's Application by 4 December 2018.

33. On 4 December 2018, the Claimant submitted its observations on the European Commission's Application, together with Legal Authorities CL-031 to CL-047.

34. On the same date, the Respondent submitted its observations on the European Commission's Application. The Respondent's letter included the Parties agreed-upon proposed procedural calendar.

35. By letter of 12 December 2018, the Claimant confirmed its agreement to the procedural calendar appended to Respondent's letter of 4 December 2018.

36. On 16 January 2019, the Tribunal issued Procedural Order No. 3 on the European Commission's Application. The Tribunal granted the European Commission's request for leave to file a written submission with respect to the issue of alleged lack of jurisdiction, upon the finding that the request met the criteria of ICSID Arbitration Rule 37(2). The Tribunal instructed the Parties to file their respective comments on the European Commission's upcoming submission in their Reply and Rejoinder on Preliminary Objections, respectively due on 10 May and 28 June 2019.

37. On 22 March 2019, the European Commission filed its written submission pursuant to ICSID Arbitration Rule 37(2) (the "**EC's Submission**"), together with annexes EC-1 to EC-8.

D. PARTIES' WRITTEN SUBMISSIONS

38. On 14 December 2018, the Respondent submitted its Memorial on the *Achmea* Preliminary Objection (the "**Respondent's Memorial**"), together with Legal Authorities RL-041 to RL-104.

39. On 22 March 2019, the Claimant submitted its Counter-Memorial on the *Achmea* Preliminary Objection (the "**Claimant's Counter-Memorial**"), together with Exhibits C-009 to C-013 and Legal Authorities CL-048 to CL-059.

40. By communications of 8 May 2019, the Parties jointly proposed to amend the procedural calendar and to extend the time for the filing of Respondent's Reply on the *Achmea*

Preliminary Objection until 14 May 2019 and for the filing of Claimant's Rejoinder on the *Achmea* Preliminary Objection until 5 July 2019.

41. On 10 May 2019, the Tribunal approved the Parties' proposed amendment to the procedural calendar.

42. On 14 May 2019, the Respondent submitted its Reply on the *Achmea* Preliminary Objection (the "**Respondent's Reply**"), together with Legal Authorities RL-105 to RL-152.

43. On 6 July 2019, the Claimant submitted its Rejoinder on the *Achmea* Preliminary Objection (the "**Claimant's Rejoinder**"), together with Exhibit C-014 and Legal Authorities CL-060 to CL-071.

44. On 9 July 2019, the Claimant submitted a corrected version of Legal Authority CL-52, originally filed along with its Counter-Memorial, and a complete translation of Legal Authority CL-65, originally filed along with its Rejoinder on *Achmea*.

45. On 19 July 2019, the Claimant requested leave to add to the record Legal Authorities CL-72 and CL-73. On the same date, the Respondent confirmed its agreement with the Claimant's request.

46. On 22 July 2019, the Tribunal approved the addition into the record of Legal Authorities CL-72 and CL-73.

E. HEARING ON THE *ACHMEA* PRELIMINARY OBJECTION

47. By letter of 4 June 2019, the Tribunal invited the Parties to submit a joint proposal for the agenda of the upcoming hearing on the preliminary objection by 8 July 2019. The Parties were further invited to indicate whether it was necessary for the Tribunal and the Parties to hold the pre-hearing organisational meeting scheduled for 17 July 2019.

48. On 8 July 2019, the Parties submitted their joint proposal on the agenda for the hearing and confirmed that it was not necessary to hold the pre-hearing organisation meeting.

49. On 12 July 2019, the Tribunal issued Procedural Order No. 4, adopting the Parties' agreements for the organisation of the hearing on the preliminary objection.

50. On 23 and 24 July 2019, a hearing on the *Achmea* Objection was held at the World Bank facilities in Washington, D.C. (the "**Hearing**"). In addition to the Members of the Tribunal, the Secretary of the Tribunal, and the Assistant to the Tribunal, the following persons were present at the Hearing:

For the Claimant:
Counsel:

Mr. Kenneth Fleuriet	King & Spalding LLP
Ms. Jessica Beess und Chrostin	King & Spalding LLP
Mr. Kostadin Sirleshtov	CMS Cameron McKenna Nabarro Olswang LLP. – Bulgaria Branch/Duncan Weston

For the Respondent:
Counsel:

Mr. Petr Polášek	White & Case LLP
Mr. Andrei Popovici	White & Case LLP
Ms. Raquel Martinez Sloan	White & Case LLP
Mr. Volodymyr Ponomarov	White & Case LLP
Mr. Daniel Shults	White & Case LLP
Ms. Nuha Hamid	White & Case LLP
Ms. Sylvia Steeva	Tomov & Tomov
Ms. Yoana Yovnova	Tomov & Tomov

Parties:

Mr. Ivan Kondov	Ministry of Finance, Republic of Bulgaria

Court Reporter:
Mr. Alan Peacock

51. During the Hearing, the Parties submitted the following demonstrative exhibits:

From Claimant

- Claimant's Opening Presentation (unnumbered)
- Hard copies of excerpts of CL-72 (paras. 155-164), CL-23 (paras. 458-468), CL-48 (paras. 395-403), CL-63 (paras. 174-176), and page 86 of Claimant's Opening Presentation.

From Respondent

- Respondent's Opening Presentation (unnumbered), and
- Respondent's Closing Presentation (unnumbered)

52. On 24 July 2019, on Day 2 of the Hearing, the Tribunal informed the Parties, in accordance with § 23.1 of Procedural Order No. 1, that no Post-Hearing Memorials should be filed.

53. On 1 August 2019, the Tribunal notified the Parties that in light of the expected date for the issuance of a ruling on the matters recently dealt with at the Hearing, the Tribunal vacated the June and July 2020 dates it had reserved in the event of a potential hearing on the merits. Further, in the event the case proceeded on the merits following the present bifurcated phase, the Tribunal would revert to the Parties regarding the procedural calendar.

III. THE RELEVANT LEGAL TEXTS

54. The Tribunal has found the legal texts and the parts of the *Achmea* Judgment set forth below relevant for its analysis.

55. The Tribunal has taken note of the Respondent's correct statement that Malta acceded to the VCLT after it acceded to both the ECT and the EU.[3] The Respondent is also correct in concluding that, in accordance with Article 4 VCLT, the VCLT can thus not directly apply to the analysis of the ECT and the EU Treaties as between Malta and Bulgaria. Nevertheless, the Tribunal shares the Respondent's view that the relevant provisions of the VCLT, to the extent that they are needed in this particular case, most closely represent the relevant customary international law and the relevant international principles of treaty interpretation.[4]

56. The Tribunal therefore still sees value in allowing arguments based on articles of the VCLT and in testing arguments, submissions, and interpretations against the articles contained therein. The relevant Articles are therefore set forth below and used and applied in the Tribunal's analysis, albeit subject to the disclaimer of "indirect" application. The Tribunal notes that neither Party, nor the European Commission, seems to have attached any consequences to Malta's late accession to the VCLT, and further notes that references to, and arguments based on articles, and even sub-paragraphs, of the VCLT are omnipresent in all submissions.[5]

A. THE ICSID CONVENTION

57. Article 25 ICSID Convention is situated in its Chapter II on "Jurisdiction of the Centre" and reads:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State

[3] Respondent's Memorial, fn. 6.

[4] Respondent's Memorial, fn. 6. See also Claimant's Rejoinder, fn. 41.

[5] The Respondent even refrains from making the argument when discussing ECT States that are not parties to the VCLT. See Respondent's Reply, fn. 93.

> (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
>
> (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

58. Article 41 ICSID Convention reads:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

B. THE ECT

59. Article 1(2) ECT reads:

> "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.

60. Article 1(6) ECT reads:

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

61. Article 1(7) ECT reads:

> "Investor" means:
>
> (a) with respect to a Contracting Party:
>
> > (i) a natural person having the citizenship. or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
> >
> > (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;
>
> (b) with respect to a "third state", a natural person, company or other organisation which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

62. Article 1(10) ECT reads:

> "Area" means with respect to a state that is a Contracting Party:
>
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
>
> (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.
>
> With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.

63. Article 16 ECT reads:

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

> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
>
> where any such provision is more favourable to the Investor or Investment.

64. Part III of the ECT is titled "Investment Promotion and Protection" and Part V of the ECT is titled "Dispute Settlement".

65. Article 26 ECT reads:

> Article 26 Settlement of Disputes between an Investor and a Contracting Party
>
> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor

has previously submitted the dispute under subparagraph (2)(a) or (b).[6]

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United

[6] This includes Bulgaria.

Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship. or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

66. Article 42 ECT reads:

Article 42 Amendments

(1) Any Contracting Party may propose amendments to this Treaty.

(2) The text of any proposed amendment to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.

(3) Amendments to this Treaty, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depositary which shall submit them to all Contracting Parties for ratification, acceptance or approval.

(4) Instruments of ratification, acceptance or approval of amendments to this Treaty shall be deposited with the Depositary. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after deposit with the Depositary of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

67. Article 46 ECT reads:

No reservations may be made to this Treaty.

C. THE *ACHMEA* JUDGMENT

68. The reasoning of the CJEU in the *Achmea* Judgment reads in the relevant part:

31 By its first and second questions, which should be taken together, the referring court essentially asks whether 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.

32 In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the 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 (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).

33 Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).

34 EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for

those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).

35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).

36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 175; and judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 33).

37 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up. a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

38 The first and second questions referred for a preliminary ruling must be answered in the light of those considerations.

39 It must be ascertained, first, whether the disputes which the arbitral tribunal mentioned in Article 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law.

40 Even if, as Achmea in particular contends, that tribunal, despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that

in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.

41 Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.

42 It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

43 It must therefore be ascertained, secondly, whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up. by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 82 and the case-law cited).

44 In the case in which judgment was given on 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754), the Court derived the status of 'court or tribunal of a Member State' of the tribunal in question from the fact that the tribunal as a whole was part of the system of judicial resolution of tax disputes provided for by the Portuguese constitution itself (see, to that effect, judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754), paragraphs 25 and 26).

45 In the case in the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. Indeed, it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.

46 That characteristic of the arbitral tribunal at issue in the main proceedings means that it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

47 The Court has indeed held that there is no good reason why a court common to a number of Member States, such as the Benelux Court of Justice, should not be able to submit questions to the Court for a preliminary ruling in the same way as the courts or tribunals of any one of the Member States (see, to that effect, judgments of 4 November 1997, *Parfums Christian Dior*, C-337/95, EU:C:1997:517, paragraph 21, and of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 40).

48 However, the arbitral tribunal at issue in the main proceedings is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step. in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules, the arbitral tribunal at issue in the main proceedings does not have any such links with the judicial systems of the Member States (see, to that effect, judgment of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 41).

49 It follows that a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.

50 In those circumstances, it remains to be ascertained, thirdly, whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.

51 It should be noted that under Article 8(7) of the BIT the decision of the arbitral tribunal provided for in that article is final. Moreover, pursuant to Article 8(5) of the BIT, the arbitral tribunal is to determine its own procedure applying the UNCITRAL arbitration rules and, in particular, is itself to choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it.

52 In the present case, the arbitral tribunal applied to by Achmea chose to sit in Frankfurt am Main, which made German law applicable to the procedure governing judicial review of the validity of the arbitral award made by the tribunal on 7 December 2012. It was thus that choice which enabled the Slovak Republic, as a party to the dispute, to seek judicial review of the arbitral award, in

accordance with German law, by bringing proceedings to that end before the competent German court.

53 However, such judicial review can be exercised by that court only to the extent that national law permits. Moreover, Paragraph 1059(2) of the Code of Civil Procedure provides only for limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award.

54 It is true that, in relation to commercial arbitration, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 35, 36 and 40, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraphs 34 to 39).

55 However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34), disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.

56 Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by 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.

57 It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183).

58 In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. 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.

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

60 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.

…

62 …

> On those grounds, the Court (Grand Chamber) hereby rules:
>
> 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.

D. THE VIENNA CONVENTION ON THE LAW OF TREATIES

69. Article 4 VCLT reads:

> Non-Retroactivity of the present Convention
>
> Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

70. Article 30 VCLT reads:

> 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.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

71. Article 31 VCLT reads:

General rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

72. Article 32 VCLT reads:

> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

73. Article 40 VCLT reads:

> Amendment of multilateral treaties
>
> 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
>
> 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
>
> (a) the decision as to the action to be taken in regard to such proposal;
>
> (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
>
> 3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
>
> 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(6), applies in relation to such State.
>
> 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
>
> (a) be considered as a party to the treaty as amended; and
>
> (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

74. Article 41 VCLT reads:

> Agreements to modify multilateral treaties between certain of the parties only
>
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> > (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> >
> > (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph l(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

75. Article 58 VCLT reads:

> Suspension of the operation of a multilateral treaty by agreement between certain of the parties only
>
> 1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
>
> (a) the possibility of such a suspension is provided for by the treaty; or
>
> (b) the suspension in question is not prohibited by the treaty and:
>
> > (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> >
> > (ii) Is not incompatible with the object and purpose of the treaty.

> 2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

IV. THE ARGUMENTS OF THE PARTIES

A. THE RESPONDENT'S POSITION

(1) The Respondent's Position on Jurisdiction

76. The Respondent raises two objections to the jurisdiction of the Tribunal: the *Achmea* Objection, to be dealt with in this Decision, and the Denial-of-Benefits Objection on the basis of Article 17 ECT (as defined in the Tribunal's decision on Bifurcation of 11 October 2018), to be dealt with in the merits phase of this case.[7] The Respondent does not further engage with the Claimant's factual submissions on its fulfilment of the conditions of Article 26 ECT and Article 25 ICSID Convention. Instead, the Respondent begins its line of reasoning with arguments on the influence on the Tribunal's jurisdiction of the *Achmea* Judgment and the supremacy of EU law.[8]

77. Nevertheless, in response to the Claimant's argument that an analysis of Article 26 ECT and Article 25 ICSID Convention is sufficient to establish jurisdiction, the Respondent counters with the tribunal in *ČSOB v. Slovak Republic* that "[t]he question of whether the parties have effectively expressed their consent to ICSID jurisdiction ... is governed by international law as set out in Article 25(1) of the ICSID Convention."[9] Therefore, according to the Respondent, any subsequent separate agreement between parties to a treaty must be given meaningful effect, independent of whether the earlier treaty contained a closed list of exceptions, prohibited reservations, or regulated its amendment or termination.[10] In the view of the Respondent, the question before the Tribunal is not about the meaning of Article 26 ECT and Article 25 ICSID Convention, but "[…] whether they are applicable in light of the agreement between Malta and Bulgaria in the EU Treaties."[11]

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[7] Respondent's Letter; Procedural Order No. 2.

[8] Respondent's Memorial, para. 5.

[9] Respondent's Reply, para. 19; RL-43, *Československá obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 35 ("***ČSOB v. Slovak Republic***"). See also Slide 2 of the Respondent's Hearing Presentation Day 1, 23 July 2019.

[10] Respondent's Reply, paras. 19, 20. See also Respondent's Reply, para. 56.

[11] Hearing Transcript, Day 1, 23 July 2019, p. 12; Hearing Transcript, Day 2, 24 July 2019, p. 233.

(2) The Respondent's Position on the Influence and Impact of the *Achmea* Judgment

a. The EU Treaties as the pertinent "Master Treaties"

78. The Respondent, in its main argument, submits that the question whether the Tribunal has jurisdiction is to be resolved by application of the relevant provisions of the ECT and the ICSID Convention, together with rules and principles of international law. According to the Respondent, the latter mentioned rules and principles of international law, not least on the basis of Article 26(6) ECT,[12] include "the international agreement among EU Member States, including Bulgaria and Malta, in the EU Treaties … to subordinate their other mutual treaty undertakings to the EU Treaties" and to grant the CJEU "the authority in the final instance to rule *erga omnes* and with an *ab initio* effect upon the meaning of the EU Treaties, including the compatibility of intra-EU treaty undertakings with the EU Treaties".[13] (On the meaning of "*ab initio effect*" see below under "m").

79. The Respondent submits that such a hierarchical arrangement of norms *inter se*, *e.g.* through an agreement on and the identification of a "master" treaty, is in accordance with international law, among which Article 5 VCLT.[14] In the Respondent's view, the arrangements in place mean that there is an explicit agreement among EU Member States that all their treaty undertakings are inapplicable in case the CJEU finds them incompatible with the EU Treaties.[15]

80. As an example of such hierarchical arrangements of treaty norms, the Respondent submits that in the *Lockerbie* case, the ICJ's jurisdiction was based on the Montreal Convention and that the Montreal Convention comprehensively regulated the issues in question, but that the ICJ nevertheless used and applied the UN Charter to find that parts of the Montreal Convention were not applicable.[16]

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[12] Respondent's Reply, para. 39; Hearing Transcript, Day 1, 23 July 2019, pp. 88ff; Hearing Transcript, Day 2, 24 July 2019, pp. 241-252.

[13] Respondent's Memorial, paras. 3, 5-22; Respondent's Reply, paras. 2ff; 71; Hearing Transcript, Day 1, 23 July 2019, pp. 11-63.

[14] Respondent's Memorial, para. 53; Respondent's Reply, para. 71; Hearing Transcript, Day 1, 23 July 2019, pp. 14ff. The Respondent presents its argument on Article 5 VCLT as a third alternative argument. Nevertheless, the Tribunal views the argument logically as part of the Respondent's main argument on the hierarchy of norms and has dealt with it as such.

[15] Hearing Transcript, Day 1, 23 July 2019, pp. 207-213.

[16] Hearing Transcript, Day 2, 24 July 2019, p. 235; Hearing Transcript, Day 1, 23 July 2019, pp. 16-17; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United Kingdom*), Provisional Measures, Order, 14 April 1992, ICJ Reports 1992, p. 3.

b. The Achmea *Judgment*

81. The Respondent submits that the *Achmea* Judgment "confirmed with final, binding effect that investor-State arbitration provisions in intra-EU treaties have been precluded by, or [are] incompatible with, the TFEU."[17] According to the Respondent, the *Achmea* Judgment carries particular weight as it was rendered by the Grand Chamber of the CJEU, including its President,[18] and because the CJEU made it clear that its decision pertained to the core constitutional principles of the EU and its legal system.[19]

82. The Respondent submits that the CJEU was especially concerned that an investment treaty tribunal may be called to interpret or apply EU law and that the decisions of such a tribunal would not be subject to sufficient judicial review by EU Member State courts.[20] The Respondent further submits that the same concern must apply whether the underlying investment treaty is bilateral or multilateral, like the ECT,[21] and that, in fact, the CJEU in the *Achmea* Judgment did not differentiate between bilateral and multilateral investment treaties and notably relied on its prior opinions concerning multilateral treaties.[22]

83. The Respondent adds that, in contrast with the *Achmea v. Slovakia* arbitration that underlies the *Achmea* Judgment, the "self-contained nature of arbitration under the ICSID Convention" and its limited post-award remedies even further remove the present case from the EU's system of judicial remedies.[23]

c. The necessity to apply EU law

84. The Respondent argues that it is highly likely that the Tribunal may be called upon to interpret or apply EU law (i) because the Claimant's claims pertain in significant part to the Respondent's implementation of EU directives and (ii) because the field of incentives for the production of electricity from renewable energy sources as well as questions of State aid are concerned.[24]

85. The Respondent adds that, contrary to the Claimant's assertions, the basis on which the Tribunal would be able to apply EU law and the likelihood that it will have to apply EU

[17] Respondent's Memorial, para. 23.

[18] Respondent's Memorial, para. 23.

[19] Respondent's Reply, para. 25; Respondent's Memorial, para. 26; Hearing Transcript, Day 1, 23 July 2019, pp. 64-65.

[20] Respondent's Memorial, paras. 27-30; Hearing Transcript, Day 1, 23 July 2019, pp. 65-68.

[21] Respondent's Memorial, paras. 33ff.

[22] Respondent's Reply, para. 25.

[23] Respondent's Memorial, para. 38; Hearing Transcript, Day 1, 23 July 2019, p. 68.

[24] Respondent's Memorial, para. 36; Respondent's Reply, para. 48; Hearing Transcript, Day 1, 23 July 2019, pp. 90-91; Hearing Transcript, Day 2, 24 July 2019, pp. 264-268.

law, are no different from what they were for the tribunal in the *Achmea v. Slovakia* arbitration.[25]

d. The effect of a finding of incompatibility

86. The Respondent submits that "several" investment treaty tribunals have confirmed that in case of incompatibility of investment treaty arbitration provisions and EU law, EU law would prevail.[26] Most notably, the tribunal in *Electrabel v. Hungary* stated that "EU law would prevail over the ECT in case of any material inconsistency".[27] The Respondent also refers to the CJEU judgment in the *Mox Plant* Case as an example of how a dispute resolution mechanism established under another international legal order, *i.e.* UNCLOS, can be found incompatible with EU law, and be subjected and subordinated to EU law and a judgment of the CJEU, and how the fact that the EU itself is a party to that latter order does not change that.[28]

e. The concept of bundles of bilateral rights and obligations

87. In support of its argument that Article 26 ECT is subject to the *Achmea* Judgment, and in order to alleviate concerns about a detrimental effect to other ECT Contracting Parties of a varying bilateral application of that Article, the Respondent argues that the arbitration provisions of the ECT have the character of "a bundle of pairs of bilateral rights and obligations" between the Contracting Parties rather than being obligations *erga omnes partes*.[29] The *Achmea* Judgment could and would therefore apply to the ECT arbitration clause even if the judgment only applied to arbitration provisions in bilateral investment treaties, and other ECT Contracting Parties would not, and could not claim to be affected by how the arbitration clause of the ECT is applied and interpreted between Malta and Bulgaria.[30] The Respondent adds that there is no provision in the ECT or the VCLT or public international law "that would require a treaty to have the same uniform meaning with respect to all the parties."[31]

88. Equally relying on the theory of bundles of bilateral rights and obligations, the Respondent submits that there are multilateral treaties that advance common interests and/or contain

[25] Respondent's Reply, para. 38.

[26] Respondent's Memorial, paras. 49, 43.

[27] Respondent's Memorial, paras. 49, 43; RL-50, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.191 ("***Electrabel v. Hungary***").

[28] Respondent's Reply, paras. 28, 32, 54; RL-116, *Commission v. Ireland* ("*MOX Plant*"), Case C-459/03, Judgment of 30 May 2006 (hereinafter the "***Mox Plant* Case**").

[29] Respondent's Reply, para. 26, fn. 91; Hearing Transcript, Day 1, 23 July 2019, pp. 97-98; Hearing Transcript, Day 2, 24 July 2019, pp. 240-241.

[30] Hearing Transcript, Day 1, 23 July 2019, pp. 97-99.

[31] Hearing Transcript, Day 1, 23 July 2019, p. 97; Respondent's Reply, para. 46, fn. 91.

erga omnes obligations on the one hand, and multilateral treaties that are bundles of bilateral rights and obligations, as a matter of convenience, such as the ECT, on the other hand. A State that is party to both kinds of treaties would *vis-à-vis* other States in the same situation normally be bound by the treaty advancing common interests, rather than by the treaty which only includes bilateral rights, and in any case, breaches of the common interest treaty would be worse, or more far-reaching, than breaches of the bilateral rights treaty.[32]

f. The Respondent's conclusion on the impact of the Achmea *Judgment*

89. In conclusion, the Respondent argues that in light of the above-mentioned subordination of all other treaty undertakings and the authority of the CJEU, and as a consequence of the application of the *Achmea* Judgment to the present case, the Tribunal lacks jurisdiction, since the Respondent's offer of arbitration in Article 26 ECT, with effect from Bulgaria's accession to the EU on 1 January 2007, cannot be applied *vis-à-vis* the Claimant and there is therefore no arbitration agreement between the Parties.[33]

g. The Respondent's alternative argument based on Article 30 VCLT

90. As an alternative ground, the Respondent submits that, according to Article 30(4)(a) in connection with Article 30(3) VCLT, in case of successive treaties relating to the same subject matter and concluded between two or more parties that are party to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[34] The Respondent adds that because both Bulgaria and Malta acceded to the EU *after* they had acceded to the ECT, the ECT is the earlier treaty *vis-à-vis* the TFEU.[35] The Respondent further submits that the treaties in question relate to the same subject matter as both regulate investor-State arbitration, the earlier allowing for it, and the later, according to the *Achmea* Judgment, prohibiting it.[36] As a consequence, according to the Respondent, once Bulgaria and Malta acceded to the EU, Article 26 ECT could not apply between them anymore.[37]

h. The Respondent's alternative argument based on Article 58 VCLT

91. As a second alternative, the Respondent submits that "one might conclude" that Bulgaria and Malta "impliedly" suspended Article 26 ECT between themselves in the sense of

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[32] Hearing Transcript, Day 1, 23 July 2019, pp. 19ff.

[33] Respondent's Memorial, paras. 4, 40-45; Respondent's Reply, paras. 2, 12-13; Respondent's Brief, para. 23; Respondent's Letter, p. 3.

[34] Respondent's Memorial, para. 46; Hearing Transcript, Day 2, 24 July 2019, p. 316.

[35] Respondent's Memorial, para. 47; Hearing Transcript, Day 1, 23 July 2019, p. 47.

[36] Respondent's Memorial, para. 48; Respondent's Reply, paras. 67-69.

[37] Respondent's Memorial, para. 51; Respondent's Reply, para. 69.

Article 58 VCLT, arguably through the conclusion of a treaty inconsistent with the earlier treaty.[38]

i. The declarations of the EU Member States

92. The Respondent notes that many Member States of the European Union have invoked the same objection in investor-State arbitrations,[39] and that the European Commission is of the opinion that Article 26 ECT, as arbitration clause, is not applicable between investors from a Member State of the EU and another Member State of the EU.[40] The Respondent notes that 22 Member States of the EU, including Bulgaria, but not Malta, have expressed their support of that view in a joint declaration of 15 January 2019, concerning the legal consequences of the *Achmea* Judgment and investment protection in the European Union (the "**22 Member State Declaration**"), in which they state that:

> Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied. [footnotes omitted][41]

93. The Respondent points out that in footnote 2 of that declaration, the 22 Member States conclude that:

> For the Energy Charter Treaty, its systemic interpretation in conformity with the Treaties precludes intra-EU investor-State arbitration.[42]

94. The Respondent submits that Malta did not disagree with that view, but, in its declaration together with four other EU Member States of 16 January 2019 (the "**Five Member State Declaration**") only argued that pending litigation on the topic, and in the absence of a

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[38] Respondent's Memorial, para. 52; Respondent's Reply, para. 70; Hearing Transcript, Day 2, 24 July 2019, pp. 233-234, 315. The Respondent presents a third "alternative" argument regarding Article 5 VCLT. Nevertheless, the Tribunal views the argument logically as part of the Respondent's main argument on the hierarchy of norms and as such has dealt with it and presented it under that header; Respondent's Memorial, para. 53, Respondent's Reply, para 71.

[39] Respondent's Letter, pp. 3-4; Respondent's Brief, para. 27.

[40] Respondent's Letter, pp. 3-4; Respondent's Reply, para. 77.

[41] Respondent's Reply, para. 72; RL-149, 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 dated 15 January 2019 (hereinafter the "**22 Member State Declaration**"), p. 2.

[42] Respondent's Reply, para. 72; RL-149, 22 Member State Declaration, p. 2.

specific judgment on the matter, it would be inappropriate to express views about the compatibility of EU law with the intra-EU application of the ECT.[43]

j. The relevance of the existing case law

95. The Respondent argues that the significance of the awards that dealt with objections based on the *Achmea* Judgment in cases based on the ECT is limited.[44] According to the Respondent, most of the decisions predate the *Achmea* Judgment and none of them "have provided a systematically and conceptually coherent analysis of the primary basis of Bulgaria's objection".[45] According to the Respondent, many of the decisions are subject to pending annulment or set-aside proceedings.[46]

k. The absence of a disconnection clause

96. In response to the Claimant's reliance on the absence of a disconnection clause, the Respondent acknowledges that the EU suggested to include such a clause in the draft of the ECT but that no disconnection clause was included.[47] The Respondent submits, however, that a treaty without a disconnection clause is not "*ipso facto*" compatible with the EU Treaties and that compatibility, and supremacy, as decided by the CJEU, does not depend on the existence of such a clause.[48] The Respondent further submits, providing examples, that the CJEU has found provisions in "various" other multilateral treaties without a disconnection clause incompatible with EU law as between or among the EU Member States, including, for example, provisions in UNCLOS.[49]

l. Article 16 ECT

97. Turning to Article 16 ECT, the Respondent calls into question whether the Article represents a "conflicts provision" and argues that the Article would rather contain an "interpretation guideline", meaning that the Article is a guideline for tribunals that requires them to choose the interpretation that is better for the investor when two treaties allow for

[43] Respondent's Reply, para. 75; RL-152, Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union dated 16 January 2019 (hereinafter the "**Five Member State Declaration**"), p. 3.

[44] Respondent's Brief, para. 25; Respondent's Comments, para. 4; Hearing Transcript, Day 2, 24 July 2019, pp. 259-261.

[45] Respondent's Reply, para. 14; Respondent's Memorial, fn. 80; Hearing Transcript, Day 1, 23 July 2019, pp. 48-49.

[46] Hearing Transcript, Day 1, 23 July 2019, p. 101.

[47] Respondent's Reply, para. 50.

[48] Respondent's Reply, para. 52; Respondent's Memorial, fn. 71. Hearing Transcript, Day 1, 23 July 2019, pp. 32-34; Hearing Transcript, Day 2, 24 July 2019, p. 263.

[49] Respondent's Reply, paras. 53-55. See above on the *Mox Plant* Case; Hearing Transcript, Day 1, 23 July 2019, pp. 91-94, 44ff; Slides 73, 29 of the Respondent's Hearing Presentation Day 1, 23 July 2019.

dispute resolution and investment protection, but cover a different scope.[50] In the view of the Respondent, Article 16 ECT cannot apply when one treaty requires what another treaty prohibits.[51] In addition, the Respondent argues that EU law is of such supremacy that it also supersedes a provision like Article 16 ECT.[52] In particular, even if Article 16 ECT dealt with conflicts of law, a provision like Article 16 ECT could not resurrect an invalid, incompatible provision.[53] Article 16 ECT cannot, according to the Respondent, let an unlawful provision trump a lawful provision, in particular when the lower, bilateral, provision, is in violation of a higher community norm.[54] Furthermore, if Article 16 ECT, were to be read as protecting Article 26 ECT from the *Achmea* Judgment, then, according to the Respondent, it would form an integral part of the arbitration clause of Article 26 ECT, and as such would share its fate under the *Achmea* Judgment.[55]

98. Regarding the question of which regime is more favourable in the sense of Article 16 ECT, the Respondent submits that in any case the European Commission seems to find the investment protections under the EU Treaties effective.[56]

99. Finally, as a matter of logic, the Respondent submits that if one agrees with the Claimant that the ECT and the TFEU do not cover the same subject matter when it comes to, for example, Article 30 VCLT, then one cannot also agree with the Claimant that the TFEU does concern the subject matter of Part III or V of the ECT in the sense of Article 16 ECT.[57]

m. The argument on* ab initio *effect

100. During the Hearing, prompted by questions of the Tribunal to illuminate the meaning of the "*ab initio*" effect of the *Achmea* Judgment, the Respondent argued that an interpretative judgment of the CJEU is not declaratory as to how the law has always been, but that it decides the law on the date of the judgment with retroactive effect, meaning that up until the date of a judgment the law is still open on the point in issue.[58] In that view, all treaty undertakings of EU Member States are potentially subject to CJEU incompatibility decisions at a later stage, and they are applicable only until the CJEU decides otherwise.

[50] Respondent's Reply, para. 59; Hearing Transcript, Day 1, 23 July 2019, pp. 94-96.

[51] Respondent's Reply, para. 59; Hearing Transcript, Day 1, 23 July 2019, pp. 95-96.

[52] Respondent's Reply, paras. 60-61; Respondent's Memorial, fn. 75; Hearing Transcript, Day 1, 23 July 2019, pp. 94ff; Hearing Transcript, Day 2, 24 July 2019, p. 262.

[53] Respondent's Reply, paras. 61-62; Hearing Transcript, Day 2, 24 July 2019, p. 263.

[54] Respondent's Reply, paras. 61-62; Hearing Transcript, Day 2, 24 July 2019, p. 263.

[55] Respondent's Reply, para. 63.

[56] Hearing Transcript, Day 2, 24 July 2019, pp. 268-271.

[57] Respondent's Reply, para. 64; Hearing Transcript, Day 1, 23 July 2019, p. 94; Hearing Transcript, Day 2, 24 July 2019, pp. 261-262.

[58] Hearing Transcript, Day 1, 23 July 2019, pp. 35-38.

Once there is a finding of incompatibility, the treaty undertaking in question is rendered inapplicable.[59]

(3) The Respondent's Position on the Tribunal's Judicial Function and the Enforceability of the Award

101. The Respondent argues that there would be no injustice in denying jurisdiction over the Claimant's claims.[60] According to the Respondent, the Claimant purports to be an EU company "that has made significant intra-EU investments" in "the EU-regulated area of renewable energy".[61] In such a case, "investment treaties are not insurance policies against ignorance of the EU Treaties and the EU legal system".[62]

102. The Respondent argues that the Tribunal should not be guided by considerations of fairness and the avoidance of a potential denial of justice, but by the hard letter of the law only.[63]

103. The Respondent adds that "if one considers that there is a duty to render an enforceable award that is part of the judicial function of the Tribunal", then it would be relevant that it is very likely that a non-ICSID award between the same Parties on the same issues would be unenforceable.[64] The Respondent acknowledges that the enforcement regime under the ICSID Convention is different, but refers to pending enforcement actions in *Masdar v. Spain*,[65] and three other cases where that premiss is tested.[66]

104. On the issue of whether an investor could sue Bulgaria in a Bulgarian court over a violation of the ECT, the Respondent submits that a claimant that files a claim for a breach of an ECT provision would have standing in Bulgarian courts but that it is not sure whether such a claimant could invoke the breach of an ECT provision, the answer to which will depend

[59] Hearing Transcript, Day 1, 23 July 2019, pp. 209-217.

[60] Respondent's Reply, para. 16.

[61] Respondent's Reply, para. 16.

[62] Respondent's Reply, para. 16; Hearing Transcript, Day 2, 24 July 2019, p. 274.

[63] Hearing Transcript, Day 2, 24 July 2019, pp. 272-274.

[64] Hearing Transcript, Day 2, 24 July 2019, pp. 276-278.

[65] CL-39, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (hereinafter "***Masdar***").

[66] Hearing Transcript, Day 2, 24 July 2019, pp. 278-279; Respondent's Reply, fn. 138; RL-145, *Foresight Luxembourg Solar 1 S.A.R.L. et al v. Kingdom of Spain*, Civil Docket for Case No. 1:19-cv-03171-ER, U.S. District Court, Southern District of New York, 10 April 2019; RL-146, *Infrastructure Services Luxembourg S.A.R.L. et al v. Kingdom of Spain*, Civil Docket for Case No. 1:18-cv-01753-EGS, U.S. District Court, District of Columbia, 27 July 2018; RL-147, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Civil Docket for Case No. 1:18-cv-02254-JEB, U.S. District Court, District of Columbia, 28 September 2018; RL-148, *Novenergia II – Energy & Environment (SCA) v. Kingdom of Spain*, Civil Docket for Case No. 1:18-cv-01148-TSC, U.S. District Court, District of Columbia, 16 May 2018.

on a direct-effect test by the respective court, inspired by the jurisprudence of the CJEU.[67] Nevertheless, the Respondent is confident that for example the prohibition of expropriation without compensation would be considered sufficiently precise.[68]

(4) The Respondent's Position on Costs

105. Regarding costs, the Respondent requests that the Tribunal order the Claimant to bear the costs of both Parties, the Tribunal, and ICSID.[69] The Respondent argues that the Tribunal's decision on bifurcation is evidence of the merit the Tribunal saw in a thorough treatment and analysis of the *Achmea* Objection and that that, in turn, must be evidence that the *Achmea* Objection cannot be characterized as frivolous.[70]

B. THE CLAIMANT'S POSITION

(1) The Claimant's Position on Jurisdiction

106. The Claimant argues that, in accordance with the most fundamental rule of treaty interpretation, an interpretation must start with the text of the treaty to be interpreted.[71] Therefore, the conditions stipulated in Article 26 ECT are the decisive criteria for the Tribunal when deciding on its jurisdiction.[72]

107. In its Request for Arbitration, the Claimant submits, with evidence, that it has satisfied the conditions of Article 26 ECT and Article 25 ICSID Convention.[73] The Claimant submits that the Respondent has not challenged its evidence.[74]

108. The Claimant concludes that because the conditions of Article 26 ECT are met, the Tribunal has jurisdiction.[75] According to the Claimant, based on the rules of treaty interpretation under the VCLT, only in cases where normal textual interpretation leads to a reading which is still ambiguous or obscure, or to a manifestly absurd or unreasonable

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[67] Hearing Transcript, Day 2, 24 July 2019, pp. 271-276.

[68] Hearing Transcript, Day 2, 24 July 2019, p. 280.

[69] Respondent's Memorial, para. 54; Respondent's Reply, para. 80.

[70] Respondent's Reply, para. 81.

[71] Claimant's Rejoinder on the *Achmea* Preliminary Objection, 5 July 2019 (hereinafter the "**Claimant's Rejoinder**"), paras. 7, 27; Hearing Transcript, Day 1, 23 July 2019, pp. 122-123.

[72] Claimant's Counter-Memorial, paras. 4ff, 67; Claimant's Letter of 15 August 2018 (hereinafter the "**Claimant's Letter**"), p. 4; Hearing Transcript, Day 1, 23 July 2019, pp. 122-123.

[73] Request for Arbitration, 7 February 2018, paras. 42-61; Claimant's Counter-Memorial on the *Achmea* Preliminary Objection, 22 March 2019 (hereinafter the "**Claimant's Counter-Memorial**"), para. 5.

[74] Claimant's Counter-Memorial, para. 5.

[75] Claimant's Counter-Memorial, paras. 4ff, 67; Claimant's Letter, p. 4.

reading, "may recourse be had to supplementary means of interpretation."[76] In the view of the Claimant, any subsequent interpretation of the ECT may not disregard the meaning which the Contracting Parties gave to the terms when they signed and ratified the ECT.[77]

109. The Claimant submits that the terms of the ECT are clear and still in force as originally drafted.[78] It argues that the text of the ECT does not specifically exclude intra-EU arbitration,[79] and does also not allow for such an exception.[80] The Claimant draws attention to the fact that the European Commission had tried to include a so called "disconnection clause" in the ECT, but failed to achieve that objective in the negotiations leading to the ECT.[81]

110. The Claimant points out that no Member State of the EU that is a Contracting Party to the ECT has yet invoked the amendment provisions of the ECT,[82] and submits, with respect to Articles 46 through 53 VCLT and the Articles on withdrawal and amendment of the ECT, that "neither the EU nor Bulgaria has invoked any of the relevant provisions."[83]

111. Based on the above, the Claimant concludes that if the Tribunal finds that it has jurisdiction on the basis of the ICSID Convention and the ECT, interpreted in accordance with the above principles, that must be the end of the inquiry.[84]

(2) The Claimant's Position on the Influence and Impact of the *Achmea* Judgment

a. The relevance of the existing case law

112. Regarding the impact of the *Achmea* Judgment, the Claimant states that no "ECT tribunal" has ever accepted an objection like the *Achmea* Objection and, to the contrary, a long line of investment treaty tribunals have rejected objections like the *Achmea* Objection.[85]

[76] Claimant's Rejoinder, para. 27.

[77] Claimant's Counter-Memorial, para. 77; Claimant's Rejoinder, para. 27; Claimant's Letter, p. 5.

[78] *E.g.*, Claimant's Counter-Memorial, paras. 33, 77.

[79] Claimant's Counter-Memorial, paras. 8-9; Claimant's Rejoinder, paras. 42-43; Claimant's Letter, p. 4; Hearing Transcript, Day 1, 23 July 2019, pp. 128-129.

[80] Hearing Transcript, Day 1, 23 July 2019, pp. 130, 133-134.

[81] Claimant's Rejoinder, paras. 48, 53-63, 70; Claimant's Counter-Memorial, paras. 10-12; Claimant's Letter, p. 5; Hearing Transcript, Day 1, 23 July 2019, pp. 141-142, 150-153.

[82] Claimant's Counter-Memorial, para. 32; Claimant's Rejoinder, para. 48; Hearing Transcript, Day 2, 24 July 2019, pp. 313-314.

[83] Claimant's Rejoinder, para. 183; Hearing Transcript, Day 2, 24 July 2019, pp. 313-314.

[84] Claimant's Rejoinder, paras. 27, 30.

[85] Claimant's Rejoinder, paras. 2ff, 172; Claimant's Counter-Memorial, paras. 34, paras. 82ff; Claimant's Letter, pp. 1, 2, 3, 5, 6, 7; Claimant's Response, para. 19; Claimant's letter of 4 September 2018, p. 2; Hearing Transcript, Day 1, 23 July 2019, pp. 112-119.

Of these decisions in the negative, at least 13 were made after the *Achmea* Judgment.[86] The Claimant notes that the Respondent has not submitted any decision by an arbitral tribunal which came to the conclusion that the ECT would exclude arbitration in intra-EU disputes.[87]

b. No incompatibility between the ECT and EU law

113. Regarding the merits of the *Achmea* Objection, the Claimant submits, as a preliminary matter, that there is no incompatibility between the ECT and EU law that could make an assessment whether the ECT or EU law takes precedence necessary.[88]

c. The impact of the* Achmea *Judgment

114. In case there were an incompatibility between the ECT and EU law, and in particular one that would affect Article 26 ECT, the Claimant submits, quoting the tribunal in *Eskosol*, that "the decisions of the CJEU with respect to EU law are not binding on an international investment tribunal empaneled under a different legal order."[89]

115. According to the Claimant, a court judgment, in particular when taken in another legal order, cannot be interpreted to be an act or procedural step by one or more parties to a treaty to invalidate, withdraw from, or amend such a treaty.[90] According to the Claimant, "[i]f the EU or Bulgaria want the ECT to say something different, they need to undertake the steps they agreed to undertake in the ECT in order to make that happen."[91]

116. The Claimant submits, in particular, that the Respondent has failed to establish that the EU Treaties enjoy supremacy over the ECT among parties to both, the EU Treaties and the ECT.[92] The Claimant adds that any such argument, be it on supremacy of the EU Treaties or the *Achmea* Judgment, is also irrelevant to an analysis of the actually relevant and clear provisions of the ECT and the ICSID Convention.[93]

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[86] Claimant's Rejoinder, para. 2; Claimant's Counter-Memorial, paras. 34, 82; Claimant's Letter, pp. 3, 5; Claimant's Response, para. 19; Claimant's letter of 4 September 2018, p. 2; Hearing Transcript, Day 1, 23 July 2019, p. 108.

[87] Claimant's Counter-Memorial, para. 34; Claimant's Response, para. 21.

[88] Claimant's Rejoinder, paras. 74-76; Hearing Transcript, Day 1, 23 July 2019, pp. 124, 156, 163-164; Hearing Transcript, Day 2, 24 July 2019, p. 300.

[89] Claimant's Rejoinder, paras. 174, 174-180; RL-110, *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, 7 May 2019 (hereinafter "***Eskosol***"), para. 178; Hearing Transcript, Day 1, 23 July 2019, p. 124.

[90] Claimant's Rejoinder, paras. 181-185.

[91] Claimant's Rejoinder, para. 185.

[92] Claimant's Counter-Memorial, para. 13; Claimant's Rejoinder, paras. 72-73.

[93] Claimant's Counter-Memorial, paras. 28, 47, 55ff.

117. The Claimant disagrees with the Respondent's reading of the *Mox Plant* Case. The Claimant submits that the *Mox Plant* Case deals with State-to-State arbitration rather than investor-State arbitration and rights granted to individuals.[94] The Claimant submits that, unlike the actions of Ireland in the *Mox Plant* Case, the Claimant's actions in this case are incapable of breaching Article 344 TFEU.[95]

d. Article 16 ECT

118. The Claimant adds that Article 16 ECT, which is *lex specialis* and a "supremacy clause" in itself,[96] specifically excludes the possibility of supremacy of EU law and the EU Treaties.[97] Paraphrasing the tribunal in *Vattenfall*, the Claimant argues that "Article 16 of the ECT prohibits that the terms of another agreement can be used to derogate from the right to dispute resolution."[98] The Claimant submits that the Respondent has failed to establish that the conditions of Article 16 for the application of provisions of another Treaty were met.[99] The Claimant dismisses the Respondent's argument that Article 16 ECT would not be a conflicts provision or might be a part of Article 26 in the sense of the *Achmea* Judgment.[100] It adds that the right to compulsory arbitration against a State is a key element of the ECT, which constitutes a favourable advantage of the ECT, in the sense of its Article 16, over other treaties.[101]

e. The content of the* Achmea *Judgment

119. The Claimant, referring to paragraphs 57 and 62 of the *Achmea* Judgment, further asserts that the judgment – even if it could apply to the ECT – would not result in the absence of jurisdiction in this case, since the *Achmea* Judgment does not deal with, aim at, or cover multilateral treaties or the ECT in particular.[102] The Claimant contends that the fact that the EU itself ratified the ECT gives rise to a presumption of the ECT's validity and its compliance with, or even supremacy over EU law.[103] It further asserts that in contrast with

[94] Claimant's Rejoinder, paras. 64-65.

[95] Claimant's Rejoinder, paras. 64-65.

[96] Hearing Transcript, Day 1, 23 July 2019, p. 170; Hearing Transcript, Day 2, 24 July 2019, p. 303.

[97] Claimant's Counter-Memorial, paras. 13-17; Claimant's Rejoinder, paras. 82ff; Hearing Transcript, Day 1, 23 July 2019, pp. 169-172.

[98] Hearing Transcript, Day 1, 23 July 2019, p. 153; CL-42, *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 (hereinafter "***Vattenfall***"), para. 202; Hearing Transcript, Day 2, 24 July 2019, p. 300.

[99] Claimant's Counter-Memorial, paras. 18, 22.

[100] Claimant's Rejoinder, paras. 92-93, 96-97.

[101] Claimant's Counter-Memorial, paras. 19-22; Hearing Transcript, Day 2, 24 July 2019, pp. 298-299.

[102] Claimant's Response, para. 21; Claimant's Counter-Memorial, paras. 3, 27, 58-60; Claimant's Rejoinder, paras. 17, 111, 114-124, 172ff; Hearing Transcript, Day 1, 23 July 2019, pp. 172ff.

[103] Claimant's Counter-Memorial, paras. 31, 62; Claimant's Rejoinder, paras. 66-69,102-110, 129-142.

Article 8(6) of the BIT underlying the *Achmea* Judgment, Article 26(6) ECT does not require an ECT tribunal to take into account "the law in force of the Contracting Party concerned" and "other relevant Agreements between the Contracting Parties", *i.e.* EU law.[104]

f. Article 26(6) ECT

120. According to the Claimant, Article 26(6) ECT is not a "back door" for the application of the *Achmea* Judgment.[105] Article 26(6) ECT, the Claimant argues, relying on *Vattenfall*,[106] can only be interpreted as referring to the substantive rules governing the Tribunal's analysis of the merits of a case, not its jurisdiction.[107] The Claimant submits that the reference to applicable rules of international law in Article 26(6) ECT refers to public international law and cannot mean EU law.[108] The Claimant adds that, in any case, EU law can only be relevant to the dispute at hand in so far as the ECT and the ICSID Convention permit its relevance.[109]

g. The necessity to apply EU law

121. The Claimant submits that its claims are limited to Bulgaria's violations of the Claimant's substantive protections under the ECT and public international law and that it has and will not ask the Tribunal to determine a breach of EU law in the merits phase of the case.[110] According to the Claimant, EU law and the domestic law of Bulgaria can and will only feature as factual background to the dispute.[111]

h. The alternative argument based on Article 30 VCLT

122. Reacting to the Respondent's submission concerning Article 30(4)(a) in connection with 30(3) VCLT, the Claimant submits that EU law and the ECT do not share the same subject

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[104] Claimant's Counter-Memorial, paras. 64-67; Claimant's Rejoinder, paras. 143-150, 153-162; Hearing Transcript, Day 1, 23 July 2019, pp. 157, 168-169, 186-189; Hearing Transcript, Day 2, 24 July 2019, pp. 288-289.

[105] Claimant's Counter-Memorial, paras. 68-69, 77; Hearing Transcript, Day 1, 23 July 2019, p. 134; Hearing Transcript, Day 2, 24 July 2019, p. 297.

[106] CL-42, *Vattenfall*, para. 116.

[107] Claimant's Counter-Memorial, paras. 70ff; Claimant's Rejoinder, paras. 164-165; Hearing Transcript, Day 1, 23 July 2019, pp. 132-133; Hearing Transcript, Day 2, 24 July 2019, pp. 284-286.

[108] Claimant's Counter-Memorial, para. 78; Claimant's Rejoinder, paras. 158-162; Hearing Transcript, Day 1, 23 July 2019, pp. 134-135; Hearing Transcript, Day 2, 24 July 2019, pp. 282-284.

[109] Claimant's Rejoinder, para. 8.

[110] Claimant's Counter-Memorial, paras. 80-81; Claimant's Rejoinder, para. 65; Hearing Transcript, Day 1, 23 July 2019, pp. 156-158; Hearing Transcript, Day 2, 24 July 2019, pp. 288, 290.

[111] Claimant's Counter-Memorial, para. 81; Claimant's Rejoinder, paras. 164-165; Hearing Transcript, Day 1, 23 July 2019, pp. 156-157.

matter.[112] The Claimant adds that the ECT and the TFEU are not incompatible, and that the treaties can thus coexist, even if both related to the same subject matter.[113]

i. The alternative argument based on Article 58 VCLT

123. Reacting to the Respondent's submission on a potential "implied suspension" of Article 26 ECT, the Claimant submits that the ECT does neither permit its suspension between specific Contracting Parties, nor the making of reservations to it, nor a withdrawal outside the specifically agreed withdrawal procedure.[114] The Claimant adds that, in any case, Malta did not agree to any suspension or modification and that in case of a withdrawal, a 20 years sunset clause would apply.[115]

j. The concept of bundles of bilateral rights and obligations

124. Reacting to the Respondent's argument on "bundles of bilateral rights and obligations", the Claimant submits that it is a ruse to escape from arguments about the EU's status as a Contracting Party to the ECT, and from arguments about the impact of the Respondent's reading of the ECT on the 25 Contracting Parties that are not Member States of the EU.[116] The Claimant submits that the meaning and/or applicability of the provisions of the ECT may not vary from case to case depending on the countries involved,[117] and that if that had been the intention of the Contracting Parties, a "disconnection clause" would have been required.[118]

k. The declarations of the EU Member States

125. On the 22 Member State Declaration and the Five Member State Declaration, the Claimant notes that Malta and the Respondent signed different declarations.[119] For the Claimant, this is one of the reasons why they cannot constitute a general agreement between Malta and

[112] Claimant's Counter-Memorial, paras. 95-96. See also Claimant's Rejoinder, paras. 186-194; Hearing Transcript, Day 1, 23 July 2019, pp. 199-200.

[113] Claimant's Counter-Memorial, para. 97; Hearing Transcript, Day 1, 23 July 2019, pp. 199-200.

[114] Claimant's Counter-Memorial, para. 104; Claimant's Rejoinder, para. 196.

[115] Claimant's Counter-Memorial, para. 104; Claimant's Rejoinder, para. 196; Hearing Transcript, Day 1, 23 July 2019, p. 201.

[116] Claimant's Rejoinder, para. 9; Hearing Transcript, Day 1, 23 July 2019, pp. 139ff.

[117] Claimant's Rejoinder, paras. 127-130; Hearing Transcript, Day 1, 23 July 2019, pp. 144-149.

[118] Hearing Transcript, Day 1, 23 July 2019, pp. 141, 150-153.

[119] Claimant's Rejoinder, paras. 197, 199-206; Hearing Transcript, Day 1, 23 July 2019, p. 201.

the Respondent.[120] The Claimant adds that the declarations are political in nature and carry no legal weight.[121]

l. The argument on ab initio *effect*

126. Regarding the Respondent's argument during the Hearing (*i.e.*, that the change to the law only happened on the date of the *Achmea* Judgment with retroactive effect from that date on), the Claimant disagrees that the CJEU would have such power, but points out that in that case the *Achmea* Objection would have to fail because of the well-established rule in ICSID practice, that a tribunal's jurisdiction is fixed at the moment of commencement of the case, and because the Request for Arbitration pre-dates the *Achmea* Judgment.[122]

(3) The Claimant's Position on the Tribunal's Judicial Function and the Enforceability of the Award

127. The Claimant submits that the impact (if any) of the *Achmea* Judgment on the enforcement of awards issued under intra-EU BITs is "highly uncertain".[123] In support of its argument, the Claimant highlights uncertainties about potentially conflicting enforcement obligations under the ICSID Convention and the New York Convention, questions of timing for cases that have begun before the *Achmea* Judgment was rendered, and the possibility of enforcement of ECT awards outside of the EU, including after Brexit.[124] The Claimant further submits that the EU Member States are not in agreement regarding the impact of the *Achmea* Judgment, and that so far no court in the EU has refused to enforce an arbitral award on *Achmea*-related grounds.[125] The Claimant predicts that the impact of the *Achmea* Judgment on the enforcement of ECT awards is likely to be "minimal to nonexistent".[126] According to the Claimant, the Tribunal should not engage in speculation about the *Achmea* Judgment's impact on enforcement matters.[127]

128. On the question of whether the principles relied upon and sanctioned in the *Achmea* Judgment would reach the level of public policy in Member States of the EU, the Claimant submits that at this point it is not clear whether this would become so, and that a recent court case, which is not on the record, did not seem to treat the findings of the *Achmea*

[120] Claimant's Rejoinder, paras. 197, 199.

[121] Claimant's Rejoinder, paras. 199, 204-205; Hearing Transcript, Day 1, 23 July 2019, p. 206.

[122] Hearing Transcript, Day 2, 24 July 2019, pp. 304-306.

[123] Claimant's Counter-Memorial, para. 86.

[124] Claimant's Counter-Memorial, para. 86; Hearing Transcript, Day 2, 24 July 2019, p. 311.

[125] Claimant's Counter-Memorial, para. 87.

[126] Claimant's Counter-Memorial, para. 87.

[127] Claimant's Counter-Memorial, paras. 91, 87.

Judgment as public policy.[128] The Claimant adds that the question is not relevant to a tribunal impanelled under the ECT and general international law.[129]

129. The Claimant places particular importance on the case at hand being an ICSID case and thus falling under the "self-contained" nature of the ICSID Convention.[130] The Respondent, according to the Claimant, would not be able to cite incompatibility of its obligations under EU law with its ICSID commitments as a ground not to comply with an ICSID award.[131]

130. On the issue of whether an investor could sue Bulgaria in a Bulgarian court over a violation of the ECT, the Claimant submits that if, on the basis of the ECT, an investor were to attempt to bring suit in a Bulgarian court the case would "likely" be thrown out.[132] The Claimant further submits that it is unaware of any Bulgarian court to date ever having applied the ECT.[133]

(4) The Claimant's Position on Costs

131. The Claimant submits that the *Achmea* Objection is frivolous and requests that the Respondent be ordered to pay all costs associated with the *Achmea* Objection, including post-award compound interest.[134]

C. THE NON-DISPUTING PARTY SUBMISSION OF THE EU COMMISSION

132. The European Commission submits that "Union law already protects all forms of cross-border intra-EU investment, throughout the entire life cycle of that investment."[135] It adds that the ECT "was not intended to bind the Member States *inter se*" and does not create rights and obligations within the EU internal market in energy, which "remains governed by the Treaties and the secondary legislation adopted on the basis thereof."[136] According to the European Commission, for intra-EU purposes, all EU Member States would have to be seen as one bloc and as such an investor from one Member State in the territory of another Member State would not qualify as an Investor in the sense of the ECT

[128] Hearing Transcript, Day 2, 24 July 2019, pp. 308-309.

[129] Hearing Transcript, Day 2, 24 July 2019, pp. 309-311.

[130] Claimant's Counter-Memorial, para. 90; Hearing Transcript, Day 2, 24 July 2019, pp. 310-311.

[131] Claimant's Counter-Memorial, para. 90.

[132] Hearing Transcript, Day 2, 24 July 2019, p. 298.

[133] Hearing Transcript, Day 2, 24 July 2019, p. 298.

[134] Claimant's Counter-Memorial, paras. 108-109; Claimant's Rejoinder, paras. 208-210.

[135] EC's written submission pursuant to ICSID Arbitration Rule 37(2), 22 March 2019 (hereinafter the "**EC's Submission**"), para. 11.

[136] EC Submission, paras. 32, 14.

anymore.[137] This is also, according to the European Commission, why no sunset clause would ever come to operate for duties and obligations that never applied.[138]

133. The European Commission submits that the *Achmea* Judgment does not only apply to the BIT between the Netherlands and Slovakia but applies to international agreements in general, including the ECT, the realm of which it pierces, not in the least, through Article 26(6) ECT.[139] The European Commission adds that it was of particular importance to the CJEU that a tribunal that decides over a dispute which is "liable to relate to the interpretation or application of EU law",[140] such as an ECT tribunal, cannot refer a question to the CJEU.[141]

134. The European Commission is of the opinion that Article 16 ECT is not a conflict rule but a rule of interpretation, but submits that even if it were a conflict rule, like any interpretation of the ECT that would allow for intra-EU arbitration, it would still be overruled by the primacy of EU law.[142]

135. The European Commission submits that an interpretation of the ECT in accordance with the VCLT requires that the tribunal take into account "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" in the sense of Article 31(2)(b) VCLT, and "any relevant rules of international law applicable in relations between the parties" in the sense of Article 31(3)(c) VCLT.[143] The European Commission adds that "treaty interpretation is a single combined operation without any hierarchy between the interpretative elements."[144]

V. THE TRIBUNAL'S ANALYSIS

136. In analysing the *Achmea* Objection the Tribunal will proceed as follows: first, the Tribunal will satisfy itself of its jurisdiction thus far, secondly, the Tribunal will analyse whether the *Achmea* Judgment has an impact on the result of the Tribunal's determination of its jurisdiction, and thirdly, the Tribunal will analyse whether considerations of propriety and

[137] EC Submission, para. 32.

[138] EC Submission, para. 40.

[139] EC Submission, paras. 21-23, 28.

[140] EC Submission, para. 26; *Achmea* Judgment, para. 39.

[141] EC Submission, paras. 25-26.

[142] EC Submission, paras. 29, 42-43.

[143] EC Submission, para. 30.

[144] EC Submission, paras. 30-31, citing Waldock (Special Rapporteur on the Law of Treaties), Sixth Report on the Law of Treaties, UN Doc. A/CN.4/186 and Add. I -7, available at [1966] 2 YB Int'l L Comm, 95.

the Tribunal's judicial function in light of potential issues with the enforcement of an award have an impact on its jurisdiction.

137. The Tribunal's analysis on jurisdiction is subject to the still pending Denial-of-Benefits Objection which, based on the Tribunal's decision on Bifurcation of 11 October 2018, was joined to the merits the case. The Tribunal's analysis is also subject to any other pertinent facts or issues that may arise during the merits phase of the case. The Tribunal's below decision on the Achmea Objection is final.

A. THE TRIBUNAL'S JURISDICTION

(1) The Respondent's argument on *ab initio* effect

138. Before beginning the proper analysis of its jurisdiction, the Tribunal must deal with an argument made by the Respondent during the Hearing, and which in itself may be dispositive of the *Achmea* Objection.

139. The Respondent argued that an interpretative judgment of the CJEU is not declaratory as to how the law had always been, but that it decides the law on the date of the judgment with retroactive effect, meaning that up until the date of a judgment, the law is still open on the point in issue.[145] In that view, all treaty undertakings of EU Member States are potentially subject to CJEU incompatibility decisions at a later stage, and they are applicable only until the CJEU decides otherwise. Once there is a finding of incompatibility, the treaty undertaking in question is rendered inapplicable.[146]

140. The Tribunal observes that this reading of the effect of CJEU decisions would be the end of the *Achmea* Objection, since the relevant dates for a tribunal's jurisdiction are the date of the alleged breach underlying a claim (or the dates of the breaches) and the date on which the proceedings are commenced. In the case at hand, the Request for Arbitration was filed on 7 February 2018 whereas the *Achmea* Judgment was issued on 6 March 2018.

141. Therefore, if the Tribunal were to accept the Respondent's argument, on the date of the Request for Arbitration, the *Achmea* Judgment could not yet have had its impact and the *Achmea* Objection would necessarily fail on that ground alone.

142. However, given that (i) in the view of the Tribunal, a judgment of the CJEU declares the law as it has always been, (ii) the argument on the exact scope of the *ab initio* effect was not entirely clear, and (iii) the issue of the *Achmea* Objection is important to the jurisdiction of the Tribunal, the Tribunal has decided not to accept the Respondent's argument here and

[145] Hearing Transcript, Day 1, 23 July 2019, pp. 35-38.

[146] Hearing Transcript, Day 1, 23 July 2019, pp. 209-217.

to continue its analysis based on the remainder of the Parties' submissions and on its own analysis, as is proper when a tribunal is investigating its own jurisdiction.

(2) The Tribunal's Jurisdiction under Article 26 ECT and Article 25 ICSID Convention

143. The starting point for the analysis of the Tribunal's jurisdiction must then be, as in any arbitration, the arbitration clause(s) on the basis of which it is claimed that an agreement to arbitrate exists between the parties.

144. Whether such an arbitration clause is included in a multilateral or in a bilateral treaty, and whether, in case of a multilateral treaty, its application is always the same, or differs per bilateral relationship, the arbitration clause is the origin of life of a tribunal, the basis without which a tribunal cannot look at any other laws, rules, or principles, let alone the merits of a case.[147]

145. The arbitration clause in the present case is Article 26 ECT in connection with Article 25 ICSID Convention. It is to these provisions that the Tribunal will first turn to determine whether there exists an agreement to arbitrate between the Claimant and the Respondent, and thus to determine whether it has jurisdiction.

a. The applicability and validity of Article 26 ECT and Article 25 ICSID Convention

146. As in this particular case doubts have been raised about the applicability of the arbitration clause, the Tribunal must deal, as a preliminary matter, with the question whether, from the point of view of an ECT Tribunal, there can be any doubt about the validity and general applicability of Article 26 ECT and Article 25 ICSID Convention.

147. In the view of the Tribunal, there can be no such doubt. The ECT and the ICSID Convention are in force both for Malta as well as Bulgaria, *i.e.* the relevant Contracting Parties. Contrary to any arguments to the opposite, the Tribunal finds no indication that either the ECT or the ICSID Convention, and in particular their respective Articles 26 and 25, would not be fully valid and binding between Malta and Bulgaria. Malta and Bulgaria have not "disapplied",[148] suspended, or amended the two Articles, nor have they made any reservations to that effect at the time of their accession to the respective agreements.

[147] The *Vattenfall* tribunal speaks of the ECT as the "foundational jurisdictional instrument", CL-42, *Vattenfall*, paras. 131, 124; the *RREEF* Tribunal calls the ECT its "constitution", CL-14, *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, 6 June 2016, paras. 72-75. See also RL-110, *Eskosol*, para. 180.

[148] RL-149, 22 Member States Declaration, p. 2.

148. The Tribunal notes in particular that, first, the ECT does not contain any clause that would render Article 26 ECT inapplicable between EU Member States, that, secondly, Article 46 ECT prohibits the making of reservations to the ECT, and, thirdly, that Article 42 ECT prescribes a detailed procedure for making amendments to the Treaty, which does not seem to have been followed or even initiated by either Malta or Bulgaria.

149. Furthermore, no argument has been made, nor, in the view of the Tribunal, could it successfully be made (i) that there was a formal, written, agreement between Malta and Bulgaria to amend the ECT *inter se*; (ii) that such a modification was not prohibited by the ECT and its Article 42 in particular, or by any other applicable rule, including the further conditions of Article 41(1)(b) VCLT; and (iii) that any such formal, written agreement to modify had been notified to the other Contracting Parties of the ECT. In addition , nothing in the record indicates that either Bulgaria or Malta have notified each other, or the other Contracting Parties, of a perceived invalidity of Article 26 ECT, nor of any reasons therefor. In the same vein, assuming for the sake of argument that any suspension of the operation of Article 26 ECT might have been possible, the Tribunal notes that nothing in the record indicates that Bulgaria and Malta concluded an agreement to suspend the operation of Article 26 ECT, let alone that they notified the other ECT Contracting Parties thereof (on whether the *Achmea* Judgment could be regarded as such an agreement see below). Equally, no submission has been made that either Bulgaria or Malta had no right to conclude and ratify the ECT in its present form.

150. In that regard, the Tribunal also notes that the political declarations on the interpretation of the *Achmea* Judgment that Malta and Bulgaria have signed, differed as to the effect they attach to the *Achmea* Judgment *vis-à-vis* intra-EU investment arbitration under the ECT, with Malta refusing to express a view regarding the compatibility of the intra-EU application of the ECT with EU law.[149]

151. Therefore, the Tribunal is satisfied that Article 26 ECT and Article 25 ICSID Convention are valid and binding on Malta and Bulgaria and are applicable between them, subject only to the further analysis below.

b. Whether the conditions of Article 26 ECT and Article 25 ICSID Convention are met

152. The Tribunal thus turns to the interpretation of Article 26 ECT and Article 25 ICSID Convention in order to satisfy itself of its jurisdiction.

[149] See RL-149, the 22 Member States Declaration, and RL-152, the Five Member States Declaration, p. 3.

153. In view of the ordinary meaning of the text of Article 26 ECT, as set forth above under III.B, Article 26 ECT establishes the following conditions for the jurisdiction of this Tribunal:

a. there must be a dispute between Claimant and Respondent;

b. the Respondent must be a Contracting Party to the ECT in the sense of Article 1(2) ECT;

c. the Claimant must be a national of another Contracting Party to the ECT;

d. the Claimant must be an Investor in the sense of Article 1(7) ECT;

e. the dispute must relate to an Investment in the sense of Article 1(6) ECT;

f. the Investment must lie within the Area of the Respondent in the sense of Article 1(10) ECT;

g. the dispute must relate to an alleged breach by the Respondent of an obligation under Part III "Investment Promotion and Protection" of the ECT;

h. an attempt for amicable settlement must have been made before requesting arbitration;

i. at least three months must have elapsed between such a request for amicable settlement and the request for arbitration;

j. the dispute must not have been submitted to the courts or administrative tribunals of the Respondent;[150]

k. the dispute must not have been submitted in accordance with any other applicable, previously agreed dispute settlement procedure;[151] and

l. the Claimant must have provided ICSID with its written consent to arbitration at ICSID.

154. Article 25 ICSID Convention, on the basis of its ordinary meaning, contains the following conditions for jurisdiction:

a. there must be a legal dispute;

[150] Bulgaria is a Contracting Party listed in Annex ID in the sense of Article 26(3)(b)(i) ECT.

[151] Bulgaria is a Contracting Party listed in Annex ID in the sense of Article 26(3)(b)(i) ECT.

b. the dispute must arise directly out of an investment;

c. the dispute must arise between a Contracting State of the ICSID Convention and a national of another Contracting State of the ICSID Convention;

d. the parties to the dispute must have consented to submit the dispute to ICSID; and

e. the consent must be in writing.

155. The Tribunal notes that, for the purposes of this case, the conditions of Article 25 ICSID Convention are met when and if the conditions of Article 26 ECT are met.

156. The circumstances of the case and the documents on the record, in particular the Exhibits attached to the Request for Arbitration,[152] indicate that these conditions are, in fact, met. There is a dispute between the Parties. The Respondent is a Contracting Party to the ECT in the sense of Article 1(2) ECT. The Claimant is a national of another Contracting Party to the ECT. The Claimant is an Investor in the sense of Article 1(7) ECT. The investments of the Claimant are, in their entirety or in part, Investments in the sense of Article 1(6) ECT and the dispute relates to them. The investments lie in the Area of the Respondent in the sense of Article 1(10) ECT. The Claimant alleges violations by the Respondent of Part III of the ECT. The Claimant has made an attempt for amicable settlement and more than three months elapsed between the attempt and the Request for Arbitration.[153] There is no evidence that the dispute was submitted to the courts of the Respondent or that any other applicable, previously agreed dispute settlement procedure was applied, and, finally, the Claimant has provided ICSID with its written consent to arbitration.

157. The Tribunal is thus satisfied that it has jurisdiction based on the fulfilment of the conditions of Article 26 ECT and Article 25 ICSID Convention.

158. As stated before, this finding is subject to any further facts that may surface in the course of the proceedings, and subject to the decision of the Tribunal on the Denial-of-Benefits Objection which is still outstanding. It is also subject to the discussion of the impact of the *Achmea* Judgment below.

[152] See Request for Arbitration and Exhibits C-2 to C-8.

[153] Request for Arbitration and Exhibit C-8.

c. Preliminary Conclusion on Jurisdiction

159. The above means that the arbitration agreement underlying the present arbitration is applicable, valid, and binding in its current form. Based on the ordinary meaning of its text, subject to the conditions set out in the preceding paragraph, the Tribunal has jurisdiction.

160. The Tribunal, in this regard, is sympathetic to the view of the Claimant that such a finding of jurisdiction, in principle, ought to be the end of the Tribunal's inquiry on the point.[154] In fact, if the ordinary meaning of a provision of a valid and binding international treaty mandates certain conditions for jurisdiction and those conditions are met, it is difficult to conceive of a situation in which this would not be the end of an objection to jurisdiction and where it would not be possible simply to dismiss any further arguments. This is in particular the case, if such further arguments seek to establish different non-textual interpretations or seek to introduce external factors which do not meet the common formal requirements for relevance, in order to invalidate a clear, self-sufficient, and exhaustive regime on jurisdiction.

161. However, the Respondent submits that this is precisely what happened in the case at hand. The Respondent argues that as a consequence of the *Achmea* Judgment, and based on the authority of the CJEU resulting from the EU Treaties, in connection with the subordination by all EU Member States of all their other treaties under the EU Treaties, and contrary to the text of Article 26 ECT, the Respondent has never given a valid offer of arbitration to any fellow EU Member States which are also Contracting Parties to the ECT.

162. The Tribunal shall therefore now turn to an analysis of the *Achmea* Judgment and its impact on its jurisdiction.

B. THE IMPACT OF THE *ACHMEA* JUDGMENT

163. In order to discern the possible impact of the *Achmea* Judgment on the jurisdiction of the Tribunal, the Tribunal will first analyse the content of the judgment and then deal with the alleged supremacy of the EU legal order over the ECT legal order, the alleged points of contact between the two legal orders, and other arguments about alleged (formal) effects of the *Achmea* Judgment on provisions of the ECT.

(1) Summary and analysis of the *Achmea* Judgment

164. While it is not usual for an international tribunal to review and interpret in detail the content of a judgment of a court of a different legal order, let alone integrate it into its decision, extensive pleadings have been made as to the content of the *Achmea* Judgment and its effect, or lack thereof, on the arbitration agreement at hand. Therefore, the Tribunal feels

[154] Claimant's Rejoinder, paras. 27, 30.

it is necessary to take note of the content of the *Achmea* Judgment, as fact, and to form its own view on its meaning.

a. Summary of the* Achmea *Judgment

165. The *Achmea* Judgment, as understood by the Tribunal, states the following:

a. Member States of the EU, through their courts, must ensure the full application of EU law in all its facets and must ensure judicial protection of the rights of individuals under that law.[155] "[K]eystone" of the judicial system of EU law is the dialogue between national and EU courts through the preliminary ruling procedure.[156] EU law is part of the law in force in each Member State and also derives from the international agreements that are the EU Treaties.[157]

b. A BIT arbitration tribunal is not a court in the sense of the EU Treaties,[158] it cannot make a reference to the CJEU for a preliminary ruling,[159] and its rulings are final and subject to the limited review that national procedural law allows for [in the *Achmea* case German procedural law, which appears to be as limited in terms of a potential review as any law of a State Party to the New York Convention would be].[160]

c. Article 19(1) TEU, second subparagraph, requires Member States of the EU to create "a system of judicial remedies" in the fields covered by EU law.[161]

d. An arbitration proceeding such as that referred to in the underlying BIT removes disputes which may concern the application or interpretation of EU law from the mandatory system of judicial remedies of Article 19(1) TEU, second subparagraph.[162]

[155] *Achmea* Judgment, para. 36 in connection with para. 33.

[156] *Achmea* Judgment, para. 37.

[157] *Achmea* Judgment, paras. 39-42.

[158] *Achmea* Judgment, para. 46.

[159] *Achmea* Judgment, para. 49.

[160] *Achmea* Judgment, paras. 51-53.

[161] *Achmea* Judgment, para. 55.

[162] *Achmea* Judgment, para. 55.

e. This endangers the principle of mutual trust between the Member States of the EU and the preservation of EU law, which is ensured by the preliminary ruling procedure of Article 267 TFEU.[163]

f. Therefore, the arbitration clause in the underlying BIT between EU Member States is not compatible with the "principle of sincere cooperation" embodied in Article 4(3) TFEU.[164]

g. As a consequence, Articles 267 and 344 TFEU preclude provisions in international agreements between EU Member States "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."[165]

b. Analysis of the* Achmea *Judgment

166. Based on the above, it appears to the Tribunal that the CJEU's essential holding is that a Member State of the EU cannot, in the case of a claim from an individual from another Member State of the EU, remove itself from the system of judicial remedies of the EU, which, importantly, includes the possibility of preliminary rulings, and consequently a Member State cannot undertake to accept the jurisdiction of an arbitral tribunal in such a case.

167. The Tribunal cannot but observe that "accepting the jurisdiction of an arbitral tribunal" in such a case is exactly what EU Member States do under the ECT, and that, in addition, it would seem that the present Tribunal has all the characteristics that the CJEU negatively noted about the arbitral tribunal in the dispute underlying the *Achmea* Judgment: (i) the Tribunal is not a court in the sense of the EU Treaties, (ii) it cannot request a preliminary ruling from the CJEU, and (iii), the Tribunal being impanelled as an ICSID Tribunal, the review of its decision by national courts of the EU is, if possible at all, even more limited than that of the tribunal decision in the dispute underlying the *Achmea* Judgment.

168. Therefore, it seems that, from the viewpoint of EU law, and based on its text, the *Achmea* Judgment might apply or have been intended to apply to the ECT, and the Tribunal finds it appropriate to base its further analysis on that assumption. The Tribunal notes, that this

[163] *Achmea* Judgment, para. 58.

[164] *Achmea* Judgment, para. 58 in connection with para. 34; the Court adds that its analysis is unaffected by the competence and capacity of the EU in the field of international relations to enter into international agreements that subject it to international arbitration, para. 57.

[165] *Achmea* Judgment, paras. 60, 62.

analysis seems to coincide with the opinion expressed by most EU Member States (including Bulgaria but excluding Malta) and by the European Commission.[166]

169. In light of the relatively clear reasoning of the *Achmea* Judgment, as just outlined, the Tribunal sees no value in further interpreting or construing the Judgment in order to escape its consequences. The Tribunal thus sees no need to entertain arguments that try to read desired exceptions into the *Achmea* Judgment, for example, based on the inclusion or omission of single words in the reasoning of the judgment, such as the word "between",[167] or based on the reference to international agreements in paragraph 57 of the *Achmea* Judgment.[168] The Tribunal is equally not inclined to entertain arguments that try to attach a particular importance to the fact that the EU itself is a Contracting Party to the ECT. In the view of the Tribunal, the establishment of any such exceptions or more intricate interpretations of the *Achmea* Judgment, would be an exercise to be made by the CJEU alone when and if that court develops its further case law. It is not an exercise for this ECT Tribunal.

170. The question that the Tribunal does find relevant in light of its above factual reading is whether, from the viewpoint of the ECT, in a decision on jurisdiction under the ECT, there are points of contact with EU law and, if so, how the Tribunal has to proceed in such situations.

171. In answering that question, the Tribunal has found Article 16 ECT relevant and will therefore now turn to its analysis.

(2) Can the *Achmea* Judgment have an effect on ECT jurisdiction?

a. Article 16 ECT

172. Article 16 ECT, titled "Relation to Other Agreements", prescribes that if two Contracting Parties to the ECT enter into a subsequent international agreement that concerns the subject

[166] RL-149, the 22 Member State Declaration; EC Submission; Annex EC-1, Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM(2018) 547, 19 July 2018, pp. 3-4, 26.

[167] See, *e.g.,* Claimant's Counter-Memorial, para. 58; Respondent's Reply, para. 24; Claimant's Rejoinder, paras. 115-117. The Claimant seems to argue that the word "between" is an indicator that only bilateral agreements were addressed in the *Achmea* Judgment whereas the Respondent seems to argue that the CJEU in its case law has used "between" as an indicator that it refers to a multilateral treaty.

[168] The argument, in short, is that (i) in paragraph 57 of the *Achmea* Judgment, the CJEU acknowledges that international agreements to which the EU is a party can and may submit disputes about such agreements to a different court and hence (ii) the CJEU cannot have meant to include such international agreements in the remainder of its Judgment. See above and Claimant's Response, para. 21; Claimant's Counter-Memorial, paras. 3, 27, 58-60; Claimant's Rejoinder, para. 17; Claimant's Rejoinder, paras. 111, 114-124, 172ff; Hearing Transcript, Day 1, 23 July 2019, pp. 172ff.

matter of Part III ECT ("Investment Promotion and Protection") or Part V ECT ("Dispute Settlement"), "nothing" in the terms of the other agreement "shall be construed to derogate from any provision of Part III or V of [the ECT] or from any right to dispute resolution with respect thereto under [the ECT], where any such provision is more favourable to the Investor or Investment."[169]

173. The Tribunal notes that the application of Article 16 ECT is excluded in case of a conflict with the Svalbard Treaty. This, however, is the only exception recognised by the ECT. Nowhere in the ECT does the Tribunal find an indication that the application of Article 16 ECT would be excluded in case of a conflict of provisions of the ECT with provisions of any of the EU Treaties or their predecessors, nor is there an indication that intra-EU disputes would be excluded in any other way under the ECT. The ECT does not contain a disconnection clause for intra-EU disputes. The Tribunal therefore finds that Article 16 ECT is valid and applicable in the case at hand.

174. Based on the text of Article 16 ECT, if

a. the EU Treaties were "subsequent international agreement[s]" that "concern" Part III ECT or Part V ECT, and

b. provisions of the EU Treaties as interpreted by the *Achmea* Judgment threatened to derogate from provisions of Part III of V of the ECT, or from any right to dispute resolution, and

c. the provisions which are threatened by derogation are more favourable to the Investor or the Investment,

the protections of Article 16 ECT would apply.

175. Regarding the first and second condition, the Tribunal notes that it would seem that the EU Treaties, at least in the interpretation given to them by the *Achmea* Judgment, "concern" the subject matter of Part III and in any case Part V of the ECT. It would further seem that the EU Treaties in fact aim to derogate from Part V of the ECT, in particular from Article 26 ECT, and the right to dispute resolution contained therein. The Tribunal is of the opinion that such a derogation, if successful, would also threaten to undermine the protections of Part III ECT. The above-mentioned first and second condition are therefore met.

[169] Both Malta and Bulgaria became parties to the ECT and the ICSID Convention before they became Member States of the EU, wherefore the Tribunal sees no need to discuss the alternative of a potentially deviating "prior international agreement".

176. Regarding the third condition, the Tribunal notes that the mere existence of Article 26 ECT and the possibility to arbitrate in itself can be seen as an advantage of the ECT over the EU system of judicial remedies.[170] The Tribunal, also in light of the convincing arguments of the Claimant on the point, thus concludes that in any case the right to dispute resolution under Part V of the ECT is more favourable to Investors and Investments than are the respective provisions of EU law. In light of this finding, the Tribunal sees no need further to compare Part III ECT and EU law with a view to their advantageousness for Investors and Investments in the sense of the ECT.

177. Therefore, it is the view of this Tribunal, that the protections of Article 16 ECT are triggered in this case, meaning that nothing in the EU Treaties or flowing from the EU Treaties "shall be construed to derogate from any provision of Part III or V" of the ECT, As a consequence, from the perspective of the ECT, the provisions of the ECT, notably its Article 26, prevail over those of EU law.

178. The Tribunal is aware that the collision of norms just referred to may have to be handled differently from the point of view of EU law. That, however, does not change its assessment as an ECT Tribunal. Indeed, because the Tribunal is an ECT Tribunal, and no Party has raised the issue (as distinguished from general arguments of supremacy), it is not for the Tribunal further to investigate whether EU law contains a provision similar to that of Article 16 ECT.[171] In any case, Article 351 TFEU does state that rights and obligations arising from agreements between one or more EU Member States and one or more third countries, which have been concluded before the date of the accession of the respective Member States (such as, in this case, the ECT) "shall not be affected by the provisions of the [EU] Treaties". That Article does not seem to aim at making EU Treaties superior to previous international agreements, but rather places EU-internal obligations on the EU Member States to eliminate, through the normal means of public international law, any incompatibilities between the treaty in question and the EU Treaties. As is clear from the text of Article 351 TFEU, and in line with public international law, such EU-internal obligations, and potential breaches thereof, would not affect any rights and obligations under the "other" treaty, even though the continuance of that other treaty in its existing form might be in violation of EU law. Article 351 TFEU therefore does not seem to create superiority over earlier treaties, but rather seems to seek harmonisation between legal orders. That, however, cannot and does not in any way contradict or undermine the Tribunal's reading of Article 16 ECT above.

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[170] See also CL-24, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 141; CL-39, *Masdar*, para. 332; CL-42, *Vattenfall*, para. 194; CL-48, *Greentech Energy Systems A/S et al. v. Italy*, SCC Arb. No. 2015/095, Award, 23 December 2018, paras. 340-341.

[171] Compare intra-EU considerations to that effect of the *Bundesgerichtshof*, RL-85, German Federal Supreme Court (*Bundesgerichtshof – BGH*), Order, 31 October 2018 (I ZB 2/15), paras. 20, 41.

179. The Tribunal observes that, in any case, it would seem difficult to assume that Malta and Bulgaria when they acceded to the EU implicitly deviated from an explicit and clear provision such as Article 16 ECT. This is especially the case in light of the fact that the ECT was concluded when the EU Treaties already existed and already included (where relevant here) the same or similar articles as today, and in light of the failed attempt to include a disconnection clause into the ECT.

180. Therefore, from the perspective of an ECT Tribunal, absent any explicit amendments to the ECT, in any case through Article 16 ECT, Article 26 ECT takes precedence over any subsequent agreement that concerns Parts III and V of the ECT and that is less favourable to the Investor or the Investment.

181. Having so concluded, the Tribunal will now turn to alternative arguments raised by the Respondent as to how EU law could prevail over the provisions of the ECT.

b. Article 26(6) ECT

182. Article 26(6) ECT reads

> A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

183. As part of the argument on applicability and supremacy of EU law, the Respondent argued that through Article 26(6) the Tribunal would need to apply EU law in its decision on jurisdiction and that it would need to accord EU law supremacy over the provisions of the ECT.

184. The Claimant's counter-argument to that proposition mostly focusses on two points. First, it is submitted that the reference to "the issues in dispute" in Article 26(6) ECT is a reference to the merits of a case only, and that consequently the issues in dispute in the sense of Article 26(6) ECT do not include questions of jurisdiction. Secondly, it is argued that the reference to "applicable rules and principles of international law" in the same Article cannot mean a reference to regional agreements, like the EU Treaties.

185. The latter argument, in the view of the Tribunal, is incorrect. A tribunal constituted under Article 26 ECT decides in accordance with Article 26(6) which rules and principles of international law it deems applicable. As a matter of course, in an intra-EU case such applicable rules and principles may include EU law, given that EU law is applicable

international law between the Member States of the EU and thus contains rules and principles of international law applicable between them.[172]

186. The former argument on the limitation of the scope of the applicable law provision to the merits of a case is worthy of more scrutiny. The argument echoes a similar debate under the ICSID Convention about the influence of Article 42 ICSID Convention on the jurisdiction decision under Article 25 of that Convention. In the view of the Tribunal, a lot is to be said in favour of reading "issues in dispute" in Article 26(4) ECT only as issues concerning alleged breaches of the protections of Part III ("Investment Promotion and Protection") as does the tribunal in *Vattenfall*.[173] However, the *Achmea* Objection itself shows that jurisdiction can also be an issue in dispute, and it is indeed when the conditions and criteria for jurisdiction have to be tested, and met, that a tribunal may have to look further than just the instrument under which it is constituted, and that it may require the guidance of an applicable law provision.

187. Nevertheless, the debate is of limited relevance here and the issue does not need to be decided by the Tribunal as both arguments miss the point.

188. This is because, first, no matter how one interprets Article 26(6) ECT, an analysis of its own jurisdiction by a tribunal impanelled under the ECT will never take place in a vacuum but rather will take place in the international law setting into which the ECT was embedded from its creation onwards. Hence, if a rule of international law existed that was relevant and applicable, even though it was not mentioned in the ECT, it would likely be, and would likely have to be, applied (this idea is also expressed in Articles 31(2)(b) and 31(3)(c) VCLT). Similarly, if there were a successive, valid and binding, formal treaty that did away with parts of the ECT, the Tribunal could not pretend that such a treaty did not exist. However, where there exists an explicit, valid and binding agreement within, and on the basis of, the ECT, a tribunal cannot be asked to rely on a potentially existing, implicit finding or agreement of incompatibility in another legal order to disregard and declare inapplicable a clear provision.

189. Secondly, Article 26(6) ECT is the wrong point of entry for an argument of incompatibility. Article 26(6) ECT, as most applicable law provisions, is not a conflict rule. The Article embodies a hierarchy which starts, logically, with "this Treaty", *i.e.* the ECT. The applicable rules and principles of international law are then mentioned to allow a tribunal to supplement the Treaty where necessary, not to contradict it. Where the ECT is thus clear, Article 26(6) does not open a door to introduce a contradictory meaning through applicable rules and principles of international law.

[172] See also CL-42, *Vattenfall*, para. 150.

[173] CL-42, *Vattenfall*, paras. 113-121.

190. All the while, there is a clear conflict rule in Article 16 ECT that shields the relevant Parts III and V of the ECT from such a conflict and would also stand in the way of a tribunal reading "applicable rules and principles" in a way that they render the clear text of the ECT inapplicable.

191. Therefore, while in theory Article 26(6) ECT would allow the Tribunal to apply rules of EU law in this dispute where it deems it necessary, potentially even in its decision on jurisdiction, in practice, no such application has been found to be necessary, and even if it had been, it would not have the consequences that the Respondent tried to attach to it.

192. Incidentally, if Article 26(6) ECT were the "back door" that the Respondent hoped it to be, and led to the direct application of the *Achmea* Judgment, that would give rise to a logical paradox: if one reads the essence of the *Achmea* Judgment to mean that an intra-EU investor-State arbitral tribunal must not interpret and apply EU law, then, ironically, it would take a great deal of interpreting and applying EU law to reach a point of direct application of the *Achmea* Judgment in an ECT case – only to then find out that one is not allowed to interpret and apply EU law. This paradox shows, in the view of the Tribunal, how uncertain and theoretical the *Achmea* Objection can appear compared to the clear terms of the ECT.

c. Article 30 VCLT

193. According to Article 30(3) VCLT, in connection with Article 30(1) VCLT, in case of successive treaties relating to the same subject matter, "[w]hen 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".

194. Pursuant to Article 30(4) VCLT, the rule that the later treaty prevails (*lex posterior derogat legi priori*) also governs situations where the parties to the earlier and later treaties do not coincide, but its effect is then limited to the States which are parties to both treaties.

195. According to Article 30(2) VCLT, "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."

196. The Respondent, in its alternative argument, relies on Article 30 VCLT. The Respondent claims that the EU Treaties are the later treaties *vis-à-vis* the earlier treaty, the ECT, because Malta and Bulgaria acceded to the EU Treaties after they had become parties to the ECT and the ICSID Convention and because both the EU Treaties and the ECT regulate investor-State arbitration. The Respondent further claims that the EU Treaties, at the latest since the *Achmea* Judgment, prohibit intra-EU ECT arbitration (see above). With the

conditions of Article 30 VCLT allegedly being met, the Tribunal would then, following the logic of the Respondent, have to turn to the EU Treaties to satisfy itself of its jurisdiction and determine that no offer to arbitrate had been made by the Respondent.

197. However, the argument of the Respondent has certain fatal weaknesses that the Tribunal cannot disregard. In particular, the argument seems to forget that the VCLT embodies general rules on treaty interpretation. As envisaged by Article 30(2) VCLT, and as actually consistently argued by the Respondent, the parties to a treaty are, with very few exceptions, free to determine the hierarchy of all norms applicable between them through special agreements thereto, *i.e. leges speciales*.

198. The parties to the ECT have done so. Article 16 ECT is *lex specialis vis-à-vis* Article 30 VCLT. Therefore, even if the EU Treaties and the ECT were "successive treaties relating to the same subject matter", an issue which, in light of the above, does not need to be decided by the Tribunal, the Tribunal would still never reach Article 30(2) let alone Article 30(3) VCLT in its analysis.

199. Therefore, the Tribunal finds that even if the EU Treaties were *leges posteriores* to the ECT, and even if they prohibited intra-EU investor-State arbitration, Article 16 ECT, as *lex specialis*, trumps the considerations of posteriority. Thus, absent any explicit amendments thereto, in determining the jurisdiction of this Tribunal, the relevant provisions of the ECT prevail over any of the implied or explicit provisions of the EU Treaties.

200. As the issue was raised in the arguments of the Parties,[174] and as indeed at least the Respondent accused the Claimant of contradictory statements on the issue (see above under IV.A(2)l), the Tribunal adds at this point that the reference to "successive treaties relating to the same subject matter" as described in Article 30 VCLT can, but does not necessarily have to, have the same scope as the reference to "subsequent international agreement[s], whose terms … concern the subject matter of Part III or V" of the ECT in Article 16 ECT. In the view of the Tribunal, the latter *prima facie* appears broader than the former. Therefore, it is not necessarily contradictory when the Claimant argues that the EU Treaties concern the same subject matter as the ECT when it comes to Article 16 ECT but not when it comes to Article 30 VCLT, and when the Respondent argues the exact opposite. Any incongruencies in both Parties' arguments on these points can thus be excused and have, in any case, never reached a level where any consequences could or should be attached to such incongruencies, nor have they deterred the Tribunal from developing its view on Article 16 ECT and Article 30 VCLT as outlined above.

[174] See, *e.g.*, Respondent's Reply, para. 64; Claimant's Rejoinder, paras. 189ff and fn. 227.

d. Article 58 VCLT

201. Article 58 VCLT ("Suspension of the operation of a multilateral treaty by agreement between certain of the parties only") states that two parties to a multilateral treaty "may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone".

202. According to Article 58 VCLT, such a suspension is only allowed if the possibility is provided for by the treaty. Alternatively, when a suspension is not prohibited, but the possibility is not provided for, any suspension *inter se* must not "affect the enjoyment by the other parties of their rights under the treaty" and must not be "incompatible with the object and purpose of the treaty".

203. According to Article 58(2) VCLT, the parties intending to suspend the operation of treaty provisions must notify the other parties of their intention to conclude the agreement to suspend and of the provisions of the treaty which are affected.

204. The Respondent relies on Article 58 VCLT for its second alternative argument, submitting that by means of the *Achmea* Judgment Malta and Bulgaria have suspended Article 26 ECT *inter se*.

205. The Tribunal has difficulty following that argument on the basis of the text of Article 58 VCLT (see also above under V.A(2)a). First of all, it is difficult to accept that the ECT with its closed system on reservations (in the sense of prohibiting them altogether), withdrawal, and amendments, would "not prohibit" a suspension like the one advocated by the Respondent, let alone "provide for it". As Article 16 ECT establishes dispute resolution, *i.e.* Part V of the ECT, as one of the core elements of the ECT, it is also doubtful that deviating from Part V of the ECT by means of a suspension would be compatible with the object and purpose of the ECT. Finally, it does not seem that Bulgaria and Malta have formally notified the other Contracting Parties of any intention to suspend.

206. In addition, a necessary precondition even to reach Article 58 VCLT would be that the *Achmea* Judgment directly, or through its impact on the EU Treaties, qualified as an agreement to suspend in the sense of Article 58 VCLT. That is highly doubtful to the Tribunal, to say the least. In the view of the Tribunal, it would require too many steps and assumptions to arrive at the conclusion that a judgment of a court in one legal order has become, or contains, a formal agreement of two States not to apply a provision of a treaty in another legal order. Nevertheless, even if the *Achmea* Judgment were to qualify as an agreement to suspend, then such an agreement would have to be very clear, through its text or the circumstances of its conclusion, as to how and why it could overcome the protections of Article 16 ECT.

207. Critically, even if one viewed the situation from an EU law perspective, "suspension" would not be the effect that the *Achmea* Judgment seeks to have or would have if it meant what it has been purported to mean, and if it had the capacity to affect the jurisdiction clause of the ECT. From an EU law perspective, arguably, the offer to arbitrate would have to be treated as never having been given, not as suspended.

208. Finally, in the case of a suspension, the same timing problem would arise as in the case of the Respondent's argument on *ab initio* effect discussed above under V.A(1). A suspension as of the date of the *Achmea* Judgment would have been too late to prevent the Tribunal from having jurisdiction on the date of the Request for Arbitration.

209. Therefore, Article 58 VCLT is not triggered and does thus not have an influence on the Tribunal's jurisdiction.

e. The* Mox Plant *Case and analogous situations in and between other legal orders

210. Regarding more particular arguments, the Tribunal has reviewed the *Mox Plant* Case on which the Respondent relied as an example of how EU law can render inapplicable and subordinate dispute resolution provisions in other international agreements such as UNCLOS.[175] While the Tribunal appreciates the *prima facie* analogy between the *Mox Plant* Case and the situation at hand, the Tribunal has found a number of points in the CJEU's judgment that fatally reduce its significance for the current dispute.

211. First, it seems to the Tribunal that, as acknowledged by the Respondent,[176] Article 282 UNCLOS specifically anticipates that States through a regional agreement may agree to subject disputes concerning the interpretation and application of UNCLOS to a different dispute resolution procedure from the one provided for in UNCLOS.[177] Furthermore, Article 282 UNCLOS subordinates the UNCLOS procedures to the other binding dispute resolution procedures so chosen. Indeed, it seems that the tribunal in the *Mox Plant* arbitration was concerned that, based on Article 282 UNCLOS, the dispute would fall under the jurisdiction of the CJEU and the tribunal did not only encourage, but enjoin the parties to resolve outstanding issues within the institutional framework of the European Communities.[178] Nothing similar is the case in the dispute over which this Tribunal presides.

212. Secondly, the *Mox Plant* Case deals with a State-to-State arbitration while the dispute at hand is that of a private investor against a State. Even if one assumed that a breach of EU

[175] Respondent's Reply, paras. 28, 32, 54; RL-116, *Mox Plant* Case.

[176] Respondent's Reply, para. 32, fn. 105.

[177] Compare Article 26(2)(b) ECT.

[178] RL-116, *Mox Plant* Case, paras. 44-46.

law could affect the jurisdiction of this Tribunal, which it cannot, it would still be the case that the Claimant in the present case, unlike Ireland in the *Mox Plant* Case, is not capable of breaching the EU Treaties as Ireland can and did.

213. Thirdly, in the *Mox Plant* Case, Ireland pleaded several violations of EU law.[179] In the case at hand, only violations of the ECT have been pleaded, and assurances have been made that this will not change (assuming, *arguendo*, that that were relevant).[180]

214. Fourthly, in the *Mox Plant* Case, another tested, international avenue to pursue its claim stood open to Ireland, as claimant. Ireland could (and was actually obliged to) bring the matter before the CJEU under, what is today Article 259 TFEU. This is not the case here.

215. Fifthly, all considerations set out above about Article 16 ECT, the lack of hierarchy between the EU legal Order and the ECT legal order from the point of view of the ECT, and the lack of impact of CJEU judgments on ECT decisions on jurisdiction would still apply.

216. Therefore, the findings in the *Mox Plant* Case do not indicate to the Tribunal that it should reconsider its analysis on jurisdiction. Considerations based on the *Lockerbie* case,[181] and the *Kadi* case,[182] as presented during the Hearing, equally fail to be analogous to a degree that they could have an impact on the Tribunal's decision.[183]

f. Article 26 ECT as a "bundle of bilateral rights and obligations"

217. Following the discussion of the arguments and cases, the Tribunal finds this a fitting place to discuss the theory of bundles of bilateral rights and obligations, brought forward by the Respondent. According to that theory, Article 26 ECT as a matter of fact only contains bundles of bilateral rights and obligations to be unravelled and interpreted on a case by case basis between the two parties to such a case. In the view of the Respondent, that would allow the Tribunal to read Article 26 ECT in one way, namely as affected by the *Achmea* Judgment, for intra-EU disputes, and in another way, namely as unaffected by *Achmea*, in other ECT disputes.

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[179] RL-116, *Mox Plant* Case, paras. 150-151.

[180] Claimant's Counter-Memorial, paras. 80-81; Claimant's Rejoinder, para. 65; Hearing Transcript, Day 1, 23 July 2019, pp. 156-158; Hearing Transcript, Day 2, 24 July 2019, pp. 288, 290.

[181] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order, 14 April 1992, ICJ Reports 1992, p. 3.

[182] *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities ("Kadi Case")*, Joined Cases C-402/05 P. and C-415/05 P, Judgment, 3 September 2008.

[183] Hearing Transcript, Day 2, 24 July 2019, pp. 235, 253-257; Hearing Transcript, Day 1, 23 July 2019, pp. 17-18.

218. The Tribunal observes that one can be of different opinions regarding the value of the presented theory of bundles of bilateral rights and obligations. Some may see it as a valuable tool to analyse how multilateral treaties work in the relationship of two parties thereto while others may feel that it undermines the coherent interpretation of treaties and with that, ultimately, the sanctity of the maxim of "*pacta sunt servanda*".

219. The Tribunal does not have to take a position on this debate. Even if it were true that Article 26 ECT as a matter of fact only contained bundles of bilateral rights and obligations to be unravelled and interpreted per case, and even if the ECT and the other Contracting Parties to the ECT, particularly those that are not EU Member States, could or must be deemed to accept such an individual reading per case,[184] still nothing indicates that the bilateral rights and obligations between Bulgaria and Malta under the ECT were modified in any way or should be interpreted as the Respondent advocates. There is thus no reason to deviate from assuming that Article 26 ECT is valid in its current form between Malta and Bulgaria. The concept of bundles of bilateral rights cannot be of any help to the Respondent if the bilateral rights and obligations in this individual case, as interpreted by the Tribunal, are not what the Respondent reads them to be.

220. This, however, is the case here. Therefore, the argument cannot be of any use to the Respondent and, consequently, the Tribunal sees no need to engage with it any further.

(3) Conclusion on the Impact of the *Achmea* Judgment

221. Based on the above, the Tribunal concludes that, while from the standpoint of EU law, and in particular the *Achmea* Judgment, the litigation of intra-EU disputes under the ECT might well be incompatible with EU law, that assessment is irrelevant from an ECT point of view. Absent an explicit and clear agreement to the contrary between the relevant parties, Article 16 ECT, a lack of other relevant points of contact, and a lack of an agreed hierarchical structure between the ECT and the EU legal order prevent such an influence of EU law.

222. Hence the analysis of the *Achmea* Judgment and its impact does not give the Tribunal any reason to deviate from its conclusion on jurisdiction above under V.B.

223. As a final step, the Tribunal will now analyse whether considerations of propriety and the Tribunal's judicial function in light of potential issues with the enforcement of an award have or should have an impact on its jurisdiction.

[184] Both might very well be the case.

C. The Tribunal's Judicial Function in Light of the Enforceability of its Award and Public Policy

224. A Tribunal is the guardian of its own judicial function. It must, in principle, seek to issue an enforceable award that is not in violation of public policy.

225. The Tribunal cannot avoid observing that its potential award in this case may violate public policy in Member States of the EU. Given, for example, the ample references to fundamental principles and premises in the *Achmea* Judgment, and the Articles that *Achmea* relies on, it would seem likely to the Tribunal that, from the point of view of EU law, the holdings of the CJEU in the *Achmea* Judgment aim to have the same public policy status as for example Article 101 TFEU, as determined and described in the *Eco Swiss Benetton* case.[185]

226. Equally, there seems to be a clear political momentum on the part of most EU Member States and the EU itself to undercut and not to accept intra-EU arbitrations under the ECT and their results.

227. Therefore, if the award in this case were rendered outside of the ICSID system, it might lack enforceability in EU Member States and, if it had its seat in one of them, it might even be set aside.

228. However, while the Tribunal acknowledges these concerns and has weighed them carefully, the Tribunal is not persuaded that they reach a level where they would make exercising the Tribunal's jurisdiction and rendering an award incompatible with its judicial function or other considerations of judicial propriety. The Tribunal has come to this conclusion based on the following reasons.

229. First, when it comes to the application of the *Achmea* Judgment on intra-EU arbitration under the ICSID Convention and the ECT, the Tribunal is unable to interpret the Judgment with definitive force and to determine its exact meaning. Neither is the *Achmea* Judgment conclusive enough not to need interpretation. There is thus too much uncertainty about the actual meaning of *Achmea* for it to form a solid basis for declining jurisdiction on grounds of judicial propriety and public policy.

230. Secondly, the developments following the *Achmea* Judgment continue to be a moving target, as further CJEU decisions, annulment and enforcement decisions, and potential new treaties or treaty amendments are to be expected. In such a situation, it would not be for an ECT tribunal to anticipate outcomes that are not within its purview.

[185] *Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97, Judgment, 1 June 1999, European Court Reports 1999 I-03055; ECLI identifier: ECLI:EU:C:1999:269.

231. Thirdly, in the presence of uncertainty on the judicial propriety of rendering an award, the Tribunal is of the view that its decision on jurisdiction should take into consideration the Claimant's right to access to justice and the risk of denial of justice. In considering these factors, the Tribunal is informed by the submissions of the Parties during the Hearing about the possibilities for the Claimant to seek justice in the ordinary courts of the Respondent (see above). The Tribunal concludes on this point that a denial of jurisdiction in this case would make it, if not impossible, at least a lot more burdensome for the Claimant to enforce the protections of Part III ECT allegedly violated by the Respondent.

232. Fourthly, the Tribunal, while the guardian of its own judicial function, considers that it should not needlessly substitute its own assessment of the chances of enforcement of its award for the assessment that the Claimant has made and seemingly still does make.

233. Finally, the Tribunal cannot help but note that the award in this case will indeed be rendered within the closed ICSID system for the enforcement of awards and many potential arguments on enforceability or lack thereof thus do not apply.

234. For these reasons, the Tribunal is confident in its power and duty to exercise its jurisdiction as established in the foregoing sections.

VI. COSTS

235. Given that the case will proceed to the next phase and that, in the view of the Tribunal, none of the Parties acted inappropriately or frivolously in this bifurcated segment of the proceedings, the Tribunal does not see a need to decide the allocation of costs now and defers the decision to the next phase of the proceedings.

VII. THE TRIBUNAL'S DECISION

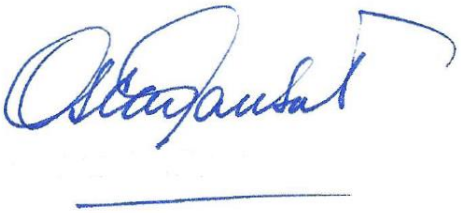
236. For the reasons set forth above, the Tribunal unanimously decides as follows:

(1) The *Achmea* Objection is hereby rejected;

(2) The Tribunal will address separately in its Award the remaining jurisdictional and/or merits issues in this case;

(3) Any decision regarding costs is deferred until the next phase of the proceedings; and

(4) The Tribunal invites the Parties to confer and seek agreement on the further procedural calendar.



Mr. Oscar Garibaldi
Arbitrator

Professor Pierre Mayer
Arbitrator

Judge Bruno Simma
President of the Tribunal