EUROPEAN COMMISSION

SVEA HOVRÄTT
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Brussels, 6 March 2019
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TO THE PRESIDENT AND MEMBERS OF THE ARBITRAL TRIBUNAL

KAJ HOBÉR, President of the Tribunal

Zachary DOUGLAS, Arbitrator

Bernardo CREMADES, Arbitrator

APPLICATION FOR LEAVE TO INTERVENE AS NON-DISPUTING PARTY

lodged by the **European Commission**, represented by Nicolaj KUPLEWATZKY, Luigi MALFERRARI, Tim MAXIAN RUSCHE, Lorna ARMATI and Petra NEMEČKOVA, Members of its Legal Service, as Agents, with an address for service at the Legal Service of the European Commission, Greffe Contentieux, BERL 1/169, 1049 Brussels, who consent to service by e-mail via nicolaj.kuplewatzky@ec.europa.eu; luigi.malferrari@ec.europa.eu; tim.maxian-rusche@ec.europa.eu, lorna.armati@ec.europa.eu; and petra.nemeckova@ec.europa.eu, in

SCC/18/98

Festorino Invest Limited. a.o.

Claimants

v.

Republic of Poland

Respondent

1. INTRODUCTION

1. On 6 March 2018, the Court of Justice of the European Union ("Court of Justice"), in its judgment in *Achmea*, held that "*Articles 267 and 344 [... of the Treaty on Functioning of European Union] must be interpreted as precluding a provision in an international agreement concluded between 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*" (emphasis added by the Commission).[1]

2. The Commission, in its Communication "*Protection of Intra-EU Investment*" of 19 July 2018, has set out that as a consequence of that judgment, "*all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement.*"[2]

3. On 31 October 2018, the *Bundesgerichtshof* (German Federal Court of Justice) handed down its judgment in *Slovak Republic v Achmea*. That judgment, for which the Commission attaches an English courtesy translation with the present request for leave to intervene as non-disputing party, informs the discussion on jurisdiction before your Tribunal for a number of reasons. First, it is the first judgment to annul an award established under a BIT on the basis of a lack of consent arising from a conflict with EU law. As such, it definitively settles the national proceedings that had triggered the preliminary reference in *Achmea* by finding that the consequence of a conflict with Union law is the disappearance of a provision establishing an intra-EU dispute settlement system outside those foreseen in Article 19 TEU on the basis of a lack of consent (as opposed the mere invalidity of consent).[3] The reasoning employed in this regard has direct implications for the proceeding pending before your Tribunal. Second, the German Federal Court of Justice's judgment sets out in detail that the appellants in *Achmea* cannot invoke legitimate expectations[4] and recalls its reasoning from the order for preliminary reference, that because the investments of *Achmea* had been made after it had become an EU Member State, it had to bear in mind that, with EU law taking precedence in relations between the Member States, that law could have an impact of the rules of the BIT[5]. Third and finally, the German Federal Court of Justice finds that a second preliminary reference is not necessary despite the arguments of *Achmea* that the Court of Justice acted *ultra vires* its own competence.[6] As such, the principles evoked by the Court of Justice were fully upheld by the German Federal Court of Justice and have become settled law.

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[1] Court of Justice of the European Union, judgment in *Achmea*, Case C-284/16, EU:C:2018:158.

[2] COM(2018)547 final, attached as **Annex EC-1**.

[3] *See*, in this regard, the language of the judgment of the *Bundesgerichtshof*, 31 October 2018, paragraphs 20, 25 to 41. The German version of that judgment is attached as **Annex EC-2** and an English courtesy translation from the Commission is attached as **Annex EC-3**.

[4] *See*, in this regard, the language of the judgment of the *Bundesgerichtshof*, 31 October 2018, paragraphs 42-58. Attached as **Annex EC-2**, together with the English courtesy translation of the Commission in **Annex EC-3.**

[5] *See*, in this regard, the language of the judgment of the *Bundesgerichtshof*, 31 October 2018, paragraph 41. Order for reference in *Achmea* (formerly Eureko) v *Slovakia*, I ZB 2/15,

4. On 15 January 2019, Cyprus, the Czech Republic, Austria, and Poland, among others, signed a declaration "On the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union" ("the Declaration").[7] Therein, those Member States declare that they deem the judgment in *Achmea* to establish that "*all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable*" and that "*[a]n arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty*".[8] That conclusion would also extend to "*sunset or grandfathering clauses*".[9]

5. In relation to the ECT, the Declaration further notes that any interpretation of the ECT "*as also containing an investor-State arbitration clause applicable between the Member States . . . would be incompatible with the Treaties and thus would have to be disapplied*".[10]

6. The Commission does not have any knowledge of the timetables agreed between the parties and so is not aware of the progress of the arbitration. However, in light of the Declaration of Cyprus, the Czech Republic, and Austria, the home States of the claimants, and Poland, the host State of the investors, on the compatibility of the present proceedings with the Union legal order, the Commission believes that the present intervention is also timely.

7. As noted by the Tribunal in *JSW Solar v Czech Republic*[11] and *Marfin v Cyprus*[12], an arbitral tribunal can and should review arguments challenging its jurisdiction where they are brought before it. That principle applies irrespective of the stage of the procedure. As the International Court of Justice in *ICAO Council* noted:

DE:BGH:2016:030316BIZB2.15.0, at paragraph 85, and case-law and academic literature quoted there. "*In the event of dispute this legal consequence is not precluded by a legitimate expectation on the part of the defendant that the clause is valid (see OLG Frankfurt, SchiedsVZ 2013, 119, 125). The defendant's investments were made only after the applicant became a member of the European Union. The defendant therefore had to bear in mind that with EU law now taking precedence in relations between the contracting parties, that law could have an impact on the rules of the BIT.*" An English courtesy translation of that order is attached as **Annex EC-3.**

6 *See*, in this regard, the language of the judgment of the *Bundesgerichtshof*, 31 October 2018, attached as **Annex EC-2** (in German) and **Annex EC-3** (in English), paragraph 66.

7 Declaration of the Representatives of the Governments of the Member States of 15 January 2019, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf [last accessed 18 January 2019], attached as **Annex EC-4**.

8 Declaration, page 1.

9 *Ibid.*

10 *Ibid*, page 2.

11 *JSW Solar (zwei) GmbH & Co KG v Czech Republic*, PCA Case No. 2014-03, Final Award of 11 October 2017, paragraph 250.

12 *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, paragraph 578.

> "*It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. The Court must however always be satisfied that it has jurisdiction. and must if necessary go into that matter proprio motu.*"[13]

8. The Arbitral Tribunal will appreciate the need to integrate into its decision-making the Declaration, the most recent judicial developments pertaining to the jurisdictional question raised by the Commission, and the recent judgment by the German Federal Court of Justice. The Commission considers that its intervention would address facts which the Arbitral Tribunal will in any event have to consider in its award.

9. In light of the above, the Commission respectfully requests leave to intervene as a non-disputing party and to submit observations in the proceedings.

10. For that purpose, the Director-General of the Legal Service of the Commission has appointed the undersigning agents to represent the Commission in the present arbitration.[14]

11. As regards its treatment of confidential information, the Commission intends to underline that, pursuant to Article 339 of the Treaty on the Functioning of the European Union ("TFEU"), the members of the institution, its officials and other servants are subject to a strict requirement not to disclose any information that they may acquire in the course of their duties.

2. LEGAL BASIS FOR THE EUROPEAN COMMISSION'S INTERVENTION AS A NON-DISPUTING PARTY

12. The dispute before your Arbitration Tribunal seems to be governed by the SCC Arbitration Rules of 2010 ("SCC Rules").

13. Article 3 of Appendix III sets out a procedure for submission to be made by a third person in investment treaty arbitration. Moreover, Article 19 of the SCC Rules provides for similar case management powers of an arbitral tribunal as Article 15 of the 1976 UNICTRAL rules. Eventually, a number of arbitral tribunals governed by SCC Rules have granted the Commission leave to intervene on the basis of its general case-management powers in disputes concerning the ECT, both directed against Spain and Italy.

14. The Commission, therefore, takes the view that, under SCC Rules, your Arbitral Tribunal has the power to admit the European Commission as *amicus curiae*.

15. In this respect, the Commission also observes that there appears to have formed a general consensus that, due to the public law nature of investment arbitration, it is appropriate to admit *amicus curiae* submissions in investment arbitration, whatever the applicable rules. For instance, the Commission has also been admitted by an

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[13] ICJ Judgment in *India v Pakistan*, Appeal relating to the jurisdiction of the ICAO Council, 18 August 1972, paragraph 13.

[14] The Authority is enclosed as **Annex EC-5.**

Arbitral Tribunal whose procedure was governed by Chapter 12 PILA (Swiss Federal Code of Private International Law)[15], and other *amici* have been admitted by ICSID tribunals prior to the introduction of Rule 37 of the ICSID Arbitration rules[16]. Also, more broadly speaking, international adjudicatory bodies have accepted such power on the basis of their general procedural powers.[17]

16. In the past, Tribunals have accepted similar requests of the European Commission both under the 1976 UNCITRAL Rules[18] and ICSID rules[19]. Tribunals have also invited the Commission under the 1976 UNCITRAL rules to present its view on certain questions.[20]

17. In exercising their discretion under Article 15(1) of the 1976 UNCITRAL Rules, those Tribunals have taken into consideration both the important public interest in the matters at issue and their specific and significant interest for the non-disputing party requesting leave to intervene.[21]

18. Rule 37 of the ICSID Arbitration Rules represents a codification of requirements that have been considered useful by Arbitral Tribunals, including by ICSID Tribunals prior to its entry into force, to assess whether to admit a non-disputing party. The Commission will in the following explain that it meets those requirements, which are:

    (a) The non-disputing party's submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by

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[15] *Wirtgen* v. *Czech Republic,* Procedural Order No 4 of 22 September 2015.

[16] *Aguas Argentinas et al.* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, §11, available at https://icsid.worldbank.org; See also *Aguas Provinciales de Junta Federal* v. *Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, §12, available at https://icsid.worldbank.org.

[17] See, for extensive references, *Brigitte Stern*, Civil Society's Voice in the Settlement of International Economic Disputes, 22 ICSID Review – Foreign Investment Law Journal 44 (2007), at 47-54; *Chester Brown*, The Inherent Powers of International Courts and Tribunals, British Year Book of International Law, 2005, pp. 195-244, at 235-236.

[18] PCA Case No. 2013-16 *U.S. Steel Global Holdings* v *Slovak Republic.*

[19] *Micula a. o.* v *Romania*, ICSID Case No. ARB/05/20, letter of the Secretary of 25 June 2009, quoted in paragraph 36 in the Award of 11 December 2013. *Electrabel* v *Hungary* , ICSID Case No. ARB/07/19, letter of the Secretary of 19 November 2008, quoted in paragraph 1.18 in the Award of 30 November 2012; *ex multis.*

[20] PCA Case No. 2008-13 *Eureko* v *Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, paragraphs 175 and following; PCA Case No. 2009-13 *EDF International S.A. (France) v Hungary* (award not public), letter of Dirk Pulkowski to the Director General of the Legal Service of the European Commission of 18 December 2012; PCA Case 2010/17 *European American Investment Bank (Austria)* v *Slovak Republic* Award on Jurisdiction of 22 October 2012, paragraphs 23 to 28.

[21] *United Parcel Service* v *Government of Canada*, Decision of the Tribunal of 17 October 2011, paragraphs 59 to 73; *Methanex* v *United States of America*, Decision of the Tribunal of 15 January 2001, paragraphs 23 to 53; see also PCA Case No. 2013-16 *U.S. Steel Global Holdings* v *Slovak Republic* (discontinued).

bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) The non-disputing party's submission would address a matter within the scope of the dispute;

(c) The non-disputing party has a significant interest in the proceeding.

19. In the absence of specific rules under the SCC arbitration rules, the Commission will in the following base the justification for its request on those considerations.

20. In recent investor-State arbitration proceedings under the ICSID Arbitration Rules, a Tribunal has authorized the Commission not only to file written *amicus curiae* submissions, but has also – in agreement with the parties – invited the Commission to the oral procedure.[22] In earlier investor-State arbitration under the Energy Charter Treaty and ICSID arbitration rules, another Tribunal noted[23]:

> "*Albeit with hindsight, it is unfortunate that the European Commission could not play a more active role as a non-disputing party in this arbitration, given that [...] the European Commission has much more than "a significant interest" in these arbitration proceedings*".

21. Should the Tribunal and the parties deem it useful, the European Commission is willing and prepared to participate in the hearing scheduled to take place in the current proceedings.

22. The Commission will set out in **Section 3** below in general terms why it considers that it would assist your Arbitral Tribunal in the determination of a legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties.

23. In **Section 4** below, the Commission will set out why it has a significant interest in the proceeding.

24. Should the Tribunal and the parties deem it useful, the European Commission is willing and prepared to participate in the hearing scheduled to take place in the current proceedings.

3. SCOPE OF THE COMMISSION'S INTERVENTION: ARTICLE 26 OF THE ENERGY CHARTER TREATY DOES NOT APPLY INTRA-EU, SO THAT YOUR ARBITRAL TRIBUNAL LACKS JURISDICTION

25. The Claimants argue that Article 26 of the Energy Charter Treaty constitutes a valid offer to arbitrate from Poland to investors from other EU Member States.

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22 *Micula a. o.* v *Romania*, ICSID Case No. ARB/05/20, letter of the Secretary of 25 June 2009, quoted in paragraph 36 in the Award of 11 December 2013; the same right has been afforded to the Commission in two pending ICSID arbitration proceedings (for confidentiality reasons, the Commission cannot reveal the precise details of those proceedings).

23 *Electrabel* v Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, part IV, paragraph 4.92.

26. The dispute before your Arbitral Tribunal hence has the particularity that it is an intra-EU dispute between investors from EU Member States, that is, Cyprus, the Czech Republic, and Austria, against another EU Member State, Poland.

27. The Energy Charter Treaty is an international treaty, to which the Union is a Contracting Party and which therefore is part of Union law[24] and which covers a field that is regulated by Union law. The Commission notes, in this regard, that the measures contested before the Tribunal reflect the transposition into Polish law of one of the options offered under the Directive on Renewable Energy. That Directive imposes upon Member States the obligation to achieve a certain national renewable energy target, so that investors in Cyprus, the Czech Republic, and Austria would be faced with similar, if not identical, home State obligations. That, in turn, *inter alia* affects your assessment on legitimate expectations.

28. As such, and while the starting point of your analysis, in accordance with Article 26(6) ECT, is one of international law[25], it is also one of European Union law, which forms part of the public international law order for the purposes of this proceeding.[26]

29. The Court of Justice of the European Union, in its judgment in Achmea, held that "*Articles 267 and 344 [... of the Treaty on Functioning of European Union] must be interpreted as precluding a provision in an international agreement concluded between 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*" (emphasis added by the Commission).

30. As has been recognized by a number of Arbitral Tribunals, starting from the Tribunal in *Electrabel* v *Hungary*, Union law takes precedence over the Energy Charter Treaty in case of conflict, at the very least in intra-EU situations, such as the present case. [27]

31. According to that arbitral precedence, there are two steps for integrating Union law into the analysis. First, an intra-EU Arbitration Tribunal based on Article 26 of the Energy Charter Treaty needs to take Union law into consideration when interpreting the extent of the offer for arbitration in Article 26 ECT. In the view of the

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[24] 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, p. 1.

[25] ICSID Case No. ARB/03/16 *ADC Affiliate Ltd.* v *Republic of Hungary*, award of 2 October 2006, at paragraph 290; ICSID Case No. ARB/01/7, *MTD Equity Sdn Bhd* v. *Republic of Chile*, award of 25 May 2004, at paragraph 86; and ICSID Case No. ARB/01/12 *Azurix Corp.* v. *Argentine Republic*, award of 14 July 14 2006, at paragraph 67; see also for further references *Antonio Parra*, "Applicable Law in Investor-State Arbitration", in: *Michael Rovine* (ed.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, Martinus Nijhoff Publishers, 2008 p. 3, at pp. 7-8.

[26] ICSID Case No. ARB/07/19, *Electrabel S.A. v Republic of Hungary* decision on jurisdiction of 30 November 2012, paragraphs 4.122, 4.189, and 4.195; and ICSID Case No. ARB/14/3, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, award of 27 December 2016, paragraph 278. *See also* judgment of the Court of Justice of 6 March 2018, Case C-284/16 *Achmea*, ECLI:EU:C:2018:158, paragraph 33.

[27] ICSID Case No. ARB/07/19, *Electrabel* v *Hungary*, Award of 30 November 2012, paragraphs 4.178 to 4.191.

Commission, based on the **principle of interpretation in conformity**, enshrined both in Article 31(1) letter c of the Vienna Convention on the Law of the Treaties ("VCLT") and in Union law, the Tribunal should have interpreted that Article as not containing an offer for arbitration by Romania to investors from other Member States, but as being directed only to investors from third countries.

32. Second, even if the Tribunal should have reached a different conclusion than the Commission, namely that such an interpretation in conformity is excluded, because it would be *contra legem*, the Tribunal would have been faced with a conflict between Article 26 of the Energy Charter Treaty and the general principles of Union law of autonomy, Article 19 TEU, and Articles 267 and 344 TFEU. This **conflict would have to be decided in favour of Union law**.

33. The Commission is aware that the Arbitral Tribunals in *Masdar* v *Kingdom of Spain* and *Vattenfall* v *Germany* have taken different views in the past, and have confirmed their jurisdiction despite the judgment in *Achmea*.

34. However, the Commission profoundly disagrees with the findings of these Arbitral Tribunals.

35. Given that the Commission did not have the possibility to engage in a contradictory debate with those Arbitral Tribunals, it has not been able to explain the fundamental flaws in the reasoning of those Arbitral Tribunals.

36. First and remarkably, in particular the Arbitral Tribunal in *Vattenfall* v *Germany* does not rule out the possibility that the findings of the Court of Justice in *Achmea* apply as well to the intra-EU application of the Energy Charter Treaty. It does not share the assessment on substance of the Arbitral Tribunal in *Masdar* v *Kingdom of Spain*, but observes at paragraphs 163 and 164:

> "*The Tribunal agrees with the conclusion in Masdar v. Spain that the ECJ Judgment is silent on the compatibility of intra-EU investor-State dispute settlement under the ECT with EU law. In the Tribunal's view, legal certainty requires that any relevant rule of international law that is taken into account during interpretation be clear. It is not for this Tribunal to extrapolate from the ECJ Judgment and declare a new rule of international law which is not clearly stated therein, or to decide which other scenarios would pose the same EU law concerns as those that the ECJ found in relation to the Dutch-Slovak BIT.*"

37. This passage has to be read in conjunction with paragraphs 139 ("*This Tribunal considers the ECJ Judgment [...] closed the door on the arbitral tribunal's jurisdiction under the Dutch-Slovak BIT*") and paragraph 150 ("*the TEU and the TFEU, including their interpretation by the ECJ, constitutes a part of international law*") of the award in *Masdar* v *Kingdom of Spain*.

38. Based on those findings, it would seem that the assessment of the Arbitral Tribunal in *Vattenfall* v *Germany* would change the moment the Court of Justice ruled explicitly on a case concerning the intra-EU application of the Energy Charter Treaty.

39. This approach reflects a fundamental misunderstanding of the role of the Court of Justice in preliminary references for interpretation of EU law. The operative part of

the judgment is the interpretation of Articles 19 TEU, 267 and 344 TFEU, and the general principle of autonomy of EU law. As the Commission would show in its *amicus curiae* brief, that interpretation clearly precludes also the intra-EU application of Article 26 of the Energy Charter Treaty.

40. Therefore, the Commission considers that the Tribunal should have declined jurisdiction in the present case. By not doing so, and in particular not addressing at all the most problematic aspects of intra-EU investor-State arbitration under the Energy Charter Treaty, it has manifestly exceeded its powers and failed to state reasons.

41. Second, the Arbitral Tribunal in *Vattenfall* v *Germany* greatly misunderstands the legal foundation of the conflict rule of primacy of Union law.[28] The principle of primacy is a written and express conflict rule, that has been codified in declaration 17 to the Treaty of Lisbon concerning primacy, and that rule in its written form clearly post-dates Article 16 ECT.

42. Therefore, the Commission considers that the Arbitral Tribunal has erred in so far as the applicable rule of conflict is concerned.

43. The Commission would like to present detailed legal argument on those points, in order to persuade your Arbitral Tribunal to depart from the findings in *Masdar* v *Spain* and *Vattenfall* v *Spain.*

4. SIGNIFICANT INTEREST OF THE COMMISSION IN THE PRESENT PROCEEDINGS

44. As set out under Section 3 above, the Commission has a central role in the interpretation and application of rules relating to investment protection within the Union in its role as guardian of the Treaties.

45. In order to avoid any conflict between arbitration awards and Union law, which would force EU Member States not to comply with those awards and the judiciary of the Member States to refuse recognition and execution of such awards, the Commission has a significant interest in ensuring that your Arbitral Tribunal is fully aware of the legal consequences of the judgment of the Court of Justice in *Achmea*, and considers these in its assessment on the jurisdictional objections.

5. FORM OF ORDER SOUGHT

46. For the reasons set out above, the Commission respectfully requests your Arbitral Tribunal to:

    i) grant the Commission leave to intervene in the present proceedings;

    ii) set a deadline for the Commission to file a written *amicus curiae* submission;

    iii) allow the Commission access to the documents filed in the case, to the extent necessary for its intervention in the proceedings;

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[28] *See* ICSID Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of* Spain, Award of 16 May 2018, paragraphs 224 to 226.

iv) allow the Commission to attend hearings in order to present oral argument and reply to the questions of your Arbitral Tribunal at those hearings, should the Tribunal and the parties deem that useful.

Nicolaj KUPLEWATZKY

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Agents of the Commission