EUROPEAN COMMISSION



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**TO THE PRESIDENT AND MEMBERS OF THE ARBITRAL TRIBUNAL**

Bernardo M. CREMADES, President

Prof. Kaj HOBER, Arbitrator

Prof. Zachary DOUGLAS QC, Arbitrator

# *AMICUS CURIAE* BRIEF

lodged by the **European Commission**, represented by Lorna ARMATI, Nicolaj KUPLEWATZKY, Luigi MALFERRARI, Tim MAXIAN RUSCHE and Petra NEMECKOVA, 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 lorna.armati@ec.europa.eu, petra.nemeckova@ec.europa.eu, nicolaj.kuplewatzky@ec.europa.eu, luigi.malferrari@ec.europa.eu, and tim.rusche@ec.europa.eu

in

**SCC Arbitration V 2018/098**

**Festorino Invest Ltd.** and others, Claimants

**v.**

**Republic of Poland**, Respondent

The European Commission thanks the Arbitral Tribunal for granting leave to make the present submission.

## 1. INTRODUCTION

1. The Commission has a central role, as guardian of the European Union ("EU" or "Union") Treaties, in ensuring the uniform interpretation and proper application of the rules relating to investment protection within the Union and therefore has a particular interest in avoiding any conflict between arbitration awards and EU law.

2. Two elements of Union law are of crucial significance for the proceedings before you:
   - **Articles 267 and 344 Treaty on Functioning of European Union ("TFEU")**: On 6 March 2018, the Court of Justice of the European Union ("CJEU") held that those provisions "*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*".[1]
   - **Commission Communication of 19 July 2018 on the Protection of intra-EU investment**: in that document, the Commission stated that Article 26 of the Energy Charter Treaty ("ECT") "*if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member State of the EU and another Member State of the EU*".[2]

3. In addition, an important element of context is now provided by the Declarations of all 28 Member States of 15 and 16 January 2019 on the legal consequences of the judgment of the CJEU in *Achmea* and on investment protection in the European Union.[3] The government of the United Kingdom, which is the home State of the investor, and the government of the Republic of Poland, have both expressed the clear position that Article 26 ECT does not apply intra-EU, and that, if it was to apply, it would be inapplicable since 1 May 2004, the date of accession of

[1] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, operative part.
[2] COM(2018)547 final, p. 1, at 3 (**Annex EC-1**).
[3] Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-2**); Declaration of the representatives of the governments of the Member States of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-3**); Declaration of the Government of Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-4**).

the Republic of Poland to the EU, by virtue of the conflict rule agreed between the United Kingdom and the Republic of Poland after the accession of the Republic of Poland to the ECT in the Act of Accession of the Republic of Poland to the EU, which is primacy of Union law. In that context, it it worth recalling the finding of the arbitral tribunal in *AFD* v *United States of America* on the function of interpretative declarations: "*We have the Parties themselves—all the Parties— speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey [...] is possible. Nothing [...] suggests that a [...] tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties [...] is in fact an "amendment" which presumably may be disregarded until ratified by all the Parties under their respective internal law.*"[4]

4. In a statement accompanying the recent signing of the International Energy Charter, and therefore in the context of the Energy Charter Treaty, the Union has affirmed its position that intra-EU investor-State dispute resolution is contrary to Union law.[5] The Union has also unanimously authorised the filing of submissions specifically putting forward that view in the context of a number of actions for enforcement of arbitration awards pending before US courts.[6]

5. The purpose of the present submission is to reiterate that Article 26 ECT does not apply in intra-EU relations[7]; to recall the case law of the CJEU according to which Union law precludes any investor-State arbitration concerning intra-EU disputes as contrary to Articles 267 and 344 TFEU and the fundamental principles of autonomy, effectiveness and mutual trust; and to explain, for the avoidance of doubt, why the Article 26 ECT should - even if it were held to apply to intra-EU disputes - be set aside as infringing a higher-ranking norm of Union law (i.e. the treaty provisions and fundamental principles mentioned a moment ago).

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[4] ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, 6 ICSID REP. 470 (2004), paragraph 177.

[5] The International Energy Charter seeks to update the ECT. The text of declaration can be found on the website of the Secretariat of the Energy Charter:. http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/EU_IEC_Declaration.pdf , The declaration reads: "*It is declared that, due to the nature of the EU internal legal order, the text in Title II, Heading 4, of the International Energy Charter on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms would become applicable in relations between the European Union and its Member States, or between the said Member States, on the basis of that text*".

[6] See for details the most recent filing of an amicus curiae submission in *Eiser Infrastructure Limited and Energia Solar Luxembourg sarl v Spain*, Civil Action no. 1:18-cv-1686 before the US District Court for the District of Colombia (**Annex EC-5**).

[7] See paragraph 18 below for further explanation in this regard.

6. The consequence of those arguments is that the Arbitral Tribunal should decline jurisdiction in the proceedings pending before it.

## 2. RELEVANT LEGAL BACKGROUND

### *2.1. The EU legal order*

7. The Member States of the Union owe each other and the Union far-reaching duties of loyal cooperation and mutual trust within the framework of a structured network of principles, rules and mutually interdependent legal relations that bind the Union and its Member States reciprocally and its Member States to each other.[8]

8. Article 19(1) TEU obliges the Member States of the Union to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. Together with the remedies provided for directly in the Treaties, a complete system of judicial protection is thereby ensured. The integrity of the Union legal order is protected via this comprehensive judicial system.

9. For present purposes, of particular importance are Articles 267 and 344 TFEU. The former describes the preliminary ruling procedure, which is the keystone of uniform interpretation and application of Union law. The latter reinforces that objective by prohibiting Member States from creating, in relation to any matter implicating Union law, dispute settlement mechanisms other than those set out in the Treaties. It is by virtue of this set-up that the specific characteristics and the autonomy of the Union legal order are preserved.[9]

10. Equally essential to the Union legal order is the principle of primacy, which is closely linked to the unity of the Union legal order and without which that legal order would not be able to function as such.[10] Union law is an integral part of, and takes precedence in, the legal order applicable in the territory of each of the Member States. The CJEU has found that the constitutional order of the Union consists of certain core principles, which may prevail over provisions of the Treaties – primacy would appear to be one of those essential ingredients.[11]

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[8] Judgment of the Court of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 33.
[9] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 35.
[10] Long-standing case law of the CJEU was codified in a Declaration on primacy annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon (**Annex EC-6**).
[11] Judgment of the CJEU of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285.

11. Union law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premise 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 Union that implements them will be respected.[12] A system of dispute resolution introduced in a situation covered by Union law but set up outside the system of effective legal protection established by the Treaties, unjustifiably calls, or risks calling into question that principle of mutual trust. Union law already protects all forms of cross-border intra-EU investment, throughout the entire life cycle of that investment. There is simply no space – or need, for that matter – for a separate avenue providing other substantive rights or protection than those afforded by the Union legal order.

12. Finally, it is important to emphasise that while the CJEU has always treated the Union legal order as "*special*", it has never called into question its international character: on the contrary, in *Achmea*, the CJEU concludes that Union 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*".[13] International courts and tribunals have consistently accepted the nature of Union law as international law applicable between the Member States.[14]

*2.2. The Energy Charter Treaty*

13. The purpose of the Energy Charter Treaty was to create a framework for energy cooperation between, on the one hand, the Union, and on the other, the newly independent country of Central and Eastern Europe, with a view to facilitating their transition to a market economy and accession to the Union. The Energy Charter Treaty was thus an instrument of the Union's external energy policy. It sought to enhance energy security, efficiency and cooperation by extending the free-market principles of the Union's internal market in energy beyond its borders to the wider neighbourhood of continental Europe as a whole. The Union's internal energy policy consisted, by contrast, of an elaborate system of rules designed to create and sustain that internal market in energy.[15] Union law does not permit the Member States (or

[12] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 34.
[13] Judgment of the CJEU of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 41. See also judgment of 5 February 1963 in *Van Gend en Loos*, 26/62, EU:C:1963:1 in which the CJEU refers to the then European Economic Community as "*a new legal order of international law*" (at p. 12).
[14] See, for example, Order No 3 of 23 June 2003 in *Ireland v United Kingdom (Mox Plant)*, UNCLOS Arbitral Tribunal.
[15] See, for a discussion, ICSID Case No. ARB/07/19, *Electrabel v Hungary*, Award of 30 November 2012, paragraphs 4.131 and 4.132. See generally with a very detailed and recent historic account of events *Johann Robert Basedow*, *The*

indeed the Union itself) to modify or replace those rules by an international treaty such as the Energy Charter Treaty; nor was it ever the intention of the Member States to do so. Indeed, Article 1(3) ECT makes it clear that the Member States had already transferred their sovereign competence to regulate the internal market in energy to the Union. That same provision also recognises the dynamic nature of that transfer of competence. For instance, as a result of the adoption of the Renewable Energy Directive, the Union now has exclusive external competence for renewable energy policy.[16] The same reasoning applies to many other fields of energy law, such as electricity and gas, where extensive EU legislation exists.

14. In other words, the Energy Charter Treaty creates rights and obligations vis-à-vis third countries, not within the internal market in energy, which was and remains governed by the EU Treaties and the secondary legislation adopted on the basis thereof.

*2.3. The Declarations made by the Member States concerning the consequences of the judgment in Achmea*

15. In the judgment in *Achmea*, the CJEU interpreted Articles 267 and 344 TFEU as precluding a provision in an international agreement concluded between Member States that permits an investor from one of those States to bring proceedings against another of those States before an arbitral tribunal.

16. By virtue of their obligations flowing from Union law, Member States are required to draw all necessary consequences from that judgment.

17. By declarations made on 15 and 16 January 2019, the Member States undertook, among other things, to inform investment tribunals about the legal consequences of the *Achmea* judgment in all pending intra-EU investment arbitrations. The vast majority of Member States (22 out of 28) specifically confirmed that they would do so in proceedings brought either under bilateral investment treaties concluded between Member States or under the Energy Charter Treaty.[17] Five Member States refrained from taking a position in relation to proceedings brought under

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*European Union's international investment policy* pp. 135-165 (Nov. 2014) (unpublished Ph.D. dissertation, London School of Economics), https://core.ac.uk/download/pdf/46519956.pdf .

[16] Judgment of the CJEU of 26 November 2014, *Green Network v Autorità per l'energia elettrica e il gas*, C-66/13, EU:C:2014:2399, paragraph 65. It is important to note that that was not the case when Energy Charter Treaty was signed; for that reason, the Treaty was signed by both the Union and the Member States.

[17] Declaration of the representatives of the governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-2**).

the Energy Charter Treaty on the grounds that the issue was *sub iudice*[18] and one Member State issued an individual declaration opining that the judgment in *Achmea* "*is silent on the investor-State arbitration clause in the Energy Charter Treaty*".[19]

## 3. ARTICLE 26 ECT DOES NOT APPLY INTRA-EU

18. The rules of customary international law on treaty interpretation rather plead in favour of concluding that the Energy Charter Treaty does not apply in intra-EU situations. It does not appear to be in doubt that the Treaty is to 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 light of its object and purpose*" (Article 31(1) VCLT). The interpreter is, moreover, required to take into account (i.e. is prohibited from disregarding) "*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*" (Article 31(2)(b) or (3)(c) VCLT). Any remaining ambiguities or absurd or unreasonable result may be resolved by recourse to, inter alia, the circumstances of the treaty's conclusion. Article 31 VCLT, as its title suggests, states a single, general rule of interpretation with the result that all of its provisions must be applied together: treaty interpretation is a single combined operation without any hierarchy between the interpretative elements.[20]

19. Nothing in the rules of interpretation thus places the wording of the treaty on any higher footing than other elements: on the contrary, the first paragraph of Article 31 VCLT refers to the ordinary meaning of the terms used "*in their context and in light of [the treaty's] object and purpose*". The terms used, including in the description in the Treaty of its purpose, must therefore be read in the wider context of the Energy Charter Treaty and the status as Member States of the Union of many of the Contracting Parties.

20. As recalled above in section 2.2, the historical context in which the Energy Charter Treaty came about clearly indicates that it was not intended to bind the Member States *inter se*. That same conclusion follows from the text of the treaty provisions themselves, which, among other things, acknowledge the power of the Union to make binding decisions in respect of its

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[18] Declaration of the representatives of the governments of the Member States of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-3**).

[19] Declaration of the Government of Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union (**Annex EC-4**).

[20] Waldock (Special Rapporteur on the Law of Treaties), Sixth Report on the Law of Treaties, UN Doc. A/CN.4/186 and Add. 1-7, available at [1966] 2 Y.B. Int'l L. Comm'n, 95 & 219.

Member States (Article 1(3) ECT) and provide that the Union and its Member States shall vote at the Energy Charter Conference as a single block (Article 36(7) ECT). Thus it is entirely within the general rule of interpretation described in Article 31 VCLT to conclude that an investor from one Member State investing in another Member State is not covered by the notion of an "*Investor*" making an investment in the "*Area*" of "*another Contracting Party*" and thus falls outside the scope of the dispute resolution mechanism provided for in Article 26 ECT. In other words, the ordinary meaning of those terms, when read in their proper context, must be understood as excluding EU investors investing in the "*Area*" of the Union: those persons are investors investing in their own economic area.[21] In that context, it must be recalled that while the Energy Charter Treaty is signed by both the Union and its Member States, the reasons for that fact are fully explained by the situation, at that relevant point in time, concerning competence for external energy policy: as a matter of Union law, the Union acting alone was not competent to conclude an agreement such as the Energy Charter Treaty. The Member States are therefore signatories to the Treaty, not because the intention was to ensure the application of that Treaty intra-EU, but rather because the Union is founded upon the principle of conferral of competence and was, for reasons internal to its own legal order, unable to sign alone.[22]

21. As a result of the context and the purpose of the Energy Charter Treaty, there is no reason to conclude that the terms of the Treaty (including definitions given for terms such as "*Contracting Party*" or "*Area*") require an interpretation of Article 26 ECT in such a way that it is found to apply intra-EU.

22. The Statement made by the EU to the ECT Secretariat pursuant to Article 26(3)(b)(ii) ECT does not provide any indication either that Article 26 ECT should be interpreted as applying intra-EU.[23]

23. That statement is intended to address cases initiated by investors from non-EU Contracting Parties under the ECT.[24]

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[21] Opinion of Advocate General Bot delivered on 29 January 2019 in relation to the request by the Kingdom of Belgium pursuant to Art 218(11) TFEU concerning the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA), EU:C:2019:72, paragraph 207.

[22] Conversely, if the Member States had been competent for all matters falling within the scope of the Energy Charter Treaty, they would have signed alone.

[23] Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter, Official Journal of the EU, OJ L 69 of 9.3.1998, p. 115 (**Annex EC-7**).

[24] Ibid., paragraph 3 of the Statement is worded as follows: "The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of

24. That statement in particular clarifies:

- first, that the Union exercises the competences conferred to it from the Member States (paragraph 1), and
- second, that the Union and its Member States each are internationally responsible for the fulfilment of their obligations under the ECT in accordance with their respective competences (paragraph 2), and
- third, that the Union has not (given the availability within the Union legal order of effective legal protection before the CJEU in relation to questions concerning the application or interpretation of an international agreement such as the Energy Charter Treaty) given unconditional consent to the submission of a dispute to international arbitration.[25]

25. The Member States were competent to sign the agreement because the Union did not (yet) have exclusive competence for external energy policy. That does not mean that they were competent to invite an investor from another Member State to enter into arbitration pursuant to Article 26 ECT in relation to an investment made in their territory. There is therefore nothing in the Statement that speaks against the conclusion that Article 26 ECT is not applicable intra-EU. On the contrary, there is specific support for the proposition that the Union operates in accordance with the principle of conferral and that that is an important part of the context of the Energy Charter Treaty.

26. In that respect, it appears useful to clarify that in certain international conventions concluded both by the Member States and the Union, a general declaration was issued at the time of ratification in order to facilitate the determination of competences.[26] No such declaration accompanied the Energy Charter Treaty, but that does not, indeed cannot mean that both the Union and the Member States became internally competent for all matters falling within the scope of that Treaty. Indeed, since any declaration is necessarily limited to stating for the sake of clarity what is, in any event, the case, nothing can be inferred from the absence of any such

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**another** Contracting Party. In such case, upon the request of an Investor, the Communities and the Member States concerned will make such a determination within a period of 30 days" (emphasis added by Commission). That statement illustrates that the Union and the Member States considered that only investors from other Contracting Parties could bring a case against the Union or its Member States and that, in such a situation, the Union and the Member States would, together, determine who the appropriate respondent would be.

[25] The reference to an internal system for dispute resolution also explains why the Statement was added only to third countries: it was only ever intended to clarify to those other parties how and by whom the proper respondent would be identified in a case brought against the Union of its Member States.

[26] See for example the declaration made by the European Community upon ratification of UNCLOS, Annex B to Council Decision 98/414/EC of 8 June 1998, Official Journal of the European Union, OJ L 189 of 3.7.1998, p. 39 (**Annex EC-8**).

declaration. Therefore, any attempt to draw an inference from the absence of a declaration, or indeed from the fact that one was proposed but not adopted, is logically flawed: the declaration served only to clarify, not to create. On the contrary, the fact that an explanation of competence and the absence of any intra-EU application of the Energy Charter Treaty was included until the last but one version of the proposed declaration is a strong indication that Member States did not consider themselves competent for all matters falling within the scope of application of the Treaty. If they had, there would have been no need the Union to have become a Contracting Party.

27. The Declarations referred to above (**Annexes EC-2 to EC-4**) serve to underline that point: no Member State took the view that intra-EU arbitration pursuant to Article 26 ECT was permitted under or compatible with the obligations of the Member States that flow from the EU Treaties. And amongst the Member States who specifically affirmed their understanding that such intra-EU arbitration was precluded were those, such as Germany and the Netherlands, who had for a time defended the opposite view.[27] As a final point on interpretation, it is therefore relevant to note that the post-ratification interpretations of an international agreement are also entitled to deference.

28. The Commission places particular emphasis on the fact that the interpretation put forward in this *amicus curiae* brief is shared both by the home State of the investor and the host State (see on the legal importance of this above paragraph 3). The arbitral tribunal cannot lightly neglect this very clear will of the relevant Contracting Parties.

[27] A number of Member States have consistently argued in arbitration proceedings that the Energy Charter Treaty does not apply intra-EU (in particular, Hungary, the Czech Republic, Spain and Italy). Others, such as Germany and the Netherlands, have publicly changed their position and stated that they too deem the ruling in *Achmea* to apply to the Energy Charter Treaty: see, for Germany, the reply of the German government to a parliamentary question on 15 May 2018 (see http://dipbt.bundestag.de/dip21/btd/19/021/1902174.pdf, courtesy translation: "*The Federal Government considers that the finding of the Court of Justice in Achmea applies to the Energy Charter Treaty. In the pending case Vattenfall v Germany (ARB/12/12), the Federal Government has requested to dismiss the application. The Federal Government has as from the beginning of the case in an exhaustive and substantiated manner argued that it is considers the case to be inadmissible and unfounded*"); or, for the Netherlands, the statement of the competent Minister to the lower house of the Dutch Parliament on 26 April 2018 (see https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2018Z07993&did=2018D26948, courtesy translation: "*The Dutch cabinet considers that the judgment [in* Achmea*] is also relevant for the admissibility of the dispute settlement procedure in the ECT in disputes between an investor from one Member State and another Member State*"). See also above paragraph 4 on the position of the Union.

## 4. IN THE ALTERNATIVE, THE TFEU MUST PREVAIL IN A CASE OF CONFLICT WITH THE ECT

29. In order to assist the Arbitral Tribunal to the fullest extent possible, the Commission will briefly consider the consequences that would follow from a finding that Article 26 ECT does apply intra-EU.

30. In such a case, Article 26 ECT would be in conflict with primary law (Articles 267 and 344 TFEU, see in detail **4.1** and **4.2**) and, in accordance with the hierarchy of norms that characterises the Union legal order, it would have to be set aside, or "*disapplied*" in any intra-EU dispute.[28] That outcome is in line with the solution that would result from an application of customary international law on conflict (see in detail **4.3**). Finally, the Commission will address certain arguments used by arbitral tribunals to come to different conclusions, and rebut them (see in detail **4.4**).

### *4.1. Consequences of Achmea*

31. It is the understanding of the Union and of each of the Member States that the CJEU in *Achmea* confirmed that the TFEU prohibits, and always has done, the Member States from offering to resolve intra-EU investor-State disputes before international arbitral tribunals.

32. Indeed, the binding interpretation of Union law handed down by the Court is not, because it cannot be, limited to the particular facts of the case underlying the preliminary ruling. The role of the CJEU in the context of the Article 267 TFEU procedure is to give a binding interpretation of Union law, not to decide the case before it; the ruling that it hands down applies *ex tunc* and *erga omnes*.[29] The ruling in *Achmea* therefore states the law as it always has been and therefore as it must be applied including in pending cases.[30] The manner in which

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[28] Judgment of the CJEU of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 305. See also judgment of the CJEU of 9 March 1978 in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21.

[29] See, for example, judgment of the Court of 19 December 2013, *Vent de colère*, C-262/12, EU:C:2013:851, paragraph 39: "*It should be recalled in this connection that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied*". It is possible for the CJEU to limit the application of its judgment in time: despite a request to that effect during the proceedings, the Court declined to do so in *Achmea*.

[30] German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15, ECLI:DE:BGH:2018:311018BIZ2.15.0, paragraph 32: "*Contrary to the defendant's view, it does not matter in the case in dispute whether the arbitral tribunal did in fact apply EU law or whether it was required to do so. To determine*

an interpretation of Union law contained in a judgment of the CJEU affects a particular set of circumstances is a matter for the court competent to hear that dispute. The question before the Arbitral Tribunal is how to apply the interpretation of Articles 267 and 344 TFEU handed down by the CJEU in *Achmea* to the arbitration clause in the Energy Charter Treaty.

*4.2. The ruling in Achmea applied to the Energy Charter Treaty*

33. The operative part of the judgment in *Achmea* is drafted in non-specific terms to refer to "*a provision in an international agreement concluded between Member States*" (emphasis added).

34. The considerations set out by the CJEU apply equally to an intra-EU application of Article 26 ECT:
    - Union law is international law applicable between all Member States of the Union,
    - Union law is covered by the term "*applicable rules and principle of international law*" as it is used in Article 26 ECT and is explicitly recognises as binding under the Energy Charter Treaty in an intra-EU context in Article 1(3) ECT;[31]
    - Arbitral tribunals are not "*national courts or tribunals*" within the meaning of Article 267 TFEU;
    - There is no full review of the award by a court in a Member State.

35. The first point appears now to be generally accepted as an accurate description of how the Union legal order fits into the international legal order.

36. The second point follows on from the first as its logical consequence and appears to be similarly uncontroversial.

37. The third point is a matter of settled case law from the CJEU. There is no difference, as regards the conditions for being considered to fall within the scope of bodies able to have recourse to the preliminary reference procedure, between a tribunal set up under an intra-EU BIT or one established under the Energy Charter Treaty, just as there is no difference between an

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*whether there was an arbitration agreement between the parties, the only decisive consideration is whether the applicant could make a valid offer to conclude an arbitration agreement with the defendant in Article 8(2) of the BIT. The Court of Justice of the EU held that it could not, irrespective of whether in the case at issue the arbitral tribunal was or was not required to apply EU law*"..

[31] "'*Regional Economic Integration Organization*' *means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*" (emphasis added).

UNCITRAL tribunal and an SCC or ICSID tribunal. Should there be any doubt in that regard, the matter is best resolved by referring a question to the CJEU pursuant to Article 267 TFEU: the Court will either confirm the point in an order of inadmissibility or answer the question and thereby resolve the fourth point and the underlying question of whether Articles 267 and 344 TFEU preclude the validity of an offer for arbitration made on the basis of Article 26 ECT to an investor from one Member State by another Member State.[32]

38. Just as in investment disputes arising out of intra-EU investments under a bilateral investment treaty, disputes arising out of intra-EU investments under the Energy Charter Treaty "*are liable to relate to the interpretation or application of EU law*".[33] But arbitral tribunals convened under the Energy Charter Treaty are no more a part of the Union judicial system than are arbitral tribunals convened under a bilateral investment treaty. Like the arbitral tribunal in *Achmea*, an investor-State arbitral tribunal constituted pursuant to Article 26 ECT lies beyond the supervision and control of the Union courts and any pronouncements that such an arbitral tribunal could make pose a threat to the integrity of the Union legal order and the principles of sincere cooperation and mutual trust that apply between the Union and the Member States and between the Member States among themselves.

*4.3. EU law prevails in case of conflict over the Energy Charter Treaty*

39. It is generally recognised that the conflict rules contained in Article 30 VCLT operate as residual rules and would thus bow to the principle of primacy that underpins the Union legal order and constitutes what, in international law terms, is called a "*special*" conflict rule (i.e. a specific regulation by the Member States of the relationship between present and future treaties entered into by those parties to the effect that Union law will take precedence over other international law obligations).[34]

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[32] To obtain such a reference, the Arbitral Tribunal could either directly refer this particular point to the CJEU, or it could put that question – possibly also alongside other questions, see the end of the *amicus curiae* brief – to the competent *juge d'appui*, with the request to refer those questions on its behalf to the CJEU. In case this Arbitral Tribunal has its seat in Stockholm, as is usual for SCC tribunals, the competent *juge d'appui* would hence seem to be the Svea Court of Appeal.

[33] Judgment of the Court of 6 March 2018 in *Slovakia v Achmea*, C-284/16, EU:C:2018:158, paragraph 39.

[34] The focus by the Tribunal in the *Vattenfall* case on Article 351 TFEU and the "*significant amount of interpretation*" allegedly required to derive the outcome argued for by the Commission in that case is incomprehensible: ICSID Case No. ARB/12/12, *Vattenfall v Germany*, Decision on the Achmea issue, paragraphs 224 to 226. There is broad academic support for the view put forward by the Commission: Thomas Eilmansberger writes that "the intentions of the parties are expressed in the most authoritative way by conflict rules included in the later treaty, [footnote omitted] and the EC Treaty (being the later Treaty in this case) does indeed contain such a conflict rule, namely the already mentioned Article 307 EC" ("Bilateral Investment Treaties and EU Law" (2009) 46 Common Market Law Review, pp. 383-429, at page 421 and 425); and Martti Koskenniemi writes in his report for the International Law Commission on fragmentation

40. The CJEU has specifically recognised that primacy applies to international treaties that were concluded between a Member State and a third country as of the day of accession of the latter to the Union.[35] As to the position of international tribunals, Order No 3 of 23 June 2003 in *Ireland v United Kingdom (Mox Plant)* of the UNCLOS Arbitral Tribunal also confirms the primacy of EU law and exclusive competence of the CJEU in the public international law relations between Member States in cases of mixed agreements, such as UNCLOS and the Energy Charter Treaty.[36]

41. Thus, in any situation concerning both the Energy Charter Treaty and Union law, the former would, pursuant to Article 30(4)(a) VCLT, only apply to the extent that it is compatible with the latter, and in particular the Act of Accession of Poland to the EU and the Treaty of Lisbon that first affirmed and then reaffirmed the will of the Contracting Parties that are also Member States of the Union to be bound by Articles 267 and 344 TFEU. As set out above, Article 26 ECT on dispute settlement is not, when applied between one Member State and an investor of another Member State, compatible with Union law. Hence, Article 26 ECT could not be applied in any proceedings concerning an intra-EU dispute.

*4.4 Overview of why certain arguments accepted by other arbitral tribunals should be rejected*

42. Certain arbitral tribunals have considered a number of arguments which lead to the contrary view. For the avoidance of doubt and in order to assist the Arbitral Tribunal in the proper interpretation of Union law, a brief explanation of the reasons for rejecting those arguments appears useful.

43. It has been suggested that the judgment in *Achmea* is limited to the bilateral investment treaty concluded between the Netherlands and Slovakia.[37] That is not credible, for two reasons. In the first place, as described above, the rulings handed down by the CJEU pursuant to Article 267 TFEU are binding interpretations of Union law not a specific solution to a particular dispute.

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that "[t]he EC Treaty takes absolute precedence over agreements that Member States have concluded" (Fragmentation of international law, Report of the Study Group of the International Law Commission, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682, paragraph 283).

[35] Judgment of the Court of 8 September 2009 in *Budějovický Budvar*, C-478/07, EU:C:2009:521, paragraphs 97 to 99; see also the earlier judgments in *Conegate*, 121/85, EU:C:1986:114, para. 25; *Matteucci v Communauté française de Belgique*, C-235/87, EU:C:1988:460, para. 22; and *Exportur*, C-3/91, EU:C:1992:420, para. 8.

[36] Paragraphs 20 to 28, available at https://pcacases.com/web/sendAttach/867 .

[37] ICSID Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, Award of 16 May 2018, paragraph 679.

And second, the circumstances of the case suggest that the Court was deliberately broader in its approach than a narrow consideration of the BIT at issue in the national proceedings. Indeed, the referring court (the *Bundesgerichtshof*, Germany) had framed its question to the CJEU in terms of "*a provision in a bilateral investment protection agreement*"; the answer from the Court refers to "*a provision in an international agreement concluded between Member States*". The interpretation of Articles 267 and 344 TFEU therefore applies to situations beyond the bilateral investment treaty concluded between the Netherlands and Slovakia.[38]

44. It has also been suggested that the matter can be settled with reference to Article 16 ECT.[39] Once again, two reasons militate against that approach. The first is that, contrary to what must be assumed if that argument is to succeed, Article 16 ECT is not a conflict rule; it is a rule of interpretation ("*shall be construed*", emphasis added by the Commission). Second, even if it were to be accepted that Article 16 ECT is a special conflict rule, that earlier provision would nevertheless be overruled by the more recent special conflict rule that is the general principle of primacy of Union law, as agreed between the Union (including the United Kingdom) and the Republic of Poland in the Act of Accession and as embodied most recently in Declaration 17 attached to the Treaty of Lisbon[40]. This has been recognized by the arbitral tribunal in *Electrabel* v *Hungary*: "*[T]he Tribunal decides that Article 16 ECT would [...] be inapplicable because the conflict rule of the later treaty would apply, namely Article 307 ECT.*"[41] The primacy of Union law is a matter of long-settled case law, which extends to national law, however framed, and international law. It is inherent to the Union legal order and the Member States would not be competent to decide to place an international agreement on a higher footing than a rule of Union law, especially one such as the autonomy of the Union legal order upon which the ruling in *Achmea* is based.[42] In other words, either Article 16 ECT is simply a

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[38] The content of the Opinion of Advocate General Wathelet in the *Achmea* case cannot call that conclusion into question. On the contrary, the opinion of an Advocate General is just that, as is clear from paragraph 27 of the judgment in particular.

[39] ICSID Case No. ARB/12/12, *Vattenfall* v *Germany*, Decision on the Achmea issue of 31 August 2018, paragraphs 208 and 231.

[40] Declaration on primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon **(Annex EC-6)**.

[41] ICSID Case No. ARB/07/19, *Electrabel v Hungary*, Award of 30 November 2012, paragraph 4.178. As becomes clear in the reasoning, in paragraphs 4.179 to 4.191, and in particular the reference to the judgments of the CJEU in *Commission* v *Italy* and *Commission* v *Austria*, quoted and explained by the arbitral tribunal in paragraphs 4.184 and 4.185, Article 307 EC is seen as expression of the principle of primacy. It is regretful that later arbitral tribunals have completely ignored the work of the *Electrabel* tribunal, which on this point is a correct application of EU law as public international law.

[42] Judgment of the Court of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461.

rule on how the text is to be interpreted, or it must be set aside in case of conflict with the principle of primacy of Union law. On that basis, Article 16 ECT cannot be usefully invoked to reach a different outcome to that which flows logically from the ruling of the CJEU in *Achmea*.

45. Having thus established the proper interpretation of the terms of the Energy Charter Treaty, one final argument and the reasons why it cannot prosper deserves mention: the operation of the sunset or grandfathering clause. If the intra-EU application of the Treaty is not and has never been possible, then it follows that a clause such as Article 47(3) ECT, the purpose of which is to extend in time the protection offered by the Treaty, cannot operate to "*cure*" the fact that a particular situation (intra-EU application) never benefitted from that protection in the first place. In any event, the grandfathering clauses would be inapplicable in an intra-EU context for the same reason as Article 26 ECT.

## 5. CONCLUSION

46. On the basis of the foregoing considerations, the Commission invites the Arbitral Tribunal to decline jurisdiction in the proceedings brought before it on the grounds that there was no valid consent to arbitration.

47. Should your Tribunal have any doubts as to the position put forward by the Commission, it may also consider referring the questions discussed in this brief to the Court of Justice, which is the ultimate authority in this matter, as the UNCLOS Tribunal in *Mox Plant*[43] and the tribunal in *Iron Rhine*[44] have convincingly argued. Following the judgment in *Achmea*, a direct reference from your Tribunal is inadmissible.[45]

48. Your Tribunal could envisage relying on a competent judge of a Member State as *juge d'appui*.[46] As the Court of Justice held in *Nordsee:*

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[43] ITLOS Order No. 3, 24 June 2003, at paragraphs 27 and 28.

[44] Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, Chapter III, in particular at paragraph 103: "*[T]he Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of EC law which constitute neither actes clairt nor actes éclairés, the Parties'obligations under Article 292 would be triggered in the sense that the relevant questions of EC law would need to be submitted to the European Court of Justice*".

[45] See also above paragraph 34 third indent.

[46] See, on that possibility, judgment in *Nordsee*, 102/81, EU:C:1982:107, paragraph 14. See on this point for example also José Carlos Fernández Rozas, *Le rôle des juridictions étatiques devant l'arbitrage commercial international*,

> *"As the Court has confirmed in its judgment of 6 October 1981 Broekmeulen, Case 246/80 [1981] ECR 2311), Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award — which may be more or less extensive depending on the circumstances — and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation."*

49. Hence, a competent court of a Member State of the Union may refer questions of interpretation and validity to the CJEU, and so can resolve the questions that you may see as unresolved at present: interpretation of Article 26 ECT and validity of Article 26 ECT.

Lorna ARMATI Nicolaj KUPLEWATZKY Luigi MALFERRARI

Tim MAXIAN RUSCHE Petra NEMECKOVA

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Académie de Droit International de la Haye / Hague Academy of International Law Recueil des cours, Collected Courses, Tome/Volume 290 (2001), p. 130. The *juge d'appui* is typically the judge designated for that function by the procedural law of the State where the tribunal has its seat. See order for reference of the *Bundesgerichtshof* in *Achmea* v *Slovakia*, paragraph 51, confirming that the relevant provision of German civil procedural law allows for such a reference from the *juge d'appui* if the seat of the commercial arbitration tribunal is Germany. See Catherine Kessedjian, "*L'arbitrage comme mode de règlement des différends est-il remis en cause par le droit européen?*", in : ibid. et Charles Leben (ed.), Le droit européen et l'investissement, Editions Panthéon-Assas, 2009, pp. 107 to 121, for references to the relevant specific provisions in British and Danish law.