PCA Case No. 2016-12:

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

- between -

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

*Claimants*

*v.*

**THE CZECH REPUBLIC**

*Respondent*

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# DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN TO THE SECOND INTERIM AWARD ON INTRA-EU OBJECTION

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1. I disagree with my colleagues' views and believe that the Tribunal lacks jurisdiction by virtue of the Intra-EU objection raised by the Respondent. Indeed, I have serious methodological and conceptual discrepancies with the majority. I believe that the Second Interim Award places too much reliance on the idea of the existence of "sub-systems" in international law, each living its own life apart from the others. Although the decision formally accepts the applicability of the law of treaties to matters of interpretation and conflict of rules, in practice the decision automatically applies the BIT as though it existed completely separately from the rest of the obligations later undertaken by the same contracting parties with regard to the treatment to be granted to their investors in what became their common economic area. As a result of the approach followed in the decision, investment in the EU by EU investors is thought to have nothing to do with the EU Treaties and it suffices for the Tribunal to follow what the BIT establishes.

2. I particularly disagree with the manner this Interim Award deals with the law of treaties. It places heavy emphasis on matters that are not under discussion, such as the invalidity and termination of treaties, while the crucial matter, the compatibility of successive treaties concluded by the same contracting parties, is examined in a quick and superficial manner. My concern increases with the temporal treatment accorded to the interpretation of treaties and their effects, before or after the moment the interpretation occurs. The qualification of the legal analysis carried out by the contracting parties to the BIT on the BIT's legal compatibility with EU treaties as "political" is also worrisome.

3. I am aware that the majority relies upon the comfort of having followed prior decisions of other tribunals on the issue of intra-EU BITs. However, the Parties in the current case raised arguments that were not addressed in those other decisions. These arguments were not examined, even less rebutted, in the Second Interim Award. In this dissenting opinion, I find myself in agreement with such arguments.

4. As mentioned above, the key question here is the (in)compatibility of the application of subsequent treaties and its impact on the jurisdiction of this Tribunal. In my understanding of the applicable law, the ability to institute arbitration foreseen in the BIT is incompatible with the later conventional engagements adopted by the same parties to the BIT at the time of their accession to the European Union on 1 May 2004. I

will not examine, and consequently I will not take a stance, on the question of the impact of Dutch Law on the question of jurisdiction, since I consider that the analysis of the relationship between the BIT and the EU Treaties from an international law perspective, and the law of treaties in particular, is sufficient to decide the issue. Except as set out herein, I take no view on other issues addressed in this Second Interim Award and should not be taken as accepting or rejecting the majority's analysis thereof.

5. This dissenting opinion is divided into seven sections: the applicable law (A.); the basis for the decision on jurisdiction (B.), further divided into two sub-sections: (a) Article 30 of the VCLT and (b) Article 351(1) of the Treaty on the Functioning of the European Union ("TFEU"); the subject matter of the BIT and the EU Treaties (C.); the incompatibility of the BIT with EU treaties (D.); the authentic interpretation by the contracting parties to the BIT of the relationship between the BIT and the EU Treaties (E.); the precedence of EU Treaties over the BIT (F.); and the "good faith" argument (G.). It concludes with some final remarks.

## A. The Applicable Law

6. The decision places emphasis on the fact that the Terms of Appointment between the Parties states under the title of "Applicable substantive rules" that "[t]he Tribunal shall decide the dispute in accordance with the BIT".[1] It is not necessary to embark upon a discussion whether the "applicable substantive rules" concern matters of jurisdiction or just the merits of the case. In any case, this provision does not prevent the Tribunal from examining the situation of the BIT in relation to other rules, particularly in light of the law of treaties, which obviously governs the interpretation and application of the BIT. This provision can by no means be interpreted as establishing that the only thing to do in order to determine whether this Tribunal has jurisdiction is simply to interpret the provisions of the BIT without paying any attention to the framework under which this BIT exists and must be interpreted and applied. The majority formally agrees with this, even if only for the reason that it considers that the Parties to the dispute "implicitly" agreed upon this.[2]

7. The first question to be clarified is the status of the BIT. No ground for invalidity has been invoked and there is none. It is also clear that the contracting parties have not

[1] Second Interim Award, paras. 84-86.
[2] Second Interim Award, para. 87.

formally terminated them. The Respondent has not invoked Article 59 of the VCLT either. The crucial question here is whether the accession of the Republic of Cyprus (hereinafter "**Cyprus**") and the Czech Republic (hereinafter "**CZ**") to the EU Treaties implies that the offer to arbitrate in the BIT is no longer operational because of its incompatibility with the EU Treaties.

8. It would be simplistic to say that, since Article 8 of the BIT confers jurisdiction on the Tribunal, the matter is settled as the EU Treaties do not apply to jurisdiction. It is clear that the only source of jurisdiction for the Tribunal would be the BIT. The question, however, is whether the BIT can be invoked in the context of the case at issue here, given the rules governing conflict of treaties.

9. The majority considers that "[t]he Tribunal is not empowered to interpret or apply Czech or EU law […]".[3] However, the majority decides that the subject matter of the BIT and that of the EU Treaties are different. How could the majority arrive at this conclusion without interpreting the content of these latter treaties?

10. The Second Interim Award nevertheless states that "the Tribunal must apply general international law, notably the provisions of the VCLT".[4] I could not agree more. However, the Award continues with the following contention: "[n]ot even the Contracting Parties acting jointly can alter general international law in order to wholly deny the existence of the BIT and its effects under the law of treaties".[5] However, the Respondent, the State of the Claimants and the EC have not denied the existence of the BIT. They precisely discuss its effects under the law of treaties. They contended that the BIT cannot be invoked because of the conflict between the BIT and the EU Treaties, the incompatibility of the former with the latter and the prevalence of the latter. Thus, the question here is neither the alteration of "general international law" nor the denial of the existence of the BIT. As to its effects, it is precisely through the application of the law of treaties that this must be determined.

11. In order to address this issue, it is necessary to apply the rules of international law that govern conflict of rules in general, as well as the particular rules of conflict of treaties, as set out in the VCLT. In turn, in order to apply these rules, it is necessary to interpret

[3] Second Interim Award, para. 93.
[4] Second Interim Award, para. 408.
[5] Ibid.

and, if necessary, to take into account the rules of the EU Treaties. The relevant question is whether the EU Treaties that are *lex posterior* have rendered the offer to arbitrate contained in the BIT ineffective.

12. The Second Interim Award embraces a doctrinal view according to which international law would be constituted by some "general principles" and then there would be sub-systems acting in an independent manner. The majority states that "EU law and international investment protection law are sub-systems of international law, existing side-by-side, without a precise hierarchy between both, governed by their own treaties and subject to their distinct dispute resolution authorities".[6]

13. The matter has extensively been discussed in the past under the ideas of "self-contained regimes" and "fragmentation" of international law.[7] The danger of considering what some call "branches" or "sub-systems" as having their own exclusive rules and being applied without paying attention to the others is to favour legal chaos. Following this approach, a given act at the international level could be held to be in accordance with one sub-system of international law for a given court or tribunal and in breach of another sub-system for another court or tribunal. And all this at the same time. It is in order to avoid such incoherence that there exist conflict of laws rules, and courts and tribunals are obliged to apply them.

14. The decision mentions that BITs were encouraged by the European Union as instruments necessary to prepare for accession to the Union.[8] It was in this context that the Cyprus-CZ BIT was concluded. What these facts reveal is rather that prior to accession, a kind of international guarantee to investors was considered by the EU to be necessary. This does not mean that from the EU's standpoint this "sub-system" should co-exist with EU law once the candidate States became EU members. This is evidenced by the fact that such encouragement has not existed for States which are already EU members. The reason is very simple: EU investors within the EU are considered to be enjoying rights and protections at the international level. The fact that the accession treaties are silent about intra-EU BITs does not mean that they were considered as

[6] Second Interim Award, para. 74.
[7] See in particular the Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the International Law Commission*, 2006, vol. II(2).
[8] *Second Interim Award, para. 200, citing the* Opinion of Advocate General Wathelet of 19 September 2017, *Slovak Republic v. Achmea B.V.*, Case C-284/16, ECLI:EU:C:2017:699, paras. 40-41.

compatible with EU law. It is precisely because they are silent that there is a need for an analysis of their compatibility.

15. The Second Interim Award discusses possible contradictions in the positions taken by the EC with regard to intra-EU BITs at different times.[9] Irrespective of the accuracy of this assertion,[10] this is immaterial for the purposes of the decision of the Tribunal, which must exclusively be based on its own analysis of the pure legal question at issue. The same applies to the position taken by the CZ Government, in particular the formal termination of one intra-EU BIT (with Italy) but not with Cyprus. The task of the Tribunal is not to decide what would have been the best manner to deal with the issue by the relevant actors, but to interpret and apply the relevant rules to the situation as it stands.

16. Cyprus and CZ are parties to the EU Termination Treaty signed on 5 May 2020. The Termination Treaty entered into force on 29 August 2020 although neither Cyprus nor CZ have ratified it yet. The Treaty imposes particular conditions that in any case are of no relevance here since the termination does not have a retroactive effect. The obligations imposed on the contracting parties with regard to pending arbitrations had actually already been fulfilled by both parties to Cyprus-CZ BIT in the present case. Both had informed the Tribunal about their position with regard to the incompatibility of their BIT with regard to EU Treaties, something that is disregarded by the majority, as will be discussed below.

17. The Tribunal unanimously agrees that the Termination Treaty has no particular impact in the instant case. The question here is whether Article 8 of the Cyprus-CZ BIT can be applied or not on the basis of its compatibility with EU Treaties in force.

## B. The Basis for the Decision on Jurisdiction: Conflict of Treaties Rules Renders Article 8 of the BIT Inapplicable

18. The majority decided that this Tribunal has jurisdiction on the basis of the following contentions: 1) consent for arbitration was given validly and remains in force; 2) no application of successive treaties arises pursuant to Article 30(3) of the VCLT; 3) the Member States' Declaration and the *Notes Verbales* are political instruments that do not

[9] Second Interim Award, para. 211.
[10] I analyze the question later at paras. 96-98.

impact this Tribunal's jurisdiction; 4) the dispute is arbitrable; 5) the Tribunal should not decline jurisdiction based on the principle of comity; and 6) the potential setting aside and unenforceability of the award is immaterial.

19. That the BIT contains an arbitration clause for investor-State disputes is beyond question. On the contrary, the question of whether it "remains in force" (or, rather, whether it is applicable) depends upon the analysis of Article 30 of the VCLT and other relevant rules of conflict of treaties applicable between the parties to the BIT. For the reasons I will explain below, I strongly disagree with the majority in this regard. I also disagree, and in the same manner, with the qualification of the Parties' statements (the Member States' Declarations and the *Notes Verbales*) as mere "political instruments".[11] Whether the dispute is "arbitrable" does not change the outcome of the question to be decided. I need not analyze the fifth and sixth points mentioned above, either. The question here is not a matter of comity in order to decline jurisdiction. Finally, the application of the conflict of treaties rules leads to a solution of the question at issue here and there is no need to examine the implications of the fact that domestic tribunals may decide to set aside the final award and not enforce it. Consequently, I will confine my analysis to the determination of the outcome of the application of the conflict of treaties rules to the case and the impact of the statements of the parties to the BIT on their interpretation.

20. Two different provisions stemming from applicable conventional law were advanced by the Respondent and the EC in order to challenge jurisdiction in this regard: Article 30 of the VCLT and Article 351 of the TFEU. I will analyze these sequentially and subsequently I will examine the question of the (in)compatibility of the BIT Investor/State arbitration clause with EU Treaties based on my conclusions with regard to the two provisions abovementioned.

**(a) Article 30 of the VCLT**

21. Article 30 of the VCLT refers to the relationship between two successive treaties between the same parties relating to the same subject matter. The relevant paragraphs read as follows:

[11] Second Interim Award, para. 258.

> 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 latter 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.

22. The situation in this case corresponds to that envisaged in paragraph (4): the later treaties are the EU Treaties[12] and the earlier one is the Cyprus-CZ BIT. By virtue of paragraph (4), the rule of paragraph (3) applies here. The question is twofold: (i) whether the EU Treaties and the BIT relate to the same subject matter and; (ii) whether the provision of Article 8 of the BIT are compatible with the EU Treaties. Before analyzing these two aspects of the question, it is also necessary to refer to an explicit rule of compatibility of prior treaties contained in the later applicable one, here the TFEU. Indeed, as discussed below, the same two aspects (subject matter identity and compatibility) need to be addressed with regard to Article 351 of the TFEU.

**(b) Article 351 of the TFEU**

23. Article 351 of the TFEU is the equivalent of Article 307 of the Treaty Establishing the European Community. It reads as follows:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and

[12] The Treaty of Nice was in force at the time of the accession of Cyprus and CZ in 2004, amending the Treaty of the European Union (Maastricht) and the treaties establishing the European Communities. For commodity, I will refer to the text of the current TFEU only.

> one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

24. At the outset, it is important to read this Article in light of Article 30 of the VCLT. The method followed in both is comparable: the first paragraph of Article 351 enounces the possibility to apply rules of treaties concluded before the EC/EU membership of the State concerned on the assumption that they are compatible with the EU Treaties. The second paragraph of Article 351 refers to the possibility of incompatibility of prior treaties with EU Treaties, in line with paragraph 3 of Article 30 of the VCLT. The logical assumption is that if incompatibility exists, it is because the subject matter is also regulated by the EU Treaties. There cannot be incompatibility for matters not falling within the realm of the EU.[13]

25. The first paragraph of Article 351 has been interpreted by the Second Interim Award as not being applicable between two States that have become EU members. The reason is that the text refers to treaties concluded "between one or more Member States on the one hand" and "one or more third countries on the other".[14] According to this view, the provision cannot be applied in the present case because the BIT is a treaty between two EU Member States. Even if the text is not a model of clarity, this interpretation is incorrect and indeed leads to an absurd result.

[13] See further below, Section D.
[14] Second Interim Award, para. 333.

26. The BIT at stake here was concluded on 15 June 2001, before the accession of Cyprus and CZ to the EU on 1 May 2004. Consequently, it is a treaty concluded between Member States (Cyprus, CZ) that were both, at the time, "third countries" *vis-à-vis* the EU. Article 351 refers to treaties concluded before the accession of Member States and consequently this would refer to the treaties concluded by Cyprus and CZ before 1 May 2004. To reject the application of Article 351 TFEU to this kind of treaty would imply that the TFEU has regulated incompatibilities between treaties concluded between Member States with third countries but did not regulate incompatibilities of treaties concluded between Member States themselves prior to the accession of them to the EU.[15] This is a manifestly absurd and unreasonable result: it would mean that the Member States should have to avoid incompatibilities of treaties with third States while leaving unregulated the incompatibility of treaties between themselves.

27. Indeed, the question of bilateral treaties concluded between EU Member States before their admission to the EU (or the admission of one of them) has been addressed by the Luxembourg Court well before *Achmea* and with the same result achieved in the latter decision: EU law prevails over incompatible rules of pre-accession EU Member States treaties.[16]

28. The second paragraph of Article 351 commands Member States to "take all appropriate steps to eliminate the incompatibilities established". The Second Interim Award considers that this requires EU Member States to take action, but does not render incompatible rules eliminated *ipso iure*. The actions this Award refers to as being considered by the Member States are just suspension, modification, or termination.[17] These are indeed options open for those States, *but they are not the only ones*. Another important possibility that can be envisaged is to consider the incompatible clauses as not being applicable. This is exactly what is foreseen in Article 30 of the VCLT. This array of possibilities in accordance with international law is open to Member States and it is for them in the context of their autonomy of will to decide which are the "appropriate steps" they wish to adopt. There is no obligation to follow one rather than another. The

[15] See Claimants' Rejoinder on Intra EU BIT Objection, para. 30; Hearings, Day 1, pp. 172-173.
[16] *Conegate Limited v. HM Customs & Excise*, Case C-121/85, Judgment, March 11, 1986, ECLI:EU:C:1986:114, para. 25; *Ministère public v. Deserbais*, Case C-286/86, Judgment, September 22, 1988, ECLI:EU:C:1988:434, paras. 17-18; *Matteucci*, para. 22; *Exportur SA v. LOR SA and Confiserie du Tech*, Case C-3/91, Judgment, November 10, 1992, ECLI:EU:C:1992:420, para. 8; *Commission v. Italy*, Case 10/61, Judgment, February 27, 1962, ECLI:EU:C:1962:2.
[17] Second Interim Award, para. 334.

majority failed to consider this, focusing exclusively on the possibility of termination. It also failed to mention, and later to pay due consideration, to the crucial option of incompatibility included in the law of treaties.

29. The third paragraph of Article 351 is also important. It assists Member States and their co-contracting parties in interpreting the extent of potential incompatibilities with EU Treaties. Indeed, it delineates the framework beyond which there is incompatibility. It recalls that:

> the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.[18]

30. In other words, the advantages of Member States granted by the EU Treaties, the creation of common institutions (including the CJEU and the whole judicial system of the EU), the respect of their powers and the fact that all members enjoy the same advantages constitute a whole that must be respected in Member States' mutual relations and in their relations with third parties. EU investors cannot ignore this either.

31. No matter what the correct interpretation of the first paragraph of Article 351 may be, the third paragraph offers clear guidance as to how treaties concluded between Member States must be interpreted. The arbitration clause of the BIT must pass this test in order to remain applicable. Again, the majority did not take this into consideration.

32. Since Article 351 of the TFEU is the explicit provision of the later treaty dealing with conflict of rules with prior treaties, it becomes a relevant rule in order to determine the relationship between the BIT and the EU Treaties. However, this provision is in line with Article 30 of the VCLT and does not introduce any particular rule deviating from the general approach set forth in the VCLT. It simply specifies the content of the "compatibility test" and renders explicit the solution that, in case of incompatibility of prior treaties with EU Treaties, the latter prevail. In other words: the application of Article 30 of the VCLT and that of Article 351 of the TFEU will lead to the exact same result.

[18] TFEU, Art. 351(3), RL-0020.

33. Consequently, the two following sections will analyze the two first elements that are necessary to decide whether Article 8 of the BIT is applicable to this case: whether the treaties concerned deal with the same subject matter and whether or not they are compatible.

### C. The BIT and the EU Treaties Deal with the Same Subject Matter

34. The Report on Fragmentation of the ILC Study Group – describing the manner in which the test of "the same subject matter" must be applied –authoritatively states:

> [T]he test of whether two treaties deal with the "same subject matter" is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.[19]

35. The Second Interim Award explicitly disagrees with the ILC, which is regrettable. The majority followed instead the reasoning of the Tribunal in *EURAM*, arguing that the ILC confounded "sameness of subject matter" with compatibility.[20]Indeed, one could affirm that the effort accomplished by the majority to show the differences between the BIT and EU Treaties begs the question: if there are no differences, and the treaties were exactly the same, there would be no conflict and no need for a rule such as that of Article 30 VCLT. I will demonstrate that, contrary to what is stated in the Second Interim Award, the three elements taken into account for the majority do not exclude the applicability of Article 30(3) of the VCLT to the BIT with regard to the TFEU. The EU Treaties address the same subject matter as the BIT.

#### (a) "Different topic"

36. The Second Interim Award indirectly recognizes that issues concerning the treatment of EU investors within the EU member States are covered by the EU treaties. However, it considers that the latter have a "broader purpose"[21], something that it is obvious but does not detract from the fact that the matters covered by the BIT are also covered by

[19] International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682, April 13, 2006.
[20] Second Interim Award, para. 292.
[21] Ibid. para 297.

the EU Treaties. It insists on the creation by the BIT of a "separate legal sub-system", granting specific rights exclusively to investors of both contracting parties, while the TFEU grants rights to all EU citizens without taking into consideration whether they have made investments or not.[22]

37. Indeed, the fact that one treaty has a wider scope than another treaty but deals with matters covered by the latter, does not mean that they have different "subject matters". On substantial issues relating to the treatment to be granted to investment, both the BIT and EU Treaties deal with the same subject. The next section, analyzing the incompatibilities of the BIT with EU Treaties, will complete the analysis by demonstrating that the application of Article 8 of the BIT both affects the obligations of EU Member States under the EU Treaties and indeed undermines their object and purpose.

38. It is important to compare the object and purpose of the BIT with the establishment of a Common Market by the EU Treaties. The preamble of the BIT explains its object and purpose. Cyprus and CZ state there that they desire "to develop economic co-operation to the mutual benefit of both Contracting Parties", and they intend "to maintain favourable conditions for investments of investors of one Contracting Party in the territory of the other Contracting Party", being conscious "that the promotion and reciprocal protection of investments in terms of the present Agreement stimulates the business initiatives in this field".[23]

39. By becoming Members of the EU and its treaties, these same States have allowed their investors to be subject to the same rules in the whole area of the common market and customs union, and national laws cannot override EU law in this regard. Indeed, one might even consider that the object and purpose of the BIT became obsolete after the accession of Cyprus and CZ to the EU Treaties. As mentioned above, when these BITs were encouraged to be concluded, it was with the purpose of preparing the accession of the new Member States to the EU.[24]

[22] Second Interim Award, para. 298.
[23] BIT Cyprus/CZ, Preamble (C-5).
[24] This is what is mentioned by the Opinion of Advocate General Wathelet in the *Achmea* case, although reaching the, in my view wrong, conclusion that, because of this, BITs and EU law are not incompatible: "For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the

40. What is considered free movement of capital within the EU is larger than what is considered as investment in the BIT, but it includes the latter.[25] The contracting parties of the BIT, and consequently their investors, enjoy all the privileges of the single European market since the accession of Cyprus and CZ to the EU in May 2004.

41. At the end of the day, the analysis of the majority would require that the treaties must be exactly identical in order to be considered as having the same subject matter. As is demonstrated below, the rights, standards of protection to, and international procedures for, Czech and Cypriot investors appear both in the BIT and in the TFEU.

**(b) "Different mechanisms of protection"**

42. The majority considers that, since the BIT provides a mechanism for nationals of one party to bring a claim against another party through international arbitration, the treaties do not cover "the same subject matter".[26]

43. The majority repeats the contention of another award, according to which, "[f]rom the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties".[27] If this were true, then the provision on applicable law becomes secondary. If one follows this view, what the arbitrators are saying is that what is essential for the protection of foreign investments is the fact of arbitrators themselves applying and interpreting the law, no matter what the law establishes.

44. In fact, all these assertions are not correct. The *subject matter* dealt with in this regard is *dispute settlement* in both, the BIT and EU Treaties. If there is conflict, it is precisely because the treaties provide for different means of dispute settlement. Furthermore, both the BIT and EU Treaties allow EU investors to have recourse, not only to an international adjudicative system, but even to international courts and tribunals. It is true that in the EU judicial system domestic courts and tribunals play a primary role.

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countries of Central and Eastern Europe." (para. 40). As a matter of course, while both treaty regimes cover the same rights and allow international protection, there is no incompatibility in this sense.

[25] *See* Council Directive 88/361/EEC of June 24, 1988 for the implementation of Article 67 of the Treaty Establishing the European Economic Community. For case law, *see* Joined Cases C-282/04 to C-283/04, *Commission v. Kingdom of the Netherlands*, Judgment, September 28, 2006, [2006] ECR I-9141; Case C-174/04, *Commission v. Italian Republic*, Judgment, June 2, 2005, [2005] ECR 1-4933.

[26] Second Interim Award, para. 302 and ff.

[27] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Second Award, March 27, 2007, para. 164. Second Interim Award, para. 304.

However, this role is neither exclusive, nor even decisive. The last word on the interpretation of EU treaties lies with a permanent international court: the CJEU. Domestic judges must trigger a preliminary ruling of the CJEU if there is a question concerning the interpretation of an EU Treaty.[28] Furthermore, Article 267 of the TFEU explicitly states that if such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU. In both cases, national courts and tribunals must follow the decision of the CJEU. Moreover, this is not the only case in which this standing international court may act in the context of an investment within the EU, as explained immediately below.

45. In accordance with the principle of state responsibility for violation of EU law, an investor can activate a mechanism to establish state responsibility for violations of EU law. This is the so-called *Francovich* principle, by virtue of which the Court of Luxembourg established that EU Member States can be liable to pay compensation to individuals who suffered a loss because a Member State failed to apply EU law. The court in *Francovich* summarized the situation in the following clear manner:

> 31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585).
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> 32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

[28] TFEU, Article 267.

> 33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
>
> 34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
>
> 35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.[29]

46. In addition, it is possible to report the possible Member State violation to the EU Commission, which, by virtue of Articles 258 to 260 TFEU, can bring an action to the CJEU against the Member State in question. Member States are responsible for the actions of their judiciary.

47. This analysis demonstrates that Article 8 of the BIT and the judicial system of the EU established by the EU Treaties cover the same subject matter: *international dispute settlement*. Naturally, they envisage two different systems of adjudication and this is the reason why the conflict between successive treaties must be solved giving preference to one or another through the application of the abovementioned conflict of rules provisions.

**(c) "Different standards of protection"**

48. For the Second Interim Award, "[t]he substantive standards of protection afforded by BITs do not exist as such within the EU legal system. These standards, which include Fair and Equitable Treatment ("FET"), Full Protection and Security and the threshold for illegal expropriation, are defined in the BITs. They have been developed over the years by investment arbitration case law and find no counterpart under European law".[30]

[29] *Andrea Francovich and Others v. Italy*, Joined Cases C-6/90 and C-9/90, Judgment, dated 19 November 1991, ECLI:EU:C:1991:428, para. 31-35.
[30] Second Interim Award, para. 309.

A strict analysis of the substantive protections accorded in those treaties shows exactly the opposite.

49. The privileges of the single European market include the four fundamental freedoms, i.e. free movements of persons, goods, capital and to establish and provide services. The Charter of Fundamental Rights of the European Union, which according to Article 6 of the TFEU has the same legal value as the EU Treaties, specifically mentions the freedom to conduct a business, the right to property, equality before the law and non-discrimination, among others. Article 18 of the TFEU explicitly contains a rule of non-discrimination. Proportionality, legal certainty and legitimate expectations are recognized as general principles of EU law and applied by the European judiciary.[31] The right of property recognized within the EU law includes the protection envisaged in the BIT concerning the deprivation and limitation of ownership. Free transfers, as protected by BIT, are equally covered by the four fundamental freedoms, particularly the free movement of capital. Clearly, the subject matter of both the BIT and EU Treaty Law is the same in matters of investment protection.

50. The breaches alleged by the Claimants are based on what they consider an alleged unfair and unequitable treatment and failure to accord full protection and security.[32] All these allegations find resonance under both the BIT and the EU law.

51. On the basis of the above, it can be considered without any doubt that the "fair and equitable treatment" that investors enjoy by virtue of the BIT is then also applicable by virtue of the EU treaties. Even more, one can also mention that EU investors enjoy within the EU more substantial rights and privileges than non-EU investors, even with regard to those non-EU investors having the benefit of the protection of BITs.[33] Indeed, it is trite to state that EU-investors enjoy more privileges for conducting their businesses in the EU than non-EU investors. No distinction exists between nationals of a Member State and nationals of other EU Member States. In fact, the "need for international protection" for the latter does not exist for the EU-investors as they are already enjoying

[31] *Pfleger,* C-390/12, EU:C:2014:281, paras. 30 to 37; ECJ, April 30, 2019, *Italy v. Conseil*, case C-611/17, paras. 97-116; ECJ (GC), December 3, 2019, *Czech Republic v. Parliament and Conseil*, case C-482/17, paras. 141, 153 and 157. The principle of the respect of legitimate expectations has been recognized as early as in 1993: *Driessen and Others v. Minister van Verkeer en Waterstaat*, Joined cases C-13/92, C-14/92, C-15/92 and C-16/92, para. 35.
[32] Claimants' Statement of Claim, Section V.
[33] See below, paras. 104-105.

it by virtue of international treaties and international institutions –including a permanent judicial Court – and mechanisms, including a judicial system binding on all EU Member States.

52. When reading the Second Interim Award, one might be led to believe that the standard of protection of investments in the BIT is higher than that of EU Treaties. Some prior decisions have stated this claim explicitly.[34] I have not been convinced by this *petitio principii*. Rather, the Cyprus-CZ BIT itself explicitly demonstrates the opposite. This is crystal clear in its key Article 3, which defines the scope of the protection to be granted to investors of the other Contracting Party and expressly excludes the benefits to investors stemming from arrangements like the EU.

53. Paragraph (3) of Article 3 of the BIT states that

> [t]he provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:
>
> (a) Any customs union or free trade area or a monetary union or similar international agreements leading to such unions or institutions or other forms of regional cooperation to which either the of the Contracting Parties is or may become a party.

54. For the purposes of the present analysis, the crucial point, however, is that considering the protection in one case as being better than in another rather shows that the subject matters are the same. It is elementary that something cannot be better than something else if they are substantially different. One cannot compare apples with pears, even though both are fruits.

55. The next section demonstrates the incompatibility of the BIT with the EU Treaties. Consequently, the provisions allowing nationals of one State to bring a claim against another State under the BIT prevent the EU Treaties from operating in the manner these treaties were envisaged to. In other words, both dispute settlement mechanisms cannot work together, as the CJEU concluded and as will be seen below.

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[34] For example: *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, *PCA Case No. 2014-03*, Final Award, October 11, 2017, para. 253.

### D. The BIT is Incompatible with the EU Treaties

56. The majority has briefly examined the question of the incompatibility of the BIT with EU Treaties and insisted that there is a "presumption of non-conflict" and applied such presumption to the relationship between intra EU-BITs and the EU Treaties.[35] Such a presumption does not appear either in the VCLT or in customary law. Rather, the mere existence of Article 30 of the VCLT shows that there is no such presumption. On the contrary, there is a need to envisage the possibility of conflict of rules and to regulate it. This is quite normal. States have concluded thousands of treaties over the years (or even centuries), the vast majority of them not providing for a time limit on their existence. Many of them even remain forgotten, although they remain formally in force.

57. Even assuming that such doctrinal presumption of non-conflict exists, it would not be applicable to this case. It is one thing for two States having concluded a bilateral treaty to ensure while concluding a later one not to adopt contradictory rules, yet it is a very different thing to become a member of a complex multilateral integration system (and consequently becoming party to its treaties). It is not a stretch of the imagination to realize that with this accession not few, but *many* conventional provisions as well as pieces of national legislation may become incompatible with EU treaties.

58. The Second Interim Award focuses its analysis on Articles 267 and 344 of the TFEU as the ground for precluding the operability of dispute resolution clauses in intra-EU BITs. The Second Interim Award "solves" the question of Article 344 TFEU just by saying that, given that under Article 8 of the BIT investors can only submit disputes on the basis of international law, domestic law would only be "a fact".[36] The decision considers that no interpretation or application of EU Treaties would be required. However, the Award itself recognizes that EU law is part of international law.[37] In any event, as stated above, in order to determine whether this Tribunal has jurisdiction, the comparison of the BIT with EU treaties is necessary, which by definition requires the interpretation thereof.

[35] Citing *Magyar Farming Company Ltd, Kintyre Kift, and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019, para. 240 (Second Interim Award, para. 313).
[36] Second Interim Award, paras. 319-320.
[37] Second Interim Award, para. 71.

59. With regard to Article 267 TFEU and the jurisdiction of the ECJ to give preliminary rulings on the interpretation of EU Treaties, the Second Interim Award simply states that since the subject matter of the BIT and EU Treaties are different, the question does not arise.[38] It was demonstrated above that this assertion is not accurate. I doubt that it is appropriate, or indeed possible, to examine whether an intra-EU investment has, for example, received fair treatment or was not subject to expropriation, while ignoring the applicability of EU law, or while contending that the analysis is limited to the interpretation of the provisions of the BIT irrespective of whether these same investments received fair treatment or were not expropriated under EU law.

60. The CJEU's reasoning in *Achmea* is that allowing arbitral tribunals in investment cases to deal with matters that require the application of EU law ultimately threatens the uniform and effective interpretation and application of EU law in violation of the principle of sincere cooperation under Article 4(3) of the TEU and Article 344 of the TFEU.[39] Indeed, the role of the CJEU as emerging from the TFEU would be undermined if the arbitration clauses of prior BITs remained applicable.

61. The exclusive jurisdiction of the CJEU to render a final interpretation of EU Treaties is not a novelty of *Achmea*. In *MOX Plant*, the EC Court asserted that international agreements cannot affect the exclusive jurisdiction of the Court under Article 344 of the TFEU.[40] Equally, in *ECHR II*, the CJEU stated that its exclusive jurisdiction is in itself an essential characteristic of EU law that precludes "any prior or subsequent external control".[41]

62. The question here is not of exclusivity, in the sense that no other court or tribunal but EU judicial bodies can examine EU law. As a matter of course, WTO panels and the Appellate Body have examined EU law and ITLOS could have done the same if the case concerning *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)* was not discontinued.[42] The same may apply in other circumstances, including the application of BITs concluded by an EU Member State

[38] Second Interim Award, paras. 324-3253.
[39] Judgement of the Court of Justice of the European Union, delivered on March 6, 2018, *Slowakische Republik v. Achmea BV*, Case C-284/16, EU:C:2018:158.
[40] *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment, May 30, 2006, ECR-I4635 para. 132.
[41] Opinion 2/13, *ECHR II*, December 18, 2014, EU:C:2014:2454, paras. 201 and 210.
[42] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009, ITLOS Reports 2008-2010*, p. 13.

with a non-Member State. Last year, the CJEU affirmed the compatibility with the principle of autonomy of EU law of the Investment Court System provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA).[43] The question here is indeed the settlement of *intra-EU disputes within the EU*.

63. Article 18 of the TFEU, which declares the principle of non-discrimination is important here. The fact that the CJEU did not consider necessary to analyze this article in *Achmea* (which was the third question put to it) because it reached the conclusion that Articles 267 and 344 of the TFEU preclude an investor of a Member State from bringing a claim against another Member State on the basis of an arbitration clause of a BIT (answering the first and second question put to it) does not prevent this Tribunal from examining it.

64. One of the bases for economic integration is the right of equal treatment of EU citizens in the enjoyment of the EU freedoms. Article 18 of Part Two of the TFEU, under the heading "Non-Discrimination and Citizenship of the Union", establishes the principle of non-discrimination and prohibits discrimination on the basis of nationality. National rules, no matter whether they have not yet been abrogated, cannot contradict this fundamental provision of EU law.[44] Collectively granting the right of citizens and corporations of some of the EU Member States to resort to international arbitration while not to citizens and corporations of other EU Member States through BITs constitutes an elementary infringement of Article 18. This ground would be largely enough to dispose of the arbitration clauses contained in BITs concluded between EU members with States that also became EU members later. In my view, together with the respect for the exclusive EU judicial system, this is a major incompatibility between the BITs and EU Treaties.

65. Taking into account the incompatibility of the BITs arbitration clause with the EU Treaties, this conflict of rules must be settled in one manner or another. Any international court or tribunal must avoid the unfortunate result of having the same conduct being considered illegal under one rule, and legal under another at the same

[43] Opinion 1/17 of the Court (full Court), 30 April 2019, ECLI:EU:C:2019:341.
[44] As stated by the Court in *Collins*, the right to equal treatment laid down in Article 18 TFEU is conferred directly by EU law. That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of national law (Case C- 92/ 92, *Collins*, para. 34).

time. With the decision adopted, this Tribunal considers that it has jurisdiction to decide about the treatment granted to EU-entities within the territory of EU Member States, and the CJEU considered exactly the opposite. My vote goes in the other direction and would avoid this unfortunate result. In my view, the EU Treaties prevail by virtue of the rules embodied in Article 30 of the VCLT and in Article 351 of the TFEU, as will be elaborated further.

66. As an ancillary issue, it must be mentioned that, as a result of the EU membership of Cyprus and CZ, it was not only Article 8 of their BIT that became inapplicable. Other articles of the BIT suffered the same fate. As seen above, Article 3(3) of the BIT lost its sense since now both contracting parties are members of the EU. The remaining articles are a mere juxtaposition of similar rules also found in EU law.

67. There can be a question of which prevails as between the *lex posterior* and the *lex specialis*. This matter is not contemplated by the VCLT. In any case, the question here is that the BIT and EU law are both "special" at the procedural level (arbitral tribunal or EU judicial system) and at the substantive level (discrimination, fair and equitable treatment, expropriation, etc.). The *lex specialis* rule does not provide a solution to this conflict. The premise that, if an arbitral tribunal is constituted on the basis of a BIT, then the applicable *lex specialis* is that of the BIT also begs the crucial question, avoiding the resolution of the conflict of applicable rules. Perhaps this explains the insistence of the majority on the argument that the CJEU is only "concerned with the application of EU law", and that an arbitral tribunal applies the relevant BIT only.

68. During the hearings, I raised a question concerning Article 10 of the BIT.[45] The Parties remained discrete about it. According to this Article, investors of the other contracting party can avail themselves of the provisions of national legislation or other international treaties that are the most favourable to them on an issue relating to investment. In my view, this article does not cover the arbitration clause contained in Article 8. Even if the arbitration clause was covered, the question would remain which of the two international adjudicative mechanisms is "most favourable". It is not for the Claimants themselves to decide. To put the question is to show its inadequacy. Would one or the other be more favourable because the chances of success are higher in one rather than in the other? Would it be because the procedure is shorter in one than in the other? Or

[45] Day 1, p. 215:11-13.

because the national judges are directly excluded in one and they participate in the other? Or would it be because the chances to obtain recognition and enforcement are higher in one case than in the other? I wonder whether EU investors within the EU could validly enjoy all the privileges of their European capacity within the EU system while at the same time exclude one fundamental element of the Union: its judicial system. Indeed, I understand the Parties' discretion in this regard. There is no need to answer any of these questions. Since the arbitration clause is incompatible with the edifice constructed by the EU Treaties, it is no longer applicable.

## E. The Authentic Interpretation Made by the Contracting Parties Must be Taken Into Consideration

69. The Parties to the BIT, together with other EU Member States and separately through their notes to the Tribunal, advanced their interpretation about the incompatibility of their BIT with the EU Treaties. This was done by a collective Declaration of 15 January 2019 and by Notes Verbales addressed by Cyprus and CZ to the Tribunal.[46] It is also mentioned in the Termination Treaty.

70. As mentioned, the majority disregarded the interpretation made by the parties to the BIT under the pretense that these were mere "political instruments".[47] The Second Interim Award made long digressions about the possibilities the contracting parties had to formally terminate the treaty and their failure to do so. The majority recognises that the Parties are masters of their treaty but does not accept their own interpretation.[48] It is curious, to say the least, to qualify as merely "political" an interpretation made on the basis of a legal analysis which furthermore is sustained by the reasoning and decision of the highest common international judicial body of both contracting parties having jurisdiction to analyze the compatibility of their action with EU law. One might also consider that this disregard for the authentic interpretation of treaties is "political".

71. I strongly dissociate myself with the comment of paragraph 409 of the Second Interim Award which seems to consider that the communication of the interpretation made by

[46] Respectively Declaration of the Representatives of the Government 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 (C-318), Czech Republic's *Note Verbale* of 9 July 2019 (R143) and Cyprus's *Note Verbale* of 20 December 2019 (R-142).
[47] Second Interim Award, para. 258.
[48] Second Interim Award, paras. 389-397.

the contracting parties to the BIT, the ECJ or the EC could be seen as an "attempt to impose instructions upon the Tribunal, or to interfere in its decision [that] would constitute an impermissible violation of the rule of law" and furthermore "to interfere with a procedure which is *sub iudice*".[49] These are but legitimate exercises of rights.

72. I will then take the Declaration and the *Notes Verbales* into consideration. The second paragraph of the 15 January 2019 Declaration (signed *inter alia* by Cyprus and CZ) states that "[U]nion law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable". A footnote to this paragraph refers to the VCLT.[50]

73. The Respondent considered the 15 January 2019 Declaration as falling within Article 31(2)(a) or Article (3)(a) of the VCLT as subsequent agreements, either forming part of the context or to be taken into account together with the context as subsequent agreements in the sense of the VCLT.[51] The Joint Declaration made clear that the Parties consider this BIT as being incompatible with European Union law and consequently inapplicable. Each Party to the BIT communicated the same conclusion to the Tribunal through their *Notes Verbales*. As a result, the two contracting parties to the BIT consider that this Tribunal lacks jurisdiction. I consider that the Tribunal cannot ignore this authentic interpretation made by both contracting parties to their BIT.

74. In order for the Joint Declaration to be considered an agreement, there is no need for any specific form. There is no doubt that this instrument is the expression of the common will and understanding of the Parties to the BIT, as they are the separate but concordant Notes sent to the Tribunal. Little doubt can exist as to their character as "subsequent agreement regarding the interpretation of the treaty" that must be taken into account, together with the context. There is also no doubt that an interpretation does not infringe any prohibition of retroactivity, if any.

[49] Second Interim Award, para. 409.
[50] Declaration of the Representatives of the Government 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, p. 1, (C-318).
[51] Respondent's Reply on Intra-EU Objection, paras. 64-76.

75. Amazingly, the Second Interim Award considers that the authentic interpretation of the conventional situation made by the parties to two treaties "cannot and does not produce retroactive effects", in other words, it would only possess *ex nunc* effect.[52] This is a novelty in the interpretation of the law of treaties. It is tantamount to consider that a single treaty has two different contents, one before the interpretation took place and another after. This attitude pays little service to the law of treaties in general and to adjudication.

76. By definition, interpretation is the operation of clarifying the content and scope of a given provision or instrument. This ascertainment of the content applies to that provision or instrument from the time of its existence.[53] This is exactly what happens when a judge or arbitrator settles a dispute as to the interpretation of a treaty, a law or a contract. It would be another thing to modify or to terminate the provision or instrument at stake. It is common knowledge that invalidity has *ex tunc* effects and suspension or termination of treaties only *ex nunc* effects. As mentioned earlier, the BITs were not formally terminated and the question here is not about modification or termination but about the BIT's compatibility with a later treaty.

77. To be precise, by definition, an ascertainment of the (in)compatibility between different conventional instruments must produce its effect at the time the treaties concerned are both (or all) in force. In other words, the compatibility test of Article 8 of the BIT with the EU Treaties applies as of 1 May 2004, when the latter treaties entered into force for Cyprus and CZ. The assertion of either compatibility or incompatibility can only apply as of the moment the conflict exists. Another solution, such as the one suggested by the majority, amounts to more legal uncertainty.

78. Nevertheless, the crucial point here is not to exclusively focus on the interpretation of one article of the BIT or another of the EU Treaties. Indeed, the point is not to interpret the scope of the arbitration clause contained in Article 8 of the BIT: it is beyond dispute that it clearly provides the possibility of arbitration. What the Parties to both the BIT and the EU Treaties have done is an *interpretation of the relationship between both conventional arrangements*. Put differently, they have interpreted Article 30 of the VCLT and Article 351 of the TFEU and applied it to the relationship between the BIT

[52] Second Interim Award, para. 364.
[53] I put aside the question of the evolutionary interpretation of treaties, which is not at issue here.

and the EU Treaties. It is this conventional whole, including the arbitration clause in the context of the EU Treaties to which the Parties became bound afterwards, that has been interpreted, not individual provisions of a treaty. This is the manner the contracting parties came to the conclusion of the incompatibility invoked in their common understanding.

79. The contracting parties to the BIT consider that the arbitration clauses contained in it are inoperative. As the CJEU is the judicial authority vested by these same contracting parties in the EU Treaties with the capacity of stating the correct interpretation of EU Treaties in an authoritative manner, the contracting parties to the BITs are bound to follow that interpretation. All this cannot be lightly disregarded.

80. The Second Interim Award considers that "there are limits to State power and autonomy, especially when a treaty creates rights for third parties". According to the majority, the capacity of interpretation by the contracting parties would be limited in such circumstance.[54]

81. At the outset, BITs are not treaties conferring rights on a third State or on human beings in general. BITs are treaties based on an inter-State relationship, on mutuality and equality of obligations. The rights conferred on private parties are exclusively based on their nationality, *i.e.* that of the contracting parties. As investors, they do not have "inherent rights". This Tribunal is not a human rights body and we are not dealing with human rights treaties. Investors' rights are exclusively based on the will of the parties of having a mutual exchange of investor protection. If the contracting parties interpret their BITs in one manner or another, this interpretation applies to the investors of both Parties. The so-called "sunset provision" does not have any bearing on the interpretation of the compatibility of intra EU-BITs with EU Treaties. It simply preserves investors' rights for a given period of time after the denunciation of a BIT by one of the contracting parties. The Tribunal is analyzing a completely different situation at this jurisdictional phase. "*Res inter alios acta*" does not play any role here.

82. The so-called principle of legal certainty does not change the present perception of things. If there is a problem of interpretation, it is necessarily because the matter is not clear enough. If the Claimants made a given interpretation of the BIT and the impact of

[54] Second Interim Award, para. 410. That was also the position adopted in *Magyar Farming Company Ltd, Kintyre Kift, and Inicia Zrt v. Hungary*, *ICSID Case No. ARB/17/27*, Award of 13 November 2019, para. 222.

the EU Treaties on them after the accession of Cyprus and CZ to the EU, it may be that this interpretation was wrong. The majority held that CZ and Cyprus did not make any statement about the inapplicability of Article 8 BIT at the time of their accession to the EU. This is also certainly the case with a number of other provisions of treaties or with their national legislation which were nevertheless incompatible with EU law. The Tribunal accuses CZ of making "a volte-face"[55] but no evidence exists that CZ has considered that Article 8 was compatible with EU law before its statement to the contrary.

83. Certainly, the situation would be different with regard to acts accomplished by Cyprus or CZ before 1 May 2004 if Claimants had made their investments before the EU accession of Cyprus and CZ. The reason for this is very simple: during that time there was no incompatibility because EU law was not applicable.

84. In any event, the interpretation of the prevalence of EU Treaties over a bilateral treaty dealing with matters covered by EU law has been consistent since the early times of the existence of the European communities. The interpretation made by both contracting parties to the BIT, by the ECJ and by the EC is then coherent and foreseeable.

### F. EU Treaties take precedence over an incompatible clause of the BIT

85. Having examined the identity of subject matter as between the BIT and EU Treaties and determined the incompatibility of the application of the arbitration clause of the former with the whole EU legal system, and having taken into account the authentic interpretation of the conventional relations entered into by the contracting parties, this section further determines which of the two systems must prevail. As will be seen, the natural response that emerges from what has been analyzed above is that the EU Treaties prevail.

86. I entirely agree with the ILC Study Group Report on Fragmentation which stated already in 2006 (that is to say, at a time when the questions raised by the intra-EU investment disputes and arbitration were not envisaged by investment arbitral tribunals in the manner as is the case today) that:

[55] Second Interim Award, para. 434.

> Agreements establishing international organizations often contain a conflict clause. The best known example is Article 103 the United Nations Charter (…). Likewise, article 307 (previously art. 234) of the Treaty establishing the European Community (EC Treaty) [today Article 351 of the TFEU] sets up a conflict rule for agreements between member States and third parties. The EC Treaty takes absolute precedence over agreements that Member States have concluded between each other.[56]

87. The position by the CJEU in *Achmea* with regard to the prevalence of EU treaties over prior ones concluded by Member States before their accession to the EU does not come as a surprise. It is coherent with the position that the Court has taken for a long time. Thus, as early as 1962, the Court held:

> in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT.[57]

88. In this context, it is useful to pay attention to the manner in which Germany explained why it referred a dispute with Italy, another member of the EU, to the ICJ. Germany considered necessary to explain why the matter could have not been submitted to the CJEU under the title "*No jurisdiction of the Court of Justice of the European Communities*" in the following manner:

> The present dispute is not covered by any of the jurisdictional clauses of the Treaty of Nice (Art. 227 EC). Although disturbances of the proper functioning of the internal market under the Treaty of Nice — and later of the Treaty of Lisbon — may result from the contested practice of the Italian courts, it has no direct link with the operation of the European market régime. The general relationship between the European nations continues to be governed by general international law. Every member State of the European Community/European Union is obligated to respect the general rules of international law vis-à-vis the other members unless specific derogations from the régime have been stipulated. In respect of the dispute in the instant case, however, no such derogation has been agreed upon. Jurisdictional immunity belongs to the core elements of the relationship between sovereign States. Outside the specific framework established by the treaties on

[56] International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. No. A/CN.4/L.682, dated 13 Apr. 2006, para. 283.
[57] *Commission v. Italy,* Case 10/61, Judgment, February 27, 1962, ECLI:EU:C:1962:2, para. II B 5.

> European integration, the 27 European nations concerned continue to live with one another under the régime of general international law. It should be added, in this connection, that the special framework of judicial co-operation that enables individuals to obtain the execution of judgments rendered in one member State of the European Union in other member States of the Union does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare.[58]

89. It is clear for Germany that Member States can only resort to international courts and tribunals on matters not covered by EU Treaties and hence, covered by general international law. It would be strange to imagine that what States prohibit among themselves on matters governed by EU law, they do not prohibit their citizens. Furthermore, there is no doubt that the issues at stake in the instant case involve the application of EU law.

90. Finally, the EU has been coherent in this interpretation of the incompatibility of intra-EU BITs with the EU Treaties. It adopted a regulation establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party[59] and another one establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[60] As a matter of course, there is no regulation with regard to investment agreements between Member States.

91. Indeed, the fact that the EU Treaties take precedence over prior treaties concluded between Member States in matters governed by the EU, as is the case here, is not a surprise nor an invention of the CJEU in *Achmea*. Other tribunals have quoted a case in which it was affirmed that the current Article 351 of the TFEU is not applicable to treaties concluded between Member States, but neglected another fundamental paragraph of the same ruling, according to which:

> the Court has consistently held (see in particular the judgment of 27 February 1962 in Case 10/61 Commission v Italy ((1962)) ECR 1) that, in matters governed by the EEC Treaty, that Treaty takes

[58] *Jurisdictional Immunities of the State (Germany v. Italy), Application Instituting Proceedings,* International Court of Justice, 22 December 2008, para. 6.
[59] Regulation (EU) No. 912/2014, [2014] OJ L257/121.
[60] Regulation (EU) No. 1219/2012, [2012] OJ L351/40.

> precedence over agreements concluded between Member States before its entry into force.[61]

92. As the Court also recalled, Member States are under a duty of solidarity as a result of "the equilibrium between advantages and obligations" flowing from their adherence to the Union.[62] In my view, this extends to all EU investors: they cannot rely on EU advantages while ignoring the entire EU system.

### G. The "good faith" argument

93. Claimants also invoked the argument of "bad faith" of the Respondent in seeking to reject jurisdiction on the basis of the intra-EU objection.[63] For my colleagues, the interpretation advanced by the CZ in these proceedings is contrary to the principle of good faith.[64]

94. The Second Interim Award does not repeat the mistake of other decisions that have invoked Article 69 VCLT, affirming that even if an intra-EU BIT would be incompatible with EU Treaties, an alleged "arbitration agreement" between the Parties would continue to exist.[65] However, the majority extends the rule of Article 69(2)(b) to the current case "by analogy", considering that Article 30(3) of the VCLT is a case of "partial derogation".[66]

95. I have serious doubts about resorting to analogy to extend the consequences of invalidity of treaties to other situations in general. The VCLT was very careful in distinguishing the consequences of invalidity and those of termination and suspension of the operation of treaties, even if they are treated in the same part of the Convention.[67] What is more, it clearly distinguished between matters of interpretation, which are in a separate part of the Convention, together with matter of application of treaties on the one hand,[68] and those of invalidity and termination/suspension, on the other. Article 69 VCLT refers to cases of invalidity of treaties, and consider that acts accomplished in

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[61] *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, Case 235/87, EU:C:1988:460, para. 22.
[62] Case 39/72, *Commission v. Italy*, EU:C:1973:13, February 7, 1973, para 24.
[63] Second Interim Agreement, para. 370.
[64] Second Interim Award, para. 431.
[65] See *Eskosol* (RL-215), para. 206.
[66] Second Interim Award, para. 369
[67] Part V: "Invalidity, Termination and Suspension of the Operation of Treaties". Section 5 of Part V deals with the "Consequences of the invalidity, termination or suspension of the operation of a treaty".
[68] Part III: "Observance, Application and Interpretation of Treaties"

good faith before the invalidity was invoked are not illegal by reason of the invalidity only. Here, however, it is not the invalidity of a treaty that is at issue, or even "its partial derogation", but rather the interpretation of incompatibility between successive treaties. This is not a question of illegal conduct, but of the determination whether a tribunal has jurisdiction. Article 69 VCLT has no place in the analysis. What incompatibility produces is not derogation, but inapplicability.

96. The majority takes for granted that the Claimants have a vested right to arbitration under Article 8 BIT.[69] But this is precisely what has to be demonstrated: whether the article is or is not applicable in the context of the subsequent accession of the contracting parties to the EU. The Second Interim Award also considers without analysis that the Claimants "entered the arbitration agreement" in good faith because this so-called agreement (indeed, the Statement of Claim) came before the *Achmea* judgment.[70] The majority considers that the Claimants could have relied on the position taken by the EC in *Eastern Sugar* in order to believe that Article 8 BIT could open the way for arbitration. For the majority, the position of the EC at the time is in contradiction with the position taken by the same organ before this Tribunal. By all means, this is not the reading I make of the position of the EC in *Eastern Sugar*, extensively quoted in the Second Interim Award.

97. The majority's reading of the EC position in *Eastern Sugar* places emphasis on the need to terminate the Intra-EU BITs and that the termination would not have a retroactive effect. Neither of these points are at issue in these proceedings. Conversely, my colleagues neglected fundamental points of the EC statement. To facilitate the understanding of their and my positions, I will quote the EC statement with the emphasis added in **bold** by the Second Interim Award and with my emphasis in *italics*:

> a) *EC law prevails in a Community context as of accession*
> Given that the rights and obligations of membership come into force on accession rather than on signature or ratification, the applicable date can be considered as 1 May 2004.
> Based on ECJ jurisprudence Article 307 EC is not applicable once all parties of an agreement have become Member States. Consequently, *such agreements cannot prevail over Community law.*
> *For facts occurring after accession, the BIT is not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic*

[69] Second Interim Award, para. 412.
[70] Notice of Arbitration, para. 16.

*representation, expropriation and eventually investment promotion, would appear to remain in question.*
*Therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the nonconforming BIT provisions.*
As you mention correctly, *the application of intra-EU BITs could lead to a more favourable treatment of investors and investments between the parties covered by the BITs and consequently discriminate against other Member States, a situation which would not be in accordance with the relevant Treaty provisions.* **The Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence**.
b) Effect on existing BITs
However, *the effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non-application of all their provisions.* Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Such termination cannot have a retroactive effect.
c) Dispute settlement procedures
As mentioned above, Community law, ***including the jurisdiction of the Court of Justice, in principle prevails from the date of accession***. However, *the transitional situation until the BITs are formally terminated may result in complex questions of interpretation with regard to jurisdiction in particularly with regard to pending arbitration procedures* but also in relation to rules such as Article 13 in the BIT between the Czech Republic and the Netherlands, which provides for an extended application of the agreement in a certain period after termination.
In so far as conflicts between Member States are concerned, it follows from Article 292 EC that the Member States cannot apply the settlement procedures provided for in the BITs in so far as the dispute concerns a matter falling under Community competence.
On the other hand, if the dispute concerns an investor-to-state claim under a BIT, the legal situation is more complex. **Since Community law prevails from the time of accession, the dispute should be decided on basis of Community law** (which indirectly also follows from Article 8(6) first bullet point in the agreement between the Czech Republic and the Netherlands). ***However, it may be argued that the private investor could continue to rely on the settlement procedures provided for in the agreement until formal termination of the BIT if the dispute concerns facts which occurred before accession.*** **The primacy of Community law should in such instance be considered by the arbitration instance.**
The primacy of EU law and its definite interpretation by the European Court of Justice would not necessarily preclude a legal instance (arbitration) in another jurisdiction arriving at a different conclusion, even in an international agreement between two Member States.
In particular, in order to avoid any legal problem with regard to an arbitration procedure, existing BITs between Member States should, as mentioned above, therefore be terminated. The formal termination can only be done according to the provisions of the agreement in question. I would note that this principle would not only apply to the Czech BIT with the Netherlands, which would seem to have given rise to a significant amount of litigation, but also those of the Czech Republic with 21 other Member States. Without prejudice to the primacy of Community law,

termination of the BIT would take effect according to the respective provisions of each such BIT.[71]

98. Nowhere in this statement is there a single admission, either explicit or implicit, that the arbitration clauses of the BITs could continue to apply for investments occurred after the admission to the EU. On the contrary, the statement clearly insists on the primacy of EU law over the BITs. Notably, the statement mentions that "it may be argued" that the investor could continue to rely on the settlement procedures provided for in the agreement until formal termination of the BIT "*if the dispute concerns facts which occurred before accession*". No doubt, if the dispute concerns facts that occurred after accession, as it is without discussion the case in these proceedings (the alleged breaches would have occurred since 14 June 2011),[72] the statement does not even evoke the possibility of such reliance on arbitration by the investors. *Achmea* is simply the clarification of the continued position of the EU on the primacy of EU law at the first occasion the CJEU had to pronounce on the issue in the continuation of the line adopted by the EEC/EC/EU since long before.

99. For all these reasons, the contracting parties' interpretation can be regarded as made in good faith. It is in line with consistent practice and case law on the prevalence of EU Treaties over national laws and international agreements dealing with EU matters. Article 31 of the VCLT gives weight to the subsequent interpretation of the parties to treaties. The interpretation should at least be "taken into account".[73] The majority decides otherwise and tells the contracting parties that they misinterpreted their own Treaties.

100. From my understanding of the First Interim Award – I did not take part in that decision – the Claimants (WCV and CCL, companies fully controlled by the Czech Senator [redacted]) established their seats in Cyprus in 2006,[74] that is to say, after the EU membership of both Cyprus and CZ. Indeed, the notice of arbitration expressly states that "WCV began its investment in the Czech Republic on 22 November 2006".[75]

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[71] Quoted in the Second Interim Award, para. 210.
[72] Statement of Claim, para. 353.
[73] VCLT, Art. 31(3).
[74] "In the Permanent Seat Objection, the Tribunal has come to the conclusion that WCV's and CCL's permanent seats have been located in Cyprus since 2006, with the consequence that when Claimants allegedly made their investment in the Czech Republic, their permanent seat was (and since their incorporation has been) in Cyprus". Interim Award, para. 449.
[75] Notice of Arbitration, para. 11.

CCL's involvement occurred later, on 10 March 2009.[76] For recollection, the Cyprus-CZ BIT entered into force on 25 September 2002 and both States became members of the EU on 1 May 2004.

101. In fact, the majority takes for granted a supposed reliance of the Claimants on something that neither the EC or CZ has manifested (the continued application of Article 8 of the BIT after their EU membership). I would thus like to point out something that seems to me important and evident. No EU investor can ignore the fundamental basis by which this highly-developed economic integration legal system operates. The fundamental characteristics of the EU legal system have been extensively addressed by the Luxembourg Court for decades, well before the problem of the BITs concluded by States that later became EU Members arose. That EU law has direct effect[77] and primacy over national law[78] has been enunciated in well-known, historic judgments. In *EP v Council and Commission (Bangladesh)*, the Court also asserted that exclusive EU competence bars the Member States from exercising their own retained competences *inter se*, outside the Treaty structures.[79]

102. In sum, Cypriot investors in CZ (and vice-versa) cannot pretend to enjoy all the benefits of EU membership of their States while ignoring the structural basis thanks to which the EU operates, which includes its judicial system.

103. For all the above reasons, I consider that the Tribunal lacks jurisdiction.

## H. Concluding Remarks

104. I am aware that a number of investment tribunals have decided this matter in the opposite direction that I consider legally appropriate. In order to achieve the goal of attributing themselves jurisdiction, they have adopted an extremely narrow interpretation of "the same subject matter" that would create incommensurable treaty chaos in international relations (as is actually being created at the European level) if it were generally applied in other fields. There is an unlimited number of treaties concluded over centuries that have never been explicitly terminated. They may easily

[76] Notice of Arbitration, para. 16.
[77] Case 26/ 62, *Van Gend & Loos*, EU:C:1963:1.
[78] Case 6/ 64, *Costa v. E.N.E.L.*, EU:C:1964:66.
[79] Joined Cases C- 181/ 91 & C- 248/ 91, *EP v. Council and Commission (Bangladesh).*

contain many clauses that are incompatible with subsequent treaties, no matter whether the treaties in their entirety address the "same subject matter".

105. There are BITs that were concluded between an EU Member State and a State that later became an EU Member. There are BITs that were concluded by two States before both becoming EU Members later, as is the case here. Significantly, there are no BITs that were concluded between two EU Member States after their EU membership. The explanation is very simple: BITs are inconceivable between EU Member States. The same investors' rights can be found in both. Arbitration to settle disputes between EU investors and EU Member States is not possible. Disputing parties have at their disposal the exclusive EU judicial system set out in the EU Treaties.

106. As mentioned above, EU investors enjoy more rights within the EU by virtue of EU Treaties than non-EU investors. As seen above, the BIT at issue in this case explicitly recognizes this in its key Article 3, which is the clause defining the scope of investor protection, and excludes the privileges accorded to investors by virtue of the adherence to common markets or custom unions. This very same article also became inoperative after the accession of Cyprus and CZ to the EU.

107. It is important to keep in mind the overall picture of the treatment of investors and their protection by the law. National investors do not enjoy the possibility of resorting to international arbitration against their own countries. They have local remedies at their disposal. EU investors are part of the most developed international system of economic integration which includes a judicial system, having at its top an international court. It is quite normal that they have at their disposal this international mechanism within the EU. They are not subject to an exclusive national (foreign) judicial system but to an international (regional) one to which they are not "foreigners" (non-EU), but part of it, as EU citizens or corporations in a single economic area. EU investors enjoy all the benefits of this sophisticated "supra-national" system. It is normal that they should have to follow the procedures of this system as well.

108. It is not in the interest of investment arbitration to extend jurisdiction where there is none. There is not even any political or moral reason to do so. This policy of creating conflict between adjudicatory bodies only serves to discredit the system of international

investment arbitration. The current practice at different levels, including treaties, looking for alternative ISDS systems should have provoked reflection in this regard.

109. The Tribunal had the opportunity to shed some light on this worrisome problem that creates a chaotic situation at the international adjudicative level. It missed it. I will not associate myself with this regrettable contribution to the fragmentation of international law.

110. I conclude borrowing the words of Professor Pierre-Marie Dupuy. Speaking about so-called "self-contained regimes" and the attitude of international courts and tribunals, he mentioned that they "are embarking on a common legal voyage. They must act cautiously and concertedly if they do not wish to capsize their vessel. To employ another metaphor, they all speak a language in which the common grammar is international law".[80]

Prof. Marcelo Kohen
29 September 2020

[80] Dupuy, Pierre-Marie, "A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law," European Journal of Legal Studies 1, no. 1 (2007): p. 28.