**AD HOC ARBITRATION UNDER THE 1976 UNCITRAL RULES**

**PCA CASE NO. 2013-35**

**- between -**

**NATLAND INVESTMENT GROUP N.V., NATLAND GROUP LIMITED, G.I.H.G. LIMITED AND RADIANCE ENERGY HOLDING S.A.R.L**

**(the "Claimants")**

**- and -**

**THE CZECH REPUBLIC**

**(the "Respondent" and together with the Claimants, the "Parties")**

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# DECISION ON THE ADMISSIBILITY OF THE *ACHMEA* OBJECTION

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**The Arbitral Tribunal**

Mr John Beechey C.B.E.

Mr J. Christopher Thomas, Q.C.

Professor Alfredo Bullard (Presiding Arbitrator)

22 July 2021

## I. Procedural Background

1. On 20 December 2017, the Tribunal issued its Partial Award, in which it decided as follows:

> (a) The Claimants' claim that the Respondent breached the Energy Charter Treaty by repealing the Income Tax Holiday and by modifying the Original Depreciation Provisions of the Act on Income Tax (Act No. 586/1992) is dismissed for lack of jurisdiction;
>
> (b) GIHG's claim that the Respondent has breached the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed for lack of jurisdiction;
>
> (c) Radiance Energy Holding's claim that the Respondent has breached the Luxembourg-Czech Republic Bilateral Investment Treaty is dismissed for lack of jurisdiction;
>
> (d) The Claimants' claim that the Respondent has breached the fair and equitable treatment standard in Article 10 of the Energy Charter Treaty is granted;
>
> (e) Natland Group's claim that the Respondent has breached the fair and equitable treatment standard in Article 2(2) of the Cyprus-Czech Republic Bilateral Investment Treaty is granted;
>
> (f) Natland Investment's claim that the Respondent has breached the fair and equitable treatment standard in Article 3(1) of the Netherlands-Czech Republic Bilateral Investment Treaty is granted;
>
> (g) The Claimants' claim that the Respondent has breached the full protection and security standard in Article 10 of the Energy Charter Treaty is dismissed;
>
> (h) Natland Group's claim that the Respondent has breached the full protection and security standard in Article 2(2) of the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed;
>
> (i) The Claimants' claim that the Respondent has breached the non-impairment standard in Article 10 of the Energy Charter Treaty is dismissed;
>
> (j) Natland Group's claim that the Respondent has breached the most-favored-nation clause in Article 3 of the Cyprus-Czech Republic Bilateral Investment Treaty is dismissed; and
>
> (k) All other claims, defenses and requests for relief, including claims for compensation and costs, are deferred to a subsequent phase of the arbitration.[1]

2. By correspondence dated 9 February 2018, the Parties informed the Tribunal that the Respondent had submitted a set-aside application against the Partial Award in Switzerland and that they had agreed to stay the arbitration until the Swiss Federal

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[1] Partial Award, para. 508. The correction of the Partial Award on 20 February 2018 in accordance with Article 36(1) of the UNCITRAL Rules did not affect the Tribunal's decision.

Tribunal had decided on the set-aside application. On the same date, the Tribunal took note of the Parties' agreement to stay the arbitration.

3. By letter dated 23 October 2020, the Claimants, on behalf of both Parties, informed the co-arbitrators and the PCA that the Swiss Federal Tribunal had rejected the Respondent's request to set aside the Tribunal's Partial Award and that the suspension agreed by the Parties in this arbitration was therefore lifted.

4. In order to recompose the Tribunal after the presiding arbitrator's vacancy on August 2018, the Parties submitted an agreed protocol for the appointment of a replacement presiding arbitrator and requested that the co-arbitrators and the PCA confirm whether they would agree to the proposed procedure. On 27 October 2020, the co-arbitrators and the PCA confirmed that they would adopt the Parties' agreed protocol set forth in the Claimants' letter of 23 October 2020.

5. On 26 January 2021, in accordance with the agreed protocol, Professor Alfredo Bullard was appointed as the presiding arbitrator in this matter.

6. By letter dated 4 February 2021, the Tribunal directed the Parties to coordinate and seek agreement on the procedural calendar for the next phase of the proceedings.

7. By correspondence dated 4 March 2021, the Parties, noting the Respondent's intention to raise a jurisdictional objection based on the CJEU's Judgment in the *Achmea* case ("the ***Achmea* Judgment**") (the "***Achmea* Objection**"), advised the Tribunal that they had agreed on the timetable and format for submissions on the admissibility of the Respondent's *Achmea* Objection.

8. On 9 March 2021, the Tribunal issued Procedural Order No. 8, whereby it accepted the Parties' agreement on the timetable and the format for submissions on the admissibility of the *Achmea* Objection and limiting the submissions to 15 pages each. The Tribunal also agreed to a procedural session by videoconference following the completion of the Parties' aforementioned written submissions.

9. On 24 March 2021, the Respondent filed its Submission on Admissibility of *Achmea* Objection (the "**Respondent's First Submission**").

10. On 8 April 2021, the Claimants filed their First Submission on Inadmissibility of the Intra-EU Jurisdictional Objection (the "**Claimants' First Submission**").

11. On 23 April 2021, the Respondent submitted its Second Submission on Admissibility of *Achmea* Objection (the "**Respondent's Second Submission**").

12. On 10 May 2021, the Claimants submitted their Second Submission on Inadmissibility of the Intra-EU Jurisdictional Objection (the "**Claimants' Second Submission**").

13. On 25 May 2021, the Tribunal held a procedural meeting by videoconference. The following individuals attended:

**Tribunal:**

Prof Alfredo Bullard (Presiding Arbitrator)
Mr John Beechey C.B.E.
Mr J. Christopher Thomas, Q.C.

**Claimants:**

Mr Frank Schulte
(*Claimants' Representative*)

Prof Luca G. Radicati di Brozolo
Mr Michele Sabatini
Mr Emilio Bettoni
Mr Flavio Ponzano
Ms Lucia Pontremoli
Ms Caterina Coroneo
(*Arblit - Radicati di Brozolo Sabatini Benedettel*)

**Respondent:**

Mr Ondřej Landa
Ms Martina Matejová
Mr Jaroslav Kudrna
Ms Anna Bilanová
Mr Martin Nováček
(*Ministry of Finance of the Czech Republic*)

Mr Libor Morávek
(*Skils s.r.o. advokátní kancelář*)

Mr Dmitri Evseev
Ms Mallory Silberman
Mr Peter Nikitin
Mr Bart Wasiak
Mr John Muse-Fisher
Ms Chloë Fletcher
M. Naomi Biden
M. Agata Daszko
Mr Yuri Pedroza Leite
(*Arnold & Porter Kaye Scholer LLP*)

**Permanent Court of Arbitration:**

Dr Levent Sabanogullari
Ms Jinyoung Seok
Ms Gaëlle Chevalier

**Court Reporter:**

Ms Claire Hill

14. Prof Luca Radicati di Brozolo, Mr Emilio Bettoni and Mr Flavio Ponzano made oral submissions on behalf of the Claimants and Mr Dmitri Evseev and Ms Mallory Silberman addressed the Tribunal on behalf of the Respondent. In addition, the Tribunal put questions to the Parties.

15. On 6 June 2021, after having carefully considered the arguments put forth by both Parties, the Tribunal informed them of its decision to declare the Respondent's *Achmea* Objection inadmissible. Through the present Decision, the Tribunal provides its reasoning on the matter to the Parties.

## II. The Parties' legal positions

17. The Respondent submits that the *Achmea* Objection is admissible notwithstanding the advanced stage of the proceedings, because the *Achmea* Judgment qualifies as a new circumstance that permits the raising of a new jurisdictional objection.

18. The Claimants argue that the Respondent is prohibited from raising the belated *Achmea* Objection by operation of the doctrines of preclusion, waiver, estoppel, and *res judicata*.

### (a) The Respondent's position

19. The Respondent submits that the *Achmea* Objection is admissible, despite the advanced stage of the proceedings, because (i) the *Achmea* Judgment is a new circumstance that constitutes "good cause" for the Respondent to raise a corresponding jurisdictional objection; (ii) the *Achmea* Objection was timely raised; and (iii) it is not precluded by waiver, estoppel or the doctrine of *res judicata*.[2]

20. *First*, with reference to *Frontier v. Czech Republic*, the Respondent argues that, under Article 15 of the UNCITRAL Rules, the Tribunal has the authority to admit jurisdictional objections even after the filing of the Statement of Defense, if the Tribunal considers it to be "appropriate," and if the Parties' due process rights are respected.[3] The Respondent submits that the *Achmea* Judgment is "an important 'new development' that gave rise to a 'new situation,'" given that it "preclude[ed]" the Respondent's consent to investor-State arbitration clause in any intra-EU investment treaties, including the Netherlands-Czech Republic BIT at issue.[4] This development, the Respondent continues, goes to "the very root of

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2 Respondent's First Submission, para. 16; Respondent's Second Submission, para. 5.

3 Respondent's Second Submission, para. 14, *referring to Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 205 (**Ex. RLA-253**); Procedural Meeting Transcript, 25 May 2021, p. 8:19-25.

4 Respondent's Second Submission, paras. 10-11, *citing* Case C-284/16, *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158, Judgment, 6 March 2018, *dispositif* (**Ex. RLA-293)**; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, 31 August 2018, paras. 46, 98 (**Ex. RLA-300**). *See also* Respondent's First Submission, para. 20, *referring to Republic of Croatia v. Raiffeisen Bank International AG and Raiffeisenbank Austria*

the jurisdiction of this Tribunal,"[5] and therefore entitles the Respondent to raise the *Achmea* Objection even at a late stage of the proceedings, as confirmed by commentators and case law.[6]

21. The Respondent emphasizes that the Tribunal has the "duty, right and competence to satisfy itself that all jurisdictional requirements are fulfilled, regardless of the particular stage of the arbitration," especially when it is faced with an issue that goes directly to the validity and enforceability of the international treaties on which the Tribunal's jurisdiction is said to rest.[7]

22. The Respondent rejects the Claimants' criticism regarding its reliance on awards rendered under the ICSID Convention because, in the Respondent's view, both the ICSID Rules and the 1976 UNCITRAL Rules permit a tribunal to admit a late jurisdictional objection, provided that the delay is justified, *i.e.*, is attributable to circumstances and facts that arose only after the statement of defense was filed.[8]

23. For the Respondent, contrary to the Claimants' submission, Article 186(2) of the Swiss Private International Law Act ("**PILA**") does not affect the Tribunal's power to admit the *Achmea* Objection under the 1976 UNCITRAL Rules, because it is not a mandatory provision.[9] Further, the Respondent asserts that a jurisdictional objection based on a fact that did not exist at the time of the merits defense, raised as soon as practically possible after that fact became known and in a manner that does not prejudice the Claimants' procedural rights, does not implicate the "proper and fair conduct of the arbitral proceedings" addressed in Article 186(2) of the PILA.[10]

24. *Second*, the Respondent notes that it indicated its intention to pursue the *Achmea* Objection to the Claimants as soon as the Tribunal was reconstituted and the

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*d.d.*, Case No. 26 SchH 2/20, ECLI:DE:OLGHE:2021:0211.26SCHH2.20.00, Judgment of the Higher Regional Court of Frankfurt am Main, 11 February 2021, para. 42 (**Ex. RLA-294**).

5 Respondent's Second Submission, para. 11, *citing Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2000, para. 262 (**Ex. RLA-308**).

6 Respondent's First Submission, para. 30, *referring to Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea issue, 31 August 2018, paras. 98-100 (**Ex. RLA-300**); *Strabag E, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, para. 8.87 (**Ex. RLA-301**); Respondent's Second Submission, para. 14, *referring to* J. Paulsson and G. Petrochilos, "UNCITRAL Arbitration", in Kluwer Law International (2017), para. 29 (**Ex. CLA-171**); D. Caron *et al*., "Chapter 12: Pleas as to the Jurisdiction of the Arbitral Tribunal", in Oxford Commentaries on International Law, The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, 2006), p. 449 (**Ex. RLA-328**); D. Caron and L. Caplan, "Chapter 14: Objections to the Jurisdiction of the Arbitral Tribunal", in The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, 2013), p. 456 (**Ex. RLA-329**); *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Second Award on Jurisdiction, 4 June 2014, para. 115 (**Ex. RLA-302**); Procedural Meeting Transcript, 25 May 2021, pp. 11:18 – 12:8.

7 Respondent's Second Submission, para. 17, *citing Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, para. 5.34 (**Ex. RLA-317**).

8 Respondent's Second Submission, para. 15.

9 Respondent's Second Submission, para. 16; Procedural Meeting Transcript, 25 May 2021, p. 9:4-6.

10 Respondent's Second Submission, para. 16.

proceedings resumed after the agreed suspension of proceedings was lifted.[11] Accordingly, the Respondent argues that it raised the *Achmea* Objection as soon as practically possible after the *Achmea* Judgment was rendered and that the timing of its objection entails no prejudice to the Claimants.[12]

25. *Third*, the Respondent rejects the Claimants' argument that the *Achmea* Objection is precluded by waiver or estoppel.[13] The Respondent notes that it is an EU Member State and, as such, it is "preclud[ed]" as a matter of prevailing EU law from consenting to intra-EU investor-State arbitration.[14] With reference to *Urbaser v. Argentina*, the Respondent further explains that such consent cannot be created by waiver or estoppel, because "[j]urisdiction is fixed by [a] treaty" between one or more States.[15]

26. Even if the Respondent could waive, or be estopped from raising, the *Achmea* Objection, the Respondent posits that its statements in the course of the proceedings that it would not pursue an intra-EU jurisdictional objection cannot be construed as a waiver of the *Achmea* Objection.[16] For a waiver to be effective, it must be unambiguous, and the Respondent argues that an unambiguous waiver would not have been possible prior to the issuance of the *Achmea* Judgment.[17]

27. According to the Respondent, the fact that the *Achmea* Objection is still "a live issue" is evident from the resignation of the former presiding arbitrator, Dr Heiskanen, on the basis of a potential issue conflict, as the resignation would not have been necessary had there been a clear and binding advance waiver of the *Achmea* Objection.[18]

28. Even if the Tribunal were to find that the Respondent's statements had amounted to a waiver, the Respondent argues that such waiver would have been ineffective, because it had an international obligation to object to the jurisdiction of this Tribunal under Article 4(3) of the Treaty on the Functioning of the European Union ("**TFEU**").[19]

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11 Respondent's First submission, paras. 27, 29.

12 Respondent's First Submission, paras. 29-30; Procedural Meeting Transcript, 25 May 2021, p. 13:14-22.

13 Respondent's Second Submission, para. 19; Procedural Meeting Transcript, 25 May 2021, p. 10:10-12.

14 Respondent's First Submission, paras. 34-35, *citing* Case C-284/16, *Slovak Republic v. Achmea BV* ECLI:EU:C:2018:158, Judgment, 6 March 2018, *dispositif* (**Ex. RLA-293**); Respondent's Second Submission, para. 21; Procedural Meeting Transcript, 25 May 2021, pp. 5:18-21, 10:12-23.

15 Respondent's Second Submission, para. 20, *citing Urbaser S.A. and others v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 112 (**Ex. RLA-318**). *See also* Procedural Meeting Transcript, 25 May 2021, pp. 10:24 – 11:16.

16 Respondent's First Submission, para. 31, *referring to* Respondent's Statement of Defense, paras. 433-441.

17 Respondent's Second Submission, paras. 22, 24-25. *See also* Respondent's First Submission, paras. 32-33.

18 Respondent's Second Submission, para. 23.

19 Respondent's First Submission, paras. 35-36; Procedural Meeting Transcript, 25 May 2021, p. 5:3-13.

29. In response to the Claimants' reliance on the tribunals' findings in the parallel *Antaris* and *WAIEN et al.* arbitrations that the Czech Republic had waived the *Achmea* Objection, the Respondent considers those findings unavailing, because the decision to accept jurisdiction despite the *Achmea* Judgment did not affect the outcome of those arbitrations, since all claims on the merits were rejected.[20]

30. As regards the issue of estoppel, the Respondent contends that the Claimants have not demonstrated that they changed their position for the worse in reliance on the Respondent's statement.[21] In addition, raising the *Achmea* Objection at this stage, in the Respondent's view, does not entail further delay to the proceedings or benefit the Respondent procedurally.[22]

31. Lastly, the Respondent, relying on *GPF v. Poland*, denies that the *Achmea* Objection is precluded by the international law doctrine of *res judicata*, given that it was not "debated or decided" in the Partial Award.[23] The Respondent further disputes that a mere mention in a footnote of the Partial Award that the Respondent was not raising an intra-EU jurisdiction could suffice to dispose in advance of the complex issues raised by the *Achmea* Judgment.[24]

32. Similarly, the Respondent argues that *Achmea* issues that were not debated and decided in the Partial Award or in the Swiss Federal Tribunal's set-aside judgment do not give rise to an application of the *res judicata* doctrine under Swiss law.[25] In any event, the Respondent emphasizes that the *Achmea* Judgment constitutes a material and relevant change in circumstances that occurred after the decision on a particular issue was made. That is a situation, which under Swiss law, allows the Tribunal to re-examine its decision until it disposes of all requests for relief in relation to that issue.[26]

### (b) The Claimants' position

33. According to the Claimants, the *Achmea* Objection should not be admitted, because (i) it is precluded by waiver or estoppel under the applicable rules and (ii)

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20 Respondent's Second Submission, para. 26, *referring to WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, paras. 444, 730 (**Ex. CLA-172**); *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 354 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 343 (**Ex. CLA-174**); *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Cases No. 2014-22, Award, 15 May 2019, para. 354 (**Ex. CLA-175**); *Antaris GmbH and Dr. Michael Göde v. The Government of the Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, paras. 73, 4560457 (**Ex. CLA-176**). *See also* Procedural Meeting Transcript, 25 May 2021, pp. 8:10-14, 9:7-11.

21 Respondent's Second Submission, para. 27.

22 Respondent's First Submission, para. 38; Respondent's Second Submission, para. 28; Procedural Meeting Transcript, 25 May 2021, pp. 13:22 – 14:9.

23 Respondent's Second Submission, para. 29, *citing GPF GP Sàrl v. The Republic of Poland*, SCC Case No. V 2014/168, Final Award, 29 April 2020, para. 291 (**Ex. CLA-199**); Procedural Meeting Transcript, 25 May 2021, pp. 9:23 – 10:8.

24 Respondent's Second Submission, para. 30.

25 Respondent's Second Submission, para. 31.

26 Respondent's Second Submission, para. 31.

the Partial Award already determined with *res judicata* effect the Tribunal's jurisdiction and the Respondent's liability in this arbitration.[27]

34. *First*, pursuant to Article 21(3) of the 1976 UNCITRAL Rules, the Claimants submit that the Respondent is barred from raising an intra-EU objection at this stage when it not only failed to raise the objection in its Statement of Defense, but also explicitly and repeatedly waived it throughout the proceedings.[28] In support of their contention, the Claimants highlight the fact that investment tribunals faced with "circumstances essentially identical" to the present case dismissed belated applications on the part of the respondent to raise the *Achmea* Objection on the basis that the respondent waived its right to raise the intra-EU jurisdictional objection.[29]

35. According to the Claimants, the deliberate use of the words "shall" and "not later than" in Article 21(3) of the UNCITRAL Rules, without containing any caveat, demonstrate that the provision is to be construed narrowly, such that "untimely jurisdictional objections [are] admitted only in very rare circumstances."[30]

36. The Claimants deny that the *Achmea* Judgment constitutes a new and exceptional circumstance, in particular a new "fact," that justifies the consideration of a new jurisdictional objection.[31] In the Claimants' view, "labelling the intra-EU objection '*Achmea* objection' does not make it something new" since "the "intra-EU issue [is] the same issue that has . . . been decided in *Achmea*."[32] Specifically, the Claimants rely on *Gavrilović v. Croatia* to argue that while the *Achmea*

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27 Claimants' First submission, paras. 8-9, 11; Claimants' Second Submission, para. 3; Procedural Meeting Transcript, 25 May 2021 p. 16:17-23.

28 Claimants' First Submission, paras. 9, 12-13; Claimants' Second Submission, paras. 34; Procedural Meeting Transcript, 25 May 2021, p. 23:10-16.

29 Claimants' First Submission, paras. 14-15, *referring to WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, para. 444 (**Ex. CLA-172)**; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 354 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 343 (**Ex. CLA-174)**; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, para. 354 (**Ex. CLA-175**); *Antaris GmbH and Dr. Michael Göde v. The Government of the Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 83 (**Ex. CLA-176**); Procedural Meeting Transcript, 25 May 2021, p. 17:7-14.

30 Claimants' Second Submission, paras. 6-7, *citing* J. Paulsson and G. Petrochilos, "UNCITRAL Arbitration", in Kluwer Law International, 2017, para. 29 (**Ex. CLA-171**) (emphasis added by the Claimants); Procedural Meeting Transcript, 25 May 2021, p. 23:20-24.

31 Claimants' First Submission, para. 28; Claimants' Second submission, paras. 14, 19.

32 Claimants' Second Submission, paras. 4, 33, *citing WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, para. 449 (**Ex. CLA-172)**; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 359 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 348 (**Ex. CLA-174)**; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, para. 407 (**Ex. CLA-175**).

Judgment clarified the law, an objection based thereon could have been raised before or the right to do so could have been reserved.[33]

37. Consequently, the Claimants maintain that the Respondent could, and should, have raised the intra-EU objection, or reserved its right to do so, when the Tribunal refused to consider the European Commission's *amicus curiae* submission that expressed the same concerns and when the *Achmea* case was referred to the CJEU.[34]

38. In response to the Respondent's argument regarding Article 15(1) of the UNCITRAL Rules, the Claimants stress that the introductory wording of Article 15(1)—"[s]ubject to these Rules"—clearly indicates that it is a "general" principle, which gives way to more specific provisions enshrined in other Articles of the Rules, including Article 21(3).[35] In this respect, the Claimants point out that the tribunals' decisions to dismiss belated jurisdictional objections were based only on Article 21(3) of the UNCITRAL Rules.[36]

39. Conversely, the awards cited by the Respondent in support of its Article 15 claim, in the Claimants' view, are inapposite, because (i) they did not involve an express waiver of the intra-EU objection; (ii) the counter-memorial in which the jurisdictional objection was raised was deemed equivalent to what Article 19 of the UNCITRAL Rules contemplates as the statement of defense; and (iii) the respondent invoked the relationship between Articles 20 and 21(3) of the UNCITRAL Rules, unlike the present case.[37]

40. In any event, the Claimants aver that the principle that each party be given a full opportunity to present its case under Article 15(1) of the UNCITRAL Rules does not justify the admission of the intra-EU objection that was repeatedly and

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33 Claimants' Second Submission, paras. 4, 18, *citing Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April, 30 April 2018, para. 42 (**Ex. CLA-188**).

34 Claimants' First Submission, para. 27; Claimants' Second Submission, para. 18; Procedural Meeting Transcript, 25 May 2021, p. 29:19-25.

35 Claimants' Second Submission, para. 8. *See also* Claimants' Second Submission, paras. 9-10, *referring to Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae", 15 January 2001, para. 28 (**Ex. CLA-207**); D. Caron *et al.*, "Chapter 2: General Provisions and Place of Arbitration", in The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, 2006), p. 27 (**Ex. CLA-209**).

36 Claimants' Second Submission, para. 10, *referring to WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, paras. 443-444 (**Ex. CLA-172)**; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, paras. 353-354 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, paras. 342-343 (**Ex. CLA-174)**; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, paras. 401-402 (**Ex. CLA-175**); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 137 (**Ex. CLA-210**).

37 Claimants' Second Submissions, paras. 12-14, *referring to Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, paras. 188, 201-202 (**Ex. RLA-253**); *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Second Award on Jurisdiction, 4 June 2014, para. 115 (**Ex. RLA-302**).

explicitly waived by the Respondent, even after the change of its counsel and at the hearing of February 2017.[38]

41. Observing that the ICSID Rules exceptionally permit late jurisdictional objections on the basis of new facts, the Claimants reject the Respondent's assertion that there is no difference between the ICSID Rules and the 1976 UNCITRAL Rules.[39] Rather, the ICSID awards relied on by the Respondent, the Claimants argue, are not relevant to this arbitration, especially when the respondent in each case did not waive the right to raise the intra-EU objection, but expressly reserved the right to raise the objection before the *Achmea* Judgment was issued.[40]

42. With respect to Swiss law, the Claimants rely on *WAIEN et al.* and other arbitrations in which the tribunals concluded that a respondent's repeated undertakings not to raise the intra-EU objection, "essentially identical" to those given in this case, constituted a "clear and unequivocal" waiver and that the respondent was therefore "foreclosed" from raising the objection pursuant to Article 186(2) of the PILA.[41] Therefore, in circumstances where the Respondent was fully aware that it could challenge the jurisdiction on a given ground, but had waived that right, the principle of foreclosure, the Claimants argue, also applies in the present case.[42]

43. The Claimants point out that the Respondent has proffered no authority regarding an exception to Article 186(2) of PILA, whereas the authorities cited by the Respondent purportedly to import the "good cause" standard for admitting belated jurisdictional objections are, in the Claimants' view, taken out of context and thus inapposite.[43]

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38 Claimants' Second Submission, paras. 11, 13, 17, *referring to Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, August 6, 2019, para. 34 (**Ex. CLA-211**); *GPF GP Sàrl v. The Republic of Poland*, SCC Case No. V 2014/168, Final Award, 29 April 2020, paras. 306, 308, 315 (**Ex. CLA-199**); Procedural Meeting Transcript, 25 May 2021, pp. 17:18-25, 26:22 – 27:2.

39 Claimants' Second Submission, para. 15.

40 Claimants' First Submission, para. 29, *referring to Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea issue, 31 August 2018, paras. 98-100 (**Ex. RLA-300**); *Strabag E, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, para. 8.87 (**Ex. RLA-301**); Claimants' Second Submission, paras. 16-17, *referring to Strabag SE et al. v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, para. 8.91 (**Ex. RLA-301**).

41 Claimants' First Submission, paras. 17, 19, *citing WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, paras. 438, 442, 444, 449 (**Ex. CLA-172)**; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, paras. 348, 352, 354, 359 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, paras. 337, 341, 343, 348 (**Ex. CLA-174)**; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, paras. 396, 400, 402, 407 (**Ex. CLA-175)**; Claimants' Second Submission, paras. 2, 24; Procedural Meeting Transcript, 25 May 2021, pp. 18:5-19, 20:16-24.

42 Claimants' Second Submission, para. 22; Procedural Meeting Transcript, 25 May 2021, p. 19:17-20.

43 Claimants' Second Submission, para. 23, fn. 42; Procedural Meeting Transcript, 25 May 2021, p. 20:4-15.

44. According to the Claimants, the Parties can only specify the principle of foreclosure codified in Article 186(2) of the PILA "by stipulating (directly or by reference to arbitral rules) how a jurisdictional defense must be raised."[44] Expounding on this point, the Claimants explain that this is what Article 21(3) of the UNCITRAL Rules does by providing that a jurisdictional defense must be raised "not later than in the statement of defence."[45] As such, the Claimants posit that there is no inconsistency between the 1976 UNCITRAL Rules and Article 186(2) of the PILA.[46]

45. Furthermore, in the Claimants' view, the question of whether the *Achmea* Judgment precludes EU Member States from consenting to intra-EU investor-State arbitration relates to arbitrability, which, under Swiss law, is governed by Article 177(1) of PILA, unless foreign law (*i.e.*, EU law) coincides with Swiss international public policy within the meaning of Article 190(2)(e) of the PILA.[47] The present dispute, according to the Claimants, meets the "economic interest" requirement in Article 177(1) of the PILA and there is "nothing to justify a conclusion that the principle identified in the *Achmea* judgment constitutes Swiss international public policy."[48]

46. Contrary to what the Respondent alleges, the Claimants submit that it is widely recognized by international courts and tribunals that the principles of waiver and estoppel apply to jurisdiction.[49]

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44 Claimants' Second Submission, paras. 20-21, *referring to* D. Girsberger and N. Voser, International Arbitration: Comparative and Swiss Perspectives (Schulthess Verlag, 2016), para. 564 (**Ex. CLA-212**); Procedural Meeting Transcript, 25 May 2021, pp. 18:21 – 19:2.

45 Claimants' Second Submission, para. 21; Procedural Meeting Transcript, 25 May 2021, p. 19:3-6.

46 Claimants' Second Submission, paras. 21, 24; Procedural Meeting Transcript, 25 May 2021, p. 19:6-9.

47 Claimants' Second Submission, para. 25; Procedural Meeting Transcript, 25 May 2021, p. 21:7-17.

48 Claimants' Second Submssion, paras. 26-27, *citing WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, para. 454 (**Ex. CLA-172)**; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 364 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 353 (**Ex. CLA-174)**; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, para. 412 (**Ex. CLA-175**); Procedural Meeting Transcript, 25 May 2021, pp. 21:18 – 22:3.

49 Claimants' Second Submission, paras. 30-31, *referring to CME Czech Republic BV v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 379 (**Ex. CLA-43**); *Cargill, Incorporated v. Republic of Poland (II)*, UNCITRAL, Award, 5 March 2008, para. 250 (**Ex. CLA-218**); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras. 191-194 (**Ex. RLA-284**); *Fraport AG Frankfurt Airport Services Worldwide v. Philippines (I)*, ICSID Case No. ARB/11/12, Award, 16 August 2007, para. 346 (**Ex. RLA-251**); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras. 118-120 (**Ex. CLA-219**); *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, 10 December 1985, I. C. J. Reports 1985, p. 192, para. 43 (**Ex. CLA-221**); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, I.C.J. Reports 1986, p. 14, para. 45 (**Ex. CLA-222**); UN Convention on Jurisdictional Immunities of States and Their Properties of 2004, Art. 7(1); Procedural Meeting Transcript, 25 May 2021, p. 27:3-12. *See also* Claimants' First Submission, fn. 41.

47. In the Claimants' view, the Respondent's repeated undertakings not to raise the intra-EU objection amount to a "clear and unambiguous" waiver, because they meet the six-prong test developed under international law.[50] Specifically:

    i. the Respondent's undertakings to the Claimants and the Tribunal both in writing and orally were "made in relation to a particular matter," *i.e.*, the intra-EU objection in this arbitration, "with the intention of being bound";[51]

    ii. the Respondent's undertakings not to raise an intra-EU objection were made by a competent authority, *i.e.*, the Respondent's counsel;[52]

    iii. the Respondent's counsel in making the undertakings were duly empowered to bind the Respondent;[53]

    iv. the Respondent's undertakings were given in the context of an intra-EU dispute and after the commencement of this arbitration;[54]

    v. the Respondent's undertakings constitute a valid waiver, since allowing the Respondent to revive the intra-EU objection after renouncing repeatedly would be a breach of good faith;[55] and

    vi. the Respondent's undertakings were categorical and left no room that they could be revoked.[56]

48. In response to the Respondent's argument on the resignations of former members of the Tribunal, the Claimants note that "[i]t was easily predictable that the Czech Republic . . . would in some form have raised the *Achmea* issue and used the presence of those arbitrators on the Tribunal to raise yet another procedural incident."[57]

49. Additionally, the Claimants argue that the Respondent is estopped from raising the *Achmea* Objection, because the Claimants relied on the Respondent's representations to their detriment when shaping their litigation strategy, including,

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50 Claimants' First Submission, para. 24; Claimants' Second Submission, para. 35; Procedural Meeting Transcript, 25 May 2021, p. 27:14-17.

51 Claimants' First Submission, paras. 23, 25, *citing Nuclear Tests (New Zealand* v. *France*), Judgment, December 20, 1974, I.C.J. Reports 1974, p. 457, para. 47 (**Ex. CLA-183**); *Nuclear Tests (Australia* v. *France)*, Judgment, December 20, 1974, I.C.J. Reports 1974, p. 253, para. 44 (**Ex. CLA-184**); Procedural Meeting Transcript, 25 May 2021, p. 27:19-20.

52 Claimants' First Submission, para. 31; Procedural Meeting Transcript, 25 May 2021, p. 27:21-22.

53 Claimants' First Submission, para. 31.

54 Claimants' First Submission, para. 32.

55 Claimants' First Submission, paras. 33-34.

56 Claimants' First Submission, paras. 35-36; Procedural Meeting Transcript, 25 May 2021, p. 27:23-24.

57 Claimants' Second Submission, para. 2.

*inter alia*, not agreeing to bifurcate the proceedings.[58] According to the Claimants, re-opening the debate on jurisdiction at this stage of the arbitration would be significantly prejudicial to the Claimants as it would further delay and increase the costs of the proceedings.[59] The Claimants also consider that the Respondent would gain "some advantage" as it would be able to re-litigate the jurisdiction of this case.[60]

50. The Claimants reject the argument that waiver and estoppel do not apply, because the Respondent is precluded as a matter of EU law from consenting to intra-EU investor-State arbitration.[61] As the Tribunal derives its jurisdiction from the ECT and the BITs at hand, and not from EU law, EU law cannot prevail over international law and over the principle of good faith from which the waiver doctrine derives.[62] Estoppel, the Claimants add, operates "irrespective of whether [the Respondent's] conduct is legal or not."[63]

51. For the Claimants, the Respondent's assertion that the Tribunal has an *ex officio* obligation to assess its jurisdiction is unavailing under both Swiss law and international law.[64] Even if the Tribunal had the power to deal *sua sponte* with matters going to jurisdiction, the Claimants contend that the Tribunal would be barred from exercising that power in the presence of the Respondent's repeated and unambiguous waiver, as otherwise the doctrines of waiver and estoppel would become meaningless.[65]

52. *Second*, the Claimants maintain that the doctrine of *res judicata* established in Swiss law prevents the Tribunal from reconsidering jurisdiction based on the intra-EU objection in view of the potential consequence of nullifying the Tribunal's findings on liability.[66] Even if the Partial Award were not deemed *res judicata*, the Claimants consider that the Partial Award has "conclusive and preclusive effects, akin to *res judicata*," since the Swiss Federal Tribunal confirmed the Tribunal's jurisdiction set out in the Partial Award and rejected the Respondent's set-aside motion.[67] Therefore, any departure from the Partial

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58 Claimants' First Submission, para. 43; Procedural Meeting Transcript, 25 May 2021, p. 32:1-4.

59 Claimants' First Submissions, paras. 43, 55-57; Claimants' Second Submission, para. 36; Procedural Meeting Transcript, 25 May 2021, p. 31:21-25.

60 Claimants' Second Submission, para. 36, *citing* D. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", in *British Yearbook of International Law*, 1957, Vol. 33, pp. 183-184 (**Ex. RLA-321**).

61 Claimants' Second Submission, para. 32.

62 Claimants' Second Submission, para. 32; Procedural Meeting Transcript, 25 May 2021, pp. 30:16-20, 31:3-7.

63 Claimants' Second Submission, para. 32, *citing Duke Energy International Peru Investments No. 1 Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, para. 245 (**Ex. RLA-15**).

64 Claimants' Second Submission, paras. 28, 37; Procedural Meeting Transcript, 25 May 2021, p. 22:4-19.

65 Claimants' Second Submission, para. 37.

66 Claimants' First Submission, paras. 46-48; Claimants' Second Submission, para. 38; Procedural Meeting Transcript, 25 May 2021, p. 33:4-10.

67 Claimants' First Submission, paras. 49-50, *citing* S. Schaffstein, *Res Judicata in International Arbitration*, cit., pp. 2653-2654 (**Ex. CLA-196**); Procedural Meeting Transcript, 25 May 2021, p. 33:19-24.

Award's findings on jurisdiction or liability due to the admission of the intra-EU objection at this stage, the Claimants submit, would violate Swiss procedural public policy.[68]

53. Furthermore, according to the Claimants, the findings in the Partial Award that the Respondent violated its FET obligations must be understood "by necessary implication" to mean that the Tribunal did not find that the intra-EU question affected its jurisdiction over the present dispute.[69] In this respect, the Claimants highlight that, by taking note of the Respondent's decision not to raise the intra-EU objection, the Tribunal considered it not to be an obstacle to its jurisdiction despite being fully aware of the intra-EU nature of the present dispute.[70] The Claimants add that the Respondent's reliance on *GPF v. Poland* is misplaced, because, unlike in this case, the tribunal's earlier decision was limited to jurisdiction and did not cover liability.[71]

## III. The Tribunal's analysis

### (a) The law applicable to the admissibility of the objection

54. On 14 February 2014, the Tribunal issued Procedural Order No. 1, whereby it decided the place of the arbitration to be Geneva.[72] Consequently, the law applicable to determine the admissibility of Respondent's objection is Swiss law.[73]

55. The arbitration, and the question of the admissibility of a belated jurisdictional objection, is also governed by the 1976 UNCITRAL Rules, as agreed upon by the Respondent on 9 July 2013 and by the Claimants on 22 July 2013.[74]

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68 Claimants' Second Submission, para. 39; Procedural Meeting Transcript, 25 May 2021, pp. 33:25 – 34:3.

69 Claimants' First Submission, para. 53, *citing Iberdrola Energía, S.A. v. The Republic of Guatemala*, PCA Case No. 2017-41, Final Award, August 24, 2020, para. 288 (**Ex. CLA-205**); Claimants' Second Submission, para. 40; Procedural Meeting Transcript, 25 May 2021, p. 34:4-12. *See also* Claimants' Second Submission, para. 41, *referring to Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports, 2007, p. 43, paras. 108-11, 123, 128, 132 (**Ex. CLA-202**).

70 Claimants' First Submission, para. 53; Procedural Meeting Transcript, 25 May 2021, p. 34:16-20.

71 Claimants' Second Submission, para. 42, *referring to GPF GP Sàrl v. The Republic of Poland*, SCC Case No. V 2014/168, Final Award, 29 April 2020, para. 287 (**Ex. CLA-199**); Procedural Meeting Transcript, 25 May 2021, p. 35:12-21. *See also* Procedural Meeting Transcript, 25 May 2021, p. 29:11-18.

72 Procedural Order No. 1, para. 1.10.

73 Swiss Private International Law Act, Art. 176(1) ("The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland").

74 Partial Award, para. 15.

### (b) Timeliness and preclusion

56. Under Swiss law, objections to the Tribunal's jurisdiction are regulated by Article 186(2) of the PILA, which establishes that: "*A plea of lack of jurisdiction must be raised prior to any defense on the merits*." It is accepted that, pursuant to such rule the admissibility of an untimely jurisdictional objection should be considered foreclosed or precluded.[75]

57. Swiss jurisprudence has applied the rule of preclusion under Article 186(2) PILA even for issues of objective arbitrability.[76] Therefore, the Tribunal considers that under Swiss law, it is irrelevant at this stage to determine if the *Achmea* objection gives rise to a matter of objective arbitrability or of public policy. The Tribunal must determine only whether the prerequisites for preclusion are satisfied or not.

58. Notwithstanding that certain doctrine cited in the written submissions holds such rule to be mandatory,[77] the Claimants concede that under Swiss law the Parties may agree to a more specific rule on how the defense should be submitted, for instance, by reference to the rules of arbitration.[78] This, however, does not prejudice the preclusion effect if the defense is untimely.

59. In this case, it is Article 21(3) of the UNCITRAL Rules which states that any "*plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense*." Without prejudice to such provision, it is accepted that "*the drafting history of the 1976 Rules shows that untimely jurisdictional objections could be admitted only in very rare circumstances, under the general powers granted to arbitrators to conduct the arbitration by article 15(1) (now article 17(1))*".[79]

60. Article 15(1) of the UNCITRAL Rules states that "*[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any*

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75 Girsberger, N. Voser, *International arbitration, Comparative and Swiss Perspectives*, Schulthess, 2016, para. 564 ("A plea of lack of jurisdiction may no longer be raised after the objecting party has submitted pleadings on the merits. Art. 186(2) SPILA is viewed as a mandatory provision from which parties cannot deviate contractually") (**Ex. CLA-212**). *See also* G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration, Law and Practice in Switzerland* (Oxford University Press, 2015), para. 5.12 (referring to the 2010 UNCITRAL Rules) (**Ex. CLA-213**).

76 G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration, Law and Practice in Switzerland* (Oxford University Press, 2015), para. 3.39 (**Ex. CLA-213**).

77 *Id*.

78 Claimant's Second Submission, para. 21; B. Berger, *Commentary on Chapter 12 PILS, Article 186 [Jurisdiction]*, in M. Arroyo (Ed.), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International (2018), para. 40 ("Art. 186(2) PILS is a rule of procedure. Therefore, the arbitral tribunal shall have due regard to any more specific procedural rules determined by the parties, whether directly or by reference to rules of arbitration or a procedural law of their choice.") (**Ex. CLA-214**).

79 J. Paulsson, G. Petrochilos, *UNCITRAL Arbitration*, Kluwer Law, para. 29 (**Ex.CLA-171**). *See also WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. =2014-19, Award, 15 May 2019, para. 444 (**Ex. CLA-172**); *Voltaic Network GmbH v. The Czech Republic*, PCA Case No.2014-20, Award, 15 May 2019, para. 354 (**Ex. CLA-173**); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019, para. 343 (**Ex. CLA-174**).

*stage of the proceedings each party is given a full opportunity of presenting his case*."[80] This provision sets out the Tribunal's general powers to conduct the proceedings, under which a late jurisdictional objection may be reasonably admitted under exceptional circumstances (good cause), *e.g.*, material new facts. *Contrario sensu*, if such condition is not satisfied, foreclosure should operate. The Tribunal is called upon to find a balance between ensuring the Parties' right to present their case, without affecting the efficiency of the proceedings and the procedural stages set.

61. It is not in dispute that the Respondent requests leave to submit a jurisdictional objection long after submitting its Statement of Defense, and even after the rendering of an award on jurisdiction and liability. The Tribunal must thus assess whether there exists a "good cause" to allow an exception to the usual rule.

62. After thoroughly considering the Parties' arguments, the Tribunal finds that there is no such good cause in the present case. In reaching its conclusion, as explained below, the Tribunal has taken into account the Parties' conduct and the current stage of the proceedings. Neither admits of the conclusion that there are new circumstances that in the present case would justify a belated objection.

63. *First*, if the defendant had the possibility to raise the objection timeously, and it did not, the Tribunal should not then admit it. The Tribunal finds that in this case, Respondent could have either raised the intra-EU objection earlier or reserved its right to do so once the *Achmea* Judgment was rendered. However, it let pass the procedural stage established under the rules.

64. This situation is similar to that which arose in the *WAIEN et al*. cases, where the *Achmea* Objection was also raised belatedly and therefore not admitted. The awards states as follows:

> "In this case, there is nothing to which the Respondent can point to satisfy the requirement in both Article 186(2) of the PILA and Article 21(3) of the UNCITRAL Rules that the jurisdictional objection in question was raised no later than the statement of defense, or any defense on the merits. Rather, as detailed below, the Respondent specifically and repeatedly stated throughout these proceedings that it would not object to the Tribunal's jurisdiction on the basis of the intra-EU nature of the dispute." [81]

65. In this case, as in *WAIEN et. al.*, the Respondent not only failed to raise an objection concerning the intra-EU nature of the dispute, but it repeatedly stated that it would not do so.

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80 UNCITRAL Rules. Article 15(1).

81 *WA InvestmentsEuropa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, para. 444 (**Ex. CLA-172**). *See also Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, para. 354 (**Ex. CLA-173** ); *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic* , PCA Case No. 2014-21, Award, 15 May 2019, para. 343 (**Ex. CLA-174** ) (emphasis added in original).

66. By the time it filed its Statement of Defense, on 30 October 2015, the Respondent was aware of the debate over whether an EU member state could validly offer to arbitrate controversies under a BIT with investors from another EU member state. Specifically, Respondent was aware of the position expressed by the European Commission in the *amicus curiae* filed in the arbitral proceeding which would later give rise to the *Achmea* Judgment, as the Statement of Defense shows: "*Of course, the Czech Republic does not believe that its obligations under the BIT or the ECT are inconsistent with its obligations under EU law . . . Unlike the European Commission, the Czech Republic does not insist that the Tribunal find that the applicability of EU law deprives the Tribunal of jurisdiction*."[82]

67. Furthermore, for the Tribunal, this is a clear declaration that the Respondent would not raise an objection akin to the position set forth by the European Commission in the *Achmea* arbitration.

68. By the time the hearing of this case took place (from 13 to 17 March 2017), the Respondent was aware that, on 3 March 2016, the German Federal Court of Justice had requested the CJEU to make a preliminary ruling on the *Achmea* arbitration.[83] However, during the hearings, the Respondent did not mention such proceeding before the CJEU. As the Claimants point out, this differs from Poland's conduct in the *Strabag* case, where the state reserved its right to raise the *Achmea* objection once the CJEU took a decision on the matter.[84]

69. Even when the *Achmea* Judgment was issued on 6 March 2018, it cannot be considered as a new fact, so as to justify that the general arguments made in reliance upon it could not have been submitted earlier in this arbitration. The Tribunal agrees with the criterion in the *Gavrilović* case in that sense: "*[T]he decision itself is legal rather than factual in nature: it clarifies the law in the EU. On balance, the Tribunal considers that the "fact" of the ruling in* Achmea *does not suffice as a basis for the objections that the Respondent seeks to raise at this stage of the proceeding*".[85]

70. *Second*, as noted, the Respondent expressly and repeatedly stated on several occasions that it would not raise the intra-EU BIT Objection. From the information provided by the Parties, the Tribunal has confirmed that during the 2014-2017 period, the Respondent stated on at least five occasions that it would not question the Tribunal's jurisdiction using arguments based on intra-EU law, for instance:

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82 Respondent's Statement of Defense, para. 5.

83 Case -C-284/16, *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158, 6 March 2018 (**Ex. RLA-293**).

84 *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, para. 8.91 (**Ex. RLA-301**).

85 *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April 2018, 30 April 2018, para. 42. (**Ex. CLA-188**).

- The Respondent's e-mail to the Arbitral Tribunal of 31 January 2014: "*To be clear, the Czech Republic does not intend to raise the intra-EU BIT objection*."

- The Respondent's Letter to the Arbitral Tribunal dated 6 October 2014, p. 2: "*The Czech Republic reaffirms that it will not raise the* intra-EU objection in this proceeding."

- The Respondent's Statement of Defense, paras. 356, 433-434, 442; and the Respondent's Rejoinder, para. 281: "*The Czech Republic does not respond to Claimants' extended comments concerning the European Commission's jurisdictional objection . . . given that the Czech Republic's views on these matters have already been explained in its Statement of Defense*."

- The Respondent's opening presentation, slide 89: "*The Czech Republic does not advance an* 'intra-*EU' jurisdictional objection*."

71. In the Statement of Defense, the Respondent stated that it was aware of parallel investment arbitrations in which this type of objection had already been presented. However, the Respondent also indicated that it would not follow those cases insofar as it did not perceive a collision of those investment treaties with EU law:

> "[T]he Czech Republic in this arbitration is not pleading a fundamental incompatibility between investment treaties and EU law" . . . "the Czech Republic has raised EU law-based jurisdictional objections in other intra EU investment arbitrations . . . [T]he Czech Republic is not raising a similar objection in this case" . . . "In this case, the Czech Republic does not perceive a collision of those investment treaties with EU law. Accordingly, the Czech Republic does not pursue the jurisdictional objection articulated by the Commission before this Tribunal."[86]

72. These statements reaffirm that the Respondent had the opportunity to raise the intra-EU objection, now called the *Achmea* Objection, but chose to waive it. Even putting to one side the Claimants' argument on estoppel and waiver under international law, such express waivers demonstrate that there is no new circumstance that would justify the admission of a belated jurisdictional objection and avoid its preclusion under the UNCITRAL Rules and Swiss law.

73. *Third*, and without prejudice to the standalone argument regarding its effects akin to *res judicata*, the Tribunal considers that the existence of a Partial Award on Jurisdiction and Liability is another reason for rejecting the claimed existence of a good cause to admit a late jurisdictional objection.

74. The late stage of the proceedings and the peril to an efficient and timely solution of the dispute should be weighed by the Tribunal when evaluating the admission of a belated submission under Article 15 of the UNCITRAL Rules. In this case a

[86] Respondent's Statement of Defense, paras. 356, 433-434, 442.

Partial Award on Jurisdiction and Liability shows that the proceedings are significantly advanced and considerable resources have been spent by the Parties, relying on the assumption that all the possible objections were being discussed and considered. From the Tribunal's perspective, this precludes a finding of good cause to admit a late objection.

75. *For the abovementioned reasons*, the Tribunal concludes that the there is no "good cause" for the *Achmea* Objection to be admitted outside of the opportunity granted by Swiss law and the UNCITRAL Rules and the possibility of raising it at this stage of the proceedings should therefore be considered precluded or foreclosed.

### *(c) Res* judicata

76. Aside from the untimeliness of the Respondent's objection, in the Tribunal's view, admitting the objection would contradict the Partial Award on Jurisdiction and Liability, which is binding and has preclusive effects akin to *res judicata*. This would in turn violate public policy, to the possible detriment of the validity of the final award under the law of the seat.

77. According to Swiss law, the Tribunal may not depart in its final award from the decisions already taken in a previous interlocutory award on a material preliminary issue. According to the Swiss Federal Tribunal, the former would violate procedural public policy.[87]

78. As shown by relevant precedents and doctrine, although partial awards do not have *res judicata* effects under Swiss law, they do have binding and preclusive effects akin thereto. As held by the Swiss Federal Tribunal: "*[A]s to interim or preliminary awards . . . which determine preliminary issues of procedure or merits, they do not have res judicata effect; having said that, unlike procedural orders or directives which can be modified or revoked over the course of the proceedings, such interim awards are binding on the arbitral tribunal which rendered them.*"[88]

79. Notwithstanding that, under international law, a decision on jurisdiction does constitute a final (and binding) award on the matter, which carries *res judicata* effects. As quoted in the *Iberdrola II* case:

> "'[T]he majority of commentators appears to agree that positive and negative arbitral decisions on jurisdiction constitute 'genuine arbitral awards' and should be entitled to the same *res judicata* effects as other arbitral awards.' For instance, Fouchard, Gaillard and Goldman write that '[a] decision on jurisdiction, the applicable law

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87 Swiss Federal Tribunal, *Case No. 128 III 191*, Judgment, 3 April 2002, para. 4(a) ("An arbitral tribunal violates procedural public policy if it disregards the res judicata effect of a previous decision or if the final award departs from the opinion expressed in an interlocutory award disposing of a material preliminary issue.") (**Ex. CLA-225**).

88 Swiss Federal Tribunal, *Case No. 128 III 191*, Judgment, 3April 2002, para. 4 (**Ex. CLA-225**); S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press, 2016), paras. 4.79-4.80 (**Ex. CLA-224**).

> or the principle of liability . . . is a final decision on one aspect of the dispute,' and 'should therefore be considered as an award, against which an immediate action to set aside can be brought.'"[89]

80. Respondent had the chance to challenge, and did challenge, the Tribunal's jurisdiction according to the applicable law. In the Partial Award, in addition to its findings on liability, the Tribunal rejected certain objections to its jurisdiction. This decision was in turn confirmed by the Swiss Federal Tribunal, which rejected Respondent's motion to set aside the Partial Award. The Tribunal is bound by its original finding on jurisdiction and could not decide otherwise now.

81. Although the Partial Award did not expressly address what is now called the *Achmea* Objection, it upheld the Tribunal's jurisdiction, except for the admitted objections, and decided that the Respondent was internationally liable for certain treaty breaches. A finding of liability means "*by necessary implication*" that the Tribunal has decided that it has jurisdiction on the merits and that any other objection, including the intra-EU nature of the arbitration agreement, has no merit.

82. The doctrine of "necessary implication", found in international law precedents submitted by the Parties, extends the *res judicata* effects of a decision to questions not expressly stated but logically implied by an award.[90] The Tribunal considers that Swiss rules on *res judicata* and binding effects akin thereto require, by logical necessity, the application of such doctrine.

83. If the objection were admitted and the Tribunal were to find that it did not have jurisdiction in the first place, it would be modifying what can no longer be modified due to the binding effect (akin to *res judicata*) of the Partial Award: that, except for those objections admitted by the Tribunal, it had jurisdiction to declare the Respondent internationally liable. In that sense, the relation between a finding of liability and the jurisdiction of the Tribunal is akin to that of "chicken and egg." If the former exists, the latter, by necessary implication, must have preceded it.

84. Admitting the Respondent's objection would derogate from the preclusive effects akin to *res judicata* by calling into question one of the premises of the Partial Award, namely that the Tribunal has jurisdiction over the dispute, except for those of the objections admitted. Thus, in the Tribunal's view, it would be contrary to the public policy of the place of arbitration, would render the final award invalid and thus cannot be admitted by the Tribunal.

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89 *Iberdrola Energía, S.A. v. The Republic of Guatemala*, PCA Case No. 2017-41, Final Award, 24 August 2020, para. 264 (**Ex. CLA-205**).

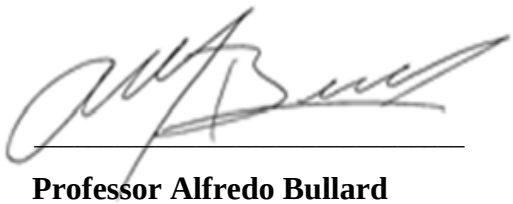
90 *Question of the Delimitation of the Continental Shel between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, I.C.J. Reports 2016, para. 68 (**Ex. CLA-203**); *Iberdrola Energía, S.A. v. The Republic of Guatemala*, PCA Case No. 2017-41, Final Award, 24 August 2020, para. 288 (**Ex. CLA-205**).

## IV. Decision

85. The Tribunal therefore declares the Respondent's objection to the Tribunal's jurisdiction based on the *Achmea* Judgment **inadmissible**.

Seat of arbitration: Geneva, Switzerland

Date: 22 July 2021



**Professor Alfredo Bullard**

(Presiding Arbitrator)
On behalf of the Tribunal