INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AS Norvik Banka and others

v.

Republic of Latvia

(ICSID Case No. ARB/17/47)

PROCEDURAL ORDER NO. 3

Decision on the European Commission's Application pursuant to Rule 37(2)

Members of the Tribunal
James Spigelman QC, President of the Tribunal
HE Judge Peter Tomka, Arbitrator
John M. Townsend, Arbitrator

Secretary of the Tribunal
Francisco Abriani

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30 October 2018

I. BACKGROUND

1. On 22 August 2018, the European Commission (the "**Commission**") filed an application to file a written submission in this proceeding pursuant to ICSID Arbitration Rule 37(2) (the "**Application**"). The Commission requested an order from the Tribunal to:

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

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

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

   (iv) allow the Commission to attend hearings in order to present oral argument and reply to the questions of [the] Tribunal at those hearings, should [the] Tribunal and the parties deem that useful.[1]

2. On the same date, the Tribunal invited the Parties to submit their observations on the Application by 29 August 2018.

3. On 29 August 2018, the Respondent filed its observations on the Application ("**Respondent's Observations**").

4. On the same date, the Claimants requested an extension of time until 31 August 2018 to submit their observations on the Application.

5. On 30 August 2018, the Tribunal granted the Claimants' request for an extension of time to submit their observations on the Application.

6. On the same date, the Respondent indicated that it did not object to the extension of time granted to the Claimants to submit their observations on the Application and that it requested leave to submit a brief reply to the Claimants' observations on the Application by 5 September 2018.

7. On 31 August 2018, the Claimants filed their observations on the Application ("**Claimants' Observations**").

[1] Application, para. 24.

8. On the same date, the Claimants indicated that they did not object to the Respondent's request for leave to submit a brief reply to the Claimants' Observations and that they reserved their right to request leave to respond to the Respondent's reply.

9. On the same date, the Tribunal granted the Respondent's request for leave to reply to the Claimants' Observations.

10. On 5 September 2018, the Respondent filed its Reply to the Claimants' Observations ("**Respondent's Reply**").

11. On 10 September 2018, the Tribunal invited submissions from the Parties as to what participation is essential for the Commission to make its contribution to the proceeding in this case, as well as to any confidentiality restrictions that should be placed with respect to such materials, if any.

12. On 17 September 2018, the Claimants submitted further observations on the Application.

13. On 5 October 2018, the Respondent submitted further observations on the Application.

14. Having deliberated and carefully considered the Parties' positions on the Application, on 16 October 2018 the Tribunal issued Procedural Order No. 2, granting the Commission's request to file a written non-disputing party submission addressing as a legal issue whether the investor-state arbitration mechanism in the Latvia/UK BIT remains available. In the same order, the Tribunal directed the Commission to file its submission on or before 5 November 2018, the Respondent to submit its observations on that submission on or before 19 November 2018, and the Claimants to submit their observations on or before 3 December 2018. The other orders sought by the Commission were rejected.

15. The Tribunal decided to issue Procedural Order No. 2 expeditiously without a summary of reasons, but advised the Parties that a further order providing the reasons would be issued in due course. The present order provides the Tribunal's reasons for Procedural Order No. 2.

II. THE COMMISSION'S APPLICATION

16. The Commission proposes that its application be limited to the legal consequences of the judgment of the Court of Justice of the European Union (the "**CJEU**") in *Achmea* (the "***Achmea* judgment**") for the case before this Tribunal.[2]

17. The Commission relies on the following passage of the *Achmea* judgment:

> "Articles 267 and 344 [… of the Treaty on Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States […] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."[3]

18. The Commission also relies on its Communication "Protection of Intra-EU Investment" of 19 July 2018, which has set out that as a consequence of that judgement:

> "All investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement."[4]

It states that the case pending before this Tribunal constitutes such a dispute.

19. The Commission asserts that it has decided "to request leave to intervene as a non-disputing party in every pending or future investment arbitration proceeding concerning disputes between an investor of one Member State and another Member State, in order to safeguard the Union's interest in ensuring the uniform application of Union law."[5]

20. The Commission argues that its application meets the requirements set out in ICSID Arbitration Rule 37(2). First, the Tribunal's jurisdiction "is, at the very least, impacted by the judgment of the Court of Justice in *Achmea*", and therefore the subject matter of the Application is within the scope of the dispute.[6]

21. Second, the Commission considers that it would bring "a perspective, particular knowledge, and insight, that is different from that of the disputing parties". It notes that according to Article 17 of

[2] Commission's Application, para. 12, citing the CJEU's judgemtn in *Achmea*, Case C-284/16, EU:c:2018:158.
[3] Commission's Application, para. 1 (emphasis added by the Commission).
[4] Commission's Application, para. 2, citing COM(2018)547 final.
[5] Commission's Application, para. 3.
[6] Commission's Application, para. 13.

the Treaty on European Union (the "**TEU**"), it shall promote the interest of the Union and oversee the application of Union law. In that role, the Commission "has to ensure in particular that the judgment of the Court of Justice in *Achmea* is fully respected and implemented."[7] The Commission also notes that it is in close contact with Member States regarding the application of the *Achmea* judgment, and has initiated infringement proceedings pursuant to Article 258 TFEU against several Member States.

22. The Commission further argues that it also has the task of the Union's external representation according to Article 17 of the TEU, and is committed to the observance of international law under Article 3 of the TEU. As such, the Commission "is an active actor in international law, and has developed a particular expertise in this field", which enables it to bring "a unique perspective from the point of view of Union law, which constitutes a '*new legal order in international law*', and from the broader point of view of international law in general."[8]

23. The Commission states that, in its observations, it would like to address the following points:

(i) First, in *Achmea*, the CJEU recalled that Union Law is domestic as well as international law applicable between two Member States, and therefore this Tribunal should apply Union law as part of its applicable law. The Tribunal should thus address the same situation as that addressed by the CJEU in *Achmea*.[9]

(ii) Second, Union law covers the same subject matter as the UK-Latvia BIT. Therefore Article 59 of the Vienna Convention on the Law of Treaties (the "**VCLT**") applies to the relationship between Union law and the UK-Latvia BIT.[10]

(iii) Third, if the Tribunal were to find a conflict between Union law and the UK-Latvia BIT, Union law prevails on the basis of Article 30 VCLT, and the special conflict rule of primacy of Union law.[11]

[7] Commission's Application, para. 14.
[8] Commission's Application, para. 15.
[9] Commission's Application, para. 17.
[10] Commission's Application, para. 18.
[11] Commission's Application, paras. 19-20.

(iv) In any event, the ECJ considers that "the *pacta sunt servanda* guarantee of Article 351(1) TFEU[12] does not apply to treaties concluded between Member States, where the general principle of primacy of Union law constitutes the special conflict rule."[13]

24. The Commission finally advances that it has a particular interest in the present proceeding, which arises from its central role in the interpretation and application of rules relating to investment protection within the Union. It states that "[i]n order to avoid any conflict between arbitration awards and Union law … the Commission has a particular interest in ensuring that [this] Arbitral Tribunal is fully aware of the legal consequences of the judgment of the Court of Justice in *Achmea*, and considers these in its assessment of the jurisdictional objections."[14]

25. The Commission requests that the Tribunal:

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

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

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

(iv) allow the Commission to attend hearings in order to present oral argument and reply to the questions of [this] Tribunal at those hearings, should [the] Tribunal and the parties deem that useful."

III. THE PARTIES' POSITIONS

a. The Claimants' position

26. The Claimants argue that the Application does not meet the requirements of ICSID Arbitration Rule 37(2).

[12] The Commission refers to the rule that the rights and duties under a public international law agreement entered into by a Member State with a non-Member state prior to accession to the EU are not affected by EU law.
[13] Commission's Application, para. 21, citing references to ECJ judgments in *Commission v. Slovakia*, C-264/09, EU:c:2011:580, and *Commission v. Austria*, C-147/03, EU:C:2005:427, as well as ICSID Case No. ARB/07/19 *Electrabel v. Hungary*.
[14] Commission's Application, paras. 22-23.

27. First, the Claimants contend that the Commission will not bring a perspective, particular knowledge or insight that is different from that of the Respondent, for the following reasons:

(i) It notes that this Tribunal is not required to adjudicate EU law issues such as *Achmea*, but rather to resolve a specific dispute brought by the Claimants against the Respondent under the UK-Latvia BIT and the ICSID Convention.[15]

(ii) The Commission's position in the legal order of the EU does not give any additional value to the Commission's opinion. In the Claimants' view, the Commission's opinion would not be of more authoritative value than the Parties' own views and the *Achmea* judgment itself.[16]

(iii) The Commission is not acting as a true *amicus curiae*. It is "in fact seeking to assist only one party (the Respondent) to escape its international law obligations (in reliance of its domestic law, which is prohibited)." The Claimants note that "the friend of the court should not be the friend of one of the parties".[17] It also notes that a number of tribunals have excluded non-disputing parties from participating when such participation is "markedly biased, prejudicial or non-neutral", or when they intend to argue in favour of just one disputing party.[18] According to the Claimants, in the instant case the interests of the Commission "are adverse to those of the Claimants and entirely aligned with those of the Respondent".[19]

[15] Claimants' Observations (I), pp. 3-4.
[16] Claimants' Observations (I), p. 4, citing: R. Schütze and T. Tridimas, *Oxford Principles of European Union Law, Volume I: The European Union Legal Order* (2018), at 568 ("*by definition, the Commission's views as to what the law is are not binding, unless they are contained in a binding decision; and in any case, the Court is the final arbiter in these matters*"); and Article 288 TFEU ("*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. … Recommendations and opinions shall have no binding force*.") (emphasis added by the Claimants).
[17] Claimants' Observations, p. 5, citing A. Mourre, "Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?", LPICT, Volume 5, 2006, Issue 2, at 257-271.
[18] Claimants' Observations, p. 5, citing: *Suez, InterAguas Servicios Integrales des Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, Exhibit CL-85, para. 13; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, Exhibit CL-82, para. 56; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012, Exhibit CL-83, para. 55.
[19] Claimants' Observations, pp. 5-6. Citing *Biwater Gauff v. Tanzania*, the Claimants also state that it is not proper for a non-disputing party to argue in favour of one party to the proceeding, and the Tribunal should therefore reject the Application.

(iv) It has not been shown that the Commission would be able to contribute any further information or arguments that would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. Both of them are represented by distinguished law firms and the Respondent is capable of presenting its case without the support of the Commission.[20]

28. The Claimants also notes that the Commission does not have a significant interest in this specific arbitration. In the Claimants' view, the Commission "is unable to demonstrate anything beyond a general interest animated by a policy agenda of reforming the investor-state arbitration system in the EU as a whole." Rule 37(2) requires a significant interest in a specific arbitration. Political and systemic reform goals cannot constitute such a significant interest in this arbitration, and this is not the appropriate forum for the Commission to advance its agenda.[21]

29. Further, the Claimants contend that the Commission's intervention would disrupt this arbitration, unduly burden the Parties and unfairly prejudice the Claimants. In their view, the *amicus* submission would impose on both Parties the burden of preparing responsive briefings, which would require additional time and resources. This burden would be disproportionately heavy for the Claimants, as the Commission has expressed views that align with the Respondent's position.[22]

30. The Claimants also assert that the Commission is conflicted by the "cooperation" between the Respondent and the European Central Bank (the ("**ECB**"). The Claimants note that the Respondent has advised that it is seeking the cooperation of the ECB with respect to the provisional measures application in this case. They also note that the Respondent has cited the role of the ECB in its support of the Application.[23] In the Claimants' view, the Respondent is seeking "cooperation" from the EU (via the ECB), while simultaneously advocating for the EU's "intervention" (via the Commission). This could generate a manifest conflict of interest.[24]

[20] Claimants' Observations, pp. 6-7, citing *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001, Exhibit CL-87, para. 48.
[21] Claimants' Observations, p. 7.
[22] Claimants' Observations, p. 8.
[23] Claimants' Observations, p. 8.
[24] Claimants' Observations, p. 9.

31. The Claimants also argue that the Commission has no right to access the arbitration record under Rule 37(2), and note that the Commission's submission would focus exclusively on the alleged implications of *Achmea* for the present dispute. In their view, "there is no conceivable basis on which the Commission ought to require disclosure of documents from the arbitration in order to opine on this discrete legal question."[25] The Claimants also assert that, should the Tribunal be minded to grant access to part of the arbitral record, this access must be limited to those extracts of the parties' pleadings that deal specifically with the *Achmea* decision, and the Commission should be asked to provide a confidentiality undertaking.[26]

32. The Claimants further object to the Commission's participation at the hearing, as under Rule 32(2) "a tribunal has no discretion to grant such a request over that Party's objection."[27]

33. The Claimants finally assert that, if the Application were to be granted, the Commission "should be required to (i) bear the costs associated with its Application if the positions advocated in its *amicus* brief are not accepted by the Tribunal in full, and (ii) provide together with tis *amicus* brief a written undertaking that it will comply with any decision on costs ordered by the Tribunal."[28]

34. The Claimants challenge some of the statements made by the Respondent in its 29 August 2018 letter. First, they reject the Respondent's statement that the Commission has intervened in "essentially all" cases in which it has applied. It cites, for example, the cases *UP and C.D Holding v. Hungary* and *RREEF Infrastructure and others v. Spain*, where the Commission's applications were rejected. The Claimants also assert that the other cases cited by the Respondent where the Commission's application was granted are distinguishable from the present dispute.[29] Second, the Claimants state that the argument that the Commission's perspective would carry added value as regards certain substantive issues of EU banking regulation is without merit, as the Commission has not sought leave to do so and it is unclear how the Commission would be in a position to contribute meaningfully to the merits in a manner distinct from the "cooperation" that is already being provided by the ECB. Third, the Claimants reject the Respondent's proposal that the

[25] Claimants' Observations, p. 9; see also Claimants' Letter of 17 September 2018, p. 2.
[26] Claimants' Letter of 17 September 2018, pp. 2-3.
[27] Claimants' Observations, p. 10.
[28] Claimants' Observations, p. 12, citing *Antin Infrastructure Services Luxembourg S.a.r.. & Anor. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, Exhibit RL-76, para. 64; and Response of the European Federation for Investment Law and Arbitration (EFILA) to Invitation to File Suggestions for ICSID Rule Amendments, 31 March 2017.
[29] Claimants' Observations, p. 11.

Commission present its full submission on *Achmea* by 15 November 2018, before the Tribunal has had an opportunity to determine whether to bifurcate the proceedings, and before a final schedule for the Parties' submissions on jurisdiction has been established. In their view, "[t]he interests of due process dictate that a third party such as the Commission should not be allowed to have the first say on this matter in these proceedings."[30]

b. The Respondent's position

35. The Respondent supports the four requests contained in the Commission's Application. It asserts that "[t]here are over a dozen available awards showing that the EC has sought to submit arguments on how investment arbitrations involving an investor from an EU Member State and a respondent EU Member State are incompatible with EU law and the EU treaties. The EC appears to have been able to intervene or submit its arguments in essentially all such cases."[31]

36. The Respondent argues that the Commission's intervention will assist the Tribunal in determining a legal issue related to the proceeding by bringing a particular perspective or knowledge different from that of the disputing parties. First, it states that the issues covered by the proposed intervention are indisputably related to the proceedings, as the Respondent has made an intra-EU BIT jurisdictional objection. Second, the Commission "will bring a particular perspective or particular knowledge distinct of that of the Respondent", because it will intervene from its position as "guardian" of European law and of its treaties, as well as from its perspective as regards responsibility for the Union's external relations. The Respondent further notes that the Commission is in a "unique position to explain its statement of 19 July 2018 on the consequences of the *Achmea* judgment."[32] According to the Respondent, there is also "ample possibility that the arguments and views put forward by" Latvia and the Commission may diverge in certain important respects.[33]

37. The Respondent rejects the Claimants' argument that the Commission has no special perspective or expertise. It notes that the Commission oversees the application of Union law under the control of the CJEU, has the power to initiate infringement proceedings against Member States, its decisions are reviewable by the CJEU, ensures the Union's external representation, and has

[30] Claimants' Observations, p. 11 (references omitted).
[31] Respondent's Observations, p. 2 (citations omitted).
[32] Respondent's Observations, pp. 4-5, citing *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Procedural Order No. 4, 28 April 2009, RL-00082, para. 24.
[33] Respondent's Observations, p. 5.

significant experience in intervening before investment tribunals. The Respondent also rejects that its interests and those of the Commission are necessarily aligned.[34]

38. The Respondent also argues that the Commission's intervention is certainly within the scope of the dispute, as the Respondent has presented a jurisdictional objection on grounds that are similar to, and overlapping, with the Commission's proposed grounds for intervention.[35] The Respondent rejects the Claimants' argument that the Commission's intervention is irrelevant because this is not a dispute about EU law. In the Respondent's view, "[t]here is no question EU law 'shall be taken into account' by the Tribunal in interpreting the Latvia-UK BIT."[36]

39. The Respondent asserts that the Commission has a significant interest in the proceedings. In its view, the Commission has a role to ensure that the *Achmea* judgment is respected and implemented by all EU Member States. Also, the Commission has initiated a number of infringement proceedings under Article 258 of the TFEU against certain Member States to ensure that EU law is respected.[37]

40. The Respondent further contends that the Commission's intervention will not disrupt the proceedings or unduly burden the Parties. Both Parties will have an opportunity to address the Commission's submission in writing and orally. Moreover, the Commission's request to intervene should have been expected by the Parties, as shown by the Commission's established practice. In the Respondent's view, the Claimants "were, or should have been, well aware of the pitfalls, financial and otherwise, of the bringing and persisting with the present claim. As such, Claimants should not be heard to object to any minor, additional costs of having to address submissions by the European Commission."[38]

41. The Respondent rejects the Claimants' allegation that the Commission would be a biased *amicus*, and argues that "merely because a proposed amicus is against a party's position on certain, or even

[34] Respondent's Reply, pp. 2-3, citing Paul Craig, Grainne de Burca, EU LAW, TEXT, CASES, AND MATERIALS, OUP, 6th edition (2015), RL-00087, p. 36.
[35] Respondent's Observations, p. 5.
[36] Respondent's Reply, p. 3, citing Article 31(3)(c) of the VCLT, and arguing that EU law is international law applicable to the relations between the parties.
[37] Respondent's Observations, p. 6, referring to authorities where tribunals allowed the Commission to make non-disputing party submissions. See also Respondent's Reply, p. 4.
[38] Respondent's Observations, p. 6. See also Respondent's Reply, p. 5, noting that the Claimants have enough resources for the prosecution of their claims.

most, issues is no basis to seriously assert bias on the part of the proposed amicus, or any other unfairness." It also distinguishes the cases invoked by the Claimants from the present case.[39]

42. Further, the Respondent states that the Claimants' reference to the cooperation with the ECB "is entirely irrelevant". In its view, "[i]t is unclear how a request from the Respondent to the ECB for certain documents relevant to this arbitration has any relevance to the intervention of the European Commission regarding the consequences of the CJEU's *Achmea* judgment."[40]

43. The Respondent proposes that the Commission submit an *amicus curiae* brief by 15 November 2018. This, in its view, is relevant to both the Tribunal's decision as to whether bifurcation should be granted and whether the Tribunal should refuse the provisional measures application for lack of *prima facie* jurisdiction. Also, the Parties would be able to address the Commission's positions in writing on 3 December 2018 and orally at the December 2018 hearing. The Respondent further argues that the Commission should be allowed to make another written submission at a later stage of the proceeding, when the parties fully argue their positions on jurisdiction.[41]

44. The Respondent asserts that the Commission should have access to the record in a manner that allows it to develop fully its arguments,[42] and states that it is within the Tribunal's discretion to decide whether to provide the Commission access to the record in whole or in part.[43] It also recalls that "one of the main grounds for the CJEU's judgment in *Achmea* is that intra-EU BITs have no mechanism for allowing arbitral tribunals to request an interpretation of EU law from the CJEU." It argues that "the background of the dispute in the present case, and how it relates to EU law, is likely to be significant to the EC in its written submissions. This is particularly so given that this is a banking dispute which raises several issues of EU law, such as the rules applicable to the granting

[39] Respondent's Reply, pp. 4 and 7.
[40] Respondent's Reply, pp. 5-6.
[41] Respondent's Observations, p. 7; Respondent's Reply, p. 9.
[42] Respondent's Observations, pp. 7-8, citing *Infinito Gold LTD. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016, Exhibit RL-00083, para 43, and *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Procedural Order No. 4, 28 April 2009, Exhibit RL-00082, para. 29. See also Respondent's Letter of 5 October 2018, pp. 2-4, citing: *Infinito Gold LTD. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2, 1 June 2016, Exhibit RL-00083, para 44; *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from the Tribunal, 5 October 2009, Exhibit RL-00121, para. 3.
[43] Respondent's Reply, p. 6.

of a banking license, rules relating to its withdrawal, and the relationship between national banking authorities and the European Central Bank."[44]

45. The Commission's submission without access to the Parties' pleadings risks being of mere academic interest and being deprived of any effective role in the present case.[45] The Respondent thus suggests that the Commission should have access to the Parties' pleadings, either fully unredacted, or unredacted with regard to the sections on intra-EU BIT/*Achmea* objection with the remainder of the pleadings redacted on the basis of legitimate legal grounds raised by the Parties.[46] The Respondent asserts that it is also willing to provide the Commission with a summary of its own arguments as well as Claimants'.[47]

46. The Respondent further states that the Commission's participation at the hearing may be allowed pursuant to ICSID Arbitration Rule 32(2), and supports the Commission's request to attend and make an oral statement at the hearing and answer questions from the Tribunal.[48]

47. The Respondent finally argues that no security for costs is warranted. It asserts that, if it is required to provide security for costs, there is a good chance that the Commission will not participate in this arbitration. Moreover, the Respondent rejects the Claimants' reliance on *Electrabel v. Hungary* to the effect that the Commission's intervention would be a complicating factor. In the Respondent's view, the Claimants argument is misleading in the context of this arbitration, and there is ample basis to expect that the Commission's intervention in this case will not be as extensive as in *Electrabel*.[49] Finally, the Respondent notes that the Claimants fails to quantify what would be appropriate security.[50]

IV. TRIBUNAL'S ANALYSIS

48. The Application of 22 August 2018 is quite specific at paragraph 12:

> "The Commission proposes that its intervention be limited to the legal consequences of the judgment of the Court of Justice in Achmea for the case before your Arbitral Tribunal".

[44] Respondent's Observations, p. 8; see also Respondent's Reply, p. 7.
[45] Respondent's Observations, p. 8.
[46] Respondent's Observations, pp. 8-9.
[47] Respondent's Letter of 5 October 2018, p. 6.
[48] Respondent's Observations, p. 9.
[49] Respondent's Reply, p. 9.
[50] Respondent's Reply, p. 9.

49. This limitation is repeated several times:

- The Commission seeks to "assist [the] Arbitral Tribunal in the determination of a legal issue"[51]
- The Commission wants to ensure that "[the] Tribunal is fully aware of the legal consequences of … Achmea"[52]

50. The Commission asks the Tribunal to make the following orders:

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

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

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

(iv) allow the Commission to attend hearings in order to present oral argument and reply to the questions of [the] Tribunal at those hearings, should [the] Tribunal and the parties deem that useful.[53]

51. The Tribunal's power to grant a non-disputing party permission to "file a written submission" is found in Arbitration Rule 37(2), which provides:

> "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.

[51] Application, para. 8.
[52] Application, para. 23.
[53] Application, para. 24.

> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

52. The position of the Commission in this regard is well documented, perhaps commencing with its statement of 19 July 2018: "Protection of Intra-Eu Investment". The Application before us states that the Commission proposes to intervene in all cases that raise the Achmea issue. It expresses its "interest" as being "to safeguard the uniform application of EU law". The Tribunal accepts that that is a significant interest.

53. The administration of justice under the ICSID Convention is also best served by a high level of consistency. It will be of assistance to this Tribunal to have the same submissions as the Commission makes to other Tribunals. This is a perspective that differs from that which the Respondent could make.

54. The Tribunal has read the legal issues raised by the Commission at paragraphs 18 to 21 of its Application. They differ in certain respects from those foreshadowed by Respondent in its Application for Bifurcation.

55. There is a further matter on which the Commission is able to provide a distinctive perspective, knowledge and insight to the proceedings. The Tribunal would appreciate the views of the Commission on the implications, if any, of Brexit on the legal issue which it will address.

56. The Tribunal concludes that it would be assisted by a written submission, limited in the way the Tribunal specified in its order of 16 October 2018. The Tribunal granted leave to intervene and to make a written submission on the legal issue, as requested.

57. The Tribunal notes the objections of the Claimants set out above. The Tribunal is of the view that these contentions may affect the weight to be given to the Commission's submission. They do not affect the conclusion that the Commission can bring a different perspective, knowledge or insight to the benefit of the Tribunal's deliberations.

58. The Tribunal is not minded to grant access to any part of the record. We note the Respondent's submission, by letter of 5 October, requesting a broad range of access, including significant parts of the existing record. These involve matters that go well beyond the legal submission which the Commission indicates is the limit of its requested involvement. Noting the generic nature of the

submission that the Commission proposes to make, the Tribunal is of the view that no part of the record is of sufficient materiality to warrant disclosure.

59. The Tribunal also rejects the request for oral submissions. Rule 37(2) contemplates only a single written submission. The Tribunal is also concerned that such a role could disrupt proceedings and operate unfairly to the Claimants.

60. The Tribunal directed that the submission be made before the application for bifurcation, which is to be heard on 12-14 December. As set out at paragraph 14 above, the Tribunal set down a timetable to ensure that the Parties had an opportunity to comment on the Commission's submission before that hearing.

V. ORDER

61. On the basis of the above, the Tribunal orders as follows:

a. Grant leave to the European Commission to file a written non-disputing party submission addressing as a legal issue whether the investor-state arbitration mechanism in the Latvia/UK BIT remains available.

b. The European Commission is to file its submission on or before 5 November 2018. The Respondent is to submit its observations on that submission on or before 19 November 2018, and the Claimants are to submit their observations on or before 3 December 2018.

c. The other orders sought by the European Commission in its Application of 22 August 2018 are rejected.

On behalf of the Tribunal,

[Signed]

James Spigelman QC
President of the Tribunal
Date: 30 October 2018