

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

THEODOROS ADAMAKOPOULOS AND OTHERS

Claimants

and

REPUBLIC OF CYPRUS

Respondent

ICSID Case No. ARB/15/49

STATEMENT OF DISSENT OF PROFESSOR MARCELO G. KOHEN

1. To my great regret, the Tribunal was unable to issue a unanimous Decision on Jurisdiction since I felt obliged to vote against the Decision. The present Statement of Dissent (the “Statement”) explains the reasons why I strongly believe that the Tribunal lacks jurisdiction by virtue of the first objection raised by the Respondent. Indeed, the possibility to set up arbitration as emerging from the two invoked BITs is incompatible with the later conventional engagements adopted by the same parties to these BITs at the time of the accession of Cyprus to the European Union on 1 May 2004.
2. This Statement focuses on the first objection to jurisdiction concerning the intra-EU BITs. Since I consider that the Tribunal does not have jurisdiction on this basis, I will only briefly refer to the other objections that were also dismissed by the majority. The Statement is divided into seven sections: A. The applicable law by the Tribunal; B. The basis for the Decision on Jurisdiction, in turn divided into three sub-sections: (a) Article 59 of the Vienna Convention on the Law of Treaties (“VCLT”); (b) Article 30 of the VCLT; (c) Article 351(1) of the Treaty on the Functioning of the European Union (“TFEU”); C. The subject-matter of the BITs and the EU Treaties; D. The incompatibility of the BITs with EU treaties; E. The authentic interpretation by the Contracting Parties to the BITs of the relationship BITs-EU Treaties; F. The precedence of EU Treaties over the BITs; and G. Brief comments on the Decision with regard to the other objections. It finishes with some concluding remarks.

A. The Applicable Law by the Tribunal

3. At the outset, it is important to clarify what the applicable law of the Tribunal is. According to the relevant rules, it is both International Law and the National Law of Cyprus.¹ EU Law is part of *both*. The foundations of EU Law are international treaties and all other EU rules and institutions derive from them. National Law of EU Member

¹ This is explicitly mentioned in Article 10(5) of the Cyprus-BLEU BIT, CL-012: “The arbitral tribunal shall decide on the basis of: The national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made; The provisions of this Agreement; The terms of the specific agreement which may have been entered into regarding the investment; The principles of international law.” The Cyprus-Greece BIT, CL-013, does not contain any rule as to the applicable law by the Tribunal. Consequently, Article 42 of the ICSID Convention is applicable, which states that, in the absence of the agreement of the parties, the applicable law is “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”.

States must be consistent with EU Law and in case of contradiction, EU Law prevails. These are well known principles that require no further elaboration. That International Law and Cypriot National Law (both including EU Law) are the applicable laws to the merits of the case - if the case arrives at the merits stage - is also without a doubt. The question here is the applicable law to decide the matter of jurisdiction. I consider that the majority of the Tribunal has largely disregarded the role of EU Treaties in that matter while alleging at the same time that it applies international law.

4. The first question to be clarified is the status of the two BITs. No ground for invalidity has been invoked and there is none. It is also clear that the Contracting Parties have not formally terminated them. Nevertheless, this is not the end of the analysis. The question remains whether the later accession of Cyprus to the EU Treaties implied the tacit termination of the BITs or whether the offer to arbitrate contained in the BITs is no longer operational after that accession because of its incompatibility with the EU Treaties.
5. It would be a simplistic analysis to state that since Article 10 of the Cyprus-BLEU BIT and Article 9 of the Cyprus-Greece BIT confers jurisdiction on the Tribunal, the matter is settled since the EU Treaties do not apply to jurisdiction. It is clear that the only source of jurisdiction for the Tribunal would be the BITs, and neither EU Law nor the National Law of Cyprus would govern the matter. The question, however, is whether the BITs can be invoked in the context of the case at issue here, on the basis of the role of other international applicable rules governing conflict of treaties. The Respondent and the EC have contended that the BITs cannot be invoked because of the conflict between the BITs and the EU Treaties, the incompatibility of the former with the latter and the prevalence of the latter. In order to address this issue, it is necessary to apply the rules of international law that govern conflict of rules in general as well as the particular rules of conflict of treaties, as set out in the VCLT.² In turn, in order to apply these rules, it is necessary to interpret and, if necessary, to take into account the rules of the EU Treaties. The relevant question is whether the EU Treaties that are *lex posterior*

² The date of the entry into force of the VCLT for the Contracting Parties to the treaties concerned are the following: Belgium: 1 October 1992, Cyprus: 27 January 1980, Greece: 27 January 1980 and Luxembourg: 23 June 2003. The VCLT is applicable to the Cyprus-Greece BIT. It can be considered to be also applicable to the Cyprus-BLEU BIT, since it was concluded by Belgium on behalf of Luxembourg. It is not disputed that the VCLT applies to either BIT. Even if it were considered not to be applicable to Luxembourg since this State became a party to the VCLT after the conclusion of the Cyprus-BLEU BIT, the relevant provisions of the VCLT can be considered as reflecting general international law.

have superseded the BITs and/or render the offer to arbitrate contained in them ineffective.

6. The question is not whether the judgment of the CJEU in the *Achmea* case³ is binding on the Tribunal. Neither *Achmea* nor any other decision by any other Court or tribunal is binding on this Tribunal. However, this does not mean that the CJEU judgment is devoid of any bearing on the present case. This is an authoritative interpretation of EU Treaties and of their impact on other rules of international law, *i.e.* the BITs concluded by EU Member States at a time one of the parties to those treaties was not a member of the EU. It is a short view approach to contend that since the CJEU decided on the basis of EU Law, then its decision has a limited scope for the question at issue here, which is placed on a broader scenario of international law. The CJEU analysed the question of the compatibility of prior conventional engagements of EU Member States with EU Treaties and came to the conclusion that they are not.

B. The Basis for the Decision on Jurisdiction

7. In order to determine whether the Cyprus-Greece and Cypms-BLEU BITs can be invoked as a basis for jurisdiction of the Tribunal or, on the contrary, have been terminated or their relevant articles became inapplicable after 1 May 2004, different avenues are open from a perspective of international law. As mentioned, there is no ground for invalidity of the BITs. Termination of the BITs is another possibility. In the instant case, since there has been no formal termination, the only possibility still open is a tacit termination in the sense of Article 59 of the VCLT. Even if the BITs are still in force, there is another possibility to be examined: the question of whether Articles 9 of the Cyprus-Greece BIT and 10 of the Cyprus-BLEU BIT can be invoked. Three different provisions stemming from applicable conventional law were advanced by the Respondent and the EC in order to challenge jurisdiction in this regard: Articles 59 and 30 of the VCLT and Article 351 of the TFEU. I will analyse these sequentially and

³ Judgement of the Court of Justice of the European Union, delivered on March 6, 2018, *Slowakische Republik v. Achmea BV*, Case C-284/16, EU:C:2018:158, RL-0015.

subsequently examine the question of the (in)compatibility of the BITs with EU Treaties based on my conclusions with regard to the three provisions.

(a) Article 59 of the VCLT

8. Article 59(1) of the VCLT refers to the possibility of an implied termination of treaties by the conclusion of a subsequent one. It reads as follows:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

9. The Respondent mentioned that the procedure set out by Article 65 and following of the VCLT is not necessary in the case of an implicit termination governed by Article 59.4 Indeed, a careful comparison of this article with the others of the same section dealing with termination of treaties or suspension of their application may confirm this conclusion. While the other articles mention that such termination or suspension “may be invoked”, Article 59 states that a treaty “shall be considered as terminated” if the conditions set out in the article are met.
10. If Article 59 of the VCLT is applied, then the two hypotheses mentioned in its paragraph (1) should be examined. I will not proceed with this analysis for the following reasons. The position of the Parties to the BITs, particularly that of the Respondent, as well as that of the EC, has not been entirely consistent. The BITs continue to be on the list of treaties for which Cyprus is a party,⁵ the possibility of unilateral termination contained in Article 13(1) and 12(1), respectively, of the Cypms-BLEU and Cyprus-Greece BITs has not been employed, the EC has urged Member States to terminate their intra-EU BITs, and negotiations are currently in course.⁶ All these facts render the applicability of Article 59 of the VCLT difficult in the instant case. Even if a formal termination

⁴ Resp. Rep. Jur., para. 104.

⁵ Tr. Day 1, p. 259; Tr. Day 2, p. 524.

⁶ Declaration of the Representatives of the Government of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 4, Annex EC-02; Declaration of the Representatives of the Governments of the Member States, of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 4, Annex EC-03.

could be explained as a manner to put an end to the existing legal ambiguity, particularly in view of the decisions of other investment arbitral tribunals considering the BITs as a valid basis for their jurisdiction in intra-EU cases, it is evident that a treaty that has implicitly been terminated needs no further termination. For this reason, I consider that Article 59 of the VCLT cannot form the basis for a decision to dismiss jurisdiction in this case. I concur with the majority on this point, however through a different path.

(b) Article 30 of the VCLT

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

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

12. The situation in this case corresponds to that envisaged in paragraph (4): the later treaties are the EU Treaties⁷ and the earlier ones are the Cyprus-BLEU and Cyprus-

⁷ The Treaty of Nice was in force at the time of the accession of Cyprus in 2004, amending the Treaty of the European Union (Maastricht) and the treaties establishing the European Communities. For commodity, I will refer to the text of the current TFEU only.

Greece BITs. By virtue of paragraph (4), the rule of paragraph (3) applies here. The question is twofold: (i) whether the EU Treaties and the BITs relate to the same subject-matter and; (ii) whether the provisions of Article 9 of the Cyprus-BLEU BIT and Article 10 of the Cyprus-Greece BIT are compatible with the EU Treaties. Before analyzing these two aspects of the question, it is also necessary to refer to an explicit rule of compatibility of prior treaties contained in the later applicable one, here the TFEU. Indeed, as discussed below, the same two aspects need to be addressed with regard to Article 351 of the TFEU.

(c) Article 351 of the TFEU

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

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

14. At the outset, it is important to read this Article in light of Article 30 of the VCLT. The method followed in both is comparable: the first paragraph of Article 351 enounces the possibility to apply rules of treaties concluded before the EC/EU membership of the State concerned on the assumption that they are compatible with the EU Treaties. The

second paragraph of Article 351 refers to the possibility of incompatibility of prior treaties with EU Treaties, in line with paragraph 3 of Article 30 of the VCLT. The logical assumption is that if incompatibility exists, it is because the subject-matter is also regulated by the EU Treaties. There cannot be incompatibility for matters not falling within the realm of the EU.⁸

15. The first paragraph of Article 351 has been interpreted as not being applicable between two States that have become EU members. The reason is that the text refers to treaties concluded “between one or more Member States on the one hand” and “one or more third countries on the other”.⁹ According to this view, this would not be the case because the BITs are treaties between two EU Member States. Even if the text is not a model of clarity, this interpretation is incorrect and indeed leads to an absurd result.
16. The two BITs at stake here were concluded before the accession of Cyprus to the EU in May 2004. Consequently, these are treaties concluded between one or more Member States (Belgium and Luxembourg, Greece) and a third country (Cyprus) at the time of the conclusion of the BITs. Article 351 refers to treaties concluded before the accession of Member States and consequently this would refer to the treaties concluded by Cyprus before 1 May 2004 but not those concluded by BLEU or Greece, because in their case the BITs were concluded after their EU membership. To strictly interpret the provision like this would imply that the TFEU has regulated incompatibilities between treaties concluded between Member States with third countries but did not regulate incompatibilities of treaties concluded between Member States themselves prior to the accession of one or more of them to the EU. This is a manifestly absurd and unreasonable result: it would mean that the Member States should have to avoid incompatibilities of treaties with third States while leaving unregulated incompatibility of treaties between themselves.
17. Indeed, the question of bilateral treaties concluded between EU Member States before their admission to the EU (or the admission of one of them) has been addressed by the

⁸ See further below, Section D.

⁹ TFEU, Article 351(1), RL-0020.

Luxembourg Court well before *Achmea* and with the same result: EU Law prevails over incompatible rules of pre-accession EU Member States treaties.¹⁰

18. The second paragraph of Article 351 commands Member States to “take all appropriate steps to eliminate the incompatibilities established”. Claimants understand this obligation as, at the most, triggering a requirement that EU Member States terminate the BITs in order to “eliminate the incompatibilities” between the BITs and EU Law.¹¹ This is just one possibility among others that Member States may decide. Another possibility is to negotiate the modification of the incompatible provisions. Yet another is to consider the treaty terminated by virtue of Article 59 of the VCLT or to consider the incompatible clauses not applicable as foreseen in Article 30 of the VCLT. This array of possibilities in accordance with international law is open to Member States and it is for them in the context of their autonomy of will to decide which are the “appropriate steps” they wish to adopt. There is no obligation to follow one rather than another.

19. The third paragraph of Article 351 is also important and has not been taken into account in the Decision. It assists the Member States and their co-contracting parties to interpret the extent of the compatibilities with EU Treaties. Indeed, it delineates the framework beyond which there is incompatibility. It recalls that:

the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.¹²

20. In other words, the advantages of Member States granted by the EU Treaties, the creation of common institutions (including the CJEU and the whole judicial system of

¹⁰ *Conegate Limited v. HM Customs & Excise*, Case C-121/85, Judgment, 11 March 1986, ECLI:EU:C:1986:114, para. 25, RL-0036; *Ministere public v. Deserbais*, Case C-286/86, Judgment, 22 September 1988, ECLI:EU:C:1988:434, paras. 17-18, RL-0037; *Annunziata Matteucci v. Communaute Frangaise of Belgium and Commissariat General aux Relations Internationales of the Communaute Frangaise of Belgium*, Case C-235/87, Judgment, 27 Sept. 1988, ECLI:EU:C:1988:460, para. 22, RL-0032; *Exportur SA v. LOR SA and Confiserie du Tech*, Case C-3/91, Judgment, 10 November 1992, ECLI:EU:C:1992:420, para. 8, RL-0038; *Commission v. Italy*, Case 10/61, Judgment, 27 February 1962, ECLI:EU:C:1962:2, RL-0039.

¹¹ Cl. Rej. Jur., para. 117.

¹² TFEU, Art. 351(3), RL-0020.

the EU), the respect of their powers and the fact that all members enjoy the same advantages constitute a whole that must be respected in their mutual relations and in the relations with third parties. No matter what the correct interpretation of the first paragraph of Article 351 is, the third paragraph offers clear guidance as to the manner in which treaties concluded between Member States must be interpreted, in light of the EU Treaties and in order to determine whether they are compatible. The arbitration clauses of the two BITs must pass this test in order to remain applicable.

21. Since Article 351 of the TFEU is the explicit provision of the later treaty dealing with conflict of rules with prior treaties, it becomes a relevant rule in order to determine the relationship between the BITs and the EU Treaties. I consider that this provision backs the application of Article 30 of the VCLT and does not introduce any specific rule deviating from the general one established by the latter. It simply specifies the content of the “compatibility test” and renders explicit the solution that in case of incompatibility of prior treaties with EU Treaties, the latter prevail.
22. Consequently, the two following sections will analyse the two first elements that are necessary to decide whether the provisions of Article 9 and 10 of the Cyprus-BLEU and Cyprus-Greece BITs are applicable to this case: whether the treaties concerned deal with the same subject-matter and whether or not they are compatible.

C. The BITs and the EU Treaties are dealing with the same subject-matter

23. The Decision rightly mentions the Report on Fragmentation of the ILC Study Group describing the manner in which the test of “the same subject matter” must be followed:

[T]he test of whether two treaties deal with the “same subject matter” is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This “affecting” might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.¹³

¹³ International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, LIN Doc. No. A/CN.4/L.682, 13 April 2006, RL-0027.

24. The majority recognizes that both BITs and EU Treaties deal with investment and that “at a certain, general, level the treaties deal with the same subject matter”.¹⁴ Indeed, the fact that one treaty has a wider scope than another treaty but deals with matters covered by the latter, does not mean that they have different “subject matters”. My colleagues consider, however, that “at a more specific level they deal with a different subject matter”.¹⁵ For them, the crucial point is that BITs “provide a mechanism for nationals of one party to bring a claim against another party, something that is not provided for in the EU treaties”.¹⁶ Before demonstrating that this is not correct, I consider necessary to show that on substantial issues relating to the treatment to be granted to investment, both the BITs and EU Treaties deal with the same subject. The next section, analyzing the incompatibilities of the BITs with EU Treaties, will complete the analysis by demonstrating that the fulfilment of the obligations of the BITs both affects the obligations of EU Member States under the EU Treaties and indeed undermines their object and purpose.

25. What is considered free movement of capital within the EU is larger than what is considered as investment in the BITs.¹⁷ The Contracting Parties of the two BITs, and consequently their investors, since the time of the accession of Cyprus to the EU, enjoy all the privileges of the single European market. This includes the four fundamental freedoms, i.e. free movements of persons, goods, capital and to establish and provide services. The Charter of Fundamental Rights of the European Union, which according to Article 6 of the TFEU has the same legal value as the EU Treaties, specifically mentions the freedom to conduct a business, the right to property, equality before the law and non-discrimination, among others. Article 18 of the TFEU explicitly contains a rule of non-discrimination. Proportionality, legal certainty and even the controversial doctrine of legitimate expectations are recognized as general principles of EU Law and applied by the European judiciary.¹⁸ The right of property recognized within the EU

¹⁴ Decision, para. 168.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty Establishing the European Economic Community. For case law, see *Commission v. Kingdom of the Netherlands*, Joined Cases C-282/04 to C-283/04, Judgment, 28 September 2006, [2006] ECR I-9141; *Commission v. Italian Republic*, Case C-174/04, Judgment, 2 June 2005, [2005] ECR I-4933.

¹⁸ *Pfleger*, C-390/12, EU:C:2014:281, paras. 30 to 37; ECJ, 30 April 2019, *Italy v. Conseil*, case C-611/17, paras. 97-116; ECJ (GC), 3 December 2019, *Czech Republic v. Parliament and Conseil*, case C-482/17, paras. 141, 153

Law includes the protection envisaged in BITs concerning the deprivation and limitation of ownership. Free transfers, as protected by BITs, are equally covered by the four fundamental freedoms, particularly the free movement of capitals.

26. The breaches alleged by the Claimants are based on what they consider discriminatory and arbitrary measures leading to their alleged expropriation, having suffered an alleged unfair and unequitable treatment.¹⁹ All these allegations find resonance under both the BITs and the EU Law.

27. On the basis of the above, it can be considered without any doubt that the “fair and equitable treatment” that investors enjoy by virtue of the BITs is then also applicable by virtue of the EU treaties. Even more, one can also mention that EU investors enjoy within the EU more substantial rights and privileges than non-EU investors, even with regard to those non-EU investors having the benefit of the protection of BITs.²⁰ Indeed, it is a banality to state that EU-investors enjoy more privileges for conducting their businesses in the EU than non-EU investors. No distinction exists between Nationals of a Member State and Nationals of other EU Member States. In fact, “the need for international protection” for the latter does not exist for the EU-investors as they are already enjoying it by virtue of international treaties and international institutions - including a permanent judicial Court - and mechanisms, including a judicial system binding on all EU Member States.

28. Analysing the same question, and in order to justify the position that BITs and EU Treaties do not deal with same subject-matters, some prior decisions have argued that the protection granted by BITs is higher than that of EU Treaties.²¹ I have not been convinced by this *petitio principii*. Rather, the two BITs themselves explicitly demonstrate the opposite. This is crystal clear in the key Article 3 of both BITs, dealing with the “protection of investments”, which is the clause defining the scope of that protection, as mentioned immediately below.

and 157. The principle of the respect of legitimate expectations has been recognized as early as in 1993: *Driessen and Others v. Minister van Verkeer en Waterstaat*, Joined cases C-13/92, C-14/92, C-15/92 and C-16/92, para. 35.

¹⁹ Cl. Mem. Merits, paras 223-349.

²⁰ See below, paragraph 78.

²¹ For example: *Jiirgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSWSolar (zwei) GmbH & Co. KG v. Czech Republic (PCA Case No. 2014-03)*, Final Award, 11 October 2017, para. 253, Annex EC-018.

29. Article 3(3) of the Cyprus-BLEU BIT provides that “[t]he treatment and protection referred to in paragraphs 1 and 2 shall at least be equal to those enjoyed by investors of a third State and shall in no case be less favourable than those recognized under international law.” Article 3(4) immediately put the following limit:

However, such treatment and protection shall not cover the privileges granted by one Contracting Party to the investors of a third State pursuant to its participation in or association with a free trade zone, a customs union, a common market or any other form of regional economic organization.

30. A similar clause is found in the Cyprus-Greece BIT.²² In other words, prior to the accession of Cyprus to the EU on 1 May 2004, Belgian, Luxembourgian, Greek and Cypriot investors could not enjoy the privileges of EU investors in EU Member States in their activities in the other Contracting Parties of the two BITs. Now it is the case: they enjoy them after the accession of Cyprus to the EU in May 2004.

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

32. The argument for the alleged higher protection to investors through BITs than from EU Treaties is that the former contains an arbitration clause. It is surprising, and even regrettable, to read in another award that “[f]rom the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties”.²³ If this were true, then the applicable law becomes secondary. If one follows this view expressed by international arbitrators, what is essential for the protection of foreign investments is the fact of having international arbitrators interpreting and applying the law, no matter what the law establishes.

²² Cyprus-Greece BIT, Art. 3(3): “This treatment is not extended to privileges or advantages granted by Contractual parties to third party investors: a) Due to their participation or link to a customs or economical union, common market, free trade zone or any other similar organization/”

²³ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 164, RL-0053.

33. Unfortunately, the Decision follows a similar path, even if it does not go so far as that quoted above, in order to conclude that BITs and EU Treaties do not address the same subject-matter. It asserts that “[u]nder the EU regime claimants are left in the hands of domestic courts only, something that BITs do not provide for. In fact, BITs provide specifically for an alternative to determination by national courts. In that respect, the EU Treaties and the BITs do not deal with the same subject matter”.²⁴ Following this conclusion, the Decision goes further and concludes that

The existence of a procedure allowing the nationals of one state to bring a claim against another state under a BIT does not prevent the EU Treaties from operating. The fact that both have provisions relating to obligations on states in respect of foreign investors does not mean that the functioning of one prevents the functioning of the other. They can both operate side by side. The object and purpose of neither treaty regime is undermined by the fact both operate in parallel.²⁵

34. In fact, these assertions are not correct. The subject-matter includes dispute settlement in both, as recognized by the Decision.²⁶ Furthermore, both the BITs and EU Treaties allow EU investors to have recourse not only to an international adjudicative system, but even to reach international tribunals or courts. It is true that in the EU Judicial System domestic courts and tribunals play a primary role. However, this role is neither exclusive nor even decisive. The last word in the interpretation of EU treaties lies in a permanent international Court: the CJEU. Domestic judges must trigger a preliminary ruling of the CJEU if there is a question concerning the interpretation of an EU Treaty.²⁷ Furthermore, Article 267 of the TFEU explicitly states that if that such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU. In both cases, national courts and tribunals must follow the decision of the CJEU. Moreover, this is not the only case in which this standing international Court may act in the context of an investment within the EU, as explained immediately below.

²⁴ Decision, para. 168.

²³ Decision, para. 170.

²⁶ Decision, para. 168.

²⁷ TFEU, Article 267, RL-0020.

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

31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 261/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585).

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community

law for which the State can be held responsible is inherent in the system of the Treaty.²⁸

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

37. It is important to compare the object and purpose of BITs with the establishment of a Common Market by the EU Treaties. The preambles of the BITs explain their object and purpose. The Cyprus-BLEU BIT states that the Governments desire “to strengthen their economic cooperation by creating favourable conditions for investments by nationals of one Contracting Party in the territory of the other Contracting Party”. For its part, the Cyprus-Greece BIT affirms “[t]he enhancement of cooperation between both countries in order to foster mutually beneficial investments, between investors who wish to invest to the other contractual party territory and vice versa”.

38. By becoming Members of the EU and its treaties, these same States have allowed their investors to be subject to the same rules in the whole area of the common market and customs union, and national laws cannot override EU Law in this regard. Indeed, one could even consider that the object and purpose of these BITs became obsolete after the accession of Cyprus to the EU Treaties. When these BITs were encouraged to be concluded, it was with the purpose of preparing the accession of the new Member States to the EU.²⁹

39. The next section demonstrates the incompatibility of the BITs with the EU Treaties. Consequently, the provisions allowing nationals of one State to bring a claim against another State under a BIT prevent the EU Treaties from operating in the manner these

²⁸ *Andrea Francovich and Others v. Italy*, Joined Cases C-6/90 and C-9/90, Judgment, 19 November 1991, ECLT:EU:C:1991:428, paras. 31-35, RL-0051.

²⁹ This is what is mentioned by the Opinion of Advocate General Wathelet in the *Achmea* case, although reaching the, in my view wrong, conclusion, that, because of this, BITs and EU Law are not incompatible: “For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe.”, para. 40, CL-0224. As a matter of course, while both treaty regimes cover the same rights and allow international protection, there is no incompatibility in this sense.

treaties were envisaged. In other words, both dispute settlement mechanisms cannot work together, as the CJEU concluded and as will be seen below.

D. The BITs are incompatible with EU Treaties

40. The Decision has not gone as far as a recent award that considered that there is a “presumption of non-conflict” and applied such presumption to the relationship between intra EU-BITs and the EU Treaties.³⁰ Such a presumption does not appear either in the VCLT or in customary law. Rather, the mere presence of Article 30 of the VCLT shows that there is no presumption and that there is a need to envisage the possibility of conflict of rules and to regulate it. This is quite normal. States have concluded thousands of treaties over the years (or even centuries), the vast majority of them not providing for a time limit of their existence. Many of them even remain forgotten although they are formally in force.
41. Even assuming that such invented doctrinal presumption of non-conflict exists, it would not be applicable to this case. One thing is imagining that two States having concluded a bilateral treaty will take care while concluding a later one not to adopt contradictory rules, yet another quite different thing is to become member of a developed multilateral integration system (and consequently becoming party to its treaties). There is no need of any stretch of imagination to realize that with this accession not few, but *many*, conventional provisions as well as national legislation, may become incompatible with EU treaties.
42. The Parties and the Tribunal have largely addressed the impact of the *Achmea* Judgment. The Decision focuses its analysis on Articles 267 and 344 of the TFEU as the ground for precluding the operability of dispute resolution clauses in intra-EU BITs. The CJEU’s reasoning is that allowing investment treaty arbitral tribunals to deal with matters that require the application of EU Law ultimately threatens the uniform and effective interpretation and application of EU law in violation of the principle of sincere cooperation under Article 4(3) of the TEU and Article 344 of the TFEU. Indeed, the

³⁰ *Magyar Fanning Company Ltd, Kintyre Kft, and Inicia Zrt v. Hungary (ICSID Case No. ARB/17/27)*, Award, 13 November 2019, para. 240.

role of the CJEU as emerging from the TFEU would be undermined if the arbitration clauses of prior BITs remained applicable.

43. The exclusive jurisdiction of the CJEU to render a final interpretation of EU Treaties is not a novelty of *Achmea*. In *MOXPlant*, the Court asserted that international agreements cannot affect the exclusive jurisdiction of the Court under Article 344 of the TFEU.³¹ Equally, in *ECHR II*, the Court stated that its exclusive jurisdiction is in itself an essential characteristic of EU Law that precludes “any prior or subsequent external control”.³² One of the points to be dealt with in the instant case, if it reaches the merits, is the alleged exclusive competence of the EU institutional bodies to supervise the capital transfer and the EU Bank Recovery and Resolution Directive. Indeed, EU Law and EU action is omnipresent in this case. This would necessarily require examining EU Law, contrary to what the Decision states, contending that these are mere “facts”.³³ EU Law, as mentioned above, is part of both national and international law applicable to the “facts” of the case by virtue of the BITs.

44. The question here is not that no other Court or tribunal but EU judicial bodies can examine EU Law. As a matter of course, WTO panels and the Appellate Body have examined EU Law and ITLOS could have done the same if the case concerning *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)* was not discontinued.³⁴ The same may apply in other circumstances, including the application of BITs concluded by a EU Member State with a non-Member State. Last year, the CJEU affirmed the compatibility with the principle of autonomy of EU Law of the Investment Court System provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada (“CETA”).³⁵ The question here is indeed the settlement of *intra-EU disputes within the EU*.

45. The Decision does not cite the importance of Article 18 of the TFEU, which declares the principle of non-discrimination. The fact that the CJEU did not consider necessary to analyse this Article in *Achmea* (which was the third question put to it) because it

³¹ *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment, 30 May 2006, ECR-T4635 para. 132.

³² Opinion 2/13, *ECHR II*, 18 December 2014, EU:C:2014:2454, paras. 201 and 210.

³³ Decision, para. 174.

³⁴ *Consultation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order of 16 December 2009, ITLOS Reports 2008-2010, p. 13.

³⁵ Opinion 1/17 of the Court (full Court), 30 April 2019, ECLI:EU:C:2019:341.

reached the conclusion that Articles 267 and 344 of the TFEU preclude an investor of a Member State from bringing a claim against another Member State on the basis of an arbitration clause of a BIT (answering the first and second question put to it) does not prevent this Tribunal from examining it.

46. One of the bases for economic integration is the right of equal treatment of EU citizens in the enjoyment of the EU freedoms. Article 18 of Part Two of the TFEU, under the heading “Non-Discrimination and Citizenship of the Union”, establishes the principle of non-discrimination and prohibits discrimination on the basis of nationality. National rules, no matter whether they have not yet been abrogated, cannot be validly opposed to this fundamental provision of EU Law.³⁶ Collectively granting the right of citizens and corporations of some of the EU Member States to resort to international arbitration while not to citizens and corporations of other EU Member States through BITs constitutes an elementary infringement of Article 18. This ground would be largely enough to dispose of the arbitration clauses contained in BITs concluded between EU members with States that also became EU members later. In my view, together with the respect for the exclusive EU judicial system, this is a major incompatibility between the BITs and EU Treaties.
47. This incompatibility could not be solved by a kind of MFNC to be applied by extension to all EU citizens and corporations for a number of reasons I do not consider necessary to explain here. I will content myself to say that such a “solution” would be tantamount to destroying the EU judicial system established by the EU Treaties.
48. Taking into account the incompatibility of the BITs arbitration clauses with the EU Treaties, this conflict of rules must be settled in one manner or another. One of the purposes of the rules governing conflict of rules is to avoid the unfortunate result of having the same conduct being considered illegal by virtue of one rule, and legal for the other at the same time. The same unfortunate result occurs when the same situation can be examined by two different adjudicative bodies at the same time. In this particular

³⁶ As stated by the Court in *Collins*, the right to equal treatment laid down in Article 18 of the TFEU is conferred directly by EU law. That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of national law (*Collins v. Imtrat Handelsgesellschaft mbH*, Joined Cases C-92/ 92 and C-326/92, Judgment, 20 October 1993, ECLI:EU:C:1993:847, para. 34).

case, the EU Treaties prevail by virtue of the rules embodied in Article 30 of the VCLT and in Article 351 of the TFEU, as will be elaborated further.

49. Ancillary, it must be mentioned that as a result of the ELI membership of Cyprus, not only Article 9 of the Cyprus-Greece BIT and Article 10 of the Cyprus-BLEU BIT became inapplicable. Other articles of both BITs followed the same sort. As seen above, Article 3(4) of the BITs lost its sense since now all Contracting Parties are members of the EU. Article 6 of the Cyprus-BLEU BIT relating to exchange rates of transfers also became inapplicable after the Euro became the same currency of the Parties to the BIT. The remaining articles are a mere juxtaposition of similar rules also found in EU Law.
50. The Claimants have invoked that between the *lex posterior* and the *lex specialis*, the latter prevails.³⁷ According to them, the BITs are *lex specialis*.³⁸ The question here is that the BITs and EU Law are both “special”, at the procedural level (arbitral tribunal or EU judicial system) and at the substantial level (discrimination, fair and equitable treatment, expropriation, etc). The *lex specialis* rule does not provide a solution to this conflict. The pretence that since this is an arbitral tribunal constituted on the basis of the BITs, the applicable *lex specialis* is that of the BITs is also a manner to beg the crucial question, avoiding the resolution of the conflict of applicable rules. Perhaps this explains the insistence on the argument that the CJEU is only “concerned with the application of EU Law”,³⁹ and that the Tribunal applies the BITs only.
51. According to the Claimants, Article 8 of the Cyprus-BLEU BIT and Article 10 of the Cyprus-Greece BIT demonstrate that BITs can coexist with EU Treaties and indeed are complementary.⁴⁰ According to these articles, the investors of the other Contracting Party can avail themselves of the provisions of national legislation or international treaties that are the most favourable to them in an issue relating to investment. In my view, these articles do not cover the arbitration clauses contained in Article 10 of the Cyprus-BLEU and Article 8 of the Cyprus-Greece BIT. Even if they were covered, the question would remain what of the two international adjudicative mechanisms is most favourable. It is not for the Claimants themselves to decide. To put the question is to show its inadequacy. Is one or the other more favourable because the chances of success

³⁷ Tr. Day 1, p. 257.

³⁸ *Ibid*; Tr. Day 2, p. 508.

³⁹ Decision, para. 180.

⁴⁰ Cl. C-Mem. Jur., paras. 93-94; Tr. Day 1, p. 257.

are higher in one rather than in the other? Is it because the procedure is shorter in one than in the other? Or because the national judges are directly excluded in one and they participate in the other? Or is it because the chances to obtain recognition and enforcement are higher in one case than in the other? I wonder whether EU investors within the EU could validly enjoy all the privileges of their European capacity within the EU system while at the same time exclude one fundamental element of the Union: its judicial system. Indeed, there is no need to answer any of these questions. Since the arbitration clauses are incompatible with the edifice constructed by the EU Treaties, Article 10 of the Cyprus-Greece BIT and Article 8 of the Cyprus-BLEU BIT are no longer applicable.

E. The Award Disregards the Authentic Interpretation Made by the Contracting Parties

52. The majority of the Tribunal presented the content of the Declarations of the EU Member States of January 2019 and the Joint Information Note Cyprus/Greece in an incomplete manner. The Decision merely states that the Declarations “establish the understanding of the Contracting Parties with regard to their obligations under EU law and require member states to advise investment tribunals of the *Achmea* decision and its consequences for them and encourages states to terminate their BITs”.⁴¹ It goes on contending that “[s]etting out the obligations of states under EU law does not constitute a subsequent interpretation of their BITs and a withdrawal of consent to arbitrate. Furthermore, encouraging states to terminate their BITs is inconsistent with the view that states no longer have obligations under those treaties”.⁴² However, the second paragraph of the 15 January 2019 Declaration (signed *inter alia* by Cyprus and Greece) states that “Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are

⁴¹ Decision, para. 179.

⁴² *Ibid.*

contrary to Union law and thus inapplicable.” A footnote to this paragraph even refers to the VCLT.⁴³

53. The Decision does not discuss the Joint Information Note of the Hellenic Republic and the Republic of Cyprus regarding their 1992 BIT either. The Respondent considered this Joint Information Note as well as the January 2019 Declarations as falling within Article 31(2)(a) or Article (3)(a) of the VCLT as subsequent agreements, either forming part of the context or to be taken into account together with the context as subsequent agreements in the sense of the VCLT.⁴⁴ The Joint Information made clear that the Parties to it consider its BIT as being incompatible with the European Union Law and consequently inapplicable. As a result, the two Contracting Parties to the 1992 BIT consider that this Tribunal lacks jurisdiction. The Cyprus-Greece Joint Information Note specifically refers to Article 31(2) and Article 31(3) of the VCLT.⁴⁵ I consider that the Tribunal cannot ignore this authentic interpretation made by both Contracting Parties to their BIT.

54. With regard to the Cyprus-BLEU BIT and its compatibility with EU Treaties, the Declaration of the Representatives of the EU Member States of 16 January 2019, which included Luxembourg, can also be considered as the expression of their interpretation. It also states that, “according to the case law of the CJEU, the provisions of a bilateral agreement between Member States containing an investment-State arbitration clause such as the one described in the *Achmea* judgment are contrary to Union law and thus inapplicable”.⁴⁶

55. It is unfortunate that the majority of this Tribunal has not given these authentic interpretations the importance that they deserve. In order to be considered agreements, there is no need of any specific form. There is no doubt that these instruments are the expression of the common will and understanding of the Parties to the BITs. There is

⁴³ Declaration of the Representatives of the Government of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 1, Annex EC-02.

⁴⁴ Decision, para. 54.

⁴⁵ Joint Information Note of the Hellenic Republic and the Republic of Cyprus regarding the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Encouragement and Protection of Investments of March 30, 1999, dated 8 May 2019, p. 1, RL-0206.

⁴⁶ Declaration of the Representatives of the Governments of the Member States, of 16 January 2019, on the enforcement of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, p. 1, Annex EC-03.

also no doubt that an interpretation does not infringe on any prohibition of retroactivity, if any. By definition, interpretation is the operation of clarifying the content and scope of a given provision or instrument and this ascertainment of the content applies to that provision or instrument since its existence. Another thing would be to modify or to terminate the provision or instrument at stake. As mentioned earlier, the BITs were not formally terminated and the question here is not about modification but of compatibility with an ulterior treaty.

56. Nevertheless, the crucial point here is not to exclusively focus on the interpretation of one article of the BITs or another of the EU Treaties. Indeed, the point is not to interpret the arbitration clauses: they clearly provide the possibility of arbitration. What the Parties to the BITs and the EU Treaties have done is an *interpretation of the relationship of both conventional arrangements*. Put differently, they have interpreted Article 30 of the VCLT and Article 351 of the TFEU and applied it to the relationship between the BITs and the EU Treaties. It is this conventional whole, including the arbitration clauses in the context of the EU Treaties to which the Parties became bound afterwards, that has been interpreted, not individual provisions of a treaty. This is how the Contracting Parties came to the conclusion of the incompatibility invoked in their common understanding.

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

58. The Contracting Parties' interpretation can be regarded as made in good faith and in line with consistent practice and case law on the prevalence of EU Treaties over national laws and international agreements dealing with EU matters. Article 31 of the VCLT gives weight to the subsequent interpretation of the parties to treaties. The interpretation should at least be "taken into account".⁴⁷ The Decision has given no weight to it. It did not take it "into account". Instead, the Decision tells the Contracting Parties to the

⁴⁷ VCLT, Art. 31(3), CL-0051.

Treaties on the basis of which the Tribunal was established that they misinterpreted their own Treaties.

59. It has been argued by other tribunals that since BITs are international treaties conferring rights to private parties, the authentic interpretation by the parties would be limited by the general principles *res inter alios acta*, *aliis nec nocet nee prodest* and of legal certainty.⁴⁸ At the outset, these are not treaties conferring rights on a third State or on human beings in general. BITs are treaties based on an inter-State relationship, on mutuality and equality of obligations. The rights conferred on private parties are exclusively based on their nationality, *i.e.* those of the Contracting Parties. As investors, they do not have “inherent rights”. This Tribunal is not a human rights body and we are not dealing with human rights treaties. Investors’ rights are exclusively based on the will of the Parties of having a mutual exchange of investor protection. If the Contracting Parties interpret their BITs in one manner or another, this interpretation applies to the investors of both Parties. The so-called “sunset provision” does not have any bearing on the interpretation of the compatibility of intra EU-BITs with EU Treaties. It simply preserves investors’ rights for a given period of time after the denunciation of a BIT by one of the Contracting Parties. The Tribunal is analyzing a completely different situation at this jurisdictional phase. *Ures inter alios acta*” does not play any role here.

60. The so-called principle of legal certainty does not change the present perception of things. If there is a problem of interpretation, it is necessarily because the matter is not clear enough. If the Claimants made a given interpretation of the BITs and the impact of the EU Treaties on them after the accession of Cyprus to the EU, it may be that this interpretation was wrong. Certainly, the situation would be different for Claimants having made their investments before or after the EU accession of Cyprus with regard to acts accomplished by Cyprus before or after 1 May 2004. However, the question here is that the interpretation of the prevalence of EU Treaties over bilateral treaties dealing with matters covered by EU Law has been consistent since the early times of the existence of the European communities. Furthermore, there is no evidence that the Claimants were motivated by the existence of the BITs when they made their alleged investments in Cyprus.

⁴⁸ *Magyar Fanning Company Ltd, Kintyre Kift, and Inicia Zrt v. Hungaiy (ICSID Case No. ARB/17/27)*, Award, 13 November 2019, para. 222.

F. EU Treaties take precedence over incompatible BITs

61. Having examined the same subject-matter of BITs and EU Treaties and determined the incompatibility of the application of the arbitration clauses of the former with the whole EU legal system and having taken into account the authentic interpretation of the conventional relations entered into by the Contracting Parties, this section further determines which of the two systems must prevail. As will be seen, the natural response that emerges from what has been analysed above is that the EU Treaties prevail.

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

Agreements establishing international organizations often contain a conflict clause. The best known example is Article 103 the United Nations Charter (...). Likewise, article 307 (previously art. 234) of the Treaty establishing the European Community (EC Treaty) [today Article 351 of the TFEU] sets up a conflict rule for agreements between member States and third parties. The EC Treaty takes absolute precedence over agreements that Member States have concluded between each other.⁴⁹

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

in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT.⁵⁰

⁴⁹ International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682, 13 April 2006, para. 283, RL-0027.

⁵⁰ *Commission v. Italy*, Case 10/61, Judgment, 27 February 1962, ECLI:EU:C:1962:2, para. II B 5, RL-0039.

64. In this context, it is useful to pay attention to the manner in which Germany explained why it referred a dispute with Italy, another member of the EU, to the ICJ. Germany considered necessary to explain why the matter could have not been submitted to the CJEC under the title ‘*Wo jurisdiction of the Court of Justice of the European Communities*’ in the following manner:

The present dispute is not covered by any of the jurisdictional clauses of the Treaty of Nice (Art. 227 EC). Although disturbances of the proper functioning of the internal market under the Treaty of Nice — and later of the Treaty of Lisbon — may result from the contested practice of the Italian courts, it has no direct link with the operation of the European market regime. The general relationship between the European nations continues to be governed by general international law. Every member State of the European Community/European Union is obligated to respect the general rules of international law vis-à-vis the other members unless specific derogations from the regime have been stipulated. In respect of the dispute in the instant case, however, no such derogation has been agreed upon. Jurisdictional immunity belongs to the core elements of the relationship between sovereign States. Outside the specific framework established by the treaties on European integration, the 27 European nations concerned continue to live with one another under the regime of general international law. It should be added, in this connection, that the special framework of judicial co-operation that enables individuals to obtain the execution of judgments rendered in one member State of the European Union in other member States of the Union does not comprise legal actions claiming compensation for loss or damage suffered as a consequence of acts of warfare.⁵¹

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

66. Finally, the EU has been coherent in this interpretation of the incompatibility of intra-EU BITs with EU Treaties. It adopted a Regulation establishing a framework for

⁵¹ *Jurisdictional Immunities of the State (Germany v. Italy), Application Instituting Proceedings*, International Court of Justice, 22 December 2008, para. 6.

managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party⁵² and another one establishing transitional arrangements for bilateral investment agreements between Member States and third countries.⁵³ As a matter of course, there is no Regulation with regard to investment agreements between Member States.

67. No EU investor (and jurist as well, even those not specialized in the field) can ignore the fundamental basis by which this highly developed economic integration legal system operates. The fundamental characteristics of the EU legal system have been extensively addressed by the Luxembourg Court for decades, well before the problem of the BITs concluded by States that later became EU Members arose. That EU Law has direct effect⁵⁴ and primacy over national law⁵⁵ has been enunciated in historic well-known judgments. In *EP v Council and Commission (Bangladesh)*, the Court also asserted that exclusive EU competence bars the Member States from exercising their own retained competences *inter-se*, outside the Treaty structures.⁵⁶

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

the Court has consistently held (see in particular the judgment of 27 February 1962 in Case 10/61 Commission v Italy [1962] ECR 1) that, in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force.⁵⁷

⁵² Regulation (EU) No. 912/ 2014, [2014] OJ L257/ 121.

⁵³ Regulation (EU) No. 1219/ 2012, [2012] OJ L351/ 40.

⁵⁴ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, Judgment, 5 February 1963, EU:C:1963:1, RL-0041.

⁵⁵ *Flaminio Costa v. E.N.E.L*, Case 6/64, Judgment, 15 July 1964, EU:C:1964:66, RL-0042.

⁵⁶ *EP v. Council and Commission (Bangladesh)* Joined Cases C- 181/ 91 & C- 248/ 91, Judgment, 30 June 1993, ECLT:EU:C:1993:271.

⁵⁷ *Annunziata Matteucci v. Communauté Française de Belgique and Commissariat Général aux Relations Internationales of the Communauté Française de Belgique*, Case C-235/87, Judgment, 27 Sept. 1988, ECLI:EU:C:1988:460, para. 22, RL-0032.

69. As the Court also recalled, Member States are under a duty of solidarity as a result of “the equilibrium between advantages and obligations” flowing from their adherence to the Union.⁵⁸ In my view, this extends to all EU investors: they cannot rely on EU advantages while ignoring the entire EU system.

70. For all the above reasons, I consider that the Tribunal lacks jurisdiction. The majority decided otherwise and continued the analysis -and rejected- all the other jurisdictional objections. I will content myself to brief remarks about them, since I consider that the Decision should have stopped at the first jurisdictional objection and decided accordingly.

G. Brief Remarks on the Decision on the Other Jurisdictional Objections

71. A first issue to be addressed is whether the claims fall under the definition of “investment” found in the BITs and the ICSfD Convention. I have my doubts about whether the claims fall within this concept, particularly whether they pass the so-called *Salini* test.⁵⁹ I do not share the manner in which the majority dismissed this objection.⁶⁰ In particular, the majority decided that the question of the life insurance contracts and the situation of Mr. Leontiadis must be addressed at the merits stage.⁶¹ I believe this is a matter of jurisdiction.

72. On mass claims, while I have my concern about their compatibility with the whole system, I share some of the majority’s theoretical analysis. I also commend the manner in which the Decision solves some intrinsic problems of mass claims in a practical manner, such as the certainty of the Claimants’ pool, potential bifurcation between a liability phase and a damages phase and an order of security for costs. Nevertheless, at the end of the day, it is the Claimants’ choice that is imposed on the Respondent to have the case organised in the manner they wish. This raises considerations as to whether the principle of equality of the Parties can be respected. More concretely, I have serious doubts about the homogeneity of the claims. The Decision recognizes the existence of

⁵⁸ *Commission v. Italy*, Case 39/ 72, Judgment, 7 February 1973, EU:C:1973:13, para 24.

⁵⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4)*, Decision on Jurisdiction, 16 July 2001, RL-0114.

⁶⁰ Decision, paras. 291-296.

⁶¹ Decision, paras. 301 and 325.

four different categories of claims. The fact that all these claims share a number of common elements is not enough to accept the possibility of imposing a collective unified case against the Respondent. Having the same nationality (or two, as is the case here), invoking investments that were allegedly affected by the same governmental measures and claiming the same kind of reparation is not enough. Otherwise, many cases having substantially different elements may be presented as one. It seems to me that the situation of the Bank of Cyprus and that of Laiki are different and cannot be treated as being the same. Similarly, the moment in which the alleged investments were made appears to be different in time and whether they were made before or after the contested measures has an impact that casts doubt on their homogeneity.

73.1 strongly disagree with the analysis (or rather, the lack of it) of the objection regarding indirect investments, which concern 30 Claimants. The majority seems to consider that the definition of investment in Article 1.1. of the Cyprus-Greece BIT as to include “any asset” means that no matter the remoteness in the manner an “investor” possesses this asset, it will be covered by that definition.⁶² The Decision bases its reasoning on the broad terms “investments by investors” in that BIT⁶³ and in its object and purpose to “strengthen their economic cooperation to the mutual benefit of both countries on a long term basis”.⁶⁴ This is an extremely extensive interpretation. I wonder what is more remote, the alleged indirect “investments” or the causal explanation given in the Decision to justify their inclusion. The same applies for its rejection of the opposite interpretation given to the same Cyprus-Greece BIT made by the *Postová* award.⁶⁵

74. In particular, no analysis is made of the reference in Article 2 of the Cyprus-Greece BIT to investments “made” by investors of the other party, not simply “held” (if they are), or to the concrete cases advanced by the Respondent. It is contradictory to contend that the protection of indirect investments on one hand because a Greek citizen has made an “investment” in a Cypriot or third country company, and to ignore the fact that some Greek companies acting as claimants are allegedly controlled by Cypriot nationals.⁶⁶

⁶² Decision, para. 275.

⁶³ *Ibid.*

⁶⁴ Decision, para. 278.

⁶⁵ Decision, paras. 280-281.

⁶⁶ Decision, para. 329.

75.1 also find the analysis of the alleged lack of compliance by all but 21 Claimants with the mandatory notice and waiting period of Article 9 of the Cyprus-Greece BIT rather short. The majority contends that since 21 Claimants satisfied these requirements and in this case all Claimants constitute one single Party, there is no need for the other Claimants to give the mandatory notice and to respect the waiting period.⁶⁷ This reasoning furnishes indeed a tool for future investors who are willing to bypass a formal requirement of a BIT: it is enough that another investor has fulfilled the relevant provision, the others may simply adhere to it. I also wonder whether this analysis is not in contradiction with the analysis of mass claims advanced earlier in the Decision.

H. Concluding Remarks

76. Even though I find the Decision extremely unbalanced on the whole, this Statement has focused on the intra-EU BITs jurisdictional objection, which in my view is dispositive at the outset. I am aware that a number of investment tribunals have decided this matter in the same manner as the majority. In order to achieve the goal of attributing themselves jurisdiction, the majority has adopted an extremely narrow interpretation of “the same subject matter” that would create incommensurable treaty chaos in international relations (as it is actually being created at the European level) if it were generally applied in other fields. There is an unlimited number of treaties concluded during centuries that have never been explicitly terminated. They may easily contain many clauses that are incompatible with ulterior treaties, no matter whether the treaties in their entirety address the “same subject-matter”.

77. There are BITs that were concluded between an EU Member State and a State that later became an EU Member. There are BITs that were concluded by two States before later both becoming EU Members. Significantly, there are no BITs that were concluded between two States after their EU membership. The explanation is very simple: BITs are inconceivable between EU Member States. The same investors’ rights can be found in both. Arbitration to settle disputes between EU investors and EU Member States is

⁶⁷ Decision, paras. 308-318.

not possible. Disputing parties have at their disposal the exclusive EU judicial system set out in the EU Treaties.

78. As mentioned above, EU investors enjoy more rights within the EU by virtue of EU Treaties than non-EU investors. Indeed, the BITs at issue in this case explicitly recognize this in their key Article 3, which is the clause defining the scope of investor protection, and exclude the privileges accorded to investors by virtue of the adherence to common markets or custom unions, as seen also above. These very same articles also became inoperative after the accession of Cyprus to the EU.
79. It is important to keep in mind the overall picture of the treatment of investors and their protection by the law. National investors do not enjoy the possibility of resorting to international arbitration against their own countries. They have at their disposal the local remedies. EU investors are part of the most developed international system of economic integration which includes a judicial system, having at its top an international Court. It is quite normal that they have at their disposal this international mechanism within the EU. They are not subject to an exclusive national (foreign) judicial system but to an international (regional) one to which they are not “foreigners” (Non-EU) but part of it as EU citizens or corporations in a single economic area. EU investors enjoy all the benefits of this sophisticated “supra-national” system. It is normal that they have to follow the procedures of this system as well.
80. It is not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so. This policy only serves to discredit the system of international investment arbitration. The current practice at different levels, including treaties, looking for alternative ISDS systems should provoke a reflection in this regard.
81. My task as an international arbitrator is to decide such disputes that are submitted to the Tribunal to which I am a member in accordance with the relevant applicable law. Consent to arbitration deserves particular attention because the general rule is the absence of it. I am not a member of a standing Court, but a member of an *ad hoc* arbitral tribunal. Extreme care is needed when deciding about one’s own jurisdiction, that is to say, whether one will continue to work on the case concerned or not.

82. As an international arbitrator, I also owe due respect to the existence of other international Courts and tribunals, “bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions”.⁶⁸ I do not wish to associate myself with the contribution to a chaotic situation at the international adjudicative level and hence append this Statement of Dissent.

[signed]

Professor Marcelo Kohen

3 (3W July 2020

⁶⁸ The *MOXPlant Case (Ireland v. United Kingdom)*, Order N° 3, 24 June 2003, para. 28, Annex EC-05.