

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**AS PNB BANKA AND OTHERS**

Claimants

and

**REPUBLIC OF LATVIA**

Respondent

**ICSID Case No. ARB/17/47**

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**DECISION ON THE INTRA-EU OBJECTION**

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*Members of the Tribunal*

Hon. James Spigelman QC, President

H.E. Judge Peter Tomka, Arbitrator

Mr John M. Townsend, Arbitrator

*Secretary of the Tribunal*

Mr Francisco Abriani

*Assistant to the President of the Tribunal*

Mr Adam Butt

*Date of dispatch to the Parties: 14 May 2021*

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## I. PARTIES

1. The Claimants are AS PNB Banka (formerly AS Norvik Banka) (the “**Bank**”), Mr Grigory Guselnikov, Mrs Yulia Guselnikova, Mr Alexander Guselnikov, Miss Aglaya Guselnikova and Master Pyotr Guselnikov (the “**Shareholder Claimants**”) (together, the “**Claimants**”). The Bank is a joint stock company incorporated under the laws of Latvia, whereas Mr Grigory Guselnikov, Mrs Yulia Guselnikova, Mr Alexander Guselnikov, Miss Aglaya Guselnikova and Master Pyotr Guselnikov are nationals of the United Kingdom.
2. The Respondent is the Republic of Latvia (the “**Respondent or Latvia**”).
3. The Claimants and the Respondent shall be referred to together as the “**Parties**”.

## II. PROCEDURAL HISTORY

4. On 14 December 2017, the Claimants submitted their Request for Arbitration (“**RFA**”) to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (“**ICSID Convention**”) and Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Latvia for the Promotion and Protection of Investments (“**UK-Latvia BIT**” or “**Treaty**”), which was signed on 24 January 1994 and entered into force on 15 February 1995.
5. On 28 December 2017, the Secretary-General of ICSID registered the RFA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.
6. On 14 August 2018, the Respondent filed a Request for Bifurcation (“**Request for Bifurcation**”).
7. On 16 August 2018, the Tribunal held a first session by telephone conference. On 24 August 2018, the Tribunal issued Procedural Order No. 1, setting out the agreed terms

for the conduct of the proceeding. The Parties' subsequent filings on the Claimants' application for provisional measures and the Claimants' request for the disqualification of Deloitte Legal ZAB as counsel for the Respondent are detailed in the respective orders addressing those issues.<sup>1</sup>

8. On 22 August 2018, the European Commission ("EC") applied for leave to file a written submission in these proceedings pursuant to ICSID Arbitration Rule 37(2) ("**First EC Application**"). The EC 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.
9. On the same date, the Tribunal invited the Parties to submit their observations on the First EC Application by 29 August 2018.
10. On 29 August 2018, the Respondent filed its observations on the First EC Application ("**Respondent's Observations**"). On the same date, the Claimants requested an extension of time until 31 August 2018 to submit their observations.
11. On 30 August 2018, the Tribunal granted the Claimants' request for an extension of time to submit their observations on the First EC Application. 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.
12. On 31 August 2018, the Claimants filed their observations on the First EC Application ("**Claimants' Observations**"). 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'

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<sup>1</sup> Ruling on Power of Tribunal to Issue Provisional Measures Whilst Proceedings are Suspended, 24 September 2018; Interim Decision on Application for Provisional Measures, 30 September 2018; Decision on Application for Provisional Measures, 17 April 2019.

Observations and that they reserved the right to request leave to respond to the Respondent's reply.

13. On 5 September 2018, the Respondent filed its Reply to the Claimants' Observations (**"Respondent's Reply"**).
14. 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.
15. On 17 September 2018, the Claimants submitted further observations on the First EC Application.
16. On 5 October 2018, the Respondent submitted further observations on the First EC Application.
17. On 10 October 2018, the Claimants submitted their Response to the Respondent's Request for Bifurcation (**"Response on Bifurcation"**).
18. By letter of 10 October 2018, the Tribunal confirmed that the hearing on provisional measures and bifurcation would be held from 12 to 14 December 2018 in The Hague.
19. On 16 October 2018, the Tribunal issued Procedural Order No. 2 which granted 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 Treaty remains available. The Tribunal's Order was issued expeditiously without reasons. The Tribunal's reasons were later provided in Procedural Order No. 3 of 30 October 2018.
20. By email of 23 October 2018, the Claimants informed the Tribunal that the Parties had agreed on a schedule for pre-hearing filings, with the Respondent's Reply on Bifurcation and the Claimants' Reply on Provisional Measures (Balance) being due on 16 November 2018 and the Claimants' Memorial on the Merits being due on 30 November 2018. The Respondent confirmed its agreement by email of the same date.

21. By letter of 25 October 2018, the Tribunal informed the Parties that the filing of the Claimants' Memorial on the Merits was to be postponed until after the December 2018 hearing.
22. On 5 November 2018, the EC filed its *Amicus Curiae Brief* ("**EC Amicus Brief**").
23. By email of 9 November 2018, the Respondent informed the Tribunal that Mr David Pawlak (who subsequently withdrew from the team as of 15 February 2019), and Ms Marie Michon had joined its legal team. By letter of the same date, the Claimants informed the Tribunal that Mr Māris Vainovskis, of Eversheds Sutherland Bitāns, Riga, Latvia, had joined their legal team.
24. On 16 November 2018, the Respondent filed its Reply on Bifurcation ("**Reply on Bifurcation**").
25. On 19 November 2018, the Respondent provided its comments on the EC *Amicus Brief*.
26. On 3 December 2018, the Claimants filed their Rejoinder on Bifurcation ("**Rejoinder on Bifurcation**") and their Observations on the EC *Amicus Brief*.
27. The Tribunal held a hearing on the applications for provisional measures, bifurcation, and the disqualification of the Respondent's counsel from 12 to 14 December 2018 in The Hague.
28. By letter of 23 January 2019, the Respondent advised the Tribunal that twenty-two Member States of the European Union ("EU"), including Latvia and the UK, had signed a "Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union."<sup>2</sup> ("**15 January 2019 Declaration**" or "**Declaration**") The Respondent's correspondence attached that declaration, and two related declarations from the other EU Member States concerning *Achmea* dated 16 January 2019.<sup>3</sup>

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<sup>2</sup> "Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union" (Declaration of the UK, Latvia and 20 other Member States), ("**Declaration**" or "**15 January 2019 Declaration**"), R-00256.

<sup>3</sup> "Declaration of the Representatives of the Governments of the Member States of 16 January on the enforcement of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union" (Declaration of Finland,

29. By letter of 24 January 2019, the Tribunal advised the Parties that, subject to any submissions from the Claimants, it believed that the Respondent's correspondence of 23 January 2019 should be admitted to the record on the bifurcation application, and that any further observations on the material should be made in the Parties' post-Hearing briefs ("RPHB" or "CPHB"). The Tribunal also invited the Parties to take up a short extension to submit their post-Hearing briefs, from 28 January to 31 January 2019.
30. On 28 January 2019, the Parties consented to the extension for their post-Hearing briefs.
31. On 31 January 2019, the Parties respectively filed their post-Hearing briefs.
32. On 5 February 2019, the Respondent wrote to the Tribunal to object to the content of the CPHB. Latvia alleged that the Claimants had attempted to re-plead their positions beyond the scope of the Tribunal's instructions for post-Hearing briefs, and requested that the Tribunal impose appropriate consequences on the Claimants including with respect to costs.
33. On 6 February 2019, the Claimants wrote to the Tribunal objecting to the Respondent's 5 February 2019 correspondence, including the Respondent's request that unspecified consequences be meted out by the Tribunal to the Claimants. The Claimants pointed out that the RPHB had, *inter alia*, introduced several impermissible matters.
34. On 1 March 2019, the Tribunal rendered its Decision on the Respondent's Request for Bifurcation ("**Decision on Bifurcation**"), deciding as follows at paragraph 200:

Now, therefore, the Tribunal:

- (i) decides to bifurcate the proceedings and deal with the Respondent's objection to the Tribunal's jurisdiction based on the alleged unavailability of the investor-State arbitration mechanism under the UK-Latvia BIT as a preliminary matter;

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Slovenia, Luxembourg, Sweden, Malta), **R-00257**; and "Declaration of the Representative of the Government of Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union" (Declaration of Hungary) ("**Hungary's Declaration**"), **R-00258**.

(ii) asks that the Parties confer and attempt to reach agreement on the dates on which the above submissions will be made;

(iii) directs the Parties to submit agreed dates to the Tribunal within two weeks of the date of this Decision and if the Parties are unable to reach agreement on such dates, each side should submit proposed dates by the same time.

35. On 15 March 2019, the Respondent submitted a letter to the Tribunal with the proposed dates to brief the bifurcated issue. In the same letter, the Respondent also informed the Tribunal that it understood the Claimants wished to submit their Memorial on the Merits on 17 May 2019. The Respondent stated that, in principle, it did not object to the submission of the Claimants' Memorial on that date, but indicated that it was "necessary for the Tribunal to formally suspend the proceedings on the merits thereafter and until a decision on the bifurcated issue is rendered." The Respondent thus requested the suspension of the proceedings on the merits pursuant to the ICSID Arbitration Rules, in particular Rule 41(3).
36. The Respondent asserted that if the case would proceed to the merits, it would need additional time to prepare a Counter-Memorial. It also noted that the Tribunal should factor in the equality of the Parties and the complexity of the case, and that the Claimants failed to meet the deadline to file their Memorial on 31 October 2018, which meant that they would have no less than 9 months between the first procedural hearing and the filing of their Memorial.
37. The Respondent also asserted that, "pursuant to ICSID Arbitration Rule 41(4), new time limits regarding the merits proceedings are to be fixed only 'if the Tribunal overrules the objection'." In this regard, it noted the importance of proportionality in terms of not imposing an undue burden on a party to prepare arguments that may become entirely unnecessary. Also, the Respondent contended that it is "not to be held responsible for Claimants' cost of preparing their Memorial, especially if the Tribunal agrees with the Respondent's position on the bifurcated issue."
38. On 16 March 2019, the Claimants submitted a letter in response to the Respondent's letter of 15 March 2019. In their letter, the Claimants confirmed that the Parties had agreed on a schedule for submissions on the bifurcated issue. They also confirmed that

they would submit their Memorial on the merits on 17 May 2019. The Claimants requested that the Tribunal: (i) reject the Respondent's request for suspension of the proceedings under Rule 41(3) of the ICSID Arbitration Rules; and (ii) direct that the Parties are to file their respective submissions on the dates set out in their letter.

39. On 16 March 2019, the Respondent filed a request for a confidentiality order ("**Application for a Confidentiality Order**"). The Parties' subsequent filings on the Respondent's Request for a Confidentiality Order are detailed in the Tribunal's Decision on Application for a Confidentiality Order of 3 June 2019.

40. On 21 March 2019, the Tribunal issued Procedural Order No. 5 on the schedule for submissions on the bifurcated issue and the request for suspension of the proceeding on the merits, ordering as follows:

(i) The schedule for submissions on the bifurcated issue, as agreed by the parties, is confirmed. [...]

(iv) The Claimants shall file their Memorial on the Merits by Friday 17 May 2019.

(v) The Tribunal defers any decision on the application to suspend the proceeding on the merits for the period following the filing of the Memorial on the Merits by the Claimants.

41. On 30 April 2019, the Respondent requested an extension to file its Memorial on the bifurcated issue from 7 May 2019 until 17 May 2019 and informed the Tribunal that the Parties agreed on a new timetable to file their submissions.

42. Later the same date, the Tribunal granted the Respondent's request for an extension and confirmed its agreement with the new timetable.

43. By email of 4 May 2019, the European Commission informed the Tribunal about two new developments, which "may be of relevance for the decision of the Arbitral Tribunal on its jurisdiction." It stated that: (i) "the 28 EU Member States have issued interpretative declarations pursuant to Article 31 VCLT on the legal consequences of the judgment in *Achmea* and the applicable conflict rules with intra-EU BIT"; and (ii) "the most solemn formation of the Court of Justice of the EU, the full court, has, in Opinion 1/17 on CETA, re-confirmed the judgment in *Achmea* and clearly indicated

that it has a broad scope of application, covering any intra-EU investment arbitration.” The European Commission offered to update its *amicus curiae* brief to take into account these new developments (“**Second EC Application**”).

44. On 13 May 2019, the Tribunal invited the Parties to comment on the Second EC Application by 20 May 2019.
45. By email of 17 May 2019, the Claimants requested a two-day extension to file their Memorial on the Merits, allegedly due to logistical delays. By email of the same day, the Respondent argued that the Claimants’ request for an extension would have an effect on the time allowed to the Respondent to prepare its Reply on the bifurcated issue.
46. Later the same day, the Tribunal granted the Claimants’ request for an extension to file their Memorial on the Merits by 21 May 2019.
47. On 18 May 2019, the Respondent requested an extension of time to file its Memorial on the bifurcated issue, at the latest on the following day.
48. On 19 May 2019, the Respondent filed its Memorial on the Bifurcated Objection (“**Memorial on the Bifurcated Objection**”), together with the Second Expert Report on EU Law of Professor Takis Tridimas (“**Second Tridimas Report**”) and the accompanying exhibits and legal authorities.
49. On 19 May 2019, the Tribunal informed the Parties that the submissions on the Second EC Application could be delayed until 24 May 2019.
50. On 21 May 2019, the Claimants submitted their Memorial on the Merits (“**Memorial on the Merits**”), together with the Witness Statements of Messrs Grigory Guselnikov, Oliver Bramwell and Georgii Guselnikov, the Expert Reports of Mr James Worsnip and of Mr Charles Carr, as well as the accompanying exhibits and legal authorities.
51. On 24 May 2019, the Parties submitted their comments on the Second EC Application.
52. By letter of 27 May 2019, the Tribunal noted that paragraphs 83 to 225 of the Respondent’s Memorial on the Bifurcated Issue seemed to be going to the merits. It informed the Claimants that they were free to respond to these paragraphs in addressing

the bifurcated issue, and added that the Tribunal did not deem it necessary, “save insofar as any paragraphs directly relate to any of the EU Regulations set out in paragraph 227.”

53. By another letter of the same day, the Tribunal informed the Parties and the European Commission about its decision on the Second EC Application. The Tribunal stated that “the two matters to which the Commission refers have been entered into the record of the arbitration and have been the subject of comprehensive submissions by the Respondent State” and that the Tribunal was “of the view that [the Tribunal] is unlikely to be further assisted by an update from the Commission in these respects.”
54. On 30 May 2019, the Claimants filed an application requesting the Tribunal to reverse its Decision on Respondent’s Request for Bifurcation dated 1 March 2019, and to join the Respondent’s EU Law Objection to the merits (“**Application to Reconsider Bifurcation**”). The Claimants essentially argued that, on the basis of the Respondent’s Memorial on the Bifurcated Objection dated 19 May 2019, the facts on the merits were central to the EU Law Objection, and therefore it was not possible to address the EU Law Objection separately from the merits.
55. The Parties’ subsequent filings on the Claimants’ Application to Reconsider Bifurcation are detailed in the Tribunal’s Decision on the Claimants’ Application to Reconsider the Decision on Bifurcation of 2 July 2019.
56. On 2 July 2019, the Tribunal rendered its Decision on Application to Reconsider the Decision on Bifurcation, ordering as follows:
- (i) the decision to address as a preliminary matter the Respondent’s objection to the Tribunal’s jurisdiction based on the alleged unavailability of the investor-State arbitration mechanism under the UK-Latvia BIT is maintained;
  - (ii) the Claimants are directed to provide, with their Counter-Memorial on the bifurcated issue, a list of exhibits that they intend to rely upon during the hearing on the bifurcated issue, as the Respondent has recently done;
  - (iii) the Claimants are not to adduce evidence to establish it has legitimate expectations under EU law at the hearing on the bifurcated issue;

(iv) the Claimants are not to adduce at that hearing expert evidence on the content of the EU law of legitimate expectations;

(v) the Tribunal will not have regard at that hearing to any evidence by the Respondent directed to the content or existence of legitimate expectations, including the relevant sections of Professor Tridimas' report;

(vi) the Tribunal confirms that it will hold its hearing on the bifurcated issue as scheduled on 19-21 September 2019.

57. On 29 July 2019, the Claimants submitted their Counter-Memorial on the Bifurcated Objection ("**Counter-Memorial on the Bifurcated Objection**"), together with the Expert Reports of Lord Neuberger of Abbotsbury ("**First Neuberger Report**") and Professor Stefan Talmon ("**First Talmon Report**"), as well as the accompanying exhibits and legal authorities.

58. By letter of 30 July 2019, the President of the Tribunal made the following disclosure to the Parties:

I note that the Claimants rely on an expert opinion on EU law by David Neuberger. As he mentions, he is a member of One Essex Court. As the parties know, I am a door tenant at those chambers, although I live in Sydney.

David Neuberger and I are also both members of the Hong Kong Court of Final Appeal. As only one foreign judge sits at one time, we never sit together.

Finally, as the parties will be aware I was a member of the Tribunal in *Cube Infrastructure v. Spain* to which Lord Neuberger and the Claimants refer.

59. On 7 August 2019, the Tribunal asked the Parties if they would object to the presence at the hearing of Mr Stijn Winters, a young lawyer who was working with Mr Townsend in Washington D.C. The Parties confirmed that they did not object to Mr Winters' presence at the hearing on the bifurcated issue as an observer.

60. On 19 August 2019, the Respondent submitted its Reply on the Bifurcated Objection ("**Reply on the Bifurcated Objection**"), together with the Third Expert Report of Professor Tridimas ("**Third Tridimas Report**") and the accompanying exhibits and legal authorities.

61. By letter of 20 August 2019, the Respondent informed the Tribunal that on 15 August 2019, the European Central Bank, “as a primary supervisor since 4 April 2019, made a determination that AS PNB Banka is failing or likely to fail.” It also added that “the Single Resolution Board determined that AS PNB Banka’s failure was not expected to have an adverse impact on financial stability in Latvia or other EU Member States and therefore the Bank shall not be placed under resolution.” It concluded that it did not believe that this development would have any impact on the procedural schedule for the proceedings. The Respondent relied on press releases of the European Central Bank (“**ECB**”), SRB and Financial and Capital Market Commission (“**FCMC**”),<sup>4</sup> all dated 15 August 2019.
62. By letter of 26 August 2019, the Respondent stated that it expected to cross-examine both Claimants’ experts, Lord Neuberger and Professor Talmon, at the hearing on the bifurcated issue. By letter of the same date, the Claimants stated that they intended to cross-examine Professor Tridimas.
63. On 27 August 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
64. On 28 August 2019, the Tribunal referred to its decision, in Procedural Order No. 5, “to defer any decision on the application to suspend the proceeding on the merits for the period following the filing of the Memorial on the Merits by the Claimants” and invited the Parties to indicate, “any reason why the Tribunal should not suspend the proceeding on the merits while the decision on the bifurcated issue is pending.”
65. By letter of 4 September 2019, the Respondent requested that the Tribunal suspend the proceeding on the merits while the decision on the bifurcated issue is pending (“**Second Request to Suspend the Proceedings**”). It referred to the fact that (i) “Mr. Guselnikov and his family sold essentially all their shares in the Bank during the month of June 2019, after the submission of Claimants’ Memorial on 17 May 2019”; (ii) “on 15 August 2019, the ECB determined that the Bank was failing or likely to fail”; and (iii)

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<sup>4</sup> ECB Press Release, “ECB has assessed that AS PNB Banka in Latvia was failing or likely to fail,” 15 August 2019, **R-00355**; SRB Press Release, “AS PNB Banka: SRB Decides No Resolution Required,” 15 August 2019, **R-00356**; FCMC Press Release, “FCMC, following the decisions of the ECB and SRB, suspends the provision of financial services by JSC “PNB Banka” and decides on the unavailability of deposits,” 15 August 2019, **R-00357**.

the question whether the Bank is insolvent and is to be liquidated is before the Latvian Courts, which should render a decision in September.

66. Based on these new facts, the Respondent argued that the Claimants' Memorial on the Merits of 21 May 2019 might need to be amended to take into account these new events that occurred after the submission of their Memorial on the Merits and that the "Respondent is not in a position to usefully respond to the claim since the Memorial, and in particular the damages analysis, was based on assumptions that have changed since." It suggested "to wait until after any decision on the Bifurcated Issue for the Tribunal to decide on an appropriate briefing schedule on the merits, which may include requiring Claimants to provide an amended Memorial, should the case proceed to the merits stage."
67. By letter of 4 September 2019, the Claimants requested that the Tribunal reject the Respondent's request for suspension. It argued that "[t]he fact that the Respondent did not apply to the Tribunal to seek the suspension of the proceedings shortly after the Claimants filed their Memorial shows that there is no credible or pressing justification for suspension" and that this delay should count against suspension. The Claimants also denied that these new facts changed the Claimants' case.
68. By letter of 5 September 2019, the Respondent noted that the Claimants took the opportunity in their letter, submitted after the Respondent's letter, to respond to the Respondent's letter on the same subject, raising issues as to the equality of the Parties and stating that it stood ready to make further submissions should the Tribunal deem it useful.
69. By email of the same day, the Claimants noted that the Respondent's letter did not constitute an application to make further submissions and argued that "there is no reason to afford the Respondent a further opportunity to address matters which could have been responded two months ago."
70. On 9 September 2019, the Claimants' submitted their Rejoinder on the Bifurcated Objection ("**Rejoinder on the Bifurcated Objection**"), together with the Second Expert Reports of Lord Neuberger of Abbotsbury ("**Second Neuberger Report**") and Professor Talmon ("**Second Talmon Report**"), as well as the accompanying exhibits and legal authorities.

71. On 10 September 2019, the Tribunal issued Procedural Order No. 6 on the Second Request to Suspend the Proceedings on the Merits, ordering as follows:

19. The Tribunal rejects the Claimants' contention that an application for suspension by a party is a condition precedent to the exercise of the Tribunal's discretion under Rule 41(3). Further, nothing in the text suggests that a request for suspension should be contained in the Request for Bifurcation. In any event, the Respondent made a request by letter of 15 March 2019.

20. There are two critical considerations which, in the opinion of the Tribunal, guide the exercise of the discretion to suspend in the present case. First, is the justifiable concern that suspension will significantly delay the hearing on the merits. Secondly, is the waste of resources involved in preparing for a hearing in the event that the Tribunal upholds the jurisdictional objection.

21. The Tribunal has determined that in all the circumstances, including the proximity of the jurisdictional Hearing, the latter outweighs the former and orders suspension of the proceedings.

22. The Tribunal notes the Respondent's contention that recent developments may require amendment of the Claimants' Memorial on the Merits. That is a matter for the Claimants.

23. The Tribunal indicates that it would be favorably disposed to an application by the Claimants to lift the suspension for the limited purpose of permitting the amendment of the Memorial if the Claimants should choose to make such an application.

72. On 13 September 2019, the Tribunal issued Procedural Order No. 7 concerning the organization of the hearing on the bifurcated objection.

73. On 13 September 2019, the Claimants submitted legal authorities CL-251 through CL-254 in accordance with Clause 6.2 of Procedural Order No. 7.

74. By email of 17 September 2019, the Tribunal made the following request to the Parties: "The Tribunal notes that prior to states joining the E.U., it was the practice of the E.U. to enter an Association Agreement. The Tribunal would be grateful if the parties could indicate whether the Latvia Association Agreement contains any reference to investment treaties and, if so, whether it could be added to the record."

75. By email of 18 September 2019, the Claimants submitted “the 1998 Europe (Association) Agreement between the European Communities, its Member States and the Republic of Latvia, as published in the Official Journal of the European Communities on 2 February 1998.”<sup>5</sup> The Claimants noted that “Article 74 of the Agreement refers to international investment treaties.”
76. On the same day, the Claimants advised the Tribunal that the Parties agreed that the Respondent would deliver its opening statement first, and that the cross-examination would commence with Professor Tridimas’ presentation. The Claimants thus requested that the Tribunal amend Clause 5 of Procedural Order No. 7 accordingly.
77. By letter of the same date, the Respondent informed the Tribunal that “on 12 September 2019, the Riga City Vidzeme District Court declared AS PNB Banka insolvent and appointed an insolvency administrator” and that it was “now in a position to provide a translated copy of the judgment to the Tribunal,” submitted as exhibit R-358. Mr Vigo Krastiņš was appointed as the Administrator of the insolvency proceedings of AS PNB Banka (the “**Administrator**”). The Respondent added that “this should not have any incidence on the scheduled hearing on the bifurcated issue” but requested that “this issue be addressed as a preliminary matter at the hearing, including whether the insolvency judgement has affected Quinn Emanuel Urquhart & Sullivan’s representation of the Bank.”
78. Later the same date, the Tribunal issued the amended version of Procedural Order No. 7, taking into account the Parties’ agreement on the order of appearance at the hearing on the bifurcated objection.
79. By email of 19 September 2019, the Tribunal informed the Parties that “[t]he issue of legal representation of the Bank should be discussed between the parties with a view to reaching an agreed position. If the matter needs to be considered by the Tribunal, it will be treated as an application by the Respondent and taken out of its allocated time.”
80. The Hearing on the Bifurcated Objection was held in Paris from 19 to 20 September 2019 (“**Hearing**”). The following persons were present at the Hearing:

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<sup>5</sup> “1998 Europe (Association) Agreement between the European Communities, its Member States and the Republic of Latvia”, Official Journal of the European Communities, 2 February 1998, CL-255.

*Tribunal*

The Honourable James Spigelman QC  
H.E. Judge Peter Tomka  
Mr John M. Townsend

President  
Co-Arbitrator  
Co-Arbitrator

*ICSID Secretariat*

Mr Francisco Abriani

Secretary of the Tribunal

*Assistant to the President of the Tribunal*

Mr Adam Butt

Assistant to the President of the  
Tribunal

*For the Claimants*

Dr Anthony Sinclair

Quinn Emanuel Urquhart & Sullivan  
UK LLP

Mr Armando Neris

Quinn Emanuel Urquhart & Sullivan  
UK LLP

Dr David Pusztai

Quinn Emanuel Urquhart & Sullivan  
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Mr James Mohajer

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*Experts*

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*For the Respondent*

Mr Pierre-Olivier Savoie

Savoie Arbitration

Ms Justine Touzet

Savoie Arbitration

Ms Léna Kim

Savoie Arbitration

Mr Lucas Mathieu

Savoie Arbitration

Ms Marie-Pier Michon

Prof. Angelos Dimopoulos

Queen Mary University of London

*Party Representatives:*

Dr Ilze Dubava

The State Chancellery

Mr Dainis Pudelis

The State Chancellery

Ms Nerika Lizinska

The State Chancellery

Mr Gvido Romeiko

Financial and Capital Market  
Commission

Ms Nora Dambure

Financial and Capital Market  
Commission

Ms Daiga Birite

Financial and Capital Market  
Commission

*Expert*

Prof. Takidis Tridimas

King's College, London; Matrix  
Chambers

*Court Reporter*

Ms Anne-Marie Stallard

The Court Reporter

81. On 23 September 2019, the Tribunal invited the Parties to agree on deadlines for submissions on these matters and gave three directions to the Parties for their post-hearing submissions on the bifurcated objection, as follows:

The Tribunal wishes to receive post-hearing submissions on the following topics:

**1. Directed to the Respondent:**

Provide particulars of each specific EU law, or provision thereof, which, if the proceeding goes to the merits, there is

- (i) a risk and/or
- (ii) on the balance of probabilities, it is likely

that the Tribunal will have to interpret that law or, alternatively, that the Tribunal may apply the law as facts without interpreting them.

- 2. Directed to the Respondent:** the Tribunal refers to the submission at paragraph 31 of the Counter-Memorial on the Bifurcated Objection, including specifically the assertion that the Tribunal “has directed” that the issue of the application of the EU law of legitimate expectations has been “deferred to the merits”, and to paragraph 13 of the Decision of July 2, 2019 on Reconsideration of the Decision on Bifurcation. The Tribunal invites the Respondent to reply.

- 3. Directed to the Claimants:** the Tribunal requests a submission on the issue of inadmissibility.

82. On 1 October 2019, the Parties informed the Tribunal of their agreement on the scheduling of post-hearing submissions on the bifurcated objection.
83. By letter of 7 October 2019, the Claimants wrote regarding the scope of the post-hearing submissions, and requested the Tribunal to “(a.) reconsider its formulation of the first topic [...]; (b.) withdraw the second topic from post-hearing submissions; and (c.) clarify the scope of the requested submissions on the third topic”<sup>6</sup> (the “**Request for Clarification**”).

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<sup>6</sup> Claimants letter to the Tribunal of 7 October 2019, para. 39.

84. By letter of 17 October 2019, the Claimants suggested that the Tribunal vacate the deadlines for submissions of post-hearing briefs and invite the Parties to agree on new deadlines to be calculated from the date on which the Tribunal will have decided on the Claimants' Request for Clarification on the scope of the post-hearing submissions.
85. On 18 October 2019, the Tribunal invited the Respondent to comment on the Claimants' letter of 7 October 2019 by 25 October 2019, and informed that the Claimants could reply to the Respondent's comments by 1 November 2019 at the latest. The Tribunal also invited the Parties to confer on a new timetable for post-hearing submissions to commence from the date the Tribunal resolves the Request for Clarification.
86. On 22 October 2019, Quinn Emanuel Urquhart & Sullivan requested that the Administrator be added to the distribution list as "a courtesy".
87. On 25 October 2019, the Respondent informed the Tribunal that the Parties had agreed to an extension for the submission of the Respondent's comments on the Claimants' letter of 7 October 2019 until 29 October 2019, and that the Claimants could submit their comments by 11 November 2019.
88. By letter of 29 October 2019, the Respondent submitted its comments to the Claimants' letter of 7 October 2019. The Respondent advised the Tribunal that it opposed the Claimants' request that "the Tribunal reconsider, clarify or withdraw its questions for post-hearing briefs on the Bifurcated Issue."
89. By letter of 1 November 2019, the Respondent advised the Tribunal that on 24 October 2019 the European Commission issued a press release and statement concerning the conclusion of a plurilateral agreement to terminate intra-EU BITs. The Respondent noted that the Parties were not in a position to further comment until more information on the agreement became available and that it was investigating whether any further information relating to the agreement could be provided to the Tribunal and/or when it was expected to become public.
90. By letter of 11 November 2019, the Claimants responded to the Respondent's letter of 29 October 2019, and requested that the Tribunal:

- a. defer question one to the merits phase;
- b. withdraw question two, thus deferring all issues concerning the EU law and international law of legitimate expectations to the merits phase; and
- c. confirm that the scope of the requested submissions on question three is limited to the admissibility objections previously raised in the Respondent's submissions, which have been summarised at paragraph 36 of the Claimants' letter dated 7 October.

- 91. On 13 November 2019, the Respondent informed the Tribunal that the Parties had been unable to agree on a timetable for post-hearing submissions and suggested a timetable.
- 92. Later the same date, the Claimants requested that "the Tribunal defer any decision on the procedural timetable for the post-hearing briefs until after it has rendered its decision" on the Claimants' application of 7 October 2019.
- 93. On 15 November 2019, the Claimants notified the Tribunal that they were seeking certain disclosures and information from the Respondent regarding the plurilateral agreement between EU Member States to terminate intra-EU BITs, referred to by the Respondent in its letter of 1 November 2019, by separate correspondence.
- 94. On 19 November 2019, the Tribunal amended its post-hearing questions, as follows:
  - i. The Tribunal amends Question 1 to read: The Tribunal invites the Respondent to reply further to the Claimants' contention that the Tribunal should treat EU law as a fact. It is a matter for the Respondent whether it wishes to do so or not.
  - ii. The Tribunal maintains Question 3. It is a matter for the Claimant whether it wishes to respond or not.
  - iii. In the case of each of i and ii, it is for the party requested to determine the content, if any, of its response. The other party's reply should be confined to the matters raised in the first submission. If the first party elects not to respond to a question, no reply will be called for.
  - iv. The Tribunal has reconsidered Question 2 and has determined that it does not require a submission from the Respondent. The Question is withdrawn.

95. The Tribunal further drew the Parties' attention to the award in *Magyar Farming Company Limited and others v Hungary* (ICSID Case No. ARB/17/27) ("**Magyar Farming**"), dated 13 November 2019, and invited the Parties to address an additional question for the post-hearing submissions: the findings of the tribunal in *Magyar Farming* with respect to the intra-EU objection submitted by Hungary. The Tribunal also invited the Parties to reach an agreement on the scheduling of the post-hearing submissions.
96. On 25 November 2019, the Respondent informed the Tribunal that the Parties had agreed on a timetable for the post-hearing submissions.
97. By letter of 26 November 2019, the Tribunal informed the Parties that their agreed schedule was approved.
98. On 4 December 2019, the Claimants notified the Tribunal of Mr Guselnikov's ancillary claims, arising out of the Respondent's alleged wrongful conduct. They also informed the Tribunal that the ancillary claims, which relate to the ongoing criminal proceedings "that relate to the harassment and attempted extortion of Mr. Guselnikov by Mr. Rimšēvičs and his affiliates", would be further particularised in due course.
99. On 9 December 2019, Mr Krastiņš, the Administrator, requested access to the case file and informed the Tribunal that Mr Vainovskis, a former counsel for the Claimants, was no longer involved in the case and that his power of attorney had been withdrawn.
100. On 10 December 2019, Mr Okko Behrends, a lawyer allegedly representing AS PNB Bank's management, contacted the ICSID Secretariat via email. Mr Behrends attached a Power of Attorney dated 29 August 2019 signed by two members of the board, stating that Mr Behrends had the power "[t]o represent the interests of the Grantor in the courts and judicial institutions of the Republic of Latvia and of the European Union." Mr Behrends also noted that the Administrator was not able to revoke the power of attorney of Mr Vainovskis.
101. On 11 December 2019, the Tribunal invited Mr Behrends to elaborate on the scope of his power of attorney, and whether his appearance before the Tribunal in this arbitration falls within the scope of the power of attorney dated 29 August 2019.

102. By separate letters of 11 December 2019, the Tribunal invited the Administrator and Quinn Emanuel Urquhart & Sullivan to comment on the Administrator's request and on Mr Behrends' email of 10 December 2019.
103. On 17 December 2019, Mr Krastiņš submitted a letter in response.
104. On the same date, Quinn Emanuel Urquhart & Sullivan informed the Tribunal that it was no longer representing AS PNB Banka, but that it would continue to represent the Shareholder Claimants.
105. Later the same date, Mr Behrends submitted a new power of attorney, which was signed by three members of the board of AS PNB Banka. This new power of attorney, dated 17 December 2019, authorized Mr Behrends to represent AS PNB Banka "in any and all matters for which the board of AS PNB Banka is the appropriate representative of the Bank". In the same email, Mr Behrends argued that the Administrator should not be representing the Bank.
106. The Tribunal, by letter of 20 December 2019, invited the Administrator, the Shareholder Claimants, the Respondent and Mr Behrends to file submissions on the issue of the representation of the Bank. The Tribunal also indicated that Mr Behrends would be included on the correspondence regarding this issue.
107. On 8 January 2020, the Shareholder Claimants notified the Tribunal of their intention to file ancillary claims arising from the declaration of insolvency of the Bank and the conduct of Latvia's Financial and Capital Market Commission (FCMC).
108. On 24 January 2020, the Shareholder Claimants further elaborated on their ancillary claims in their reply submission on the representation issue.
109. The Administrator, Mr Behrends, the Shareholder Claimants and the Respondent filed submissions on the issue of representation. Following these submissions on 30 January 2020, the Tribunal issued Procedural Order No. 8 on the representation of the Bank (**"Decision on Representation"**). The Tribunal decided as follows:
- a. The Tribunal recognises Mr. Krastiņš as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal questions.

b. Mr. Krastiņš will be given access to the submissions on the Bifurcated Issue.

c. Until further order, the Tribunal rejects Mr. Behrends' application to be accepted as the representative of the Bank. The parties are directed to continue to copy Mr. Behrends on any communication relating to the representation of the Bank.

d. The Tribunal accepts that both Mr. Krastiņš, in the exercise of his statutory powers, and the former Directors or the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the Respondent's jurisdictional challenge on the Bifurcated Issue.

e. If that occurs, further submissions will be sought at that time.

110. On 30 January 2020, in response to the Shareholder Claimants' letter of 8 January 2020, the Tribunal informed the Parties that it took note of the Shareholder Claimants request for leave to make an ancillary claim and that it would leave this application on hold until it has decided on the bifurcated issue.
111. Also on 30 January 2020, the Tribunal invited the Parties to address in their post-hearing submissions on the bifurcated issue, in addition to the issues indicated in the letter of 19 November 2019, the following question: "What is the impact, if any, of the UK leaving the European Union on the availability of the dispute settlement procedures under Article 8 of the UK-Latvia BIT, as this BIT will not as from February 1, 2020 be a BIT between two Member States of the European Union?"
112. On 6 February 2020, the Administrator proposed a timetable for post-hearing submissions. By letter of 6 February 2020, the Respondent informed the Tribunal that the Parties had been unable to agree on a timetable for post-hearing submissions and that it would seek the Tribunal's leave for the Parties to file submissions on costs after the filing of the last post-hearing submission.
113. On 11 February 2020, the Tribunal issued a timetable for the Parties' post-hearing submissions and invited the Claimants' to comment on the Respondent's proposal on costs submissions.
114. By letter of 17 February 2020, the Shareholder Claimants confirmed that there was no pending request or application for leave before the Tribunal in relation to the

Shareholder Claimants' notification of an ancillary claim dated 8 January 2020 and requested that "the Tribunal clarify that its statement in the letter dated 3[0] January 2020 was not intended to mean that the Shareholder Claimants' Insolvency Ancillary Claim is not properly brought before the Tribunal and that any permission to admit such a claim is required."

115. On 17 February 2020, Mr Behrends filed a proposal to disqualify all of the Members of the Tribunal on behalf of AS PNB Banka.
116. On 18 February 2020, the Shareholder Claimants filed a proposal to disqualify all of the Members of the Tribunal.
117. On 20 February 2020, the Secretary-General notified the Parties that pursuant to ICSID Arbitration Rule 9(6), the proceeding was suspended.
118. The Parties' subsequent filings on Mr Behrends' and the Shareholder Claimants' disqualification proposals are detailed in the Decision on the Proposals to Disqualify Messrs. James Spigelman, QC, Peter Tomka and John M. Townsend of 16 June 2020 ("**Decision on the Disqualification Proposals**"). In its Decision on the Disqualification Proposals, the Chairman of the Administrative Council decided that Mr Behrends had no standing to file a proposal for disqualification on behalf of AS PNB Banka and rejected the Shareholder Claimants' proposal for disqualification.
119. By letter of 16 June 2020, ICSID informed the Parties that the proceeding had resumed on the same date.
120. By letter of 20 June 2020, the Tribunal issued its directions to the Parties regarding the schedule for the filing of the post-hearing submissions. The Tribunal advised that the Parties should file the first submission on 9 July 2020, the second submission on 30 July 2020 and the last submission on 13 August 2020. The Tribunal also noted that the proceedings had been suspended for 119 days.
121. On 25 June 2020, the Tribunal invited the Parties to comment in their post-hearing submissions, on the Decision on Jurisdiction in the case *Addiko Bank AG v. Croatia* (ICSID Case No. ARB/17/37) rendered on 12 June 2020 ("**Addiko v Croatia**").

122. Also on 25 June 2020, the Centre invited the Parties to indicate whether they agreed to the publication on the ICSID website of the two decisions on provisional measures dated 30 September 2018 and 17 April 2019, respectively, as well as the Decision on the Respondent's Request for Bifurcation dated 1 March 2019 and the Decision on the Application to Reconsider the Decision on Bifurcation dated 2 July 2019. To date, the Parties have not provided their responses to the Centre.
123. On 9 July 2020, the Administrator filed a submission concerning the *Addiko v Croatia* decision. The Administrator advised the Tribunal that this submission completed the submission filed on 12 March 2020, in which he had already "addressed the three questions previously raised by the Tribunal."
124. On the same date, the Shareholder Claimants filed their Post-Hearing Submission dated 9 July 2020, along with a cover letter and consolidated indices of the Legal Authorities and Factual Exhibits (the "**Shareholder Claimants' First Post-Hearing Submission**" or "**SC PHS 1**"). The Respondent also filed its Post-Hearing Submission dated 9 July 2020, along with a cover letter and indices of the Legal Authorities and Factual Exhibits (the "**Respondent's First Post-Hearing Submission**" or "**Respondent's PHS 1**").
125. On 10 July 2020, the Administrator's submission of 12 March 2020 filed while the case was suspended was transmitted to the Members of the Tribunal.
126. On 22 July 2020, Mr Okko Behrends submitted a "Statement for Submission in ICSID Case No. ARB/17/47".
127. Later on the same date, the Tribunal informed the Parties that "[u]ntil the ruling on the bifurcated issue, the Tribunal has directed the Secretary of the Tribunal not to transmit to the Tribunal any communications unless they are filed by, or with the consent of, the parties to the proceeding."
128. By letter of 30 July 2020, the Administrator informed the Tribunal that AS PNB Banka: (i) considered that the Tribunal "has been sufficiently briefed on the [jurisdiction] issues and will be in a position to take a decision based on the Parties' hitherto submissions"; (ii) therefore did not see the need to make further submissions at this stage, but reserved its right to do so; and (iii) maintained its position and rejected the Respondent's objections in this matter.

129. On the same date, the Shareholder Claimants filed their Second Post-Hearing Submission dated 30 July 2020, along with updated indices of the legal authorities and factual exhibits (the “**Shareholder Claimants Second Post-Hearing Submission**” or “**SC PHS 2**”). The Respondent also filed its Second Post-Hearing Submission on the same date, along with updated indices of the legal authorities and factual exhibits (the “**Respondent’s Second Post-Hearing Submission**” or “**Respondent’s PHS 2**”).
130. On 8 August 2020, the Respondent’s counsel informed the Parties and the Tribunal that the law firm “Savoie Arbitration” changed its name to “Savoie Laporte”.
131. On 13 August 2020, the Administrator filed his Third Post-Hearing Submission. The Respondent also filed its Third Post-Hearing Submission, along with updated indices of the legal authorities and factual exhibits (“**Respondent’s PHS 3**”). The Shareholder Claimants submitted their Third Post-Hearing Submission also on the same date, along with legal authorities CL-330 to CL-335 and an updated index of the legal authorities (“**SC PHS 3**”).
132. By letter of 1 September 2020, the Shareholder Claimants notified the Tribunal that the Agreement for the Termination of Bilateral Investment Treaties between the Members States of the European Union (the “**Termination Agreement**”), submitted as legal authority CL-336, had entered into force on 29 August 2020. They further noted that (i) the UK-Latvia BIT had not been terminated under Article 2 and Annex A; (ii) the UK was not a Contracting Party; (iii) Latvia had not terminated all of its “intra-EU” BITs; and (iv) the UK and Latvia had not sought to inform the Tribunal of “the legal consequences of the *Achmea* judgment” in accordance with Article 7 and the *pro forma* statement in Annex C of the Agreement.
133. On 2 September 2020, the Tribunal invited the Respondent and the Administrator to comment on whether, pursuant to paragraph 16.3 of Procedural Order No. 1, the Tribunal should receive this further submission and legal authority, and if so, to indicate whether they wished to make any comments limited to the contents of the new material.
134. By letter of 2 September 2020, the Tribunal reminded the Parties that pursuant to Administrative and Financial Regulation 14(3), the Tribunal would have no choice but to stay the proceeding for lack of payment if the required payment remained outstanding when the available funds would be exhausted.

135. On 4 September 2020, in response to the Tribunal’s invitation of 2 September 2020, the Respondent informed the Tribunal that it did not object to the inclusion of the submission and additional exhibit into the record, to the extent such addition did not further disrupt the proceedings. It also added that, should the Tribunal admit the submission into the record, it would request a right to provide a brief response.
136. On the same date, the Shareholder Claimants argued that there was no basis or need for further submissions by virtue of paragraph 16.3 of Procedural Order No. 1. They also took note of the Partial Award on Jurisdiction in *Strabag, Raiffeisen Centrobank & Syrena Immobilien Holding v. Poland*, ICSID Case No. ADHOC/15/1 dated 4 March 2020 (“**Strabag**”), which was made publicly available on 3 September 2020.
137. By letter of 7 September 2020, the Tribunal invited the Respondent and Mr Krastiņš to file a document, within three days of the date hereof (i.e., by no later than 10 September), drawing the Tribunal’s attention to any other pertinent aspects of the Termination Agreement and commenting (if at all) on the submission in the third paragraph of the Shareholder Claimants’ letter. In the same letter, the Tribunal requested the Parties to file a submission, if they wished to do so, within three days (i.e., by no later than 10 September) and in less than five pages, on any aspect of the *Strabag* decision that they believed to be sufficiently different from previous decisions to merit the Tribunal’s attention.
138. By respective letters of 10 September 2020, the Administrator and the Respondent submitted their comments on the Termination Agreement and the *Strabag* decision (“**Respondent’s PHS 4**”). The Shareholder Claimants also submitted their comments on the *Strabag* decision, together with legal authority CL-337 and a consolidated index of legal authorities (“**SC PHS 4**”).
139. On 21 September 2020, the Centre informed the Parties that pursuant to ICSID Administrative and Financial Regulation 14(3)(d), the Secretary-General had moved the Tribunal to stay the proceeding for non-payment and that the Tribunal had stayed the proceeding as of 21 September 2020.
140. By letter of 4 January 2021, the Shareholder Claimants informed the Centre and the Tribunal that they would pay the outstanding amount and commented on the Administrator’s failure to pay the Bank’s share of the requested advance.

141. On 6 January 2021, the Administrator sought leave to comment on the Shareholder Claimants' letter of 4 January 2021.
142. By letter of 7 January 2021, the Respondent submitted comments on the Shareholder Claimants' letter of 4 January 2021 and the Administrator's email of 6 January 2021. It also requested an indication from the Tribunal as to when a decision or award on the bifurcated issue was expected to be issued.
143. On the same date, the Centre informed the Parties that it was in receipt of the outstanding amount.
144. By letter of 8 January 2021, the Tribunal informed the Parties that the proceedings had resumed on the same date. It also informed them that it was not in a position to give precise dates for the ruling on the bifurcated issue. Further, the Tribunal invited: (i) the Administrator to comment on the Shareholder Claimants' letter by no later than 15 January 2021; and (ii) the Parties to submit their submissions on costs by 12 February 2021 and any comments on the costs submissions of the other party by 26 February 2021.
145. On 15 January 2021, the Administrator of the Bank commented on the Shareholder Claimants' letter of 4 January 2021, and explained, *inter alia*, that all the previous advances on behalf of the Claimants were paid exclusively by the Bank and that the Shareholder Claimants did not contribute.
146. On 12 February 2021, the Respondent and the Shareholder Claimants filed their respective Submissions on Costs. The Administrator also filed his Submission on Costs, together with Appendix 1.
147. On 26 February 2021, the Respondent and the Administrator filed their respective Reply Submissions on Costs. On the same date, the Shareholder Claimants submitted their Reply Submissions on Costs, together with legal authorities CL-338 to CL-342.
148. On 16 March 2021, Mr Kristof Vizey of VP Arbitration informed the Secretary General that he and his firm had taken over the representation of the Shareholder Claimants from Quinn Emanuel. Quinn Emanuel confirmed the change of counsel by email dated 17 March 2021. VP Arbitration submitted a power of attorney on 23 March 2021.

### III. LATVIA’S INTRA-EU OBJECTION

#### A. INTRODUCTION

149. Latvia’s challenge to the jurisdiction of this Tribunal turns in large measure on the decision of the Court of Justice of the European Union (“CJEU”) in *Achmea* and its *CETA Opinion*.<sup>7</sup> It is appropriate to summarise these two decisions at the outset.

#### B. *ACHMEA*

150. *Achmea* concerned a request by the *Bundesgerichtshof* (Federal Court of Justice, Germany) for a preliminary ruling from the CJEU with respect to the interpretation of Articles 18, 267 and 344 Treaty on the Functioning of the European Union (“TFEU”).

151. The context of the request was an arbitral proceeding involving the Slovak Republic and Achmea BV concerning an arbitral award of 7 December 2012 rendered by the arbitral tribunal constituted under the Slovakia-Netherlands BIT. The Netherlands-Czech and Slovak BIT (the “**Slovakia-Netherlands BIT**”) entered into force on 1 January 1992. The Slovak Republic succeeded to that BIT on 1 January 1993. Article 8 of the Slovakia-Netherlands BIT provides:

1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.
2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.
3. The arbitral tribunal referred to in paragraph (2) of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the

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<sup>7</sup> CJEU, *Slovak Republic v. Achmea BV*, Case C-284-16, 6 March 2018, **RL-0001** (“*Achmea*”); CJEU, *Opinion 1/17 of the Court*, 30 April 2019, **TT-0060** (“*CETA Opinion*” or “*Opinion 1/17*”).

date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.

4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.
5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.
6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
  - the law in force of the Contracting Party concerned;
  - the provisions of this Agreement, and other relevant agreements between the Contracting Parties;
  - the provisions of special agreements relating to the investment;
  - the general principles of international law.
7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.<sup>8</sup>

152. On 1 May 2004, the Slovak Republic acceded to the EU. During 2004, it opened up its market to private health insurance services. Achmea (Netherlands) set up a subsidiary in Slovakia offering such services. By a law of 25 October 2007, the Slovak Republic prohibited the distribution of profits generated by private health insurance activities. Subsequently, the Slovak Constitutional Court held that the prohibition was unconstitutional. Later the Slovak Republic again allowed the distribution of the profits.

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<sup>8</sup> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, **RL-00159**.

153. In October 2008, Achmea commenced arbitration proceedings against the Slovak Republic under Article 8 of the Slovakia-Netherlands BIT and the UNCITRAL Arbitration Rules for damages caused by its legislative measures. The tribunal determined Frankfurt am Main to be the place of the arbitration. The Slovak Republic objected to the tribunal's jurisdiction on the basis that, due to its accession to the EU, recourse to arbitration provided for in Article 8(2) of the Slovakia-Netherlands BIT was incompatible with EU law.
154. On 26 October 2010, the tribunal dismissed the objection. Set aside applications before the courts of Germany, the place of arbitration, were unsuccessful at first instance and on appeal. By an award of 7 December 2012, the tribunal ordered that the Slovak Republic pay Achmea damages of EUR 22.1 million. The Slovak Republic brought a further set aside action before the Frankfurt Higher Regional Court which dismissed the action.
155. The Slovak Republic then appealed to the *Bundesgerichtshof*. On 3 March 2016, it requested a preliminary ruling from the CJEU under Article 267 of the TFEU. Given the numerous BITs still in force between Member States with similar arbitration clauses to the one in question, the *Bundesgerichtshof* sought a ruling on the following questions:

- (1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

- (2) Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

- (3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?

156. The CJEU ultimately answered the first two questions affirmatively. Consequently, it did not need to, or proceed to, address the third question. In essence the CJEU had been asked to assess whether Articles 267 and 344 of the TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Slovakia-Netherlands BIT, under which an investor from one of those 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. In addressing that question, the CJEU first emphasised the principle enshrined in Article 344 of the TFEU, that international agreements cannot affect the allocation of powers fixed by the EU Treaties or the autonomy of the EU legal system. It was significant to the CJEU that:

EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.<sup>9</sup>

157. The CJEU reasoned that EU law is based on the fundamental premise that each EU Member State shares with the other Member States a set of common values on which the EU is founded (Treaty on European Union (“TEU”) Article 2), implying and justifying the existence of mutual trust between Member States that those values will be recognised and respected. In that context, Member States must, by reason, *inter alia*, of the principle of sincere cooperation set out in Article 4(3) of the TEU, ensure in their territories the application of, and respect for, EU law.

158. The CJEU explained that to ensure that the autonomy of the EU legal order is preserved, the EU Treaties have established a judicial system which is intended to ensure consistency and uniformity in interpreting EU law.<sup>10</sup> Pursuant to Article 19 of the TEU,

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<sup>9</sup> *Achmea*, para. 33.

<sup>10</sup> *Achmea*, para. 25, citing CJEU, *Opinion 2/13* (Accession of the EU to the ECHR), 18 December 2014, EU:C:2014:2454, **RL-00025** (“*Opinion 2/13*”), para. 174.

national courts, tribunals and the CJEU, are to ensure the full application of EU law in all Member States and the judicial protection of the rights of individuals. The “keystone” of this judicial system is the preliminary ruling procedure provided for in Article 267 of the TFEU, which intends to secure uniform interpretation of EU law.<sup>11</sup>

159. The CJEU assessed whether the disputes which the arbitral tribunal was called on to resolve are liable to relate to the interpretation or application of EU law.<sup>12</sup> While the tribunal was being called on to rule on possible infringements of the Slovakia-Netherlands BIT, in order to do so pursuant to Article 8(6), it had to “take account” of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.
160. According to the CJEU, the characteristics of EU law mean that EU law had to be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States. On that “twofold basis,” the arbitral tribunal could be called on to interpret or to apply EU law, particularly the provisions concerning the fundamental freedoms including freedom of establishment and free movement of capital.<sup>13</sup> However, with no links with the judicial systems of the Member States,<sup>14</sup> the arbitral tribunal could not be classified as a court or tribunal “of a Member State” within the meaning of Article 267 of the TFEU. It followed that a tribunal “such as” that referred to in Article 8 of the Slovakia-Netherlands BIT could not be regarded as a “court or tribunal of a Member State” under Article 267 of the TFEU, and therefore is not entitled to make a reference to the Court for a preliminary ruling.<sup>15</sup>
161. This finding was reinforced by the notion that any award would not meet the requirements of Article 19 of the TEU, i.e., being subject to review by a court of a Member State. Within this framework, under Article 8(7) of the Slovakia-Netherlands BIT, the decision of the arbitral tribunal provided for in that Article is final. Further, under Article 8(5), the tribunal was also to determine its own procedure applying the UNCITRAL rules, including choosing its seat and consequently the law applicable to

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<sup>11</sup> *Achmea*, para. 37, citing *Opinion 2/13*, para. 176 and the case-law cited.

<sup>12</sup> *Achmea*, para. 39.

<sup>13</sup> *Achmea*, paras. 40-42.

<sup>14</sup> Cf the types of courts referred to at paras. 44 and 47 of *Achmea*.

<sup>15</sup> *Achmea*, para. 49.

the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it.

162. The CJEU observed that any judicial review of the validity of the arbitral award by the tribunal on 7 December 2012 was limited to the validity of the arbitration agreement under applicable law and the consistency with public policy of the recognition or enforcement of the award.<sup>16</sup> The system of dispute resolution set up by the relevant Member States removed from their own courts' jurisdiction, and hence from the system of judicial remedies which Article 19(1) of the TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.<sup>17</sup> This could prevent the full effectiveness of EU law.<sup>18</sup> Article 8 thus called into question the principle of mutual trust between the Member States and the preliminary ruling procedure. This was deemed to be incompatible with the principle of sincere cooperation and to adversely affect the autonomy of EU law.<sup>19</sup>

163. Having made these findings, the CJEU held that the answer to the referral was that:<sup>20</sup>

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the [Slovakia-Netherlands BIT], 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.

### C. CETA OPINION

164. In the present matter, the parties rely on the *CETA Opinion* (or Opinion 1/17) in competing and detached ways. Latvia submits that the *CETA Opinion* is authority for the proposition that the incompatibilities between EU law and the BIT are more wide-ranging than that which can be established from *Achmea* alone. Taken together, it is said, *Achmea* and the *CETA Opinion* establish that essentially all provisions of the Treaty are incompatible with EU law.

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<sup>16</sup> *Achmea*, paras. 52-53. See also para. 1059(2) Code of Civil Procedure (*Zivilprozessordnung*).

<sup>17</sup> *Achmea*, para. 55, referring to *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* (“*Associação Sindical dos Juizes Portugueses*”), C-64/16, EU:C:2018:117, Judgment, 27 February 2018, para. 34 (**TT-0092**).

<sup>18</sup> *Achmea*, para. 56.

<sup>19</sup> *Achmea*, paras. 58-59.

<sup>20</sup> *Achmea*, para. 62.

165. For the Claimants, the *CETA Opinion* is authority for the notion that if the Tribunal has to consider EU law as fact here, then that will not render the BIT incompatible with EU law.

166. The *CETA Opinion* is a CJEU *Opinion* which post-dates *Achmea*. It concerned a request for an opinion by the Kingdom of Belgium in the following terms:

Is Section F ('Resolution of investment disputes between investors and states') of Chapter Eight ('Investment') of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016 (OJ 2017 L 11, p. 23; 'the CETA') compatible with the Treaties, including with fundamental rights?<sup>21</sup>

167. The Comprehensive Economic and Trade Agreement ("**CETA**") is a free trade agreement that contains rules relating to, *inter alia*, investment. Section F of Chapter Eight of CETA contains Articles 8.18 to 8.45 which pertain to the establishment of a mechanism for the resolution of investment disputes between investors and States ("**ISDS mechanism**"). Article 8.27 provides for the creation of a Tribunal ("**CETA Tribunal**") upon the entry into force of the CETA. Article 8.28 provides for the creation of an Appellate Tribunal ("**CETA Appellate Tribunal**"). Article 8.29 provides for the eventual establishment of a multilateral investment tribunal and appellate mechanism, the establishment of which will end the operation of the CETA Tribunal and the CETA Appellate Tribunal.<sup>22</sup>

168. In the *CETA Opinion*, the CJEU found that Section F of Chapter 8 of the CETA is compatible with EU primary law.<sup>23</sup> The *Opinion* centred on the compatibility of the ISDS mechanism with: (1) the autonomy of EU law; (2) the general principles of equal treatment and the requirement of effectiveness; and (3) the right of access to an independent tribunal.

169. In the present proceeding, the parties' reliance focuses on points (1) and (3) above.

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<sup>21</sup> *CETA Opinion*, TT-0060, para. 1.

<sup>22</sup> *CETA Opinion*, para. 7. The CETA Tribunal and Appellate Tribunal are the first stage in the envisaged Investment Court System.

<sup>23</sup> *CETA Opinion*, para. 245.

## **(1) Compatibility with EU Legal Order**

170. The CJEU indicated that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the EU, is, in principle, compatible with EU law. The CETA, in so far as it provides a process of submitting to judicial adjudication the resolution of disputes between investors and States by means of establishing a Tribunal, Appellate Tribunal and a later multilateral investment Tribunal, may be compatible with EU law if it has no adverse effect on the autonomy of EU law.<sup>24</sup>
171. In order to ensure that the autonomy of the EU legal order is preserved, the EU Treaties established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (see Article 19 of the Treaty on the European Union). That system includes the preliminary ruling procedure in Article 267 of the TFEU.
172. The high watermark of the *CETA Opinion* for current purposes is that the CJEU stated that in order to determine that the envisaged ISDS mechanism was compatible with the autonomy of the EU legal order, it was necessary to be satisfied (which it was) that:<sup>25</sup>
- Section F of Chapter Eight of the CETA does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law applicable between the Parties, and
  - Section F of Chapter Eight of the CETA does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.
173. The CJEU explained that, by reference to Articles 8.6-8.14, 8.18 and 8.31.1-8.31.2 of the CETA, the power of interpretation and application conferred on the CETA Tribunal in determining investment claims, is confined to the provisions of the CETA, and that

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<sup>24</sup> *CETA Opinion*, paras. 107-108. By “autonomy” of EU law, the CJEU elucidated that “that autonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law... That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it.” *CETA Opinion*, paras. 109-110.

<sup>25</sup> *CETA Opinion*, para. 119.

such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the Parties (but not under a Party's domestic law: Article 8.31.2).

174. The CJEU distinguished Section F of Chapter Eight CETA from the investment agreement in *Achmea*. Two main differences were noted: first, in *Achmea*, the agreement established a tribunal that would be called on to give rulings on disputes that might concern the interpretation or application of EU law;<sup>26</sup> and, second, *Achmea* concerned an agreement between Member States in contrast to the *CETA Opinion* which concerned the creation of a tribunal by agreement between the EU and a non-Member State.<sup>27</sup> The principle of mutual trust with respect to compliance with the right to an effective remedy before an independent tribunal under Article 47 of the Charter is not applicable in relations between the EU and a non-Member State.

175. The CJEU clarified that the power of interpretation and application conferred on the CETA Tribunal was confined to the CETA provisions, and “undertaken in accordance with the rules and principles of international law applicable between the Parties”, was not invalidated by Article 8.31.2 of the CETA, which provides that:<sup>28</sup>

“in determining the consistency of a measure with [CETA], the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact” and further states that, “in doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party,” adding that “any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”

176. Commenting on the significance of Article 8.31.2, the CJEU notably said that:<sup>29</sup>

Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken

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<sup>26</sup> See paras. 42, 55 and 56 of *Achmea*; cf *CETA Opinion*, paras. 126-127.

<sup>27</sup> Cf *Achmea*, paras. 57 and 58.

<sup>28</sup> *CETA Opinion*, paras. 122 and 130.

<sup>29</sup> *CETA Opinion*, paras. 131-133.

into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but consists, on the contrary, of that domestic law being taken into account as a matter of fact, while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.

The fact that there is no jurisdiction to interpret the rules of EU law other than the provisions of the CETA is also reflected in Article 8.21 of that agreement...

Nor will the CETA Appellate Tribunal be called upon to interpret or apply the rules of EU law other than the provisions of the CETA. (see Article 8.28.2(a))...

177. The CJEU's key relevant finding was that Section F of Chapter Eight does not confer on the tribunals any jurisdiction to interpret or apply EU law other than that relating to the agreement's provisions.
178. Further, the CJEU addressed a concern that the CETA Tribunal might, in the course of examining relevant facts, which may include the primary law on the basis of which the contested measure was adopted, weigh the investor claimant's freedom to conduct business against public interests set out in the EU Treaties and Charter relied on by the EU in its defence. This would entail making findings on secondary acts of EU law as to whether EU measures are 'fair and equitable' (Article 8.10), or constitute indirect expropriation (Article 8.12), or unjustly restrict the freedom to make payments and capital transfers (Article 8.13). Tribunal decisions would result in binding conclusions on the EU. The question is whether this would adversely affect the autonomy of the EU legal order.<sup>30</sup>
179. In response, the CJEU noted *inter alia* features in the CETA which prevent the agreement from adversely affecting the capacity of the EU to operate autonomously within its constitutional framework. This includes provisions regarding the choice of the respondent,<sup>31</sup> setting parameters for awards,<sup>32</sup> exceptions provided in Article 28.3.2

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<sup>30</sup> E.g. *CETA Opinion*, paras. 137-138, 149-150.

<sup>31</sup> See *CETA Opinion*, para. 140.

<sup>32</sup> See e.g. Article 8.39.1; *CETA Opinion*, paras. 144-147.

of CETA,<sup>33</sup> the right to regulate,<sup>34</sup> the obligation not to lower standards,<sup>35</sup> the annex on indirect expropriation<sup>36</sup> and the exhaustive definition of ‘fair and equitable treatment’.<sup>37</sup>

## **(2) Right of Access to Independent Tribunal**

180. Regarding the compatibility of the ISDS mechanism with the right of access to an independent tribunal, the CJEU conveyed that a consequence of Article 47 of the Charter is that the EU must ensure that Section F of Chapter Eight of the CETA, and any other provisions that determine the effect of Section F, guarantee that, once the agreement is implemented, the tribunals will be accessible and independent. The CJEU stated that that outcome is not invalidated by the fact that the envisaged ISDS mechanism is ‘hybrid’ in nature, containing characteristics of both judicial bodies and arbitration mechanisms.<sup>38</sup>
181. In the CJEU’s view, the rules establish independent, impartial and permanent investment Tribunals. For instance, Article 8.27 provides for the establishment of a permanent tribunal of 15 Members with a division of 3 Members hearing the case on a rotation basis. This ensures that the composition of divisions is random and unpredictable. Article 8.28.5 provides that the division of the Appellate Tribunal will consist of 3 randomly appointed Members. The appeal mechanism aims to ensure the “consistency of the decisions of the Tribunal of first instance.”<sup>39</sup> Such features indicate that the tribunals will essentially exercise judicial functions, in an autonomous manner, issuing final and binding decisions.

## **D. THE DECLARATIONS**

182. On 15 January 2019, twenty-two EU Member States, including Latvia and the UK, signed the Declaration of 15 January 2019.<sup>40</sup>

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<sup>33</sup> See Section C of Chapter 8 CETA, **RL-00107**.

<sup>34</sup> See *CETA Opinion*, para. 154; see also Section D of Chapter 8 CETA, **RL-00107**.

<sup>35</sup> See *CETA Opinion*, para. 155; see also Point 1(d) and Point 2 of the Joint Interpretative Instrument.

<sup>36</sup> See *CETA Opinion*, para. 157; see also Point 3 of Annex 8-A to the CETA, **RL-00107**.

<sup>37</sup> See *CETA Opinion*, para. 158; see also Article 8.10 CETA, **RL-00107**.

<sup>38</sup> *CETA Opinion*, para. 193. The CJEU also noted that the finding was not invalidated by the fact that the non-Member State of Canada is not affected by the safeguards provided under EU law, since the Union is so bound. *CETA Opinion*, para. 192.

<sup>39</sup> *CETA Opinion*, para 196. See also Point 6(i) and 6(g) of the Joint Interpretative Instrument.

<sup>40</sup> *15 January 2019 Declaration*, **R-00256**.

183. The following day six other EU Member States signed substantially similar declarations in two separate documents.<sup>41</sup>
184. The Declaration manifests the Member States' intentions to draw all necessary consequences from the *Achmea* judgment pursuant to their obligations under Union law.
185. The fundamental notion conveyed in the Declaration is that Union law takes precedence over BITs concluded between Member States.<sup>42</sup> As a consequence, it is declared, all investor-State arbitration clauses contained in BITs concluded between Member States are contrary to Union law and inapplicable. The effect of this includes that an arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying BIT.<sup>43</sup>
186. The Declaration addresses fundamental freedoms. It states that when investors from Member States exercise fundamental freedoms such as the freedom of establishment or the free movement of capital, they act within the scope of Union law and thus enjoy the protection granted by those freedoms and, as the case may be, by the relevant secondary legislation, by the Charter of Fundamental Rights of the European Union (“**Charter**”), and by the general principles of Union law including non-discrimination, proportionality, legal certainty and protection of legitimate expectations.<sup>44</sup> Where a Member State enacts a measure that derogates from one of the fundamental freedoms guaranteed by Union law, that measure falls within the scope of Union law and the fundamental rights guaranteed by the Charter also apply.<sup>45</sup>
187. Remedies are also addressed in the Declaration. Member States must provide remedies sufficient to ensure the effective legal protection of investors' rights under Union law.<sup>46</sup>

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<sup>41</sup> “Declaration of the Representatives of the Governments of the Member States of 16 January on the enforcement of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union” (Declaration of Finland, Slovenia, Luxembourg, Sweden, Malta), **R-00257**; and Hungary's Declaration, **R-00258**.

<sup>42</sup> 15 January 2019 Declaration, **R-00256**, p. 1, fn. 1, citing *Matteucci*, 235/87, EU:C:1988:460, para. 21; and *Budějovický Budvar*, EU:C:2009:521, C-478/07, paras. 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law. The same result is also said to follow also under general public international law, in particular from the relevant provisions of the VCLT and customary international law (*lex posterior*).

<sup>43</sup> 15 January 2019 Declaration, **R-00256**, p. 1.

<sup>44</sup> 15 January 2019 Declaration, **R-00256**, citing judgment in *Pfleger*, C-390/12, EU:C:2014:281, paras. 30-37.

<sup>45</sup> 15 January 2019 Declaration, **R-00256**, citing judgment in *Online Games Handels*, C-685/15, EU:C:2017:452, paras. 55 and 56.

<sup>46</sup> 15 January 2019 Declaration, **R-00256**, citing judgment in *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, Judgment, 27 February 2018, paras. 31-37 (“**TT-0092**”).

Under Article 19(1) of the TEU, every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection.

188. The Declaration states that Member States and the Commission will intensify their discussions in order to better ensure complete, strong and effective protection of investments within the EU.
189. In the Declaration, the Member States undertake that they will carry out certain actions without undue delay including:
  - (1) by the Declaration, informing intra-EU investment arbitration tribunals about the legal consequences of *Achmea*;
  - (2) defending Member States by requesting any court (including in third countries) which is to decide proceedings relating to intra-EU investment arbitration awards, to set the awards aside or not enforce them due to a lack of valid consent;
  - (3) by the Declaration, informing the investor community that no new intra-EU investment arbitration proceeding should be initiated;
  - (4) taking steps under national laws to withdraw pending cases where Member States control undertakings that are involved in pending investment arbitration cases against other Member States;
  - (5) terminating all BITs concluded between them by means of a plurilateral treaty or, if mutually more expedient, bilaterally;
  - (6) not challenging settlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and were voluntarily complied with or definitively enforced before *Achmea*;
  - (7) making best efforts to deposit their instruments of ratification, approval or acceptance of the plurilateral treaty or of any bilateral treaty terminating BITs between Member States by 6 December 2019;

- (8) discussing whether any additional steps are necessary to draw all the consequences from *Achmea* generally or in relation to the intra-EU application of the ECT.<sup>47</sup>

#### **E. THE TERMINATION AGREEMENT**

190. In the 15 and 16 January 2019 Declarations the Member States stated, *inter alia*, that:

5. In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally.
6. Member States will ensure effective legal protection pursuant to the second subparagraph of Article 19(1) TEU under the control of the Court of Justice against State measures that are the object of pending intra-EU investment arbitration proceedings.
7. Settlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and were voluntarily complied with or definitively enforced before the *Achmea* judgment should not be challenged. Member States will discuss, in the context of the plurilateral Treaty or in the context of bilateral terminations, practical arrangements, in conformity with Union law, for such arbitral awards and settlements. This is without prejudice to the lack of jurisdiction of arbitral tribunals in pending intra-EU cases.
8. Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019. They will inform each other and the Secretary General of the Council of the European Union in due time of any obstacle they encounter, and of measures they envisage in order to overcome that obstacle.<sup>48</sup>

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<sup>47</sup> In its separate declaration of 16 January 2019, Hungary clarified that in its view, *Achmea* concerned only intra-EU BITs and is silent on and does not concern the investor-state arbitration clause in the ECT. See points 8 and 9 at p. 3 of Hungary's Declaration, **R-00258**.

<sup>48</sup> Declaration, **R-00256**, p. 4.

191. Subsequently on 5 May 2020, an agreement was reached for the termination of bilateral investment treaties between the member states of the EU<sup>49</sup> (“**Termination Agreement**”).
192. The Preamble to the Termination Agreement emphasised *inter alia*:
- (1) That the CJEU held in *Budějovický Budvar*<sup>50</sup> that provisions laid down in an international agreement between two Member States cannot apply in the relations between them if the provisions are found to be contrary to the EU Treaties.
  - (2) That Member States must draw the necessary consequences from Union law as interpreted in *Achmea*.
  - (3) That investor-State arbitration clauses in intra-EU bilateral investment treaties are contrary to the EU Treaties and cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State.
  - (4) That there is a common understanding between the parties to the EU Treaties and intra-EU bilateral investment treaties that such a clause cannot serve as legal basis for Arbitration Proceedings.
  - (5) That the Termination Agreement should cover all investor-State arbitration proceedings based on intra-EU bilateral investment treaties under any arbitration convention or set of rules, including *inter alia* under the ICSID Convention.
  - (6) That the Termination Agreement was without prejudice to the question of compatibility with the EU Treaties of substantive provisions of intra-EU bilateral investment treaties.

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<sup>49</sup> Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, **CL-316** (“**Termination Agreement**”) pp. 51-53 for the list of the terminated investment treaties of Latvia. The Shareholder Claimants note that Latvia did *not* terminate all of its intra-EU investment treaties either, for instance the treaties with Sweden and Finland remain in full force.

<sup>50</sup> CJEU, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, C-478/07, EU:C:2009:521, Judgement of 8 September 2009, **RL-00152** (“**Budějovický Budvar**”).

- (7) That the Termination Agreement addresses intra-EU bilateral investment treaties but not intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty.<sup>51</sup>
- (8) That Member States are obliged under the Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection of investors' rights under Union law. In particular, every Member State must ensure that its courts/tribunals, within the meaning of Union law, meet the requirements of effective judicial protection.<sup>52</sup>

193. As to the main provisions in the Termination Agreement:

- (1) Article 2 provides that Annex A lists the bilateral treaties which are terminated under the Termination Agreement.
- (2) Article 4 confirms that investor-State arbitration clauses in intra-EU bilateral investment treaties are contrary to the EU Treaties and inapplicable. As a result of this incompatibility, as of the date on which the last of the parties to a relevant bilateral investment treaty became a Member State, the arbitration clause cannot serve as a legal basis for Arbitration Proceedings.
- (3) Article 6 provides that the Termination Agreement shall not affect concluded arbitration proceedings or an agreement to settle an applicable arbitral proceeding.
- (4) Article 7 provides that contracting parties which are parties to BITs on the basis of which pending or new arbitration proceedings were initiated, must *inter alia* cooperatively inform arbitral tribunals about the legal consequences of *Achmea*.<sup>53</sup>
- (5) Article 8 sets out transitional measures related to pending arbitration proceedings.
- (6) Article 9 sets out a settlement procedure for pending arbitration proceedings.

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<sup>51</sup> This would be dealt with at a later stage.

<sup>52</sup> CJEU, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, Judgment, 27 February 2018, paras. 31-37 (TT-0092).

<sup>53</sup> Article 7 connects with Annex C.

- (7) Article 10 sets out investors’ entitlements to access national courts in pending arbitration proceedings.
  - (8) Article 17 enables contracting parties to apply the Termination Agreement provisionally.
194. Annex A of the Termination Agreement lists the bilateral investment treaties that are terminated. The UK-Latvia BIT is not among the list of treaties that Latvia has terminated.
195. Nor for that matter have the UK and Latvia terminated the BIT.

#### **F. THE TRIBUNAL’S JURISDICTION**

196. It is common ground that the law applicable to the Tribunal’s jurisdiction includes Article 25 of the ICSID Convention, Article 8 of the BIT if in force, and general international law. Latvia asserts, and the Claimants deny, that the applicable law includes EU law.
197. It is also common ground that this Tribunal only has jurisdiction if Latvia had consented to refer a dispute such as this to arbitration under Article 25 of the ICSID Convention and under Article 8 of the BIT. It is also common ground, for purposes of the bifurcated objection to jurisdiction (“**Bifurcated Objection**”), that the consent had to be extant as at the time Latvia’s offer to arbitrate was accepted by the Claimants by expressing their consent under Article 8 of the BIT by submitting their Request for Arbitration on 14 December 2017. Thereafter there is little common ground.
198. The parties are also agreed that the Tribunal can consider EU law insofar as it is necessary for the assessment of the Bifurcated Objection.<sup>54</sup>

##### **(1) Respondent’s Submissions**

199. On the basis of the CJEU’s decision in *Achmea*,<sup>55</sup> as reinforced by that Court’s *Opinion I/17*, Latvia submits that EU law requires this Tribunal to find that it has no jurisdiction and/or to declare the claim inadmissible, because there was no valid arbitration offer to

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<sup>54</sup> Claimants’ Counter-Memorial on the Bifurcated Objection, para. 31; SC PHS 1, paras. 135-138, 170(d); Respondent’s PHS 2, para. 273.

<sup>55</sup> Citing *Achmea*, para. 60.

accept when the Claimants purported to do so in December 2017. Latvia's offer to arbitrate under the BIT became precluded by its accession to the EU on 1 May 2004.<sup>56</sup>

200. By “preclusion,” the Respondent, quoting Professor Tridimas, means “a conflict between two rules...in a way that not both of them can be applied.”<sup>57</sup> The Tribunal must resolve the conflict that has existed between the BIT (1994) and the EU Treaties between the UK and Latvia since 2004.
201. Latvia submits that the law applicable to the Tribunal's jurisdiction includes the ICSID Convention, the BIT and general international law. The Tribunal is required to take into account all relevant rules of international law applicable in UK–Latvia relations, including EU law, on the issue of jurisdiction.<sup>58</sup>
202. The EU law which is required to be taken into account encompasses EU Treaties, EU Regulations, EU Directives and CJEU judgments interpreting them.<sup>59</sup> These are sources of international law as conventional norms or as part of the relevant rules of international law stemming from the EU Treaties. Latvia submits that the BIT is incompatible with, and is superseded by, EU law.
203. The BIT is incompatible with EU law as determined by *Achmea* and *Opinion 1/17*, in at least four ways:
- (1) Article 8 of the BIT is precluded by EU law as a matter of principle and specifically by Articles 267 and 344 TFEU, as authoritatively interpreted by the CJEU.
  - (2) Article 8 of the BIT is precluded by EU law as a matter of fact since this Tribunal will necessarily have to interpret or apply EU law in the present case.

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<sup>56</sup> Relevant to the Respondent's argument on accession is its contention that as of 1992, Latvia was in the process of becoming part of the EU. At that time, it is argued, the Baltic countries, including Latvia, were included in the EU's PHARE enlargement program. Subsequently, the following events ensued: in 1994, Latvia and the UK signed the Treaty, which entered into force in 1995; on 12 June 1995, Latvia signed the EU Association Agreement which entered into force in 1998; in 1998 Latvia's progress report on EU accession confirmed that it signed BITs with all EU Member States except Ireland; on 1 May 2004, Latvia acceded to the EU.

<sup>57</sup> Hearing, Day 1, 165: 9-10.

<sup>58</sup> Respondent's Reply on the Bifurcated Objection, para. 18.

<sup>59</sup> Latvia says that its definition is without prejudice for other sources of EU law, such as Decisions, which under EU law have the same level as Regulations and Directives, to also be considered international law.

- (3) The entire BIT is precluded by EU law since the BIT has insufficient safeguards in its substantive provisions to ensure that the EU Member States' right to regulate and obligation to apply EU law will be sufficiently protected.
  - (4) The entire BIT is precluded because its interpretation and application can lead to a change in the division of powers of EU institutions within the EU's constitutional framework.
204. Furthermore, Latvia asserts that the principle of primacy of EU law is an international conflict rule. EU law must prevail in any conflict with the BIT. The same conclusion arises from the application of the principles of *lex specialis*, *lex posterior* (EU law by virtue of Latvia's 2004 accession prevails over the 1994 BIT) and *lex superior* (EU law prevails over incompatible *inter se* international obligations between Member States), as well as comity and the principle of systemic integration of different international legal orders.
205. Alternatively, Article 8 of the BIT is suspended by Articles 59(2) and 30(3) of the Vienna Convention on the Law of Treaties ("VCLT"), since the EU Treaties and the BIT are on the "same subject matter" because the BIT covers EU law's four freedoms (free movement of goods, services, labor and capital).
206. In relation to consent to jurisdiction, Latvia insists that the Tribunal must look not only to the ICSID Convention, but to the BIT as well. There are "two consents" which have to be considered in this context; one under Article 25 of the ICSID Convention, the other under Article 8 of the BIT. These present distinct issues. While the Respondent does not question that the UK and Latvia are parties to the ICSID Convention, as of the Respondent's accession to the EU in 2004, there was no offer to arbitrate, nor was there an offer to accept, under the BIT, once EU law had been brought in.<sup>60</sup>
207. Latvia submits that the "irrevocability of consent" which is contemplated by Article 25 of the ICSID Convention operates only after that consent has been perfected, which it never was in this case.<sup>61</sup> Although there was an offer to arbitrate open by both Latvia and the UK as of 1995, by Latvia's accession to the EU there was no longer an offer to

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<sup>60</sup> Hearing, Day 1, 56:12 - 58:11.

<sup>61</sup> Hearing, Day 2, 32:1-33:6, citing Christoph Schreuer et al., *The ICISD Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> edn. (2009), p. 254, para. 599.

accept. By December 2017, the offer was precluded or vitiated by Latvia's accession to the EU.

## **(2) Claimants' Submissions**

208. The Claimants maintain that, by their submission of the RFA on 14 December 2017, they accepted Latvia's standing offer of arbitration which had never been withdrawn or suspended up until that time. At that point in time, they submit, "consent to ICSID arbitration had been perfected".<sup>62</sup>
209. Under Article 25 of the ICSID Convention, "no party may withdraw its consent unilaterally." Under, Article 26 of the ICSID Convention, the parties' consent to ICSID arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.
210. The Claimants contend that EU law is a *sui generis* and autonomous sub-system that does not touch upon the law and legal system by which this investment Tribunal was constituted.<sup>63</sup> Instead, the nature of "consent" is to be determined in accordance with the terms of the ICSID Convention against the backdrop of general international law. Ascertaining "consent" requires interpreting and applying Article 25 of the ICSID Convention.
211. Because it applies to *all* ICSID Convention Contracting States, the Claimants state, the meaning of "consent" must be given an autonomous interpretation under the Convention. It does not have a malleable meaning that turns on whether the Contracting Parties are EU Member States or not. Only rules of international law that apply to all ICSID Convention Contracting States should be taken into account in interpreting the ICSID Convention under Article 31(3)(c) of the VCLT.
212. The Claimants maintain that Latvia does not appear to assert that there is any conflict between the ICSID Convention (*cf* the BIT) and EU law. In the Claimants' submission, this should dispose of the Bifurcated Objection. Latvia would have to show for its

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<sup>62</sup> Hearing, Day 1, 62:19-20.

<sup>63</sup> Hearing, Day 1, 63:13-17, citing, e.g. *Eskosol S.p.A in Liquidazione v Republic of Italy*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, **RL-00189** ("**Eskosol**"), para. 181. Further, in *Kadi*, Advocate General Maduro delineated EU law as "a municipal legal order of trans-national dimensions", and "distinct from the existing legal order of public international law." CJEU, C-402/05, P - *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, 16 January 2008, **ST-15** ("**Kadi**"), para. 21.

purposes not only that EU law applies (which it is assumed to do *arguendo*), but also that EU law invalidates the express permission of the ICSID Convention for ICSID Contracting States to make ICSID offers in the manner adopted by Latvia. The point is not addressed by the Respondent.

213. The core of the issue before the Tribunal is: “Can EU law principles be invoked to defeat consent to arbitration?”<sup>64</sup> In the Claimants’ submission, the answer is no, because the Tribunal derives its existence from the BIT (Article 8) and from the ICSID Convention (Article 25)<sup>65</sup> – the “Instruments of Consent” – and not from the legal orders of the UK, Latvia or the EU. The applicable *lex arbitri*, and the law applicable to the Tribunal’s jurisdiction, is the Instruments of Consent, in addition to such applicable rules of international law as may be necessary to apply to interpret those instruments. That is a legal order of public international law different from the EU legal order.<sup>66</sup>
214. The Claimants emphasise that Latvia had the capacity to enter into the BIT pursuant to Article 6 of the VCLT. Latvia’s consent was never impeached, withdrawn or suspended pursuant to the procedures that must be followed under the VCLT. Nor was the BIT terminated when the Respondent’s consent was perfected (*cf* Article 42(2) of the VCLT).
215. The Claimants also contend that when Latvia gave its consent in Article 8 of the BIT, it was not an EU Member State, such that there can be no question of incompatibility with EU law.<sup>67</sup> Moreover, by the terms of the BIT itself, Latvia’s consent is not expressed to be revocable outside the BIT’s termination provision in Article 14. The language of consent in Article 8 – “hereby consents” – is present tense, reflecting a continuing consent. Article 14 then provides that the BIT’s provisions continue in force until one Contracting State gives written notice to the other that the BIT is terminated,

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<sup>64</sup> Hearing, Day 1, 62:24-25.

<sup>65</sup> *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, **CL-34**, paras. 68-70.

<sup>66</sup> See e.g. *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, **DN-1** (“**Cube Infrastructure**”), paras. 130, 144-146; see also *Eskosol*.

<sup>67</sup> See Article 13 of the BIT; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision, Jurisdiction of the Arbitral Tribunal, 8 December 1998, **CL-246**, para. 43.

which neither Contracting State has ever done. Article 14, it is submitted, defines the period for which consent is deemed to continue to be given under Article 8.<sup>68</sup>

## G. APPLICABLE LAW

### (1) EU Law as International Law

#### a. Respondent's submissions

216. Latvia submits that EU law is international law.<sup>69</sup> By EU law, Latvia means not only EU treaties, but EU law generally too. EU law is a source of international law<sup>70</sup> as it stems from particular or regional conventions mentioned in Article 38(1) of the ICJ Statute. Latvia accepts that EU law has a dual nature and is considered as domestic law as well, notably because of its incorporation in the domestic legal system of Member States. At the same time, in respect to Latvia, EU law remains international law distinct from Latvian law, including the Latvian Constitution, as is the case in Germany.
217. The status of EU law as international law is asserted to be shown by EU treaties themselves and confirmed by arbitral decisions and publicists. EU law includes EU regulations, directives, decisions and the CJEU's judgments. The latter are binding sources of EU law under Article 19 of the TEU and Article 267 of the TFEU.
218. In addition: (a) EU law is international law because it creates obligations binding on EU Member States and on individuals;<sup>71</sup> (b) CJEU judgments are international law;<sup>72</sup> and (c) the most qualified publicists confirm that acts of organs of an international organization are sources of international law.<sup>73</sup>

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<sup>68</sup> See also Garibaldi, 'On the Denunciation of the ICSID Convention' in Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 251, **CL-247**, p. 269; Nolan, Caivano, 'Limits of Consent - Arbitration without Privity and Beyond' in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (2010) 873, **CL-248**, pp. 909-910; Gaillard, 'The Denunciation of the ICSID Convention', *The New York Journal*, 26 June 2007, **CL-249**, p. 3.

<sup>69</sup> Citing *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, **RL-00088** ("**Vattenfall**"), paras. 141, 148, 150; Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', (2014) *McGill Journal of Dispute Resolution* 1, **ST-10**, p. 24.

<sup>70</sup> Second Tridimas Report, para. 247.

<sup>71</sup> See CJEU, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26-62, 5 February 1963, **RL-00024** ("**Van Gend & Loos**"), p. 4; see also *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **RL-00020** ("**Electrabel**"), para. 4.120.

<sup>72</sup> *Vattenfall*, paras. 141, 148, 150.

<sup>73</sup> See Dionisio Anzilotti, *Cours de Droit International*, 1929, **RL-00281**, pp. 295-296; Philip C. Jessup, 'Parliamentary Diplomacy - An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations', *Recours des Cours*, vol. 89, 1956, **RL-00282**, p. 204; Markus Benzing, 'Secondary Law of International Organizations,' MPEPIL, **RL-00283**, para. 2; *United Kingdom Supreme Court, R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC

219. EU law, as a subset of public international law, interacts with the general normative environment through the “master key” of Article 31(3)(c) of the VCLT. “Special” regimes of international law do not exist in clinical isolation, but they interact with each other, as confirmed by the ILC<sup>74</sup> and by publicists.<sup>75</sup>
220. Latvia asserts that international law must be interpreted in its social context.<sup>76</sup> Hence, the BIT is not isolated from everything else. As seen in the CJEU’s *Wightman* decision, for example, with respect to Brexit, the CJEU referred to provisions of the VCLT which would be considered applicable if or when the UK leaves the EU.<sup>77</sup> Latvia’s core submission is that the EU treaties interact with the rest of international law.
221. Latvia argues that, having established the necessary principles leading to this submission, the Tribunal must, when interpreting Article 8 of the BIT, take into consideration EU law, notably CJEU judgments, in order to interpret and apply the BIT. The Tribunal must do so on the basis of what EU law conceives itself to be.<sup>78</sup> The *Achmea* and *Opinion I/17* judgments show that there is a conflict between EU law and the BIT.
222. The Respondent’s case on jurisdiction invokes the fact that, as of 1992, Latvia was in the process of becoming part of the EU. At that time, Latvia states, the Baltic countries, including Latvia, were included in the EU’s PHARE enlargement program. Subsequently, the following events ensued:
  - (1) in 1994, Latvia and the UK signed the BIT, which entered into force in 1995;
  - (2) on 12 June 1995, Latvia signed the EU Association Agreement which entered into force in 1998;

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5, **RL-00225**, para. 63 (Lord Neuberger). Latvia argued that even Lord Neuberger did not contest that EU Treaties are legal instruments under public international law, referring to Second Neuberger Report, para. 9.

<sup>74</sup> Report of the Study Group of the International Law Commission on Fragmentation of International law (“**ILC Fragmentation Report**”), **RL-00154**, paras. 139, 152.

<sup>75</sup> Pierre-Marie Dupuy, *Droit international public*, 8th ed., 2006, **RL-00264**, p. 156; Jan Klabbbers, *An Introduction to International Institutional Law*, 2002, **RL-00195**, p. 103; Henry G. Schermers, Niels M. Blokker, *International Institutional Law*, Martinus Nijhoff Publishers, 4th ed., 2003, **RL-00197**, pp. 840-844. The Respondent notes that the sources of international law which interact with one another are the ones mentioned in Article 38 of the ICJ’s Statute.

<sup>76</sup> *ILC Fragmentation Report*, **RL-00154**, para. 418 (citing to Pellet & Daillier).

<sup>77</sup> CJEU, *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, Case C-621/18, Judgement, 10 December 2018, **TT-0095**.

<sup>78</sup> Citing PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, PCIJ Series A, No. 21, Judgment, 12 July 1929, **TT-0176**, p. 124 (for the purposes of stating that this is what the PCIJ held regarding domestic law); ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports 2010, Judgment, 30 November 2010, **RL-00310**, p. 664, para. 67 (ICJ decision in context of African Charter on Human and People’s Rights).

- (3) in 1998, Latvia's progress report on EU accession confirmed that it had signed BITs with all EU Member States except Ireland;
- (4) on 1 May 2004, Latvia acceded to the EU.

223. Latvia says that the significance of its accession to the EU is that, while there was an offer to arbitrate open by both Latvia and the UK as of 1995 when the BIT entered into force, after 1 May 2004, when Latvia acceded to the EU, there was no longer an offer to accept. As to whether consent was perfected in December 2017 when the Claimants submitted their RFA, Latvia's response is that there was no consent at that time. This argument is predicated on Latvia's trajectory towards accession commencing in 1992, and by factoring in the international law which bound the UK and Latvia at the material time.<sup>79</sup>

***b. Claimants' submissions***

224. The Claimants submit that EU law is a *sui generis* and autonomous sub-system that does not touch upon the law and legal system by which this investment Tribunal was constituted.<sup>80</sup> EU law is not applicable to jurisdiction or to merits. At most, EU law should be taken into account, but that is distinct from applying it as the applicable law.
225. The Claimants reject, in each respect, Latvia's submissions on the scope of applicable law. Specifically, they rely on an expert opinion of Lord Neuberger that the decision in *Achmea* is wrong, that it is not binding on the Tribunal, alternatively that it is distinguishable, that it is inapplicable because this case will not involve interpretation of EU law as distinct from applying EU law as fact, relying on *Opinion 1/17* and, finally that it should not be given retroactive effect.
226. Alternatively, insofar as EU law is otherwise applicable to the merits for purposes of *Achmea*, or to jurisdiction, that application is precluded by Article 11 of the BIT or the MFN Clause in Article 3.
227. In the Claimants' submission, *Achmea* does not evidence any general principle or rule of international law on the conflict of treaties. As Professor Talmon explains, *Achmea*

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<sup>79</sup> Hearing, Day 2, 114:22 - 123:14.

<sup>80</sup> Citing, e.g. *Eskosol*, para. 181.

purports only to preclude recourse to dispute resolution mechanisms as a matter of EU law.<sup>81</sup> It is an EU law rule. It is not an international law rule.

228. The Claimants contend that EU law is not applicable to, and cannot affect, the Tribunal's jurisdiction or admissibility, and this applies in a post-*Achmea* context.<sup>82</sup> *Achmea* does not bind this Tribunal as it is a decision rendered by a court within the EU legal order, which does not sit in the same hierarchy as this Tribunal.
229. Even if *Achmea* is correct and applies, by continuing to make its standing offer of arbitration to UK investors in Latvia by Article 8 of the BIT, the Respondent was, from its accession to the EU in 2004, in breach of Article 344 of the TFEU and can be held responsible by the EU and its fellow Member States for such breach.<sup>83</sup>

## **(2) Articles 27 and 46 of the VCLT**

### ***a. Claimants' submissions***

230. The Claimants invoke Articles 27 and 46 of the VCLT for the purposes of preserving the validity of Latvia's consent to ICSID arbitration. The Claimants contend that Latvia consented to arbitration and that that consent was relied on by them. A State cannot invoke its internal laws to invalidate its consent (Article 46) or to justify its non-performance of a treaty obligation (Article 27).
231. For the purposes of Article 27 of the VCLT, the decisive question is not whether EU law is international law or domestic law, but whether EU law is "internal law" of Latvia. It plainly is, the Claimants say, and that is precisely the consequence of EU law having primacy over the domestic law of Latvia for the purposes of Latvian law. It must follow that EU law operates as law that is internal to the legal system of the Member States, qualifying as internal law for the purposes of Article 27 of the VCLT.

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<sup>81</sup> First Talmon Report, paras. 11-14.

<sup>82</sup> See e.g. *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, **RL-00138** ("**UP and C.D v Hungary Award**"), para. 253. See also *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, **RL-00308** ("**United Utilities**"). In their Fourth PHS, the Claimants also assert that, in contrast to the *Strabag* Award of 4 March 2020 (**CL-337**), this Tribunal is not subject to any domestic legal system and derives its jurisdiction exclusively from the BIT and the ICSID Convention, the latter being self-contained, delocalised and transnational in nature. There is asserted to be no basis for EU law to intrude. SC PHS 4, p. 2.

<sup>83</sup> Second Neuberger Report, para. 32.

232. The Claimants cite *Cube Infrastructure* for the notion that EU law has no supremacy over international law.<sup>84</sup>

The EU treaties are, certainly, international agreements of a kind familiar in international law, binding as between the States Parties; but they also function as the constitution of an autonomous community. The rules established by EU secondary legislation are essentially supra-national regulations rather than part of the corpus of international law as such... Within the system of international law, EU law does not have supremacy, and has no hierarchical priority over the laws of non-Member States, or over rules of international law...

233. Article 46 of the VCLT received less attention from the parties in their pleadings. During the Hearing, however, Judge Tomka raised the question whether, in the context of Article 46, consent to be bound by the BIT relates only to the BIT's entry into force. Dr Sinclair said that it is open to the Tribunal to interpret Article 46 of the VCLT such that it is not limited in time.<sup>85</sup>

***b. Respondent's submissions***

234. In contrast to the Claimants, the Respondent maintains that EU law is not a supranational autonomous body of law which is equivalent to domestic law for the purposes of Articles 27 and 46 of the VLCT.
235. The Respondent describes the Claimants' approach to Article 27 of the VCLT as follows: because EU law would be implemented into, or directly applicable into, domestic law, EU law could not be international law.
236. The Respondent rejects this approach because, on this reasoning, any international treaty implemented into a domestic system would not be international law anymore, as it has been implemented.
237. Regarding the Tribunal's questioning on Article 27 of the VCLT, specifically, whether EU law could be treated as Latvia's "internal law" for the purposes of Article 27 of the VCLT, Latvia's position is that EU law is not a supra-national "autonomous" body of law which is equivalent to domestic law for relevant purposes. Latvian law and EU law

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<sup>84</sup> *Cube Infrastructure*, para. 130.

<sup>85</sup> Hearing, Day 2, 146:15-24; Hearing, Day 1, 24:ff.

are distinct.<sup>86</sup> EU law cannot be treated as “internal law” under Article 27 of the VCLT.<sup>87</sup> In this context, the Respondent relies on Article 5 of the VCLT to argue that the EU is an international organisation and EU law is international law. The Respondent cites *Eskosol*<sup>88</sup> and *Vattenfall*<sup>89</sup> to confirm its position that EU law is recognised as international law. In *Vattenfall*, the Tribunal said:<sup>90</sup>

Since the ECJ is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties (*see* Article 19 TEU and Article 267 TFEU), the Tribunal considers the ECJ Judgment’s interpretation of the EU Treaties likewise to constitute a part of the relevant international law.

238. To the extent that the Claimants cite *Cube Infrastructure* in the Article 27 of the VLCT context, the Respondent says that they miss the fundamental point from that case. The point was that EU law stems from international treaties to which not all ECT Members are a party. The Claimants are alleged to have omitted part of the paragraph being relied on:

Any such claim to priority [of EU law over the ECT] would challenge the basis of the ECT as a multilateral treaty, unilaterally asserting for the EU and its Member States a right to be treated differently from all other ECT Contracting Parties.<sup>91</sup>

239. Here, it is argued, the only parties to the BIT are two EU Member States, which does not raise any issues related to third parties.
240. As to Article 46 of the VCLT, Latvia contends that that Article is irrelevant.

### **(3) Article 42 of the ICSID Convention**

#### ***a. Respondent’s submissions***

241. The Respondent submits that Article 42 of the ICSID Convention applies to the question of the Tribunal’s *jurisdiction*, as well as to merits, and requires the Tribunal to apply EU law to this case. Latvia cites various matters in support of this assertion,

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<sup>86</sup> Second Tridimas Report, paras. 247-248.

<sup>87</sup> Second Tridimas Report, paras. 240-246.

<sup>88</sup> *Eskosol*, para. 175.

<sup>89</sup> *Vattenfall*, paras. 144-146, 148.

<sup>90</sup> *Vattenfall*, para. 148.

<sup>91</sup> *Cube Infrastructure*, para. 130.

including the Declaration, certain ICSID tribunals decisions,<sup>92</sup> and leading commentary.<sup>93</sup>

242. EU law is said to apply as follows:

- (1) it is agreed by the UK and Latvia that EU law is part of the law applicable to an intra-EU BIT;<sup>94</sup>
- (2) EU law applies under Article 42 of the ICSID Convention on the basis of applicable principles of international law<sup>95</sup> (e.g. Articles 31(3)(c) and 5 of the VCLT and conflicts rules); and
- (3) EU law applies on the basis of Latvia's conflict-of-law rules (e.g. constitutional rules requiring that EU law prevail over other legal norms).

243. In respect of the question of merits, Latvia contends that EU law qualifies under one of the two prongs of Article 42 of the ICSID Convention. The two 'prongs' are:

- (1) the "law of the Contracting State party to the dispute (including its rules on the conflict of laws);" or
- (2) "such rules of international law as may be applicable".<sup>96</sup>

244. The Tribunal addressed a question to the parties on the first prong above. In response to it, Latvia stated *inter alia* that the terms of the first prong could include the rule of primacy of EU law incorporated into Latvian law. In this manner, and as per EU law's dual aspect as international law and domestic law, EU law can be considered as "laws of the Contracting State" including its rules on the conflict of laws.

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<sup>92</sup> E.g. *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, **RL-00261** ("Tidewater"), para. 86; *Interocean Oil Development Company and Intercocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, **RL-00266** ("Interocean"), para. 65; also *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, **RL-0004**, para. 225-226.

<sup>93</sup> Christoph Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> edn. (2009), **RL-00267**, p. 552.

<sup>94</sup> Citing German Federal Court of Justice in *Slowakische Republik v. Achmea*, Order, 31 October 2018, **R-00212**, para. 18; Declaration, **R-00256**, fn. 1; and Declaration No. 17 on Primacy, Annexed to the Final Act of the Intergovernmental Conference Which Adopted The Treaty of Lisbon signed on 13 December 2007, Official Journal of the European Union, No. 326/227, 26 October 2012, ("**Declaration 17**"), **R-00266**, p. 10.

<sup>95</sup> E.g. *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, **CL-66**, para. 50; *Tidewater*, para. 86; Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', (2014) *McGill Journal of Dispute Resolution* 1, **ST-10**, pp. 4, 24. Latvia also says that the Declaration shows that the UK and Latvia intend that EU law apply to the question of the Tribunal's jurisdiction via Article 42 of the ICSID Convention.

<sup>96</sup> See also First Talmon Report, para. 24.

245. Latvia contends that EU law is international law within the meaning of Article 42(1) of the ICSID Convention because:

- (1) EU law is part of the law “agreed” to by Latvia and the UK to be applicable to a BIT dispute. Under Article 31(3)(c) of the VCLT, in interpreting the BIT, this Tribunal “shall” take into account international agreements in force between the UK and Latvia. Such international agreements include EU law as derived from the EU Treaties. In this dispute, it is argued, EU law will include EU regulations and directives on banking law.
- (2) The Declaration confirms that EU law applies to the determination of this dispute. For the same reasons, says Latvia, EU law necessarily comes within the text of “such rules of international law as may be applicable” in the Article 42(1) definition.

***b. Claimants’ submissions***

246. The Claimants submit that the law applicable to jurisdiction is derived from Article 8 of the BIT and Article 25 of the ICSID Convention, not from Article 42 of the ICSID Convention.
247. Article 42 of the ICSID Convention is said to expressly govern the law applicable to the *merits*, and not jurisdiction.<sup>97</sup> Article 42 applies to the “dispute”. The term “dispute” in Articles 25(1) and 42 of the ICSID Convention means the same thing, and Article 25(1) makes clear that what is in contemplation is the *substantive* dispute.
248. The Claimants submit that Article 42 of the ICSID Convention is a choice of law rule for the purposes of determining the law applicable to the merits, not jurisdiction.
249. On Latvia’s theory, say the Claimants, the default law applicable to the Tribunal’s jurisdiction would be the host State’s law. Here that is Latvian law under the second sentence of Article 42(1). On Latvia’s theory, host states could unilaterally regulate the law applicable to the jurisdiction of ICSID tribunals. Latvia’s theory, if correct, would defeat the object and purpose of the ICSID Convention, which is the *delocalisation* of

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<sup>97</sup> See *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 December 2009, **CL-222**, para. 37; *Vattenfall*, paras. 118-119; *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the “Intra-EU” Jurisdictional Objection, 25 February 2019, **ST-9** (“**Landesbank**”), para. 161; See also First Talmon Report, para. 47; Christoph Schreuer, ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’, (2014) *McGill Journal of Dispute Resolution* 1, **ST-10**, p. 3.

investment arbitration. It follows that the law applicable to the Tribunal’s jurisdiction is not determined by Article 42.

#### **(4) Article 31(3) of the VCLT**

##### ***a. Respondent’s submissions***

250. Latvia maintains that, as there is no applicable law clause in the BIT, the BIT must be interpreted in accordance with international law. Article 31(3) of the VCLT is specifically applicable to interpret the entire BIT. It requires that “any relevant rules of international law” must be “taken into account.”<sup>98</sup> Just as with Slovakia and the Netherlands BIT in *Achmea*, the “relevant rules of international law” applicable to UK-Latvia relations include the EU Treaties and thus EU law. It follows that this Tribunal should arrive at the same result as in *Achmea*.
251. Latvia submits that EU law, as a subset of public international law, interacts with the general normative environment through the “master key” of Article 31(3)(c) of the VCLT. Latvia contends that Article 31(3)(c) of the VCLT must import the principle of primacy to this case. The principle to be imported is referenced in the Declaration,<sup>99</sup> namely, that the provision of a bilateral agreement between two Member States that is incompatible with EU law is precluded and thus inapplicable. Latvia cites not only *Achmea* and *Opinion 1/17* in support of the principle to apply, but three cases concerning intra-EU bilateral treaties (albeit not investment treaties): *Matteucci*,<sup>100</sup> *Exportur*<sup>101</sup> and *Ravil*.<sup>102</sup> The proposition being advanced is that EU Member States cannot circumvent the fundamental rules of the treaties and contract with each other to avoid them.

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<sup>98</sup> See also *Achmea*, para. 40.

<sup>99</sup> Latvia says the *15 January 2019 Declaration* should be taken into account by the Tribunal under Article 31(3)(a)-(b) VCLT, as an agreement or subsequent practice on the interpretation or application of the Treaty by the UK and Latvia. The Declaration is also said to confirm that both the UK and Latvia accept the consequences of *Achmea*.

<sup>100</sup> CJEU, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, Case 235/87, Judgment, 27 September 1988, **RL-00151** or **RL-00212** (“*Matteucci*”), paras. 19, 22-23.

<sup>101</sup> CJEU, *Exportur SA v. LOR SA and Confiserie du Tech SA*, Case C-3/91, Judgment, 10 November 1992, **RL-00216**, (“*Exportur*”), para. 8.

<sup>102</sup> CJEU, *Ravil SARL v. Bellon Import SARL, Biraghi SpA*, C-469/00, Judgment, 20 May 2003, **TT-0028** (“*Ravil*”), paras. 66-67. Latvia also cites other CJEU judgments such as CJEU, *Costa v. Enel*, Case 6/64, Judgment, 15 July 1964, **TT-0007** (“*Costa v Enel*”), p. 594 and CJEU, *Commission v. Italy*, Case 10/61, Judgment, 27 February 1962, **RL-00211** (“*Commission v Italy*”), p. 10. See also Second Tridimas Report, paras. 81-90.

**b. Claimants' submissions**

252. According to the Claimants, Article 31(3)(c) of the VCLT cannot import EU law in the way that Latvia seeks to do in order to revoke its consent. Article 31(3)(c) is not an applicable law clause or a conflict clause.<sup>103</sup> Rather, it is concerned with the interpretation of a specific treaty term or provision. If it were an applicable law clause or a conflict clause, the Claimants say, then the treaty conflict rules in the VCLT would be superfluous. However, that Article states that, together with “context,” as defined in Article 31(2), “relevant rules of international law” shall be “taken into account” in interpreting the treaty. Article 31 sets out the principles that the Tribunal should take into account in ascertaining *meaning* through interpretation.
253. Yet far from asking the Tribunal to merely “take into account” EU law as a relevant rule of international law as part of the interpretive process, the Respondent seeks to effectively invalidate or give no meaning to Article 8 of the BIT and to Article 25 of the ICSID Convention, by applying EU law. This is an attempt to *re-write* a provision,<sup>104</sup> not an attempt to “interpret” a provision. Latvia’s construction is impermissible as it would directly invalidate the provisions purportedly being interpreted. That is not a good faith interpretation in accordance with the ordinary meaning given to the BIT’s terms.
254. Nor does Article 31(3)(c) give primacy to other rules of international law.<sup>105</sup> The Tribunal need only “take into account” other rules of international law. The Respondent cannot “interpret away” its consent to ICSID arbitration by application of Article 31(3)(c) of the VCLT.

**(5) The Declarations**

**a. Respondent's Submissions**

255. Latvia addresses the Declarations in connection with *inter alia Magyar Farming*.<sup>106</sup> In *Magyar Farming*, it says, the tribunal’s reasoning which rejected the intra-EU objection

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<sup>103</sup> The Claimants say the absence of an applicable clause in the Treaty distinguishes it from the Slovakia-Netherlands BIT.

<sup>104</sup> Citing *Vattenfall*, para. 154; *Eskosol*, para. 126. See also *Strabag* which is relied on to assert that Article 31(3) cannot be used to rewrite the ordinary meaning of the text of the treaty under interpretation. *Strabag*, paras. 8.125-8-125.6.

<sup>105</sup> *Landesbank*, para. 164

<sup>106</sup> Latvia also similarly addresses the Declarations in connection with the Claimants’ arguments relating to *Addiko*. *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, **CL-284** or **RL-00419** (“**Addiko v Croatia**” or “**Addiko**”).

rests essentially on two grounds: (1) that the 15 January 2019 Declarations cannot be considered to retroactively withdraw Hungary's consent to arbitration; and (2) that the conditions of Article 30 VCLT are not met in that case.

256. Contrary to this, Latvia asserts that the Declarations are authentic interpretations of intra-EU BITs<sup>107</sup> as subsequent agreements on the interpretation and application of intra-EU BITs, and subsequent practice on their interpretation pursuant to VCLT Article 31(3)(a)-(b). This explains the treaty law consequences of *Achmea*.
257. The Declaration is said to be an agreement on the interpretation and application of Article 8 of the BIT because it concerns the consequences of *Achmea* for “all” investor-state arbitration clauses contained in BITs concluded between Member States, and because the Declaration is signed by both Latvia and the UK.<sup>108</sup> In this context, EU law takes precedence over intra-EU BITs because EU law, pursuant to CJEU case law,<sup>109</sup> trumps provisions of international agreements applicable as between EU Member States.
258. Latvia accepts that the Declarations do not directly impact the interpretation or application of EU law.<sup>110</sup> However, it submits that the CJEU is the authoritative interpreter of EU law. Factoring in this reasoning, Latvia submits that the *Magyar Farming* tribunal, by considering whether the Declarations “terminate[d]”<sup>111</sup> the offer to arbitrate under the Hungary-UK BIT in January 2019, failed to grasp that under EU law the Declarations could not have such an effect. Rather the Declarations reflect the existence, since 1 May 2004, of the preclusion of the offer to arbitrate under the intra-EU BITs of Member States that acceded to the EU on that date (such as Latvia). The Declarations did not themselves retroactively extinguish Latvia's consent to ICSID arbitration.
259. As will appear, Latvia relies on the Declarations, the Termination Agreement and the EC's notices of infringement, to assert the existence of an EU Public Policy which

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<sup>107</sup> As subsequent agreements on the interpretation and application of intra-EU BITs and subsequent practice on their interpretation pursuant to VCLT Article 31(3)(a)-(b).

<sup>108</sup> *15 January 2019 Declaration*, **R-00256**, p. 1.

<sup>109</sup> See e.g. Declaration 17, **R-00266**.

<sup>110</sup> Latvia asserts in this regard that the CJEU has held that interpretative statements of Member States or their practice have no effect on the interpretation of EU law: Marc Blanquet, *Droit général de l'Union Européenne*, 11th ed., Sirey, 2018, **RL-00418**, pp. 463-464.

<sup>111</sup> *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, **RL-00414** or **CL-318** (“*Magyar Farming*”), paras. 214.

allegedly precludes intra-EU BIT claims on the basis of an investor-State arbitration mechanism.

**b. Claimants' Submissions**

260. The Claimants contend that the Declaration was not a subsequent agreement on the application of the BIT. The Declaration was an “inter-governmental political declaration of the governments of the 22 Member States which signed it,”<sup>112</sup> as confirmed in *Eskosol*.<sup>113</sup> *Eskosol* imparts that the Declarations cannot be given such weight so as to retroactively extinguish Latvia’s consent to arbitration.<sup>114</sup> Member States are not competent to provide conclusive interpretations of EU law notwithstanding what may be purported or how they intend to apply *Achmea* ‘in the future.’ Referring to Article 43 of the Statute of the Court it submits that the prerogative to issue authoritative interpretations of EU law is conferred on the CJEU.<sup>115</sup>
261. In contending that the Declaration cannot extinguish Latvia’s consent to ICSID arbitration, the Claimants also rely on Professor Talmon’s report<sup>116</sup> in addition to the *Magyar Farming* tribunal. In *Magyar Farming*, the claimants had accepted Hungary’s offer to arbitrate prior to *Achmea* (as is the case here), finding that it was not open for Hungary to renege on its consent.<sup>117</sup> The tribunal also said that even if the Declaration could be regarded as an agreement to terminate the BIT, the consent to arbitrate, which is perfected by the investor’s acceptance of the State’s offer to arbitrate expressed in the BIT, could not be retroactively invalidated by a later termination of the BIT.<sup>118</sup> In doing so, say the Claimants, the *Magyar Farming* tribunal concurred with the finding in *Eskosol*.<sup>119</sup>
262. To the extent that Latvia relies on the Termination Agreement for its purposes, the Claimants contend that the UK’s failure to sign it reinforces that the BIT is in full force

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<sup>112</sup> First Talmon Report, para. 161.

<sup>113</sup> *Eskosol*, paras. 222-223

<sup>114</sup> *Eskosol*, para. 226. First Talmon Report para. 167.

<sup>115</sup> Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, **RL-00123**, Article 43, Protocol 3 (exhibit pages 173-174) (“If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.”).

<sup>116</sup> First Talmon Report, para. 167, referring to VCLT Article 28.

<sup>117</sup> *Magyar Farming*, para. 217.

<sup>118</sup> *Magyar Farming*, para. 214.

<sup>119</sup> *Eskosol*, para. 226.

and effect. Moreover, the Termination Agreement is not relevant for the purposes of Article 31(3)(c) of the VCLT.

## **(6) The Termination Agreement**

### ***a. Respondent's Submissions***

263. Latvia contends that the Termination Agreement confirms that effective legal protection of EU investors with ongoing intra-EU BIT claims is a matter for domestic courts of EU Member States, not for arbitral tribunals.
264. Latvia emphasises that on 14 May 2020, a notice of infringement was issued by the EC to the UK for failing to remove the intra-EU BITs from its legal order. The infringement notice allegedly confirms that EU law continues to apply to the UK during the transition period in respect of intra-EU BITs, and so continues to preclude the application of the BIT. The notice also confirms that the UK's related obligation to remove intra-EU BITs from its legal order will survive Brexit since the UK's obligation to formally terminate already incompatible intra-EU BITs is, for the UK, a "legal situation of the parties [EU Member States] created through the execution of the treaty [EU Treaties] prior to its termination" (Article 70(1)(b) of the VCLT).
265. Latvia notes that it has signed the Termination Agreement.<sup>120</sup> The fact that the UK did not sign the Agreement, just like Austria, Finland and Sweden, does not mean that such States are not subject to their ongoing EU law obligations in respect of intra-EU BITs. While the BIT is not *per se* "terminated," it is precluded by EU law from applying.
266. In Latvia's submission, there is currently a consensus amongst EU Member States including the UK, as reflected by the 15 and 16 January 2019 Declarations, the Termination Agreement and the EC's notices of infringement, that there is an EU Public Policy precluding intra-EU BIT claims on the basis of an investor-State arbitration mechanism. Such public policy requires EU Member States and the UK to take steps to remove those intra-EU BITs from their legal order.
267. In so far as the Claimants rely on Latvia's failure to terminate the BIT under Article 14 for their purposes, Latvia contends that triggering that termination is superfluous and

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<sup>120</sup> Termination Agreement, **RL-00362**, p. 14 (also submitted as exhibit **CL-316**).

contrary to the intentions of the parties to the BIT, which both signed the Declaration. Ultimately, says Latvia, the BIT is precluded by EU law.

***b. Claimants' Submissions***

268. The Claimants highlight that Latvia has not terminated all of its intra-EU investment treaties, for instance its treaties with Sweden and Finland remain in full force. The Claimants submit that the state parties' failure to terminate the BIT should be conclusive on the Bifurcated Issue; by deciding *not to* terminate the BIT - albeit that the draft of the Termination Agreement envisaged that the BIT would be terminated<sup>121</sup> - the UK and Latvia have in fact expressed their intention that the BIT will remain in full force and effect. This is despite the fact that Latvia has at its disposal the unilateral termination mechanism under Article 14 of the BIT which it has not triggered.
269. The Claimants assert that the fact that the UK has not signed the Termination Agreement reinforces that the BIT remains in full force and effect. They say further that:
- (1) The Termination Agreement is not a relevant source of law under Article 31(3)(c) of the VCLT.
  - (2) The EC's notice of infringement recognises that the BIT remains in force.
  - (3) The signatories of the Termination Agreement recognise that *Achmea* did not have the effect of terminating the intra-EU BITs.
  - (4) Several EU Member States, including the UK, did not agree to terminate their intra-EU BITs.
  - (5) All non-EU States continue to enforce international arbitration awards based on intra-EU BITs, showing that there is no international consensus on *Achmea* as alleged.
  - (6) The BIT is now an extra-EU BIT, thus any comparison with *Achmea* is inapposite.

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<sup>121</sup> Draft Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, undated, CL-267, p. 12.

## H. CONFLICT RULES

270. Latvia submits that the Tribunal must apply international conflict rules of *lex posterior*, *lex specialis* and *lex superior*. EU law is contended to be, in respect of the BIT, posterior,<sup>122</sup> more special<sup>123</sup> and superior.<sup>124</sup>

### (1) CJEU Doctrine of Primacy

#### a. Respondent's submissions

271. Latvia contends that the principle of primacy of EU law over international agreements is a conflict rule of public international law. Latvia defines the principle as “any provision of an *inter se* international agreement between two Member States that is incompatible with EU law, for example, its principle of autonomy, will be precluded and thus inapplicable.” The principle was established in a line of authority prior to *Achmea*.<sup>125</sup>
272. The principle of primacy should apply to this Tribunal’s interpretation of Article 8 and to the rest of the BIT on the basis of Article 31(3)(c) of the VCLT and on the agreement of the parties to the BIT. Specifically, Latvia relies on that Article and/or on primacy itself.
273. Latvia submits that there is no real distinction between “interpretation” and “conflicts.” It highlights that the European Court of Human Rights (“ECHR”) has used Article 31(3)(c) of the VCLT to preclude the application of certain norms of the ECHR in light of the international law rules of state immunity.<sup>126</sup> There, says Latvia, the ECHR concluded that it could use other aspects of international law outside the relevant convention that it was interpreting to conclude that certain provisions could not apply.

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<sup>122</sup> ECHR, *Slivenko and others v. Latvia*, 23 January 2002, **RL-00317**, paras. 60-61; *ILC Fragmentation Report*, **RL-00154**, para. 225. See also “*Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*,” Report of the Study Group of the International Law Commission No. A/CN.4/L.702, 18 July 2006 (“**ILC Fragmentation 18 July Report**”), **RL-00316**, para. 14(25).

<sup>123</sup> See *ILC Fragmentation Report*, **RL-00154**, para. 248. At the Hearing, Counsel for the Respondent put matters in these terms: “Clearly there is something more special about being a member of the European Union than signing a bilateral investment treaty.” Hearing, Day 1, 32:8-10. Latvia also refers to Article 5 of the VCLT and the rule of primacy as contributing to EU law as special law.

<sup>124</sup> See *15 January 2019 Declaration*, **R-00256**.

<sup>125</sup> *Matteucci; Exportur*; and *Ravil*, Latvia says that primacy within the international sphere of the EU is well established since the 1960s with CJEU judgments such as *Costa v Enel* and *Commission v Italy: Costa v Enel*, p. 594; *Commission v Italy*, p. 10. See also Second Tridimas Report, paras. 81-90. The status of the principle of primacy as a fundamental conflict rule of EU law was further reaffirmed in Declaration 17, **R-00266**; see also *15 January 2019 Declaration*, **R-00256**, fn 1. Latvia also relies on the *ILC Fragmentation Report*, **RL-00154**, para. 283.

<sup>126</sup> *ILC Fragmentation Report*, **RL-00154**, para. 437.

274. The end result, says Latvia, is that Article 8 and the rest of the BIT must be interpreted in light of the EU Treaties. The ultimate end result is that this Tribunal has no jurisdiction.
275. The principle to be imported is referenced in the Declaration,<sup>127</sup> namely, that the provision of a bilateral agreement between two Member States that is incompatible with EU law is precluded and inapplicable. Latvia says the Declaration should be taken into account by the Tribunal under Article 31(3)(a)-(b) of the VCLT, as an agreement on the interpretation or application of the BIT by the UK and Latvia. The Declaration is also said to confirm that both the UK and Latvia accept the consequences of *Achmea*.
276. Latvia says that Professor Tridimas' evidence at the Hearing confirmed that the addressees of primacy include any organ competent to consider or take into account EU law, including this Tribunal.
277. In addition to applying EU law primacy as its own international law rule of conflict, Latvia submits that it should apply in this case via the general international law principle of *lex superior*<sup>128</sup>. The EU Treaties set up a system whereby the international legal order established on the basis of the EU Treaties takes precedence over international obligations of the Member States among themselves.<sup>129</sup> As *lex superior*, primacy of EU law is absolute and cannot be derogated from in the relationship between Member States.
278. Furthermore, Latvia contends that the primacy principle applies to the BIT as *lex specialis* in the context of Article 5 of the VCLT, in favour of more generalised rules of conflict such as Articles 30 or 59 of the VCLT.<sup>130</sup>

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<sup>127</sup> Latvia says the Declaration supports the notion that EU law is superior to the Treaty, citing the following passages: "Union law takes precedence over bilateral investment treaties concluded between Member States.... With regard to agreements concluded between Member States, see judgments in *Matteucci*, 235/87, EU:C:1988:460, paragraph 21; and *Budějovický Budvar*, EU:C:2009:521, C-478/07, paragraphs 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law. The same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention in the Law of the Treaties and customary international law (*lex posterior*)."  
*15 January 2019 Declaration*, p. 1, fn. 1. Latvia also relies on Declaration 17 annexed to the Lisbon Treaty. Treaty of Lisbon, 13 December 2007, **TT-0050**, p. 268 (also as Declaration 17, **R-00266**).

<sup>128</sup> See *15 January 2019 Declaration*, **R-00256**.

<sup>129</sup> See e.g. *ILC Fragmentation 18 July Report*, **RL-00316**, paras. 14(31-34).

<sup>130</sup> See *ILC Fragmentation Report*, **RL-00154**, para. 248. At the Hearing, Counsel for the Respondent put matters in these terms: "Clearly there is something more special about being a member of the European Union than signing a bilateral investment treaty." Hearing, Day 1, 32:8-10.

279. Latvia's position is that, in the context of these proceedings which involve *inter-se* international agreements between Member States, and by virtue of Article 5 of the VCLT, EU law and its primacy rule is a special law that takes priority over general law.<sup>131</sup> On the sole basis of the *lex specialis* principle, the principle of EU law primacy must be applied to the BIT instead of other more general rules of conflict such as Articles 30 or 59 of the VCLT.

***b. Claimants' submissions***

280. The Claimants submit that the so-called EU "principle of primacy" is not an applicable treaty conflict norm, but a judge-made rule. The rule governs the applicability of conflicting rules by national authorities of EU Member States, primarily by national courts.<sup>132</sup> There is no authority under EU law to the effect that international courts or tribunals are the addressees of the principle of primacy, let alone that they are bound by such a principle. For the Tribunal to rule otherwise would be a first.

281. The principle of primacy is an internal constitutional principle of the EU legal order.<sup>133</sup> The principle does not override conflict provisions under general international law, and Latvia has not produced any decisions to the contrary.

282. The Claimants reject the proposition that the primacy principle, as incorporated into Latvia's domestic legal system, can qualify as a "conflict of laws" norm for the purposes of Article 42.<sup>134</sup>

283. There is no inconsistency when, for example, the ECHR does not decline jurisdiction when adjudicating claims against EU Member States, notwithstanding the "primacy" of EU law. The ECHR determines claims under the Convention pursuant to its mandate

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<sup>131</sup> See *ILC Fragmentation 18 July Report*, **RL-00316**, paras. 14(7); also 14(11), (14). See also O. Dörr, K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, **RL-00165**, Article 30, para. 10; e.g. ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, **RL-00434**, para. 274 ("In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.").

<sup>132</sup> Citing e.g. First Talmon Report, paras. 50-56, 64-86 and 129-132; Second Talmon Report, paras. 21 to 27 noting that nowhere did the German Federal Supreme Court say that the EU law principle of primacy was a rule of international treaty law as claimed by Latvia. See also *Kadi*; Second Neuberger Report, para. 15; *Cube Infrastructure*, paras. 130 and 144; *Eskosol*, para. 182, 184-186; First Tridimas Report, para. 16.

<sup>133</sup> See *CETA Opinion*, para. 109.

<sup>134</sup> See also First Talmon Report para. 159.

and finds that EU law cannot be a defence to violations of the European Convention on Human Rights.<sup>135</sup>

284. The Claimants characterise the Respondent's invocation of the *lex specialis* principle as an attempt to circumvent the "same subject matter"<sup>136</sup> threshold which should be rejected by the Tribunal.
285. In the Claimants' submission, Article 11 governs any conflicts with EU norms and is the *lex specialis* found in the BIT's express terms which prevails over EU law on primacy.<sup>137</sup> *Lex specialis* governs only derogation from a dispositive norm (i.e. a norm that permits derogation).<sup>138</sup> The Claimants contend that Article 11 does not permit derogation, or, alternatively, it takes precedence as the relevant conflict norm within the BIT. In any event, EU law is not more *specific* than the BIT. According to the Claimants, it remains a mystery as to what "specificity" Latvia claims EU law has over the BIT.

## **(2) Articles 8 and 11 of the BIT**

### ***a. Claimants' submissions***

286. The Claimants contend that under Article 11 of the BIT, they can, and have, opted to elect to have the BIT provisions apply to the exclusion of other conflict rules.<sup>139</sup> In this context, the Claimants reject Latvia's assertion that the applicability of Article 11 is in the hands of the State-appointed insolvency administrator (Mr Krastiņš),<sup>140</sup> insisting instead that their prior invocation of Article 11 is unaffected by his appointment.
287. By its terms, it is contended, Article 11 excludes the application of EU law to Article 8 of the BIT if the Claimants regard the BIT as providing more favourable treatment, which they do on Latvia's stance that Article 8 is precluded by EU law. The Claimants

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<sup>135</sup> See ECHR, *Matthews v UK*, 18 February 1999, **RL-221**, para. 32; ECHR, *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi*, 30 June 2005, **TT-159**, para. 153.

<sup>136</sup> Conclusions of the Study Group of the International Law Commission on the Fragmentation of International Law, 2006, **CL-240**, para. 251 (5) (p. 178 as numbered, emphasis added) ("The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.")

<sup>137</sup> See First and Second Talmon Reports; cf *Vattenfall*, para. 217; *Cube Infrastructure*, para. 132 (ECT context).

<sup>138</sup> Conclusions of the Study Group of the International Law Commission on the Fragmentation of International Law, 2006, **CL-240**, para. 251 (8) (p. 178 as numbered).

<sup>139</sup> See *Vattenfall*, paras. 217; *Cube Infrastructure*, para. 132.

<sup>140</sup> The Shareholder Claimants describe this argument as a "cynical stunt." SH PHS 2, p. 6.

argue that the word “treatment” in Article 11 extends to Article 8 of the BIT, the dispute resolution mechanism.<sup>141</sup> Article 11 is said to be equivalent to Article 16 of the ECT.

288. The Claimants invoke Article 11 to exclude any alleged “rules of EU law” that would allegedly deprive them of their rights under the BIT and the ICSID Convention. Their position is that Article 11 applies not only to jurisdictional issues in Article 8 of the BIT, but it excludes EU law from applying to the merits as well. The result is the full compatibility of the BIT with *Achmea*.
289. It is the Claimants’ submission that the effect of Article 11 was never addressed in *Achmea* in relation to the equivalent clause there, namely, Article 3(5) of the Slovakia-Netherlands BIT. The CJEU was asked to only rule on a narrowly defined question which specifically concerned the compatibility of the dispute settlement provision of the Slovakia-Netherlands BIT with EU law.<sup>142</sup> The CJEU never addressed Article 3(5).
290. The Claimants cite *Addiko v Croatia* for the proposition that a lack of an express choice-of-law provision in an investment treaty must be deemed to constitute a choice of the investment treaty and general principles of international law as the applicable rules, to the exclusion of EU law.<sup>143</sup>
291. In the alternative, the Claimants invoke *Middle East Cement v Egypt* for the proposition that a clause analogous to Article 11 of the BIT constituted a choice-of-rule for the merits of the dispute for the purposes of Article 42 of the ICSID Convention.<sup>144</sup> The same considerations are contended to apply here.
292. This interpretation is said by the Shareholder Claimants to be further supported by the principle of harmonious interpretation,<sup>145</sup> specifically, that Latvia and the UK, in

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<sup>141</sup> See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, **CL-226**, paras. 85-86, 103. The Claimants say there is no reason to read “treatment” as not including the basis on which access to dispute resolution in Article 8 of the Treaty is conferred. It is one of the most fundamental Treaty provisions for an investor. Under Article 31 of the VCLT, in ascertaining the meaning of “treatment” the Tribunal must also consider other clauses in the Treaty using the same term for consistency. The Claimants note in this regard the MFN Clause.

<sup>142</sup> See *Achmea*, para. 23.

<sup>143</sup> *Addiko v Croatia*, paras. 260, 267.

<sup>144</sup> There the tribunal applied Article 11 of the Agreement between the Hellenic Republic and the Arab Republic of Egypt for the promotion and reciprocal protection of investments, 16 July 1993, **CL-285**, Art. 11 (“If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.”). See *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CL-257** (“**Middle East Cement v Egypt**”), paras 86-87.

<sup>145</sup> See e.g. *Magyar Farming*, para. 241.

keeping in force the BIT, intended the BIT to comply with their other obligations under international law. Here that leads to the conclusion that whether as a matter of principle, or by application of Article 11, EU law does not form part of the rules applicable to the merits of the dispute.

293. The Claimants submit that Article 11 thus governs any conflict with EU norms and is the *lex specialis* found in the BIT's express terms which prevails over EU law on primacy.<sup>146</sup> In so far as this Tribunal accepts that there is no meaningful distinction between Article 11 of the BIT and Article 16 of the ECT, that ends the inquiry.<sup>147</sup>

294. Moreover, in so far as Latvia has argued that Article 11:

(1) says nothing about less favourable rules in order to try to distinguish Article 16 of the ECT, this a distinction without difference. Article 11 would be redundant if the host State could apply less favourable rules notwithstanding its undertaking in Article 11 that nationals and companies of other Contracting States may invoke a more favourable rule;

(2) does not extend to dispute settlement because it refers only to "investments," the Claimants describe this as "entirely unworkable," because the BIT expressly includes Article 25(2)(b) of the ICSID Convention, and permits an investment to be a Claimant in accordance with Article 8(2) of the BIT.<sup>148</sup>

***b. Respondent's submissions***

295. Latvia notes that the Claimants argue that Article 11 of the BIT, which concerns more favourable treatment, is a conflict clause which defeats Latvia's position. Latvia rejects the argument that Article 11 is a conflict rule and makes the following submissions in response.

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<sup>146</sup> See First and Second Talmon Reports; cf *Vattenfall*, para. 217; *Cube Infrastructure*, para. 132 (ECT context).

<sup>147</sup> *Cube Infrastructure*, para. 144; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, **RL-00080** ("**Masdar v Spain**"), para. 332; *Vattenfall*, paras. 192-193; *Landesbank*, paras. 168-172. See also *RREEF Infrastructure (G.P.) Limited and Anor v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, **CL-92**, para. 75.

<sup>148</sup> The Bank is said to be both an investment of the other Claimants and it is a Claimant which can sue under the Treaty.

296. First, there is a substantially similar provision in Article 3(5) of the Netherlands-Slovakia BIT, thus the CJEU in *Achmea* must have considered the issue. This factor alone should be conclusive on the matter.
297. Second, Article 11 concerns the treatment of “investments,” not of “investors”. Article 11 cannot be used with respect to dispute settlement (Article 8), which concerns only investors (“national” or “company”). While the Claimants’ interpretation is based on Article 16 of the ECT, that is a very different provision because it not only gives or offers more favourable treatment from other treaties, it also precludes less favourable treatment from other treaties. This aspect is absent in Article 11 of the BIT. To the extent that the Claimants admit that Article 16(2) of the ECT would prevent EU law from applying, they cannot “have their cake and eat it too” by refusing to admit EU law is connected to the BIT while recognizing that the ECT and EU law interact through Article 16(2).
298. Third, Latvia contends that Article 11 cannot apply to dispute resolution provisions, including provisions on applicable law, which are not “treatment.”<sup>149</sup> Treatment provisions cannot be used to import dispute resolution rights, as that is a substantive issue.
299. Fourth, Latvia contends that the Claimants have not identified any provisions that specifically allow for the application of EU law as ‘fact’ in other *extra*-EU BITs of Latvia. Even if the Claimants did so identify, says Latvia, the provisions are not “obligations” in the sense of Article 11 of the BIT, which must refer to substantive obligations.
300. Latvia makes several additional arguments including the following:
- (1) An intra-EU investor/investment not having access to ISDS against an EU Member State is not receiving “less favourable” treatment compared to an extra-EU investor/ investment.<sup>150</sup>

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<sup>149</sup> See also *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, **RL-00451**, para. 149.

<sup>150</sup> The Tribunal notes that in its First PHS, the Respondent elaborated on four reasons regarding why ISDS does not constitute “treatment” for the purposes of the MFN provision of the Treaty. In short: (1) there are at least two instances post-1994 where the UK and Latvia concurrently and simultaneously agreed that dispute resolution issues cannot generally be considered as “treatment” for the purposes of an MFN; (2) there now exists a rule of customary international law pursuant to which dispute

- (2) The Shareholder Claimants are not “in like situations” or “in like circumstances” to those allegedly receiving more favorable treatment.<sup>151</sup>
- (3) Article 11 applies only regarding more favorable rules that benefit Latvian or UK nationals, but the Claimants invoke rules stemming from extra-EU BITs that apply to non-EU nationals (i.e. having EU law apply as ‘fact’ to the merits of an investment treaty case) and are simply outside the scope of Article 11.
- (4) Article 11 of the BIT does not allow the exclusion of applicable international law.
- (5) Even if Article 11 of the BIT was found to be a conflict clause, it would not prevail over the principle of primacy of EU law as it concerns only investors.
- (6) Should Article 11 be applicable, it can only be invoked by the Bank and Mr Krastiņš (and not by the Shareholder Claimants).
- (7) Professor Tridimas’ expert report confirms that it is prohibited by EU law to avoid or abuse obligations. This is further supported by CJEU case law,<sup>152</sup> and the rule that EU Member States cannot contract out bilaterally or otherwise of EU law obligations.

301. As to certain arguments raised by the Shareholder Claimants’ in their First Post-Hearing Submissions, Latvia makes some responsive arguments including the following:

- (1) Latvia disagrees that *Middle East Cement v Egypt* applies as a choice-of-rule for the merits of the dispute for reasons previously invoked. Further, the case confirms Latvia’s contention that Article 11 only applies to more favourable rules benefiting the parties to the BIT and that it does not enable the exclusion

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resolution issues are not considered as “treatment” for the purposes of MFN provisions in investment treaties, considering State practice from 75 States; (3) this Tribunal must interpret international law following the evolution of law in time; (4) accepting the Claimants’ argument that EU law can be applied as “fact” through the BIT’s MFN provision found in Article 3 would be contrary to EU law’s “non circumvention” rule. Respondent’s PHS 1, paras. 75-80.

<sup>151</sup> The Tribunal observes that this argument also applied to the BIT’s MFN provision, there being substantial overlap with Latvia’s arguments in respect of that provision and the present one.

<sup>152</sup> CJEU, *Commission of the European Communities v France*, C-270/8, Judgment, 28 January 1986, **RL-00320** (“**Commission v France**”). See for instance *Matteucci*, paras. 19-22; *Commission v Italy*, p. 10; CJEU, *Irène Bogiatzi v Deutscher Luftpool*, C-301/08, 22 October 2009, **RL-00147**, para. 19; *Exportur*, para. 8.

of parts of the applicable law.<sup>153</sup> However, should the Tribunal agree with the Claimants, Latvia says that the EU system provides a more favourable treatment than investment treaty proceedings, both substantively and procedurally.

- (2) The Claimants' view of the "harmonious interpretation" principle would have this Tribunal interpret the BIT as allowing it not to apply EU law. Far from a harmonious result, that would create a direct conflict between the BIT and EU law, which disregards how EU law functions. Systemic integration requires the taking into account of "any relevant rules of international law applicable in the relations between the parties" (VCLT, 31(3)(c)). In order to comply with this principle, which is customary international law,<sup>154</sup> the Tribunal must take into account EU law and the primacy principle.
- (3) Likewise, the Claimants' argument concerning *Addiko v Croatia*, that the absence of an applicable law clause in the Austria-Croatia BIT distinguishes that case from *Achmea*, is wrong. As above, VCLT Article 31(3)(c) requires that EU law be taken into account as international law stemming from the EU Treaties.

### **(3) The MFN Clause: Articles 3 and 11 of the BIT**

#### ***a. Claimants' submissions***

302. The Claimants rely on the MFN clause in the alternative to, or in conjunction with, Article 11 of the BIT, for the purposes of seeking to benefit, in relation to jurisdiction and admissibility issues, from the application of allegedly more favourable forms of Article 11 in other BITs. By the MFN Clause, the Claimants submit, the law applicable to consent to ICSID arbitration in more favourable BITs to which Latvia is a party, which does not include EU law, should apply to Latvia's consent to ICSID arbitration under Article 8 of the BIT.
303. The Claimants submit that, if the Tribunal finds that Article 11 of the BIT does not apply to Article 8, then they rely on other forms of Article 11 in other BITs – South

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<sup>153</sup> Citing *Middle East Cement v Egypt*, para. 87 ("While that provision requires the application of additional provisions of the national law if more favorable for the investor – which the Tribunal does not find to exist in this case -, by argumentum *a contrario* it does not permit application of provisions of national law limiting any claims found by the Tribunal to exist under the BIT.") (emphasis is Latvia's).

<sup>154</sup> *ILC Fragmentation 18 July Report*, RL-00316, para. 14(7).

Korea-Latvia BIT, Armenia-Latvia BIT, Georgia-Latvia BIT, Czech Republic-Latvia BIT, Hungary-Latvia BIT – by application of the Article 3 MFN Clause.

304. Article 11 is a substantive standard, and there are more favourable forms of it in other Latvia treaties, such as Article 10 of the South Korea-Latvia BIT,<sup>155</sup> which is clear that both investments and investors may avail themselves of the more favourable rules.
305. In their Post-Hearing Submissions, the Claimants elaborate on their alleged entitlement, via the MFN Clause, to invoke Article 9(5) of the Armenia-Latvia BIT,<sup>156</sup> for other applicable law provisions between Latvia and a non-EU State. Article 9(5) of the Armenia-Latvia BIT is contended to render international law applicable here to the merits. The Claimants recognise that EU law could also apply as part of Latvian law. However, EU law would only be domestic law, and could not give rise to any “international public policy” concern. Nor could it trump international law (or the underlying investment treaty) under that BIT, even if there was a conflict with EU law.<sup>157</sup>
306. The Claimants assert that the MFN Clause expressly applies to Article 8 of the BIT, and, therefore, to jurisdiction and admissibility.<sup>158</sup> By the MFN Clause, the law applicable to the consent to ICSID arbitration in more favourable BITs should apply to Latvia’s consent to ICSID arbitration under Article 8 of the BIT.<sup>159</sup> This is not using the MFN Clause to create consent, say the Claimants. The consent exists in Article 8. The MFN Clause extends to Article 8 and is relied on to invoke a more favourable form of Article 11.

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<sup>155</sup> Article 10 states: “Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who own investments in the territory of the other Contracting Party from taking advantage of whichever rules are more favourable to his case.” Agreement between the Government of the Republic of Korea and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments, signed on 23 October 1996, **CL-228**.

<sup>156</sup> Article 9(5) states: “The arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of the Contracting Party, which is a party to the dispute, provisions of this Agreement, as well as applicable rules of international law.” Agreement between the Government of the Republic of Latvia and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments, 7 October 2005, **CL-231**. The Shareholder Claimants also in their PHS 1 at fn. 41 invoke Art. 9(5) of Agreement between the Government of the Republic of Latvia and the Government of Georgia for the Promotion and Reciprocal Protection of Investments, 5 October 2005, **CL-232**.

<sup>157</sup> Citing *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986, **CL-287**, para. 22.

<sup>158</sup> Citing *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction on the Respondent Objection to Jurisdiction *Ratione Voluntatis* (English), 26 July 2016, **CL-223**, para. 102. See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, **CL-69**, paras. 167 and 168.

<sup>159</sup> The Claimants rely by MFN to the same form of provision as Article 16 ECT which has been dispositive in cases: e.g. *Eskosol*.

307. The Claimants also invoke Article 3 of the BIT to rely on the rules chosen to govern the merits of an investment claim under the Canada-Latvia BIT. They assert that Latvia has, through its own *express* reliance on the Canada-Latvia BIT in its Memorial on the Bifurcated Objection, recognised that, by operation of the MFN clause, Article XIII(7) of the Canada-Latvia BIT is incorporated into the BIT.<sup>160</sup> According to the Claimants, the legal position here is uncontroversial,<sup>161</sup> and should be common ground (although it is not). Further, it is said to be beyond doubt that EU law is not part of international law as between Canada and Latvia, irrespective of whether EU law constitutes international law *as between* EU Member States (which is denied). Accordingly, it is contended, if the Tribunal finds that the choice of rules applicable to the merits under the BIT (read with the ICSID Convention) include EU law, Article XIII(7) of the Canada-Latvia BIT is invoked as the proper choice-of-rules provision for the purposes of Article 42 of the ICSID Convention, on the basis of Article 3 of the BIT. Article XIII(7) provides more favourable treatment to the Claimants and their investments than that which Latvia affords to UK nationals, UK companies and their investments under the BIT, as it excludes the applicability of EU law to the merits of an investment claim.
308. According to the Claimants, while Latvia tries to argue that MFN clauses do not apply to applicable law clauses, “[t]hat is precisely the effect [of] the MFN Clauses - they allow investors to have their disputes resolved on the basis of rules other than the rules expressly or impliedly stipulated in the underlying investment treaty.”<sup>162</sup> Moreover:

- (1) Contrary to Latvia’s arguments, there is no new rule of “customary international law” pursuant to which the MFN Clause would not apply to “dispute resolution issues”.<sup>163</sup> This runs contrary to the BIT’s express language: per Article 3(3), the MFN Clause “shall apply to the provisions of Articles 1 to 11 of this Agreement”, which includes the BIT’s Article 8 dispute settlement mechanism.

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<sup>160</sup> Article XIII(7) states: “A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, 5 May 2009, **RL-00187**.

<sup>161</sup> Citing the Respondent’s Memorial on the Bifurcated Issue dated 17 May 2019, para. 386 (“in addition to the obvious provision on free transfer of capital found in the Latvia-UK BIT, the BIT also has specific disciplines on the free transfer of goods and services, as well as the admission of physical persons, which are incorporated [from] the Canada-Latvia BIT by way of the Latvia-UK BIT’s most-favoured nation provision.”)

<sup>162</sup> SC PHS 2, p. 4.

<sup>163</sup> Cf Respondent’s PHS 1, para. 74-78.

- (2) Tribunals have recognised that express stipulations such as this must be given effect in interpreting the MFN Clause.<sup>164</sup>
- (3) Even if there was a general customary rule on how MFN Clauses should be interpreted (*quod non*), deviation of the rule by the BIT should be given effect.
- (4) The Claimants reject that the question of the applicable law is a “dispute settlement issue” as the rules applicable to the merits is a substantive issue.
- (5) There is no “circumvention” of EU law in the MFN Clause. The MFN Clause secures *consistency* with EU law, as it allows the resolution of investment disputes without rendering EU law part of the applicable law.
- (6) The MFN Clause enables the dispute to be determined by the standards of other extra-EU investment treaties which are, on Latvia’s admission, consistent with EU law and contain “sufficient safeguards.” Latvia fails to explain why the BIT cannot be interpreted so as to ensure consistency with the *CETA Opinion*. It plainly can, say the Claimants.

***b. Respondent’s submissions***

309. The Respondent’s position in relation to Article 3 and Article 11 of the BIT is that nothing in the BIT, whether Article 3 or 11, supports a conclusion that this Tribunal has jurisdiction. *Achmea* cannot be avoided.
310. The Respondent says further that it is understood among states that “treatment” provisions cannot be used to import dispute resolution rights, as that is a substantive issue. In support of its argument, Latvia cites the terms of CETA, Article 8.7(4) on MFN.<sup>165</sup> The CETA provision overrides the “for the avoidance of doubt” provision in Article 3(3) of the BIT, which applies the MFN clause to *inter alia* Article 8.<sup>166</sup> Latvia

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<sup>164</sup> *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction on the Respondent Objection to Jurisdiction *Ratione Voluntatis* (English), 26 July 2016, **CL-223**, para. 102.

<sup>165</sup> Referring to CETA Article 8.7(4) on MFN, which was negotiated with both Latvia and the UK as EU Member States and, it is submitted, should reflect the intent or practice of those states with respect to what treatment in an MFN means (“***For greater certainty***”).

<sup>166</sup> In arriving at this construction, Latvia says that, consistent with Article 31 of the VCLT, it factors in the text of Article 8, context, object and purpose, and, pursuant to Article 31(3)(c), other relevant international law. The latter includes *Achmea* which is a source of international law. The end result is that there is no consent in December 2017. Latvia says that if the Tribunal deems *Achmea* to be irrelevant, or does not want to apply it, that is one thing, however, *Achmea* is relevant and when taking it into account under Article 31(3)(c) of the VCLT, the Tribunal must at least acknowledge the existence of a collision between EU law and the Treaty. In terms of factoring in Latvia and the UK’s “intention” regarding the arbitration clause, the

contends that it became the position of the UK and Latvia when the CETA provision was drafted that treatment in an MFN clause does not include dispute resolution procedures. This is what the words “[f]or greater certainty” mean in the CETA provision.

311. It is Latvia’s position that Article 8 of the BIT is precluded under EU law because there is no consent, and one cannot use MFN to bring in dispute resolution. Even if the Tribunal accepted that the MFN Clause could bring in dispute resolution, the Tribunal cannot use MFN to create dispute resolution with an investor. “You cannot create consent in the absence of consent”.<sup>167</sup>
312. The “treatment” referred to does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.
313. Latvia criticises the Claimants’ position on the MFN Clause as an attempt to try to circumvent the fundamental principle that states have to consent to jurisdiction.<sup>168</sup>
314. During the Hearing, Arbitrator Townsend asked Latvia’s counsel whether the commencement date to assess the UK’s and Latvia’s intention in interpreting the MFN clause in the context of Article 31 of the VCLT, should commence as at the date the BIT was signed (1994). Mr Savoie said no, arguing that, as a matter of intertemporal law, it is proper to look at the intention of the parties generally, not being fixed in time. There was no consent perfected in December 2017, as is clear given Latvia’s trajectory towards accession commencing in 1992 and given the international law which bound the UK and Latvia.<sup>169</sup>

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*15 January 2019 Declaration* should be factored in as an agreement of the parties on the interpretation and application of the Treaty under Article 31(3)(a). It shows what they believe should happen as a matter of law, that all intra-EU BITs are captured by the CJEU’s findings, and, to the extent an order of priority is needed, EU Member State obligations supersede those of the Treaty.

<sup>167</sup> Hearing, Day 2, 113:15-16.

<sup>168</sup> See *Ravil*. Latvia also refers to *Commission v France*, which is relied on to assert that if there is a rule which says “this is EU law”, one cannot contract around it as the MFN clause purports to do.

<sup>169</sup> Hearing, Day 2, 114:22 - 123:14.

315. Insofar as the Claimants argue that by way of the BIT's MFN Clause, Article XIII(7) of the Canada-Latvia BIT is incorporated into the BIT (which provides that a tribunal should decide issues with regard to "applicable rules of international law"), or that other treaties are similarly incorporated, Latvia makes the following responsive submissions:

- (1) Latvia denies that the Canada-Latvia BIT could benefit the Claimants via the MFN Clause or otherwise, as that BIT was terminated by CETA.<sup>170</sup> Latvia explains that it only referred to the Canada-Latvia BIT in its Memorial on the Bifurcated Objection to illustrate that, at the time of Latvia's accession to the EU, both the substantive and procedural protections available in the BIT and the EU Treaties covered the same issues, and that issues such as trade in goods and services as reflected by performance requirement provisions, can, in principle, be within a BIT's subject matter.
- (2) Even if the Canada-Latvia BIT was relevant for MFN purposes, and its provisions could be incorporated into the BIT, EU law would still apply to this case since the Canada-Latvia BIT requires application of all "applicable rules of international law." It is thus not limited to the applicable international law rules between Canada and Latvia. Indeed, as between the Claimants and the Respondent, "applicable rules of international law" include EU law.
- (3) The BIT's MFN provisions cannot circumvent the application of EU law. It is not possible for EU Member States to enter into *inter se* agreements that contract out of EU law.<sup>171</sup> The incompatibility of an intra-EU BIT with EU law cannot be cured. This is only possible for extra-EU BITs given Article 351 of the TFEU. In the intra-EU context, any incompatibility with EU law means the offending norm is automatically precluded from application.<sup>172</sup>

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<sup>170</sup> CETA, **RL-00107**, Article 30.8(1), Annex 30-A

<sup>171</sup> See for instance *Commission v France*, **RL-00320**, para. 26; Third Tridimas Report, paras. 45-48; Hearing, Day 1, 110:8-110:17; *Matteuci*, paras. 19-22; *Commission v Italy*, p. 10; CJEU, *Irène Bogiatzi v Deutscher Luftpool*, C-301/08, 22 October 2009, **RL-00147**, para. 19; *Exportur*, para. 8.

<sup>172</sup> *Commission v Italy*, p. 10; CJEU, *Attorney General v Burgoa*, Case 812/79, Judgment, 14 October 1980, **CL-147** or **TT-0068** ("**Burgoa**"), para. 6; CJEU, *Conegade Ltd. V. HM Customs & Excise*, Case 121/85, Judgment, 11 March 1986, **RL-00311**, para. 25; CJEU, *Ministère public v. Gérard Deserbais*, Judgment, 22 September 1988, No. 286/86, **RL-00146**, para. 18; *Matteuci*, paras. 19-22; *Exportur*, para. 8; CJEU (First Instance), *Independent Television Publications Ltd v. Commission of the European Communities*, Case T-76/89, Judgment, 10 July 1981, **RL-00213**, paras. 75-76; CJEU, *Radio Telefís Éireann (RTE) v. Commission*, Joined Cases C-241-42/91, Judgment, 6 April 1995, **RL-00312**, para. 84; **TT-0028**, para. 37; CJEU, *Commission of the European Communities v. Republic of Austria*, Case 147/03, Judgment, 7 July 2005, **RL-00214**, para. 58; *Budějovický Budvar*, paras. 97-98; CJEU, *Irène Bogiatzi v Deutscher Luftpool*, C-301/08, 22 October 2009, **RL-00147**, paras.

(4) While the Shareholder Claimants also argue that through Article 3 of the BIT, they can “invoke other applicable law provisions between Latvia and non-EU States, which equally provide for the application of international law as between Latvia and non-EU States,” they only refer (in their Post-Hearing Submissions) to Article 9(5) of the Latvia-Armenia BIT and Article 9(5) of the Latvia-Georgia BIT. As with the Canada-Latvia BIT, those treaties’ applicable law clauses refer to “applicable rules of international law” (not to applicable international law as between the parties to that BIT). As such, to the extent that “applicable rules of international law” was to be transposed to the BIT, it would include EU law.

316. Further, the Latvia-Armenia and Latvia-Georgia BITs, in Article 9(5) of each treaty, include the “national laws and regulations of the Contracting Party” as part of the applicable law. Hence, if the provisions on applicable law were incorporated *in toto* into the BIT by way of Article 3, EU law, as a law that is incorporated into Latvian law, would have to be taken into account by the Tribunal, as it arose in *Achmea*.

## **I. THE STATUS OF CJEU DECISIONS**

### **(1) Introduction - Articles 267 and 344 of the TFEU and 2, 4(3) and 19 of the TEU**

317. The Respondent relies on CJEU decisions as being sources of EU law under Article 19 of the TEU and Article 267 of the TFEU. Specifically, it relies on *Achmea* and the *CETA Opinion 1/17*.

318. Latvia submits that the result of the conflict between the BIT and the autonomy of EU law stemming from Articles 267 and 344 of the TFEU as authoritatively interpreted by the CJEU in *Achmea* and *Opinion 1/17* as part of international law applicable to the BIT, is that this Tribunal has no jurisdiction and the claims are inadmissible. Alternatively, Latvia invokes Article 5 of the VCLT. The effect of these authorities is that much of the BIT, specifically Article 8, is precluded.

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17-20; CJEU, *Commission of the European Communities v. Luxembourg*, Case C-473/93, Judgement of 2 July 1996, **RL-00149**, para. 40; Third Tridimas Report, paras. 54-58.

319. In contrast, the Claimants: put forward an expert opinion that *Achmea* was wrongly decided;<sup>173</sup> that distinguishes the two cases; that asserts they are inapplicable because EU law will not be interpreted but relied on as fact; that rejects the relevance of Article 5 of the VCLT; that contests the retroactive effect of the CJEU decisions; and that says that *Achmea* should no longer be applicable because the BIT is no longer an intra-EU BIT.

## (2) Preclusion

### a. Respondent's submissions

320. Latvia's position based on *Achmea* is that at least Article 8 of the BIT, as an investor-state arbitration clause in an intra-EU BIT, has been precluded since Latvia acceded to the EU on 1 May 2004.<sup>174</sup> The basis of the preclusion is that Articles 267 and 344 of the TFEU must be interpreted in light of the principles of mutual trust, sincere cooperation<sup>175</sup> and judicial protection found in Articles 2, 4(3) and 19 of the TEU. The Respondent says that CJEU judgments are sources of EU law under Article 19 of the TEU and Article 267 of the TFEU.

321. The Respondent's position based on *Opinion 1/17*<sup>176</sup> is that the incompatibilities between EU law and the BIT are more wide-ranging than that which can be established from *Achmea* alone. Taken together, *Achmea* and *Opinion 1/17* establish that essentially all provisions of the BIT are incompatible with EU law.

322. There is an incompatibility between the BIT and EU law in that Article 8 requires this Tribunal to "interpret or indeed to apply" EU law,<sup>177</sup> namely, a large number of directives in respect of EU banking law.<sup>178</sup> This conflicts with the autonomy of EU law.

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<sup>173</sup> See e.g. Hearing, Day 1, 185:1 - 186:5; 190:3-6; 205:19-21 (Lord Neuberger); see also Second Neuberger Report, para. 53ff; First Neuberger Report, para. 31ff; see also Claimants' Rejoinder, para. 122, citing Second Neuberger Report, paras. 46-49.

<sup>174</sup> *Achmea*, paras. 58-59

<sup>175</sup> Citing *Achmea*, para 60. The principle of mutual trust and sincere cooperation is also reflected in the *15 January 2019 Declaration*, **R-00256**.

<sup>176</sup> *Opinion 1/17*.

<sup>177</sup> *Achmea*, para. 42

<sup>178</sup> See, e.g., FCMC Regulation No 199 on the Internal Capital and Liquidity Adequacy Assessment Process, 29 November 2016, **VK-0002**; Credit Institution Law, 1 March 2018, **R-0007**; Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, 26 June 2013, **CL-26**; Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, 26 June 2013, **R-0008**; Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP), European Central Bank, No

323. Latvia submits that for an “incompatibility” to arise between EU law and the BIT, there is no need for “actual conflict.” The “potential” undermining of the effectiveness of EU law is sufficient.<sup>179</sup> As per *Achmea*: the fact that a tribunal “*may* be called on to interpret or indeed to apply EU law” is sufficient.<sup>180</sup> In this case, unlike in *Achmea*, the risk of actual conflict is submitted to not only be possible, but actual, considering that this dispute concerns banking law.
324. This Tribunal is not a court/tribunal of a Member State and cannot make a preliminary reference to the CJEU. Nor is its award subject to control by a court or tribunal that could make such a reference. As such, there would be no opportunity for the EU legal system to correct any error of the Tribunal, which undermines the full effectiveness of EU law.
325. Latvia further submits that *Opinion 1/17* confirms that the BIT’s substantive provisions, which include Article 8,<sup>181</sup> are incompatible with, and precluded by, EU law. Article 8 is incompatible with EU law, according to Latvia, as it does not contain important safeguards to the autonomy of EU law. In contrast, CETA’s Chapter 8 has several provisions ensuring that, while EU law may be taken into consideration as a fact, it is not applicable law and cannot be interpreted or applied as such.<sup>182</sup>
326. Latvia submits that Article 8 of the BIT is incompatible with EU law on the same basis as Article 8 of the Slovakia-Netherlands BIT, because of the absence of the availability to the Tribunal of the preliminary ruling procedure in Article 267 of the TFEU.
327. The Respondent contends that the arbitration clause in this case, which only provides for ICSID arbitration, is *more incompatible* with EU law than the arbitration clause in *Achmea*, which allowed for a limited review of the award before an EU court. Even that

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EBA/GL/2014/13 (the EBA Guidelines), 19 December 2014, **VK-0023**. See also detailed list at Respondent’s Reply on the Bifurcated Objection, at paras. 71-72.

<sup>179</sup> See CJEU, *Commission of the European Communities v. Republic of Austria*, Case C-205/06, Judgment, 3 March 2009, **TT-0070**; CJEU, *Commission of the European Communities v. Kingdom of Sweden*, Case C-249/06, 3 March 2009, **TT-0071**; CJEU, *Commission of the European Communities v. Republic of Finland*, Case C-118/07, Judgment, 10 September 2009, **TT-0075**.

<sup>180</sup> *Achmea*, paras. 42, 59.

<sup>181</sup> It refers to Articles 2-6, 8, 9, 11 and 14 least.

<sup>182</sup> Contrast provisions regarding the choice of the respondent, allowing the EU to be respondent in circumstances where EU measures are at issue is a further protection to the autonomy of EU law (CETA, **RL-00107**, Article 8.21; CJEU, *Opinion 1/17*, para. 140); the existence of appeals on questions of law and fact (which could include issues of EU law) (CETA, **RL-00107**, Article 8.28; CJEU, *Opinion 1/17*, paras. 195-198.); and the possibility for the CETA Joint Committee to adopt further interpretations of the Investment Chapter as such interpretations require the consent of the EU (CETA, **RL-00107**, Article 8.31; CJEU, *Opinion 1/17*, paras. 232-235).

limited review was deemed insufficient by the CJEU to adequately protect the autonomy of EU law. The CJEU still held there that the investor-state tribunal was not a “court” in the EU for the purpose of the EU Treaties.<sup>183</sup> It was material, says Latvia, that it was impossible to request a preliminary ruling under Article 267 of the TFEU.<sup>184</sup> Here, the ICSID tribunal is further removed from the EU legal order than an UNCITRAL tribunal seated in Frankfurt, Germany.

328. The Respondent also invokes Article 19 of the TEU to argue that the Claimants benefit from the right to effective legal protection under that Article, being able to pursue their claim subject to the control of the CJEU (as confirmed by the Declaration).<sup>185</sup> The Respondent says that under EU law, the CJEU is vested with the exclusive prerogative to offer authoritative interpretations of EU law. As enabled by Article 5 of the VCLT, the EU Treaties clearly establish this right of the CJEU in Article 19 of the TEU. It is submitted that the protection of this exclusive right of the CJEU to offer such interpretations of EU law lies at the core of the principle of autonomy of EU law, which must be respected as a matter of international law, not only because Article 5 of the VCLT allows the EU to do so, but also because it represents the clear will of EU Member States. Latvia submits that the CJEU, as final and binding interpreter of EU law pursuant to its powers granted under Article 19 of the TEU, has developed the principles of primacy and autonomy which are clearly “rules of the organization [the EU]” on treaty law.

329. Latvia submits that investment treaty tribunals including *Vattenfall* have held that primary and secondary EU law, as interpreted by the CJEU, is international law. If the EU law is not a source of international law proper, it is part of relevant international law relating the Treaty’s interpretation.<sup>186</sup> The EU Treaties take precedence over international obligations of the Member States amongst themselves, such as the Treaty. This is consistent with CJEU case law, Article 19 TEU, and the primacy principle as

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<sup>183</sup> *Achmea*, para. 49.

<sup>184</sup> *Achmea*, para. 49.

<sup>185</sup> On this point, the Respondent cites the *15 January 2019 Declaration* in support which itself cites the Judgment in *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, Judgment, 27 February 2018, paras. 31 to 37. Regarding the CJEU, Article 19 of the TEU provides: “1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”

<sup>186</sup> *Vattenfall*, paras. 141, 148 (“Since the ECJ is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties (see Article 19 TEU and Article 267 TFEU), the Tribunal considers the ECJ Judgment’s interpretation of the EU Treaties likewise to constitute a part of the relevant international law.”).

recognised in the Declarations, in addition to Declaration 17 to the Lisbon Treaty in 2007.

- 330. The EU Treaties take precedence over international obligations of the Member States amongst themselves, such as the BIT. This is consistent with CJEU case law, Article 19 of the TEU, and Declaration 17 to the Lisbon Treaty of 2007.
- 331. Latvia submits that the Declaration should also be taken into account under Article 31(3)(a)-(b) of the VCLT, as an agreement on the interpretation of the BIT by the UK and Latvia, or their subsequent practice in its application establishing their agreement regarding its interpretation.
- 332. Latvia contends that the Declaration confirms that the UK and Latvia accept the consequences of *Achmea*, namely that the provision of a bilateral agreement between two Member States that is incompatible with EU law is inapplicable and precluded.

***b. Claimants' submissions***

- 333. The Claimants reject the Respondent's arguments, in various respects.
- 334. The Claimants do not accept that the consequence of consent having been given in breach of EU law (which they deny) is that the Tribunal lacks jurisdiction. *Achmea* does not convey that that is the consequence. The Claimants rely for their argument on the following opinion of Lord Neuberger:<sup>187</sup>

In particular, I do not agree that breach by Latvia (or the UK) of the “rules internal to the EU as an international organization, which govern the relationship between the Member States and the EU as a creature of international law”, such as TFEU Articles 267 and 344, in offering arbitration to the Claimants has the consequence of depriving the Tribunal of jurisdiction under international law. The consequence, if *Achmea* is correct and applies here, seems to be that, by continuing to make its standing offer of arbitration to UK investors in Latvia by Article 8 of the UK-Latvia BIT, Latvia was from its accession to the EU in 2004 in breach of Article 344, and can be held responsible by the EU and its fellow Member States for such breach. But that does not alter the fact that the Tribunal has jurisdiction under the arbitration agreement that Latvia and the Claimants actually made. If, for instance, there had been a treaty between Latvia and another country which included a provision that Latvia would

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<sup>187</sup> Second Neuberger Report, para. 32.

not agree to arbitrate investor claims, that would be an international arrangement binding on Latvia, but it could not invalidate the present arbitration agreement, even though the agreement would be a violation by Latvia of the treaty with the other country. I do not see why the fact that Latvia has made such a Treaty with the UK, of which the Claimants are nationals, along with 27 other countries should justify a different result.

335. Further, the Claimants insist that the alleged “incompatibilities” between EU law and the BIT are of the Respondent’s own making. Latvia could have notified other ICSID Contracting States that it does not consent to ICSID arbitration for certain classes of disputes under Article 25(4) of the ICSID Convention (such as e.g. banking disputes), but it has not done so. Latvia could also have insisted on the exhaustion of local remedies as a precondition of recourse to ICSID arbitration, under Article 26 of the ICSID Convention. This would have allowed a “judicial dialogue” between its domestic courts and the CJEU pursuant to Article 267 of the TFEU. Yet it has not done so. The fact that Latvia has not made use, *even today*, of these provisions of the ICSID Convention corroborates that its consent to ICSID arbitration in the BIT remained intact upon its accession to the EU.
336. The Claimants submit that, even if *Achmea* stood for the preclusion of the application of the BIT “as a matter of EU law”, that would not evidence that the application of the BIT is precluded as a matter of *public international law*. It is perfectly possible, say the Claimants, as is recognised in the jurisprudence of the CJEU, that EU law precludes the application of a legal instrument whereas public international law simultaneously mandates its application.<sup>188</sup> *Achmea* does not deprive investors of the rights derived from the BIT under international law.
337. The Claimants clarify their position and confirm that they do not say that Article 11 of the BIT prevents “preclusion” of Article 8 of the BIT for the *purposes of EU law* (the issue in *Achmea*). The Claimants’ argument is that, notwithstanding any preclusion, Article 8 of the BIT remains applicable for the purposes of Article 25 of the ICSID Convention and general international law. The Claimants emphasise that this issue was not contemplated by the CJEU in *Achmea*, and the issue has to be decided here.

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<sup>188</sup> See e.g. CJEU, C-402/05 P - *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, 16 January 2008, **ST-15**, para. 21; *Eskosol* para. 182; *Vattenfall*, para. 20; German Federal Court of Justice, Order, 31 October 2018, **R-00212A**, para. 67.

338. Further, if the applicable law in this case (*cf* Article 8 of the Slovakia-Netherlands BIT) under the Respondent’s reasoning is Article 31(3)(c) of the VCLT or Article 42 of the ICSID Convention, then it is those provisions that are precluded, and not the BIT.
339. The Claimants reject Latvia’s reliance on the Declaration. They cite Professor Tridimas’ expert report<sup>189</sup> for the purposes of arguing that the Declaration cannot add anything to the *Achmea* judgment, since Member States are not competent to provide conclusive interpretations of EU law notwithstanding what may be purported or how they intend to apply *Achmea* ‘in the future.’ The prerogative to issue authoritative interpretations of EU law is conferred on the CJEU.<sup>190</sup> The Declaration is a self-serving and irrelevant expression of the Respondent’s views (even if shared by the UK) and nothing more.

### **(3) Autonomy**

#### ***a. Respondent’s submissions***

340. Flowing from *Achmea*, Latvia submits that there is an incompatibility between the autonomy of EU law and Article 8 of the BIT, as Article 8 would require this Tribunal to “interpret and apply” a large number of resolutions and directives, particularly as implemented in respect of EU banking law.
341. *Opinion 1/17* on the compatibility of the CETA’s investment chapter with EU law recalls that the autonomy of EU law will be sufficiently protected in circumstances set out at paragraph 119 of the *Opinion*.<sup>191</sup> Factoring in *Opinion 1/17*, Latvia asserts that there are certain additional conflicts presented by the BIT and the autonomy of EU law.
342. One such conflict is that essentially the entire *BIT* (as an intra-EU BIT) is in conflict with the autonomy of EU law. As the CJEU said in *Opinion 1/17*,<sup>192</sup> EU Member States, or the EU, can conclude investment protection treaties, but there need to be adequate substantive safeguards to protect the autonomy of EU law. According to Latvia, referring to *Opinion 1/17*, the CETA has the following safeguards which were held sufficient: general exceptions (para. 152), the right to regulate is confirmed (para. 154),

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<sup>189</sup> Second Tridimas Report, para. 268.

<sup>190</sup> Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, **RL-00123**, Article 43, Protocol 3 (exhibit pages 173-174) (“If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.”).

<sup>191</sup> *Opinion 1/17*, para. 119.

<sup>192</sup> *Opinion 1/17*.

there is an obligation not to lower standards (para. 155), there is an annex on indirect expropriation (para. 157) and fair and equitable treatment being exhaustively defined (para. 158). There are no such substantive safeguards in the BIT. In their absence, the BIT's substantive provisions are incompatible with, and precluded by, EU law. Further, whereas Article 8 (and Article 9) of the BIT is incompatible with EU law for failing to contain important safeguards to the autonomy of EU law, CETA's Chapter 8 has several provisions ensuring that while EU law may be taken into consideration as a fact, it is not applicable law, and cannot be interpreted or applied as such.<sup>193</sup>

343. The Respondent submits that a further conflict is raised in *Opinion 1/17*, namely, a threat to the autonomy of EU institutions specifically (or balance of institutional power within the EU), here the ECB as joint supervisor, and the BIT does not ensure that that risk is sufficiently protected.<sup>194</sup>
344. The FCMC has requested, because of *inter alia* this ICSID proceeding, a change of supervision. The Respondent says that it is clear that this proceeding has had an effect on the institutional power balance within the EU system.
345. The Respondent highlights that Advocate General Wathelet in *Achmea* recognised that an intra-EU BIT arbitration under the ICSID Convention would threaten the autonomy of EU law.<sup>195</sup> Latvia contends that the incompatibility of an intra-EU BIT with EU law will be more important in an ICSID arbitration than an UNCITRAL one, as ICSID proceedings have no connection to domestic courts, which prevents any request to the CJEU for a preliminary ruling, even on annulment.
346. During the Hearing, Arbitrator Townsend asked Latvia's counsel whether *Opinion 1/17* would make the ICSID Convention incompatible with EU law. The Response of Latvia's counsel was "no,"<sup>196</sup> because CETA allows for claims to be submitted under the ICSID Convention and Rules as well as the ICSID Additional Facility Rules and

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<sup>193</sup> Contrast provisions regarding the choice of the respondent, allowing the EU to be respondent in circumstances where EU measures are at issue is a further protection to the autonomy of EU law (CETA, **RL-00107**, Article 8.21; CJEU, *Opinion 1/17*, para. 140); the existence of appeals on questions of law and fact (which could include issues of EU law) (CETA, **RL-00107**, Article 8.28; CJEU, *Opinion 1/17*, paras. 195-198); and the possibility for the CETA Joint Committee to adopt further interpretations of the Investment Chapter as such interpretations require the consent of the EU (CETA, **RL-00107**, Article 8.31; CJEU, *Opinion 1/17*, paras. 232-235).

<sup>194</sup> *Opinion 1/17*, referring to *Opinion 1/09*, para. 125.

<sup>195</sup> *Opinion of Advocate General Wathelet*, 19 September 2017, Case C-284/16, *Slowakische Republik v. Achmea BV*, **CL-152**, para. 253.

<sup>196</sup> Hearing, Day 2, 98:16ff.

the UNCITRAL Rules. The CJEU in *Opinion 1/17* must have considered the issue. Moreover, *Achmea* never ruled that the UNCITRAL Rules were incompatible with EU law. Nor can the ICSID Rules be incompatible with EU law in and of themselves, since another instrument of consent is needed, be it a contract, an investment treaty or investment law.

**b. Claimants' submissions**

347. The Claimants maintain that the principle of autonomy of the EU legal order, which Latvia identifies as the principle allegedly infringed by its offer to arbitrate this dispute in accordance with the ICSID Convention, is not a conflict rule of public international law. *Achmea* does not support the existence of such a rule.<sup>197</sup> The principle of autonomy is a principle of the *constitutional* system of the EU. This is also said to be confirmed by the *CETA Opinion*.<sup>198</sup>
348. The Claimants assert through authorities including *Kadi* and *Eskosol*, that while the EU legal order is of a transnational dimension,<sup>199</sup> and while the EU has primacy over the national laws of EU Member States, it does not prevail over independent rules of international law.<sup>200</sup>
349. The Claimants note Latvia's reliance on the *CETA Opinion*,<sup>201</sup> which Latvia cites for the purposes of arguing that safeguards for the substantive interpretation of investment treaty provisions are necessary to preserve the autonomy of EU law.
350. However, even if the CJEU's findings in the *CETA Opinion* applied to treaties concluded by Member States, it would still not follow that the powers conferred upon this Tribunal are precluded by EU law. This Tribunal derives its existence and its powers from the Instruments of Consent.

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<sup>197</sup> The Claimants argue that *Achmea* suggests the opposite, namely, that an *inter se* international agreement between two Member States might apply irrespective of whether they are contrary to EU law.

<sup>198</sup> *Opinion 1/17*, paras. 109, 118.

<sup>199</sup> Citing CJEU, C-402/05 P - *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, 16 January 2008, **ST-15**, para. 21.

<sup>200</sup> *Eskosol*, para. 182.

<sup>201</sup> The Claimants highlight Latvia's reliance on CJEU, *Opinion 1/17*, para. 150 ("If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.") (emphasis is Claimants').

#### **(4) International Organisations - Article 5 of the VCLT**

##### ***a. Respondent's submissions***

351. Latvia emphasises the following words from Article 5 of the VCLT in its submissions:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

352. Latvia invokes Article 5 of the VCLT, which it says reflects general international law,<sup>202</sup> for the purposes of confirming the legitimacy and superiority of “rules of the organization” i.e. the EU, which include CJEU judgments interpreting the EU Treaties.

353. Article 5 of the VCLT establishes that the relevant EU rules will apply, to the exclusion of the other VCLT rules where there is a conflict, to treaties that constitute an international organisation or rules that are adopted within an international organisation. Article 5 of the VCLT applies “without prejudice” to any relevant organisational treaty rules, including the “primacy principle”, which extends to *inter-se* international agreements between EU Member States. The CJEU’s role is to interpret and apply EU law in the relationship between Member States and their nationals.<sup>203</sup>

354. Accordingly, it is contended, when examining whether there was a valid offer to arbitrate from Latvia that could be accepted by the Claimants under Article 8 of the BIT, the Tribunal must interpret and apply EU law which is the *lex superior* in comparison to the BIT. Article 31(3)(c) of the VCLT requires the Tribunal to take into account the EU Treaties and EU law, while Article 5 of the VCLT confirms that relevant rules of the law of treaties supersede the other VCLT rules whether as a matter of interpretation, application or conflict.

##### ***b. Claimants' submissions***

355. The Claimants reject Latvia’s arguments on the basis that the BIT and the ICSID Convention are not constituent EU instruments, nor were they adopted within the EU.

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<sup>202</sup> See Respondent’s Reply on the Bifurcated Objection, para. 30.

<sup>203</sup> See also Article 19 of the TEU and Article 267 of the TFEU.

356. The BIT was adopted outside the EU, at a time when only one party was a Member State. Indeed, each of the Instruments of Consent predates Latvia's accession to the EU, and the EU had no role in their conclusion.
357. Citing Professor Talmon's reports and material therein, the Claimants argue that a treaty qualifies as being adopted within the EU when it is adopted "by an organ of the organisation," not when it is adopted just by two Member States.<sup>204</sup> Further, the relevant rules of the organisation apply and take precedence over the general rules of the VCLT "only within the self-contained legal order of the international organization."<sup>205</sup>
358. The Claimants submit that the ICSID Convention is not a constituent instrument of the EU. It is of the ICSID.
359. Likewise, the BIT is not a treaty enacted within the EU as an international organisation. Instead, it is a treaty that can be construed as being enacted within the context of the ICSID, as a result of the reference to ICSID dispute settlement.

**(5) The Authority of *Achmea* and *Opinion 1/17***

360. As the Tribunal has noted above, the Claimants assert that *Achmea* and *Opinion 1/17*, even if accepted as applicable law, do not result in depriving the Tribunal of jurisdiction under the BIT on the basis of the answers for which they contend to the following four questions:

*a. Is Achmea Distinguishable?*

*b. Is Opinion 1/17 Distinguishable?*

*c. Will the Tribunal Interpret EU Law or Apply it as Fact?*

*d. Do Achmea and Opinion 1/17 Apply Retroactively?*

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<sup>204</sup> First Talmon Report, paras. 40, 42; Second Talmon Report, para. 5.

<sup>205</sup> First Talmon Report, para. 41.

*a. Is Achmea Distinguishable?*

(i) *Claimants' Submissions*

361. The Claimants' position is that the Instruments of Consent and this arbitration are clearly distinguishable from *Achmea* on at least three grounds.
362. First, and, critically, the Slovakia-Netherlands BIT provided for arbitration under the UNCITRAL Rules, whereas this Tribunal is constituted under the ICSID Convention. A Tribunal constituted under the UNCITRAL Rules will be anchored in, and derive its existence from, the domestic legal system of its seat; its *lex arbitri* will be domestic law. This Tribunal is not subject to any domestic legal systems and derives its existence from public international law.<sup>206</sup>
363. Secondly, *Achmea* is applicable law-specific. Unlike the Slovakia-Netherlands BIT, the BIT does not contain an analogous applicable law provision, thus the rationale of *Achmea* does not apply<sup>207</sup> While Latvia says that EU law is applicable under Article 42 of the ICSID Convention or Article 31(3)(c) of the VCLT, the law applicable to this dispute is the BIT (Articles 11 and/or 3), not EU law. Further, EU law does not contain any rules on the jurisdiction of ICSID tribunals. In addition, if Latvia was correct that Articles 42 of the ICSID Convention and Article 31(3)(c) of the VCLT were applicable law provisions so as to render EU law applicable to the merits and *Achmea* applicable to the BIT, then those Articles, not the BIT, would be contrary to and “precluded” by EU law.
364. *Achmea* did not address any provisions of the relevant BIT other than the dispute resolution clause. It does not impose an obligation on this Tribunal to decline jurisdiction which pertains to a different BIT under the self-contained ICSID Convention, which is delocalised from EU law,<sup>208</sup> and in circumstances where this Tribunal is not called upon to apply EU law to the merits. Further, applying *Achmea* to disrupt the carefully crafted arrangement under the multilateral ICSID Convention would impact upon the rights of third contracting states under the ICSID Convention.<sup>209</sup>

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<sup>206</sup> Similarly to the *Cube Infrastructure* Tribunal: see *Cube Infrastructure*, para. 144

<sup>207</sup> In this regard, the Claimants note that the *Strabag* tribunal did not need to consider whether, in light of the absence of an applicable law provision, Article 8 of the Austria-Poland BIT is a provision “such as” Article 8 of the Slovakia-Netherlands BIT.

<sup>208</sup> See e.g. *Cube Infrastructure*, paras. 144-146.

<sup>209</sup> Cf *Vattenfall*, paras. 155-156; *Eskosol*, para. 125; see also *UP and C.D v Hungary Award*.

365. Even if *Achmea* stood for the preclusion of the application of the BIT “as a matter of EU law”, that would still not evidence that the application of the BIT is precluded as a matter of public international law.<sup>210</sup> Nothing in *Achmea* conveys that any rule or principle stated therein would be a rule or principle of public international law.<sup>211</sup>
366. The Claimants submit that *Achmea* does not demonstrate the existence of a conflict rule of public international law. The *Achmea* award was annulled by the *Bundesgerichtshof* on German law grounds, not on public international law grounds.<sup>212</sup> The principle of autonomy of the EU legal order, which Latvia identifies as the principle allegedly infringed by its offer to arbitrate this dispute in accordance with the ICSID Convention, is not a conflict rule of public international law. The *Bundesgerichtshof* also held that the *Achmea* judgment “does not constitute a general rule of international law.”<sup>213</sup>
367. At most, say the Claimants, *Achmea* supports the proposition that Member States and their courts have a duty, for the purposes of EU law, *not to continue to apply* inter-State agreements that are contrary to EU law. Such a duty, if it existed, and if it applied *mutatis mutandis* to the BIT, does not apply to this Tribunal. It does not follow from *Achmea* that agreements that *have actually been applied*, despite being “precluded”, would not be “applicable” for the purposes of public international law.
368. Thirdly, in their Fourth Post Hearing Submissions, the Claimants emphasised that the BIT is no longer an intra-EU BIT, thus any comparison to *Achmea* is inapposite. If Article 8 of the BIT is “suspended”, as Latvia contends, then it should be “revived” as the alleged incompatibility is resolved.<sup>214</sup>

#### (ii) Respondent’s Submissions

369. In *Achmea* the CJEU held that an investor-state arbitration clause found in an intra-EU BIT “such as” the one found in Article 8(6) of the Slovakia-Netherlands BIT was incompatible with the principle of autonomy of EU law as well as with the principle of loyal and sincere cooperation between EU Member States.<sup>215</sup> Latvia contends that

<sup>210</sup> See Talmon Report, paras 53-56. Neuberger Report, para. 9. CJEU, C-402/05 P - *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, 16 January 2008, **ST-15**, para. 21 (emphasis added). *Eskosol*, para. 182

<sup>211</sup> See also *Vattenfall*, para. 20.

<sup>212</sup> German Federal Court of Justice *Slowakische Republik v. Achmea*, Order, 31 October 2018, **R-00212A**, para. 27, referring to the applicable provision of the German Civil Procedure (*Zivilprozessordnung*).

<sup>213</sup> German Federal Court of Justice *Slowakische Republik v. Achmea*, Order, 31 October 2018, **R-00212A**, para. 67

<sup>214</sup> SC PHS 4, pp. 4-5.

<sup>215</sup> *Achmea*, paras. 58, 60.

because Article 8 of the BIT is a provision “such as” Article 8(6) of the Slovakia-Netherlands BIT,<sup>216</sup> it is precluded on the basis of *Achmea*.

370. In *Achmea*, the CJEU found an incompatibility between Article 8 of the Slovakia-Netherlands BIT and the autonomy of EU law, because the applicable law provision in the BIT required the tribunal to rule based on “the law,” “taking into account” both “the law in force in the Contracting Party concerned” (Slovakian law) and “the provisions of this Agreement, and other relevant Agreements between the Contracting Parties.”<sup>217</sup> For the CJEU, a tribunal constituted under the Slovakia-Netherlands BIT would be required to interpret and/or apply EU law on this “twofold basis”.<sup>218</sup>
371. The Respondent contends that in this case, the second aspect of such “twofold basis” (“other relevant Agreements between the Parties”) is applicable because Article 31(3)(c) of the VCLT requires exactly the same,<sup>219</sup> i.e., to take into account relevant rules of international law applicable in the relationship between the UK and Latvia, including “Agreements” in force between the UK and Latvia such as the EU Treaties. Accordingly, Article 8 of the BIT is incompatible with EU law on the same basis as Article 8 of the Slovakia-Netherlands BIT, because of the absence of the availability to the arbitral Tribunal of the preliminary ruling procedure found in Article 267 of the TFEU.
372. In the Respondent’s view, the fact that this case is an ICSID arbitration is not a distinguishing factor which justifies a finding that Article 8 of the BIT is not precluded by EU law. To the contrary, that Article 8 of the BIT only allows for ICSID arbitration renders Article 8 *more incompatible* with EU law than Article 8 of the Slovakia-Netherlands BIT. While the latter allowed for limited review of the award before an EU court, such review was deemed insufficient by the CJEU in *Achmea* to adequately protect the autonomy of EU law. The investor-state tribunal there was still held to not be a “court” in the EU for the purpose of the EU Treaties.<sup>220</sup> It was material in *Achmea* that it was impossible to request a preliminary ruling under Article 267 of the TFEU.<sup>221</sup>

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<sup>216</sup> *Achmea*, para. 60.

<sup>217</sup> *Achmea*, para. 6.

<sup>218</sup> *Achmea*, paras. 41-42. See also *Eskosol*, 7 May 2019, **RL-00189**, para. 175.

<sup>219</sup> VCLT, **RL-00023**, Article 31(3)(c) (“There shall be taken into account, together with the context: ...Any relevant rules of international law applicable in the relations between the parties.”).

<sup>220</sup> *Achmea*, para. 49.

<sup>221</sup> *Achmea*, para. 49.

Here, the ICSID tribunal is further removed from the EU legal order than an UNCITRAL tribunal seated in Frankfurt, Germany.

373. The Respondent submits that this case cannot be distinguished from *Achmea* on the basis that Article 8 of the BIT has no applicable law clause. For an incompatibility to arise between EU law and the BIT, actual conflict is not necessary, only the *potential* undermining of the effectiveness of EU law is necessary.<sup>222</sup> Since this is an EU banking dispute, Article 8 of the BIT is incompatible with the autonomy of EU law in the same fashion as there was an incompatibility in *Achmea*.

374. Latvia states that the Declaration confirms that the UK and Latvia accept the consequences of *Achmea*, namely that the provision of a bilateral agreement between two Member States that is incompatible with EU law is precluded and thus inapplicable.

***b. Is Opinion 1/17 Distinguishable?***

***(i) Claimants' Submissions***

375. The Claimants submit that the CJEU in the *CETA Opinion* was making pronouncements on the consequences of international agreements concluded by the *Union*, not by Member States.

376. According to the Claimants, the *CETA Opinion* does not apply to ICSID Tribunals notwithstanding Latvia's assertions to the contrary. Latvia says that in the *CETA Opinion*, "the CJEU held that safeguards for the substantive interpretation of investment treaty provisions are necessary to preserve the autonomy of EU law", and that "[t]he threat to the autonomy of EU law will exist where interpretations of the EU and its Member States' international obligations risk forcing Member States to change conduct that was otherwise compatible with EU law and the investment treaty provisions". In support of this contention, Latvia cites the following finding of the CJEU:<sup>223</sup>

If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made

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<sup>222</sup> *Achmea*, para. 42.

<sup>223</sup> Referring to CJEU, *Opinion 1/17*, para. 150; Respondent's Memorial on the Bifurcated Objection, para. 398 (emphasis added).

by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.

377. In response, the Claimants say that the underlined words above clarify that the CJEU made pronouncements on the consequences of international agreements concluded by the *Union*, not by the Member States. Even if the CJEU's findings apply to treaties concluded by Member States, it would still not follow that the powers conferred on this Tribunal are precluded under EU law. The Tribunal derives its existence from the Instruments of Consent. Its powers, express or implied, stem from the Instruments of Consent. Similarly, Member States' obligations to enforce ICSID awards, and to comply with recommendations for provisional measures by ICSID Tribunals, are based on the ICSID Convention. Latvia's obligations to that effect are owed to *all* ICSID Contracting States and to ICSID *itself*. They squarely fall under Article 351 of the TFEU.<sup>224</sup>
378. The Claimants reject the suggestion that their claims threaten or can alter the autonomy of EU institutions. This arbitration has not interfered with the ECB's conduct, nor with the FCMC's conduct. To the contrary, the ECB's and FCMC's conduct resulted in the Bank's operations being suspended.
379. In so far as Latvia argues that this Tribunal can "threaten" or alter the autonomy of EU institutions in reliance on the *CETA Opinion*, the Claimants reject this. The *CETA Opinion* is authority that tribunals outside the EU legal order cannot make awards that might prevent EU institutions from operating in accordance with the EU constitutional framework. The CJEU confirmed this in opining on the compatibility of the ISDS mechanism of the CETA.<sup>225</sup>

On the other hand, since those Tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU

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<sup>224</sup> The Claimants rely on Third Tridimas Report, para. 52 ("Article 351(1) seeks to ensure that international law obligations undertaken by the Member States *vis-à-vis* third countries before they acceded to the EU remain valid under EU law."). The Claimants submit that Latvia's agreement to confer express and implied powers on ICSID Tribunals constitutes such an obligation which is preserved by Article 351 of the TFEU even for the purposes of EU law.

<sup>225</sup> *Opinion 1/17*, para. 118.

institutions from operating in accordance with the EU constitutional framework.

380. It is the Claimants' submission that this statement applies *mutatis mutandis* to the present Tribunal. Unlike the Tribunal in *Achmea*, this Tribunal stands outside the EU judicial system. This Tribunal's award will not be issued under any domestic law, and it will not prevent any EU institution from operating in accordance with the EU constitutional framework.
381. The Claimants submit that even if the Tribunal considers that Article 11 of the BIT is insufficient to render EU law inapplicable, Article 8 of the Canada-Latvia BIT, for instance, is availing, since that Article provides that "[a] tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law".<sup>226</sup> As Latvia itself confirms, the Canada-Latvia BIT "would not allow for the interpretation or application of EU law."<sup>227</sup>

(ii) *Respondent's Submissions*

382. Latvia asserts that it stems from *Opinion 1/17* that the autonomy of EU institutions, such as the ECB, within their competences, cannot be threatened or altered by investment treaty tribunals. The facts of this case clearly establish an incompatibility between the BIT and EU law. *Opinion 1/17* holds that there will be a threat to the autonomy of EU law where:<sup>228</sup>

the envisaged ISDS mechanism ... does not structure the powers of [investment treaty] tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.

383. According to Latvia, there will be such a threat in any investment treaty claim in the banking sector concerning Eurozone banks, as such banks are jointly supervised by the national supervisor and the ECB under the SSM Regulation and SSM Framework

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<sup>226</sup> For the avoidance of any doubt, the Claimants note that their reliance on the Canada-Latvia BIT is residual, and is relevant only in the event the Tribunal rejects their reliance upon the South Korea-Latvia BIT, the Armenia-Latvia BIT and the Georgia-Latvia BIT in the context of the law applicable to jurisdiction and the admissibility of their claims.

<sup>227</sup> Respondent's Memorial on the Bifurcated Objection, para. 55.

<sup>228</sup> *Opinion 1/17*, para. 119.

Regulation,<sup>229</sup> and a claim regarding such banks may change the allocation of powers between the national supervisor and the ECB. The Respondent submits that the change of the Bank's supervisor in the middle of the present proceedings crystallized such a threat.

384. The Respondent elaborates that an award on the merits in this case would very likely prevent EU institutions, notably the CJEU, from operating within the EU's constitutional framework. That is because a number of questions at issue are likely to be directly within the CJEU's jurisdiction itself. There is also no explicit limit to what remedy the Tribunal may order,<sup>230</sup> while in CETA's investment chapter, the powers of the investment court are limited to granting compensation.<sup>231</sup>
385. Moreover, there is a much greater risk here that, without guidance on the interpretation of 'fair and equitable treatment,' an annex on 'indirect expropriation' and general exceptions applicable to all obligations, the BIT will be interpreted in a manner more threatening for the autonomy of EU law than CETA's investment protections.

***c. Will the Tribunal Interpret EU Law or Apply it as Fact?***

***(i) Claimants' Submissions***

386. The Claimants submit that to the extent that EU law is relevant it can only be relevant as fact. However, a consideration of EU law as fact does not render the BIT incompatible with EU law, as confirmed by the *CETA Opinion*. The *CETA Opinion* confirms that consideration of EU law as fact does not engage *Achmea*.<sup>232</sup> Nor will it breach Article 344 of the TFEU, as confirmed in *Eskosol*.<sup>233</sup>
387. As stated earlier, nor is there inconsistency, say the Claimants, when, for example, the ECHR does not decline jurisdiction when adjudicating claims against EU Member States, notwithstanding the "primacy" of EU law.

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<sup>229</sup> Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework cooperation within the single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, **CL-76**, Article 3(1).

<sup>230</sup> **CL-1**, Article 8. To the contrary, see CETA, **RL-00107**, Article 8.39.

<sup>231</sup> **CL-1**, Article 8. To the contrary, see CETA, **RL-00107**, Article 8.39. See also CJEU, *Opinion 1/17*, paras. 144-147.

<sup>232</sup> *Opinion 1/17*, paras. 130-132. In the *CETA Opinion*, the CJEU confirmed the compatibility of the CETA dispute settlement mechanism with the EU legal order, notwithstanding that a dispute settlement body under CETA might be confronted with issues of domestic law and EU law as relevant factual issues. Opinion of Advocate General Bot dated 29 January 2019, CJEU, *Opinion 1/17*, 29 January 2019, **CL-156**, paras. 120-136.

<sup>233</sup> *Eskosol*, para. 123.

388. The *CETA Opinion* is authority for the proposition that, if the Tribunal has to consider EU law as fact in this case, then that will not render the BIT incompatible with EU law.<sup>234</sup> A consideration of EU law norms as relevant facts, as opposed to applicable law, does not engage *Achmea*.
389. A consideration by this Tribunal of EU law as fact, relevant to considering whether there have been violations of the public international law standards in the BIT, also does not breach Article 344 of the TFEU, as confirmed in *Eskosol*.<sup>235</sup>

(ii) *Respondent's Submissions*

390. Latvia's argument is that EU law applies to the merits in this case. It is directly applicable to banking. In its Memorial and Reply on the Bifurcated Objection, the Respondent set out a detailed list of EU law which it says may have to be interpreted or applied to the merits in this case. The Respondent asserts that EU law may also arise in respect of corruption allegations.
391. The Respondent highlights that while the Claimants allege various breaches of the BIT, the underlying situation nevertheless concerns mostly the FCMC's regulation of the Bank. To examine the merits of the case, the Tribunal will have to interpret and apply at least a number of EU Regulations and EU directives, Latvian law implementing the EU directives, and the EU SSM Regulation and ECB SSM Framework Regulation.<sup>236</sup> The banking factor leads to the conclusion that the Tribunal has no jurisdiction and that the claim is inadmissible.
392. The Respondent emphasises that it has a duty of loyal and sincere cooperation to react to certain criminal offences. Article 83(1) of the TFEU empowers the EU to adopt directives providing minimum harmonisation for serious crimes, including corruption. The 1997 Convention on fighting corruption involving officials of the EU or officials of Member States as well as the 2003 Framework Decision on combating corruption in

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<sup>234</sup> CJEU, *Opinion I/17*, 30 Apr. 2019, **TT-0060**, paras. 130-132.

<sup>235</sup> *Eskosol*, para. 123.

<sup>236</sup> See, e.g., FCMC Regulation No 199 on the Internal Capital and Liquidity Adequacy Assessment Process, 29 November 2016, **VK-0002**; Credit Institution Law, 1 March 2018, **R-0007**; Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, 26 June 2013, **CL-26**; Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, 26 June 2013, **R-0008**; Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP), European Central Bank, No EBA/GL/2014/13 (the EBA Guidelines), 19 December 2014, **VK-0023**.

the private sector, which aims at criminalising both active and passive bribery, could also have a bearing on this case.

***d. Do Achmea and Opinion 1/17 Apply Retroactively?***

***(i) Claimants' submissions***

393. In opening submissions at the Hearing, counsel for the Claimants, Dr Sinclair, submitted that the Claimants, through their lodgement of the RFA on 14 December 2017, accepted Latvia's standing offer of arbitration which had never been withdrawn or suspended up until that time. At that point in time, he contended, "consent to ICSID arbitration had been perfected".<sup>237</sup>
394. Nevertheless, Latvia seeks to assert that its consent was somehow retrospectively "precluded," and precluded when Latvia joined the EU in 2004 by virtue of the judgment in *Achmea*. Latvia's argument was said to be "based on a legal fiction."<sup>238</sup> In the Claimants' submission:<sup>239</sup>

The Vienna Convention does not allow a state to invoke a legal fiction, the declaratory retroactive theory of law, in order to declare that consent previously given is no longer valid, especially in the context of an ongoing litigation proceeding.

395. The Claimants' submission is that EU law principles cannot be invoked to defeat consent to arbitration because this Tribunal derives its existence from Article 8 of the BIT and Article 25 of the ICSID Convention,<sup>240</sup> not from the legal orders of the UK, Latvia or the EU. The declaratory approach is inconsistent with Article 25(1), which prevents the unilateral withdrawal of consent to ICSID arbitration.<sup>241</sup>
396. The Claimants maintain that pursuant to Article 69(2) of the VCLT, even if EU law applied to Article 8 of the BIT, as Latvia asserts, to declare Article 8 invalid would not deprive the Tribunal of jurisdiction. Pursuant to Article 69(2) of the VCLT, where acts

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<sup>237</sup> Hearing, Day 1, 62:19-20.

<sup>238</sup> Hearing, Day 1, 60:11 - 60: 25.

<sup>239</sup> Hearing, Day 1, 66: 18-23.

<sup>240</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, **CL-34**, paras. 68-70.

<sup>241</sup> Hearing, Day 2, 172:19-25.

have been performed in reliance on a treaty in good faith before the invalidity was invoked, they are not considered unlawful simply because of the treaty's invalidity.<sup>242</sup>

397. The Claimants also invoked Article 42 of the VCLT which provides:

(1) The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

(2) The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or the present Convention. The same rule applies to suspension of the operation of a treaty.

398. In opening submissions, counsel for the Claimants submitted, in the context of Latvia's reliance on the proposition that the BIT or relevant provisions thereof were only suspended, not terminated, that:

Article 42 of the Vienna Convention confirms that Latvia's consent to be bound by the treaty may be impeached only through the application of the Vienna Convention itself and whether it withdrew such consent must also be assessed under the Vienna Convention Rules. Latvia's consent ...has not been impeached or withdrawn or *suspended* in accordance with the standards and procedures that must be followed in the Vienna Convention....<sup>243</sup>

399. Counsel for the Claimants also asked rhetorically: "How can a right be suspended with retroactive effect?"<sup>244</sup>

400. The Claimants emphasise that the alleged lack of consent was not manifest in the text of the BIT, nor was it apparent in the contemporaneous conduct of the EU and Member States.

401. In this regard, the *Eskosol* tribunal indicated that it was not until the *Achmea* decision at the earliest, that it could have been said that investors were placed on notice about the risks of relying upon Member States' apparent consent in BITs.<sup>245</sup>

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<sup>242</sup> Hearing, Day 1, 67:2-19.

<sup>243</sup> Hearing, Day 1, 65-66 (emphasis added).

<sup>244</sup> Hearing, Day 1, 61:23-24.

<sup>245</sup> *Eskosol*, para. 206.

402. The Claimants contend that the “rules of EU law” cannot deprive UK nationals and companies of their direct rights under the BIT and the ICSID Convention citing for instance *Wirtgen* at paragraphs 254-256.<sup>246</sup> The Claimants note that international law does not condone the deprivation of an individual’s acquired rights.<sup>247</sup> They also rely on *Burgoa* (which Latvia also relies on) for the proposition that rights conferred on individuals are not affected by the EU law rules on pre-existing international agreements.<sup>248</sup>

403. According to the Claimants, from Latvia’s accession to the EU in 2004, until after this dispute commenced, at no time did it indicate that it regarded Article 8 of the BIT as incompatible with EU law. Nor did it seek an EU court opinion on the matter.

404. On the contrary, Latvia consented to arbitration in Article 8 of the BIT, and that consent was relied on by the Claimants as perfected by the Notice of Arbitration. Under Article 25 of the ICSID Convention, “no party may withdraw its consent unilaterally.” Counsel for the Claimants submitted:

Article 25(1)...excludes the retroactive application of any later effort by any means, by judicial, by executive, by legislative, or by treaty means to withdraw that consent.”<sup>249</sup>

405. Further Article 26 of the ICSID Convention provides that the parties’ consent to ICSID arbitration shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. The Claimants contend that this rule imposes an obligation on all contracting parties to the ICSID Convention to decline jurisdiction once an ICSID arbitration has been commenced.<sup>250</sup> Moreover, invoking *Achmea* to disrupt this arrangement would impact the rights of many other Contracting States under the ICSID Convention.<sup>251</sup>

406. With respect to the Declaration, the Claimants contend that it cannot extinguish Latvia’s consent to ICSID arbitration. They rely on the expert report of Professor

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<sup>246</sup> See e.g. *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs. Gisela Wirtgen and JSW Solar (zwei), GmbH & Co. KG v. Czech Republic*, UNCITRAL, PCA Case No. 2014-03, Award, 11 October 2017, **RL-00081** or **CL-146** (“*Wirtgen*”), paras. 254-256.

<sup>247</sup> See e.g. *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/15, Award, 29 July 2008, **CL-15**, para. 335. See also Hearing, Day 2, 171-172. See also *Eskosol*, para. 226.

<sup>248</sup> See *Burgoa*, para. 10.

<sup>249</sup> Hearing, Day 2, 149:16-20.

<sup>250</sup> Hearing, Day 2, 150:10-12.

<sup>251</sup> Hearing, Day 2, 150:13-17.

Talmon in support of this position,<sup>252</sup> in addition to *Magyar Farming* and *Eskosol*. These matters were referred to above in the Declaration section.

(ii) *Respondent's Submissions*

407. During openings, President Spigelman asked Latvia to consider in closing submissions whether the Tribunal, on a jurisdictional issue, should acknowledge the retrospective effect of the CJEU's judgment in *Achmea* under the various provisions of the VCLT which reflect the general principle against retrospectivity.<sup>253</sup>
408. Mr Savoie responded in closing that the Tribunal should note Professor Tridimas' oral presentation that the CJEU can indicate in a judgment that it does not have retrospective effect, but it did not do so in *Achmea*.<sup>254</sup> The CJEU's interpretation applies through time, he submitted, confirming that Articles 267 and 344 of the TFEU as interpreted in light of Articles 2, 4(3) and 19 of the TEU preclude investor-state arbitration clauses in intra-EU BITs.<sup>255</sup> The Respondent said further that the issue of retroactivity which is raised by Article 28 of the VCLT concerns the application of a treaty before its entry into force. It was contended that this is a different matter to the interpretation issue under consideration.<sup>256</sup>
409. Professor Tridimas' submission was that EU law permits retroactive revocation of consent. At the hearing, Arbitrator Townsend asked him whether the doctrine of primacy of EU law permits retroactive revocation of the standing underlying consent to arbitrate under the ICSID Convention. Professor Tridimas responded as follows:<sup>257</sup>

The answer is...yes, it does... how do we get there? We get there because the obligations that flow for Member States when they act by concluding international agreements between them, these obligations are derived by the EU treaties.

How do we know about them? We know about them when the European Court of Justice interprets those treaties. So it is a matter of interpretation of the treaty. The orthodox view goes, this interpretation is conducted by the European Court of Justice because the Member States have given to it the exclusive power

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<sup>252</sup> First Talmon Report, para. 167, referring to VCLT Article 28.

<sup>253</sup> Hearing, Day 1, 55 - 56.

<sup>254</sup> Hearing, Day 1, 172 - 173.

<sup>255</sup> Hearing, Day 2, 102 - 103.

<sup>256</sup> The Respondent went on to refer to NAFTA practice in support of the idea that interpretation of treaty provisions in time should be considered as confirming/reaffirming treaty obligations.

<sup>257</sup> Hearing, Day 1, 172:11 - 174:15.

to do so under Article 344. The European Court of Justice does not make the law. It tells us what the law -- how the law ought to have been understood since the provision which it interprets came into force. So the judgment applies *ex tunc* and not *ex nunc*.

Now, to alleviate that, the adverse consequences that might be created, the Court of Justice in some cases limits the retroactive effect of its rulings, and it has done so in some cases. So it did in a case, for example, decided back in the 1990s, about pension rights. It came to the conclusion that certain pension rights are covered by the principle of gender equality, and that had enormous economic repercussions because it meant that pension funds had to pay out monies to female workers which were not covered by contributions, and simply there wouldn't be enough money in the kitty.

So what the Court of Justice did was to say the ruling cannot be taken advantage of by anyone who has not brought proceedings before the judgment was delivered. So it is a kind of different form of perspective of the ruling as it could be understood in US law.

The rules that apply on this is that a party to the proceedings -- I was going to say a party to the proceedings must ask for it, but I think I may be wrong, I think the Court of Justice might do that in its own motion in some cases. But the case law states that the court can only do it in the judgment where it delivers, as it were, a novel ruling. It cannot do it subsequently. It cannot come in another judgment and say: my previous judgment will now only apply prospectively. Which begs the question, why did the court not do it in *Achmea*? My view on that is because I don't think *Achmea* is an innovative judgment. I think *Achmea* flows from the previous -- from a long line of cases that go back to 1963, essentially, but which have been developed particularly in the 2000s, going back to the *Opinion 1/91*, that's the first one where the court took issue with alternative dispute resolution systems, so I think what we experience is an incremental development of the case law, but I don't think that the ruling in *Achmea* could be said to be unpredictable.

410. On the question of acquired or vested rights, Latvia rejects the Claimants' invocation of the doctrine.<sup>258</sup> According to the Respondent, the doctrine is inapplicable to the Claimants' present situation since the question of "vested rights" and how such rights

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<sup>258</sup> Latvia notes the doctrine was also invoked by the *Eskosol* (RL-00189, para. 226) and *Addiko v Croatia* tribunals (CL-287 or RL-00419, para. 290).

may be protected by international law arises only after a change of the applicable legal regime, for example through a succession of States or through a change of sovereignty.<sup>259</sup> Here, the intra-EU Objection, as it applies to whether the Claimants could invoke the BIT in December 2017 in respect of an investment made in Latvia in 2013, has nothing to do with the continuity of rights following a change of legal regimes. The change of regime occurred on 1 May 2004, when Latvia acceded to the EU, well before the 2013 investment. This is aside from Latvia's argument that Mr Guselnikov was a Russian national in 2013, becoming a UK national in 2015. Further, Latvia asserts that there is no universal rule of international law preventing the *ex tunc* applications of law,<sup>260</sup> which is consistent with the EU law rule that incompatible *inter se* agreements between Member States become incompatible as of the time that all relevant States become Member States. Latvia also cites a 2017 study to argue that there is no general or regional rule regarding respect for acquired rights.<sup>261</sup>

411. Latvia also refers to *Addiko v Croatia* for the proposition that the *Addiko* tribunal failed *inter alia* to consider or accept that a preliminary ruling on the interpretation of EU law applies retrospectively as “it clarifies and defines the scope of the rule of EU law in question as it ought to have been understood and applied from the time of its coming into force.”<sup>262</sup> According to Latvia, the text “in force at any given time” in Article 11(2) of the Austria-Croatia BIT,<sup>263</sup> should have been interpreted as meaning EU law (or the *legal acquis* of the EU) in force between Austria and Croatia during the time they are both EU Member States, including the preclusion of rules incompatible with EU law found in *inter se* agreements in force between Austria and Croatia as EU Member

<sup>259</sup> E.g. Pierre A. Lalive, ‘The Doctrine of Acquired Rights,’ in *Rights and Duties of Private Investors Abroad*, 1965, **RL-00441**, pp. 162, 172 (“Doctrine of Acquired Rights in Public International Law: In the Case of Transfer of Sovereignty”); Georges Kaeckenbeeck, ‘La Protection Internationale des Droits Acquis,’ Collected Courses of the Hague Academy of International Law, 1937, **RL-00442**, paras. 22-36 (French); PCIJ, *German Interests in Polish Upper Silesia Case (Germany v. Poland)*, Judgment, 25 May 1926, Series A, No 7, p. 22, **CL-260**, p. 30; PCIJ, *German Settlers in Poland case*, Advisory Opinion, 10 September 1923, PCIJ, Series B, No. 6, **RL-00443**, p. 36; PCIJ, *The Oscar Chinn case (United Kingdom v. Belgium)*, Judgment, 12 December 1934, Series A/B, No 63, **RL-00444**, p. 88.

<sup>260</sup> Pierre A. Lalive, ‘The Doctrine of Acquired Rights,’ in *Rights and Duties of Private Investors Abroad*, 1965, **RL-00441**, p. 156.

<sup>261</sup> Antonio Fernandez Tomas and Diego Lopez Garrido, ‘The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and UK citizens living in the EU-27’, April 2017, **R-00386**, p. 21.

<sup>262</sup> Tridimas First Report, para. 82; Tridimas Second Report, paras. 284, 295; Tridimas Third Report, para. 140 (“Judgments delivered by the ECJ interpret the EU Treaties as they ought to have been understood from the time of their coming into force. They apply *ex tunc* and not *ex nunc* unless the ECJ itself limits the retroactive effect of its judgment. The ECJ did not limit the retroactive effect of its ruling in *Achmea*”).

<sup>263</sup> Cited in Respondent's PHB, para. 178: “The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.”

States. Latvia concludes that the *Addiko* tribunal's interpretation was thus contrary to the law applicable to the Austria-Croatia BIT.

412. In oral submissions, Latvia highlighted that the Claimants advanced several arguments in relation to certain VCLT provisions which concern the validity of a treaty (the BIT).<sup>264</sup> Latvia opted not to put forward arguments about the validity of the BIT.

#### **(6) Lex Posterior - Articles 59(2), 30, and 65(1) of the VCLT**

##### ***a. Respondent's submissions***

413. The Respondent submits that if the Tribunal does not decide to apply directly primacy or *Achmea* or EU law, then the Tribunal can find that it is without jurisdiction on the basis of Articles 59 and 30 of the VCLT. Latvia does not assert that the BIT is terminated, only that it is suspended.
414. Latvia cites Article 59(2) of the VCLT for the proposition that the earlier BIT is suspended, because that was the intention of the same parties to it who also concluded a later treaty (EU Treaties) relating to the "same subject matter".<sup>265</sup> The BIT's subject matter is the same as the EU Treaties' since the BIT's protection touches on the free movement of goods, capital, services and labor, while covering not only existing investments but also the right to establishment. Latvia says that the BIT's subject matter is the same as that of the EU Treaties since the BIT is entirely subsumed by EU law regulation of the internal market, through the applicable four freedoms (freedom of movement of goods, services and capital and the freedom of establishment of persons).
415. Latvia also submits that the BIT and the EU Treaties are on the same subject matter, since the BIT was adopted in the context of the 1992 PHARE program for the enlargement of the EU.
416. Latvia asserts that there are incompatibilities with the entire BIT based on *Achmea* and *Opinion 1/17*.<sup>266</sup> The State parties' intention is said to be clear that the BIT has been suspended in operation as proved by the Declaration, which states that in light of *Achmea*, the EU Member States will take steps to terminate intra-EU BITs. Latvia has

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<sup>264</sup> Including Articles 42, 46 and 69 of the VCLT.

<sup>265</sup> Latvia states that the *travaux préparatoires* of the VCLT as well as State practice and opinion of EU Member States (notably of Latvia and the UK) support this interpretation: *15 January 2019 Declaration*, **R-00256**, fn. 1.

<sup>266</sup> In its Memorial, Latvia says that at least Articles 2-6, 8, 9, 11 and 14 of the BIT are incompatible with EU law, and without these provisions, there is essentially nothing left in the Treaty.

also signed the Termination Agreement and the UK is still subject to its ongoing EU law obligations in respect of intra-EU BITs. In any event, the BIT is precluded by EU law from applying.

417. The Respondent emphasises that the criterion of “same subject matter” in Article 59 and Article 30<sup>267</sup> cannot be interpreted too strictly. Otherwise the criterion is unworkable. The Respondent amplifies its argument by stating that the text of “relating to” in the context of Articles 30 and 59 of the VCLT concerns a question of a connection between two or more things, such that a stricter test would not be appropriate.<sup>268</sup>

418. In relation to Article 30 of the VCLT, the Respondent says that there is an incompatibility involving Article 8 of the BIT because of the EU law rule which provides that one cannot respect EU law if one offers to arbitrate an intra-EU dispute. Latvia first cites the *Achmea Arbitral Tribunal* in support of this argument:

More importantly, it is difficult to see how Article 30 could deprive the Tribunal of jurisdiction based upon the Parties’ consent derived from Article 8 of the BIT (whether operating the first stage, second stage or both), even if there may be circumstances in which a true incompatibility between the BIT and EU law arises. Any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.

**The one exception would be if Article 8 of the BIT, which provides for arbitration between the investor and the State, were by itself incompatible with EU law. It could not be incompatible when the BIT was made; but it might be argued that it is incompatible with the CSFR Association Agreement, the Association Agreement, the Accession Treaty or the Lisbon Treaty. If that were so, that would, at least arguably, deprive the Tribunal of jurisdiction.**

There is, however, no rule of EU law that prohibits investor-State arbitration.<sup>269</sup>

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<sup>267</sup> Article 30 concerns the priority between particular provisions of earlier and later treaties relating to the same subject matter.

<sup>268</sup> *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **RL-00073** (“**Achmea Arbitral Tribunal Award on Jurisdiction**”).

<sup>269</sup> *Achmea Arbitral Tribunal Award on Jurisdiction*, paras. 272-274 (emphasis is Latvia’s).

419. The Respondent then refers to the *Achmea* judgment for the rule of EU law which it relies on, namely, that Articles 267 and 344 of the TFEU, interpreted in light of Articles 2, 4(3) and 19 of the TEU, preclude investor-state arbitration clauses in intra-EU BITs.
420. The Respondent asserts that, contrary to the Claimants' arguments that there can be no conflict between the BIT and the CJEU judgments for the purposes of Articles 30 or 59 of the VCLT because CJEU judgments are not "provisions" of an earlier treaty, the *Achmea* judgment and *Opinion 1/17* interpret and apply provisions of the EU Treaties. As such, they are reflective of the provisions of the EU Treaties and derived from international convention law.<sup>270</sup>
421. In so far as the Claimants contend that Latvia's failure to adhere to the required Article 65(1) of the VCLT notification procedure is problematic in this context, the Respondent asserts that the conditions of Article 65(1) of the VCLT are superseded by the agreement of the parties to the BIT as reflected in the Declaration or otherwise fulfilled.

#### ***b. Claimants' submissions***

422. The Claimants reject Latvia's arguments on Articles 59 and 30(3) of the VCLT.
423. Article 59 concerns termination and suspension of a treaty. Suspension is at issue. The Claimants say that Article 59 does not support Latvia's case that Article 8 (or the whole BIT) was suspended because, factoring in the text of Article 59, there is no conflicting later treaty. The EU law "principle of primacy" is not a later treaty.
424. Article 59 is also concerned with a conflicting later treaty as a whole, not a mere particular provision. Contrary to Latvia's position, the BIT and EU law do not govern the same "subject-matter",<sup>271</sup> and, further contrary to Latvia's position, the test of "same subject matter" is to be "strictly" interpreted.<sup>272</sup> The Claimants emphasise that the TFEU concerns the functioning of the European Union, while the BIT concerns the

<sup>270</sup> It is also emphasised that the BIT and EU Treaties are on the same subject matters, notably since the BIT was adopted in the context of the 1992 PHARE program for the enlargement of the EU.

<sup>271</sup> The Claimants cite several cases as to why Articles 59 and 30 do not apply. E.g.: *Marfin*; *Rupert Joseph Binder v. Czech Republic*, UNCITRAL Case, Award on Jurisdiction, 6 June 2007, CHB 5-302 ("**Binder**"); *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, **RL-00074** ("**EURAM v Slovak Republic**"); *WNC Factoring Ltd (United Kingdom) v. Czech Republic*, UNCITRAL, Award, 22 February 2017, **RL-00021** ("**WNC Factoring Ltd**"); *Wirtgen*; *UP and C.D v Hungary*; *United Utilities*.

<sup>272</sup> See e.g. François Dubuisson, 'Article 59 – Convention of 1969', in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties – A Commentary*, Vol. II, OUP 2011, **RL-00218**, p. 1335, para. 25.

protection and promotion of investments.<sup>273</sup> Ultimately, since Latvia has not identified a conflicting, incompatible later treaty as required by Article 59, Article 59 does not support its case.

425. Further, for there to be a suspension under Article 59, once the two conditions of Article 59(1) are met (that all parties to the earlier treaty conclude a later treaty and it relates to the same subject matter), Article 59(2) may apply to suspend the earlier treaty only where there is an *intention* that that treaty is not abrogated but just suspended. Here, the Claimants take issue with any suggestion of an intention to suspend the BIT. The Declarations made no reference to suspending the BITs,<sup>274</sup> and the UK and Latvia cannot retroactively issue authoritative determinations as to whether the BIT and EU law covers the same subject matter in order to modify and amend the BIT.<sup>275</sup> The *Achmea* judgment also does not spell out or prescribe the consequences for any treaty.
426. The Claimants maintain that even if EU law and the BIT govern the same subject matter, the Respondent fails to demonstrate incompatibility for the purposes of Articles 59 and 30 of the VCLT between EU law and the BIT. That is because there will be a conflict only when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.<sup>276</sup> That is not the case here, as any alleged incompatibilities between EU law and the Instruments of Consent can be reconciled by the exclusion of EU law from the law applicable to the merits pursuant to Article 11 and/or Article 3 of the BIT.
427. Moreover, no appropriate action has been taken by Latvia to suspend the BIT in accordance with the notification procedure required by Article 65(1) of the VCLT.
428. Article 30(3) of the VCLT also requires that the later treaty concern the same subject matter and that it conflicts with the earlier treaty. The same problems that befall

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<sup>273</sup> There are said to be substantive and procedural protections in the Treaty that are wider than those afforded by the TFEU and not replicated in EU law: e.g. the right without exhaustion of local remedies to have recourse to ICSID arbitration against a Member State. The Claimants add that the fact the Treaty ‘touches on’ subjects (four freedoms) which might be governed by EU law is not the same as the Treaty governing the *same* subject matter as EU law. The Claimants assert that various awards support the view that the EU treaties and BITs do not relate to the same subject matter: *Binder*, para. 61; *EURAM v Slovak Republic*, para. 61; *Achmea Arbitral Tribunal Award on Jurisdiction*, para. 161; *WNC Factoring Ltd*, para. 298; *Wirtgen*, para. 253.

<sup>274</sup> The Claimants say the contrary is true. The Declarations state that only the investor state dispute settlement provisions are inapplicable. That is not the same as saying all the treaties are suspended.

<sup>275</sup> First Talmon Report, 167; *Eskosol*, para 226.

<sup>276</sup> European Communities - Export Subsidies on Sugar - Complaint by Australia - Report of the Panel, 15 October 2004, CL-237, para. 7.155.

Latvia's arguments in relation to Article 59 are contended to apply to Article 30(3): i.e. Latvia has not identified a later conflicting/incompatible treaty, the primacy principle is not a treaty rule, there is no intention to suspend the BIT, and there is no suspension because the mandatory notification procedure under Article 65 of the VCLT was not followed by Latvia.

429. Even if EU law potentially applied, whether there is an actual incompatibility can only be determined later in the proceedings when the Tribunal has a full and proper appreciation of the nature of the claim and the extent to which the Tribunal might have to interpret and apply EU law.

## **(7) Harmonious Interpretation**

### ***a. Claimants' Submissions***

430. The Claimants submit that, insofar as the BIT's text allows an interpretation which is consistent with other international obligations assumed by Latvia, that interpretation must be followed. Even on Latvia's theory that EU law (and *Achmea*) comprise public international law obligations in conflict with the BIT, Latvia cannot explain why the BIT's correct interpretation should result in a conflict as opposed to avoiding conflict.<sup>277</sup> For the Claimants, the principle guiding the Tribunal's interpretation of the BIT must be that Latvia and the UK, in keeping in force the BIT, intended it to comply with their other obligations under international law. This principle has been articulated as follows:

#### ***a. The ICJ in *Right of Passage*:***

It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.<sup>278</sup>

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<sup>277</sup> SC PHS 2, p. 2.

<sup>278</sup> ICJ, *Case concerning right of passage over Indian territory (Preliminary Objections)*, Judgment, 26 November 1957, ICJ Reports 1957, p. 125 ("**Right of Passage**") CL-286, p. 142.

b. The *Magyar Farming* tribunal:

If apparently conflicting treaty provisions can be interpreted in such a way that they are compatible with each other, this approach is the first to be chosen.<sup>279</sup>

431. The Claimants' argument on harmonious interpretation surfaces in several places in its submissions including:

- (1) EU law is not applicable to merits: The Claimants submit that EU law is not part of the rules applicable to the merits by virtue of the parties' choice of law. Article 11 of the Treaty constitutes the agreement of the UK and Latvia on the scope of the rules applicable to the merits for the purposes of Article 42 of the ICSID Convention. EU law does not apply by virtue of the Claimants' objection to any less favourable EU law being applied to their investments, which is reinforced by the principle of harmonious interpretation. Professor Tridimas' evidence is that the principle of harmonious interpretation is a principle of EU law.<sup>280</sup>

Even if the Tribunal accepts that EU law is part of the applicable international law, and that EU law prevents this Tribunal from proceeding to determine the merits, the question is “whether there is a possible interpretation of the Treaty (and the choice of applicable rules) which allows the Tribunal *not* to apply EU law.”<sup>281</sup>

The Claimants insist that there is no ambiguity and that Article 11 should be given effect. Even if there were ambiguity here, it must be resolved to ensure the harmonious co-existence of the BIT and EU law. Here, that would mean accepting as a matter of principle, or by applying Article 11, that EU law does not form part of the rules applicable to the merits of the dispute.

- (2) No Conflict Between BIT and EU Treaties: Without prejudice to the Claimants' submissions that the BIT does not share the same subject matter as the EU Treaties, the Claimants contend that there is no conflict between the two given the principle of harmonious interpretation and the presumption of compatibility.

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<sup>279</sup> *Magyar Farming*, para. 241.

<sup>280</sup> Hearing, Day 1, 158:3-17.

<sup>281</sup> SC PHS 1, para. 41.

There is a conflict only when two treaty instruments contain obligations which cannot be complied with simultaneously. Here any alleged incompatibility can be reconciled, in particular by accepting the Claimants' submission that EU law does not apply to the merits.<sup>282</sup>

432. Furthermore, citing *Magyar Farming*, the Claimants maintain that:<sup>283</sup>

- (1) the Tribunal must engage in harmonious interpretation unless there is an *outright* conflict between the treaty provisions.
- (2) the treaties are not in conflict, consistent with the view that the *Magyar Farming* tribunal took when it failed to see a conflict between Article 8 of the Hungary-UK BIT and Articles 267 and 344 of the TFEU.
- (3) If the Tribunal decides otherwise, however, the question would be whether it is reasonably within the Tribunal's power to harmoniously interpret the Treaty in a way that it is compatible with EU law.
- (4) If so, the Tribunal must engage in such reconciliatory interpretation under international law and must read the BIT in a manner that it complies with EU law.

***b. Respondent's Submissions***

433. Latvia notes that the Claimants' view of the "harmonious interpretation" principle would have this Tribunal interpret the BIT as allowing it not to apply EU law. Far from a harmonious result, Latvia submits, that that would create a direct conflict between the BIT and EU law, which disregards how EU law functions.

434. Rather than focusing on the principle of "harmonious interpretation" as described by the Claimants, Latvia emphasises the principle of systemic integration.<sup>284</sup> The principle, says Latvia, allows for the harmonious interpretation of international law amongst the orders of different international organizations where this is possible, as well as comity between international jurisdictions. Here, the principle requires the taking into account of "any relevant rules of international law applicable in the relations between the

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<sup>282</sup> Claimants' Rejoinder on the Bifurcated Objection, para. 77.

<sup>283</sup> SC PHS 1, paras. 151-152.

<sup>284</sup> See e.g. Respondent's Reply on Bifurcated Objection, paras. 108-110; Respondent's PHS 2, paras. 88-91.

parties” (VCLT, 31(3)(c))<sup>285</sup>. In order to comply with this principle, which forms part of customary international law,<sup>286</sup> the Tribunal must take into account EU law and the primacy principle.

435. Insofar as the Claimants cite the principle of harmonious interpretation which the *Magyar Farming* tribunal referred to in its award, Latvia asserts that the principle cannot be used to avoid EU law obligations either through their domestic law or through bilateral treaties amongst themselves.
436. Further, harmonious interpretation is only possible if the interpretation of both norms results in possible co-existence. An extra-EU BIT may be interpreted in a manner which is consistent with *Opinion I/17*. This is not possible for intra-EU BITs.<sup>287</sup>
437. In its Third Post-Hearing Submissions, Latvia expands on its rejection of the Claimants’ invocation of the harmonious interpretation principle, focusing on their alleged presumption of compatibility between the BIT and EU law. Latvia submits that even if there existed such a presumption of compatibility, it would be rebutted by a real conflict which exists between the BIT and EU law. In support of this submission, Latvia cites the *Magyar Farming* tribunal<sup>288</sup> and reports of the ILC on Fragmentation of International Law.<sup>289</sup>
438. Latvia asserts that conflict is to be understood broadly, citing jurists who define it as meaning that two treaties cannot be reconciled; even a latent inconsistency will suffice.<sup>290</sup> In the face of a clear conflict, says Latvia, between an intra-EU BIT and the superior, posterior and more special EU law rules:

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<sup>285</sup> See also discussion of systemic integration e.g. in Respondent’s Reply on Bifurcated Issue para 108.

<sup>286</sup> *ILC Fragmentation 18 July Report*, **RL-00316**, para. 14(7).

<sup>287</sup> Respondent’s PHS 2, para. 92.

<sup>288</sup> *Magyar Farming*, paras. 240-241 (“[t]his harmonious interpretation should not be understood as a suggestion to ignore outright conflicts.”).

<sup>289</sup> *ILC Fragmentation Report*, **RL-00154**, para. 42 (“However, although harmonization often provides an acceptable outcome for normative conflict, there is a definite limit to harmonization: ‘it may resolve apparent conflicts; it cannot resolve genuine conflicts.’”); *ILC Fragmentation 18 July Report*, **RL-00316**, para. 42 (“Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.”).

<sup>290</sup> See Christopher J. Borgen, ‘Resolving Treaty Conflicts,’ St John’s Law Scholarship Repository, 2005, **RL-00487**, p. 575. 36 Hersch Lauterpacht, “The Covenant as the ‘Higher Law’” *British Yearbook of International Law*, 1936, **RL-00488**, p. 58. See also Joost Pauwelyn, *Conflict of Norms in International Law: How WTO Law relates to other rules of International Law*, CUP, Excerpt, 2003, **RL-00489**, p. 168. 37 Yearbook of the International Law Commission, Summary Records of the

- (1) harmonious interpretation must yield to the application of conflicts rules; and
- (2) the proposition advanced by the Claimants that insofar as the BIT's text "allows an interpretation which is consistent with other international obligations assumed by Latvia, that interpretation has to be followed" is to be rejected.

439. In Latvia's submission, one cannot view the EU Treaties in a vacuum without considering the EU institutions they create, including the CJEU's role within the EU Treaties and its case law (on *Achmea*, *Opinion 1/17* and primacy to *inter se* agreements), in addition to the Declaration and Termination Agreement. According to Latvia, the intra-EU BIT cannot be consistent with its and the UK's EU law obligations.

## J. EC SUBMISSIONS

440. The EC filed an *Amicus* Brief in the matter dated 5 November 2018. This Brief was summarised in the Decision on Bifurcation of 1 March 2019 at paragraphs 73 to 89. Accordingly, a briefer treatment is appropriate at this time.
441. The EC addresses the issue whether the investor-state arbitration mechanism in the BIT remains available. It also comments briefly on whether there are any related implications of Brexit.
442. According to the EC, judgments of the CJEU contain an authoritative and binding interpretation of the relevant provisions of Union law for all EU Member States and any investor established in those states, as well as the Tribunal. In support of this position, the EC cites *MOX Plant*<sup>291</sup> and *Iron Rhine*.<sup>292</sup>
443. The legal consequence of *Achmea* is said to be that Latvia's offer and the corresponding offer of the UK to investors from the other Contracting Party to enter into investment arbitration has not been valid since 1 May 2004, when Latvia acceded to the EU.

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Sixteenth Session, A/CN.4/SER.A/1964, vol. 1, 11 May-24 July 1964, **RL-00490**, p. 125. See also Christopher J. Borgen, 'Resolving Treaty Conflicts,' St John's Law Scholarship Repository, 2005, **RL-00487**, fn. 12. See also the ICJ, *Oil Platforms case* (Islamic Republic of Iran v. United States of America), Judgment, 6 November 2003, ICJ Reports 2003, **RL-00319**, p. 182, para. 41.

<sup>291</sup> *MOX Plant (Ireland v. United Kingdom)*, PCA Case 2002-01, Order No. 3, 24 June 2003, at paras. 27 and 28.

<sup>292</sup> Award in the Arbitration regarding the Iron Rhine ("*Ijzeren Rijn*") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, Chapter III, in particular at paragraph 103.

444. The EC contends that, contrary to the view taken by the ICSID tribunal in *UP and C.D Holding v Hungary*, *Achmea* is relevant to this proceeding because it stands for the notion that *any* intra-EU investment arbitration is precluded by the general principle of Union law of autonomy, Article 19 of the TEU, and Articles 267 and 344 of the TFEU. In this regard, the differences identified in *UP and C.D Holding* between an UNCITRAL arbitral tribunal with its seat in Germany and an ICSID tribunal<sup>293</sup> are irrelevant.
445. According to the EC, the state parties' ratification of the ICSID Convention does not suffice to establish consent to arbitration here. The legal foundation for the consent is Article 8 of the BIT, and not Article 25 of the ICSID Convention alone.
446. This Tribunal, submits the EC, must assess the existence of valid consent to arbitration under the BIT in order to confirm or decline jurisdiction. That inquiry should lead to the conclusion that consent was never validly given *ab initio*, because the request for arbitration was filed after Latvia's accession to the EU.
447. The conflict in relation to Article 8 of the BIT is said to be self-evident because EU law (*Achmea*) precludes such a clause. Moreover, there are two possible rules on conflict of laws that may apply to the present matter. Both avenues are said to support the same conclusion, namely, the preclusion by EU law.
448. The first conflict avenue is the primacy of EU law as codified in Declaration 17 to the Treaty of Lisbon.<sup>294</sup> EU law is said to have primacy not only over domestic law of Member States, but also international treaties concluded between two Member States. Regarding the latter, Article 351 of the TFEU establishes that EU law takes precedence over international treaties concluded between Member States regardless of whether they were concluded before or after EU accession.<sup>295</sup>
449. Second, and alternatively, the conflict rules of the VCLT (Articles 59 and 30(3) VCLT) are said to also lead to the conclusion that EU law prevails over the BIT.<sup>296</sup> EU law

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<sup>293</sup> *UP and C.D Holding v Hungary Award*, paras. 254 and 255.

<sup>294</sup> See also *Costa v. ENEL*.

<sup>295</sup> See e.g. *Commission v Italy*, p. 1; *Budějovický Budvar*, paras. 97 to 99.

<sup>296</sup> The EC referred to these Articles as "residual" rules compared to the special conflict rule of primacy of EU law. EC *Amicus* Brief, para. 30. See Felipe Paolillo, Commentary on Article 30 VCLT, in: Olivier Corten et Pierre Klein, *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, pp. 1258 to 1259, with further references, in particular to the explanations given by *Waldock* at the Vienna Conference (**Annex EC-12**).

covers the same subject matter as the BIT, thus Article 59 of the VCLT applies to the relationship between EU law and the BIT. Further, Article 30(3) also applies because there is a conflict between an earlier and a later treaty. In this context, the “same subject matter” requirement and “conflict” are one and the same thing.<sup>297</sup> The EC rejected the contrary views on this issue of the *Eastern Sugar* tribunal as being “too narrow.”<sup>298</sup>

450. The EC submitted that Brexit has no implications on the present issues. This is because consent to arbitration had to be present when the arbitration started, i.e. when the request for arbitration was filed. In the EC’s view, there was no valid offer for arbitration from Latvia.
451. Subsequent to the EC’s filing of its *Amicus* brief, the EC later wrote to the Tribunal on 4 May 2019 offering to update its Brief further in light of the Declaration and the issuance of the *CETA Opinion*.
452. After reviewing the parties’ submissions on the EC’s offer, the Tribunal, on 27 May 2019, conveyed to the parties and the EC that since the Declaration and the *CETA Opinion* were already on the record and the subject of comprehensive submissions by Latvia, the Tribunal did not require further assistance from the EC.<sup>299</sup>

#### **K. THE BANK’S SUBMISSIONS**

453. The Administrator of the Bank, Mr Vigo Krastiņš, has filed 5 submissions on behalf of the Bank in connection with the Bifurcated Objection since 12 March 2020.<sup>300</sup>
454. The Bank’s submissions have addressed matters including the awards in *Magyar Farming*, *Addiko v Croatia* and *Strabag*, in addition to the impact of the UK leaving the EU, the Termination Agreement and admissibility.

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<sup>297</sup> Citing the *travaux préparatoires*, the work of the ILC (Fragmentation of international law. Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi. Available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.682>, paras 21 et seq. (Annex EC-16).) and academic writing set out at fn 48 of the *Amicus* Brief.

<sup>298</sup> See EC *Amicus* Brief, paras. 43, 47; see also Nico Basener, Investment Protection in the European Union, 2017, pp. 225 to 256 (Annex EC-11), and *PL Holding v Poland*, SCC Case No. V 2014/163, Award, 28 June 2017, para. 311 (said to correctly identify “incompatibility” as the sole criterion for applying Article 30 VCLT).

<sup>299</sup> Letter from the Secretary of the Tribunal to the Parties copying the EC dated 27 May 2019.

<sup>300</sup> Letters to the Tribunal of 12 March, 9 July, 30 July, 13 August, and 10 September 2020.

455. On 30 July 2020, for the avoidance of doubt, the Bank maintained its submissions made before Mr Krastiņš' appointment as Administrator. It also reiterated out of caution that it accepts Latvia's offer to arbitrate in the matter.<sup>301</sup>

456. In relation to the tribunal awards cited, the Bank has asserted as follows:

- (1) As to *Magyar Farming*, the Bank observed that an ICSID tribunal found that it must assess its own jurisdiction under principles of international law and not exclusively under EU law. In that case, the tribunal assessed whether a conflict existed between the EU treaties and the BIT pursuant to the VCLT. Based on that assessment the tribunal determined that Article 8 of the UK-Hungary BIT (1987) contained a valid offer to arbitrate. The tribunal also found that the Declarations were irrelevant to the jurisdictional question and could not retroactively invalidate or render inapplicable the offer to arbitrate which had been accepted by the Claimants.
- (2) As to *Addiko*, the Bank commented that the tribunal's rejection of Croatia's jurisdictional objection is relevant to the present case. *Addiko* is contended to stand for the proposition that treaties whose applicable law was limited to the terms of the treaties themselves and general principles of international law, are compatible with Articles 267 and 344 of the TFEU according to *Achmea*. The Bank says that the *Addiko* tribunal found support for this reading of *Achmea* in the distinction drawn between the interpretation and application of EU law as part of the applicable law on the one hand, and its consideration as fact on the other. The CJEU reinforced this distinction in *Opinion 1/17*. The *Addiko* tribunal also found that even if, *arguendo*, *Achmea* did not hinge on the applicable law of the BIT, it would not apply to pre-*Achmea* cases, since at that time, any alleged incompatibility of intra-EU BIT arbitration with the TFEU was not manifest (see also Articles 46 and 69 VCLT). The relevant time for determining consent is the date of the registration of the request for arbitration. Finally, *Addiko* was invoked for the notion that the Declarations cannot invalidate the existing consent to arbitrate.

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<sup>301</sup> Letter from the Bank to the Tribunal of 30 July 2020. In its PHS 3 the Respondent said that the Bank "cannot accept an offer which does not exist." Respondent's PHB 3, p. 11.

- (3) *Strabag* is said to stand for the proposition that the EU Treaties, *Achmea* and Declaration cannot “trump over the methods of interpretation” in Article 31(1) of the VCLT or “amend the text of the treaty.” The Bank contends that the ordinary meaning of the text of Article 8 of the Austria-Poland BIT, in light of its context and purpose, left no interpretive doubt for the *Strabag* tribunal. The same interpretation should apply here for Article 8 of the BIT. The Bank also invokes the finding that the conflict provisions in Articles 30(3) and 59(1) of the VCLT did not apply, consistent with investment arbitration case law which has consistently found that the EU Treaties (specifically the TFEU) do not deal with the same subject matter as intra-EU BITs.

457. In respect to the UK leaving the EU, the Bank submits that this has no impact on the availability of the dispute settlement procedure of the BIT. Neither the UK nor Latvia has terminated the BIT, which remains in full force and effect under public international law.
458. Moreover, the BIT is no longer an intra-EU BIT, thus its arbitration clause can no longer be challenged on the ground that it conflicts with the principle of equal treatment. Nor can unlawful discrimination be established under EU law.
459. In relation to the Termination Agreement, the Bank agrees with the Shareholder Claimants that the Termination Agreement does not apply to pending proceedings under the BIT. The BIT has not been terminated.
460. On the question of admissibility, the Bank has endorsed the submissions of the Claimants in their Counter-Memorial and Rejoinder.<sup>302</sup>

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<sup>302</sup> See e.g. Bank’s letter of 30 July 2020.

#### **IV. TRIBUNAL ANALYSIS**

461. The Respondent's Intra-EU Objection raises two distinct, but overlapping, issues. First, a challenge to the jurisdiction of the Tribunal. Secondly, the alleged inadmissibility of the claims sought to be made by the Claimants. As the summary of submissions has shown, many of the grounds advanced by Latvia in support of its objection apply to both aspects of its objection. As will appear below, the Tribunal does not find it necessary to deal with all of the grounds so advanced in order to determine the jurisdictional challenge. As set out below, admissibility was not the subject of the Tribunal's bifurcation order.

##### **A. JURISDICTION**

462. It is common ground that the law applicable to the Tribunal's jurisdiction includes Article 25 of the ICSID Convention, Article 8 of the BIT if the BIT is in force and not suspended, and general international law. Latvia asserts, and the Claimants deny, that the applicable international law includes EU law.

463. It is also common ground that this Tribunal only has jurisdiction if Latvia had consented to refer a dispute such as this to arbitration under Article 25 of the ICSID Convention and Article 8 of the BIT and that consent remained valid after Latvia's accession to the EU.

464. It is further common ground, for purposes of the Bifurcated Objection, that the consent had to be extant at the time Latvia's 'offer' to arbitrate was accepted by the Claimants who, accordingly, added their consent, on 14 December 2017.

465. Thereafter there is little common ground.

466. Chapter II of the ICSID Convention is entitled "Jurisdiction of the Centre". It relevantly provides:

##### **Article 25**

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have

given their consent, no party may withdraw its consent unilaterally.

(2) “National of another Contracting State” means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
  - (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
- (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

#### Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

467. The consent of the State required by Article 25 was contained in Article 8 of the BIT:

- (1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the

Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965<sup>303</sup> any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

- (2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.
- (3) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.
- (4) Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless:
  - (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre, or
  - (b) the other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.

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<sup>303</sup> Treaty Series No25 (1967), Cmnd33255.

468. It is also relevant to note Article 14 of the BIT which provides:

#### Article 14

##### Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

469. The concept of what is or is not “jurisdictional” has long eluded definition. Justice Felix Frankfurter once described the idea of jurisdiction as “a verbal coat of too many colours”.<sup>304</sup> On another occasion he referred to the “morass” into which one can be led by “loose talk about jurisdiction” and concluded that “‘jurisdiction’ competes with ‘right’ as one of the most deceptive legal pitfalls”.<sup>305</sup> The Tribunal will apply the word jurisdiction in the sense of the Tribunal’s authority to consider the claims submitted to it and to rule on them.

470. The critical step in the establishment of the jurisdiction of the Centre, and thus of the Tribunal, is the existence of consent by both parties to a dispute at the time a Request for Arbitration is submitted to the Secretary-General under Article 36 of the Convention.

471. It is conventional to refer to the jurisdictional requirement of consent by the parties to submit a dispute to arbitration in terms of a standing offer by the State, which is accepted by the complainant investor. This contractual metaphor is supported by the reference in the Preamble of the ICSID Convention:

Recognising that mutual consent by the parties to submit such disputes to...arbitration...constitutes a binding agreement.

472. Latvia’s case on jurisdiction turns on the proposition that, under EU law, both the UK and Latvia were precluded from maintaining their consent to arbitration in Article 8 of

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<sup>304</sup> *United States v LA Tucker Truck Lines Inc.*, 344 US 33, 39 (1952).

<sup>305</sup> *City of Yonkers v United States* 320 US 685, 695 (1944).

the BIT, indeed were precluded from maintaining the BIT in force in substantial part, as and from Latvia's accession to the EU on 1 May 2004. Accordingly, Latvia contends, there was no consent to arbitrate by Latvia from that time, with the effect that there was no "offer to arbitrate" when the Claimants purported to accept it.

473. According to Latvia the time from which the apparent consent ceased to constitute an offer to arbitrate was based on the fact that, under EU law, the decision of the CJEU in *Achmea*, which clarified the impact of the EU law on bilateral investment treaties concluded between the EU Member States, took effect retroactively.
474. This Tribunal must commence its analysis with the Instruments of Consent on which the Claimants rely as conferring jurisdiction upon it. The Tribunal accepts the principal contention of the Claimants that, for purposes of the Bifurcated Objection, this Tribunal's jurisdiction turns on whether there was consent by Latvia on the basis of Article 8(1) of the BIT for the purpose of Article 25 of the ICSID Convention, at the time the Claimants added their consent under Article 8(3) of the BIT on 14 December 2017, by filing a Request for Arbitration. The Tribunal notes that in its consideration of the BIT it is bound to apply the relevant provisions of the VCLT which is applicable to the BIT. Latvia acceded to the VCLT on 4 May 1993 while the United Kingdom ratified it on 25 June 1971. According to Article 4 of the VCLT it applies to treaties which are concluded by States after its entry into force with regard to such States. The BIT was signed on 24 January 1994, i.e., subsequently to the entry into force of the VCLT for the United Kingdom and Latvia.
475. The critical words in Article 8 - "hereby consents" - reflect a standing consent. Article 14 expressly provides that the BIT will continue in force until terminated in accordance with its terms. It provides 20 additional years of protection for investments made prior to termination, without prejudice to the rules of general international law.
476. The Tribunal accepts the Claimants' submission<sup>306</sup> that Article 14 defines the period for which Latvia's consent will remain open for an investor to add its consent and thus complete the requirements of Article 25(1).

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<sup>306</sup> Claimants' Rejoinder on the Bifurcated Objection, paras. 59-61.

477. As set out above, Latvia has put forward a number of distinct arguments to support its contention that there was no consent by it at the time the Claimants purported to add their consent. The Tribunal will consider those submissions below.
478. However, the starting point, which Latvia has to overcome, is that the Tribunal’s jurisdiction is based on the provisions of the ICSID Convention and the BIT to which the Tribunal has referred. It is not derived from the legal orders of the EU, or Latvia, or the UK. The ICSID Convention creates a legal order of public international law different from the EU legal order. The extent to which EU law may impinge on the jurisdiction of an ICSID Tribunal turns on the specific mechanisms that Latvia invokes.

## **B. *ACHMEA***

479. Latvia relies principally on the judgments of the CJEU in *Achmea*, as reinforced and extended by the Court in *Opinion 1/17*. Although both these decisions were handed down after 14 December 2017, under EU law they take effect *ex tunc* and represent interpretations of the scope and application of the EU Treaties from the time they came into force with regard to the States concerned. Latvia’s position is supported by the *Amicus* Brief of the European Commission.
480. This Tribunal, as the Claimants submit, is not bound by decisions of the CJEU and does not operate in the same authoritative hierarchy as that Court. However, both the UK and Latvia, at 14 December 2017, were subject to EU law and were bound by the interpretation of the EU Treaties by the CJEU.
481. The Tribunal notes Latvia’s invocation of the decision of the tribunal appointed pursuant to the *UN Convention on the Law of the Sea* (“**UNCLOS**”) in the *MOX Plant*<sup>307</sup> case. Latvia submitted that once the Tribunal has decided that EU law applies and should prevail, this Tribunal should follow the *MOX Plant* tribunal and not hear the claims on the basis of comity with the CJEU.<sup>308</sup> However, there is a fundamental difference between UNCLOS and the ICSID Convention.<sup>309</sup>

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<sup>307</sup> *MOX Plant (Ireland v. The United Kingdom)*, PCA Case 2002-01, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, 24 June 2003, **CL-100** (“**MOX Plant Order No. 3**”).

<sup>308</sup> Respondent’s PHS 2, para. 273.

<sup>309</sup> As pointed out by Professor Talmon, Second Talmon Report, para. 19, and counsel for the Claimants: Hearing, Day 2, 160.

482. Articles 281 and 282 of UNCLOS expressly permit States parties to agree to an alternative form of dispute resolution. This was a critical consideration in the decision in that case, where there was a real possibility of proceedings being instituted in the CJEU, which could hold that it had exclusive jurisdiction to determine the dispute. On the basis of comity, the UNCLOS tribunal determined that it should not proceed but should instead suspend proceedings awaiting “a clearer picture of the position regarding European Community Law and possible proceedings thereunder”.<sup>310</sup>
483. The position under the ICSID Convention is the opposite. Article 26 of the ICSID Convention provides, with effect from the time of acceptance of an offer to arbitrate by a Contracting State: “Consent to arbitration under this Convention shall, unless otherwise stated, be deemed to be consent to such arbitration to the exclusion of any other remedy”.
484. Lord Neuberger expressed the view, contested by Professor Tridimas, that the CJEU decision in *Achmea* was in error. The Tribunal notes that the Claimants, in response to Latvia’s reliance on the Declaration, referred to Article 43 of the TFEU as establishing that only the CJEU can give authoritative interpretations of EU law.<sup>311</sup> Further, Professor Talmon accepted that *Achmea* was correctly decided as being in line with earlier decisions.<sup>312</sup>
485. As a matter of comity, this Tribunal accepts the decisions of the CJEU as the authoritative interpretations of the EU Treaties, as a matter of EU law, for purposes of the issues before it.
486. The Claimants submit that both *Achmea* and *Opinion 1/17* are distinguishable. They rely on the reasoning by a number of investment treaty tribunals which have found that they had jurisdiction to hear claims arising under intra-EU investment treaties

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<sup>310</sup> *MOX Plant Order No. 3*, para. 28. In the event the CJEU found Ireland in breach of EU law for submitting the dispute to the UNCLOS Tribunal. CJEU, *Commission of the European Communities v. Ireland*, Case C-459/03, 30 May 2006, **RL-00110**. Thereafter Ireland notified the Tribunal of the withdrawal of the claim regarding the MOX Plant and the Tribunal accordingly placed on record the withdrawal of the claim and terminated the arbitral proceedings, Order No. 6, 6 June 2008.

<sup>311</sup> Claimants’ Counter-Memorial on the Bifurcated Objection, para. 108, asserting that the prerogative to issue authoritative interpretations of EU law is conferred on the CJEU. TFEU, 26 October 2012, **RL-00123**, Article 43, Protocol 3 (exhibit pages 173-174) (“If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein”).

<sup>312</sup> Transcript Day 2: 60.

notwithstanding those decisions.<sup>313</sup> Some have applied that reasoning after the *CETA Opinion*.<sup>314</sup>

487. As the Claimants point out, there are significant distinguishing features between the facts of this case and those in *Achmea*. There is a fundamental difference between an ICSID arbitration and an arbitration under the UNCITRAL Rules, such as the one at issue in *Achmea*. The *lex arbitri* of the latter is the domestic law of the seat, which in *Achmea* was within the EU, in Germany. The *lex arbitri* of an ICSID arbitration, which has no seat, is international law. Indeed, the ISDS clause considered in *Achmea* also made specific provision that the applicable law included the law in force of the Contracting Party concerned, i.e., Slovakia. As the Claimants submitted, there is no equivalent, express applicable law clause in the UK-Latvia BIT.
488. Article 8 of the Slovakia-Netherlands BIT at issue in *Achmea* has been set out above at paragraph 151.
489. These aspects of *Achmea* give rise to a question as to why the case was a suitable vehicle for determining that the protection of the preliminary ruling procedure to the CJEU was a fundamental aspect of the autonomy of the EU judicial system. It was by such a reference that the case was before the CJEU.
490. Nevertheless, these distinguishing characteristics do not detract from the content of the constitutional principles applied by the CJEU to the specific facts of the case. These were the principle of primacy and the principle of autonomy. The latter principle was determinative with respect to Article 8 of the Slovakia-Netherlands BIT. Both are principles of EU constitutional law.
491. As the CJEU said in *Opinion I/09*, referring to the long-standing principle of primacy:

It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights...The essential characteristics of the European Union legal order thus constituted are in particular its primacy

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<sup>313</sup> See e.g. *Cube Infrastructure*; *UP and C.D v Hungary Award*; *United Utilities*; *Vattenfall*; *Landesbank*; *Eskosol*; *Masdar v Spain*.

<sup>314</sup> See e.g. *Strabag*; *Addiko v Croatia*; *Magyar Farming*; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, **CL-320**.

over the laws of the Member States and the direct effect of a whole series of provisions...<sup>315</sup>

492. The CJEU held in the *CETA Opinion*: “That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it.”<sup>316</sup> Professor Tridimas agreed: “Autonomy must be understood within the above constitutional footprint”.<sup>317</sup> These comments reflect the dual character of EU law discussed above.
493. Further, in both *Achmea* and the *CETA Opinion*, the CJEU held that an infringement of autonomy would occur when there was the mere possibility that a tribunal would interpret and apply EU law.<sup>318</sup> This approach also manifests the constitutional dimension of the principle.
494. Professor Tridimas noted, that the principle of autonomy - the determinative principle in *Achmea* - is a recent development. He identified the definitive adoption of the principle, despite earlier references, as having occurred in *Opinion 2/13* preventing the EU from itself becoming a party to the *European Convention on Human Rights and Fundamental Freedoms*.
495. According to him, “essential character of the powers of the EU and its institutions must remain unaltered”.<sup>319</sup> Subjecting the EU to the jurisdiction of the European Court of Human Rights, the CJEU concluded, impinged on the role of the CJEU as the final arbiter of EU law. Professor Tridimas further noted that such impingement “affected the autonomy of EU law and interfered with the exclusivity of the CJEU jurisdiction under Article 344 TFEU”.<sup>320</sup> He described that case as “the turning point” for the principle of autonomy.<sup>321</sup>
496. The Tribunal notes that in *Opinion 2/13* the CJEU stated that the principle that “an international agreement cannot affect the allocation of powers fixed by the Treaties or,

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<sup>315</sup> CJEU, *Opinion 1/09*, 8 March 2011, **TT-010**, para. 65. See First Tridimas Report, para. 17.

<sup>316</sup> *Opinion 1/17*, para. 110. Note also CJEU, *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, Case C-621/18, Judgement of 10 December 2020 (“**Wightman**”), **TT-0095**, para. 45 and “constitutional charter” CJEU, *Opinion 1/91*, 14 December 1991, **TT-0023**, para. 21.

<sup>317</sup> Second Tridimas Report, para. 106.

<sup>318</sup> *Achmea* e.g. paras. 40, 42, 55-56, 58-59; *Opinion 1/17* e.g. paras. 118-119, 126.

<sup>319</sup> First Tridimas Report, paras. 26-27. *Opinion 2/13*, **RL-00025**. **RL-00024**. See Second Tridimas Report, paras. 27-28.

<sup>320</sup> Second Tridimas Report, para. 39. Article 344 set out below.

<sup>321</sup> Second Tridimas Report, paras. 27, 104.

consequently, the autonomy of the EU legal system” had been established in prior cases.<sup>322</sup> The Court identified the precedents.<sup>323</sup>

497. The Tribunal has reviewed these cases and finds in each of them statements of the kind referred to in *Opinion 2/13*. They may not have been central to the decision in those cases, however, Professor Tridimas may be understating this prior consideration as “references”.

498. In each of these cases the CJEU was concerned only with EU law, as such. That is most clear in *Kadi* where the international obligations that the CJEU declined to enforce were based on the United Nations Charter. As the CJEU put it in that case, even in the case of the Charter:

... the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaties.<sup>324</sup>

499. This judicial history may well have legal implications e.g. for a legitimate expectations case under EU law, as argued by the Claimants. However, in the light of Article 26 of the ICSID Convention, prohibiting withdrawal of consent, it cannot affect the jurisdiction of a Tribunal once consent has been perfected. None of the prior cases, including *Achmea* itself, involved a treaty provision of this kind.

500. As a constitutional court, the CJEU does not apply the VCLT when interpreting the EU Treaties. As Professor Tridimas put it:

In interpreting EU law, the ECJ places emphasis on systematic and teleological interpretation, focusing on the objectives of the Treaties, the dynamic character of EU law and the evolution of the EU legal order. This approach has led the ECJ to reach results which could not be supported solely by reference to the text of Treaty provisions.<sup>325</sup>

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<sup>322</sup> *Opinion 2/13*, para. 201.

<sup>323</sup> *Opinion 2/13* citing to *Opinion 1/91*, para. 35; *Opinion, 1/00*, EU:C:2002:231, paras. 11-12; *Commission v Ireland*, C-459/03, EU:C:2006:345, paras. 123, 136; *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, para. 282.

<sup>324</sup> *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, (TT-0026), para. 285.

<sup>325</sup> First Tridimas Report, para. 22.

501. A principle of constitutional law derived from such a process should be applied at a level of generality that overcomes factors that might otherwise restrict the precedential effect of a Court's reasoning.
502. The words from *Achmea*, that are the subject of focus in this respect, give rise to the question whether Article 8 of the BIT is a clause "such as" that considered in *Achmea*.<sup>326</sup> Those words must be understood in the full context of the CJEU reasoning. It is difficult to give so flexible a formulation the precision and weight it has been asked to bear. That is particularly so because the words "such as" were contained in the specific question put to the CJEU by the German *Bundesgerichtshof*. All the CJEU was doing in *Achmea* was answering the question it was asked.
503. With respect to the learned tribunals that have distinguished *Achmea*, this Tribunal is of the view that the constitutional principles actually applied by the CJEU in that case did not turn on the *lex arbitri* under the UNCITRAL Rules and the applicable law provision in the BIT there under consideration. The principle of autonomy, specifically the protection of the preliminary ruling procedure by the CJEU, is the fundamental basis of the decision. In this respect, Article 8 of the BIT answers the description of a provision "such as" the ISDS clause in *Achmea*.
504. As a matter of EU law, on the materials before the Tribunal, *Achmea* is not distinguishable. What the effect of the decision is on the law applicable to this Tribunal's jurisdiction is a distinct matter. The Tribunal's jurisdiction does not derive from EU law.
505. The dual character of EU law in relevant respects is fundamental to the application by this Tribunal of the decisions of the CJEU. Notwithstanding that we accept such decisions as statements of EU law, we cannot accept that the reasoning of those decisions, which abjures reliance on the customary international law principles of treaty interpretation as codified in the VCLT, represents the correct method of interpretation of the BIT as a matter of international law. With respect to the central jurisdictional question before us - did Latvia consent to arbitration - we have to determine the issue

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<sup>326</sup> *Achmea*, e.g. paras. 18, 20, 31, 43, 49, 55, 58, 60, 62.

in accordance with principles that are not constrained by the constitutional dimension of EU law.

506. The CJEU's holding that granting consent in the form of an ISDS clause is "precluded" - to adopt the terminology of the CJEU and of Latvia - creates an obligation on the part of Latvia under EU law. Nothing in the materials before the Tribunal suggests that any such obligation takes effect on the obligations of member states to third parties without further steps.

507. The fact that Latvia may be in breach of its legal obligations under EU law is not, in and of itself, determinative of the Tribunal's jurisdiction. As Lord Neuberger put it:

Wrongful consent nonetheless constitutes consent, and in order to establish jurisdiction, consent (whether rightly or wrongly given) is all that is required.<sup>327</sup>

508. Latvia contends that its offer to arbitrate had been retrospectively vitiated by reason of the fact that the CJEU's decision in *Achmea* took effect from the date of the accession of Latvia to the EU. As noted above, the CJEU has the power to make its decisions take effect prospectively, but did not do so in *Achmea*. That is the effect under EU law.

509. However, in determining its jurisdiction this Tribunal is not bound to apply EU law and is not obliged to give the decision, notwithstanding its "international legal character", retroactive operation. That is particularly the case where, as here, the CJEU interpreted the EU Treaties on principles which cannot be adopted in an international arbitration. The "constitutional framework" part of the dual characterisation of the EU Treaties appears to have been the dominant element in its approach.

### C. CETA OPINION

510. To a substantial degree, the *CETA Opinion* reinforces *Achmea*. That is so particularly with respect to the autonomy of EU law. Some of the Court's reasoning extends the principles relied on in that case to encompass other aspects of the EU institutional structure, most relevantly with respect to the ECB.

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<sup>327</sup> First Neuberger Report, para. 20.

511. The following passage from the *CETA Opinion* was relied on by Latvia as describing the kind of threat to the autonomy of EU law that Latvia perceives this case to present:

the envisaged ISDS mechanism ... does not structure the powers of [investment treaty] tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.<sup>328</sup>

512. Latvia relies on the *CETA Opinion* to extend the preclusive effect of EU law beyond Article 8 of the BIT to encompass, as well, the substantive protections in Articles 2-6, 11, 14 and possibly the whole BIT. It submits that the BIT does not include a range of the provisions of the CETA which the Court found to constitute “safeguards” of the autonomy of EU law and its institutions.
513. Many of these “safeguards” involve the provisions which prevent a CETA Tribunal from making awards of the character that States and the EU have criticised over recent years with respect to the jurisprudence developed by investment treaty tribunals. That includes perceived intrusion into State powers to regulate, the scope of the FET standard, the existence of a remedy for indirect expropriation, the power to make orders other than compensation and other such matters.
514. The Tribunal does not consider these “safeguards” relevant to the jurisdictional issue of consent. Even to suggest, if that is what is being done, that consent may be conditional on particular behaviour, would undermine the effectiveness of the consent itself. These ‘conditions’ are not appropriate restrictions on the exercise by a tribunal of its jurisdiction.
515. There are also structural differences between the CETA and the BIT. Specifically, the CETA provision for an appeal on both fact and law confirms the role of the CJEU and, in that respect, reinforces *Achmea*. Further, provision for the EC to be joined as a party and the existence of a joint Committee to issue clarifications are said, respectively, to

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<sup>328</sup> *Opinion I/17*, para. 253.

ensure that EU law will be appropriately applied and that the autonomy of the EU legal order will be preserved.<sup>329</sup>

516. In these respects also the Tribunal finds that these differences do not impinge on the issue of consent. They are directed to the exercise of jurisdiction, not to its existence.

#### **D. APPLICABLE LAW**

##### **(1) EU Law as International Law**

517. The Tribunal received evidence and submissions directed to answering the question: Is EU law International law? The answer to that question does not assist the determination of the Intra-EU objection to the jurisdiction of this Tribunal. In many respects the answer is obviously: “Yes it is.” EU law, as Latvia accepted, has a dual character: it is both international law and domestic law. Furthermore, as we have indicated, the EU Treaties also serve as a constitution for the closely integrated polity known as the EU.
518. That a law can have a dual character as both domestic and international is confirmed by the decision of the ICJ in the Advisory Opinion on the *Unilateral Declaration of Independence in respect of Kosovo*. The request before the court was expressed in terms of whether the Declaration was in accordance with international law. The Court rejected a submission that the interim “Constitutional Framework”, promulgated by a regulation of the Special Representative of the United Nations Secretary-General for Kosovo, was “an act of an internal law rather than an international law character.”<sup>330</sup>
519. The Court observed that as the “Constitutional Framework” was adopted pursuant to the authority of Security Council resolution 1244 (1999), it derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore “possesses an international legal character.”<sup>331</sup>
520. The Court went on to hold:

At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order...which is applicable only in Kosovo and the purpose of which is to

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<sup>329</sup> Respondent’s Memorial on the Bifurcated Objection, esp. paras. 254-255.

<sup>330</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports 2010 (II), **RL-00299** (“**Unilateral Declaration of Independence of Kosovo**”), pp. 439-440, para. 88.

<sup>331</sup> *Unilateral Declaration of Independence of Kosovo*, para. 88.

regulate,..., matters which would ordinarily be the subject of internal, rather than international, law...The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo...The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law ...<sup>332</sup>

521. Professor Tridimas referred to this opinion for the proposition that international law may establish a constitutional framework without that framework losing its character as international law.<sup>333</sup> The Tribunal accepts that proposition. However, the Professor goes on to derive from this premise the further proposition that constitutional principles of EU law, such as the principle of primacy (an integral part of EU law), are also principles of international law, because EU law is a specific branch of international law.
522. This second proposition does not take into account the way the ICJ adopted a dual characterisation of the Constitutional Framework. The issue it was determining in its Advisory Opinion on the *Unilateral Declaration of Independence of Kosovo* was whether the Constitutional Framework could be characterised as international law at all, so that it fell within the law applicable to the question asked by the General Assembly when it requested the advisory opinion. However, it also held that the Framework took effect within the Kosovo legal order as internal law.
523. The reasoning of the *Vattenfall* tribunal in the following passage is persuasive:

145. However, this autonomous or constitutional nature of the TEU and the TFEU does not exclude them from the purview of international law. As mentioned in Article 38(1)(a) of the Statute of the International Court of Justice, any kind of international convention “whether general or particular”, constitutes international law.

146. In this regard, the Tribunal agrees with the finding of the tribunal in *Electrabel v. Hungary* that “EU law is international law because it is rooted in international treaties.

... It would be more exact to say that the corpus of EU law derives from treaties that are themselves a part of, and governed by, international law, and contains other rules that are applicable on the plane of international law, while also containing rules that

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<sup>332</sup> *Unilateral Declaration of Independence of Kosovo*, para. 89.

<sup>333</sup> Third Tridimas Report, paras.15-16.

operate only within the internal legal order of the EU and, at least arguably, are not a part of international law; but for present purposes the *Electrabel* formula suffices.

147. Instead of excluding EU law from the purview of international law, tribunals that have considered the relationship between EU law and the ECT have attempted to resolve conflicts, if any, between them. They have done so, for example, by (i) endorsing harmonious interpretation, (ii) prioritising international law over EU law, or (iii) finding that there is no conflict that requires resolution.

148. Since the ECJ is empowered by the EU Treaties to give preliminary rulings on the interpretation of EU law, including the EU Treaties (*see* Article 19 TEU and Article 267 TFEU), the Tribunal considers the ECJ Judgment's interpretation of the EU Treaties likewise to constitute a part of the relevant international law.

524. This Tribunal needs to further consider whether the “*Electrabel* formula suffices” for the BIT as it did for the ECT under consideration in *Vattenfall*. That is to say whether the relevant principles the Tribunal has to consider in this case “operate only within the internal legal order of the EU.” That question did not arise in *Vattenfall*, because the EU is itself a party to the ECT. The Tribunal has accepted the submission that the CJEU decisions at the centre of this case have a dual character. The *Vattenfall* tribunal did not deal with this alternative.
525. The Tribunal does not accept that CJEU decisions are international law of the same character as the Treaties. It accepts the formulation in *Electrabel*, endorsed in *Vattenfall*, that CJEU decisions are “applicable on the plane of international law”. This distinction is of significance for the application of conflict rules, as we have to consider a conflict between a treaty and judicial decisions.
526. As we have noted, CJEU decisions are not based on principles of interpretation, codified in the VCLT, applicable to treaties, but on a teleological approach applicable to constitutional law. As further discussed below, we do not identify a conflict between the BIT and the EU Treaties. The conflict arises from an incompatibility between the BIT and the CJEU's interpretation of those Treaties by application of the teleological approach.

527. The issue before the Tribunal is whether Latvia's membership of the EU, as it contends, had, in effect, an automatic impact by rendering inapplicable (to use only one of many terms deployed in the case in this respect) the consent to arbitrate contained in Article 8 of the BIT. If so, did that inapplicability take effect before 14 December 2017?
528. The answer to this question turns on the impact of the CJEU decisions in *Achmea* and *Opinion I/17*, the reasoning of which the Tribunal has accepted to be capable of such application. The Tribunal is here concerned with determining whether EU law is applicable to determining jurisdiction. Whether it is applicable to the merits is a distinct issue.<sup>334</sup>
529. These CJEU decisions establish that, if there is a mere possibility that a tribunal will interpret or apply EU law, then it is "precluded" by EU law from assuming its jurisdiction. That proposition is not determinative of the issue before the Tribunal, unless EU law is otherwise applicable law for purposes of jurisdiction. Such a test of conflict may be appropriate to resolve a conflict for constitutional law purposes. It is not appropriate to resolve a conflict in international law. The Tribunal was not presented with any text or precedent to suggest that it could be.
530. We will consider below the several alternative routes by which Latvia contends EU law becomes applicable to preclude the Tribunal's jurisdiction.
531. The starting point for this analysis, as indicated above, is that, as the Tribunal is not part of the EU legal structure, EU law is not determinative of its jurisdiction, unless made so by a provision of law which is applicable. A number of contextual matters are pertinent to an assessment of the routes put forward by Latvia by which EU law is said to preclude the Tribunal's jurisdiction.
532. First, Latvia does not challenge before this Tribunal the ICSID Convention itself, specifically Articles 25 and 26. Nor, despite certain observations expressing doubts by Advocate-General Wathelet in his Opinion presented to the CJEU in *Achmea*, has the CJEU expressed any view in that regard.

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<sup>334</sup> The Tribunal will deal with the issue of applicable law for the merits in that context.

533. Furthermore, neither the EU nor any EU State, including Latvia, has expressed any doubt or qualification about the validity of EU Member State being a party to the ICSID Convention. That position is also reflected in the Declaration on which Latvia relies.
534. Neither Latvia nor, on the materials before the Tribunal, any EU Member State subjected its ratification of the ICSID Convention to a reservation with respect to intra-EU disputes.
535. Latvia did not avail itself of the possibility to “state” that its consent under the ICSID Convention did not operate to the exclusion of an “other remedy” under the first sentence of Article 26. Although such a statement does not constitute a reservation.
536. Nor did Latvia require the exhaustion of local remedies under the second sentence of Article 26.
537. Further, neither Latvia nor, on the materials before the Tribunal, has any EU Member State made use of the express provision under Article 25(4) to lodge a notification that it would not agree to submit intra-EU disputes, or some other category, such as banking regulatory disputes, to the jurisdiction of ICSID.
538. Nor has Latvia, either before 14 December 2017 or since, given Notice of Termination of the BIT under Article 14 thereof.
539. The Declaration upon which Latvia relies, which asserts an obligation on both Latvia and the UK to terminate the BIT, was not implemented by Latvia and the UK.
540. In any event, throughout these proceedings, Latvia has not suggested that the BIT has been terminated. It contends that the BIT was suspended upon Latvia’s entry into the EU. This proposition was originally put in terms that any incompatible section of the BIT is “inapplicable for the duration of its incompatibility”.<sup>335</sup>

## **(2) VCLT Article 5**

541. Latvia invokes Article 5 of the VCLT for the proposition that decisions of the CJEU “may override (as *lex superior*) general rules of the law of treaties”. This Tribunal,

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<sup>335</sup> Respondent’s Memorial on the Bifurcated Objection, para. 241.

Latvia submits, should accept the decisions of the CJEU as *lex superior*.<sup>336</sup> Subsequently it characterised CJEU judgments as *lex specialis*.<sup>337</sup> Article 5 provides:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

542. Latvia's case is based on the proposition that CJEU judgments create "rules" of the EU as an international organisation. The principles of primacy and autonomy are said to be such "rules".<sup>338</sup> This proposition is supported by Article 19 of the TEU, which makes CJEU judgements binding and therefore creates obligations. And "an obligation establishes rules".<sup>339</sup> No authority for this elision from "binding" via "obligation" to "rules" has been cited. The Tribunal finds Professor Talmon's rejection of this approach convincing.
543. First, Professor Talmon notes that Article 5, in terms, applies to the constituent instrument of the organisation and any treaty adopted within the organisation. It does not apply to bilateral treaties adopted outside the EU framework.<sup>340</sup> This is supported by the commentary he quotes.<sup>341</sup> However, the focus of Latvia's submissions is not on the BIT but on alleged "rules" developed by the CJEU under the EU Treaties.
544. Secondly, and of direct relevance, he states: "Court rulings are not 'relevant rules'". They interpret existing rules, but they are not rules themselves.<sup>342</sup>
545. The Tribunal accepts Professor Talmon's opinion and rejects Latvia's invocation of Article 5. Specifically, the Tribunal rejects Latvia's invocation of the Article to characterise the principles of primacy and autonomy as "rules" of the EU as an "organisation" and, accordingly, entitled to prevail or serve as a conflict rule.<sup>343</sup>

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<sup>336</sup> Respondent's Memorial on the Bifurcated Objection, paras. 246-247.

<sup>337</sup> Respondent's Reply on the Bifurcated Objection, para. 30.

<sup>338</sup> Respondent's Reply on the Bifurcated Objection, para. 30. Latvia's submissions refer to a number of texts interpreting Article 5, but Latvia's submissions do not suggest that they support the proposition that a judicial decision can be a "relevant rule".

<sup>339</sup> Hearing, Day 2, 43 - 44. Article 19 TEU set out below.

<sup>340</sup> First Talmon Report, paras. 41-43; Second Talmon Report, para. 7; Hearing, Day 2, 12:38-39.

<sup>341</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 119.

<sup>342</sup> Hearing, Day 2, 41.

<sup>343</sup> Respondent's Memorial on the Bifurcated Objection paras. 246-248; Reply Memorial paras. 30, 136.

### (3) ICSID Convention Article 42(1)

546. Latvia relies on Article 42(1) of the ICSID Convention to argue that EU law is applicable not only to the merits, but also to the question of the Tribunal's jurisdiction.

Article 42 provides:

- (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply 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.
- (2) The Tribunal may not bring in a finding on *non liquet* on the ground of silence or obscurity of the law.
- (3) The provisions in paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

547. The Tribunal will consider the application of this Article to the merits in that context. The Tribunal upholds the Claimants' contention that this provision has no application to the issue of jurisdiction.<sup>344</sup>

548. The text is clear. The introductory words are: "The Tribunal shall decide a dispute in accordance with..." The Article proceeds on the basis that the jurisdiction of the Tribunal has been enlivened. It applies, and applies only, to the legal basis on which the tribunal should "decide the dispute". That is clearly a reference to the decision on the merits.

549. This conclusion is reinforced by the contrast between the reference to the law "agreed by the parties," in the first sentence and the reference to "the law of the Contracting State party to the dispute" in the second sentence. Similarly, the reference to "applicable" international law picks up the word "apply" in the first part of the second sentence. As Professor Talmon put it: the word "parties" refers to the parties to the dispute, not to the parties to the BIT.<sup>345</sup>

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<sup>344</sup> See *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 December 2009, CL-222, para. 37; *Vattenfall*, para. 119. *Landesbank*, para. 161; see also First Talmon Report, para. 47; Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', (2014) *McGill Journal of Dispute Resolution* 1, ST-10, p. 3.

<sup>345</sup> First Talmon Report, para. 153.

550. The focus on the actual dispute in Article 42(1) is apparent from paragraphs (2) and (3) of that Article and from the structure of the Convention. First, as the Claimants contend, the word “dispute” is a reference back to the “dispute” in Article 25, which is directed to the substantive issues. Secondly, the immediately preceding Article 41 is expressly directed to the issue of jurisdiction. It allows a tribunal to deal with an objection to its jurisdiction as a preliminary issue or to join it to the merits, in particular if it considers that it does not have an exclusively preliminary character or is closely linked to the merits issues. Article 41 provides:

Article 41:

- (1) The Tribunal shall be the judge of its own competence.
- (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

551. Both parties relied on the same leading Commentary on the ICSID Convention in support of their submissions.<sup>346</sup>

552. The Claimants relied on this passage:

The prevailing view, that Art. 42 does not address questions of jurisdiction, was reaffirmed in the Decision on Jurisdiction in *CMS v. Argentina*.<sup>347</sup> The Tribunal held:

“88. Article 42 is mainly designed for the resolution of disputes on the merits and, as such, it is in principle independent from the decisions on jurisdiction, governed solely by Article 25 of the Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions. However, the argument of the Republic of Argentina has merit in so far as the parties can agree to a different choice of law applicable also to jurisdictional questions. The very option the investor has under the Treaty to submit a dispute to local jurisdiction also involves to an extent a choice of law provision, as local courts will apply mainly domestic law. In

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<sup>346</sup> Christoph Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> ed. (2009), **RL-00267**, p. 552.

<sup>347</sup> *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8 (“**CMS v. Argentina**”), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CL-65**, paras. 42, 87–89.

such a case, domestic law might apply together with the Treaty and Convention or separately.”<sup>348</sup>

553. The Respondent relied on the subsequent reference:

Other tribunals have confirmed that the law applicable to the tribunal’s jurisdiction were the provisions of the BIT and Art. 25. A minority of tribunals have recognized a role for the host State’s domestic law [i.e. a source of law found in Article 42 of the ICSID Convention] in determining jurisdiction.<sup>349</sup>

554. On the basis of the textual analysis above, the Tribunal prefers the “prevailing view”. That approach has been reinforced by subsequent precedents.<sup>350</sup> Furthermore, five years after the second edition of his Commentary was published, Professor Schreuer appeared to accept that the “prevailing view” was now generally accepted. He wrote:

Tribunals have held consistently that questions of jurisdiction are not subject to the law applicable to the merits of the case. Questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties’ consent to jurisdiction.<sup>351</sup>

555. The instruments of consent in this case, as the Claimants contend, are Article 25 of the ICSID Convention and Article 8 of the BIT. As the Tribunal has indicated above, these provisions govern the centrality of consent as a jurisdictional issue.

556. The Tribunal notes Latvia’s reliance on a passage in *Tidewater*:

[A]n ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according primarily to national law, but rather **has to take into account the principles of international law**. The next question naturally is to determine which principles of international law are applicable.<sup>352</sup>

557. In *Tidewater* the issue of jurisdiction under Article 25(1) did arise, in part, under national law, because the relevant consent was contained in a local statute, not in a BIT.

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<sup>348</sup> *CMS v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CL-65**, para. 88. To the same effect: *CMS v. Argentina*, Decision on Annulment, 25 September 2007, para. 68.

<sup>349</sup> Christoph Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> ed. (2009), **RL-00267**, p. 552.

<sup>350</sup> *Vattenfall*, paras. 118-119 and *Landesbank*, para. 161.

<sup>351</sup> Christoph Schreuer, ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’, (2014) *McGill Journal of Dispute Resolution* 1, **ST-10**, p. 3.

<sup>352</sup> *Tidewater*, para. 86. (emphasis is Latvia’s).

When considering the “applicable” principles of international law, the Tidewater tribunal made no reference to Article 42.

558. Latvia also referred to another case in which consent was contained in a statute.<sup>353</sup> The paragraph reference provided<sup>354</sup> has no apparent connection to Article 42. The only reference to Article 42 occurs later in the Decision<sup>355</sup> in a reference to a jurisdictional argument put forward by the State, which the tribunal rejected on the facts.

559. The Tribunal finds the reasoning of the tribunal in *Vattenfall* convincing. Specifically, it agrees with the following passage:

118. Article 42(1) likewise only concerns the law applicable to the merits of a dispute. The phrase “decide a dispute” points to the application of those rules of law in order to decide the dispute between the parties, and the ordinary meaning of that phrase (pursuant to Article 31 VCLT) is that it refers to the substantive dispute between the parties.

119. Under the ICSID Convention, a jurisdictional objection is clearly demarcated from the merits of the dispute. When Article 42(1) refers to the applicable law when the Tribunal “decides a dispute”, it therefore does not include a decision on any jurisdictional objection. The view that Article 42 ICSID Convention addresses the substantive law only, and not questions of jurisdiction or procedure, is also held by Professor Schreuer, whose commentary is relied upon by Claimants.<sup>356</sup>

#### **(4) VCLT Article 31(3)**

560. As the Tribunal has noted above, Latvia invokes Article 31(3)(c) of the VCLT as the “master key”<sup>357</sup> to apply EU law as international law to the BIT, specifically to Article 8 thereof. The “master key” provision must be understood in the context of Article 31 as a whole. Article 31 of the VCLT provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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<sup>353</sup> *Interocean*, para. 65.

<sup>354</sup> Respondent’s Reply on the Bifurcated Objection, fn 17.

<sup>355</sup> *Interocean*, para. 118.

<sup>356</sup> Christoph Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> ed. (2009), **CL-0219**, Article 42.

<sup>357</sup> The terminology of the ILC in the *ILC Fragmentation Report*, **RL-00154**, para. 420.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

561. Both the heading of the Section and the heading of the Article make it clear that every part of Article 31 is concerned with interpretation, in the sense of determining the meaning of a particular section of an international treaty. Each of the provisions employs the word “shall”, indicating that they are all mandatory and must be considered together.

562. The Tribunal agrees with the conclusion of the tribunal in *Vattenfall* when refusing to apply Article 31(3)(c) in the manner submitted by the EC in that case. The starting point for interpreting the BIT is paragraph 1 of Article 31, and not paragraph (3)(c) thereof.<sup>358</sup>

563. Paragraph (3)(c) of Article 31 refers to matters that must “be taken into account” for the purposes of determining the meaning of the BIT under consideration in these

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<sup>358</sup> *Vattenfall*, para. 153.

proceedings. Latvia's approach would have the effect of writing Article 8 (and more) out of the BIT completely. The Tribunal accepts the Claimants' submission that such cannot be the result of a process of interpretation.<sup>359</sup>

564. Latvia must look elsewhere for a conflicts clause. The Tribunal does not understand that it was put that, in some way, membership of the EU could qualify the natural and ordinary meaning of the word "consent", whether in the ICSID Convention or in the BIT. Insofar as it is suggested to have such effect, the Tribunal rejects the suggestion.
565. There is no ambiguity in the words "hereby consents" in Article 8. Nothing in the relevant context suggests a qualified meaning. The meaning of the word must be interpreted in the context as it existed at the time of the BIT, subject to each of the three parts of subparagraph 3 of Article 31.
566. Nor does Latvia receive any support from the application of the full range of principles of interpretation in Article 31. Indeed, to the contrary, the "object and purpose" which Article 31(1) requires the Tribunal to apply, are to the contrary. They are to be found in the Preamble to the BIT which reads as follows:

Desiring to create favourable conditions for greater investment  
by nationals and companies of one State in the territory of the  
other State;

Recognising that the encouragement and reciprocal protection  
under international agreement of such investments will be  
conducive to the stimulation of individual business initiative and  
will increase prosperity in both States.

567. In any event, for the reasons the Tribunal has advanced above with respect to Article 5 of the VCLT, a decision of the CJEU is not a "rule" of international law within the meaning of Article 31(3)(c). The Treaties contain such rules. The Tribunal will take them into account below on the issue of incompatibility.
568. With respect to jurisdiction, the Respondent relies on Articles of the EU Treaties, particularly: TFEU 267, 344, TEU 2,4,7 and 19, in the manner set out in the

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<sup>359</sup> See *Vattenfall*, para. 154.

Submissions section. It contends that the Tribunal should apply judgments of the CJEU interpreting those Articles as obstacles to the exercise of jurisdiction in this case.

569. Contrary to Latvia's case based on Article 31(3)(c) of the VCLT, culminating in the conclusion of preclusion, this Tribunal cannot reach the result for which Latvia contends. It has to apply the VCLT to the interpretation of the EU Treaties and the BIT. As the evidence and submissions before the Tribunal from both sides made clear, the CJEU did not apply the VCLT in the authorities relied on by Latvia.
570. The Tribunal cannot approach the Treaties as if it were a Constitutional Court by adopting a teleological approach. It has to apply the VCLT, relevantly Article 31. Doing so does not lead to any qualification of the meaning of "consent" in the ICSID Convention or in the BIT in any relevant way. The Tribunal agrees with the conclusion of the tribunal in *Landesbank* that any preclusion by force of EU law which must be "taken into account" in accordance with VCLT Article 31(3)(c) "could not prevail over the ordinary meaning of the text" of Article 8 of the BIT interpreted in good faith and in its context, as required by Article 31.<sup>360</sup>
571. Latvia's reliance on Article 31(3)(c) does not assist in supporting its objection.

#### **(5) The Declaration and the Termination Agreement**

572. Latvia also invokes Article 31(3)(a) and (b) in connexion with the Declaration and, to some extent, with the Termination Agreement.
573. The first thing to note about the Declaration and the subsequent Termination Agreement is that these documents do not state that they are directed to interpretation or application of intra-EU bilateral investment treaties as international law. Moreover, there is no reference in either to Article 31(3)(a) or (b) of the VCLT.
574. The Declaration and its subsequent implementation are directed to acknowledging the binding force of the CJEU decision in *Achmea* and establishing an agreed process for bringing Member States into compliance with that ruling. That includes the steps Member States will take with respect to any investment treaty proceedings and the

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<sup>360</sup> *Landesbank*, para. 164.

termination of existing BITs. It also includes a commitment to extending protection of investments under EU law.

575. As the Tribunal has indicated above, Article 31 of the VCLT is concerned with interpretation. The Declaration is not. Latvia's invocation of the word "application" is closer to the mark.<sup>361</sup> However, as Professor Talmon said, the Declaration is not concerned with how the BIT is to be applied. It asserts that it cannot be applied at all.<sup>362</sup> He refers to the reasoning of the WTO Appellate Body:

In our view, the term 'application' in Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be 'applied'; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation and are to expire.<sup>363</sup>

576. The Tribunal accepts this approach and concludes that the obliteration of a provision in a treaty would not constitute an "application" of the Treaty.
577. The Declaration refers at one point to the absence of a "valid consent". The document then proceeds on the basis that, as a matter of EU law, consent should not have been granted because the ISDS clause was "inapplicable". (Equivalent to the CJEU's "precluded").
578. The Tribunal accepts Professor Talmon's conclusion that the Declaration is a statement of the effect of EU law on Member States. It does not address the position of the BIT as a matter of international law. As he notes, there is one footnote reference to general public international law, the VCLT and the lex posterior principle.<sup>364</sup> That footnote provides support for the text which asserts that "Union law takes precedence over BITs concluded between Member States." It consists of two sentences. The first sentence refers to two CJEU decisions and Declaration 17 to the Lisbon Treaty. That supports the text. The next sentence, referring to international law, commences with the words:

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<sup>361</sup> Respondent's Memorial on the Bifurcated Objection, para. 433; Respondent's Reply on the Bifurcated Objection, para. 149.

<sup>362</sup> First Talmon Report, para. 166.

<sup>363</sup> WTO Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU and Corr.1, adopted 11 December 2008, and Second Recourse to Article 21.5 of the DSU by the United States WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, **ST-61**, para. 391.

<sup>364</sup> First Talmon Report, para. 162.

“The same result follows under general international law....” It is clear that the document is directed to the position under EU law. The reference to international law is supportive but secondary and not the purport of the document.

579. The Termination Agreement carried into effect the intention expressed in the Declaration to terminate intra-EU BITs. In addition to *Achmea* it referred to another decision of the CJEU for the proposition that an agreement between Member States cannot apply if the provisions are contrary to EU law.<sup>365</sup> In terms of its import as a matter of international law, this Agreement takes the matter no further than the Declaration. The focus is on compliance with EU law.
580. In any event, the UK is not a party to the Termination Agreement. Latvia is a party. However, the BIT in these proceedings was not in the list of BITs scheduled for termination and has not been terminated. The Tribunal notes that the EC has issued an infringement notice to the UK for failing to terminate its intra-EU BITs. That is not relevant for the issue before the Tribunal.
581. Article 31(3) requires the Tribunal to take into account the matters therein. We repeat that this is a process of interpretation. Deleting a clause in its entirety cannot be described as interpretation. In any event, having taken these matters into account the Tribunal concludes that they do not have the effect of depriving the Tribunal of its jurisdiction over this dispute.

## **E. INCOMPATIBILITY**

### **(1) The EU Treaties**

582. The principal provisions to establish incompatibility, relied on by Latvia, are TFEU Articles 267 and 344:

#### *Article 267*

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;

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<sup>365</sup> *Budějovický Budvar*.

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any 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 Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

#### Article 344

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for herein.

Those provision are to be interpreted in the light of TEU Articles 2, 4(3) and 19:

583. TEU Articles 2, 4(3) and 19, in turn, provide as follows:

#### Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

#### Article 4(3)

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

#### Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:
  - (a) rule on actions brought by a Member State, an institution or a natural or legal person;
  - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
  - (c) rule in other cases provided for in the Treaties.

## (2) The Pre-*Achmea* Position

584. Latvia in its written pleadings and submissions draws attention to a history of doubts about the validity of BITs under EU law.<sup>366</sup> Professor Tridimas reinforces this submission, albeit in the context of legitimate expectations.<sup>367</sup>

585. This pre-history of *Achmea* is of no assistance to the Tribunal. It consists of:

- The fact that in 2004 the EC instituted proceedings asserting that some BITs of three Member States were inconsistent with EU law. These contentions were upheld by the CJEU. However, the cases concerned BITs with third States and involved challenges of specific provisions. They had nothing to do with the intra-EU objection and are of no relevance to the consent to arbitrate.
- There are a number of references to doubts within the EC about the continued efficacy of intra-EU BITs commencing with an internal memorandum in 2006. The Executive branch, however, does not determine legality.
- The point was taken in an intra-EU investment treaty case by the Czech Republic that commenced in 2004.<sup>368</sup> The arbitral tribunal rejected the State's submission that the BIT terminated on accession. The tribunal had before it the EC document of 2006 which expressed the opinion that the ISDS clause would not operate where EU regulations existed. However, the authors expressly stated that accession did NOT automatically terminate intra-EU BITs and it would be necessary to terminate such agreements in accordance with their terms. It added that termination would not have retroactive effect.
- Reliance was also placed on the fact that some Member States terminated their intra-EU BITs. The Czech Republic commenced doing so in 2005 but had not completed that process, including its BIT with Latvia, at the time of these proceedings.<sup>369</sup>

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<sup>366</sup> See e.g. Respondent's Memorial on the Bifurcated Objection, paras. 47-54.

<sup>367</sup> Second Tridimas Report, para. 300.

<sup>368</sup> *Eastern Sugar B. V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **RL-00069** ("**Eastern Sugar**") esp. para. 119.

<sup>369</sup> Respondent's Memorial on Bifurcated Objection, para. 49.

- Ireland terminated its BITs in 2012 and Italy did so in 2013. The EC formally requested five Member States to terminate all intra-EU BITs between them. It is not clear why these states were asked and others, including Latvia, were not.
- Of some 150 intra-EU BITs in existence in 2004, the date that Latvia submits its BIT with the UK was “suspended”, a substantial majority were still in force in the subsequent years. That continued to be the case at the time *Achmea* was handed down. On the materials before the Tribunal, those that had been terminated were done in accordance with their terms.

586. The EC has been concerned for some time that bilateral investment treaties between Member States potentially cut across its regulation of commercial transactions within the EU, particularly the principle of a single market. Nevertheless, the predominant view of the Member States rejected the idea of incompatibility. Only a small proportion of intra-EU BITs had been terminated prior to *Achmea*.

587. Nothing in the prior history suggests that the opinion that the arbitration clause was inconsistent with EU law was held by Member States, other than the Czech Republic, and much later Slovakia in the context of the *Achmea* arbitration, nor widely held within EU institutions, at or about Latvia’s accession in 2004.

588. Indeed, the Association agreements, including that of Latvia,<sup>370</sup> encouraged prospective Members to enter into BITs in preparation for joining the EU. There was no suggestion that adherence to such treaties may need to be reviewed after accession.

589. As Counsel for the Claimants put it:

The EU would not encourage Latvia to enter into BITs with their specified durations, with their binding legal commitments, with their sunset clauses, if there were any understanding that they might shortly become illegal upon accession.<sup>371</sup>

590. The Tribunal finds that the predominant opinion prior to *Achmea* was that expressed by Advocate General Wathelet in that case. In a careful analysis, referring to CJEU case

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<sup>370</sup> “1998 Europe (Association) Agreement between the European Communities, its Member States and the Republic of Latvia,” Official Journal of the European Communities, 2 February 1998, **CL-255**, Article 74.

<sup>371</sup> Hearing, Day 1, 68:9-13.

law, he concluded, most relevantly, albeit with an expression of doubt about the ICSID Convention, that:

- Article 344 of the TFEU did not prevent references to arbitration between individuals and Member States.<sup>372</sup>
- As the BIT is not itself EU law, Article 344 does not apply.<sup>373</sup>

591. That this was the dominant view at the time of Latvia's accession to the EU is confirmed by the fact that neither Latvia, nor on the materials before the Tribunal, any of the other new Member States, exercised the right under Article 26 of the ICSID Convention to require the exhaustion of local remedies. It appears to the Tribunal that *Achmea* would have no application if that had occurred.

### (3) CJEU Interpretations

592. Notwithstanding its reliance on the language of Article 344 of the TFEU, Latvia accepts that the Tribunal may interpret the Treaties for purposes of this jurisdictional objection, on the principle of competence/competence.

593. The primarily relevant incompatibility arises from the preclusion under EU law of the investor-State dispute settlement mechanism found in Article 8 of the BIT, as determined in *Achmea*. The *CETA Opinion* broadens the application of the scope of incompatibility, but it does not impinge on the issue of consent in a different way.

594. This Tribunal cannot simply transpose the interpretations of the EU Treaties in these decisions into this arbitration. As noted above, they were not developed on the basis of applying the VCLT principles of interpretation, which it has to apply. Specifically, the Tribunal cannot apply a test turning on the mere possibility of incompatibility creating a conflict, which is the test applied by the CJEU in *Achmea*. There must be an actual incompatibility.

595. The principle of harmonious interpretation, invoked by the Claimants, and the cognate principle of systemic integration, referred to by the Respondent, only apply if the two

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<sup>372</sup> *Opinion of Advocate General Wathelet*, 19 September 2017, Case C-284/16, *Slowakische Republik v. Achmea BV*, CL-152, paras. 146-153.

<sup>373</sup> *Opinion of Advocate General Wathelet*, 19 September 2017, Case C-284/16, *Slowakische Republik v. Achmea BV*, CL-152, paras. 167-168.

laws said to be in conflict derive from the same source. The international law element of the dual characterisation of EU law satisfies that condition. It is appropriate to apply that principle here.

596. The issue for the Tribunal is whether Latvia's express written consent by way of treaty, in the form of a standing offer, was no longer in existence at the time the Claimants accepted it. Consent is a positive act requiring deliberate conduct. Harmonious interpretation of Article 8 of the BIT requires the same kind of conduct for removal of the consent that had been given. A judicial decision that, by force of another set of legal obligations, concludes that the consent should never have been given, is not of that character. The obligation not to grant consent is not self-executing.
597. It is pertinent to note that the Tribunal is dealing with an offer made to a third party to the BIT itself. Such a third party accepted the standing offer prior to the definitive decision precluding the making of the offer as a matter of EU law. That is the only fact it needs to take into account on jurisdiction.
598. The Preamble of the VCLT states fundamental principles which the Tribunal bears in mind. It states: "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised." The same principles of good faith and *pacta sunt servanda* are embodied in Article 26. Giving the CJEU decisions retroactive effect in the present circumstances, would violate each of these principles. The Tribunal finds that the retroactive effect of these CJEU decisions is ineffective in international law.
599. There is a certain incongruence in Latvia's case when it submits that something that is "precluded" is only "suspended". However, there is an understandable reason for adopting that position, turning on the sunset clause in Article 14 of the BIT. The Tribunal has not been invited to interpret and apply that provision.
600. The two provisions which were the subject of the reference to the CJEU in *Achmea* were Article 344 of the TFEU, pursuant to which Latvia undertook not to refer a dispute concerning the interpretation or application of the EU Treaties, and Article 267, which established the preliminary ruling procedure for the interpretation of the EU Treaties. Nothing in the language of those provisions impinges directly on Latvia's express

consent. The interpretation of both Articles must take into account the context, including the other Articles which Latvia invokes.

601. The Tribunal finds, by application of the rules of treaty interpretation, as codified in the VCLT, unaffected by constitutional principles of interpretation, that Article 344 of the TFEU, in its context, is directed to disputes concerning the interpretation or application of the EU Treaties. It is not concerned with investor-state disputes under the BITs.
602. Applying the same approach to treaty interpretation, Article 267 of the TFEU, in its context, concerns the preliminary ruling procedure to be followed by a court or tribunal of a Member State. It does not apply to a tribunal created pursuant to an agreement governed by international law between a national of a Member State and another Member State.
603. Further, the consequences of the breach of the EU law obligations on which Latvia relies is not the subject of any express provision to which the Tribunal's attention has been drawn. Nothing in the materials before it suggests that a breach renders the consent void as distinct from voidable. The very word used by the CJEU - "precluded" - does not suggest that past, inconsistent conduct is set aside. It suggests that such conduct constitutes a breach of an obligation, with consequences that have to be determined.
604. The relevant incompatibility or conflict, to be resolved by application of conflict rules which the Tribunal can apply, is between the express words of a bilateral treaty and decisions of a Final Court of a regional organisation and its international legal order created by the Treaties.
605. The Tribunal has accepted that decisions of the CJEU have a dual characterisation: international and domestic/constitutional. The combination leads it to adopt the terminology suggested by the ICJ in Kosovo discussed above. CJEU decisions have an "international legal character", or in the *Electrabel/Vattenfall* formulation "applicable on the plane of international law". That is, in the Tribunal's view, sufficient to require resolution of the actual conflict thus created, by application of the relevant conflict rules of international law.

## F. CONFLICT RULES

### (1) Lex Superior/Primacy

606. Article 31(3)(c) of the VCLT was one of the bases on which Latvia contended that EU law should operate as *lex superior*.<sup>374</sup> As the Tribunal has said, that Article concerns interpretation and does not contain a conflict rule. The Tribunal has also rejected the invocation of Article 5 of the VCLT for this purpose.
607. Latvia also contends that the EU principle of primacy is a conflict rule of international law which precludes any international agreement between Member States that is incompatible with EU law. It invokes the principle of *lex superior*. That characterisation adds nothing but a label to the EU law primacy submission.
608. Latvia invokes Declaration 17 annexed to the Lisbon Treaty on 7 December 2007. This statement in fact suggests the opposite conclusion. It limits the doctrine of primacy of the Treaties to “the law of Member States”. There is no suggestion in Declaration 17 that it extends to inter-se treaties.
609. Latvia refers to several CJEU precedents: *Matteucci*, *Exportur* and *Ravil*<sup>375</sup>. These cases do support the proposition that, in the case of a conflict with EU law, the EU treaties prevail over prior bilateral agreements between Member States. Professor Tridimas refers to another CJEU precedent where a statement to the same effect was made.<sup>376</sup>
610. Professors Tridimas and Talmon have expressed conflicting opinions on whether the EU law principle of primacy is addressed to international agreements of Member States, as well as to the internal legislative, executive and judicial organs of such States.
611. Professor Talmon quotes a number of statements in CJEU judgments which appear to treat agreements between Member States as national law. He concludes that there is no authority which expressly refers to the principle of primacy in its application to international agreements.<sup>377</sup>

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<sup>374</sup> Respondent’s Memorial on the Bifurcated Objection, paras. 47-50, 54, 59.

<sup>375</sup> *Matteucci*, paras. 19, 22-23; *Exportur*, para. 8; *Ravil*, para 37.

<sup>376</sup> *Commission v Italy*, p. 10. Third Tridimas Report, paras. 54-59.

<sup>377</sup> Second Talmon Report, para. 37.

612. The three cases relied on by Latvia do not deploy the word “primacy.” Nor does the additional authority referred to by Professor Tridimas. But the effect of the reasoning is precisely that. In the case of a conflict with EU law, EU law prevails over a prior bilateral agreement between Member States.
613. Professor Talmon accepted in cross-examination that these cases established that obligations under the bilateral treaties were suspended in EU law, but maintained that this was because EU law treated such treaties as national law.<sup>378</sup> In the event, Professor Talmon accepted that a bilateral treaty may have been part of the EU legal order, but it was also part of the international legal order.<sup>379</sup>
614. The Tribunal accepts that a bilateral agreement between EU Member States that is inconsistent with EU law is ineffective as a matter of EU law. However, that is insufficient to characterise primacy as a conflict rule of international law applicable in the case of a prior bilateral agreement. This is another example of the difficulties which arise from dual characterisation.
615. The Respondent’s submissions in this respect are to the same effect as those dismissed by the Tribunal in *Vattenfall*. This Tribunal agrees with what was stated therein:

Respondent identifies no principle of public international law, or even of EU law, which would permit the Tribunal to interpret the words of the ECT, being its foundational jurisdictional instrument, so as to give priority to external treaties (the TFEU and the TEU), and a court judgment interpreting those treaties.<sup>380</sup>

616. The judgments of the CJEU have an “international legal character”, to use the terminology of the ICJ in *Kosovo*. They are not, however, of a superior status in international law to a treaty between sovereign States. Nor are they of superior status to the source of this Tribunal’s jurisdiction. The ICSID Convention is one of the most widely adopted international regimes including, as far as the Tribunal is aware, all the Member States of the EU with the exception of Poland.

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<sup>378</sup> Hearing, Day 2, 51-54.

<sup>379</sup> Hearing, Day 2, 59:2-4.

<sup>380</sup> *Vattenfall*, para. 131.

## (2) Lex Specialis

617. Latvia invokes the concept of a “special self-contained regime” as set out in the ILC Fragmentation Report<sup>381</sup> as a form of *lex specialis*. It submits that the system of institutions and rules created by and pursuant to the EU Treaties is such a regime.
618. Nothing in the analysis of the ILC suggests that what the authors had in mind was applicable to an integrated, wide ranging set of treaties and institutions that created a new closely integrated polity. All of the examples given in that part of the Report had a specificity capable of characterisation as *lex specialis*. The Report refers to “rules and principles concerned with a particular subject matter” and “rules and principles that regulate a certain problem area”.<sup>382</sup> None of the examples given are of the breadth and diversity of matters within the EU.
619. Other than this “regime” point, the natural application of the concept of *lex specialis* leads to the conclusion that investment treaty protection was more specific than the breadth of the EU regime. The authorities that come to that conclusion are convincing.<sup>383</sup>
620. The Tribunal notes Latvia’s contention that the primacy principle applied to the BIT as *lex specialis*, in the context of Article 5 of the VCLT, in favour of more generalised rules of conflict such as Articles 30 or 59 of the VCLT. For the above reasons the Tribunal rejects Latvia’s invocation of Article 5. The EU law principle of primacy is neither more nor less “special” than the BIT. It is relevant only if it applies to make EU law entitled to predominance. The Tribunal discusses this contention below.

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<sup>381</sup> ILC Fragmentation 18 July Report, **RL-00316**, para. 14 (11-14).

<sup>382</sup> ILC Fragmentation 18 July Report, **RL-00316**, para. 14 (11-12).

<sup>383</sup> E.g. *Eastern Sugar*, paras. 159-165; *Binder*; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL Case, Decision on Jurisdiction, 30 April 2010, **RL-00050** (“*Oostergetel*”), paras. 74-79 and 104; *Achmea Arbitral Tribunal*, paras. 239-267; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, **RL-00074**, paras. 165-185; *Electrabel*, para. 4.176; *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, **RL-00106**; *WNC Factoring Ltd*, paras. 296-308. *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Case V 2015/014, Final Award, 10 March 2017, **ST-44**, paras. 115-116; *Wirtgen*; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, **CL-145**; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018, **CL-234**, para. 346; *United Utilities*, para. 484.

### **(3) Lex Posterior**

621. In this respect the parties refer to the following provisions of the VCLT:

Article 30 relevantly provides:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

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 later treaty.

...

Article 59 provides:

1. 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.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

622. Articles 65 and 67 relevantly provide:

Article 65

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall

indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

...

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

...

#### Article 67

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

623. The requirements for termination and, relevantly, for suspension of a treaty are reinforced by Article 42(2) of the VCLT which provides:

The termination of a treaty, its denunciation or the withdrawal of a party,...may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

624. It is also pertinent to note Article 72 of the VCLT which provides:

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

625. All of these Articles appear in Part V of the VCLT headed “Invalidity, Termination and Suspension of the Operation of Treaties”. The Part also makes detailed provision for many aspects of, relevantly, suspension of parts of a treaty.

626. The idea that later law generally supersedes earlier law is a well-established principle in most legal systems. As the Tribunal has identified a conflict between EU law and the BIT, the *lex posterior* principle is potentially applicable.

627. Latvia invokes the *ILC Fragmentation Report* which, in one comment, appears to have particular resonance for the position of a treaty between two Member States of the EU, which came into force between them before one of them became a Member State. The Report said:

The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime).<sup>384</sup>

628. This is a different point to the regime point the Tribunal has considered under *lex specialis*. It is not focused on characterising EU law. It is directed to drawing out the implications of the ‘institutional link.’ Such a link exists because both parties to the BIT have obligations and receive the benefits as the Members of the EU. The Tribunal notes the contrast between the concept of advancing “similar objectives” and the “same subject matter” formulation of Article 30 of the VCLT, which it discussed below.

629. Latvia relies on Article 59(2) and submits that the BIT is suspended, rather than terminated under Article 59(1). This interpretation would avoid the lengthy sunset

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<sup>384</sup> *ILC Fragmentation 18 July Report*, **RL-00316**, para. 14(26).

period upon termination for which Article 14 of the BIT provides. Although Latvia, and the EC, submit that Article 14 is also precluded, that issue was not part of the case before the Tribunal.

630. The Tribunal is not persuaded that the BIT is suspended. First, the procedure expressly laid down in the VCLT for suspension of a treaty was not followed. There was no notification, in writing, identifying the grounds for suspending the BIT, with reasons under Articles 65(1) and 67(1). Specifically, there was no Instrument signed by the Head of State, Head of Government or Minister of Foreign Affairs or other expressly authorised person, as required by Article 67(2).
631. Further, there was no opportunity for the UK to object to the suspension and invoke the procedure for settlement under Article 65(3) and the further detailed procedures for determining the dispute set out in Article 66.
632. In the interests of legal certainty with respect to obligations undertaken by a State in a treaty, these procedural steps are mandatory. Article 65(1) states that the State “must notify” and what the notification “shall indicate”. Similarly, Article 67(2) requires a suspension to be set forth in a formal instrument. The mandatory nature of this procedure is put beyond doubt by Article 42(2) which state that suspension can “take place only” in accordance with the VCLT or the particular treaty. There is no suspension provision in the BIT.
633. Secondly, in order to apply Article 59(2) it must “appear” from the later treaty, or be otherwise established, that the parties actually intended that the earlier treaty should stand suspended. There is virtually nothing before the Tribunal by way of evidence, or indeed submission beyond assertion, to suggest that that was the intention of Latvia and the UK at the time that Latvia joined the EU, about seventeen years ago. Apparently, the Tribunal is to draw that inference, primarily from decisions of the CJEU which all Member States of the EU have to respect. The two States have the obligation to respect a decision of the court, but that is not evidence of intention. An obligation is not an intention.
634. No such intention appears from the EU Treaties themselves. Further, the Tribunal does not accept that an inference of such an intention can be drawn from the materials before it, particularly an inference of an intention to take effect at the time Latvia joined the

EU. The Tribunal has set out above the very limited number of Member States which terminated intra-EU BITs by that time. Even assuming that was done for legal reasons, neither Latvia nor the UK did so.

635. The Tribunal cannot accept the Respondent's reliance on Article 59.
636. Alternatively, Latvia invokes Article 30 of the VCLT, set out above. As Article 30(3) states, this Article can apply if Article 59 does not. Article 30 shares an important element with Article 59. Each is triggered by a finding that the two treaties must "relate to the same subject matter". However, contrary to Article 59, there is no mandatory procedure for invoking Article 30. Nor is there a need to identify a relevant intent. The ultimate test is one of incompatibility.
637. As indicated above, the Tribunal cannot apply the CJEU's approach that even a possible incompatibility is sufficient. That approach appears to be derived from the constitutional element of the Court's reasoning. It is not an approach that is appropriate for the interpretation of compatibility in Article 30(3).
638. The Tribunal notes the Respondent's submission that Article 30 is concerned with incompatibility and the same subject matter element is not a pre-condition to its application.<sup>385</sup> This argument cannot be reconciled with the structure of the Article. The first paragraph establishes the requirement expressly and states that rights and obligations are to be established in accordance with the next two paragraphs. If the authors wished to establish a test of incompatibility simpliciter that would have been an easy drafting task.
639. The interpretation of the words "same subject matter" is, as the detailed analysis in the first *ILC Fragmentation Report* shows, a complex matter. It cannot be approached merely on the basis of dictionary definitions of the words. The ILC concluded that a strict interpretation is "neither a necessary nor a reasonable interpretation" of the words.<sup>386</sup> That is so for the reasons set out at length earlier in the first Report.<sup>387</sup>

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<sup>385</sup> Respondent's Memorial on the Bifurcated Objection, paras. 359-368.

<sup>386</sup> *ILC Fragmentation Report*, **RL-00154**, para. 253.

<sup>387</sup> *ILC Fragmentation Report*, **RL-00154**, paras. 21-26.

640. The ILC notes that a treaty may often be classified in multiple ways and indicated that a focus on the word “same” would result in a treaty being applied on a basis that was:

crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes. Everything would be in fact dependent on argumentative success in pigeon-holing legal instruments...<sup>388</sup>

641. The Tribunal rejects Latvia’s submission that there is no difference between interpretation and conflicts. The *ILC Fragmentation Report* on which this proposition is based does not say that they are the same. The learned authors indicate that the process of determining whether a conflict exists is not just an exercise in logical reasoning. It involves interpretation of the two treaties said to be in conflict.<sup>389</sup> The Tribunal is of the view that determination of whether there is a conflict involves two stages. The scope of each of the two treaties in issue must be determined by a process of interpretation. Only after that is done can any relevant incompatibility be identified.

642. The Claimants invoke a substantial body of precedent, focussed on investment treaty cases, which applies a strict interpretation of the words “same subject matter”. In those cases, the trigger is confined, in different but cognate terminology, to treaties which have the same general objective and, as it is sometimes put, “share a degree of general comparability”.<sup>390</sup> A number of these cases expressly reject the proposition that investment treaties share the same subject matter with EU law.<sup>391</sup>

643. One aspect of this substantial body of case law is that none of the cases focus on the words “relating to”, indeed few even mention it as relevant terminology. All focus on “same subject matter”. However, the words “relating to”, as the Respondent submits, involve a broad set of possible connections. The Tribunal is of the view that a focus on

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<sup>388</sup> *ILC Fragmentation Report*, **RL-00154**, para. 22.

<sup>389</sup> *ILC Fragmentation Report*, **RL-00154**, paras. 23-25.

<sup>390</sup> *Oostergetel*, para. 79 et al.

<sup>391</sup> *Eastern Sugar*, paras. 159-165; *Rupert Joseph Binder v. Czech Republic*, UNCITRAL Case, Award on Jurisdiction, 6 June 2007, CHB 5-302; *Oostergetel*, paras. 74-79 and 104; *Achmea Arbitral Tribunal*, paras. 239-267; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 Oct. 2012, **RL-00074**, paras. 165-185; *Electrabel*, para. 4.176; *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, **RL-00106**; *WNC Factoring Ltd*, paras. 296-308. *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Case V 2015/014, Final Award, 10 March 2017, **ST-44**, paras. 115-116; *Wirtgen; Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, **CL-145**; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018, **CL-234**, para. 346; *United Utilities*, para. 484.

the word “same” is too restrictive if it fails to take account of the potential breadth of the words of connection.

644. Precedents from investment treaty case law are not binding on later tribunals. There is no doctrine of *stare decisis* in this sphere of legal discourse. As a matter of comity and in order to ensure a high degree of certainty of the law, normally a substantial body of prior decisions that appears to represent a shared view will be treated with appropriate respect. However, a Tribunal is not subject to any restriction if it comes to a clear view that a line of precedent requires modification.
645. The Tribunal has before it a number of analyses of the overlap between protection of investments under the BITs and under EU law. Advocate-General Wathelet set out considerable detail on this issue in his Opinion before the Court in *Achmea*.<sup>392</sup> There are also some detailed academic writings.<sup>393</sup> The EC published a statement in support of this approach.<sup>394</sup>
646. No doubt drawing on these materials, Latvia’s submissions focused on three aspects of the EU which it contended showed a substantial degree of overlap between EU law and the BIT. First, it identified the requirements of a single market and the means by which that is enforced, notably by the principles against discrimination between Member States. Secondly, and overlapping with the first, the existence and application of the four freedoms guaranteed by the TEU: freedom of movement of goods, services, capital and persons. Thirdly, protection of the right to property under the *Charter of Fundamental Rights of the European Union*.
647. The objective of the BIT set out in the Preamble the Tribunal has quoted above, is the promotion of cross-border investment. The EU single market and the four freedoms have a similar purpose within the borders of the EU.
648. Further, the Tribunal accepts that there is substantial overlap between the protections available under the four freedoms and the Charter with respect to expropriation

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<sup>392</sup> *Opinion of Advocate General Wathelet*, 19 September 2017, Case C-284/16, *Slowakische Republik v. Achmea BV*, **CL-152**, paras. 179-228.

<sup>393</sup> E.g. Basener “Investment Protection in the European Union” (**Annex EC-11**).

<sup>394</sup> European Commissions: “Protection of Intra-EU Investment” 19 July 2018 (**Annex EC-05**).

protection under the BIT and, in view of the EU law on legitimate expectations, with the fair and equitable treatment standard. However, these are matters going to merits.

649. If Latvia is correct that the same subject matter threshold is met, the issue with respect to jurisdiction is compatibility under paragraph 3 of Article 30. The CJEU has determined that Article 8 is not compatible with EU law. As we have set out above, this Tribunal has to determine such issues for itself by application of the principles of treaty interpretation without the teleological approach adopted by the CJEU. That Court's determination of the exclusivity of its own jurisdiction, notably the preliminary ruling procedure, is also a manifestation of such constitutional interpretation.
650. The Tribunal appreciates the jurisprudential process by which the CJEU determined the scope of its authority. However, it is not bound by the CJEU's approach. When determining incompatibility the Tribunal is focused on the simplicity of the relevant word---"consent". That word finds its origins in Article 25 of the ICSID Convention. BIT Article 8 is the means chosen to express that consent in the particular context of the BIT.
651. The relevant conflict, as the Claimants submitted, is not between the EU Treaties and the BIT. It is between the EU Treaties and the ICSID Convention. Where the latter expressly permitted a reservation for the exhaustion of local remedies, the principle of harmonious interpretation should be applied with the effect that there is no incompatibility between the two dispute resolution processes.
652. The Tribunal is reinforced in this interpretation by the fact that so few intra-EU BITs were terminated prior to *Achmea*. It is not clear that those who terminated those treaties believed there to be an incompatibility. A significant majority of States did not believe there was.
653. The Tribunal rejects an interpretation of the EU treaties which, in effect, not only requires exhaustion of local remedies under the guidance of the CJEU, but precludes the recourse to an international tribunal offered by the BIT to an investor who feels unable to vindicate his rights in the national courts.
654. Further, unlike the CJEU, the Tribunal does not accept that the mere possibility that a tribunal will reach a result that an EU court would not reach is sufficient. The judiciaries

of all legal systems sometimes have to apply foreign law. The exercise of that jurisdiction sometimes leads to divergent outcomes. That is simply a manifestation of the fact that there is no international court with global jurisdiction. For the same reason, there is no warrant for any court or tribunal to refuse to exercise its actual jurisdiction. Indeed, many ICSID tribunals and annulment committees have emphasized the duty of a tribunal constituted under the ICSID Convention to exercise the jurisdiction entrusted to it.<sup>395</sup>

655. Aspects of the scope of EU law may arise on the merits, pursuant to ICSID Article 42. It is not appropriate to comment on that in this Decision.

656. The principle of *lex posterior* has no application to this Tribunal's jurisdiction.

#### **(4) BIT Articles 11 and 3**

657. The Claimants invoked the 'more favourable treatment clause in Article 11 of the BIT and also the MFN clause in Article 3. In view of the conclusions the Tribunal has reached on the Claimants' primary submissions, it is unnecessary to deal with these alternative cases.

#### **(5) VCLT Articles 27 and 46**

658. The Claimants invoke VCLT Articles 27 and 46. These Articles provide:

##### **Article 27**

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

##### **Article 46**

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

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<sup>395</sup> See, e.g., *Eskosol*, para. 186; *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, **RL-00103**, para. 80.

2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

659. The Tribunal notes that Article 46 applies to “consent to be bound by a treaty”. It accepts the Respondent’s submission that this Article is not relevant.
660. Article 27 is one of two Articles in a section entitled “Observance of Treaties”. The other, Article 26, asserts the principle of *pacta sunt servanda*: every treaty is binding and must be performed in good faith.
661. Article 27 turns on the concept of “internal law”. This raises an unusual issue in a context where the EU Treaties have a dual character.
662. The Respondent’s submissions and Professor Tridimas’ evidence proceeded on the basis that the issue under Article 27 was a choice concerning the characterisation of EU law as “international law” or “domestic law”. The Professor described the choice as “binary”.<sup>396</sup> That customary distinction is not of assistance in the case of a law which may be either or both.
663. Article 27 does not expressly put forward such a choice. It applies if the appropriate characterisation is “internal”. Such questions of characterisation cannot be answered in the abstract by attaching a label. They require an analysis of the particular circumstances in which they arise.
664. The issue before this Tribunal is how to characterise the law which is said to have the consequence that the express offer to arbitrate in Article 8(1) of the BIT ceased to exist. This has not been an easy task.
665. Professor Tridimas, whilst rejecting the position that EU law was “internal”, also set out the mechanism by which EU law became binding on Latvia. He notes that both the UK and Latvia are dualist nations which require the incorporation of international law into domestic law. The UK did so by the *European Communities Act 1972* and Latvia did so by adding three provisions to its Constitution in 2002.<sup>397</sup>

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<sup>396</sup> Hearing, Day 1, 107.

<sup>397</sup> Second Tridimas Report, paras. 246-247.

666. Professor Tridimas also said:

... subject to isolated exceptions, the courts of Member States adhere to the principle of primacy but derive its normative foundations not from EU law but the provisions of the national constitution which establishes the legal basis of EU membership. From the perspective of national courts, EU law is a derived legal order, its binding effect anchoring in the domestic legal system.<sup>398</sup>

667. *Prima facie*, this process answers the description of “internal law”. However, as the Respondent submitted, this would imply that any international agreement made applicable by local legislation would lose its status as international law. Indeed, that would be the case for all international treaties in dualist nations. That is not a reasonable interpretation of Article 27 in which the concept of “internal law” is counterposed with performance of treaty obligations.

668. In a case, such as the present, where the same law is capable of being characterised as either international or internal, it is necessary to identify the nature of the application of the law in the particular circumstances. As we have indicated above, the Tribunal is of the view that the relevant principles in *Achmea* are a manifestation of EU constitutional law. As such, it is an internal law within the meaning of Article 27.

669. The question before this Tribunal is not, however, whether an international agreement loses its status as international law, but whether the EU Treaties, as they apply within the EU, override purely international obligations undertaken by Member States. Within each Member State, those treaties have, as Professor Tridimas puts it, a “binding effect anchoring in the domestic legal system.” Once anchored in the domestic legal system, however, Article 27 prevents them from being invoked as justification for a state’s failure to perform a treaty.

## G. CONCLUSION

670. For the above reasons the Tribunal rejects Latvia’s case that EU law operates as applicable law on the issue of jurisdiction. It also rejects Latvia’s submissions that there

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<sup>398</sup> Second Tridimas Report, para. 90.

is any conflict rule which could have the result that EU law could prevail over the terms of the BIT, specifically with respect to Article 8, as a matter of international law.

671. The fact that Latvia may be in breach of its legal obligations under EU law is not, in and of itself, determinative of the Tribunal’s jurisdiction. As Lord Neuberger put it:

Wrongful consent nonetheless constitutes consent, and in order to establish jurisdiction, consent (whether rightly or wrongly given) is all that is required.<sup>399</sup>

672. The Tribunal finds that Latvia’s consent, contained in Article 8, has not been suspended, superseded or vitiated in any way. The offer contained therein was open to acceptance by the Claimants at the time they accepted it by filing the Request for Arbitration.

## V. SCOPE OF THE BIFURCATION

### A. THE PARTIES’ SUBMISSIONS

#### (1) Claimants’ Submissions

673. The Claimants contend that the Respondents’ case on admissibility, in whole or in large part, is beyond the scope of the bifurcated issue defined in the Tribunal’s Decision on Respondent’s Request for Bifurcation dated 1 March 2019 (the “**Decision on Bifurcation**”) and its Decision on Application to Reconsider the Decision on Bifurcation (the “**Reconsideration Decision**”) of 2 July 2019.
674. Prior to the Tribunal’s Decision on Bifurcation, no EU law admissibility objections had been raised by Latvia.
675. The Decision on Bifurcation expressly confined the scope of bifurcation to *jurisdictional* issues.<sup>400</sup>

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<sup>399</sup> First Neuberger Report, para. 25.

<sup>400</sup> The Tribunal’s Decision on Bifurcation dated 1 March 2019, para. 200 (“(i) decides to bifurcate the proceedings and deal with the Respondent’s objection to the Tribunal’s jurisdiction based on the alleged unavailability of the investor-State arbitration mechanism under the UK-Latvia BIT as a preliminary matter”) (emphasis is Shareholder Claimants’).

676. The first admissibility objection was raised in Latvia’s Memorial on the Bifurcated Issue (May 2019). The Claimants delineate this as the “**Applicable Law Admissibility Objection.**”

677. The Applicable Law Admissibility Objection is to the effect that the claim is inadmissible on the basis of EU law, i.e. that:

... this Tribunal must find that, on the basis of EU law, which is incompatible with and supersedes the Latvia-UK BIT, it lacks jurisdiction over the present dispute, and, why, in addition, the claim, is inadmissible on the merits because it is precluded by EU law.

...considering that the applicable law to the merits of the dispute is EU law, the present claim is inadmissible. This is so because EU law precludes Member States from allowing the interpretation and application of EU law from being made by an international arbitral tribunal with no connection with the EU legal order, such as an ICSID tribunal.<sup>401</sup>

678. The Applicable Law Admissibility Objection was further particularised in Latvia’s August 2019 Reply, which based the objection on the “international public policy of the [EU]”.<sup>402</sup>

679. The Tribunal’s Reconsideration Decision reiterated that Latvia’s preliminary objection concerned the Tribunal’s “jurisdiction.”<sup>403</sup>

680. What the Claimants termed “**Belated Admissibility Objections**” were then raised by Latvia at the September 2019 Hearing.<sup>404</sup> As will appear, the Claimants submit that these admissibility objections cannot be dealt with in the current bifurcated phase (if any can be, which they deny), as being, *inter alia*, abusive.

681. The Claimants’ primary argument in response to Latvia’s admissibility objections is that *all* of Latvia’s EU law admissibility objections were not before the Tribunal before

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<sup>401</sup> See the Respondent’s Memorial on the Bifurcated Objection, paras. 235-236, 268, 425; SCPHS 1, para. 18 (emphasis is the Shareholder Claimants’).

<sup>402</sup> SCPHS 1, para. 19, citing Respondent’s Reply on the Bifurcated Objection, para. 13.

<sup>403</sup> The Tribunal’s Decision on Application to Reconsider the Decision on Bifurcation dated 2 July 2019, para. 19. See also para. 14.

<sup>404</sup> These are referred to by the Shareholder Claimants as admissibility objections pertaining to: Judicial Protection, Constitutional Powers, and Banking Sector (collectively “**Belated Admissibility Objections**”). SCPHS 1, paras. 21-22.

its Decision on Bifurcation, so that none of them could have informed the decision to bifurcate. The Claimants contend that a ruling on admissibility is distinct from, and presupposes a prior affirmative ruling on, jurisdiction.<sup>405</sup> It follows that *all* the EU law admissibility objections, which are not objections to jurisdiction, but are objections to admissibility, were not ordered to be bifurcated, are not to be dealt with as preliminary matters, and remain joined to the merits, to be dealt with after the Tribunal's jurisdictional determination.<sup>406</sup>

682. The Claimants say that the reference at paragraph 149 of the Decision on Bifurcation to sub-issues which “may also lead to a decision on the admissibility standard, capable of affecting the continuation of these proceedings,” does not undermine their argument since: (1) the Tribunal never held that a decision on the admissibility standard is capable of “affecting the continuation of these proceedings” upon the conclusion of the bifurcated phase, let alone where proceedings on the merits are suspended and pleadings on the merits are thus excluded; and (2) admissibility objections can only be raised by a respondent.<sup>407</sup>

683. The Claimants submit that the absence of any admissibility objections being brought before the Tribunal prior to the Decision on Bifurcation explains why their Counter-Memorial on the Bifurcation Objection (July 2019) did not address admissibility. In these circumstances, it would be inconsistent with the Decision on Bifurcation (and later procedural directions), and irregular, to dispose of the EU Law Admissibility Objections at this phase. The EU Law Admissibility Objections should be dealt with at the merits phase.<sup>408</sup>

684. In the alternative, the Claimants submit that only the Applicable Law Admissibility Objection was timely. The rest (Belated Admissibility Objections) are procedurally

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<sup>405</sup> *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 Sept. 2008, **CL-319**, para. 63. In their Third PHS, the Shareholder Claimants at p 3 also cite August Reisch, ‘Jurisdiction and Admissibility in International Investment Law’, 16 *Law & Prac. Int’l Cts. & Tribs.*, 21 (2017), **CL-330**, p. 24, and Jan Paulsson, ‘Jurisdiction and Admissibility’, *Global Reflections on International Law, Commerce and Dispute Resolution*, 601 (2005), **CL-331**, p. 604, in support of their position.

<sup>406</sup> SC PHS 1, para. 10.

<sup>407</sup> *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, **CL-282**, para. 94.

<sup>408</sup> In their Third PHS, the Claimants describe Latvia’s Second PHS as an “ambush” on the admissibility issue. Latvia allegedly introduced 58 legal authorities mainly directed to the concept of “international public policy,” which, say the Claimants, “does not exist.” In these circumstances, the proper course is for the admissibility objections concerning “international public policy” to be joined to the merits. SC PHS 3, pp. 1-2.

unfair/abusive and cannot be dealt with at the Bifurcated phase. They must be dismissed or deferred to the merits.

## (2) Respondent's Submissions

685. The Respondent submits that its admissibility objection is part of the Bifurcated Objection for three main reasons.

686. First, in Latvia's Request for Bifurcation (3 August 2018), it framed all of its objections as both jurisdictional and admissibility objections. The Claimants have thus been on notice since then that all the objections could have a dual jurisdiction and/or admissibility character. For instance:

(1) Section III of Latvia's Request characterized all its objections as both jurisdictional and admissibility.<sup>409</sup>

(2) Latvia's 14 August 2018 Request for Bifurcation described all objections, including the intra-EU Objection, in the same manner.<sup>410</sup>

(3) The same is clear from the rest of Latvia's bifurcation pleadings.<sup>411</sup>

687. Second, the Decision on Bifurcation shows that the Tribunal accepted that Latvia's plea on its intra-EU objection may have a dual character going to jurisdiction and admissibility. The Tribunal explicitly cited paragraph 5 of Latvia's Request at paragraph 33 and held that all issues relating to the intra-EU objection could raise dual jurisdiction and admissibility standards.<sup>412</sup>

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<sup>409</sup> Respondent's Preliminary Comments on Claimants' 20 July Application for Provisional Measures and Notification of Preliminary Objections to the Tribunal's Jurisdiction and/or Admissibility of the Claim, 3 August 2018, para. 71 ("Respondent hereby notifies the Tribunal of its intention to make at least the five following preliminary objections and that it intends to request the Tribunal to bifurcate the proceedings so that jurisdictional, admissibility and any other preliminary matters be first heard, distinct from the merits...").

<sup>410</sup> Respondent's Request for Bifurcation, 14 August 2018, para. 5 ("Respondent presents below the five following objections to the Tribunal's jurisdiction **and/or admissibility of the claim**: the investor-state arbitration mechanism found in the Latvia-UK BIT is unavailable (A)...") (Emphasis added is Latvia's)).

<sup>411</sup> See Respondent's Reply on Bifurcation, 16 November 2018, paras. 1, 44; Respondent's Request for Bifurcation, 14 August 2018, para. 68; Respondent Reply on Bifurcation, 16 November 2018, para. 44; Respondent Post-Hearing Brief on Bifurcation, 31 January 2019, paras. 70 and fn. 90; RPHS 1, para. 111.

<sup>412</sup> Decision on Bifurcation, para. 149 ("There are a number of sub-issues which can affect the conclusion on this jurisdictional issue. **Some of the sub-issues may also lead to a decision on the admissibility standard, capable of affecting the continuation of these proceedings.** These issues are: [listing 12 questions which the parties have extensively debated on the Bifurcated Issue]") (Emphasis is Latvia's)).

688. Third, the Claimants’ argument that the admissibility objection does not form part of the Bifurcated Objection on the basis that the Tribunal cannot rule on admissibility before ruling on jurisdiction should be rejected because:<sup>413</sup>

(1) The Claimants’ reliance on the Tribunals’ 30 January 2020 decision is misplaced as the relevant passage did not concern the scope of the Bifurcated Issue.<sup>414</sup>

(2) The Claimants’ reliance on *Micula* to argue that “a ruling on admissibility is distinct from and presupposes a prior, affirmative ruling on jurisdiction”<sup>415</sup> misrepresents that decision. Paragraph 63 of *Micula* states: “If a tribunal finds a claim to be inadmissible, it must dismiss the claim without going into its merits even though it has jurisdiction.”

(3) Nowhere in *Micula* did the tribunal say that to rule on admissibility there must be a prior ruling on jurisdiction.<sup>416</sup>

(4) Objections to jurisdiction and admissibility can be presented at the same time as shown in numerous cases.<sup>417</sup>

(5) Joining the admissibility objection to the merits would be inefficient and wasteful of significant resources.

689. The Respondent thus contends that it raised its admissibility objection in a timely fashion and rejects the counterargument that any new admissibility objections included in Latvia’s Reply were belated under the ICSID Rules. Latvia rejects the Claimants’ attempt to dissect its admissibility objection into a “belated” part. The essential point,

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<sup>413</sup> Cf SCPHS 1, paras. 9-10.

<sup>414</sup> Cf SCPHS 1, paras 9-10.

<sup>415</sup> *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **CL-319** (“*Micula*”), para. 63. Referring to SCPHS 1, para. 9.

<sup>416</sup> Latvia states that the tribunal just explained that admissibility and jurisdiction are different concepts: jurisdiction pertains to “the ability of a tribunal to hear a case,” admissibility “aims at the claim itself,” which means that a tribunal should rule on admissibility only when it can hear the case.

<sup>417</sup> See e.g. *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **RL-00167**, paras. 404, 411-413; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, **RL-00456**, paras. 274-276; *LE.S.I. S.p.A. and ASTALDI S.p.A. v. République algérienne démocratique et populaire*, ICSID Case No. ARB/05/3, Decision, 12 July 2006, **RL-00457**, para. 58.

according to Latvia, is that it “made only one admissibility objection.”<sup>418</sup> That admissibility objection is that:<sup>419</sup>

the claim is precluded by EU law and as such it would be against EU law (and thus EU international public policy) for this Tribunal to entertain the claim on the merits.

690. The “fundamental incompatibility” Latvia asserts it relies on is EU law’s preclusive effect over an intra-EU BIT claim, as outlined in *Achmea* and buttressed in *Opinion I/17*. These matters were advanced as jurisdictional or admissibility objections in its Memorial on the Bifurcated Objection<sup>420</sup> and further specified in its Reply.<sup>421</sup>
691. According to Latvia, the timeliness of its admissibility objection is reinforced not only by the Decision on Bifurcation, but the Tribunal also has a discretion to raise admissibility as an issue of the Tribunal’s own motion.<sup>422</sup> This is consistent with the principle that it should ensure the integrity of its own proceeding.
692. Latvia submits that an ICSID tribunal may dismiss a claim on admissibility grounds without examining the merits of the case.<sup>423</sup> There would not be any “annullable error” in so doing. As long as the grounds of Article 52(1) of the ICSID Convention are not fulfilled, there would be no annullable error.

## B. TRIBUNAL ANALYSIS

693. The actual decision to bifurcate was expressed in these terms in the Decision on Bifurcation:

“[200 (i)] The Tribunal decides to bifurcate the proceedings and deal with the Respondent’s objection to the Tribunal’s jurisdiction based on the availability of the investor-state arbitration mechanism under the UK-Latvia BIT as a preliminary matter.”

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<sup>418</sup> RPHS 2, para. 173.

<sup>419</sup> RPHS 2, para. 174.

<sup>420</sup> Respondent’s Memorial on the Bifurcated Objection, paras. 237, 268, and 401 (read with 302).

<sup>421</sup> Respondent’s Reply on the Bifurcated Objection, paras. 125-130; 147.

<sup>422</sup> Citing *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/95/3, Award, 10 February 1999, **RL-00458**, para. 86 (“Although no objection was raised by the Respondent in this regard, the Tribunal considered it its duty also to examine the admissibility of the application.” [Free translation]).

<sup>423</sup> Jan Paulsson, ‘Jurisdiction and Admissibility,’ *Global Reflections on International Law, Commerce and Dispute Resolution*, November 2005, **RL-00461**, p. 607.

694. As is apparent, the decision does not extend to any objection based on admissibility. The Tribunal did not bifurcate five other objections in the Respondent's Request. Nor did it bifurcate the alternative objection to the admissibility of claims in the Request for the one matter it did bifurcate. This appears from the background context and the Decision on Bifurcation.
695. The Respondent expressly stated in the first paragraph of its Request for Bifurcation of 14 August 2018 that the purpose of the request was "that its jurisdictional and admissibility objections be heard as a preliminary matter and separate from the merits." The Respondent introduced the list of topics which it requested to be bifurcated as objections to "jurisdiction and/or admissibility."<sup>424</sup> Relevantly, the Claimants repeated the use of both terms in their Response to the Request.<sup>425</sup>
696. The reasoning of the Tribunal in the "Conclusion and Directions" section, leading up to the decision, makes the intention clear:

[193] For the reasons explained above, the arbitration proceeding is bifurcated to permit the Tribunal to consider, as a preliminary issue under Rule 41 ICSID Arbitration Rules, the Respondent's objection to the jurisdiction of the Tribunal based on the decision of the CJEU in *Achmea*. All other objections to jurisdiction are reserved to be considered at the merits stage, if it reaches the merits stage.

[199] It seems to the Tribunal that it would be most efficient to receive the following submissions before the hearing on jurisdiction in the following order:

a...

b. The Respondent's submission on its objection to the jurisdiction of the Tribunal based on the decision of the CJEU in *Achmea*.

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<sup>424</sup> Respondent's Request for Bifurcation 14 August 2018, para. 5. See also, para. 50. The Respondent referred to "five objections". There are in fact six.

<sup>425</sup> Claimants' Response to Respondent's Request for Bifurcation, 10 October 2018, paras. 7, 10.

c. The Claimants' response to the Respondent's *Achmea* objection

d..."

697. It is the case, as the Respondent points out, that the Tribunal made reference to the Respondents' submissions on admissibility in the Decision on Bifurcation. Those submissions were directed to the Claimants' procedural fairness objection to the Tribunal hearing the admissibility issues raised by the Respondent. However, such references are also pertinent for determining the scope of what the Tribunal bifurcated.
698. At paragraph 33, the Tribunal listed the matters which the Respondent applied to be heard as preliminary issues and described them as "objections to the Tribunal's jurisdiction."
699. At the commencement of the Analysis section at paragraph 137, the Tribunal noted that the Respondent sought a preliminary determination of "five jurisdictional or, alternatively, admissibility, objections..."<sup>426</sup>
700. After identifying the principal jurisdictional issue as whether the CJEU decision in *Achmea* meant that there was no consent to arbitration, the Tribunal set out at paragraph 149 a long list of legal sub-issues which, the Tribunal said "can affect the conclusion on this jurisdictional issue", the Tribunal added: "Some of the sub-issues may also lead to a decision on the admissibility standard, capable of affecting the continuation of these proceedings."
701. As is apparent, the Tribunal fully understood the scope of the Respondents' request for bifurcation. It deliberately confined its ruling to the intra-EU objection to jurisdiction.
702. This was reinforced in the Tribunal's Reconsideration Decision rejecting the Claimants' Application to Reconsider the Decision on Bifurcation. The Tribunal ruled at paragraph 19(i): "the decision to address as a preliminary matter the Respondent's objection to the Tribunal's jurisdiction based on the alleged unavailability of the investor-State arbitration mechanism under the UK-Latvia BIT is maintained."

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<sup>426</sup> As noted above, "five" was the Respondent's word, an error.

703. The Respondent's Applicable Law Admissibility Objection is effectively the same as its objection to the Tribunal's jurisdiction, just presented under a different label. Both objections assert that, "because EU law precludes Member States from allowing the interpretation and application of EU law from being made by an international arbitral tribunal with no connection with the EU legal order," the Tribunal has no jurisdiction to hear the Claimants' claims and that those claims must be declared inadmissible. The Respondent put forward no reasons for a finding of inadmissibility that added to or differed from those advanced on the jurisdiction issue. The Tribunal notes that it may have to form a view on EU law if asked to do so under Article 42 of the ICSID Convention.
704. All other objections to the admissibility of the Claimants' claims are reserved to the merits phase of this arbitration.

## **VI. COSTS**

705. The Tribunal received submissions on costs from the parties.
706. Under Arbitration Rule 47(1)(j) of the ICSID Convention the Tribunal has the power to order costs only at the time of rendering the Award. Since the Tribunal has not made an Award, it will reserve all issues of costs until it does so.
707. The Tribunal will determine the appropriate allocation of costs in its Award, taking into consideration, in addition to its decision on the merits, the number of interlocutory applications made up to this point, the extent to which such applications may have caused delays to the proceedings, and whether those applications raised issues which will arise again during the merits phase.
708. The submissions on costs made at this stage will be of assistance when the Tribunal has to determine costs. The Parties may refer back to these costs submissions when they make their final costs submissions at the conclusion of the merits phase; there will be no need to duplicate them.

## **VII. DECISION**

709. For the reasons stated above, the Tribunal decides that:

- (1) the Intra-EU Objection to the jurisdiction of the Tribunal is rejected;
- (2) the issue of costs incurred by the Parties to date is reserved and will be addressed in the final Award; and
- (3) the proceedings shall continue to the next phase in accordance with the procedural schedule to be determined by the Tribunal in a procedural order to be issued.

[Signed]

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H.E. Judge Peter Tomka  
Arbitrator

Date: 13 May 2021

[Signed]

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Mr John M. Townsend  
Arbitrator

Date: 13 May 2021

[Signed]

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Hon. James Spigelman QC  
President of the Tribunal

Date: 13 May 2021