EUROPEAN COMMISSION
LEGAL SERVICE

AFFAIR Team (Establishment, services, business law, movement of capital, transport, intellectual property and information society)

Brussels, 22 September 2021
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Via e-mail

To the attention of:

[redacted]
Legal Department of the Ministry of Economic Affairs and Climate Policy

Subject: **Your letter of 15 September 2021 – dispute of the Kingdom of the Netherlands against RWE AG, pending at the *Oberlandesgericht Köln* with case number 19 Sch 15/21**

Madame,

1. The Commission acknowledges receipt of your letter of 15 September 2021, in which you have informed the Commission of intra-EU investment arbitration proceedings brought by RWE AG against the Kingdom of the Netherlands under Article 26 of the Energy Charter Treaty. You have also informed the Commission that RWE AG relies on the procedural rules of the ICSID Convention.

2. You have drawn the attention of the Commission to proceedings brought by the Kingdom of the Netherlands before the Higher Regional Court of Cologne in Germany. Those proceedings aim at a declaration, by that court, based on § 1032(2) of the German Code of Civil Procedure, that there is no arbitration agreement between RWE AG and the Kingdom of the Netherlands.

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3. The legal basis for seeking such a declaration are the judgments of the Court of Justice in *Slowakei* v *Achmea*[1] and in *République de Moldavie* v *Komstroy*[2]. There is a precedent for such a declaration in a judgment of the Higher Regional Court of Frankfurt.[3]

4. With the exception of proceedings concerning competition law and State aid law, which are governed by specific texts of secondary Union law, the Commission does not intervene as *amicus curiae* before the courts and tribunals of the EU Member States. That is because courts and tribunals of the EU Member States are, pursuant to Article 19(1) TEU, the ordinary judges of Union law, and have the possibility and, under certain circumstances, the obligation to refer questions of interpretation and application of Union law to the Court of Justice for a preliminary ruling, pursuant to Article 267 TFEU.

5. The situation is different for courts and tribunals of third countries, as well as arbitration tribunals. Those cannot make a preliminary reference to the Court of Justice. Therefore, the Commission may appear before those instances on behalf of the Union as *amicus curiae*, in the exercise of its powers of external representation of the Union pursuant to Article 17(1) TEU.

6. Concerning the litigation pending before the Higher Regional Court of Cologne, the Commission draws your attention to the following elements, which may be of relevance for those proceedings.

7. In *République de Moldavie* v *Komstroy*, the Court of Justice has given a final and binding interpretation of Article 26 ECT. It is competent to do so, because the ECT, as an international agreement to which the Union is a party, is part of EU law.[4] It held that that Article 26(2)(c) ECT must be interpreted as not applying to disputes between a Member State and an investor of another Member State.[5]

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1 Case C-284/16, 6 March 2018, EU:C:2018:158.

2 Case C-741/19, 2 September 2021, EU:C:2021:655.

3 Judgment of the OLG Frankfurt of 11.02.2021, reference 26 SchH 2/20, ECLI:DE:OLGHE:2021:0211.26SCHH2.20.00.

4 Case C-741/19, 2 September 2021, EU:C:2021:655, para 23, with further references.

5 *Ibidem*, para 66.

8. That conclusion flowed from the unique nature of the EU legal order, and the need to ensure the integrity of the EU judicial system and consistency and uniformity in the interpretation and application of EU law. It is based on the premise, set out by the Court of Justice in its earlier judgment in *Slowakei v. Achmea*, that intra-EU arbitration would violate core elements of EU law, in particular the principles of autonomy of EU law and of mutual trust between the EU Member States, as well as the fundamental tenets of the EU judicial system.[6] Therefore, it is impermissible.

9. Under Article 344 TFEU, the EU Member States, i.e. including the Federal Republic of Germany and the Kingdom of the Netherlands, have entrusted the Court of Justice with the task of rendering final and binding interpretations of EU law. Crucially, that includes the interpretation of international agreements to which the EU and its Member States are a party, insofar as their application between two EU Member States is concerned.[7] As a result of the direct application of EU law in the legal orders of the EU Member States, that interpretation by the Court of Justice is also binding on companies incorporated in the EU, such as RWE AG.[8]

10. If a company attempts nevertheless to initiate intra-EU investor-State arbitration pursuant to Article 26 ECT, it acts in violation of that provision, and in violation of fundamental rules of Union law. Those rules also form part of the *ordre public* of each EU Member State and must be upheld by national courts when dealing with arbitration proceedings.[9]

11. In *Matteucci*, concerning precisely bilateral international obligations between EU Member States, the Court of Justice recalled that it follows from the principle of loyal cooperation (enshrined today in Article 4(3) TEU) that "*if the application of a provision of Union law is liable to be impeded by a measure adopted pursuant to the implementation of an international agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate*

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6 *Ibidem*, paras 40-65.

7 Case C-459/03, *Commission* v *Ireland* ("Mox Plant"), 30 May 2006, EU:C:2006:345, paras 121-133.

8 See, for an illustration of the principle that the EU treaties and general principles of EU law apply directly between private parties and can create obligations for private parties, Case C-415/93, *Bosman*, 15 December 1995, EU:C:1995:463, paras 82-87.

9 See, to that effect, Case C-284/16, *Slowakei* v *Achmea*, 6 March 2018, EU:C:2018:158, para 54, with further references.

the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law." If no other solution can be found, that may include disapplying the provision of such an international agreement, based on the principle of precedence of Union law.[10] That duty of loyal cooperation extends to the all organs of the State, including the judiciary.

12. By bringing the action under § 1032(2) of the German Code of Civil Procedure, the Kingdom of the Netherlands seeks the assistance of the German courts in order to comply with its obligations under Articles 19(1) TEU, 267 and 344 TFEU and the principles of mutual trust and autonomy of Union law. Those obligations preclude any investor-State arbitration proceedings between an investor from one EU Member State and another EU Member State.

13. It follows from your letter that in that context, a question has arisen concerning the relationship between the ICSID Convention and Union law. In particular, it would seem that it has been argued that the fact that RWE AG has launched investor-State arbitration relying on the procedural rules of the ICSID Convention, rather than on UNCITRAL rules[11], deprives the German courts of jurisdiction under § 1032(2) of the German Code of Civil Procedure.

14. As a preliminary point, it is important to stress that the ICSID Convention is not part of Union law, for the following reason: The Union is not a contracting party to the ICSID Convention. The ICSID Convention therefore could only be part of Union law if two cumulative conditions were met: if all EU Member States were parties to it, and if there had been a full transfer of the powers previously exercised by the EU Member States to the Union.[12] Poland is not a contracting party to the ICSID Convention, so that the first of those two cumulative conditions is manifestly not met. The ICSID Convention hence is not part of Union law.

15. Rather, the ICSID Convention is an international convention to which 26 of the 27 Member States are party.

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10 Case 235/87, EU:C:1988:460, paras 19 and 22.

11 As was the case in the case decided by the Higher Regional Court of Frankfurt, quoted in footnote 3.

12 See judgments in *Intertanko*, C-308/06, EU:C:2008:312, para 49; and in *Commune de Mesquer*, C-188/07, EU:C:2008:359, para 85.

16. Just like for the ECT, the ICSID Convention creates a bundle of bilateral international obligations between the home State of the investor and the responding State. Therefore, just like for all other multilateral treaties which create international obligations that can be "*bilateralised*", rights of third countries are not at stake where a situation is a purely intra-EU situation.[13] The CJEU has confirmed such "*bilateralisation*" for numerous multilateral treaties;[14] there is no reason to exempt the ICSID Convention from this rule.[15]

17. As a result, possible international obligations created by the ICSID Convention between the Kingdom of the Netherlands and the Federal Republic of Germany have to be treated in the same manner as the bilateral international obligations between the Kingdom of Belgium and Germany at stake in *Matteucci*: First, they have to be interpreted, as much as possible, in conformity with Union law. Second, if such interpretation in conformity is not possible, the national judge has to disapply them, based on the principle of primacy of Union law.

18. Interpretation in conformity of the relevant provisions of the ICSID Convention seems possible. In particular, according to its Article 25, the ICSID Convention only applies where the Contracting Party has given consent to arbitration in a separate instrument, be that in a commercial contract or in an investment treaty. It is precisely the existence of such consent that is contested in the proceedings brought on the basis of § 1032(2) of the German Code of Civil Procedure. Should those proceedings conclude that there is no consent to arbitration, the ICSID Convention would not be engaged.

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[13] See, for a detailed analysis, Klabbers, *Treaty Conflict and the European Union*, CUP 2009, pp. 115-149.

[14] Judgments in *Ministère Public* v *Deserbais*, 286/86, EU:C:1988:434 (Stresa Convention on Cheeses); in *RTE and ITP* v *Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98 (Berne Convention for the Protection of Literary and Artistic Works); in *Commission* v *Austria*, C-147/03, EU:C:2005:427 (Council of Europe Convention on the Equivalence of Diplomas); in *Bogiatzi* v *Deutscher Luftpool et al.*, C-301/08, [2009] EU:C:2005:427 (Warsaw Convention on International Carriage by Air); and in *République de Moldavie* v *Komstroy*, concerning the Energy Charter Treaty. Indeed, in a context closely analogous to that of the ICSID Convention, the Court has ruled that while Article 351(1) TFEU "*allows Member States to honour obligations owed to non-Member States under international agreements preceding the Treaty, it does not authorize them to exercise rights under such agreements in intra-Community relations*" Judgment in *Commission* v *Luxembourg*, C-473/93, EU:C:1996:263, para 40, concerning the Council of Europe Convention entitled "European Convention on Establishment" of 1955, which has been ratified by a certain number of EU Member States as well as non-Member States. In particular, Norway ratified it in 1957.

[15] See for a detailed analysis *McGarry* et *Ostransky*, Modifying the ICSID Convention under the Law of Treaties, ejiltalk.org/modifying-the-icsid-convention-under-the-law-of-treaties.

19. Should the Higher Regional Court of Cologne reach the opposite result, i.e. that the ICSID Convention constitutes an obstacle to proceedings brought on the basic of § 1032(2) of the German Code of Civil Procedure and cannot be interpreted in conformity with Union law, it would have to disapply the ICSID Convention.[16] That is because its application would result in a violation of its duty of loyal cooperation vis-à-vis the Kingdom of the Netherlands, as well as a violation of Articles 19(1) TEU, 267 and 344 TFEU and the principles of mutual trust and autonomy of Union law. In fact, declining the admissibility of proceedings brought on the basic of § 1032(2) of the German Code of Civil Procedure would enable RWE AG to opt out of the Union legal system. That is precisely what the Court of Justice held to be impermissible under Union law in *République de Moldavie* v *Komstroy*.[17]

20. Should the Higher Regional Court of Cologne have any doubts as to questions of interpretation and application of Union law raised before it, it may be in the interest of an efficient administration of justice that it makes use of its possibility to refer those matters to the Court of Justice pursuant to Article 267 TFEU.

Sincerely yours,

Vittorio DI BUCCI
Principal Legal Adviser

c.c.: [redacted] (EZK);
[redacted] (SJ).

[16] The Commission observes that rights and obligations of third countries are not engaged here, for the reasons set out in paragraph 16 of this letter. Therefore, the ICSID Convention is not protected by Article 351(1) TFEU. Even if the Higher Regional Court of Cologne was to take the opposite view, Article 351(1) TFEU would still not be engaged, because the Kingdom of the Netherlands and the Federal Republic of Germany have concluded the ICSID Convention after 1 January 1958.

[17] Case C-741/19, 2 September 2021, EU:C:2021:655, paras 51-53.