INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/15/31

GABRIEL RESOURCES LTD.
AND GABRIEL RESOURCES (JERSEY) LTD.

Claimants

VS.

ROMANIA

Respondent

THE RESPONDENT'S ADDITIONAL PRELIMINARY OBJECTION

25 May 2018

Before:

Prof. Pierre Tercier (President)
Prof. Horacio A. Grigera Naón
Prof. Zachary Douglas QC

LALIVE LEAUA & ASOCIATII

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TABLE OF ABBREVIATIONS

Term	Definition
BGH	German Supreme Court or "*Bundesgerichtshof*"
CJEU	Court of Justice of the European Union
Decision	Judgment of the CJEU (Grand Chamber) in the case of *Slovak Republic v. Achmea BV*, Case C-284/16, dated 6 March 2018 (**Exhibit R-363**)
ECJ	European Court of Justice (now the Court of Justice of the European Union)
EU	European Union
EU Treaties	TEU and TFEU
Intra-EU BITs	Bilateral investment treaties between EU Member States
TEU	Treaty on the European Union dated 7 February 1992 and effective since 1 November 1993 (**Exhibit RLA-92**)
TFEU	Treaty on the Functioning of the European Union dated 13 December 2007 and effective since 1 December 2009 (**Exhibit RLA-93**)
Lisbon Treaty	Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community dated 13 December 2007 and effective since 1 December 2009 (**Exhibit RLA-91**)
UK-Romania BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments dated 13 July 1995 and effective since 10 January 1996 (**Exhibit C-3**)
VCLT	Vienna Convention on the Law of Treaties (**Exhibit RLA-1**)

1 INTRODUCTION

1 Further to the Procedural Calendar set out in Procedural Order No. 2, as amended by the Parties, the Respondent submits this Additional Preliminary Objection.[1]

2 Romania demonstrated in its Counter-Memorial that the Claimants have not met their burden of proving that the Tribunal has jurisdiction over the Claimants' claims, including over Gabriel Jersey's claims under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "**UK-Romania BIT**").

3 Romania hereby submits an additional objection to the Tribunal's jurisdiction over Gabriel Jersey's claims under that treaty or, alternatively, to the admissibility of those claims, as a result of new facts that came to light after the filing of the Counter-Memorial.

4 On 6 March 2018, the Court of Justice of the European Union (the "**CJEU**") issued a landmark decision in the case of *Slovak Republic v. Achmea BV* (the "**Decision**"). For the first time, the CJEU addressed the issue of the interaction between the right to arbitration under a bilateral investment treaty concluded between two European Union ("**EU**") Member States and EU law. The Respondent's preliminary objection arises out of and is based on that decision.

5 As explained in detail below, the CJEU held that arbitration clauses in investment treaties concluded between two EU Member States (or "**intra-EU BITs**") have an adverse effect on the autonomy of EU law; consequently, EU law must be interpreted as precluding a provision in an intra-EU BIT under which an investor from a Member State may bring proceedings against another Member State before an arbitral tribunal.[2]

[1] See Claimants' letter to the Tribunal dated 27 April 2018; Respondent's email to the Tribunal dated 27 April 2018.

[2] *Slovak Republic v. Achmea BV,* Case C-284/16, Judgment of the Court (Grand Chamber) dated 6 March 2018, at **Exhibit R-363**, p. 10 *et seq*. (paras. 59-60).

This holding affects approximately 200 BITs concluded between EU Member States, including the UK-Romania BIT.

6 The Decision represents an authoritative interpretation of EU law that is binding on EU Member States (including Romania and the UK), their courts and their nationals, including legal entities. It directly impacts investment treaty arbitration proceedings such as the present arbitration, which were initiated at least in part pursuant to an intra-EU BIT.

7 This submission sets out the evolution of the EU legal framework, its institutions, and fundamental principles, including the principles of supremacy and direct effect of EU law, as relevant to assessing the impact of the Decision on these proceedings (**Section 2**).

8 Although the European Commission and certain Member States had previously argued, in the context of other proceedings, that arbitration clauses in intra-EU BITs were incompatible with EU law, no arbitral tribunals or courts had ever reached such a conclusion (as far as is publicly known). However, these decisions never addressed the issue in terms of the Decision (**Section 3**).

9 This submission then sets out in detail the *Achmea* proceedings and the Decision (**Section 4**) and demonstrates that the Tribunal is competent and indeed duty-bound to address the Respondent's preliminary objection (**Section 5**). Finally, the submission elaborates on the impact of the Decision and demonstrates that the Tribunal does not have jurisdiction over Gabriel Jersey's claims under the UK-Romania BIT in this case; in the alternative, those claims are inadmissible (**Section 6**).

2 EVOLUTION OF EU LAW AND THE COMPETENCIES OF EU INSTITUTIONS

10 Following almost 70 years of evolution, the main two sources of EU law today are the Treaty on European Union dated 7 February 1992 and effective since 1 November 1993 (the "**TEU**") and the Treaty on the Functioning of the European Union dated 13 December 2007 and effective since 1 December 2009 (the "**TFEU**") (together, the "**EU Treaties**").[3]

11 These treaties establish the principles upon which EU law is based, including the principle of conferral, namely, that the EU can only act within the limits of the powers conferred to it by the Member States.[4] Accordingly, certain competences are exclusive to the EU, whereas others are shared between the EU and Member States, and others remain with Member States.

12 Significantly, foreign direct investment became an exclusive competence of the EU (and no longer one of Member States)[5] with the adoption of the Lisbon Treaty, which amended the EU Treaties. Furthermore, with the Lisbon Treaty, the European "Community" was replaced by the "Union," which acquired international legal personality.[6]

[3] The TFEU was known as the Treaty Establishing the European Community until the entry into force of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (the "**Lisbon Treaty**"). See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (adopted on 13 December 2007, entered into force 1 December 2009) 2007/C 306/01, at **Exhibit RLA-91**.

[4] Treaty on European Union (adopted on 7 February 1992, entered into effect on 1 November 1993, version consolidated on 26 October 2012) 2012 C 326/13, at **Exhibit RLA-92**, p. 6 (Art. 5(1): "The limits of Union competences are governed by the principle of conferral...").

[5] Treaty on the Functioning of the European Union (adopted on 25 March 1957, entered into effect on 1 January 1958, version consolidated on 26 October 2012) 2012 C 326/47, at **Exhibit RLA-93**, p. 94 *et seq*. (Art. 207: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.") (emphasis added).

[6] TEU, at **Exhibit RLA-92**, p. 29 (Art. 47: "The Union shall have legal personality.").

13 Several institutions carry out the tasks of the EU, including the European Parliament, the Council of the EU, the Commission, and the CJEU.[7]

14 The Commission, whose powers and functions are set out in Articles 17(1) and 17(2) of the TEU, plays a central role in the EU legislative function.[8] Its right of legislative initiative has enabled it to act as a "motor of integration" for the EU.[9] It may also exercise a delegated power from the Council and the Parliament to make further regulations within particular areas.[10]

15 The Commission must also ensure the application of the EU Treaties and EU law and, to this end, may bring actions, including ultimately legal actions or "infringement proceedings," against Member States when they breach EU law.[11]

[7] *Id*., at p. 10 (Art. 13(1)).

[8] *Id.*, at p. 13 (Art. 17(1): "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the [EU] Treaties. With the exception of the common foreign and security policy, and other cases provided for in the [EU] Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements."); *id.*, at p. 13 (Art. 17(2): "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the [EU] Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the [EU] Treaties so provide.").

[9] P. Craig and G. de Búrca, *EU Law: Text, cases, and materials* (6th edition, Oxford University Press, 2015) (excerpts), at **Exhibit RLA-94**, p. 36.

[10] TFEU, at **Exhibit RLA-93**, p. 126 (Art. 290(1): "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.").

[11] *Id*, p. 114 (Art. 258: "If the Commission considers that a Member State has failed to fulfil an obligation under the [EU] Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."); P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 38.

16 The CJEU is the judicial institution of the EU. Its primary task is to ensure the uniform interpretation and application of EU law.[12] It has recognized and shaped seminal principles of the EU legal order, including the principles of direct effect and supremacy of EU law.[13]

17 The principle of direct effect was first applied by the CJEU in the case of *Van Gen den Loos* in 1963, where the CJEU held that Article 12 of the Treaty Establishing the European Economic Community (now Article 30 of the TFEU) should be interpreted "as producing direct effects and creating individual rights which national courts must protect."[14] Thus, the principle of direct effect translates into the immediate enforceability of rights and obligations stemming from EU law, namely before national courts.[15] For a provision of EU law to have direct effect, it must be clear, precise, and unconditional.[16] This principle can be applied vertically (against the State or an emanation of the State) or horizontally (therefore imposing an obligation on a private party).[17]

18 The CJEU also developed the principle of supremacy. In 1964, in the case of *Flaminio Costa v. E.N.E.L.*, the CJEU ruled that the aims of the Treaty Establishing the European Economic Community would be undermined if a Member State refused to give effect to an EU provision which should uniformly bind all Member States; accordingly, it was necessary to deem

[12] In accordance with Article 19 of the TEU, the CJEU is made up of two main courts: the Court of Justice and the General Court. Up until 2009, the judicial body of the EU was the Court of Justice of the European Communities (the "**ECJ**"), which included the Court of First Instance since 1988 (the equivalent of the actual General Court). With the entry into force of the Lisbon Treaty, the judicial organ of the EU was renamed as the "Court of Justice of the European Union" or "CJEU." For ease of reference, this submission refers to the decisions of the ECJ (pre-2009) and the CJEU (post-2009) as decisions of the "CJEU." See TEU, at **Exhibit RLA-92**, p. 15 (Art. 19).

[13] P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 63.

[14] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, Judgment of the Court dated 5 February 1963, at **Exhibit RLA-95**, p. 13 (referring to Article 12 of the Treaty Establishing the European Economic Community, which stated: "Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.").

[15] P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 189.

[16] *Id.*, at p. 192.

[17] *Id*.

that EU law took precedence or had primacy over Member States' national law.[18]

19 Member State courts are bound to directly apply EU law to any dispute with which they are seized. The CJEU ensures the uniform interpretation of EU law by these courts primarily via the preliminary ruling mechanism envisaged under Article 267 of the TFEU:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (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."[19]

20 Thus, the CJEU assists national courts that are in doubt about the meaning or effect of a particular provision of the EU law.

21 Preliminary rulings of the CJEU, including those which declare a legal provision incompatible with EU law, are binding and opposable *erga*

[18] *Flaminio Costa v E.N.E.L.*, Case 6/64, Judgment of the Court dated 15 July 1964, at **Exhibit RLA-96**, p. 593 *et seq*.
[19] TFEU, at **Exhibit RLA-93**, p. 118 (Art. 267).

omnes.[20] Indeed, the CJEU reply to the national court is not merely an opinion, but rather a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given.[21] The CJEU's judgment likewise binds other national courts before which the same issue is raised.[22]

22 As to ensuring the uniform application of EU law, the CJEU addresses complaints by the Commission or a Member State that another Member State has failed to comply with or otherwise infringed EU law.[23]

23 Significantly, the decisions of the CJEU have retroactive effect in the sense that, once the CJEU has ruled on a given issue, the interpretation of EU law given by the CJEU has effects from the time when the provisions of EU law at issue entered into force.[24]

24 The CJEU is currently assisted by eleven Advocates General, who make independent reasoned submissions on cases.[25] Candidates for appointment must be qualified for the highest judicial offices in their home country or

[20] Rules of Procedure of the Court of Justice, 25 September 2012, at **Exhibit RLA-97**, p. 40 (Art. 91(1): "A judgment shall be binding from the date of its delivery."); P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 475; *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato*, Case 66/80, Judgment of the Court dated 13 May 1981, at **Exhibit RLA-98**, p. 1215 (paras. 12-13).

[21] J. Rodríguez Medal, "Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who Can Refer Questions to the Court of Justice of the EU" (2015) 8 European Journal of Legal Studies 104, at **Exhibit RLA-99**, p. 108 *et seq*; Rules of Procedure of the Court of Justice, 25 September 2012, at **Exhibit RLA-97**, p. 40 (Art. 91(1): "A judgment shall be binding from the date of its delivery."); P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 475; *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato*, Case 66/80, Judgment of the Court dated 13 May 1981, at **Exhibit RLA-98**, p. 1215 (paras. 12-13).

[22] P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 475-478.

[23] See *supra* para. 15.

[24] P. Craig and G. de Búrca, *EU Law* (excerpts), at **Exhibit RLA-94**, p. 477; *Commission v. Ireland*, Case C-455/08, Judgment of the Court (Second Chamber) dated 23 December 2009, at **Exhibit RLA-100**, p. 7 (para. 39: "it is appropriate to point out that, according to settled caselaw, the interpretation which the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force …. In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force…").

[25] TEU, at **Exhibit RLA-92**, p. 15 (Art. 19(2)); TFEU, at **Exhibit RLA-93**, p. 112 *et seq*. (Arts. 252-254).

be jurisconsults of recognized competence. Considering the experience and expertise of Advocates General, and while the CJEU is not obliged to follow their opinion, in most cases it does so.[26]

[26] See A. A. Dashwood, "The Advocate General in the Court of Justice of the European Communities" (1982) 2 Legal Studies 202, at **Exhibit RLA-101**, p. 212.

3 ARBITRAL JURISPRUDENCE RELATING TO INTRA-EU BITS

25 Many BITs were concluded in the 1990s, including BITs between EU Member States and former Eastern bloc countries.[27] Many of these Eastern European countries subsequently joined the EU, including Romania which became a Member State on 1 January 2007.[28]

26 As set out below, with the progressive enlargement of the EU and the expansion of EU law to new Member States, the Commission developed the position that intra-EU BITs were incompatible with EU law. The issue arose largely because there were few intra-EU BITs between the "old" EU Member States, whereas there were several between the old and the new Member States.

27 Between 2006 and 2014 and prior to the Decision (which will be further detailed in **Section 4**), EU Member States and/or the Commission argued in several investment arbitration proceedings brought under an intra-EU BIT, that the tribunal lacked jurisdiction due to an incompatibility of the relevant investment treaty with EU law. However, in none of those cases, some of which are summarized below, did the arbitral tribunal accept the objection in question.

28 In the *Eastern Sugar v. Czech Republic* arbitration proceedings, which arose under the 1991 Netherlands-Czech Republic BIT, the respondent objected to the tribunal's jurisdiction. It argued in part that EU law automatically superseded the BIT as a result of the Czech Republic's accession to the EU in 2004.[29] The European Commission sent a letter to the Czech Deputy Minister of Finance in January 2006 and a note to the Economic and Financial Committee of the Council of the EU in November 2006, which the respondent then provided to the tribunal.[30] The

[27] European Commission press release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties" dated 18 June 2015, at **Exhibit R-364**.
[28] Aside from Romania, these countries include Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Estonia (2004), Hungary (2004), Latvia (2004), Lithuania (2004), Malta (2004), Poland (2004), Slovakia (2004), and Slovenia (2004).
[29] *Eastern Sugar B.V. v. Czech Republic*, Partial Award, SCC No. 088/2004, 27 March 2007, at **Exhibit RLA-102**, p. 21 (para. 104).
[30] *Id*., at p. 24 *et seq*. (paras. 119-129).

Commission opined that "where the EC Treaty or secondary legislation are in conflict with some of these BIT's provisions … Community law will automatically prevail over the non-conforming BIT provisions"[31] and that "intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence."[32]

29 In a partial award dated 27 March 2007, the tribunal rejected the Czech Republic's argument.[33] It noted that, while there are common protections afforded to investors under EU law and the Netherlands-Czech Republic BIT, there were additional protections in the BIT, in particular, the right to international arbitration.[34] Thus, the BIT and EU law could not be considered to cover identical subject matters under Article 59(1) of the Vienna Convention on the Law of Treaties ("**VCLT**").[35]

30 With regard to the letters of the Commission, the tribunal held that the opinion of the Commission was not binding on the tribunal and that the Commission had not actually expressed a view that intra-EU BITs were automatically superseded by EU law.[36] The tribunal ultimately found in favor of the investor, holding that the Czech Republic had breached its obligation to afford Dutch investors fair and equitable treatment.

31 In *Binder v. Czech Republic*, an UNCITRAL case arising under the 1990 Germany-Czech Republic BIT, the respondent argued that BITs and the EU investment regime addressed the same subject matter, "namely the

[31] *Id.*, at p. 24 *et seq*. (para. 119).
[32] *Id.*
[33] *Id.*, at p. 37 (para. 172).
[34] *Id.*, at p. 35 *et seq*. (paras. 159-166) (in particular para. 165: "[f]rom the point of view of the promotion and protection of investments, **the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties**" and this provides "the best guarantee that the investment will be protected against potential undue infringements by the host state", adding: "**EU law does not provide such a guarantee.**") (emphasis added).
[35] Vienna Convention on the Law of Treaties, 1155 UNTS 331, at **Exhibit RLA-1**, p. 345 (Art. 59 (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.").
[36] *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, at **Exhibit RLA-102**, p. 26 (para. 123) and p. 30 (paras. 128-129).

faculty for a national of a contracting party to invest assets in the territory of another contracting party and to freely dispose of revenues deriving from the operation of such assets or investments."[37] The respondent concluded that issues relating to intra-EU investment were governed by EU law.[38] Furthermore, the Czech Republic argued that, when it joined the EU in 2004, its BIT with Germany was automatically superseded by EU law in accordance with Article 59 of the VCLT.[39] It also argued that intra-EU investor-State arbitration was inconsistent with the EU legal order since it violated the non-discrimination principle.[40]

32 In its award dated 6 June 2007, the tribunal held that the substantive provisions of the BIT did not conflict with EU law.[41] Furthermore, it noted the absence of consensus between EU institutions regarding the issue of automatic termination of intra-EU BITs.[42] It also stated that the right to submit a dispute to arbitration is not in conflict with EU law and that it does not imply discrimination since individuals from other Member States benefit from access to national courts.[43] Thus, the tribunal concluded that there was no basis for finding that the protections of the BIT had become automatically inoperative.[44]

33 After the entry into force of the amended EU Treaties in 2009, tribunals continued to be confronted with the intersection between intra-EU investment treaties and EU law. In *Oostergetel v. Slovak Republic*, an UNCITRAL case arising under the 1991 Netherlands-Slovakia BIT, Slovakia argued that, since the BIT had the same subject matter as the TFEU, it had been terminated, pursuant to Article 59 of the VCLT, when

[37] *Rupert Joseph Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007, at **Exhibit RLA-103**, p. 4 *et seq*. (para. 13).
[38] *Id.*, at p. 4 *et seq*. (paras. 12-15).
[39] *Id.*, at p. 5 (paras. 16, 19).
[40] *Id.*, at p. 5 (paras. 17-18).
[41] *Id.*, at p. 14 (para. 63).
[42] *Id.*, at p. 14 (para. 64) (noting that whether measures should be envisaged to terminate intra-EU BITs had given rise to some debate within the EU but had not finally been settled as a matter of policy).
[43] *Id.*, at p. 14 (para. 65).
[44] *Id.*, at p. 14 (para. 66).

Slovakia acceded to the EU in 2004.[45] It argued alternatively that the TFEU prevailed over the BIT since, according to Article 30 of the VCLT, the earlier of two consecutive treaties continues to apply "only to the extent that its provisions are compatible with those of the later treaty."[46] Since the BIT was incompatible with the TFEU, Slovakia argued that the BIT, as the earlier treaty, should not be applied.[47]

34 In its award dated 30 April 2010, the tribunal dismissed the objection. First, it found that the two treaties did not cover the same subject matter since the safeguards were not identical and also because the BIT offered the right to arbitration.[48] Second, there was no indication that the Netherlands and Slovakia had intended for the BIT to be superseded by the TFEU.[49] Furthermore, the tribunal did not see any conflict between the BIT and the relevant EU law provisions that would prevent it from applying the two sets of legal norms simultaneously.[50] Finally, it concluded that the TFEU did not have retroactive effect and that the events that gave rise to the arbitration happened before Slovakia's accession to the EU in 2004.[51]

35 In the UNCITRAL case of *EURAM v. Slovakia*, which arose under the 1990 Austria-Slovakia BIT, the respondent objected to the tribunal's jurisdiction, for the same reasons invoked in the *Oostergetel* case.[52] Separately, the Commission argued in an *amicus curiae* brief dated October 2011 that the subject matter of the arbitration fell within the scope

[45] *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, Decision on Jurisdiction, 30 April 2010, at **Exhibit RLA-104**, p. 19 (para. 66).
[46] VCLT, at **Exhibit RLA-1**, p. 339 (Art. 30(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.").
[47] *Oostergetel v. Slovakia*, Decision on Jurisdiction, 30 April 2010, at **Exhibit RLA-104**, p. 19 (para. 67).
[48] *Id.*, at p. 21 *et seq*. (paras. 74-79).
[49] *Id.*, at p. 22 *et seq*. (paras. 80-85).
[50] *Id.*, at p. 23 *et seq.* (paras. 86-88).
[51] *Id.*, at p. 24 (paras. 89-91).
[52] *European American Investment Bank AG v. Slovak Republic*, Award on Jurisdiction, PCA Case No. 2010-17, 22 October 2012, at **Exhibit RLA-105**, p. 23 *et seq*. (paras. 55-59).

of the TFEU and that the BIT was incompatible with the non-discrimination principle.[53]

36 In its award dated 22 October 2012, the tribunal dismissed the objections of both the respondent and the Commission and concluded that the two treaties did not have the same overall subject matter since the EU Treaties created an internal market whereas the BIT sought to promote and protect international investment.[54] It also held that it could not find an implied intention in the treaties adopted in view of the accession to the EU, or in the EU Treaties, to terminate the BIT.[55] Finally, it stated that the parallel rules under the BIT and the EU Treaties are not incompatible, but should be viewed as cumulative.[56]

37 In the PCA arbitration proceedings of *U.S. Steel v. Slovakia*, brought pursuant to the 1991 Netherlands-Slovakia BIT, the Commission argued, in an *amicus curiae* brief dated 15 May 2014, that the BIT provisions on which the investor sought to rely had been superseded by the EU legal framework when Slovakia acceded to the EU in 2004. The Commission observed that "[b]ilateral investment treaties between Member States discriminate against investors from Member States that are not party to those bilateral treaties."[57] The Commission criticized the findings of the arbitral tribunals in *Eureko* and *Eastern Sugar*[58] and emphasized that EU national courts (and ultimately the CJEU) were the appropriate forum for questions involving EU law.[59] Finally, it warned that it "[would] pursue every appropriate legal avenue, including the submission of *amicus curiae* observations to the national courts entrusted with the task of recognising and enforcing the arbitral awards rendered in violation of the [EU's] State

[53] *Amicus curiae* brief of the European Commission in *European American Investment Bank AG v. Slovak Republic*, 13 October 2011, at **Exhibit RLA-106**, p. 2 *et seq.*; *EURAM v. Slovakia*, Award on Jurisdiction, 22 October 2012, at **Exhibit RLA-105**, p. 25 (para. 61).
[54] *EURAM v. Slovakia*, Award on Jurisdiction, 22 October 2012, at **Exhibit RLA-105**, p. 59 (para. 178).
[55] *Id.*, at p. 63 (para. 197).
[56] *Id.*, at p. 71 *et seq*. (para. 231).
[57] *Amicus curiae* brief of the European Commission in *U.S. Steel Global Holdings I B.V. v. Slovak Republic*, PCA Case No. 2013-6, 15 May 2014, at **Exhibit RLA-107**, p. 11 (paras. 30-31).
[58] *Id.*, at p. 13 *et seq*. (paras. 40-47).
[59] *Id.*, at p. 10 *et seq*. (para. 27).

aid control rules."[60] The proceedings were discontinued before the arbitral tribunal had a chance to issue its decision on the matter.

38 The Commission's position, as expressed over the years, including in some of the arbitrations described above, caused several Member States such as the Czech Republic to start to terminate their intra-EU BITs as early as 2007.[61] Two other Member States also terminated their intra-EU BITs in the following years: Ireland terminated its only BIT (with the Czech Republic) in 2012 and Italy terminated all of its intra-EU BITs in 2013.[62]

39 The Commission also initiated infringement proceedings against Romania, Austria, the Netherlands, Slovakia and Sweden on 18 June 2015 requesting that they terminate their intra-EU BITs.[63] Certain Member States proposed instead to implement EU-wide agreements to replace intra-EU BITs.[64]

40 On 29 September 2016, the Commission sent a formal request to Romania, Austria, the Netherlands, Slovakia and Sweden in accordance with the infringement proceedings procedure set out at Article 258 of the TFEU.[65]

[60] *Id.*, at p. 15 *et seq*. (para. 46).
[61] *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, at **Exhibit RLA-102**, p. 27 *et seq*. (para. 127); E. Německá, "The Czech Republic's Experience with Bilateral Investment Treaties (BITs)" *Ministry of Finance of the Czech Republic*, Oct. 2013, at **Exhibit R-365**, p. 4 *et seq*.
[62] European Commission press release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties" dated 18 June 2015, at **Exhibit R-364**.
[63] *Id*.
[64] In April 2016, Austria, Finland, France, Germany, and the Netherlands issued a joint statement proposing the conclusion of an EU-wide agreement that would replace pre-existing intra-EU BITs. Without prejudice to their respective views and positions regarding the incompatibility of intra-EU BITs with the EU Treaties, these countries proposed a coordinated termination, or "phasing out," of intra-EU BITs. To do so, they proposed the conclusion of a multilateral agreement between EU Member States which would replace and supersede pre-existing intra-EU BITs in accordance with Article 59 of the VCLT. This EU-wide agreement would guarantee an appropriate level of substantive and procedural protection for EU investors. See Trade Policy Committee (Services and Investment), "Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands", *General Secretariat of the Council of the European Union*, 7 Apr. 2016, at **Exhibit R-366**.
[65] See *supra* para. 15; European Commission press release, "September infringements' package: key decisions" dated 29 September 2016, at **Exhibit R-367**, p. 4.

41 Consequently, even prior to the Decision, several EU Member States, including Romania,[66] Poland,[67] Latvia,[68] and Denmark[69] also indicated that they would terminate their intra-EU BITs.

[66] Law 18/2017 approving the termination of the validity of the agreements regarding the mutual promotion and protection of the investments concluded by Romania with the Member States of the European Union, at **Exhibit R-368**.
[67] M. Orecki, "Let the Show Begin: Poland Has Commenced the Process of BITs' Termination", *Kluwer Arbitration Blog*, 8 Aug. 2017, at **Exhibit R-369**.
[68] The Baltic Times Staff, "Latvia to terminate bilateral investment treaties with Poland, Czech Republic at EU request", *The Baltic Times*, 2 Feb. 2018, at **Exhibit R-370**.
[69] J. Dahlquist and L. E. Peterson, "INVESTIGATION: Denmark proposes mutual termination of its nine BITs with fellow EU member-states, against spectre of infringement cases", *Investment Arbitration Reporter*, 2 May 2016, at **Exhibit R-371**.

4 THE ACHMEA PROCEEDINGS AND THE DECISION

4.1 The *Achmea* Arbitration Proceedings

43 In 2008, a Dutch-owned insurer named Achmea (at the time still named Eureko)[70] commenced arbitration proceedings against Slovakia under the Netherlands-Slovakia BIT. It sought damages stemming from Slovakia's partial reversal of health-insurance liberalization.[71] The proceedings were initiated pursuant to the UNCITRAL Arbitration Rules and seated in Germany.

44 During the arbitration, Slovakia objected to the tribunal's jurisdiction, arguing that the arbitration clause in Article 8 of the BIT was incompatible with EU law.[72] Article 8 provided in part:

> "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 either party to the dispute requested amicable settlement.
>
> …
>
> 5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).

[70] The claimant in these proceedings was previously known as "Eureko B.V.," until it changed its name to "Achmea N.V." following the merger of Eureko B.V. and Achmea Holding N.V. on 18 November 2011. *Achmea B.V. v. Slovak Republic*, Award, PCA Case No. 2008-13, 7 December 2012, at **Exhibit RLA-108**, p. 1 (para. 1). References in this submission to "Achmea" should be understood to refer to Eureko B.V. and/or its successor Achmea N.V.

[71] See Decision, at **Exhibit R-363**, p. 4 (paras. 7-9); *Achmea B.V. v. Slovak Republic*, Award, 7 December 2012, at **Exhibit RLA-108**, p. 2 *et seq*. (para. 7).

[72] See Decision, at **Exhibit R-363**, p. 4 (para. 11).

> 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."[73]

45 Slovakia first argued that the TFEU governed the same subject-matter as the Netherlands-Slovakia BIT because "they cover the same types of investors and investments, serve the same purposes, offer the same standards of protection, and provide for equivalent remedies."[74] As an example, Slovakia argued that certain provisions of the BIT, such as Article 4, concerning the free transfer of payments, had been held by the CJEU to be incompatible with the TFEU.[75]

46 Accordingly, it submitted that, further to Article 30 of the VCLT, the BIT was inapplicable.[76] As noted above, Article 30 provides in part:

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[73] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (adopted on 29 April 1991, entered into force in 1 October 1992), at **Exhibit RLA-109**, p. 4 *et seq*. (Art. 8).

[74] *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, 26 October 2010, at **Exhibit RLA-110**, p. 17 (para. 65).

[75] See *id.*, at p. 21 (para. 76); see also 1991 Netherlands-Slovakia BIT, at **Exhibit RLA-109**, p. 3 (Art. 4: "Each Contracting Party shall guarantee that payments related to an investment may be transferred. The transfers shall be made in a freely convertible currency, without undue restriction or delay. Such transfers include in particular though not exclusively: (a) profits, interests, dividends, royalties, fees and other current income; (b) funds necessary i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or ii. for the development of an investment or to replace capital assets in order to safeguard the continuity of an investment; (c) funds in repayment of loans; (d) earnings of natural persons; (e) the proceeds of sale or liquidation of the investment.").

[76] *Eureko v. Slovakia*, Award on Jurisdiction, 26 October 2010, at **Exhibit RLA-110**, p. 37 (paras. 127-128).

> "Application of successive treaties relating to the same subject-matter
>
> 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…"[77]

47 Second, Slovakia argued that, further to Article 59 of the VCLT, the BIT became "obsolete" and thus automatically terminated upon the accession to the EU of Slovakia in 2004.[78] As also noted above, Article 59 provides:

> "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty
>
> 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.

[77] VCLT, at **Exhibit RLA-1**, p. 339 *et seq*. (Art. 30); see also supra para. 33.
[78] *Eureko v. Slovakia*, Award on Jurisdiction, 26 October 2010, at **Exhibit RLA-110**, p. 25 *et seq*. (paras. 86-96).

> 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."[79]

48 Slovakia maintained that, consequently, "EU courts", not the arbitral tribunal, had exclusive jurisdiction over Achmea's claims.[80]

49 The Commission intervened in the proceedings by making a submission before the tribunal. As had Slovakia, it argued that certain provisions of the BIT and the TFEU were incompatible "within the meaning of Article 30(3) of the [VCLT]."[81] In particular, with regards to Article 344 of the TFEU, which provides that EU Member States undertake not to submit a dispute on the interpretation or application of the EU Treaties to any method of settlement not provided for in the EU Treaties themselves, the Commission took the view that the investor-State provisions in the BIT "conflict with EU law on the exclusive competence of EU courts for claims which involve EU law, even for claims where EU law would only partially be affected."[82]

50 In an award dated 26 October 2010, the tribunal dismissed Slovakia's objections and concluded that it had jurisdiction over the claims.

51 First, the tribunal found that Article 30(3) of the VCLT would be applicable only if Article 8 of the BIT were incompatible with EU law.[83] However, it found that there is "no rule of EU law that prohibits investor-State arbitration" and that not "all arbitrations that involve any question of EU law are conducted in violation of EU law."[84] With regard to Article 344 of the TFEU, the tribunal held:

> "There is no suggestion here that every dispute that arises between a Member State and an individual must be put before the [CJEU];

[79] VCLT, at **Exhibit RLA-1**, p. 345 *et seq*. (Art. 59); see also *supra* para. 31.
[80] *Eureko v. Slovakia*, Award on Jurisdiction, 26 October 2010, at **Exhibit RLA-110**, p. 56 (para. 200).
[81] The brief submitted by the Commission is not publicly available. *Id.*, at p. 54 (para. 192).
[82] *Id.*, at p. 54 (para. 193).
[83] *Id.*, at p. 73 (para. 273).
[84] *Id.*, at p. 73 *et seq*. (para. 274).

> nor would the [CJEU] have the jurisdiction (let alone the capacity) to decide all such cases."[85]

52 Second, it found that that the protections afforded pursuant to the BIT and EU law were substantially different, such that EU law could not supersede the BIT in its entirety in accordance with Article 59(1) of the VCLT.[86]

53 Finally, the tribunal dismissed Slovakia's objection based on the argument that EU law prevails over both national law and international treaties and that the CJEU has an interpretative monopoly over EU law.[87] The tribunal recognized that, although EU law and German law (as the *lex loci arbitri*) might affect the scope of the rights and obligations under the BIT, this did not prevent the tribunal from asserting jurisdiction.[88]

54 Slovakia challenged the jurisdictional award in set-aside proceedings before German courts.[89] It argued that the arbitration agreement violated Articles 344 and 18 of the TFEU[90] and that the arbitral tribunal wrongly concluded that it had jurisdiction based on an invalid arbitration agreement.[91] Accordingly, Slovakia requested that the court seek a preliminary ruling from the CJEU in accordance with Article 267 of the TFEU.[92]

55 The first instance court, however, upheld the award on the grounds that, first, contrary to Slovakia's arguments, Article 344 of the TFEU covers only disputes between Member States, not disputes between a private law entity and a Member State of the EU.[93]

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[85] *Id.*, at p. 74 (para. 276).
[86] *Id.*, at p. 67 *et seq*. (paras. 244-267).
[87] *Id.*, at p. 74 (para. 278).
[88] *Id.*, at p. 74 *et seq*. (para. 279).
[89] See Decision, at **Exhibit R-363**, p. 4 (para. 11).
[90] TFEU, at **Exhibit RLA-93**, p. 10 (Art. 18: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited…". See also *supra* para. 49 (regarding Article 344 of the TFEU).
[91] See Decision, at **Exhibit R-363**, p. 4 (para. 11).
[92] See *supra* para. 19 (regarding Article 267 of the TFEU).
[93] Higher Regional Court Frankfurt am Main, Resolution dated 10 May 2012, Ref. 26 SchH 11/10, at **Exhibit R-372**, p. 5 (paras. 89-90) and p. 7 *et seq*. (paras. 99-102).

56 The court held that, while the final and relevant interpretation of EU law rests with the CJEU, this does not preclude national courts and arbitration tribunals from independently examining and applying EU law.[94]

57 Finally, in relation to Article 18 of the TFEU which enshrines the principle of non-discrimination based on nationality, the court held that, since discrimination between the parties to the arbitration procedure did not come into play with regards to the arbitral award, Slovakia's objection was irrelevant.[95]

58 The first instance court concluded that it saw no reason to refer the case to the CJEU for a preliminary ruling on these questions.[96]

59 Slovakia appealed the decision of the first instance court to the German Supreme Court ("***Bundesgerichtshof***" or "**BGH**").

60 In the meantime, on 7 December 2012, the arbitral tribunal issued an award on the merits in favor of Achmea, ordering Slovakia to pay EUR 22.1 million in damages.[97]

61 The BGH then determined that Slovakia's appeal regarding the jurisdictional award was no longer admissible since the arbitral tribunal had just rendered an award on the merits.[98]

62 On 31 January 2013, Slovakia brought an action for *vacatur* of the December 2012 award before the first-instance court of Frankfurt.[99] It again argued that Article 8 of the Netherlands-Slovakia BIT was incompatible with Articles 18, 267 and 344 of the TFEU.[100] Slovakia also argued that the award should be set aside because its recognition and enforcement would be contrary to public policy since the arbitral tribunal

[94] *Id.*, at p. 9 (para. 108).
[95] *Id.*, at p. 12 (para. 125).
[96] *Id.*, at p. 1 *et seq*. (para. 26) and p. 13 (para. 140).
[97] *Achmea B.V. v. Slovak Republic*, Award, 7 December 2012, at **Exhibit RLA-108**, p. 115 (para. 352); see also Decision, at **Exhibit R-363**, p. 4 (para. 12).
[98] See Bundesgerichtshof, Decision dated 30 April 2014, Ref. III ZB 37/12, at **Exhibit R-373**, p. 2 (para. 3).
[99] See Higher Regional Court Frankfurt am Main, Resolution dated 18 December 2014, Ref. 26 Sch 3/13, at **Exhibit R-374**, p. 1 (para. 31).
[100] *Id.*, at p. 1 (para. 32).

had not referred the question of the incompatibility of the BIT with the TFEU to the CJEU.[101] It furthermore reiterated its prior request that the court refer the aforementioned questions to the CJEU.[102]

63 On 18 December 2014, the Frankfurt court dismissed Slovakia's motion to set aside the award on the grounds that the arbitration clause in Article 8 of the BIT did not contravene the exclusivity of the EU dispute settlement mechanisms in Article 344 of the TFEU because neither the TFEU nor the TEU envisage specific legal action for disputes between a private investor and a Member State.[103] There was thus no need to refer the question to the CJEU, as Slovakia had requested.[104] Furthermore, any discrimination against investors from other Member States in relation to Article 18 of the TFEU would not lead to the invalidity of the arbitration clause at the expense of the defendant, but rather at most to its extension to investors from all the Member States of the EU.[105]

64 Slovakia appealed this decision to the BGH, again arguing that the award was contrary to public policy and that the arbitration agreement that gave rise to the award was null and void.[106]

4.2 The Referral by the *Bundesgerichtshof* to the CJEU

65 On 3 March 2016, the BGH rendered a decision finding that Article 344 of the TFEU did not envisage disputes between a private individual or entity and a Member State.[107] Furthermore, the BGH considered that there was no reason why the option under Article 8(2) of the BIT to bring an investment dispute to an arbitral tribunal would be incompatible with Article 267 of the TFEU.[108]

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[101] *Id.*, at p. 4 *et seq*. (para. 34).
[102] *Id.*, at p. 6 (para. 41).
[103] *Id.*, at p. 9 *et seq*. (para. 57).
[104] *Id*., at p. 8 *et seq*. (para. 54).
[105] *Id.*, at p. 12 (para. 63).
[106] See Decision, at **Exhibit R-363**, p. 4 (para. 12); Bundesgerichtshof, Decision dated 3 March 2016, Ref. I ZB 2/15, at **Exhibit R-375**, p. 1 *et seq*. (para. 12).
[107] Bundesgerichtshof, Decision dated 3 March 2016, Ref. I ZB 2/15, at **Exhibit R-375**, p. 2 (para. 24).
[108] *Id.*, at p. 10 *et seq*. (para. 76).

66 With regards to Article 18 of the TFEU, the BGH held that the limitation of benefits to nationals of the contracting States based on an intra-EU BIT is discriminatory only if the non-beneficiary nationals of other Member States are in an objectively comparable situation.[109]

67 However, the BGH nevertheless decided to refer these questions to the CJEU.[110] In particular, the BGH recognized that Article 344 of the TFEU does not clearly exclude private law individuals from its scope.[111] It also admitted that the CJEU had never addressed the question of whether Article 267 of the TFEU precludes a clause in which a Member State agrees to settle a dispute with an investor from another Member State before an arbitral tribunal.[112] Finally, the BGH concluded that the request for a preliminary ruling was necessary because the Commission was pursuing infringement proceedings against Slovakia (and the Netherlands) for refusing to terminate their BITs.[113]

68 Further to Article 267 of the TFEU, the BGH therefore posed the following questions to the CJEU, which it deemed important given the numerous intra-EU BITs with arbitration clauses similar to Article 8 of the Netherlands-Slovakia BIT:

> "(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:

[109] *Id.*, at p. 11 (para. 77).
[110] *Id.*, at p. 12 (para. 86).
[111] *Id.*, at p. 5 (para. 28).
[112] *Id.*, at p. 2 (para. 22).
[113] *Id.*, at p. 12 (para. 86).

(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?"[114]

4.3 The Opinion of the Advocate General

69 On 19 September 2017, the CJEU Advocate General assigned to the matter, Mr. Melchior Wathelet, issued an opinion concluding that the arbitration clause in the Netherlands-Slovakia BIT was compatible with the TFEU.[115]

70 First, he opined that investor-State disputes did not fall within the scope of Article 344 of the TFEU since such disputes did not concern the interpretation or application of the EU Treaties.[116]

71 Second, he concluded that an arbitral tribunal was a "court or tribunal of a Member State" within the meaning of Article 267 of the TFEU and was therefore able to ask the CJEU to issue a preliminary ruling on questions of EU law.[117]

72 Third, Mr. Wathelet opined that the BIT did not grant preferential treatment to Dutch investors as compared to non-Dutch investors in Slovakia and thus did not give rise to discrimination in violation of Article 18 of the TFEU.[118]

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[114] See Decision, at **Exhibit R-363**, p. 4 (para. 14) and p. 6 (para. 23).
[115] The Czech, Hungarian, and Polish governments subsequently expressed disagreement with the Advocate General's opinion. See *Slovak Republic v. Achmea BV,* Case C-284/16, Opinion of Advocate General Wathelet of 19 September 2017, at **Exhibit R-376**; Decision, at **Exhibit R-363**, p. 48 (para. 273).
[116] *Slovak Republic v. Achmea BV,* Case C-284/16, Opinion of Advocate General Wathelet of 19 September 2017, at **Exhibit R-376**, at p. 25 (para. 133) and p. 46 (paras. 255-256).
[117] *Id.*, at p. 24 (para. 131).
[118] *Id.*, at p. 18 (para. 82).

73 Mr. Wathelet thus recommended that "Articles 18, 267 and 344 [of the] TFEU … be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal."[119]

4.4 The Decision

74 On 6 March 2018, contrary to the Advocate General's opinion, the CJEU ruled that the dispute resolution clause in the Netherlands-Slovakia BIT was not compatible with Articles 267 and 344 of the TFEU.[120]

75 The CJEU noted that the questions posed should be addressed in light of the principles of autonomy and direct effect of EU law:

> "… 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. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other ...
>
> … It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of

[119] *Id.*, at p. 48 (para. 273).
[120] Decision, at **Exhibit R-363**, p. 11 (para 62); see also CJEU press release, "The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law" dated 6 March 2018, at **Exhibit R-377**.

> the Treaties or resulting from the acts of the institutions of the EU…"[121]

76 Addressing Questions 1 and 2 together, the CJEU observed that an arbitral tribunal constituted under the Netherlands-Slovakia BIT could be called on to interpret or apply EU law, both as the domestic law in force in every Member State and as international agreements concluded by those States.[122] The CJEU disagreed with the Advocate General that arbitral tribunals constituted pursuant to intra-EU BITs qualified as "tribunals of Member States" permitted to refer questions to the CJEU under Article 267 of the TFEU.[123] Furthermore, awards rendered by arbitral tribunals constituted pursuant to intra-EU BITs were subject only to limited judicial review by EU courts – in this case, German courts.[124]

77 The CJEU thus found:

> "… by concluding the [Netherlands-Slovakia] BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law."[125]

78 The CJEU concluded that the arbitration clause in the BIT "call[s] into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the [EU] Treaties" and "has an adverse effect on the autonomy of EU law."[126]

79 The CJEU accordingly ruled as follows:

> "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 Agreement on

[121] Decision, at **Exhibit R-363**, p. 7 (paras. 33-34).
[122] *Id.*, at p. 8 (para. 42).
[123] *Id.*, at p. 9 (para. 49).
[124] *Id.*, at p. 9 (paras. 51-53).
[125] *Id.*, at p. 10 (para. 56).
[126] *Id.*, at p. 10 (paras. 58-59).

> encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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."[127]

80 The CJEU did not reach Question 3 of whether the arbitration clause in the BIT was compatible with Article 18 of the TFEU.[128]

81 The Decision has an impact and effect beyond the four corners of the *Achmea* proceedings themselves. Although the CJEU did not specify the practical implications of its ruling for other investment arbitrations brought pursuant to intra-EU BITs, the holding applies *erga omnes*: the CJEU made clear that Articles 267 and 344 of the TFEU should be interpreted as precluding a provision "in an international agreement concluded between Member States," *i.e.* in *any* intra-EU BIT, with a dispute resolution clause similar to Article 8 of the Netherlands-Slovakia BIT.

82 As explained above, the BGH is bound by the Decision and is thus expected to annul the underlying arbitration award.[129]

83 In response to the Decision, the Netherlands has announced that it will terminate all of its intra-EU BITs[130] and has published a new draft model BIT.[131]

84 On the investor's side, the consequences of the Decision are also making themselves apparent. For example, on 22 May 2018, it was reported that the Dutch company Airbus had withdrawn investment treaty claims against

[127] *Id.*, at p. 11 (para. 62) (emphasis added).
[128] *Id.*, at p. 11 (para. 61).
[129] See *supra* para. 21.
[130] L. Yong, "Netherlands to terminate BIT with Slovakia in wake of Achmea", *Global Arbitration Review*, 2 May 2018, at **Exhibit R-378**.
[131] A. Ross, "Radical proposals in draft Netherlands Model BIT", *Global Arbitration Review*, 16 May 2018, at **Exhibit R-379**.

Poland, reportedly citing the Decision.[132] It will allegedly seek compensation before Polish courts instead.[133]

[132] L. Yong, "Airbus withdraws treaty claim against Poland", *Global Arbitration Review*, 22 May 2018, at **Exhibit R-380**.
[133] *Id*.

5 THE RESPONDENT'S ADDITIONAL PRELIMINARY OBJECTION COMPLIES WITH ARTICLE 41(1) OF THE ICSID ARBITRATION RULES

85 Article 41(1) of the ICSID Arbitration Rules, which addresses the filing of preliminary objections, provides, in relevant part:

> "Any objection that the dispute … is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, … — unless the facts on which the objection is based are unknown to the party at that time." [134]

86 Significantly, in this case, the Claimants agreed to this submission as well as to the Parties' exchanging two rounds of submissions regarding the Decision and its impact on the Tribunal's jurisdiction.[135] The Claimants expressed this agreement when, in part further to the Tribunal's request upon its reconstitution, the Parties jointly revised the Procedural Calendar in Procedural Order No. 2 and agreed to the dates for these submissions. Thus, the Claimants have already recognized that this preliminary objection is appropriate and timely under Article 41(1).

87 In any event, the Respondent has filed this submission "as early as possible," both following analysis of the Decision (and consideration of its impact on this case), the reconstitution of the Tribunal on 5 April 2018, and

[134] The ICSID Arbitration Rules also empower a tribunal to examine *sua sponte* whether it has jurisdiction over certain claims before it. Article 41(2) provides that "[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence." See International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 10 April 2006, at **Exhibit RLA-111**, p. 119 (Art. 41). See also *Zhinvali Development Limited v. Republic of Georgia*, Award, ICSID Case No. ARB/00/1, 24 January 2003, at **Exhibit RLA-112**, p. 73 *et seq*. (paras. 316-322) (finding that, where respondent had raised objection to jurisdiction in rejoinder, the respondent had not satisfied Article 41(1), but nevertheless examining the objections further to Article 41(2)).

[135] See letter from the Claimant to the Tribunal dated 27 April 2018; email from the Respondent to the Tribunal dated 27 April 2018.

its consultations and agreement with the Claimants regarding the amendments to the Procedural Calendar.

88 Indeed, the Respondent could not have filed a preliminary objection based on the Decision in its Counter-Memorial, since the Decision was rendered subsequently. Thus, "the facts on which the objection is based [were] unknown" to the Respondent at the time it filed its Counter-Memorial.[136]

89 The Decision could not have been anticipated. It represents the first time the CJEU opined on the question of the compatibility of EU law and investment treaty arbitration. While the Commission and certain Member States had argued that certain dispute resolution provisions in intra-EU BITs were incompatible with EU law, as set out in **Section 3**, there were no publicly available decisions of arbitral tribunals or domestic courts reaching that conclusion.[137] Furthermore, the Decision does not follow the recommendations of the CJEU Advocate General.[138]

90 In any event, preliminary objections can be raised after the Counter-Memorial and indeed various ICSID tribunals have addressed preliminary objections filed after the Counter-Memorial.

91 In *AIG v. Kazakhstan*, the respondent filed objections to jurisdiction two and a half months after its counter-memorial. Notwithstanding the claimant's arguments that the objections were untimely and precluded under Article 41(1), the tribunal held that Article 41(1) was not "coercive:"

> "Mere tardiness in raising a point of jurisdiction cannot preclude it being considered by the Tribunal at a later stage: so long as the same is raised during the course of the arbitral proceedings.
>
> Rule 41 of the Arbitration Rules (Objection to Jurisdiction) cannot and does not negate the mandate of Article 41 of the Convention:

[136] ICSID Arbitration Rules, at **Exhibit RLA-111**, p. 119 (Art. 41(1)).
[137] See *e.g. Eureko v. Slovakia*, Award on Jurisdiction, 26 October 2010, at **Exhibit RLA-110**, p. 77 (para 293); *Oostergetel v. Slovakia*, Decision on Jurisdiction, 30 April 2010, at **Exhibit RLA-104**, p. 23 *et seq*. (para. 87) and p. 28 (para. 109); *Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007, at **Exhibit RLA-103**, p. 14 (paras. 66-67); *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, at **Exhibit RLA-102**, p. 39 (para. 181).
[138] Opinion of Advocate General Wathelet, at **Exhibit R-376**, p. 48 (para. 273).

> **the latter requires a Tribunal to determine every objection to jurisdiction**.
>
> The time limits prescribed in Rule 41(1) and the requirement that every objection as to jurisdiction or competence of the Tribunal shall be made 'as early as possible' is intended to alert the parties to bring forth their objections, basic to the dispute being adjudicated upon on merits, at the earliest possible point of time. It appears to be rationally and reasonably related only to the expeditious disposal of ICSID arbitral proceedings. It cannot be read as coercive. It could not for instance empower the Arbitral Tribunal to grant relief to a Claimant when there is apparently no jurisdiction of the Centre or the Tribunal to entertain and try the case…"[139]

92 Similarly, in *Helnan v. Egypt*, the respondent raised a new objection to jurisdiction roughly eight months after the tribunal's Decision on Jurisdiction.[140] Although the tribunal concluded that the respondent could have raised its new objection earlier, it nevertheless found that the respondent had not waived the objection.[141] The tribunal accordingly agreed to examine the respondent's jurisdictional objections.

93 Irrespective of the Respondent's submission of this new objection, the Tribunal has the duty to consider, if necessary proprio motu, its jurisdiction

[139] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, Award, ICSID Case No. ARB/01/6, 7 October 2003, at **Exhibit RLA-113**, p. 29 (para. 9.2) (emphasis added).

[140] *Helnan International Hotels A/S v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/19, 3 July 2008, at **Exhibit RLA-114**, p. 32 *et seq*. (paras. 111-113).

[141] *Id*. See also *Desert Line v. Yemen*, where the respondent submitted objections to jurisdiction on the date of and in lieu of a counter-memorial. The Tribunal held that "[i]t [wa]s difficult to accept that the Respondent's two simple objections, based on the alleged absence of two elements which should have been manifest to the Government… could not have been made in the first half of 2005 when the Claimant indicated its intention of pursuing ICSID arbitration, especially since the Respondent alleges that each of these elements wholly precludes the Claimant's access to ICSID." Nevertheless, the tribunal examined and addressed the jurisdictional objections in question. *Desert Line Projects LLC v. Republic of Yemen*, Award, ICSID Case No. ARB/05/17, 6 February 2008, at **Exhibit RLA-115**, p. 22 *et seq*. (paras. 97-98).

over the claims before it. Indeed, Article 41 of the ICSID Convention provides:

> "(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."[142]

94 Thus, the Tribunal must ensure that it respects the limits of its own jurisdiction.

95 The Decision constitutes a new and important development that directly affects the mandatory limits of the Tribunal's jurisdiction. These limits are mandatory in the sense that they are a matter of the applicable international and EU law rather than arising out of a private-law contract, and therefore cannot be waived by a party. The Tribunal must therefore consider and rule on the impact of the Decision on its jurisdiction in its future award.

96 As discussed in **Section 6** below, the Decision directly affects the Tribunal's jurisdiction in this matter, given the CJEU's ruling that EU law precludes dispute resolution provisions contained in an investment treaty between EU Member States.[143] This ruling necessarily has an impact on these proceedings, and it is the Tribunal's duty to consider this impact, if necessary on its own motion.

[142] Convention on the settlement of investment disputes between States and nationals of other States (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159, at **Exhibit RLA-116**, p. 186 (Art. 41) (emphasis added).
[143] See *supra* para. 79.

6 THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER GABRIEL JERSEY'S CLAIMS UNDER THE UK-ROMANIA BIT

97 This dispute arises in part out of claims by Gabriel Jersey, a company allegedly incorporated in the UK (Bailiwick of Jersey), brought against Romania pursuant to the UK-Romania BIT.[144] The other claims in this arbitration are brought by Gabriel Canada pursuant to the Canada-Romania BIT.[145]

98 Gabriel Jersey invokes the dispute resolution provision in Article 7 of the UK-Romania BIT, which provides:

> "(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
>
> (2) Where the dispute is referred to international arbitration, the national or company concerned may choose to refer the dispute either to:
>
> (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

[144] Memorial, p. 416 (para. 931); see also Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (adopted on 13 July 1995, entered into force on 10 January 1996) UK Treaty Series No. 84 (1996), at **Exhibit C-3**, p. 4 *et seq*. (Arts. 2(2) and 5).
[145] Memorial, p. 416 (para. 931).

> (b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> (3) Nothing in this Article shall prevent a national or company of one Contracting Party from referring a dispute concerning an investment to the domestic courts of the other Contracting Party, where it has the right to do so under the domestic law of that other Contracting Party."[146]

99 The dispute resolution provision in Article 7 is similar to Article 8 of the Netherlands-Slovakia BIT quoted at paragraph 44 above, in that both provide a consent by the two State Parties to arbitrate and thus allow investors of the other State Party to invoke that consent and to provide their own consent to arbitration, thereby giving rise to an agreement to arbitrate a dispute.

100 As explained above, the impact of the Decision goes well beyond the limits of the *Achmea* case itself. The CJEU made clear that Articles 267 and 344 of the TFEU should be interpreted as precluding a provision "in an international agreement concluded between Member States" – *i.e.* in any intra-EU BIT – with a dispute resolution clause similar to Article 8 of the Netherlands-Slovakia BIT.[147] The Decision thus affects the dispute resolution provisions of all intra-EU BITs, including the UK-Romania BIT.

101 While the present proceedings are governed by the ICSID Convention and the ICSID Arbitration Rules (and not by the UNCITRAL Arbitration Rules, like *Achmea* proceedings), this difference does not affect the applicability of the Decision in these proceedings. The State's consent to arbitrate, and thus the basis of the Tribunal's jurisdiction, is contained in the BIT and not in the applicable arbitration rules; the investor must invoke that consent and then give its own consent for there to be an agreement to arbitrate a dispute under the BIT. The applicable arbitration rules thus have no bearing on the existence of an agreement to arbitrate between investor

[146] UK-Romania BIT, at **Exhibit C-3**, p. 5 *et seq*. (Art. 7); Memorial, p. 378 *et seq*. (para. 839).
[147] See *supra* para. 81.

and the host State; nor do they affect a tribunal's jurisdiction over claims under the BIT.

102 As a result of the Decision and for the reasons explained below, the Tribunal cannot assert jurisdiction over Gabriel Jersey's claims brought under the UK-Romania BIT, even if Gabriel Jersey demonstrates that it qualifies as a UK investor under the UK-Romania BIT (a showing which it has thus far not made).[148]

103 First, even if Gabriel Jersey were a UK investor under the BIT, under domestic law it lost the right to consent to arbitration under Article 7 of the UK-Romania BIT at the latest when the TFEU came into force on 1 December 2009 (**Section 6.1**). Second, Romania's consent to arbitration in the UK-Romania BIT also became inapplicable when the TFEU entered into force, pursuant to Article 30(3) of the VCLT (**Section 6.2**).

6.1 As an allegedly UK company, Gabriel Jersey lost the right to consent to arbitrate under the UK-Romania BIT at the latest when the TFEU came into force

104 Unlike the State Parties giving their consent to arbitrate in BITs, investors are not themselves party to those BITs. Investors become entitled to invoke the host State's consent to arbitrate, contained in a BIT, only after the relevant BIT has been ratified and has become part of the home State's law. It is only then that the investor can invoke the consent of the host State, and accordingly the consent of the investor is always given under the law of its own home State.

105 Accordingly, the legal standing of a legal entity to sue is determined by the *lex societatis*, that is, the law of the State where the entity is incorporated.[149] In the case of EU Member States, their domestic laws automatically incorporate EU law as a result of the principles of direct effect and supremacy described in **Section 2** above. Thus, investors who are EU persons can only invoke and accept the consent to arbitrate of

[148] Respondent's Counter-Memorial, p. 189 *et seq*. (paras. 486-490).
[149] Z. Douglas, *The International Law of Investment Claims* (1st edition, Cambridge University Press, 2009) (excerpts), at **Exhibit RLA-117**, p. 78 (paras. 134-135).

another Member State under an intra-EU BIT insofar as they are permitted to do so under their own domestic law, which includes EU law.

106 In this case, Gabriel Jersey relies on and purports to bring its claims under the UK-Romania BIT, which was concluded on 13 July 1995 and entered into force in January 1996. The BIT was extended to companies incorporated in the Bailiwick of Jersey in 1999 and was subsequently renewed in 2005 for an indefinite period of time.[150]

107 EU law has been directly applicable in the UK since 1973. It in turn became directly applicable in Romania as of 1 January 2007, when Romania became an EU Member State.[151] On that date, the UK-Romania also became an intra-EU BIT.

108 Gabriel Jersey initiated this arbitration against Romania in July 2015, pursuant to Article 7 of the UK-Romania BIT, which contains the consent to arbitrate of the UK and Romania *vis-à-vis* the investors of the other Contracting Party.[152]

109 As the CJEU noted in the Decision, arbitral tribunals constituted pursuant to arbitration clauses in intra-EU BITs may be called upon to interpret or apply EU law.[153] Because arbitral tribunals are not courts within the meaning of Article 267 of the TFEU and thus cannot refer questions to the CJEU for a preliminary ruling, dispute resolution clauses contained in intra-EU BITs adversely affect the autonomy of EU law.[154] Consequently, Articles 267 and 344 of the TFEU are to be interpreted as precluding such dispute resolution clauses.[155] Thus, EU investors are precluded under EU

[150] The BIT will remain 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 in accordance with Article 13 of the BIT. Thus far, neither party has served notice of termination. See UK-Romania BIT, at **Exhibit C-3**, p. 7 *et seq*. (Art. 13).
[151] Chamber of Deputies and Senate of Romania, "Declaration of the Parliament of Romania on signing the Accession Treaty of Romania to the European Union on the 25th of April 2005" dated 27 April 2005, at **Exhibit R-381**.
[152] See Gabriel's Consents and Authorizations to Commence Arbitration of Bilateral Investment Treaty Dispute dated 15 July 2015, at **Exhibit C-5**; see also *supra* para. 98 (describing Art. 7).
[153] Decision, at **Exhibit R-363**, p. 8 (para. 42).
[154] *Id.*, at p. 9 (para. 49) and p. 10 (para. 59).
[155] *Id.*, at p. 10 *et seq*. (para. 60).

law, as incorporated into their home State's law, from consenting to arbitrate under intra-EU BITs.[156]

110 Furthermore, as explained above, judgments of the CJEU – including the Decision – apply and are opposable *erga omnes*.[157]

111 In light of the Decision, UK investors no longer had the right under EU law – as incorporated into UK law (as well as Romanian law)[158] – to invoke and accept the host State's consent to arbitrate in the UK-Romania BIT after the TFEU entered into force on 1 December 2009.[159] Thus, even if Gabriel Jersey were to demonstrate that it is a company validly incorporated in the Bailiwick of Jersey (which it has thus far failed to do),[160] as of 1 December 2009, it lost the right under UK law (which incorporates EU law) to invoke and accept Romania's consent to arbitrate contained in Article 7 of the UK-Romania BIT. Stated differently, as from 1 December 2009, EU law did not permit Gabriel Jersey to accept that consent to arbitrate.

112 It follows that, when Gabriel Jersey initiated this arbitration in July 2015 and when it purported to give its own consent to arbitrate in the Request for Arbitration, as an allegedly UK and thus EU company, it had no right under EU law – as incorporated into UK law[161] – to consent to arbitrate under the BIT.

113 Consequently, because Gabriel Jersey had no right to consent to arbitrate under the UK-Romania BIT at the time it initiated the present arbitration, there is no valid arbitration agreement between the Parties – Gabriel Jersey and Romania – in this case. The Tribunal accordingly does not have and cannot assert jurisdiction over Gabriel Jersey's claims.

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[156] See *supra* para. 81.
[157] See supra para. 21.
[158] See *supra* para. 17 (describing the direct application of EU law into Member States' law).
[159] See *supra* para. 21 (describing binding nature of CJEU judgments).
[160] As explained in the Counter-Memorial, the Claimants have not demonstrated that Gabriel Jersey is a company properly incorporated in the UK and that it qualifies as an investor under the BIT. See Respondent's Counter-Memorial, p. 189 *et seq.* (Section 8.2).
[161] See *supra* para. 17.

6.2 Romania's consent to arbitrate in Article 7 of the UK-Romania BIT is incompatible with the TFEU and accordingly the provision does not apply

114 Under international and EU law, Romania's unilateral consent to arbitrate contained in Article 7 of the UK-Romania BIT became inapplicable – at the latest – when the TFEU took effect on 1 December 2009.

115 As noted above, Article 30(3) of the VCLT provides for situations where two successive treaties that relate to the same subject matter are incompatible:

> "[w]hen all the parties to the earlier treaty are parties also to the later treaty …, the earlier treaty applies **only to the extent that its provisions are compatible** with those of the later treaty."[162]

116 Article 7 of the UK-Romania BIT (the "earlier treaty") and Article 344 of the TFEU (the "later treaty") have the same subject matter insofar as Article 7 of the UK-Romania BIT deals with the resolution of disputes that may involve the application of the EU Teaties, whereas Article 344 of the TFEU establishes an exclusive obligation of Member States to submit any disputes concerning the interpretation or application of the EU Treaties to the judicial system of the EU. Since the CJEU confirmed in its Decision that investment treaty tribunals do not qualify as "tribunals of Member States" permitted to refer questions to the CJEU under Article 267 of the TFEU,[163] provisions such as Article 7 of the UK-Romania BIT "could prevent those disputes form being resolved in a manner that ensures the full effectiveness of EU law."[164] Consequently, dispute resolution provisions such as Article 7 of the UK-Romania BIT are incompatible with Articles 267 and 344 of the TFEU.[165]

117 Since Article 7 of the UK-Romania BIT is incompatible with the provisions of a later treaty (Articles 267 and 344 of the TFEU), pursuant to Article 30(3) of the VCLT, it did not apply at the time the present

[162] VCLT, at **Exhibit RLA-1**, p. 339 (Art. 30(3)) (emphasis added); see *supra* para. 46.
[163] See *supra* para. 76.
[164] Decision, p. 6.
[165] See *supra* para. 79.

arbitration proceedings were initiated and cannot be invoked and accepted by a foreign investor.[166] The Tribunal therefore has no jurisdiction over Gabriel Jersey's claims.

****

118 While the Respondent considers that the impact of the CJEU Decision on the present proceedings is a matter of jurisdiction, in the alternative, if the Tribunal considers that it is a matter of admissibility of the claims, the Respondent submits that Gabriel Jersey's claims should be dismissed as inadmissible under the UK-Romania BIT.

[166] M. E. Villiger, "Commentary on the 1969 Vienna Convention on the Law of Treaties" (1st edition, Martinus Nijhoff Publishers, 2009), at **Exhibit RLA-118**, p. 405 *et seq*. (para. 13: "Moreover, para. 3 [of Article 30 of the VCLT] neatly confirms that Article 30 is about priorities, not the invalidity of a treaty … and that para. 3 aims where possible at 'saving' the earlier treaty."); *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (Objection to the Jurisdiction of the Court) [1924] PCIJ Rep Series A No. 2, at **Exhibit RLA-119**, p. 31 ("the provisions of the [earlier treaty] and more particularly those regarding the jurisdiction of the Court are applicable in so far as they are compatible with the [later treaty].").

7 PRAYERS FOR RELIEF

119 The Respondent respectfully requests that the Arbitral Tribunal:

a) determine that the Respondent's additional preliminary objection is timely and complies with Article 41 of the ICSID Arbitration Rules; and

b) dismiss Gabriel Jersey's claims for lack of jurisdiction under Article 7 of the UK-Romania BIT or, alternatively, as inadmissible.

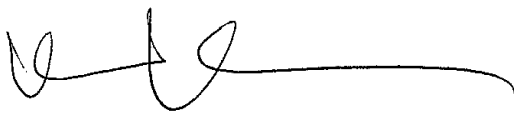
Respectfully submitted,

25 May 2018

For and on behalf of,

Romania

LALIVE



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