Arbitration — Jurisdiction — Investor–State arbitration — Energy Charter Treaty, 1994 — ICSID Convention, 1965 — Energy Charter Treaty concluded between European Union and States some of which Members of the European Union — Whether provision for investor–State arbitration compatible with European Union law in intra-European Union disputes — Applicable law — Whether including European Union law — Nature of arbitration tribunal

Economics, trade and finance — Investment — Investment protection treaties — Energy Charter Treaty, 1994 — Investor–State arbitration provision — Whether provision for arbitration of investor–State dispute compatible with European Union law in intra-European Union disputes

Treaties — Interpretation — Principles — Relevance of other rules of international law — Energy Charter Treaty, 1994 — Whether provisions on investor–State arbitration should be read as inapplicable to disputes between investor from one European Union State and another European Union State — Whether investor–State dispute resolution provision providing for arbitration compatible with Treaty on the Functioning of the European Union, 2007

Treaties — Conflict between treaty obligations — European Union Member States — Whether obligations under European Union treaties prevailing over obligations under Energy Charter Treaty, 1994 — Express provision on conflict — Energy Charter Treaty, Article 16

Relationship of international law and municipal law — European Union law — Double nature of European Union law as part of the law in force in every Member State and as deriving from an international agreement between the Member States — Relationship between rights accorded to investors under investment protection treaty and principles of European Union law

VATTENFALL AB, VATTENFALL GMBH, VATTENFALL EUROPE NUCLEAR ENERGY GMBH, KERNKRAFTWERK KRÜMMEL GMBH AND CO. OHG AND KERNKRAFTWERK BRUNSBÜTTEL GMBH AND CO. OHG ("THE CLAIMANTS") *v.* FEDERAL REPUBLIC OF GERMANY[1]

[1] The claimants were represented by Kaj Hober, Jakob Ragnwaldh, Frederik Andersson, Alexander Foerster and Friederike Strack of Mannheimer Swartling Advokatbyrä AB and Richard Happ and

(ICSID Case No ARB/12/12)

(Decision on the *Achmea* Issue)

ICSID Arbitration Tribunal. 31 *August* 2018

(van den Berg, *President*; Brower and Lowe, *Members*)

Summary: *The facts*:—The claimants brought proceedings under the Energy Charter Treaty, 1994 ("the ECT"), a multilateral treaty the parties to which included the European Union ("EU") and States, some of which were members of the EU and others not, against the respondent with regard to the respondent's decision to phase out nuclear power in Germany. Following hearings on issues of jurisdiction, merits and quantum, and the exchange of post-hearing submissions, the European Court of Justice ("the ECJ") gave its judgment of 6 March 2018 in Case C-284/16 *Slovak Republic* v. *Achmea BV* (181 ILR 175) in respect of a preliminary reference from the German Federal Supreme Court. That case concerned an attempt by Achmea BV, a Netherlands company, to enforce in the German courts an arbitration award (181 ILR 50) given in its favour against the Slovak Republic under the terms of the bilateral investment treaty between the Netherlands and the Slovak Republic. The German Federal Supreme Court referred to the ECJ a number of questions[2] concerning whether Articles 267 and 344 of the Treaty on the Functioning of the European Union, 2007 ("the TFEU")[3] precluded the application of a provision in a bilateral investment agreement between Member States of the European Union providing for the submission of investment disputes to arbitration.

In its judgment, the ECJ ruled that—

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on the 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.[4]

Georg Scherpf of Luther Rechtsanwaltgesellschaft MBH. The respondent was represented by Sabine Konrad and Arne Fuchs of McDermott, Will and Emery and Hans-Joachim Henckel and Annette Tiemann of the Bundesministerium für Wirtschaft unde Energie.

[2] The text of the questions appears in para. 30 of the present Decision.

[3] The text of these provisions is set out in para. 29 of the present Decision.

[4] *Achmea* judgment, para. 62, 181 ILR 175 at 262, reproduced in para. 33 of the present Decision.

In light of this ruling, the Tribunal decided to hear further argument from the parties and the Commission of the European Union (which had been allowed to make submissions as a non-disputing party in accordance with ICSID (International Centre for the Settlement of Investment Disputes) Arbitration Rule 37(2)[5]) and to render a separate decision on whether the principles identified by the ECJ were applicable to proceedings between an investor of one EU Member State and another EU Member State under the ECT.

The respondent and the Commission argued that the implications of the ECJ *Achmea* judgment were not limited to bilateral investment treaties but were also applicable to the ECT, with the consequence that the Tribunal lacked jurisdiction. The claimants maintained that the objection to jurisdiction had been made out of time and should be rejected on that ground but that, if it were admitted it should be dismissed on the ground that EU law did not preclude the jurisdiction of the Tribunal being derived from the ECT.

Held (unanimously):—The objection to jurisdiction was rejected.

(1) The objection to jurisdiction had been made in a timely fashion. Article 41 of the ICSID Arbitration Rules[6] required that an objection to jurisdiction be made as early as possible and, in any event, no later than the date specified for the filing of the counter-memorial unless the facts on which the objection was based were not known to the party concerned at the time. The ECJ Judgment constituted a new fact the existence of which could not have been known until the judgment was delivered on 6 March 2018. Moreover, ICSID Arbitration Rule 41(2) permitted a tribunal to consider *proprio motu*, at any stage of the proceedings, whether the dispute was within its competence (paras. 95-107).

(2) The Tribunal derived its jurisdiction from Article 26(1) of the ECT.[7] While the ICSID Convention set outer limits to that jurisdiction, it could not confer a broader jurisdiction than that provided by the ECT. EU law and the ECJ Judgment in *Achmea* could not be "taken into account" in such a way as

[5] ICSID Arbitration Rule 37(2) provided that: "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

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

[6] The text of Article 41 is set out at para. 97 of the present Decision.

[7] The relevant parts of Article 26 are set out in paras. 114 and 115 of the present Decision.

to exclude from the jurisdiction conferred by Article 26(1) of the ECT all intra-EU investor–State arbitrations (paras. 108-12 and 166-8).

(a) The law applicable to determining the extent of the jurisdiction of the Tribunal was to be distinguished from that applicable to the merits of a dispute. Article 26(6) of the ECT was concerned with the law applicable to the merits (paras. 113-22).

(b) Article 26(1) of the ECT had to be interpreted in accordance with the principles of international law relating to the interpretation and application of treaties (paras. 123-9).

(c) The EU treaties were agreements concluded under international law. Irrespective of their special constitutional status under EU law, they were treaties under international law. It followed that EU law as a whole was to be regarded as international law or, more precisely, as a body of rules derived from international law treaties (paras. 130-50).

(d) While the principle enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969, required that, in the interpretation of a treaty, account be taken of "relevant rules of international law applicable in the relations between the parties", that principle could not be used to substitute for the plain meaning of the words of the treaty other rules of international law, external to the treaty, which would contradict the ordinary meaning of its terms. Legal certainty required that any rule of international law to be taken into account under this principle should be clear. The ECJ Judgment was concerned with bilateral treaties between EU Member States and it was not for the Tribunal to extrapolate from that context to the different context of a multilateral treaty to which the EU itself, as well as States inside and outside the EU, was a party (paras. 151-65).

(3) Article 26(1) of the ECT could not be interpreted so as to exclude jurisdiction with regard to intra-EU disputes (paras. 207-10).

(a) Article 26 gave jurisdiction to a tribunal to hear a case between an investor of one Contracting Party to the ECT and another Contracting Party. The question for the Tribunal was whether the terms of Article 26(1) could be read as excluding from the term "Contracting Party" EU Member States insofar as a claim was brought against one of them by an investor from another EU Member State. The terms of the ECT did not support such a construction; had it been the intention to exclude EU Member States in this way, it would have been necessary to include explicit language to that effect (paras. 169-84).

(b) The Statement[8] made by the European Communities (as the forerunner of the EU) to the ECT Secretariat under Article 26(3)(b)(ii) of the ECT[9] did not exclude the competence of an arbitral tribunal seised of a dispute between an investor and an EU Member State (paras. 185-91).

[8] The text of the Statement is set out in para. 185 of the present Decision.
[9] The text of Article 26(3)(b)(ii) is set out in the footnote to para. 185 of the present Decision.

(c) In any event, Article 16(2) of the ECT,[10] which provided that nothing in the terms of an agreement between two or more Contracting Parties to the ECT "shall be construed to derogate from any provision of Part III or Part V of this Treaty", ensured that the dispute settlement provisions of Part V, which included Article 26, of the ECT were not required to yield to the provisions of the EU treaties in an intra-EU dispute (paras. 192-6).

(d) The object and purpose of the ECT was a factor in the interpretation of Article 26 but it could not be read in such a way as to support the exclusion of intra-EU disputes (paras. 197-200).

(e) It was significant that there was no clause in the ECT of the kind regularly inserted into mixed agreements concluded by the EU and EU Member States to the effect that the treaty did not apply as between EU Member States (paras. 201-6).

(4) EU law did not prevail over the ECT under a conflict of laws analysis. Articles 267 and 344 of the TFEU were not in conflict with Article 26 of the ECT; their scope and subject matter were different. The ECJ's judgment in *Achmea* did not pronounce upon the relationship between the TFEU provisions and the ECT. The priority sometimes accorded to a later or more specialized treaty was not applicable here given the express provisions of Article 16 of the ECT (paras. 207-29).

(5) That there might be difficulty over the enforcement of any award rendered by the Tribunal where enforcement was sought before a court of an EU Member State was not material to determining the jurisdiction of the Tribunal (paras. 230-1).

The following is the text of the Decision of the Tribunal:

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[10] The text of Article 16 is set out in para. 192 of the present Decision.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

A. Contents of this decision

1. This Decision arises from the jurisdictional objection made by Respondent, to the effect that "all claims pending before this Tribunal be dismissed because the Tribunal has no jurisdiction in the light of ECJ's *Achmea* Judgment".[1] Respondent raised this objection to the Tribunal's jurisdiction on 4 April 2018, following the release of the *Achmea* judgment on 6 March 2018, after the Parties' exchange of written submissions, the hearing, and the filing of post-hearing submissions in this matter.

2. This Decision shall therefore address the implications for these proceedings ("*Achmea* issue"), if any, of the judgment rendered by the European Court of Justice ("ECJ") in Case C-284/16 *Slowakische Republik* v. *Achmea BV*, dated 6 March 2018 ("ECJ Judgment").

B. Reason for a separate decision

3. The *Achmea* issue is a distinct matter, unrelated to the remainder of the issues between the Parties to this arbitration. The Tribunal considers it appropriate and in the interests of efficiency and procedural economy to issue this separate Decision prior to any further ruling in these proceedings, in order to address the specific jurisdictional objection by Respondent with respect to the *Achmea* issue.[2]

[1] Respondent's First Submission re the ECJ Judgment, ¶ 69.

[2] In this respect, the Tribunal recalls Article 41(2) of the ICSID Convention, which provides that "[a]ny 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". The Tribunal further recalls ICSID Rule 41(2), providing that "[t]he Tribunal may on its

4. This Decision is rendered without prejudice to the Tribunal's determinations regarding all other issues of jurisdiction, admissibility or merits in these proceedings.

C. Broader procedural context

5. This Decision is taken in the context of a dispute between Claimants and Respondent which was commenced by the Request for Arbitration dated 14 May 2012 of Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, and Kernkraftwerk Brunsbüttel GmbH & Co. oHG, submitted against the Federal Republic of Germany ("Request").

6. There is no dispute that all concerned Parties to the present proceedings are currently based in the European Union ("EU"). The five Claimants are legal entities within the EU, and Respondent is an EU Member State.

7. The Request was received by the International Centre for Settlement of Investment Disputes ("ICSID") on 16 May 2012, and on 31 May 2012 was registered by the Secretary-General of ICSID in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

8. The Parties' dispute arises out of Respondent's decision to phase out the use of nuclear energy. In the context of Respondent's decision, Claimants allege that Respondent has breached a number of obligations under the Energy Charter Treaty ("ECT").

9. As mentioned at ¶ 1 above, at this stage of the proceedings the Parties have exchanged written submissions. A hearing on jurisdiction, merits and quantum took place at the World Bank Headquarters in Washington, D.C., from 10 to 21 October 2016 ("Hearing"). Following the Hearing, the Parties have exchanged post-hearing submissions.

D. Procedural context specific to the Achmea *issue*

10. Turning now to the procedural context relating to the *Achmea* issue, it is relevant to recount a number of steps preceding the ECJ Judgment.

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".

11. On 24 July 2015, the European Commission ("EC") filed an "Application for Leave to Intervene as a Non-Disputing Party" in the present proceedings ("EC Application").

12. On 7 August 2015, the Tribunal issued Procedural Order No 13 ("PO 13"), granting the EC Application under Rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules").

13. On 30 September 2015, the EC filed its "Written Submission" as a non-disputing party ("EC 2015 Submission").

14. On 29 April 2016, Claimants submitted their Observations on the EC 2015 Submission ("Claimants' 2016 Observations"). On the same date, Respondent submitted a letter to the Tribunal stating as follows:

> We write to the Tribunal in response to Procedural Order No 13 (dated 7 August 2015) which directs the Parties to file any observations on the EU Commission's amicus submission in the above referenced case no later than Friday, 29 April 2016.
>
> Respondent requests the Tribunal to conduct an *ex officio* assessment of the arguments submitted by the EU Commission on 30 September 2015.[3]

15. Following the release of the ECJ Judgment on 6 March 2018, the Tribunal invited the Parties to provide their comments on (i) the implications of the ECJ Judgment on the present case, if any; and (ii) whether the Tribunal should invite comments from the EC in respect of the ECJ Judgment. On these points, the Parties provided two rounds of comments, first, on 4 April 2018 ("Claimants' First Submission re the ECJ Judgment" and "Respondent's First Submission re the ECJ Judgment", respectively) and second, on 23 April 2018 ("Claimants' Second Submission re the ECJ Judgment" and "Respondent's Second Submission re the ECJ Judgment", respectively).

16. In the meantime, the EC, by its email dated 19 April 2018, offered to update the EC 2015 Submission in light of the recent ECJ Judgment. Taking into account the Parties' submissions in their respective First and Second Submissions of 4 April and 23 April 2018, the Tribunal decided to grant the EC's request to update the EC 2015 Submission, and did so by Procedural Order No 36 dated 25 April 2018. Following this determination, on 9 May 2018, the EC filed its update to the EC 2015 Submission ("EC 2018 Submission").

17. Thereafter, both Claimants and Respondent filed their respective observations with respect to the EC 2018 Submission on 30 May

[3] Respondent's letter to the Tribunal dated 29 April 2016.

2018 ("Claimants' 2018 Observations" and "Respondent's 2018 Observations", respectively).

E. Respondent's jurisdictional objection

18. The Tribunal notes that Respondent did not originally object to the Tribunal's jurisdiction on the basis of EU law. The issue of any potential incompatibility between intra-EU investor–State dispute settlement under the ECT and EU law was first raised in these proceedings by the EC, in the EC Application and EC 2015 Submission. Even after the EC 2015 Submission, Respondent did not raise a jurisdictional objection in line with the arguments made by the EC. Rather, in response to the EC 2015 Submission, Respondent "request-[ed] the Tribunal to conduct an *ex officio* assessment of the arguments submitted by the EU Commission".[4] Respondent's jurisdictional objection arose only after the ECJ Judgment had been rendered in 2018.

19. The Tribunal will give further consideration to the timeliness of Respondent's objection below. As further elaborated (see ¶¶ 104-6 below), irrespective of the timeliness of Respondent's objection, the Tribunal considers that it has a broad power to examine issues relating to its jurisdiction on an *ex officio* basis. In respect of the issue of the alleged incompatibility of intra-EU investor–State arbitration under the ECT with EU law, the Tribunal would have exercised that power to examine its jurisdiction *ex officio*, even in the absence of a jurisdictional objection by Respondent.

F. Costs

20. In respect of the issue of costs associated with the EC's intervention as a non-disputing party, Claimants objected that the EC's intervention would cause them to incur additional costs. In their letter to the Tribunal dated 31 July 2015, Claimants requested that

> any decision granting the [EC] Application be conditioned upon the Commission posting satisfactory security for the costs caused to the parties by its intervention in this arbitration.[5]

21. In PO 13 (see ¶ 12 above), the Tribunal reserved the question of costs associated with the EC's intervention as non-disputing party,

[4] Respondent's letter to the Tribunal dated 29 April 2016.
[5] Claimants' letter to the Tribunal dated 31 July 2015.