
INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Claimants

v.

ROMANIA

Respondent

ICSID CASE No. ARB/15/31

**CLAIMANTS' SURREJOINDER ON
NEW JURISDICTIONAL OBJECTION**

June 28, 2019

Țuca Zbârcea & Asociații

WHITE & CASE^{LLP}

Counsel for Claimants

**CLAIMANTS' SURREJOINDER ON
NEW JURISDICTIONAL OBJECTION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. THE <i>ACHMEA</i> JUDGMENT DOES NOT NULLIFY THIS TRIBUNAL'S JURISDICTION	2
A. Respondent's Argument That In View of the <i>Achmea</i> Judgment Article 7 of the UK BIT Should Be Interpreted as Inapplicable Should Be Rejected.....	3
1. The UK BIT and the TFEU Do Not Relate to the Same Subject Matter within the Meaning of VCLT Article 30	3
2. The CJEU Did Not Rule that Article 7 of the BIT as Extended to the Bailiwick of Jersey Is Incompatible with the TFEU.....	7
3. The Declarations Made by EU Member States Are Political Statements Not Relevant to Treaty Interpretation	10
4. Retroactive Nullification of Romania's Consent Cannot Be Given Effect.....	13
B. There Is No Basis for Respondent's Contention that Gabriel Jersey Lost the Right to Consent to Arbitrate Pursuant to the Terms of the UK BIT	14
III. CONCLUSION	18

I. INTRODUCTION

1. Gabriel Resources Ltd. (“Gabriel Canada”) and Gabriel Resources (Jersey) Ltd. (“Gabriel Jersey”) (collectively “Gabriel” or “Claimants”) hereby submit this Surrejoinder on New Jurisdictional Objection in accordance with the amended procedural calendar as set forth in Procedural Order No. 22.¹

2. This submission accordingly is limited and solely responds to the arguments set forth in Respondent’s Rejoinder § 2.2.3 regarding the claimed effects on this Tribunal’s Jurisdiction of the *Achmea* Judgment.

3. Claimants respectfully refer the Tribunal to § VII.B.3 of the Claimants’ Reply and Counter-Memorial on Jurisdiction. Claimants there set forth the reasons why Respondent’s jurisdictional objection based on the *Achmea* Judgment must be rejected. As detailed below, nothing in Respondent’s Rejoinder detracts from that conclusion.

4. In short, to date at least 14 investment treaty tribunals have considered the impact of the *Achmea* Judgment on their jurisdiction and all have rejected jurisdictional objections presented on that basis. Such tribunals specifically have rejected the argument, presented by Respondent in this case, that the effect of the *Achmea* Judgment is that the arbitration provision in Article 7 of the UK BIT must be interpreted as being inapplicable once the TFEU entered into force. That argument should be rejected by this Tribunal as well.

5. The reasoning of the *Achmea* Judgment also does not apply in this case to the extent that Article 7 of the UK BIT extends to investors, such as Gabriel Jersey, that are not from an EU Member State. In addition, Respondent’s argument that as a result of the *Achmea* Judgment Gabriel Jersey lost the right to consent to arbitration pursuant to the UK BIT is incorrect. In any event, Respondent’s objection on the basis of the *Achmea* Judgment likely will become moot upon the United Kingdom’s expected withdrawal from the European Union.

¹ Abbreviations and terms used in Claimants’ Memorial and Reply and Counter-Memorial on Jurisdiction will have the same meaning in this Surrejoinder.

II. THE *ACHMEA* JUDGMENT DOES NOT NULLIFY THIS TRIBUNAL'S JURISDICTION

6. To date at least fourteen (14) investment treaty tribunals have considered objections to jurisdiction based specifically on the alleged impacts of the *Achmea* Judgment. Every one, without exception, has rejected the objection.²

7. Respondent's objection on that basis likewise should be rejected. As addressed further below, Respondent's argument based on VCLT Article 30(3) that Article 7 of the UK BIT became inapplicable once the TFEU entered into force is without merit because the UK BIT and the TFEU are not successive treaties relating to the same subject matter to which the rule in Article 30(3) may apply; moreover, the reasoning of the CJEU in the *Achmea* Judgment does not demonstrate that Article 7 of the UK BIT is incompatible with the TFEU. Romania's further argument that the Declaration made by Romania and the United Kingdom along with several other EU Member States regarding the impact of the *Achmea* Judgment operates in effect

² *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award dated May 16, 2018 (CL-254) ¶¶ 678-683; *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue dated Aug. 31, 2018 (CL-216) ¶¶ 92-232; *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated Oct. 9, 2018 (CL-247) ¶¶ 252-267; *Marfin Inv. Grp. Holdings S.A. et al. v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award dated July 26, 2018 ("*Marfin v. Cyprus*") (CL-294) ¶¶ 577-597; *Foresight Lux. Solar 1 S.à.r.l. et al. v. Kingdom of Spain*, SCC Arb. No. 2015/150, Final Award dated Nov. 14, 2018 (CL-295) ¶¶ 198-222; *Greentech Energy Systems A/S (now Athena Investments A/S), NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V (2015/095), Final Award dated Dec. 23, 2018 (CL-296) ¶¶ 388-403; *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability dated Jan. 8, 2019 (decision not public), see Luke Peterson, An Update on Under-the-Radar Arbitral Rulings that Address Achmea Objection, IA REPORTER, Jan. 13, 2019 (CL-297); *CEF Energia v. Italian Republic*, SCC Case No. 158/2015, Award dated Jan. 16, 2019 ("*CEF Energia v. Italy*") (CL-298) ¶¶ 74-101; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Award dated Jan. 28, 2019 (award not public) see Sebastian Perry, Hungary Hit with Another Intra-EU BIT Award, GLOBAL ARB. REV., Feb. 5, 2019 (CL-299); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles dated Mar. 12, 2019 ("*NextEra v. Spain*") (CL-300) ¶¶ 332-357; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treat to Intra-EU Disputes dated May 7, 2019 ("*Eskosol v. Italy*") (CL-301) ¶¶ 108-235; *9Ren Holdings S.À.R.L. v. the Kingdom Spain*, ICSID Case No. ARB/15/15, Award dated May 31, 2019 ("*9Ren Holdings v. Spain*") (CL-302) ¶¶ 142-173; *Landesbank Baden-Württemberg et al. v Spain*, ICSID Case No. ICSID Case No. ARB/15/45, Decision dated Feb. 23, 2019 (decision not public), see Tom Jones, Greenwood panel rejects intra-EU objection, GLOBAL ARB. REV., Jun. 21, 2019 ("*Landesbank Baden-Württemberg v. Spain*") (CL-303); *Rockhopper Italia SpA et al. v Italy*, ICSID Case No. ARB/17/14, Decision dated Jun. 26, 2019 (decision not public), see Damien Charlotin, ECT tribunal of Reichert, Poncet and Dupuy weighs in with decision, rejecting Italy's efforts to derail Rockhopper v. Italy arbitration due to Achmea and intra-EU objections, IA REPORTER, Jun. 28, 2019 ("*Rockhopper v. Italy*") (CL-304).

to “delete” Article 7 of the UK BIT is without merit as the UK BIT, including its Article 7, remains in force. In any event, Romania’s consent under the UK BIT to this arbitration cannot be considered as without effect *ex tunc* in view of the fact that Gabriel Jersey relied on that consent and accepted it in good faith. Finally, there is no basis for Romania’s argument that as a result of the *Achmea* Judgment Gabriel Jersey lost the right to consent to this arbitration.

A. Respondent’s Argument That In View of the *Achmea* Judgment Article 7 of the UK BIT Should Be Interpreted as Inapplicable Should Be Rejected

8. Respondent argues based on VCLT Article 30(3) that Article 7 of the UK BIT became inapplicable following the entry into force of the TFEU due to its alleged incompatibility. That argument is without merit for the reasons set forth below and in Claimants’ Reply and Counter-Memorial on Jurisdiction.

1. The UK BIT and the TFEU Do Not Relate to the Same Subject Matter within the Meaning of VCLT Article 30

9. Respondent maintains that Article 7 of the UK BIT “became inapplicable” when the TFEU took effect on December 1, 2009 and that this follows from the application of VCLT Article 30(3), which applies to successive treaties relating to the same subject matter.³

10. Respondent’s position must be rejected as it fails to establish that the basic condition for application of VCLT Article 30(3), *i.e.*, that there are successive treaties relating to the same subject matter, is met. The *Achmea* Judgment does not address the question whether the TFEU relates to the same subject matter as the BIT there at issue, and Respondent barely addresses the question in relation to the UK BIT either, preferring instead to jump to its argument that the two treaties, allegedly, are incompatible.⁴ It is clear, however, that the rule set forth in VCLT Article 30(3) regarding the extent to which the provisions of an earlier treaty are compatible with a later one, applies only when it is established that the two treaties are successive and relate to the same subject matter within the meaning of VCLT Article 30(1).

³ Rejoinder ¶ 119 *et seq.*

⁴ Rejoinder ¶ 121 (arguing without regard to the “same subject matter” condition that “Article 30(3) deals with the situation when a subsequent treaty between the same Members States is incompatible with an earlier treaty”).

11. The *Eskosol v. Italy* tribunal addressing an Achmea objection considered the argument presented by the European Commission in that case that the “same subject matter” condition was not distinct from the “incompatibility” condition and that the “*lex posterior* rule ‘applies to all situations where there is a conflict between the earlier and the later treaty.’”⁵ The *Eskosol v. Italy* tribunal squarely rejected that interpretation of VCLT Article 30:

The Tribunal disagrees. First, adopting the Commission’s interpretation would effectively require rewriting the text, to ignore a threshold provision (“the rights and obligations of State Parties to successive treaties relating to the same subject matter”) which is expressly stated to be the foundational requirement for any of the following provisions of Article 30 even to apply (“shall be determined in accordance with the following paragraphs...”). Adherence to the natural and ordinary meaning of the terms does not permit the requirements of Article 30(1) to be skipped over, allowing direct recourse to Article 30(3).⁶

Thus the *Eskosol v. Italy* tribunal, like other investment treaty tribunals addressing that issue, concluded that the *lex posterior* rule set forth in VCLT Article 30 applies only where “(a) there are ‘successive treaties relating to the same subject matter,’ and (b) there exists an incompatibility between certain provisions of the two related treaties.”⁷

12. The *Eskosol v. Italy* tribunal addressed the “successive treaties relating to the same subject matter” requirement at some length.⁸ It observed:

[A] treaty is not “successive” to *all* treaties that came before it, simply because it is later in time; to “succeed” a prior treaty implies *some intended relationship* between the two, such that an inference may be drawn from the sequence regarding the Contracting Parties’ intent for provisions of the latter to supplant those of the former. Otherwise, the *lex posterior* notion would be fatally broad, inconsistent with the right of States to enter into various different treaties for different purposes, without the earlier ones being negated each time a later one entered into force. The

⁵ *Eskosol v. Italy* (CL-301) ¶ 135.

⁶ *Id.* ¶ 136.

⁷ *Eskosol v. Italy* (CL-301) ¶ 140. See also Reply and Counter-Memorial on Jurisdiction ¶ 445 and *Marfin v. Cyprus* (CL-294) ¶ 587 (observing that Respondent “conflates the question of whether treaties have the same subject-matter with the question of whether treaties are compatible with each other. For purposes of an analysis under Articles 59 and 30 of the VCLT, these are distinct inquiries and the question of compatibility only arises if and when it has been determined that the treaties have the same subject matter”).

⁸ See *id.* ¶¶ 141-147.

“same subject matter” test provides the description of the *type of relationship* that must be established between distinct treaties, before any inferences regarding intent may be drawn based on temporal considerations.⁹

Referring to the International Law Commission 2006 Report on Fragmentation of International Law, the *Eskosol v. Italy* tribunal observed that the ILC Report emphasizes that where treaties “are not institutionally linked and intended to realize parallel objectives, ... the *lex posterior* rule has least application. In such situations, emphasis should be on guaranteeing the rights set up in the relevant conventions.”¹⁰ The *Eskosol v. Italy* tribunal thus considered that evaluating whether the treaties are “linked institutionally” such that the States parties “envisage them as part of the same concerted effort” is a useful way of approaching the VCLT Article 30(1) inquiry as to whether they are successive treaties relating to the same subject matter.¹¹

13. In the case of the EU treaties and the ECT, the *Eskosol v. Italy* tribunal thus concluded they were not successive treaties relating to the same subject matter.¹² The tribunal also observed that it agreed with the decision of other tribunals addressing the issue in concluding that “a good faith interpretation of VCLT Article 30 does not support the conclusion that the two treaties deal with the same subject matter simply because they may apply simultaneously to the same set of facts.”¹³ As regards the ECT and the EU Treaties, the *Eskosol v. Italy* tribunal emphasized:

The mere fact that protections under both regimes could be afforded in certain circumstances to the same investors – at least in the context of direct rather than indirect investment – does not conclusively demonstrate that the ECT and the EU Treaties themselves have the same subject matter for purposes of international law.¹⁴

⁹ *Id.* ¶ 141 (emphasis in original).

¹⁰ *Id.* ¶ 143 (footnotes omitted).

¹¹ *Id.* ¶ 144.

¹² *Id.* ¶¶ 144-147.

¹³ *Id.* ¶ 146.

¹⁴ *Id.* ¶ 146. Other international tribunals have ruled analogously. See *Southern Bluefin Tuna* (New Zealand-Japan, Australia-Japan), UNCLOS Decision dated Aug. 4, 2000, XXIII RIAA 1 (CL-313) ¶ 52 (“[T]he Tribunal recognizes as well that it is a commonplace of international law and State practice for more than one treaty to bear on a particular dispute. There is no reason why a given act of a State may not violate its

Indeed, every investment treaty tribunal that has considered this argument has rejected it on the basis that the relevant investment treaty and the EU Treaties do not relate to the same subject matter in the sense of VCLT Article 30.¹⁵

14. The same conclusion applies with equal force in this case to the UK BIT and the TFEU. Those treaties do not qualify as successive treaties relating to the same subject matter within the meaning of VCLT Article 30 and therefore there is no basis to examine the alleged incompatibility within the meaning of Article 30(3) of the UK BIT with the EU Treaties. Thus, having concluded that the investment treaty and the EU treaty do not relate to the same subject matter, the *Eskosol v. Italy* tribunal emphasized, “there is no need to reach the second question (compatibility as a matter of international law).”¹⁶ Likewise, the *Marfin v. Cyprus* tribunal concluded for the same reason that the “purported incompatibility between the [BIT] and its various provisions and EU law, do not thus require further examination by the Tribunal.”¹⁷

15. Likewise following the conclusion that the UK BIT and the TFEU are not successive treaties relating to the same subject matter, this Tribunal does not even need to consider the alleged incompatibility of provisions. As set forth below, however, their alleged incompatibility is not demonstrated.

obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.”).

¹⁵ Reply and Counter-Memorial on Jurisdiction ¶ 448 and n. 894. See also *Marfin v. Cyprus* (CL-294) ¶ 588 (concluding the BIT at issue and the EU treaties do not have the same subject matter and noting in addition that “the Tribunal sees no reason to depart from consistent case law finding that intra-EU BITs and the EU treaties deal with different subject matters”); *NextEra v. Spain* (CL-300) ¶ 352 (concluding that “the rule relating to ‘treaties relating to the same subject matter’ is not applicable to the present situation,” and that the TFEU and the ECT “do not ‘relate to the same subject matter’ in the sense of [VCLT] Article 30”); and *Eskosol v. Italy* (CL-301) ¶¶ 135-147 (discussing the question in detail and concluding the TFEU and investment treaties do not deal with the same subject matter).

¹⁶ *Eskosol v. Italy* (CL-301) ¶ 140. See also Reply and Counter-Memorial on Jurisdiction ¶ 445.

¹⁷ *Marfin v. Cyprus* (CL-294) ¶ 591.

2. The CJEU Did Not Rule that Article 7 of the BIT as Extended to the Bailiwick of Jersey Is Incompatible with the TFEU

16. As noted previously, this Tribunal must be the judge of its own competence.¹⁸ This tribunal therefore must make its own determination as to the applicability of VCLT Article 30 in this case. Thus, if this Tribunal were to conclude, contrary to every other investment treaty tribunal that has ruled on the issue, that the TFEU is a successive treaty relating to the same subject matter as the UK BIT (which it should not), the Tribunal then would need separately to consider whether VCLT Article 30(3) applies in relation to Article 7 of the BIT as extended to the Bailiwick of Jersey.

17. As Claimants observed, the Bailiwick of Jersey is not part of the United Kingdom and is not an EU Member State.¹⁹ Similarly, Gabriel Jersey is not a company incorporated in the United Kingdom, is not a UK investor, and Respondent was mistaken to refer to it as such.²⁰

18. As Claimants also observed, the UK BIT's protections, including its investor-State arbitration provision, apply not only to companies of the two Contracting States (Romania and the United Kingdom), but also to companies constituted in any territory to which the BIT is extended.²¹

19. The CJEU's holding that the TFEU precludes an agreement under which an investor of one Member State may submit claims against another Member State to arbitration, by its terms, does not encompass agreements under which an investor that is not from a Member State may submit claims to arbitration. Thus, the *Achmea* Judgment on its face does not apply to the investor-State arbitration provision of the UK BIT insofar as it is extended to other territories, including the Bailiwick of Jersey.

¹⁸ Reply and Counter-Memorial on Jurisdiction ¶¶ 441-443. *See also Eskosol v. Italy* (CL-301) ¶ 186 (“[T]he Tribunal not only has the right to exercise its jurisdiction under the ECT, it has the duty to do so. The Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside the EU and the dictates of EU law.”).

¹⁹ Reply and Counter-Memorial on Jurisdiction ¶¶ 419-423.

²⁰ Reply and Counter-Memorial on Jurisdiction ¶ 421.

²¹ Reply and Counter-Memorial on Jurisdiction ¶ 418. The UK BIT was extended to the Bailiwick of Jersey by a subsequent exchange of notes between the Contracting States. *Id.* n. 843.

20. Respondent argues that “Jersey can be equated to ‘a Member State’” for purposes of the *Achmea* Judgment because its status implies “at least a partial application of EU law.”²² Respondent relies on the fact that the courts of Jersey have the right to refer preliminary questions (of relevance to Jersey’s limited status) to the CJEU and that in a case relating to customs duties the Court ruled that for purposes of applying such duties the Bailiwick of Jersey and the United Kingdom must be treated “as a single Member State.”²³

21. Respondent’s argument, however, is merely speculation as to how the CJEU might interpret its ruling in a context involving the Bailiwick of Jersey. The *Achmea* Judgment does not state that its holding applies to investor-State arbitration provisions that are made applicable to investors from non-Member State territories such as the Bailiwick of Jersey. Indeed, it is unavoidable that the *Achmea* Judgment does not address that issue.

22. As set forth previously, there are several further reasons why in this case the *Achmea* Judgment does not support a determination of incompatibility per VCLT Article 30(3).²⁴

23. Among those, one may observe that the CJEU specifically based its conclusion that a tribunal constituted in accordance with Article 8 of the Netherlands-Slovakia BIT “may be called on to interpret or indeed to apply EU law” based on its observation that Article 8 of that BIT expressly directed that 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.”²⁵ Thus it was clear that a tribunal constituted pursuant to Article 8 of the

²² Rejoinder ¶¶ 108-109.

²³ Rejoinder ¶ 107 (citing *Jersey Produce Marketing*, Case C-293/02, Judgment of the Court of Nov. 8, 2005 (RLA-137) and *Gibraltar Betting and Gaming*, Case C-591/15, Judgment of the Court of June 13, 2017 (RLA-141) (referring to Gibraltar and citing *Jersey Produce Marketing*)).

²⁴ Reply and Counter-Memorial on Jurisdiction ¶¶ 449- 453.

²⁵ Reply and Counter-Memorial on Jurisdiction ¶ 414 (citing *Achmea* Judgment (Exh. R-363) ¶¶ 40-42 and Netherlands-Slovakia BIT (RLA-109) Art. 8(6)).

Achmea BIT may be called upon to apply EU law. Notably, the CJEU’s ruling states that what is “precluded” is a provision “such as Article 8 of the [subject BIT].”²⁶

24. In contrast, the UK BIT does not have a provision such as Article 8 of the *Achmea* BIT that directs the Tribunal “to apply” EU law. Accordingly, in this case, even if this Tribunal were to consider it necessary to evaluate certain aspects of EU law as a factual matter in the context of the Parties submissions, this Tribunal will not be called upon “to apply” EU law; rather it will apply the standards of treatment set forth in the UK BIT interpreted in accordance with relevant principles of international law.²⁷

25. In view of the CJEU’s reasoning as set forth in the *Achmea* Judgment regarding the law to be applied by the BIT tribunal, when assessing compatibility of provisions in the context of VCLT Article 30(3) this distinction is significant. Thus, the *Eskosol v. Italy* tribunal stated with regard to the ECT by comparison to the *Achmea* BIT:

[T]he ECT contains *no equivalent incorporation* into its applicable law of either category of law that the CJEU found offending in Article 8(6) of the *Achmea* BIT. ... In these circumstances, the CJEU’s concern about an arbitral tribunal applying EU law under the *Achmea* BIT is not directly transposable to the ECT. ... As such, there is no equivalent risk that the arbitration mechanism in the ECT could endanger the CJEU’s ultimate control on the application of EU law, which was the driving force in the *Achmea* Judgment about its decision about a “provision in an international agreement ... such as Article 8” of the *Achmea* BIT.²⁸

Other tribunals likewise have concluded that following the CJEU’s reasoning in *Achmea* regarding the basis for alleged incompatibility, *i.e.*, that the arbitral tribunal was directed to apply EU law, does not support a finding of incompatibility in cases such as the instant one.²⁹ The same conclusion is warranted here.

²⁶ Reply and Counter-Memorial on Jurisdiction ¶ 416 (*citing* *Achmea* Judgment (Exh. R-363), ruling following ¶ 62).

²⁷ See *Eskosol v. Italy* (CL-301) ¶ 123 (observing that EU law was not the applicable law in relation to claims under the ECT but that the tribunal may consider EU law as part of the factual matrix of the case).

²⁸ *Id.* ¶ 174.

²⁹ *E.g.*, *9Ren Holdings v. Spain* (CL-302) ¶¶ 168, 172 (“The Claimant’s case does not rest on EU law. The Tribunal is not required to interpret and apply EU law... Spain, on the other hand, *does* invoke EU law. ... [I]t is within that jurisdiction to consider EU law to the extent necessary for the resolution of the dispute under

26. Moreover, any alleged incompatibility between the UK BIT and the TFEU is likely to be eliminated upon the United Kingdom’s withdrawal from the European Union.³⁰

3. The Declarations Made by EU Member States Are Political Statements Not Relevant to Treaty Interpretation

27. In its Rejoinder, Respondent points to the fact that several EU Member States, including Romania and the United Kingdom, signed a Declaration in January 2019 regarding the legal consequences of the *Achmea* Judgment stating that the Member States “are bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law,” and also stating, *inter alia*, that as a consequence of the judgment, “all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable.”³¹ Respondent argues the Declaration signed by Romania and the United Kingdom is an agreement “regarding the interpretation of the treaty or the application of its provisions” within the meaning of Article 31(3)(a) of the VCLT which the Tribunal should consider as “persuasive.”³²

28. Article 31 of the VCLT, however, sets forth the general rule of interpretation of treaties, which is to be done in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of their object and purpose; and together with the context, a subsequent agreement between the parties regarding interpretation or the application

international law. For the purpose of its decision on jurisdiction, the Tribunal does not consider that EU law is materially incompatible with the applicable international law, including the EU treaties and Article 26 of the ECT as to investor-State arbitration under the ICSID Convention.”). *See also CEF Energia v. Italy* (CL-298) ¶¶ 85-99 and *Rockhopper v. Italy* (CL-304).

³⁰ Reply and Counter-Memorial on Jurisdiction ¶ 455.

³¹ Declaration of the Representatives of the Governments of the Member States of Jan. 15, 2019 (Exh. R-484) (declaration signed by certain Member States). *See also* Declaration of the Representatives of the Governments of the Member States of Jan. 16 (Exh. R-485) (separate declaration signed by certain other Member States); Declaration of the Representative of the Government of Hungary of Jan. 16, 2019 (Exh. R-486).

³² *See* Rejoinder ¶ 125 *et seq.*

of its provisions shall be taken into account.³³ Article 31(3)(a) thus is not a means of amending a treaty or “deleting” any of its expressly stated provisions, as Respondent suggests.³⁴

29. The Declaration, which is a statement that the arbitration provisions of certain bilateral investment treaties (the meaning of which are plain, clearly understood and in no way in doubt) are contrary to another agreement concluded among the EU Member States, cannot reasonably be understood as an “interpretation” of those arbitration provisions. Even if it is understood as an agreement regarding their “application,” VCLT Article 31 only provides a basis to take such an agreement into account when interpreting the meaning of the arbitration provisions.

30. Notably, the *Eskosol v. Italy* tribunal considered the cited Declarations and the argument that they should be considered in view of VCLT Article 31(3)(a). That tribunal concluded that “VCLT Article 31(3)(a) is not, however, a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used.”³⁵ The tribunal explained as follows:

This is all the more true for an interpretative declaration, which “does not modify treaty obligations,” but “may only specify or clarify the meaning or scope which its author attributes to a treaty ... and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

In particular an interpretative declaration may “corroborate or ‘support’ an interpretation that has already been determined by other methods,” such as “the objective elements listed in articles 31 and 32 of the Vienna Convention,” but cannot override the application of those elements.³⁶

Since then, another two investment treaty tribunals have rejected similar arguments presented in reliance on the cited Declarations.³⁷

³³ VCLT (RLA-1), Art. 31.

³⁴ Respondent’s argument (Rejoinder ¶ 128) that the Declaration is an agreement to “delete” Article 7 of the UK BIT is not supported by reference to VCLT, Art. 31(3)(a).

³⁵ *Eskosol v. Italy* (CL-301) ¶ 223.

³⁶ *Id.* ¶¶ 223-224 (citing ILC 2011 Guide to Practice on Reservations to Treaties).

³⁷ *Landesbank Baden-Württemberg v. Spain* (CL-303); *Rockhopper v. Italy* (CL-304).

31. In any event, in the context of this case, while the Declaration refers to “investors from Member States,” it says nothing about investor-State arbitration clauses that have been extended to territories such as Jersey.³⁸ Thus, even “taking the Declaration into account” within the meaning of VCLT Article 31(3)(a) does not lead to the conclusion that the BIT Contracting Parties have agreed that Article 7 of the UK BIT is “inapplicable” in relation to companies established in the Bailiwick of Jersey. Indeed, there is no dispute that the UK BIT remains in force.

32. In any event, even if the Tribunal were to conclude that it should consider the Declaration as an agreement between Romania and the United Kingdom that Article 7 of the BIT would be considered inapplicable, including as to investors from territories such as the Bailiwick of Jersey, there is no basis in Article VCLT Article 31 to conclude that agreement would operate so as effectively to remove Article 7 from the BIT with retroactive effect as Romania contends. This is because VCLT Article 31 establishes rules for interpreting existing treaties, not a rule for retroactive amendment of terms whose meaning is well understood.

33. Thus, as the *Eskosol v. Italy* tribunal observed:

[E]ven if the January 2019 Declaration were to be treated as a binding joint interpretation of ECT Article 26(6) on a prospective basis, the Tribunal is unable to accept that it should be given retroactive effect to require the termination of a pending arbitration, initiated in good faith by an investor years before the Declaration was issued, and indeed already *sub judice* as of its issuance.³⁹

The *Eskosol v. Italy* tribunal emphasized that giving the Declaration such effect in a pending case “would go against the security of the legal order intended to be achieved by Article 25(1) of the ICSID Convention, namely that ‘[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.’”⁴⁰

³⁸ Indeed, although the Declaration (Exh. R-484 at 3) includes a declaration that the Member State “in which an investor that has brought such action is established” will take the necessary measures to inform the investment arbitration tribunals concerned of the consequences of the *Achmea* Judgment, Gabriel Jersey is not established in a Member State.

³⁹ *Eskosol v. Italy* (CL-301) ¶ 226.

⁴⁰ *Id.* See also *Marfin v. Cyprus* (CL-294) ¶ 593.

4. Retroactive Nullification of Romania's Consent Cannot Be Given Effect

34. As previously observed, Romania gave its consent to ICSID arbitration in Article 7 of the UK BIT and Gabriel Jersey likewise gave its consent by initiating this arbitration with consequences under Article 25 of the ICSID Convention.⁴¹

35. It is fundamental that the jurisdiction of an international tribunal is to be evaluated as of the date when the parties have given their consent to submit the dispute to arbitration. This principle has been repeated by many ICSID tribunals:

For example, the tribunal in the *CSOB* case stated that “it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.” Support for this proposition also can be found in the *Vivendi* case, where the tribunal explained.... “This is not only a principle of ICSID proceedings; it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date when the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not. ... The consequence of this rule is that, *once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events.*”⁴²

As of the commencement of this arbitration, there was no question that Romania's consent was validly expressed in Article 7 of the BIT.⁴³

36. In light of this principle, the *Eskosol v. Italy* tribunal concluded that “[e]ven if as a matter of EU law the *Achmea* Judgment is considered to be *ex tunc*, in the sense that Italy lacked consent from the inception to agree to Article 26 of the ECT, this still would not imply that

⁴¹ Reply and Counter-Memorial on Jurisdiction ¶¶ 456-458.

⁴² *Eskosol v. Italy* (CL-301) ¶ 202 (emphasis in original; footnotes omitted).

⁴³ Indeed, as the tribunal observed in *ČSOB v. Slovakia*, “any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.” *ČSOB v. Slovakia* (CL-201) ¶ 34 (citing *Amco Asia et al. v. Indonesia*, ICSID Case No. 81/1, Decision on Jurisdiction of September 25, 1983). Romania's consent, expressed unambiguously in a treaty that entered into force, was given with the reasonable and legitimate expectation that it may be accepted by a company in accordance with the terms of that treaty and with the consequence that a binding agreement to submit to arbitration thereby may be concluded.

Eskosol’s acceptance – prior to the *Achmea* Judgment – of Italy’s apparent offer of ECT arbitration is considered to be void. This follows from Article 69 of the VCLT regarding the consequences under international law of the invalidity of a treaty because of lack of consent.”⁴⁴ The tribunal explained further as follows:

Under Article 69(1), the general rule is that invalidation of a treaty based on the absence of consent operates retroactively, with the effect that the provisions of that treaty are “void” and “have no legal force.” ... However, there is an important exception to this rule stated in Article 69(2)(b), under which acts that have been performed “in good faith before the invalidity was invoked” are not considered unlawful simply because of invalidity of the treaty.⁴⁵

On that basis, the Tribunal stated that in its view, “this is the case for arbitration agreements perfected before the *Achmea* Judgment, in reliance on EU Member States’ apparent offer of consent to investor-State arbitration under the ECT or other treaties.”⁴⁶ Thus, the *Eskosol v. Italy* tribunal considered that the State’s apparent offer of consent, accepted in good faith, must be given effect in accordance due also to the principle reflected in VCLT Article 69(2)(b).

B. There Is No Basis for Respondent’s Contention that Gabriel Jersey Lost the Right to Consent to Arbitrate Pursuant to the Terms of the UK BIT

37. As Claimants previously observed,⁴⁷ there is no basis for Respondent’s argument that Gabriel Jersey “lost the right” to consent to arbitration in accordance with the terms of the UK BIT. Respondent’s argument in this regard is misguided as Gabriel Jersey’s “right to consent” is not derived from the law of Jersey, but rather from the terms of the UK BIT and the ICSID Convention.

38. Respondent maintains that Gabriel Jersey’s consent to arbitrate pursuant to the terms of the BIT was not valid under the law of the Bailiwick of Jersey.⁴⁸ Respondent, however, fails to demonstrate that the *Achmea* Judgment applies with direct effect to nullify any of the

⁴⁴ *Eskosol v. Italy* (CL-301) ¶ 204.

⁴⁵ *Id.* ¶ 206.

⁴⁶ *Id.*

⁴⁷ Reply and Counter-Memorial on Jurisdiction ¶¶ 424-432.

⁴⁸ Rejoinder ¶¶ 114, 118.

rights of private persons, let alone private persons in the Bailiwick of Jersey. The *Achmea* Judgment is not directed to rights of private persons. Rather, it refers to the compatibility with certain provisions of the TFEU of undertakings entered into by Member States.⁴⁹ While Respondent argues that the rights of a private party “can” be limited in certain circumstances,⁵⁰ the fact that such rights can be limited does not mean that they were limited in this instance.⁵¹

39. Thus, not only does Respondent fail to demonstrate that the *Achmea* Judgment establishes a rule that is directly applicable to persons in the United Kingdom, it fails to demonstrate, in view of the Bailiwick of Jersey’s limited relationship with the European Union, that the *Achmea* Judgment establishes a rule that is directly applicable to persons in the Bailiwick of Jersey.⁵² Indeed, Respondent itself describes the judgment as applicable to “EU citizens and corporations,”⁵³ whereas Gabriel Jersey is not an “EU corporation”.

40. In any event, Respondent’s argument⁵⁴ that an investor’s right to consent to arbitration pursuant to the UK BIT and the ICSID Convention must be assessed with reference to the law of its home State is without any support. While the *lex societatis* determines questions such as whether a company exists (as a company is by definition a creature of municipal law), the *lex societatis* is not the source or the basis of the national or the company’s right to consent to arbitration as provided by the UK BIT and the ICSID Convention.

41. Respondent’s argument suggests, incorrectly, that a treaty must not only be in force for the investor’s home State, but that its terms must be incorporated into the home State’s domestic law and that the domestic law must thereby “permit” the investor to consent to

⁴⁹ Reply and Counter-Memorial on Jurisdiction ¶ 431.

⁵⁰ Rejoinder ¶ 112.

⁵¹ Moreover, the authority cited by Respondent on this point merely recognizes that the national laws of an EU Member State may impose limits on the exercise of rights by private persons, consistent with EU law, in some circumstances (in the case cited, relating, for example, to the right to strike). The case cited does not support the conclusion that a decision of the CJEU itself imposes limits on the rights of private parties with direct effect nor that the decision imposes any such limitations on the rights of Jersey persons. See Rejoinder ¶ 112 n. 96 (*citing* RLA-142).

⁵² Reply and Counter-Memorial on Jurisdiction ¶ 430.

⁵³ Rejoinder ¶ 112.

⁵⁴ Rejoinder ¶¶ 111, 114.

arbitration as the relevant treaty allows.⁵⁵ There is no basis for that position which presumes that an investor's right to submit a dispute to international arbitration pursuant to a treaty that is in force for the home State is derived from the municipal law of the investor's home State.⁵⁶

42. Indeed, significant authority demonstrates that is incorrect.⁵⁷

43. The right of the investor to consent to submit a covered dispute to international arbitration is derived solely from the UK BIT.⁵⁸ Thus, the law of the investor's home State, here

⁵⁵ Rejoinder ¶ 111.

⁵⁶ It is correct that a treaty providing rights to a private party must be applicable in the relevant municipal law in order to permit that party to invoke such treaty rights *before municipal courts*. See, e.g., Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 267 (2001) (CL-305) (stating that "[t]he treaty conferring the rights on individuals might impact them only if the direct applicability of the international treaty within the domestic legal order of the State concerned is possible" but citing as the illustrative example of what is meant the PCIJ's *Jurisdiction of the Courts of Danzig* case which allowed individuals to bring pecuniary claims "before municipal courts on the basis of an international agreement"). The situation is different when the individual seeks to invoke treaty rights before an international forum as provided by the treaty.

⁵⁷ See e.g. OPPENHEIM'S INTERNATIONAL LAW 847-849 n.2 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996) (CL-306) ("States can, however, and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *stricto sensu*, ie rights which they acquire *without the intervention of municipal legislation* and which they can *enforce in their own name before international tribunals*." (emphasis added)); Malcolm N. Shaw, INTERNATIONAL LAW 204, 205 (8th ed. 2017) (CL-307) (observing that "individuals have become increasingly recognized as participants and subjects of international law," and that "states may agree to confer particular rights on individuals *which will be enforceable under international law, independently of municipal law*..." (emphasis added)); Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: General Introduction*, 136 RECUEIL DES COURS 337 (1972) (CL-308) at 349 (describing the most significant features of the ICSID Convention and explaining that "[f]rom the legal point of view the most striking feature of the Convention is that it firmly establishes the *capacity* of a private individual or a corporation to proceed *directly* against a State *in an international forum*, thus contributing to the growing recognition of the individual as a subject of international law." (emphasis added)). See also ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, Art. 33(2) and cmt 4 (2001) (CL-309) (providing that this "Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State," and citing along with human rights treaties, "rights under bilateral or regional investment protection agreements" as examples of instances "whereby that [non-State] entity can invoke the responsibility [of a State] *on its own account and without the intermediation of any State*." (emphasis added)); ILC Draft Articles on Diplomatic Protection, Art. 16 (2006) (CL-310) ("The rights of States, natural persons, legal persons or other entities to resort *under international law* to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles." (emphasis added)).

⁵⁸ Article 7(1) of the UK BIT (Exh. C-3) provides that covered disputes shall be submitted to international arbitration "if the national or company concerned so wishes," without further limitation. This is in contrast to Article 7(3) of the UK BIT which recognizes that domestic law will dictate the extent to which disputes regarding covered investments may be submitted to the domestic courts of the Contracting Parties, *i.e.*, providing that nothing in that article prevents a national or company from referring a dispute to the domestic

the Bailiwick of Jersey, is not the source of Gabriel Jersey’s right to consent to arbitration and thus does not govern the ability of Gabriel Jersey to consent to arbitration. Moreover, in the context of consent under the ICSID Convention, as has been repeatedly affirmed, the analysis is one governed solely by reference to international law.⁵⁹

44. Respondent argues that the TFEU and the *Achmea* Judgment interpreting its provisions are part of international law. That observation, however, does not assist Respondent. That is because for the reasons set forth previously and above nothing in the TFEU and the *Achmea* Judgment precludes a company from Jersey from giving its consent to submit to ICSID arbitration as provided by the terms of the UK BIT. That is, there is no basis to claim that international law limits the investor’s “capacity” *ex tunc* to consent as Respondent argues.

courts of the host State for the investment “where it has the right to do so under the domestic law of that other Contracting Party.”

⁵⁹ Reply and Counter-Memorial on Jurisdiction ¶ 429 and n. 861 (*citing* *ČSOB v. Slovakia* (CL-201) and *Abaclat v. Argentina* (CL-202)). *See also, e.g., Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment dated Mar. 1, 2011 (CL-311) ¶ 141 (“In addressing this question of consent under Article 25, a tribunal is not bound to apply host state law, even in a case where the parties’ consent derives from or relates to an agreement under host state law.”); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated Oct. 17, 2013 (CL-312) ¶ 85 (“[T]he law the Tribunal must apply in deciding whether jurisdiction has been conferred upon it by the ICSID Convention and the BIT is international law.”).

III. CONCLUSION

45. For all the reasons set forth in § VII.B.3 of the Claimants' Reply and Counter-Memorial on Jurisdiction and above, Respondent's objection to jurisdiction on the basis of the claimed effects of the *Achmea* Judgment must be rejected.

Respectfully submitted,



Țuca Zbârcea & Asociații
Victoriei Square
4-8 Nicolae Titulescu Ave.
Sector 1, Bucharest 011141
Romania

WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
USA

June 28, 2019

Counsel for Claimants