School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Theodoros Adamakopoulos and Others v. Republic of Cyprus (ICSID Case No. ARB/15/49) – Decision on Jurisdiction – 7 February 2020

Case Report by: Jake Lowther**, Editor Ignacio Torterola***

Summary: The Claimants brought an action for relief against the Republic of Cyprus (Cyprus) pursuant to the Cyprus-Greece BIT and the Belgium-Luxembourg Economic Union-Cyprus BIT ('BITs') alleging Cyprus violated the BITs prohibition against expropriation without compensation and the Claimants' right to fair and equitable treatment. In a bifurcated proceeding, the Tribunal heard jurisdictional objections on, *inter alia*, the inoperability of the arbitration provisions contained in the BITs under EU law, the multi-party dispute, whether the claims qualified as 'investments' under the BITs and the ICSID Convention and whether the notice requirements under the BITs had been fulfilled. In its Decision on Jurisdiction, a majority of the Tribunal found that it had jurisdiction in the case and that the multi-party claim was admissible. In a Statement of Dissent, Arbitrator Marcelo G. Kohen set out the reasons for his decision to vote against the majority.

Main Issues: Jurisdiction - Competence of the Arbitral Tribunal, Conflict of Treaties, Qualifying Investment, Qualifying Investor, Multi-Party Claim; Admissibility - Multi-Party Claim

Tribunal: Prof. Donald M. McRae (President), Mr. Alejandro Escobar (Arbitrator), Prof. Marcelo G. Kohen (Arbitrator), Prof. Francisco Orrego Vicuña (Arbitrator, replaced)

Claimant's Counsel: Mr. Jay Eisenhofer, Mr. Olav Haazen, Ms. Caitlin Moyna, Ms. Alice Cho Lee (Grant & Eisenhofer P.A., New York), Mr. Stephen Fietta, Mr. Ashique Rahman, Ms. Oonagh Sands (Fietta, London), Mr. Geoffrey Jarvis, Mr. Stuart Berman, Ms. Emily Christiansen (Kessler Topaz Meltzer & Check LLP, Radnor), Ms. Chrysthia Papacleovoulou (Cyprus), Mr. John Kyriakopoulos (Kyros Law, Athens)

Respondent's Counsel: Mr. Mark H. O'Donoghue (Curtis, Mallet-Prevost, Colt & Mosle LLP, New York), Mr. Justin M. Jacinto (Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington D.C.), Mr. Peter M. Wolrich (Curtis, Mallet-Prevost, Colt & Mosle LLP, Paris), Ms. Luciana Ricart, Mr. William Hampson, Ms. Sena Tsikata (Curtis, Mallet-Prevost, Colt &

Mosle LLP, London), Mr. Costas Clerides (Attorney General of the Republic of Cyprus), Mrs. Elena Zachariadou, Mrs. Mary-Ann Stavrinides, Mrs. Despina Kyprianou (Office of the Attorney General, Cyprus)

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Digest:

1. Relevant Facts

The Claimants are comprised of 951 natural persons and seven companies ('Claimants') (¶ 2).[1] Except for one company incorporated in Luxembourg, the Claimants are all Greek nationals (¶ 2). The Respondent in this case is the Republic of Cyprus ('Cyprus' or the 'Respondent') (¶ 3). The Claimants and the Respondent are each a 'Party' and collectively referred to as the 'Parties' (¶ 4).

The dispute arose against the backdrop of the Greek economic crisis ('Crisis') and concerns certain financial instruments and bank deposits in Laiki Bank and Bank of Cyprus held by the Claimants (¶ 5). In 2012-2013, both banks incurred losses due to their exposure to the Crisis (¶ 5). Facing an economic emergency, in March 2013 the Respondent agreed to a EUR 10 billion bailout package for Cyprus by the European Commission ('EC'), the European Central Bank ('ECB') and the International Monetary Fund ('IMF') (the 'Troika') (¶ 5). This agreement included the adoption of an adjustment plan which led to the merger of the two banks and a bail-in of shareholders, bondholders and deposit holders of the Bank of Cyprus ('Plan B') (¶ 5).

In 2015, the Claimants submitted a claim to the International Centre for Settlement of Investment Disputes ('ICSID'), alleging discriminatory treatment arising out of the adoption of Plan B by the Respondent which resulted in a violation of its obligations towards the Claimants' investments under the Cyprus-Greece BIT and the Belgium-Luxembourg Economic Union ('BLEU')-Cyprus BIT (the 'BITs') (¶ 5). In its response, the Respondent objected to the jurisdiction of the ICSID Tribunal ('Tribunal') and requested a bifurcation of the proceeding (¶ 16).

[1] All citations (e.g. '¶ 2') are to the Tribunal's Decision on Jurisdiction (Decision), unless stated otherwise.

2. Procedural History

Theodoros Adamakopoulos and 676 of the Claimants filed a Request for Arbitration against the Respondent on 25 September 2015, which was subsequently amended on 18 November 2015 to a total of 947 requesting parties and registered by ICSID on 17 December 2015 (¶¶ 6-7).

On 4 March 2016, the Claimants requested that the Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention and on 7 March 2016, ICSID informed the Parties that the Tribunal would consist of three arbitrators, with each Party appointing an arbitrator and the President of the Tribunal to be appointed by agreement of the Parties (¶ 9). On 19 March 2016, the Claimants' nominee Francisco Orrego Vicuña accepted his appointment and on 3 April 2016 the Respondent's nominee Prof. Marcelo G. Kohen accepted his appointment (¶¶ 10-11).

On 26 August 2016, the Claimants informed ICSID that the Parties could not reach agreement on the President of the Tribunal and requested the Chairman of the ICSID Administrative Council to make the appointment of the President of the Tribunal (¶ 12). Following an unsuccessful ballot process, on 21 September 2016 ICSID proposed the appointment of Prof. Donald M. McRae as President of the Tribunal (¶ 13). Receiving no objection from the Parties, ICSID deemed the Tribunal to have been constituted on 28 September 2016 (¶ 14).

The first session was held by teleconference on 30 November 2016 (¶ 15). On 6 December 2016, the Tribunal issued Procedural Order No. 1 which provided that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C, as well as the agreed procedural schedule for submissions concerning the Respondent's request for bifurcation of the proceeding (¶ 16).

The Respondent submitted its Notification of Jurisdictional Objections and Request for Bifurcation and Document Production on 9 December 2016 and the Claimants submitted their response on 12 January 2017 (¶¶ 17-18). On 24 January 2017, a second session concerning bifurcation and other procedural matters was held in London (¶ 19). On 13 February 2017, the Tribunal issued Procedural Order No. 2, deciding *inter alia* to bifurcate the proceedings after the filing of the Claimants' Memorial on the Merits (¶ 20).

On 27 September 2017, the Claimants requested a modification of the Tribunal's Procedural Order No. 1, seeking to file their Memorial on the Merits without quantification of their moral damages (¶ 21). Following the submissions from the Parties, the Tribunal issued Procedural Order No. 3 on 19 October 2017 directing the Claimants to include all damages in their Memorial on the Merits (¶ 21). On 15 December 2017, the Claimants filed their Memorial on the Merits (¶ 22).

On 30 January 2018, the Respondent requested the Tribunal to direct the Claimants to provide certain spreadsheets used in an expert report (¶ 23). Following the submissions of the Parties, on 9 February 2018, the Tribunal issued Procedural Order No. 4 ordering the Claimants to produce the material relied on in the relevant expert report (¶ 23).

On 16 March 2018, the Respondent filed its Memorial on Jurisdiction and on 1 June 2018, the Claimants filed their Counter-Memorial on Jurisdiction, with a modified version of filed on 6 June 2018 (¶¶ 24-25). On 27 July 2018, the Respondent filed its Reply on Jurisdiction and the Claimants filed their Rejoinder on Jurisdiction on 7 September 2018 (¶¶ 26-27).

On 13 September 2018, the EC filed an application ('EC Application') for leave to intervene as a non-disputing party in the proceedings to file a written submission regarding the Tribunal's jurisdiction under the Cyprus-Greece BIT and the judgment of the Court of Justice of the European Union in *Slowakische Republik v. Achmea BV*, Case C-284/16, EU:C:2018:158 ('*Achmea'*) and any effect of an award under EU state aid rules (¶ 28). On 14 September 2018, the Tribunal invited the Parties to file their comments by 19 September 2018 and any reply comments by 21 September 2018 (¶ 29). On 17 September 2018, the Claimants requested an extension of time to respond to the EC Application until 3 October 2018 with replies due on 10 October 2018, which the Tribunal granted on 19 September 2018 (¶ 30). Shortly before the Tribunal's communication extending the time limit, the Respondent filed its comments on the EC Application, urging the Tribunal to grant the EC Application (¶ 31).

On 21 September 2018, the Hearing on Jurisdiction scheduled for 18-19 October 2018 was postponed due to health reasons of one of the arbitrators (¶ 32). On 27 September 2018, the Claimants requested a further extension of time to comment on the EC Application, which the Respondent did not oppose, and was granted by the Tribunal until 24 October 2018 and 31 October for the Parties' replies (¶ 32).

On 2 October 2018, ICSID informed the Parties of the passing away of Prof. Francisco Orrego Vicuña, with the proceeding suspended in accordance with ICSID Arbitration Rule 10(2) (¶ 33). On 7 November 2018, the Claimants notified ICSID that they appointed Mr. Alejandro Escobar as replacement arbitrator and on 9 November 2018 ICSID informed the Parties that the proceeding had resumed (¶ 35).

On 12 November 2018, the Tribunal invited the Claimants to file their observations on the EC Application by 14 December 2018 and the Parties to file their simultaneous responses by 21 December 2018 (¶ 36). On 14 December 2018, the Claimants filed their observations on the EC Application, in which they did not object to the EC's submissions on the validity of the BITs but opposed any intervention on the issue of EU state aid, which it considered irrelevant (¶ 37). On 21 December 2018, the Respondent filed its response, agreeing that the EC's submission should only address the intra-EU BIT jurisdictional question at this stage of the proceeding, while the Claimants made no further submission on this point (¶¶ 38-39).

On 9 January 2019, the Tribunal issued Procedural Order No. 5, granting the EC leave to file a written submission regarding the intra-EU BIT jurisdictional issue (¶ 40). On 18 January 2019, the Tribunal confirmed that the Hearing on Jurisdiction ('Hearing') would be held in Washington, D.C. on 17-18 May 2019, with 19 May 2019 held in reserve (¶ 41). On 13 February 2019, the EC filed an *amicus curiae* brief and the Parties filed observations on the EC's submission on 28 February 2019 (¶¶ 42-43). On 7 March 2019, the Parties filed their responses to each other's observations (¶ 44).

On 12 April 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by teleconference and on 17 April 2019, the Tribunal issued Procedural Order No. 6 concerning the organization of the Hearing (¶¶ 45-46). The Hearing was held in Washington, D.C. on 17-18 May 2019 (¶ 47).

3. Positions of the Parties

3.1 Respondent's objections

The Respondent's objections to the Tribunal's jurisdiction were mainly based on the following arguments: (1) there was no consent to arbitration because EU law prevails over the BITs which were rendered inoperative upon Cyprus' accession to the EU; (2) multiparty claims are inadmissible without the consent of the respondent; (3) consolidation of the claims was not permissible; (4) the Claimants' claims were indirect and do not qualify as investments under the BITs; (5) the Claimants' investments were not qualifying investments under the BITs and the ICSID Convention; (6) the Claimants did not comply with the notice provisions under the BITs; (7) the Claimants made claims on behalf of investors not covered by the Cyprus-Greece BIT; (8) Greek legal entities controlled by Cypriot nationals were not covered investors under the Cyprus-Greece BIT and the ICSID Convention; and (9) the Cyprus-Greece BIT's fork-in-the-road clause precluded Claimants from resorting to arbitration (¶ 49).

3.2 Claimants' responses

The Claimants responded as follows: (1) the arbitration provisions contained in the BITs constitute valid bases for the Tribunal's jurisdiction under international law and the BITs have not been terminated; (2) multi-party claims are admissible and the Tribunal has jurisdiction; (3) there has been no consolidation of claims under multiple BITs; (4) the Tribunal has jurisdiction over 'indirect' investments; (5) all Claimants made investments that satisfy the requirements of the ICSID Convention and the BITs; (6) the notice provisions under the BITs are no basis for the Tribunal to decline jurisdiction; (7) all Claimants made qualifying investments in Cyprus; (8) legal entities incorporated and seated in Greece are eligible to bring claims, regardless of shareholder nationality; and (9) and the Claimants have not violated the relevant fork-in-the-road provision (¶ 94).

3.3 EU law prevails over the BITs which were rendered inoperative upon Cyprus' accession to the EU

The Respondent submitted that the arbitration clauses contained in the BITs are incompatible with EU law in four respects: (1) they are incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union (the 'TFEU'), as confirmed in the *Achmea* decision; (2) the arbitration clauses in the BITs are terminated by Articles 59 and 30(3) of the Vienna Convention on the Law of Treaties ('VCLT'); (3) the intra-EU BITs overlap and are incompatible with the EU treaties; and (4) the adjudication of the claims violates the exclusive competence of the EU to supervise capital transfers and EU Bank Recovery and Resolution Directive ('Directive') (¶ 50). In essence, the Respondent argued that the Tribunal and ICSID did not have jurisdiction because the primacy of EU law rendered the arbitration clauses invalid upon the accession of Cyprus to the EU in 2004 (¶ 51).

The Claimants refute the Respondent's arguments on the basis that the BITs are in full force and effect and their arbitration provisions constitute valid bases for this Tribunal's jurisdiction (¶ 95).

3.3.1 The BITs are incompatible with Articles 267 and 344 of the TFEU

The Respondent called on to the Tribunal to follow the *Achmea* ruling which precludes investment arbitration pursuant to intra-EU BITs because of the threat to the uniform interpretation and application of EU law. The Respondent also referred to the Declarations of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union ('Declarations') as well as the Joint Information Note of the Hellenic Republic and the Republic of Cyprus regarding the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Encouragement and Protection of Investments of March 30, 1999, dated 8 May 201 ('Joint Information Note'). The Respondent submitted that these were subsequent agreements on the interpretation and application of the EU Treaties and intra-EU BITs under Article 31(3)(a) of the VCLT and an authentic interpretation and application of the treaties under international law. It argued that no further formality was necessary to implement the consequences of *Achmea* (¶¶ 53-54).

The Claimants argued that the Tribunal's jurisdiction is derived from international law, not EU law and the *Achmea* judgment was not binding. Its application to the instant case was limited as it refers to a different BIT. The Claimants submitted that there is no general conflict rule establishing the supremacy of EU law and that even if there were, it would not apply to the instant case under the ICSID Convention and the BITs (¶ 96). Articles 267 and 344 of the TFEU do not bind the Tribunal, whose jurisdiction is derived from international law (¶ 97). Thus, the Claimants argued that EU law is irrelevant to the Tribunal's jurisdiction. Further, the *Achmea* decision did not terminate any BITs or render them inoperative, but rather it found that the relevant BIT was incompatible with EU law. The Claimants argued

that *Achmea* should be confined to its facts, has limited precedential value and can be distinguished from the present proceeding (¶ 98).

3.3.2 Conflict of treaties

The Respondent submitted that the intra-EU BITs had been superseded through the application of international law rules on the resolution of conflicts of treaties. According to the Respondent, EU law prevails over the conflicting provisions of the BITs pursuant to: (i) Articles 59 and 30(3) of the VCLT; and (ii) Article 351 of the TFEU (¶ 55). Article 59(1) of the VCLT will terminate an earlier treaty if: (i) the successive treaties relate to the same subject matter; and (ii) there is incompatibility under the subjective or objective test (¶ 56).

The Respondent argued that the treaties govern the same subject matter and that the objective test was satisfied because of incompatibility between the treaties, as confirmed in the Joint Information Note (¶ 56). The Respondent, relying on the *Electrabel v. Hungary* award, also submitted that the limited grandfathering provision in Article 351 of the TFEU demonstrates that pre-existing treaties between EU member states such as the BITs cannot prevail over EU law (¶ 57).

The Claimants submitted first that the BITs remain in force as they have not been terminated in accordance with their terms and even if they had been, the BITs contain sunset clauses providing protection for a further 10 years (¶ 99). Second, that the Joint Information Note demonstrates that the BITs remain in force as the Declarations require the EU members to commit to terminate intra-EU BITs by 'best efforts' and there was no evidence that the BITs were superseded as a result of Cyprus' accession to the EU (¶ 100). Third, that the CJEU did not terminate intra-EU BITs through the *Achmea* ruling, but rather that the relevant BIT was 'not compatible' with EU law (¶ 101). Fourth, that the BITs were not terminated pursuant to the VCLT because: (i) the EU treaties do not share the same subject matter as the BITs; (ii) the contracting parties did not intend for the EU treaties to supersede the BITs; and (iii) the EU treaties are not incompatible with the BITs (¶ 102).

The Claimants submitted that the legal standard for the 'same subject matter' was a high one and the topic or substance must relate to the same legal relationship. The Claimants referred to cases such as *Marfin* which held that EU treaties and BITs do not relate to the same subject matter nor do they cover the full scope of the BIT protections, such as fair and equitable treatment. Any overlap of capital transfer provisions in the BITs and EU law is irrelevant as no capital transfer claim has been made (¶ 103). The Claimants argued that the parties to the BITs did not intend for the EU treaties to supersede the BITs, but that they would coexist (¶ 104). Finally, the Claimants submit that the BITs are not so incompatible with the EU treaties that they cannot be applied in full under Articles 59(1)(b) and Article 30(3) of the VCLT, even if the 'same subject matter' exists. The standard required under Article 59 of the VCLT is such that it must be impossible to reconcile the two treaties. The *Electrabel* award does not support the Respondent's position, as it affirmed that the substantive protections in the

relevant investment treaty and the TFEU are different, and as a result, the treaties do not share the same subject matter (¶ 105).

3.3.3 Incompatibility between EU treaties and Intra-EU BITs

The Respondent submitted that the intra-EU BITs overlap with EU law and are incompatible with the EU treaties because: (i) the investment protection provisions in the intra-EU BITs were replaced by the EU treaties through the application of Articles 59 and 30 of the VCLT; (ii) the nationals of different EU member states were subject to discriminatory treatment, prohibited under the TFEU; and (iii) the arbitration clauses contained in the intra-EU BITs are incompatible with the EU's institutional and judicial framework, in line with the *Achmea* decision (¶¶ 58-61).

The Claimants argued that the protection of investors from EU member states under the BITs is not irreconcilable with the principle of non-discrimination under the TFEU, as similar remedies or protections are available. Further, the arbitration provisions in the BITs are not irreconcilable with the exclusive jurisdiction over the EU under Articles 267 and 344 of the TFEU as the Tribunal need not rule on any issue of EU law in order to make a decision on violations of the BITs (¶ 106). In any case, the Tribunal is not bound by the autonomy of the EU legal system and no arbitral tribunal applying the rules of public international law has found incompatibility between intra-EU BITs and EU treaties under the VCLT (¶¶ 108-109).

3.3.4 Violation of the exclusive competence of the EU to supervise the capital transfer

The Respondent argued that the Claimants' claims conflict with the Directive, which is EU law and cannot be challenged through the intra-EU BITs (¶ 63).

The Claimants contested the relevance of the capital transfer provisions objection and whether the asserted violations of the BITs were attributable to the Troika and the timing of the Directive (¶ 107).

3.4 Mass claims proceeding is outside Tribunal's jurisdiction and inadmissible

The Respondent argued that it did not consent to an arbitration brought by a group of investors under the ICSID Convention or the BITs, relying on the use of the singular terms 'national' and 'investor' in the consent provisions. It argued that an expansive interpretation to include the plural is not supported by the other provisions in the treaties, the *travaux preparatoires*, the treaties' context and purpose or jurisprudence (¶ 64).

The Respondent critiqued the majority's reasoning in *Abaclat* which found that jurisdiction *ratione materiae* could extend to jurisdiction over a collective mass claim. The Respondent also critiqued the majority decision in *Ambiente*, which did not distinguish between multi-party proceedings and proceedings where consolidations or multi-party proceedings were agreed to. The Respondent argued that in the instant case, the large group of investors were

not homogenous, but rather independent entities with distinct rights and interests holding different types of assets at different times and thus jurisdiction did not exist (¶¶ 65-66).

The Respondent also pointed to problems of enforceability for any award on costs against multiple claimants, with issues of inequality as to how much each Claimant is to pay, as well as potential procedural issues (¶ 67).

Relying on the *Alemanni* and *Ambiente* awards, the Claimants argued that the ICSID Convention and BITs do not require a respondent to expressly consent to multi-party proceedings (¶ 112). In any event, the Claimants submitted that the Respondent did consent as: (i) the BITs can be interpreted to protect mass investments; (ii) the Respondent encouraged investment in its banking sector; (iii) the Respondent did not include a minimum claim threshold in the BITs; and (iv) the Respondent previously consent to multi-party proceedings under the Cyprus-Greece BIT (¶ 114).

Relying on *Abaclat* and *Ambiente*, the Claimants submitted that their claims were admissible as they are 'sufficiently linked and homogenous' as: (i) all Claimants seek similar relief of full reparation from the Respondent; (ii) the Claimants' losses arising out of the bonds and deposits at Cypriot banks are all sufficiently similar; (iii) the claims arise out of the Respondent's conduct; and (iv) all of the claims are based on the BITs' protection against uncompensated expropriation and the right to fair and equitable treatment (¶ 116).

The Claimants argued that the multi-party proceeding was manageable and could be conducted in accordance with the ICSID Convention and ICSID Arbitration Rules. Further, the Claimants argued that to limit the arbitration to a single dispute between two parties would lead to an absurd result and be a denial of justice. It would result in an inefficient, cost-prohibitive and unmanageable proceeding (¶ 118).

3.5 Respondent has not consented to consolidation of claims under multiple BITs

The Respondent argued that the Claimants cannot unilaterally consolidate the claims brought under the two BITs without the Respondent's consent, in reliance on the London Commercial Court case of *A v. B.* It argued that the consolidation compromised the constitution of the Tribunal, restricting the possibility to appoint nationals of each of the BITs (¶¶ 72-74).

Relying on *Ambiente*, the Claimants argued that the proceeding was not a consolidation, but rather a single multi-party proceeding, and the case of *A v. B* relied on by the Respondent was irrelevant as it is not an ICSID case (¶ 120).

3.6 The Cyprus-Greece BIT does not cover indirect investments or indirect investors

The Respondent argued that the claims based on 'indirect investments' should be dismissed, as indirect investments are not expressly included in the limited definition of investment in the BIT. To presume that indirect investments are covered by the BIT would contravene the *verba aliquid operari debent* principle, as it would render the express references to indirect

investments in treaties 'otiose' (¶ 75). Relying on the *Poštová banka* award, the Respondent submitted that the Claimants whose claims were based on assets held by legal entities registered in offshore jurisdictions did not satisfy the nationality requirements under the BITs (¶¶ 76-77).

The Claimants submitted that 'indirect investments' are protected under the Cyprus-Greece BIT as evidenced by the broad construction of Article 1.1 and to the treaty's object and purpose (¶ 121). The Claimants argued that the *Poštová banka* award is an outlier and erroneous (¶ 122). Further, the Claimants argued that jurisdiction is not precluded by virtue of investments through a corporate chain, even when companies are incorporated in third states (¶ 123).

3.7 Claimants' assets do not all qualify as investments under the ICSID Convention and BITs

The Respondent argued that the Claimants' assets do not all qualify as investments under the ICSID Convention as applied through the *Salini* test and the BITs because the holdings of assets, bonds, and claims to money do not fulfil the qualities inherent to an investment being a contribution of assets or money, a certain duration and risk (¶ 78). The Respondent referred to the Claimants' assets of: (i) life insurance contracts associated with Laiki bonds; and (ii) bonds issued by the UK entity Egnatia Finance PLC ('UK Entity') (¶ 79).

The Respondent argued that the life insurance contracts could not be considered investments as they refer to a contractual relationship between the individual Claimant and CNP Zois S.A., a Greek insurer. Even if they did constitute investments, they would be investments in Greece and not Cyprus (¶ 80).

Finally, the Respondent argued that some Claimants may not have qualifying investments in Cyprus under the ICSID conventions and the BITs due to their short-term nature (¶ 83).

The Claimants argued that the bonds and deposits qualify as investments under the both the ICSID Convention and the BITs and that the *Salini* test was not relevant. In any event, the Claimants argue that the *Salini* test was satisfied as: (i) the Claimants' investments were of substantial value, from EUR 100,000 to EUR 50 million; (ii) the investments amount to a significant duration, with the bonds issued for ten year terms; (iii) the Claimants' investments were for the purpose of deriving a profit; (iv) the Claimants assumed significant risk due to the bank's ability to pay interest; and (v) the Claimants submit the investments were part of the Respondent's policy to attract investments to its financial sector (¶ 125).

The Claimant submitted that the life insurance contracts were covered investments as the indirect claims for the losses flowing from the Laiki bonds fall under the BITs' broad definition of 'investment' (¶ 127).

3.8 Claimants that did not comply with notice requirements of the BITs must be excluded

The Respondent submitted that only 21 Claimants complied with the mandatory notice and waiting periods in the relevant BITs and thus, the other Claimants should be dismissed from this proceeding. The Respondent referred to the six-month waiting period under Article 10(2) of the BLEU-Cyprus BIT which was not satisfied because the Request for Arbitration was filed less than six months after the notice of dispute was sent. The Claimants listed in the Request for Arbitration but not listed in the notice of dispute should therefore be excluded from the proceeding (¶¶ 84-87).

The Claimants submitted that the relevant notice periods were complied with through the multiple notices sent to the Respondent detailing the claims and that as no response was received, it relied on the futility exception (¶ 129). Additionally, the Claimants argued that the notice provisions are non-jurisdictional in nature (¶ 120).

3.9 Claimants may not bring claims on behalf of investors not covered by the Cyprus-Greece BIT

The Respondent submitted that at least two Claimants did not appear to be nationals of the parties to the BITs. The Respondent argued that while Claimant No. 221 was designated as Mr. Ioannis Leontiadis, the actual Claimant was Liberian company Seaworthy Bay Inc., with an 'ambiguous shareholdership' and with Mr. Leontiadis being a mere director. Further, the Respondent submitted that there was no investment at the time of the notice of dispute (¶ 88). The Respondent also argued that Claimant No. 2 (CNP Asfalistiki Ltd) did not appear to satisfy the nationality requirement and that while the relevant claims had been withdrawn, Claimant No. 2 remained on the list of Claimants (¶ 89).

The Claimants argued that Claimant No. 221 (Mr. Leontiadis) is a proper Claimant in the proceeding as a shareholder and there was no prejudice to the Respondent as his designation as a potential Claimant was sent to the Respondent in July 2014 and he was granted sufficient corporate authorisation effective upon the commencement of the proceeding (¶ 132).

3.10 Claimants controlled by Cypriot nationals are not entitled to bring claims

The Respondent submitted that the Tribunal lacks jurisdiction over the claims of Claimants No. 1 (CNP Asfalistikes Praktoriakes Ergasies S.A.) and No. 3 (CNP Zois S.A.) as they are controlled by Cypriot nationals and therefore precluded from bringing their claims under the ICSID Convention and or the Cyprus-Greece BIT as they are not 'foreign investors' (¶¶ 90-91).

The Claimants argued that there was insufficient evidence to prove that Claimant No. 1 and Claimant No. 3 were controlled by a Cypriot entity. In fact, they are controlled by a French entity and in any event, the place of incorporation is determinative of nationality under the ICSID Convention. The Claimants submitted that Claimant No. 1 and Claimant No. 3 are incorporated in Greece and therefore proper Claimants in this proceeding, and the Tribunal

should not pierce the corporate veil but rely on the BIT's definition of 'investor' (¶¶ 134-135).

3.11 The Cyprus-Greece BIT's fork-in-the-road clause precludes Claimants from resorting to arbitration

The Respondent submitted that Claimant No. 37 should not be permitted to resort to arbitration as the dispute has been submitted to Cypriot courts and was precluded by Article 9(2) of the Cyprus-Greece BIT. Applying the 'Fundamental Basis' test as set out by the tribunal in *Pantechniki v. Albania*, the Claimant argued that the approximately 1,800 civil actions before the Cypriot district courts have the same fundamental basis as the instant claims under the BITs because they pursue the same purposes, being the recovery of money deposited or held in bonds (¶¶ 92-93).

The Claimants submitted that the prevailing test was the 'Triple Identity' test under which a claim is precluded by a fork-in-the-road provision if: (i) the dispute is between the same parties, (ii) the same object is at stake and (iii) the dispute arises under the same claim (¶ 136). The Claimants further argued that even if the 'Fundamental Basis' test applies, a claim is not precluded simply because of the similarity of facts or prayers of relief underlying the action (¶ 137).

4. The EC's position

The EC argued that the Tribunal lacked jurisdiction due to a lack of consent and its non-disputing party submission focused on: (i) the relevance of the *Achmea* ruling; (ii) the law applicable to the decision on jurisdiction; (iii) the primacy of EU law as a special applicable conflict rule; and (iv) in the alternative, the application of the conflict rules in the VCLT (¶ 139).

The EC submitted that the *Achmea* ruling applies *ex tunc*, rendering investor-state arbitration clauses in intra-EU BITs inapplicable, and that any arbitral tribunal established under an intra-EU BIT lacks jurisdiction (¶¶ 140-141). Given that the conflict between the BITs and EU law existed from the date of Cyprus' access to the EU, the Respondent's consent to arbitrate was lacking *ab intitio* (¶ 141). Further, EU law precludes a dispute settlement mechanism for it falls outside Article 19 of the Treaty on the European Union ('TEU') (¶ 140).

In the alternative, the EC argued that the Tribunal had to decline jurisdiction as the BITs have been terminated, pursuant to Articles 30(3) and 59 of the VCLT, following the Respondent's accession to the EU (¶ 143). The EC further argued that the parties to the BITs intended that investment protection be governed by EU law as per Article 59(1)(a) of the VCLT on the basis that EU law takes primacy upon a member state's accession (¶ 144). Additionally, EU law and the BITs are so incompatible as to be incapable of simultaneous application (¶ 145),

as both relate to the same subject matter, being the Respondent's treatment of the investment (¶ 146).

The EC argued that EU law prevails under all conflict rules over the BITs as: (i) the applicable law is the law of Cyprus, which includes EU law, giving EU law precedence over the BITs; (ii) the legal consequence of the conflict between the BITs and the EU law is that there is no valid offer of arbitration under Cyprus law; (iii) relying on *Electrabel v. Hungary*, the primacy of EU law under Article 351(1) of the TFEU is the relevant conflict rule of international law, which precludes the sunset clause and offer of arbitration; and (iv) pursuant to Article 30 of the VCLT, EU law prevails over the arbitration clause in the BITs because the BITs, the EU treaties and the treaty governing Cyrus' accession to the EU are successive treaties governing the same subject matter (¶¶ 147-148).

Finally, the EC submitted that any award in favour of the Claimants would face annulment and could not be enforced (¶ 149).

5. Tribunal's analysis

5.1. Intra-EU BIT Objection

The Tribunal divided the Respondent's intra-EU BIT objection to its jurisdiction into two categories: (i) the effect of EU law; and (ii) the effect of applying principles of international law (¶ 151).

5.1.1 The Effect of EU law

The Tribunal noted that the law applicable to determining its jurisdiction is derived from the BITs and Article 25 of the ICSID Convention, under which it was constituted, and that there were two bases under which EU law was potentially relevant: (i) under the BLEU-Cyprus BIT, the Tribunal is to decide on the basis of the applicable national law, which includes EU law; and (ii) EU law is international law and can be applied as part of the Tribunal's mandate to apply the principles of international law in resolving the dispute (¶ 156).

On the first basis, the Tribunal did not consider the relevance of domestic law to its jurisdiction, which is governed by international law (¶ 157). Indeed, it considered that the whole system would be undermined if jurisdiction could be defeated on the basis of domestic law (¶ 158). On the second basis, the Tribunal accepted that EU law is international law binding on EU member states, however given the conflict of treaties, the issue for the Tribunal was whether EU law or the BITs had primacy (¶¶ 160-161). Given that it was not constituted under EU law, the Tribunal could not accept that EU law must necessarily override other principles of international law applicable between the parties (¶ 162).

5.1.2 The effect of applying principles of international law

The Tribunal was of the view that Articles 59 and 30(3) of the VCLT were potentially applicable to the question of jurisdiction. However, the Tribunal considered that while the treaties deal with the same subject matter at a general level, at a more specific level they deal with different subject matters. The BITs provide a mechanism for nationals of one party to bring a claim against another party, which is not provided for in the EU treaties (¶ 168).

The Tribunal considered the appropriate test to be whether fulfilment of the obligation under one treaty prevents the fulfilment of the obligation under the other treaty or undermines its object and purpose. Applying the test, the Tribunal was of the view that the arbitration regime under the BITs did not prevent the operation of the EU treaties and that they can operate 'side by side' (¶ 170). Further, the Tribunal considered the objection on the basis of non-discrimination was too broad (¶ 171), while the narrower view of the conflict, that a tribunal might refer to domestic and therefore EU law to determine whether a claimant has the requisite nationality, was hardly an action that would prevent the fulfilment of the EU treaties (¶ 172). The standards of compatibility set by Articles 59 and 30 of the VCLT were therefore not met (¶ 172).

The Tribunal was also unable to conclude that there was evidence of any intention on the part of the Respondent or the EU states that the TFEU was to replace BITs (¶ 178). Indeed, the Declarations and Joint Information Note point to continued obligations under the BITs (¶ 179). The Tribunal considered that tribunals established under BITs deal with different things to the CJEU and was no basis for concluding that the EU treaties and the BITs are incompatible and not capable of being applied at the same time (¶ 180). While the Tribunal acknowledged that *Achmea* renders enforcement of any intra-EU investor state arbitral award within the EU difficult, it pointed out that the enforcement of ICSID awards is not limited to the courts of the host state or other EU member states (¶ 181).

The Tribunal rejected the Respondent's objection to its jurisdiction on the basis of EU law (¶ 187).

5.2 Mass claims proceeding is outside Tribunal's jurisdiction and inadmissible

The Tribunal did not consider the arguments relying on the use of the singular or the plural to be conclusive (¶ 198), nor was it convinced by the Respondent's argument that a separate consent to mass claims due to the silence in the BITs (¶ 201). The Tribunal was persuaded by the view in *Abaclat* that a claim can only proceed if a tribunal has jurisdiction over a claimant, or each claimant in multi-party proceedings (¶ 202). It also agreed with the *Alemanni* tribunal, that the question then is whether there was a single dispute under the BITs, such that those individual claims can be put together as a single 'mass claim.' However, the Tribunal was mindful of the difference between the cases involving a smaller number of claimants and the instant case, involving 956 claimants (¶ 205).

The Tribunal took the view that as all the Claimants either held bonds in the banks or deposits of over USD 100,000, which were rendered valueless or received a 'haircut' as a result of Plan B, there was a 'substantial unity' in the claims (¶¶ 208, 210). The alleged liability of the Respondent does not differ between the individual claimants (¶ 211). The Tribunal considered that it did not have to make individual determinations of liability for each Claimant and as a result, the invocation of two BITs was not a barrier to the present case being considered a single dispute (¶¶ 212-213). While the Tribunal saw the number of Claimants in the case as a cause for concern, it failed to see any justification for dividing jurisdiction between different categories of claims, as this would lead to four cases based on the same measures taken by the Respondent and the same alleged breaches of the BITs (¶ 215). The Tribunal therefore concluded that the claims constituted 'a dispute' within the meaning of the BITs and that it had jurisdiction (¶¶ 219-220).

In considering the admissibility of the claims, the Tribunal made an assessment: (i) balancing the rights of the Claimants to have their claims heard; (ii) the capacity of the ICSID framework to manage the claim process, and (iii) the due process rights of the Respondent (¶ 224). The Tribunal considered each stage of the arbitral process to determine whether the claim can be conducted in a manner that preserves the rights of the parties (¶ 250). For example, the Tribunal considered that document production would ultimately be limited in scope due to the commonality of the claims. The potential to bifurcate the liability and damages phases of the proceeding would reduce the length of submissions and hearings and assist in the manageability of the claim (¶¶ 252-256). It would also eliminate the need to quantify damages if no liability were found (¶ 257). Accordingly, the Tribunal concluded that the claims were admissible as a single mass claim, subject to the fixing of the 'pool' of Claimants and to submissions from the Parties on bifurcation and security for costs (¶¶ 259-266).

5.3 Consolidation Objection

The Tribunal agreed with the finding in the *Ambiente* decision that there is no consolidation where multiple claimants agree to proceed jointly in one proceeding. In the instant case, the Claimants are pursuing their claims as a single claimant party and there is no additional issue of consent (¶ 269).

5.4 Indirect Investments Objection

In considering whether certain claims based on indirectly held investments should be dismissed because these are not expressly protected under the Cyprus-Greece BIT, the Tribunal based its analysis on the following definition: ''[i]nvestment' means every kind of asset' (¶ 275). Given the ordinary meaning of its terms and the object and purpose of the Cyprus-Greece BIT to foster long-term economic cooperation, the Tribunal concluded that this included indirect investments (¶¶ 277-279). Further, the Tribunal took the view that the *Poštová* award was only relevant to the issue of standing and did not provide guidance as to whether the Tribunal had jurisdiction (¶ 282).

In considering Article 31 of the VCLT, the Tribunal took the view that a treaty must be interpreted on its own terms and was not persuaded by the Respondent's argument invoking the principle *verba aliquid operari debent* (¶ 283).

In addition, the Tribunal also found that 'beneficial interest' was a widely recognized legal interest and sufficient basis for an investment to qualify for protection, as were minority shareholdings by virtue of Article 7 of the Cyprus-Greece BIT. Accordingly, it found that the Claimants had met the burden of evidence to establish *prima facie* jurisdiction and dismissed the Respondent's objection based on indirect investments, without prejudice to its right to rebut the evidence in the liability phase of the proceeding (¶¶ 288-290).

5.5 Absence of a Qualifying Investment Objection

The Tribunal took the view that the bonds and deposits for which the Claimants claim are investments for the purpose of the BITs and the ICSID Convention based on the ordinary meaning of the term (¶ 293). This also applied to the bonds that were held by certain Claimants for shorter periods (¶ 295).

In respect to the life insurance contracts, the Tribunal agreed with the Claimants that these had a territorial nexus with Cyprus and found that the contractual relationship created a beneficial interest in the bonds, amounting to an indirect investment (¶ 300). In respect to the bonds issued by the UK Entity, the Tribunal found that as they were guaranteed by Laiki bank, they therefore amounted to investments in Cyprus (¶ 304). The Tribunal therefore rejected the Respondents objections as to qualifying investments.

5.6 Non-Compliance with Notice Provisions Objection

The Tribunal considered the issues of non-compliance with the relevant notice periods under the BITs as twofold: (i) whether jurisdiction was excluded over the Claimants who did not comply with the Cyprus-Greece BIT; and (ii) whether jurisdiction was excluded over the Claimant from Luxembourg due to non-compliance with the BLEU-Cyprus BIT (¶ 308).

In considering the first issue, the Tribunal noted that 21 Claimants gave notice of the dispute within the time limit on 11 July 2014, and in the initial notice of dispute advised the Respondent that other Claimants may join the claim (¶ 309). On 12 August 2015, an additional 303 Claimants gave notice and joined the initial Claimants in the Request for Arbitration in respect Plan B that they allege violated the Cyprus-Greece BIT (¶ 311). In total, 631 additional Claimants joined the initial 21 Claimants as a single claimant party in the Request for Arbitration of 18 November 2015. The Tribunal concluded that the ordinary meaning of Article 9 of the Cyprus-Greece BIT did not require the investor to request amicable settlement as a condition to commence arbitration nor did it prevent additional investors from being added to the Claimant party at least six months prior to the commencement of the arbitration (¶¶ 315-316). The Respondent had the opportunity to settle with the initial 21 Claimants, which would have been required for it to attempt to do so with

the additional Claimants, but did not take it. Therefore, the Tribunal concluded that all Greek Claimants had complied with the notice requirements of the Cyprus-Greece BIT and dismissed the Respondent's objection (¶¶ 317, 322).

In considering the second issue, the Tribunal referred to Article 10(1) of the BLEU-Cyprus BIT, under which a dispute will be submitted to arbitration 'within six months from the receipt of the notification' (¶ 320). The Luxembourg Claimant notified the dispute to Cyprus on 11 June 2015, while the Claimants filed their request for Arbitration less than six months later on 18 November 2015. However, the Tribunal noted that a dispute to ICSID Convention arbitration is only submitted upon registration of the Request for Arbitration by the ICSID Secretary-General. In the instant case, this occurred on 17 December 2015, more than six months after the notice of dispute from the Luxembourg Claimant (¶ 321). The Tribunal therefore concluded that the notification requirements of the BLEU-Cyprus BIT had been met and dismissed the Respondent's objection (¶¶ 321-322).

5.7 Non-Qualifying Investor Objection

The Tribunal found that Claimant No. 221 (Mr. Leontiadis) had asserted *prima facie* grounds for jurisdiction over his claims against the Respondent through his possession of the share certificate (¶ 325).

The Tribunal noted that Claimant No. 2 (CNP Asfalistiki Ltd) and Claimant No. 417 (Athanasios Vasileiou) had requested a discontinuance of their claims and conceded that there were not nationals of Greece or Luxembourg at the relevant time (¶ 326). The Tribunal therefore dismissed jurisdiction, except with regard to any potential costs award against them (¶ 328).

5.8 Cypriot-Controlled Entities Objection

The Tribunal considered its jurisdiction in respect to Claimant No. 1 (CNP Asfalistikes Praktoriakes Ergasies S.A.) and Claimant No. 3 (CNP Zois S.A.), noting that the definition of 'investor' in Article 1(3)(b) of the Cyprus-Greece BIT was not on the basis of the control and that the reference to foreign control in Article 25(2)(b) of the ICSID Convention was intended to expand the scope of ICSID jurisdiction (¶¶ 331-332). Accordingly, the Tribunal dismissed the Respondent's objections to the Cypriot-controlled entities (¶ 333).

5.9 Fork-in-the-Road Clause Objection

The Tribunal noted that Claimant No. 37 (Theodosios Arvanitopoulus and Chariklia Arvanitopoulos) and Claimant No. 335 (Alexandra Samouil) withdrew their claim before the Supreme Court of Cyprus ('Court') and that the Court dismissed the claim of Claimant No. 35 (Dionysios Argyros) for lack of jurisdiction (¶¶ 336-337). As the Respondent either withdrew or did not maintain its objection during the Hearing on Jurisdiction, the Tribunal assumed the objection was 'moot' (¶ 338).

5.9 New Claimants Objection

The Tribunal noted that Claimant No. 626 (Ioannis Chrissovelonis) and Claimant No. 627 (Simon Simoudis and Angeliki Simoudis) were not new Claimants, but rather corrections of an error in the list of Claimants and dismissed the Respondent's objection that these were new Claimants with new claims (¶ 338).

6. Costs

The Tribunal deferred the issue of costs until its award (¶ 341).

7. Statement of Dissent of Professor Marcelo G. Kohen

In Prof. Kohen's Statement of Dissent ('Statement'), he explained the reasons why he strongly believed that the Tribunal lacks jurisdiction on the basis that EU law superseded the intra-EU BITs, rendering them inoperative upon Cyprus' accession to the EU (Statement ¶ 1). The Statement considered: (i) the applicable law of the Tribunal; (ii) the basis for the Decision on Jurisdiction; (iii) the subject-matter of the BITs and the EU treaties; (iv) the incompatibility of the BITs with the EU treaties; (v) the authentic interpretation by the parties to the BITs; (vi) the precedence of EU treaties over the BITs; and (vii) brief comments on the Respondent's other objections (Statement ¶ 2).

7.1 Applicable Law of the Tribunal

The applicable law of the Tribunal is international law and the national law of Cyprus. EU law is part of both. According to Prof. Kohen, the majority of the Tribunal ('Majority') largely disregarded the role of EU treaties in its application of international law (Statement ¶ 4). For Prof. Kohen, in question was the status of the BITs and whether the later accession of Cyprus to the EU treaties implied the termination of the BITs, or whether the offer to arbitrate contained in the BITs is no longer operational after that accession because of its incompatibility with the EU treaties (Statement ¶ 5). Prof. Kohen agreed that the *Achmea* judgment was not binding on the Tribunal, however this did not mean that the decision did not have any bearing on the case. He noted that the CJEU analysed the question of the compatibility of intra-EU BITs with EU treaties and concluded that they are not (Statement ¶ 6).

7.2 Basis for the Decision on Jurisdiction

For Prof. Kohen, there may have been a tacit termination under Article 59 of the VCLT. However, the inconsistent behaviour of the Respondent and other EU member states alongside the logic that a treaty that has been tacitly terminated needs no further termination, meant that Article 59 of the VCLT was no basis to dismiss jurisdiction (Statement ¶ 10). Prof. Kohen then considered Article 30 of the VCLT and whether the EU treaties and the BITs relate to the same subject matter and whether the arbitration provisions of the BITs are compatible with the EU treaties, with regard to Article 351 of the TFEU (Statement ¶ 12).

7.3 The subject-matter of the BITs and the EU Treaties

Prof. Kohen referred to the Majority's assessment of the 'same subject matter' test in respect to the BITs and the EU treaties as dealing with the same subject matter of investment at a general level. Prof. Kohen stated that the fact that one treaty has a wider scope than another but deals with matters covered by the latter does not mean they have different subject matters (Statement ¶ 24). Indeed, the Claimants' claims are based on uncompensated expropriation and unfair and unequitable treatment, protections for which can be found both in the BITs and EU law (Statement ¶ 26). While the levels of protections or forum for dispute resolution might differ, the analysis demonstrates that the subject matters are the same (Statement ¶¶ 31, 34).

7.4 the Incompatibility of the BITs with EU treaties

For Prof. Kohen, in question was the settlement of intra-EU disputes within the EU and the importance of the principle of non-discrimination under Article 18 of the TFEU (Statement ¶¶ 44, 45). This provision both alone and in addition to the exclusive jurisdiction of the EU judicial system leads to a major incompatibility of the BITs and the EU treaties (Statement ¶ 46). In settling the conflict of treaties, Prof. Kohen considered that the EU treaties prevail by virtue of the rules embodied in Article 30 of the VCLT and Article 351 of the TFEU. The arbitration provisions in the BITs are therefore no longer applicable. (Statement ¶ 51).

7.5 The authentic interpretation by the Contracting Parties to the BITs

Prof. Kohen considered that the Majority presented the content of the Declarations and the Joint Information Note in an incomplete manner, missing the point that EU law 'takes precedence' over intra-EU BITs. Consequently, all investor-state arbitration clauses contained in intra-EU BITs are contrary to EU law and inapplicable (Statement ¶ 52). The Joint Information Note and the Declarations which included Luxembourg made clear that the parties considered the BITs to be incompatible with EU law and inapplicable and therefore that the Tribunal lacks jurisdiction. Prof. Kohen considered this to be an authentic interpretation of the parties to the BIT and could not be ignored by the Tribunal (Statement ¶¶ 53-54). For Prof. Kohen, the Respondent and other parties to the BITs have interpreted Article 30 of the VCLT and Article 351 of the TFEU and applied it to the relationship between the BITs and the EU treaties. Further, Article 31 of the VCLT gives weight to the subsequent interpretation of the parties to treaties and should at least be 'taken into account.' For Prof. Kohen, the Decision on Jurisdiction tells the parties to the treaties on which the Tribunal was established that 'they misinterpreted their own treaties' (Statement ¶ 58).

7.6 EU Treaties take Precedence over Incompatible BITs

Prof. Kohen explained that the position advanced by the CJEU in *Achmea* that EU treaties prevail over prior ones concluded by EU member states before their accession to the EU is not new (Statement ¶ 63). In his view, all EU investors were under a duty of solidarity

flowing from their adherence to the EU: 'they cannot rely on EU advantages while ignoring the entire EU system' (Statement ¶ 69). As a result, Prof. Kohen considered that the Tribunal lacks jurisdiction (Statement ¶ 70).

7.7 Remarks on Other Jurisdictional Objections

Prof. Kohen doubted whether the claims fell within the definition of 'investment' found in the BITs and the ICSID Convention and whether they passed the *Salini* test. He also considered the question of the life insurance contracts and the situation of Claimant No. 221 (Mr. Leontiadis) should be addressed at the merits stage (Statement ¶ 71). Prof. Kohen commended some of the Majority's solutions to the problems raised by a mass claim, but had concerns that the Claimants' choice was essentially being imposed on the Respondent, as well as to the extent of the homogeneity of the claims, given the four categories identified (Statement ¶ 72). Prof. Kohen was also concerned by the broadness of the Majority's interpretation of 'indirect investment', and the shortness of the analysis of the alleged non-compliance with the notice period. (Statement ¶¶ 73, 75).

7.8 Concluding Remarks

In concluding remarks, Prof. Kohen pointed out that while there are BITs that were concluded between an EU member state and a state that later became an EU member state and by two states that both became EU members states, there are no BITs that were concluded between two states after their accession to the EU (Statement ¶ 77). For Prof. Kohen, the simple explanation for this is that BITs are 'inconceivable' between EU member states (Statement ¶ 77). In his view, it was 'not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so' and he did not wish to associate himself with the contribution to 'a chaotic situation at the international adjudicative level' (Statement ¶¶ 80, 82).